

Federal Court Appointment Process

1. U.S. Department of Justice keeps a file on likely candidates, getting names from Senators and other important party leaders.
2. Informal investigation is conducted with outsiders by the Deputy Attorney General.
3. The names of leading candidates are sent to the American Bar Association (ABA), Standing Committee on the Federal Judiciary.

Rated: Exceptionally Well Qualified

 Well Qualified

 Qualified

 Not Qualified

4. An appointment decision is made by the Attorney General after which the Department of Justice consults with the U.S. Senate Judiciary Committee.
5. FBI investigation.
6. Recommendation from the Attorney General to the President.
7. Announcement of the nomination by the President, and it is sent to the Senate.
8. The Senate Judiciary Committee hold confirmation hearings, votes on the nominee, and reports to the full Senate where a final vote is taken.
9. The nomination goes to the President for signature after a majority vote of the Senate.

What Would Scalia Want in His Successor? A Dissent Offers Clues

By ADAM LIPTAK, *The New York Times* Online, February 15, 2011, A1.

Photo



Members of the Supreme Court in 2010. As Justice Antonin Scalia noted, its members are by many measures remarkably similar, giving the court the quality of a private club. Credit: Doug Mills/The New York Times

WASHINGTON — What sort of person would Justice [Antonin Scalia](#) have wanted [President Obama](#) to name as his successor? We know more than you might think.

In a largely overlooked passage in his dissent from the [court's decision](#) in June establishing a constitutional right to [same-sex marriage](#), he left detailed suggestions. Avoid “tall-building lawyers,” especially ones who work in skyscrapers in New York. Find someone who did not go to law school at Harvard or Yale. Look for a candidate from the Southwest. Consider an evangelical Christian.

[Justice Scalia](#) was criticizing the lack of diversity of the court he sat on, and he did not exclude himself. He was right as a factual matter: [Supreme Court](#) justices these days are by many measures remarkably similar, giving the court the insular quality of a private club or a faculty lounge.

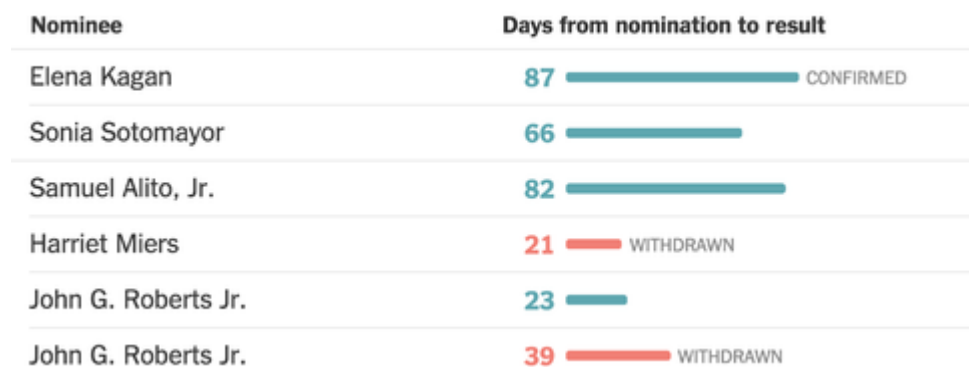
The [same-sex marriage](#) decision, he said, underscored the obligation of the president to diversify the Supreme Court.

“To allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine,” [Justice Scalia](#) wrote, “is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.”

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How Long Does It Take to Confirm a Supreme Court Nominee?

Republicans and Democrats are arguing over whether President Obama, whose term expires in 342 days, should try to fill Justice Antonin Scalia’s seat.



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To be sure, the court is by some standards reasonably diverse. For the first time it has three women, one of whom is Hispanic. It has an African-American member, only the second in its history.

On the other hand, Justice Scalia wrote, the court “consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School.” Justice Scalia attended Harvard, as did five other members of the court. The other three went to Yale.

There is one asterisk, Justice Elena Kagan joked in 2012. “Justice Ginsburg spent one year at Columbia,” said Justice Kagan, a former dean of Harvard Law School. “You know, slumming it.” (Justice Ruth Bader Ginsburg spent two years at Harvard Law School but then moved to New York with her husband and earned her law degree from Columbia.)

Since Justice John Paul Stevens retired in 2010, the court, for the first time, has no Protestant member. Justice Scalia was Catholic, as are five other justices. The other three are Jewish.

In his dissent from June, Justice Scalia lamented this state of affairs, writing, “Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination.”

Justice Scalia also surveyed the lack of geographical diversity on his court. “Four of the nine are natives of New York City,” he wrote.

Indeed, every borough but Staten Island was represented. Justice Scalia was from Queens. Justice Ginsburg is from Brooklyn, Justice Kagan is from Manhattan and Justice Sonia Sotomayor is from the Bronx.

“Eight of them grew up in east- and west-coast States,” Justice Scalia wrote. “Only one hails from the vast expanse in-between,” he added, referring to Chief Justice John G. Roberts Jr., who is from Indiana.

“Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count),” he added, discounting the backgrounds of Justice Anthony M. Kennedy, who was born in Sacramento, and Justice Stephen G. Breyer, who was born in San Francisco.

In general, Justice Scalia seemed suspicious of elite legal opinion, suggesting that it reliably espoused liberal orthodoxies. “The predominant attitude of tall-building lawyers with respect to the questions presented in these cases,” he wrote, referring to the same-sex marriage cases before the court, “is suggested by the fact that the American Bar Association deemed it in accord with the wishes of its members to file a brief in support of the petitioners.”

There are other ways in which the current court may be out of touch with ordinary lawyers, to say nothing of ordinary Americans.

Three of the current justices are former Supreme Court law clerks. Only one has served as a trial judge, and none has served on a state court. Not one has run for public office.

All of the justices but one are former federal appeals court judges. With one exception, those eight served on what might be called the court of appeals for the Acela Circuit, in Boston, New York, Philadelphia and Washington.

These trends are new. Before Dwight D. Eisenhower’s presidency, about a third of the nominations to the Supreme Court went to sitting judges. Since 1953, more than two-thirds have.

In 1946, for instance, eight of the nine justices had not been sitting judges when they were appointed, Timothy P. O’Neill wrote in a 2007 article in *The Oklahoma Law Review* criticizing the current uniformity of the backgrounds on the court. The article was titled “[The Stepford Justices](#).”

The decision in [Brown v. Board of Education](#) in 1954, the towering judicial landmark that struck down segregation in public schools, was written by Earl Warren, a former

governor of California. Among the justices who joined the unanimous decision were Hugo L. Black, a former senator; Felix Frankfurter, a former law professor; William O. Douglas, who had served as the chairman of the Securities and Exchange Commission; and Robert H. Jackson, who had been the United States attorney general.

Justice Scalia wrote in the June dissent that he wished various kinds of diversity did not matter in judicial appointments. “Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant,” he wrote.

But he added that a court capable of finding a right to same-sex marriage in the Constitution was doing something other than using legal skill to interpret legal materials, meaning presidents should consider factors other than legal acumen.

“The strikingly unrepresentative character of the body voting on today’s social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage,” he wrote.

Mr. Obama will consider many factors in deciding on the next nominee. He will no doubt nominate someone to the left of Justice Scalia. But he may want to listen to the departed justice’s plea to broaden the court’s profile.

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