

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

[Please note that this part of the appointment process was suspended by President Donald Trump, as it was by President Richard M. Nixon.]

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.

A version of this article appears in print on February 16, 2016, on page A1 of the New York edition with the headline: Suggestions on a Successor.

Gorsuch Clinched Spot After a Lengthy Process

ADAM LIPTAK, *The New York Times* National Edition, February 7, 2017, A15.



Judge Neil M. Gorsuch, President Trump's Supreme Court nominee, was the last person standing after a lengthy selection process. Credit Al Drago/The New York Times

WASHINGTON — Judge Neil M. Gorsuch's road to a [Supreme Court](#) nomination included stops at a fancy law firm conference room, the dreary basement of a government office building, President Trump's gilded penthouse in Trump Tower, the White House's Lincoln Bedroom and a ride on a military jet.

Although his name did not even appear on Mr. Trump's [first list of 11 potential nominees](#), Judge Gorsuch was the last person standing in a selection process that in some ways began last year, when as a candidate Mr. Trump took the unusual step of releasing the names of those he would consider for the court. The process, described in interviews with White House and transition officials and others involved, ended last Tuesday night, [with the president's announcement](#) that he had found a judge who was "as good as it gets."

Mr. Trump's lists — the second one [added 10 names](#), including that of Judge Gorsuch — leaned on recommendations from two conservative groups, the Federalist Society and

the Heritage Foundation. Both lists were compiled by Donald F. McGahn, Mr. Trump's longtime election lawyer and now the White House counsel.

Judge Gorsuch was well known in conservative circles, but his stellar academic credentials — which include degrees from Columbia, Harvard and Oxford — may have worked against him at first, an official said, as the initial list had an anti-establishment theme. His body of judicial work and other writing was substantial and warranted careful review, which took time. And there was a concern about subjecting him to early “scrutiny and attacks” should liberal groups “unleash the hounds.”

Mr. Trump told aides that he wanted “the absolute best person,” one who resembled Justice Antonin Scalia, whose seat has been vacant since his [death last February](#). Mr. Trump, who mentioned how important the next justice was to Republican voters, according to exit poll data, said he wanted someone who was “not weak,” an adviser said.

Mr. Trump also said he wanted to avoid what he called the mistaken appointments of other Republican presidents — namely Justice David H. Souter, who drifted left, and Chief Justice John G. Roberts Jr., who voted to uphold the Affordable Care Act.

By early January, officials on Mr. Trump's transition team had whittled the campaign's lists down to seven finalists. They were invited to Washington and faced two sets of probing interviews.

Aides had read everything the finalists had written. In Judge Gorsuch's case, that meant a trip to New York to obtain copies of student newspapers he had contributed to as a student at Columbia.

On Jan. 5, Judge Gorsuch met with Mr. McGahn in a conference room at Jones Day, Mr. McGahn's law firm. The meeting was for “personal vetting,” to make sure there was nothing embarrassing in Judge Gorsuch's background.

Later that day, Judge Gorsuch was driven to the Trump campaign's transition office. In a basement room, under florescent lights and with bags of cookies and candy bars in the corner, Judge Gorsuch was grilled by five members of the Trump team: Vice President-elect Mike Pence; Reince Priebus, now the White House chief of staff; Stephen K. Bannon, Mr. Trump's chief strategist; Mark Paoletta, now Mr. Pence's counsel; and Mr. McGahn.

With a six-page memo on Judge Gorsuch's writing prepared by Mr. McGahn in front of them, the five men asked him about his writings and the role of a judge.

“We've never talked to him about abortion,” a White House official said. “There was no discussion about specific cases or outcomes.”

Mr. Pence, the official said, was particularly engaged in the selection process.

The six other finalists all went through a similar two-step interview in Washington.

Four, like Judge Gorsuch, served on federal appeals courts: Judges Thomas M. Hardiman, William H. Pryor Jr., Diane S. Sykes and Raymond M. Kethledge. The others

were Judge Amul R. Thapar, of a Federal District Court in Kentucky, and Justice Don R. Willett of the Texas Supreme Court.

With the exception of Justice Willett, all had already undergone F.B.I. background checks and Senate confirmations.

“People loved Tom Hardiman,” an official said. “He was super personable. Pryor has done more for the cause than anyone else in the country. But the politics are really tough.”

Judge Pryor had taken strong stands against gay rights and abortion, calling *Roe v. Wade*, the 1973 decision that established a constitutional right to abortion, “the worst abomination of constitutional law in our history.”

Judge Gorsuch emerged from the interviews as a strong contender, partly because of his intellectual polish and partly because of support from other candidates.

“If not you, who?” they were asked, an official said. “Most of them said Gorsuch. Kethledge went on about him for three or four minutes.”

Judge Gorsuch clinched his spot in a meeting at Trump Tower on Jan. 14 with Mr. Trump and Mr. McGahn. Judge Gorsuch, who had represented corporate titans as a lawyer in private practice, hit it off with the president.

That same day, Mr. Trump and Mr. McGahn also interviewed two other finalists, Judges Hardiman and Pryor. Each of the three meetings lasted from 30 to 45 minutes. (The only other finalist interviewed by Mr. Trump was Judge Thapar, at the White House.)

After the interviews in New York, Mr. Trump asked his lawyer for his recommendation, a White House official recalled. Mr. McGahn said that the clear choice was Judge Gorsuch.

Mr. Trump called Judge Gorsuch in Colorado with the good news last Monday, and soon he and his wife, Louise, took off on a military jet from Rocky Mountain Metropolitan Airport, headed to Andrews Air Force Base. Mr. McGahn called the other judges the next day.

On Tuesday, Judge Gorsuch was smuggled into the White House, where aides had him wait in the Lincoln Bedroom before his prime-time appearance with Mr. Trump.

Mr. Trump’s team is already looking down the road, weighing the choices should Justice Anthony M. Kennedy decide to step down. Judge Kethledge would be a leading candidate, an official said, and so would Judge Brett M. Kavanaugh of the Federal Appeals Court in Washington.

Both judges, like Judge Gorsuch, once served as law clerks to Justice Kennedy.

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