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# Supreme Court Appointment Process: Senate Debate and Confirmation Vote

Updated October 16, 2020

**Congressional Research Service**
https://crsreports.congress.gov
R44234

**CRS REPORT**
Prepared for Members and
Committees of Congress

# Summary

The procedure for appointing a Justice to the Supreme Court is provided for in the U.S. Constitution in only a few words. The "Appointments Clause" in the Constitution (Article II, Section 2, clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court." While the process of appointing Justices has undergone some changes over two centuries, its most essential feature—the sharing of power between the President and the Senate—has remained unchanged: To receive lifetime appointment to the Court, one must first be formally selected ("nominated") by the President and then approved ("confirmed") by the Senate.

For the President, the appointment of a Supreme Court Justice can be a notable measure by which history will judge his presidency. For the Senate, a decision to confirm is a solemn matter as well, for it is the Senate alone, through its "Advice and Consent" function, without any formal involvement of the House of Representatives, that acts as a safeguard on the President's judgment. This report provides information and analysis related to the final stage of the confirmation process for a nomination to the Supreme Court—the consideration of the nomination by the full Senate, including floor debate and the vote on whether to approve the nomination.

Traditionally, the Senate has tended to be less deferential to the President in his choice of Supreme Court Justices than in his appointment of persons to high executive branch positions. The more exacting standard usually applied to Supreme Court nominations reflects the special importance of the Court, coequal to and independent of the presidency and Congress. Senators are also mindful that Justices—unlike persons elected to legislative office or confirmed to executive branch positions—receive the opportunity to serve a lifetime appointment during good behavior.

The appointment of a Supreme Court Justice might or might not proceed smoothly. From the appointment of the first Justices in 1789 through its consideration of nominee Brett Kavanaugh in 2018, the Senate has confirmed 119 Supreme Court nominations out of 163 received. Of the 44 nominations which were not confirmed, 12 were rejected outright in roll-call votes by the Senate, while nearly all of the rest, in the face of substantial committee or Senate opposition to the nominee or the President, were withdrawn by the President, or were postponed, tabled, or never voted on by the Senate. Six of the unconfirmed nominations, however, involved individuals who subsequently were renominated and confirmed.

Additional CRS reports provide information and analysis related to other stages of the confirmation process for nominations to the Supreme Court. For a report related to the selection of a nominee by the President, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion. For a report related to consideration of nominations by the Senate Judiciary Committee, see CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion.

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# Introduction

The procedure for appointing a Justice to the Supreme Court of the United States is provided for by the Constitution in only a few words. The "Appointments Clause" (Article II, Section 2, clause 2) states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court." The process of appointing Justices has undergone changes over two centuries, but its most basic feature—the sharing of power between the President and Senate—has remained unchanged. To receive an appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate. This report provides information and analyses related to the debate and consideration of Supreme Court nominations by the full Senate once nominations are reported by the Judiciary Committee.[1]

# Criteria Used by Senators to Evaluate Nominees

Once the full Senate begins debate on a Supreme Court nomination, many Senators typically will take part in the debate. Some, in their remarks, underscore the importance of the Senate's "advice and consent" role, and the consequent responsibility to carefully determine the qualifications of a nominee before voting to confirm.[2] Typically, each Senator who takes the floor states his or her reasons for voting in favor of or against a nominee's confirmation.

The criteria used to evaluate a Supreme Court nominee are an individual matter for each Senator. In their floor remarks, some Senators may cite a nominee's professional qualifications or character as the key criterion,[3] others may stress the importance of the nominee's judicial

[1] For CRS reports providing information and analyses related to other stages of the selection and confirmation process of Supreme Court nominations, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion, and CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion.

[2] "The advice-and-consent role of the Senate," one of its Members noted in 1994, "is something that we do not take lightly because this is the only opportunity for the people of this Nation to express whether or not they deem a nominee qualified to sit on the highest court in the land." Sen. Mark O. Hatfield, "Nomination of Stephen G. Breyer, of Massachusetts, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, July 29, 1994, pp. S18692-18693.

[3] For example, during 1991 Senate debate on the Supreme Court nomination of Judge Clarence Thomas, the criterion of professional qualification was cited by both supporters and opponents of the nominee to explain their votes. A Senator supporting the Thomas nomination maintained that instead of the nominee's "philosophy on particular issues" which might come before the Supreme Court, the "more appropriate standard" was that the nominee "have outstanding legal ability and wide experience and meet the highest standards of integrity, judicial temperament, and professional competence." Judge Thomas, the Senator added, "clearly meets that standard." Sen. Frank H. Murkowski, "Nomination of Clarence Thomas to the Supreme Court," remarks in the Senate, *Congressional Record*, October 1, 1991, p. S24748. Other Senators, however, used the criterion of professional competence to find Judge Thomas unqualified. One, for example, found the nominee's "legal background and experience" inadequate and added that, if a President did not nominate to the court "well-qualified, experienced individuals, the American people have the right to expect that the members of the Senate will reject the nomination." Sen. Jeff Bingaman, "Justice Clarence Thomas," remarks in the Senate, *Congressional Record*, October 2, 1991, p. S24973.

philosophy or views on constitutional issues,[4] while still others may indicate that they are influenced in varying degrees by all of these criteria.[5]

## Professional Qualifications

Just as most Presidents want their Supreme Court nominees to have unquestionably outstanding legal qualifications, most Senators also look for a high degree of merit in nominees to the Court. Consequently, floor remarks by Senators often focus, in part, on the professional qualifications of a nominee—both in recognition of the demanding nature of the work that awaits an appointee to the Court, but also because of the public's expectations that a Supreme Court nominee be highly qualified.[6]

With such expectations of excellence, floor remarks by Senators often highlight the various ways in which nominees have distinguished themselves in the law (as lower court judges, legal scholars, or attorneys in private practice), or in other types of professional positions (such as elective office).[7] Given the importance of a nominee's professional qualifications in the selection and confirmation process, Senators have on occasion questioned—either directly or indirectly in

[4] During debate over the nomination of Clarence Thomas in 1991, these criteria were used both by Senators favoring the nomination and by others opposing it. One Senator in support of the nomination, for example, declared his desire to have "Supreme Court Justices who will interpret the Constitution and not attempt to legislate or carry out personal agendas from the bench." Sen. Richard C. Shelby, "Nomination of Judge Clarence Thomas To Be an Associate Justice of the U.S. Supreme Court," remarks in the Senate, *Congressional Record*, October 1, 1991, p. S24703. By contrast, another Senator, explaining his opposition to confirming Judge Thomas, said that if Senators were "not confident that nominees possess a clear commitment to the fundamental constitutional rights and freedoms at the heart of our democracy, they should not be confirmed." Sen. Edward M. Kennedy, "Nomination of Clarence Thomas, of Georgia, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 3, 1991, p. S25271.

[5] "In addition to the obvious criteria any nominee for the Supreme Court ought to have—I suppose any nominee for any position on the judiciary ought to have—those of intellect, of integrity, and of judicial temperament, it is very appropriate of the Senate to inquire into a nominee's judicial philosophy. Of course, that includes the nominee's fidelity to the Constitution. It involves that nominee's understanding of the limited role of the courts, and it involves what I hope is a commitment to judicial restraint." Sen. Charles E. Grassley, "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, August 2, 1993, p. S18133. Similarly evincing concern with both a nominee's professional qualification and his constitutional values was this 1991 Senate floor statement during debate on the nomination of Clarence Thomas: "When I face a Supreme Court nominee I have three questions: Is he or she competent? Does she or he possess the highest personal and professional integrity? And, third, will he or she protect and defend the core constitutional values and guarantees around free of speech, religion, equal protection of the law, and the right of privacy?" Sen. Barbara A. Mikulski, "Nomination of Clarence Thomas, of Georgia, To Be An Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 15, 1991, p. S26299. More recently, Senator Chuck Schumer stated, "I have always had a consistent standard for evaluating judicial nominees. I use it when voting for them. I use it when joining in, in the nomination process. I did under President Bush and continue to under President Obama. Those three standards are excellence, moderation, and diversity." Sen. Chuck Schumer, "Sotomayor Nomination," remarks in the Senate, *Congressional Record*, June 23, 2009, p. S6914.

[6] Senator Mitch McConnell, for example, has stated "The American people also want a nominee with the requisite legal experience. They instinctively know a lifetime position on the Supreme Court does not lend itself to on-the-job training." Sen. Mitch McConnell, "Nomination of Elena Kagan," remarks in the Senate, *Congressional Record*, May 10, 2010, p. S3453.

[7] For recent examples of floor remarks by Senators highlighting the professional qualifications of nominees, see Sen. Patrick Leahy, "Kagan Nomination," remarks in the Senate, *Congressional Record*, June 7, 2010, p. S4610; Sen. Dick Durbin, "Sotomayor Nomination," remarks in the Senate, *Congressional Record*, July 7, 2009, p. S7155; Sen. Bill Frist, "Executive Session," remarks in the Senate, *Congressional Record*, January 25, 2006, p. S36 (Alito nomination); and Sen. Orrin Hatch, "Nomination of John Roberts," remarks in the Senate, *Congressional Record*, July 20, 2005, p. S8584.

their floor remarks—whether a nominee has the requisite professional qualifications or experience to be appointed to the Court.[8]

## Judicial Philosophy or Ideology

In recent decades, Senate debate on virtually every Supreme Court nomination has focused to some extent on the nominee's judicial philosophy, ideology, constitutional values, or known positions on specific legal controversies. Many highly controversial decisions of the Court in recent decades have been closely decided, by 5-4 votes, appearing to underscore a long-standing philosophical or ideological divide in the Court between its more so-called liberal and so-called conservative members. A new appointee to the Court, Senators recognize, could have a potentially decisive impact on the Court's currently perceived ideological "balance" and on whether past rulings of the Court will be upheld, modified, or overturned in the future.[9] Announcements by the Court of 5-4 decisions, a journalist covering the Court in 2001 wrote, had "become routine, a familiar reminder of how much the next appointment to the court will matter."[10]

Senators sometimes will indicate in their floor statements whether they believe the views of a particular nominee, although not in complete accord with their own views, nonetheless, fall

[8] This issue arose, for example, during Elena Kagan's nomination to the Supreme Court (Ms. Kagan was the first appointee to the Court since 1981, when Sandra Day O'Connor was appointed, who was not serving as a U.S. circuit court judge at the time of being nominated).

In floor remarks about Kagan's nomination, Senator Mitch McConnell stated that "one does not need to have prior experience as a judge before being appointed to the country's highest Court, but it strikes me that if a nominee does not have traditional experience, they should have substantial litigation experience. Ms. Kagan has neither, unlike Justice Rehnquist, for instance, who was in private practice for 16 years prior to his appointment as Assistant Attorney General for the Office of Legal Counsel, a job he had at the time of his appointment to the Supreme Court." Sen. Mitch McConnell, "Nomination of Elena Kagan," remarks in the Senate, *Congressional Record*, May 10, 2010, p. S3453. In contrast, another Senator argued that Kagan, as a result of "more than 24 years of legal experience in a range of settings, she will bring a distinct perspective to judging that will serve both the Court and Americans well." Sen. Jeanne Shaheen, "Nomination of Elena Kagan," remarks in the Senate, *Congressional Record*, June 16, 2010, p. S4956.

[9] Three political scientists, for example, wrote in 2002 that although "speculation about possible Supreme Court vacancies is usually met with much interest by court watchers, it is particularly intense at present due to the ideological balance of the current Court and the recent politics of the judicial confirmation process. Given the delicate ideological balance on the current Court, a single vacancy could produce a dramatic shift in the ideological direction of future rulings." Kenneth L. Manning, Bruce A. Carroll, and Robert A. Carp, "George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?" *Judicature*, vol. 85, May-June 2002, p. 278.

[10] Linda Greenhouse, "Divided They Stand: The High Court and the Triumph of Discord," *The New York Times*, July 15, 2001, sec. 4, p. 1. Following the next two appointments to the Court—of Chief Justice John G. Roberts Jr. in 2005 and Associate Justice Samuel A. Alito Jr. in 2006—the proportion of 5-4 rulings by the Court increased. At the end of the Court's October 2006 term (the first full term with both Justices Roberts and Alito on the Court), Greenhouse reported that "[f]ully a third of the court's decisions, more than in any recent term, were decided by 5-to-4 margins. Most of those, 19 of 24, were decided along ideological lines, demonstrating the court's polarization whether on constitutional fundamentals or obscure questions of appellate procedure." Greenhouse added, "Of the ideological cases decided this term, the conservative majority, led by Chief Justice John G. Roberts Jr. and joined by Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., prevailed in 13. The court's increasingly marginalized liberals—Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—prevailed in only six.... " Linda Greenhouse, "In Steps Big and Small, Supreme Court Moved Right," *The New York Times*, July 1, 2007, p. 1. For the 2014-2015 term, 19 (or 26%) of the Court's opinions were 5-4 rulings (13 of the 19 cases, or 68%, were decided along ideological lines—with Justices Roberts, Scalia, Kennedy, Thomas, and Alito voting opposite Justices Breyer, Ginsburg, Sotomayor, and Kagan). While the percentage of all opinions that were 5-4 rulings for the 2014-2015 term was the fourth highest of the 10 terms since 2005-2006, the percentage of 5-4 rulings that were decided along ideological lines was sixth highest during these same 10 terms. Data available online at http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_5-4cases_OT14.pdf.

within a broad range of acceptable legal thinking.[11] Senators' concerns with a nominee's judicial philosophy or ideology may become heightened, and their positions more polarized relative to other Senators', if a nominee's philosophical orientation is seen as controversial, or if the President is perceived to have made the nomination with the specific intention of changing the Court's ideological balance.[12]

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[11] For example, during 1994 floor debate on the Supreme Court nomination of Stephen G. Breyer, one Senator said of the nominee's views, "Certainly in terms of an expansive definition of the Constitution, I have no doubt that Judge Breyer is going to make rulings that represent a different interpretation of the great document than I have and that people who share my views have. But I also believe that Judge Breyer's views are mainstream liberal views. I believe that anyone who voted for Bill Clinton knew or should have known that the chances [of] anyone more conservative than Judge Breyer being nominated by Bill Clinton were almost zero." Sen. Phil Gramm, "Nomination of Stephen G. Breyer, of Massachusetts, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, July 29, 1994, pp. S18671-18672.

[12] Most recently, the nomination of Brett Kavanaugh to replace Justice Kennedy was considered controversial by some Senators because of the possibility that Judge Kavanaugh's appointment to the Court would shift the Court's ideological balance in a more conservative direction on one or more issues. See, for example, floor statements by Sen. Elizabeth Warren, "Nomination of Brett Kavanaugh," remarks in the Senate, *Congressional Record*, August 1, 2018, pp. S5555-5556; by Sen. Patty Murray, "Executive Session," remarks in the Senate, *Congressional Record*, July 18, 2018, pp. S5032-5033; and by Sen. Ed Markey, "Executive Session," remarks in the Senate, *Congressional Record*, July 12, 2018, p. S4930-4931.

Prior to the vacancy created by the retirement of Justice Kennedy, one reason for Senate division over the nomination of Samuel A. Alito Jr. in 2005-2006 was a widespread perception that confirmation of Alito would change the ideological balance of the Court (specifically, he might align in decisions with Justices whose views were regarded by some as conservative). Alito was nominated to replace Sandra Day O'Connor, perceived by many as a moderate or "swing" vote on the Court. See, for example, Seth Stern and Keith Perine, "Alito Confirmed After Filibuster Fails," *CQ Weekly*, vol. 64, February 6, 2006, p. 340 (characterizing Alito's confirmation, "by a mostly party-line vote of 58-42," as "the culmination of years of planning by conservatives to move the court to the right"); also, "A Supreme Nomination," *The Washington Times*, November 1, 2005, p. A18 (editorial describing the nomination as "the moment conservatives have been waiting for" and predicting a "confirmation battle" in the Senate).

Earlier, in 1987, Senate concern with a nominee's judicial philosophy was also especially heightened when President Reagan nominated appellate court judge Robert H. Bork to the Court. The nomination sparked immediate controversy, and polarized the Senate generally along party lines, in large part because of the nominee's judicial philosophy of "original intent" and the perception that he had been nominated by President Reagan to move the Court in the future in what was characterized as a more conservative direction. For analysis of how central an issue Judge Bork's judicial philosophy was in the Senate confirmation battle, see John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations*. (Albany, NY: State University of New York Press, 1990), pp. 159-193. (Hereinafter cited as Massaro, *Supremely Political*.)

In a Senate floor statement shortly after the Bork nomination was made, the then-chair of the Senate Judiciary Committee, Sen. Joseph R. Biden Jr. (D-DE), faulted the President for his choice. Senator Biden declared that when a President selects nominees "with more attention to their judicial philosophy and less attention to their detachment and statesmanship," a Senator "has not only the right but the duty to respond by carefully weighing the nominee's judicial philosophy and the consequences for the country." The Senate, he continued, had both the right and the duty to raise political and judicial "questions of substance," for "we are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends." Sen. Joseph R. Biden Jr., "Advice and Consent: The Right and Duty of the Senate To Protect the Integrity of the Supreme Court," remarks in the Senate," *Congressional Record*, July 23, 1987, p. S20913 (first quote) and p. S20915 (second quote).

Various Senators who favored Judge Bork's confirmation, however, disagreed with Senator Biden regarding the importance of the nominee's judicial philosophy. Some expressed a preference for a narrower scope of Senate inquiry, focusing on Judge Bork's legal competence and character. Others considered Judge Bork's judicial philosophy and views of the Constitution appropriate areas of inquiry, but the crucial determination for the Senate to make in these areas, they argued, was whether his views fell within a broad range of acceptable thinking, not whether individual Senators agreed with those views. Further, some Senators maintained, to evaluate a nominee according to political or judicial philosophy, or to vote to confirm only if Senators agreed with the nominee's views, would politicize the Supreme Court and undermine its independence of the legislative branch. See, for example, statements by Sen. Robert Dole, "The Nomination of Robert Bork," remarks in the Senate, *Congressional Record*, July 23, 1987, p. S10538.

During the George W. Bush presidency, a Senate Judiciary subcommittee examined the question of what role ideology should play in the selection and confirmation of federal judges.[13] In his opening remarks, the chair of the subcommittee, Senator Charles E. Schumer (D-NY), stated that it was clear that "the ideology of particular nominees often plays a significant role in the confirmation process." The current era, he said, "certainly justifies Senate opposition to judicial nominees whose views fall outside the mainstream and who have been selected in an attempt to further tilt the courts in an ideological direction."[14]

By contrast, Senator Orrin G. Hatch (R-UT), in testimony before the subcommittee, declared that there "are myriad reasons why political ideology has not been—and is not—an appropriate measure of judicial qualifications. Fundamentally," he continued, "the Senate's responsibility to provide advice and consent does not include an ideological litmus test because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge."[15]

More recently, Senators of both parties have based, at least in part, their opposition to particular Supreme Court nominations on the belief that a nominee's ideological disposition or views on specific issues fall outside the mainstream of legal thought or public opinion.[16]

## Views of Peers, Constituents, Interest Groups, and Others

Other factors also may figure importantly into a Senator's confirmation decisions. One, it has been suggested, is peer influence in the Senate (especially, perhaps, when the nomination is viewed as controversial).[17] Particularly influential, for instance, might be Senate colleagues who are championing a nominee or spearheading the opposition,[18] or who played prominent roles in the Judiciary Committee hearings stage. Another consideration for Senators will be the views of their constituents, especially if many voters back home are thought to feel strongly about a nomination.[19] Other influences may be the views of a Senator's advisers, family, and friends, as

[13] For the complete record of the June 26, 2001 hearing, entitled "Judicial Nominations 2001: Should Ideology Matter?" see pp. 1-109 in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *The Judicial Nomination and Confirmation Process*, hearings, 107th Cong., 1st sess., June 26 & September 4, 2001 (Washington: GPO, 2002).

[14] Ibid., pp. 2-3.

[15] Ibid., p. 30. Soon thereafter, on September 4, 2001, the same Senate Judiciary subcommittee held a hearing on a related issue involving judicial nominations—namely, does the "burden of proof" lie with the nominee, to demonstrate that he or she merits appointment to the federal bench, or with Senate opponents, to demonstrate that the nominee is unfit for confirmation? The hearing, entitled "The Senate's Role in the Nomination and Confirmation Process: Whose Burden?" featured two panels of witnesses, some arguing for, and others against, placing the burden of proof on the nominee. Ibid., pp. 111-218 (for the complete record of the hearing on September 4).

[16] See, for example, floor statements by Sen. Jeff Merkley, "Executive Session," remarks in the Senate, *Congressional Record*, April 4, 2017, pp. S2224-S2225; by Sen. Chris Murphy, "Executive Session," remarks in the Senate, *Congressional Record*, April 4, 2017, pp. S2376-2377; by Sen. Saxby Chambliss, "Executive Session," remarks in the Senate, *Congressional Record*, August 4, 2010, pp. S6695; and by Sen. Chuck Grassley, "Sotomayor Nomination," remarks in the Senate, *Congressional Record*, August 4, 2009, pp. S8780-8781.

[17] See Watson and Stookey, *Shaping America*, pp. 191-195, for discussion of how a relatively few number of Senators may serve as "cues" to other Senators during the consideration of controversial Supreme Court nominations.

[18] See, for example, Seth Stern, "'Bork's America' Resounds," *CQ Weekly*, vol. 67, September 7, 2009, p. 1987, where the author suggests the profound influence that one floor speech by the late Sen. Edward M. Kennedy (D-MA) had in galvanizing Senate opposition to the Bork nomination.

[19] Illustrative of this, during 1991 Senate debate over the Clarence Thomas nomination, Sen. Frank H. Murkowski (R-AK) stated, "I have heard from a number of Alaskans and visited with them last week during our recess. Many have gone back and forth during the testimony, but now the hearings are concluded, and they are telling me by a substantial

well as the position taken on the nomination by advocacy groups that the Senator ordinarily trusts or looks to for perspective.[20]

## Diversity Considerations

Just as Presidents are assumed to do when considering prospective nominees for the Supreme Court, Senators may evaluate the suitability of a Supreme Court nominee according to whether certain groups, constituencies, or individuals with certain characteristics are adequately represented on the Court.[21] Among the representational criteria commonly considered have been the nominee's party affiliation, geographic origin, ethnicity, religion, and gender.[22]

## Senate Institutional Factors or Prerogatives

When considering Supreme Court nominations, Senators may also take Senate institutional factors into account. For instance, the role, if any, that Senators from the home state of a nominee played in the nominee's selection, as well as their support for or opposition to the nominee, may be of interest to other Senators. At the same time, Senators may be interested in the extent to which the President, prior to selecting the nominee, sought advice from other quarters in the Senate—for instance, from Senate party leaders and from the chair, ranking minority member, and other Senators on the Judiciary Committee. A President's prior consultation with a wide range of Senators concerning a nominee may be a positive factor for other Members of the Senate, by virtue of conveying presidential respect for the role of Senate advice, as well as Senate consent, in the judicial appointments process.[23]

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majority that they favor the confirmation of Judge Thomas by this body." Sen. Frank H. Murkowski, "Nomination of Clarence Thomas, of Georgia, To Be An Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 15, 1991, p. S26300.

[20] See Watson and Stookey, *Shaping America*, pp. 198-199.

[21] In recent decades, for instance, Presidents and Senators at various times have endorsed the goal of increasing the demographic diversity of the lower courts, as well as on the Supreme Court, to make the judiciary more representative of the nation's population.

[22] Concern for adequate representation of women on the Court, for example, was expressed by some Senators after President George W. Bush nominated Samuel A. Alito Jr. to succeed retiring Justice Sandra Day O'Connor. (President Bush had nominated Alito after withdrawing his earlier nomination of White House counsel Harriet E. Miers to succeed Justice O'Connor.) Confirmation of Alito, it was widely noted, would leave the Court with only one woman member, Justice Ruth Bader Ginsburg. In this context, Sen. Barbara A. Mikulski (D-MD), during January 25, 2006, floor debate on the Alito nomination, remarked, "After Harriet Miers was withdrawn, who did they give us? Certainly, I think in all of the United States of America there was a qualified woman who could have been nominated to serve on the Court." Sen. Barbara A. Mikulski, "Nomination of Samuel A. Alito Jr. To Be an Associate Justice on the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, daily edition, January 25, 2006, p. S66. More recently, after President Obama nominated Sonia Sotomayor to the Court, Senator Specter (D-PA) stated "to talk about being a Latino, well, what is wrong with a little ethnic pride? And isn't it about time we had some greater diversity on the Supreme Court? Isn't it surprising, if not scandalous, that it took until 1967 to have an African American on the Court, Thurgood Marshall, and it took until 1981 to have the first woman on the Court, Sandra Day O'Connor?" Sen. Specter, remarks in the Senate, *Congressional Record*, daily edition, August 5, 2009, p. S8800.

[23] President George W. Bush, for instance, received bipartisan praise for personally, and through his aides, consulting widely with Members of the Senate, over a several week period, prior to nominating John G. Roberts Jr. to the Court in 2005. See, for example, the remarks of Majority Leader Bill Frist (R-TN), in "Supreme Court Confirmation Process," remarks in the Senate, *Congressional Record*, daily edition, July 12, 2005, pp. S8091-S8092, and of Senate Democratic Leader Harry Reid (D-NV) in "Pressing Issues," remarks in the Senate, *Congressional Record*, daily edition, July 11, 2005, pp. S7945-S7946. By contrast, President Bush's announcement of Samuel A. Alito Jr. on October 31, 2005, as a Court nominee, occurring four days after the withdrawal of a previous nominee to the same position (Harriet E. Miers), was faulted by some Senators as a selection made with little concern for consultation with Senators. Instead of an

Sometimes, Senators may find themselves debating whether the Senate, in its "advice and consent" role, should defer to the President and give a nominee the "benefit of the doubt." This issue received particular attention during Senate consideration of the Supreme Court nomination of Clarence Thomas in 1991. In that debate, some Thomas supporters argued that the Senate, as a rule, should defer to the President's judgment concerning a nominee except when unfavorable information is presented overcoming the presumption in the nominee's favor.[24] Opponents, by contrast, rejected the notion that there was a presumption in favor of a Supreme Court nominee at the start of the confirmation process or that the President, in his selection of a nominee, is owed any special deference.[25]

# Floor Procedures for Considering the Nomination

After the Judiciary Committee has reported a nomination, it is placed on the *Executive Calendar* and assigned a calendar number by the executive clerk of the Senate.[26] As with other nominations listed in the *Executive Calendar*, information about a Supreme Court nomination includes the name and office of the nominee; the name of the previous holder of the office; whether the committee reported the nomination favorably, unfavorably, or without recommendation; and, if there is a printed report, the report number.

Business on the *Executive Calendar*, which consists of treaties and nominations, is considered in executive session.[27] Unless voted otherwise by the Senate, executive sessions are open to the public.[28] Floor debate on a Supreme Court nomination, in contemporary practice, invariably has

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invitation to the White House, Senator Reid stated, "I received nothing more than a pro forma telephone call from the President's Chief of Staff, telling me he had selected Judge Alito about an hour before he announced the nomination." Sen. Harry Reid, "The Nomination of Judge Alito," remarks in the Senate," *Congressional Record,* daily edition, November 16, 2005, p. S12874.

[24] Among those Senators supporting the nomination, one declared that he strongly believed "that a nominee comes to the Senate with a presumption in his favor. Accordingly, opponents of the nominee must make the case against him, especially since Judge Thomas has been confirmed to positions of great trust and responsibility on four separate occasions." Sen. Strom Thurmond (R-SC), "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 3, 1991, p. 25257. Another Senator stated that while his vote in favor of Judge Thomas was not "cast without some doubt, ... I have tried to insist on every judicial nomination of every President that I would give both the President and the nominee the benefit of the doubt." Sen. Wyche Fowler Jr. (D-GA), "Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 3, 1991, p. 25270.

[25] During the Thomas nomination debate, for example, one Senator declared that "[i]n the selection of a person to serve on the Nation's highest court, in my view, the Senate is an equal partner with the President. The President is owed no special deference, and his nominee owed no special presumptions. We owe the public our careful and thorough consideration and our independent judgment." Sen. Frank R. Lautenberg (D-NJ), "Against the Confirmation of Clarence Thomas," remarks in the Senate, *Congressional Record*, vol., 137, September 27, 1991, p. 24449. Likewise, another Senator maintained that, on "a question of such vast and lasting significance, where the course of our future for years to come is riding on our decision, the Senate should give the benefit of the doubt to the Supreme Court and to the Constitution, not to Judge Clarence Thomas." Sen. Edward M. Kennedy (D-MA), "Nomination of Clarence Thomas, of Georgia, To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, October 15, 1991, p. 26290.

[26] "It is not in order for a Senator to move to consider a nomination that is not on the Calendar, and except by unanimous consent, a nomination on the Calendar cannot be taken up until it has been on the Calendar at least one day (Rule XXXI, clause 1)." CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (under heading "Taking Up a Nomination"). The Senate may also discharge a matter from a committee, by motion or by unanimous consent.

[27] See CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

[28] In 1925, the full Senate for the first time considered a Supreme Court nomination—that of Harlan F. Stone to be an

been conducted in public session, open to the public and press and, since 1986, to live nationwide television coverage.[29]

## Bringing the Nomination to the Floor[30]

The Senate's executive business is comprised of nominations and treaties. The Senate considers such business in executive session. Since the Senate typically begins its day in legislative session on any day it sits, the decision to proceed to executive session and consider a specific nomination is made while the Senate is in legislative session.[31]

Consideration of a nomination is scheduled by the majority leader, who typically consults with the minority leader and all interested Senators.[32] In previous Congresses, the typical practice in calling up a Supreme Court nomination was for the majority leader to consult with the minority leader and interested Senators and to ask for unanimous consent that the Senate proceed to executive session and consider the nomination. The leader asked for unanimous consent to proceed to executive session to consider the nomination immediately,[33] or at some specified time in the future.[34]

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Associate Justice—in open session, waiving a rule requiring the chamber to consider nominations in closed session. In 1929, the Senate amended its rules to provide for debate on nominations in open session unless there were a vote to go into closed session. Thenceforth, it became the regular Senate practice to conduct debate on nominations, including those to the Supreme Court, in open session.

[29] The Senate has allowed gavel-to-gavel broadcast coverage of Senate floor debate since June 1986. The Senate's first floor debates on Supreme Court nominations ever to be televised were its September 1986 debates on the nominations of William H. Rehnquist to be Chief Justice and Antonin Scalia to be an Associate Justice.

[30] See CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki. For an historical examination of floor procedures used by the Senate in considering Supreme Court nominations, see CRS Report RL33247, *Supreme Court Nominations: Senate Floor Procedure and Practice, 1789-2011*, by Richard S. Beth and Betsy Palmer. The report examines the 146 Supreme Court nominations on which some form of formal proceedings took place on the Senate floor. It sketches the changing patterns of consideration that have been normal in successive historical periods since 1789, and, in considering all of the 146 nominations, discusses the kinds of dispositions that they received, the length of their floor consideration, and the kinds of procedural action taken during their consideration.

[31] Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*, S. Doc. 101-28, 101st Cong., 2nd sess. (Washington, GPO, 1992), pp. 907-908 (hereinafter *Riddick's Senate Procedure*).

[32] The scope of this report involves final Senate action on nominations to the Supreme Court. For a report providing information and analysis related to the selection of a nominee to the Court by the President, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion. For a report providing information and analysis related to Judiciary Committee action on nominations, see CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion.

[33] For instance, under a unanimous consent agreement propounded by Majority Leader Robert C. Byrd (D-WV), on October 21, 1987, the Senate proceeded immediately to consider the Supreme Court nomination of Robert H. Bork. Sen Robert C. Byrd, "Executive Session," remarks in the Senate, *Congressional Record*, October 21, 1987, p. 28654. Similarly, under a unanimous consent agreement requested by Majority Leader Bill Frist (R-TN) on January 25, 2006, the Senate proceeded immediately to consider the nomination to the Court of Samuel A. Alito Jr. Sen. Bill Frist, "Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, daily edition, January 25, 2006, p. S35.

[34] For instance, on September 27, 1990, a unanimous consent agreement was propounded by Majority Leader George J. Mitchell (D-ME) providing for the Senate to proceed to the Supreme Court nomination of David H. Souter at 2:30 p.m., October 2. Sen. George J. Mitchell, "Nomination of David L. Souter To Be an Associate Justice of the Supreme Court of the United States," remarks in the Senate, *Congressional Record*, September 27, 1990, p. 26387. Likewise, on September 22, 2005, a unanimous consent agreement was obtained by Majority Leader Bill Frist (R-TN) providing for the Senate to proceed to the nomination of John G. Roberts Jr. to be Chief Justice of the United States, on September 26, 2005, "following the prayer and pledge" at 1 p.m. Sen. Bill Frist, "Orders for Monday, September 26, 2005,"

A unanimous consent request also could include a limit on the time that will be allowed for debate and specify the date and time on which the Senate will vote on a nomination.[35] Typically, the amount of time agreed upon for debate is divided evenly between the majority and minority parties, who usually have as their respective floor managers the chair and ranking minority member of the Judiciary Committee. If agreed to, a time limit on debate, with a date and time set for a final Senate vote on the nomination, precludes unlimited debate or delay in considering a nomination and the possibility of a filibuster. Conversely, if the Senate agrees by unanimous consent to consider a nomination, but does not provide for a time limit on debate or specify when, or under what circumstances, a Senate vote will take place, extended debate is possible, although not necessarily inevitable.[36]

When unanimous consent to call up a nomination has not been secured, the majority leader may make a motion that the Senate proceed to consider the nomination. As already explained, such a motion is made while the Senate is in legislative session.[37] The motion is not debatable. Since

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remarks in the Senate, *Congressional Record*, daily edition, September 22, 2005, p. S10392; on August 4, 2009, Majority Leader Harry Reid (D-NV) obtained a unanimous consent agreement providing that the Senate proceed to consider the Supreme Court nomination of Sonia Sotomayor later that day ("upon disposition of H.R. 2997"), Sen. Harry Reid, remarks in the Senate on proceeding to executive session, *Congressional Record*, daily edition, August 4, 2009, p. S8724; and, on August 2, 2010, Sen. Christopher J. Dodd (D-CT) asked and received unanimous consent that at 9:30 a.m., August 3, the Senate, immediately after its opening, proceed to consider the Supreme Court nomination of Elena Kagan. Sen. Christopher J. Dodd, "Unanimous Consent Agreement—Executive Calendar," *Congressional Record*, daily edition, August 2, 2010, p. S6593.

[35] In this vein, Majority Leader George J. Mitchell (D-ME), on July 28, 1994, while the Senate was in legislative session, asked unanimous consent that at 9 a.m. on July 29, the Senate proceed to executive session to consider the Supreme Court nomination of Stephen G. Breyer. The unanimous consent request also specified that there be six hours of debate, after which the Senate, "without any intervening action on the nomination," would vote on whether to confirm. Sen. George J. Mitchell, "Unanimous-Consent Agreement," remarks in the Senate, *Congressional Record*, July 28, 1994, p. 18544. Likewise, unanimous consent requests limited the time for debate and set the date and time for Senate votes on the Supreme Court nominations of Ruth Bader Ginsburg (1993), Clarence Thomas (1991), Anthony M. Kennedy (1988), and Sandra Day O'Connor (1981).

[36] For example, a September 27, 1990, unanimous consent agreement, which provided for the Senate to proceed to the Supreme Court nomination of David H. Souter at 2:30 p.m., October 2, did not also provide for a time limit on the debate, or for a vote at the end of that debate. Despite the absence of these provisions in the unanimous consent agreement, the Senate concluded its debate and voted to confirm, on the same day (October 2) that it began debate on the Souter nomination. Likewise, the Senate on August 29, 1967, by unanimous consent, proceeded to consider the Supreme Court nomination of Thurgood Marshall, without also providing for a time limit on the debate, or for a scheduled time for a vote on confirmation. "Supreme Court of the United States," *Congressional Record*, August 29, 1967, p. 24437. Even in the absence of such provisions, the Senate concluded debate on, and voted to confirm, the Marshall nomination the next day, August 30.

Also, the Senate, without providing for a vote on confirmation, may enter into one or more unanimous consent agreements, each with a time limit, to complete debate time and ultimately arrive at a time for a vote on confirmation. That was the scenario followed when, in 2005, the Senate considered the nomination of John G. Roberts Jr. to be Chief Justice. Initial consideration of the Roberts nomination, on September 26, 2005, occurred pursuant to a unanimous consent agreement entered into on September 22, 2005. The agreement specified the precise amounts of time on September 26 to be allotted to the majority and minority party leaders or their designees for debate on the nomination, without, however, setting a date and time for a vote on confirmation. "Orders for Monday, September 26, 2005," *Congressional Record*, daily edition, September 22, 2005, p. S10392. Pursuant to three additional unanimous consent (UC) agreements, further Senate consideration of the nomination followed, on September 27, 28, and 29, 2005, culminating in a 78-22 vote to confirm on September 29. (A complete chronology of Senate actions on the Roberts nomination, including all unanimous consent agreements reached on the nomination, can be accessed using the nominations database of the Legislative Information System [LIS] of the U.S. Congress.)

[37] If the majority leader moves to consider the nomination during executive session (rather than when the Senate is in legislative session), the motion is debatable under Senate rules. Closing debate on the motion, in turn, may require the Senate to invoke cloture by an affirmative vote of three-fifths of the entire Senate membership (60 Senators if there are no vacancies). Note that a majority leader today is unlikely to make such a motion while in executive session since the

1980, the Senate has explicitly established the precedent that a nondebatable motion may be made to go into executive session *to take up a specified nomination*.[38] One congressional scholar observed that the precedent limits a potential filibuster to the nomination itself.[39]

## Filibusters and Motions to End Debate

Senate rules place no limits on how long floor consideration of a nomination may last.[40] With time limits lacking, Senators opposing a Supreme Court nominee may seek, if they are so inclined, to use extended debate or delaying actions to postpone or prevent a final vote from occurring. The use of dilatory actions for such a purpose is known as a filibuster.[41]

By the same token, however, supporters of a Court nomination have available to them a procedure for placing time limits on consideration of a matter—the motion to invoke cloture.[42] When the Senate agrees to a cloture motion on a Supreme Court nomination, further consideration of the matter being debated is limited to 30 hours. The majority required for cloture on nominations, including Supreme Court nominations, is a majority of Senators voting, a quorum being present. By invoking cloture, the Senate ensures that a nomination may ultimately come to a vote and be decided by a voting majority.

The Senate reinterpreted its cloture rule to allow a majority of Senators voting to invoke cloture on a Supreme Court nomination on April 6, 2017.[43] Shortly thereafter the Senate was able to invoke cloture on the nomination of Neil M. Gorsuch to be a Supreme Court Justice by a vote of 55-45.[44]

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motion is debatable.

The debatable nature of a motion to consider, when made in executive session, was demonstrated in 1968, when the nomination of Associate Justice Abe Fortas to be Chief Justice was brought to the Senate floor. The episode marked the most recent Senate proceedings in which a *motion* was made to proceed to consider a Supreme Court nomination while the Senate was in *executive* session. Significant opposition within the Senate to the Fortas nomination raised the theoretical possibility of two filibusters being mounted—the first against the motion to consider, and then (if Fortas supporters were successful in ending debate on the first filibuster) a second, against the nomination itself. The vote on the motion to close debate on the motion to consider the Fortas nomination was 45-43, well short of the supermajority then required by Senate rules for passage of a "cloture motion" (prior to 1975, two-thirds of Senators present and voting). Consequently, the second filibuster did not materialize after the Senate failed to reach the supermajority required to close debate on the motion to consider. Shortly after the unsuccessful attempt at cloture on the motion to consider, the Fortas nomination was withdrawn by President Lyndon B. Johnson.

[38] *Riddick's Senate Procedure*, pp. 941-942.

[39] Tiefer, *Congressional Practice and Procedure*, p. 608.

[40] As discussed earlier, however, the Senate may set time limits on such debates by unanimous consent.

[41] See discussion earlier in this report, regarding debatable motions and filibusters, under subheading "Bringing the Nomination to the Floor."

[42] For historical information on filibusters and cloture attempts on Supreme Court nominations, see CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene. For more recent developments on cloture and Supreme Court nominations, see CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[43] For a discussion of the reinterpretation of the Senate cloture rule that reduced the threshold for invoking cloture on Supreme Court nominations from three-fifths of the Senate to a majority of those voting, a quorum being present, see CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[44] The 2017 precedent was again used on October 5, 2018, to invoke cloture on the nomination of Brett M. Kavanaugh to be a Supreme Court Justice by a vote of 51-49.

Prior to the 2017 precedent, a supermajority was required to invoke cloture on a Supreme Court nomination. Motions to bring debate on Supreme Court nominations to a close under the previous procedures were made on four prior occasions.[45] The first use occurred in 1968, when Senate supporters of Justice Abe Fortas tried unsuccessfully to end debate on the motion to proceed[46] to his nomination to be Chief Justice. After the motion was debated at length, the Senate failed to invoke cloture by a 45-43 vote,[47] prompting President Lyndon Johnson to withdraw the nomination. The 45 votes in favor of cloture fell far short of the supermajority required—then two-thirds of Senators present and voting, a quorum being present.

A cloture motion to end debate on a Court nomination occurred again in 1971, when the Senate considered the nomination of William H. Rehnquist to be an Associate Justice. Although the cloture motion failed by a 52-42 vote,[48] Rehnquist was confirmed later the same day.[49] In 1986, a cloture motion was filed on a third Supreme Court nomination, this time of sitting Associate Justice Rehnquist to be Chief Justice. Supporters of the nomination mustered more than the three-fifths majority needed to end debate (with the Senate voting for cloture 68-31),[50] and Justice Rehnquist subsequently was confirmed as Chief Justice.

A cloture motion was presented to end consideration of a Supreme Court nomination a fourth time, during Senate consideration of the nomination of Samuel A. Alito Jr. in January 2006. The motion was presented on January 26, after two days of Senate floor debate on the nomination.[51] On January 30, the Senate voted to invoke cloture by a 72-25 vote,[52] and the next day it confirmed the Alito nomination by a final vote of 58-42.[53]

As one news analysis at the time observed, Senators "are traditionally hesitant to filibuster" Supreme Court nominations.[54] Indicative of this, the article noted, was the fact that some of the "most divisive Supreme Court nominees in recent decades, including Associate Justice Clarence Thomas, have moved through the Senate without opponents resorting to that procedural

[45] It has only been since 1949, under Senate rules, that cloture could be moved on nominations. Prior to 1949, dating back to the Senate's first adoption of a cloture rule in 1917, cloture motions could be filed only on legislative measures. CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene.

[46] As mentioned above, prior to 1980, the motion to proceed to consider a specific nomination on the Executive Calendar was debatable.

[47] For the Senate's debate on the Fortas nomination immediately prior to the vote on the motion to close debate, see "Supreme Court of the United States," *Congressional Record*, October 1, 1968, pp. 28926-28933.

[48] For the Senate's debate on the Rehnquist nomination immediately prior to the vote on the motion to close debate, see "Cloture Motion," *Congressional Record*, December 10, 1971, pp. 46110-46117.

[49] The Senate, on December 10, 1971, confirmed the Rehnquist nomination by a vote of 68-26, after voting 22-70 to reject a motion that a vote on the nomination be deferred until January 18, 1972. *Congressional Record*, December 10, 1971, p. 46121 (vote on motion to defer) and p. 46197 (confirmation vote).

[50] "Nomination of William H. Rehnquist To Be Chief Justice of the United States," *Congressional Record*, September17, 1986, pp. 23729-23739.

[51] "Cloture Motion," *Congressional Record*, January 26, 2006, daily edition, p. S197.

[52] "Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the Supreme Court of the United States," *Congressional Record*, January 30, 2006, daily edition, pp. S260-S308.

[53] The final vote, a newspaper editorial observed, "allowed Judge Alito to become Justice Alito even though enough Democrats opposed the nomination to stop it with a filibuster." "The Filibuster That Wasn't," *The Washington Post*, February 5, 2006, p. B6.

[54] Matthew Tully, "Senators Won't Rule Out Filibuster of High Court Nominees," *CQ Daily Monitor*, March 21, 2002, p. 7.

weapon."[55] In 1991, five days of debate on the Thomas nomination concluded with a 52-48 confirmation vote. The 48 opposition votes would have been more than enough to defeat a cloture motion if one had been filed. In three earlier episodes, Senate opponents of Supreme Court nominations appear to have refrained from use of the filibuster, even though their numbers would have been sufficient to defeat a cloture motion. In 1969, 1970, and 1987 respectively, lengthy debate occurred on the unsuccessful nominations of Clement F. Haynsworth, G. Harrold Carswell, and Robert H. Bork. In none of these episodes, however, was a cloture motion filed, and in each case debate ended with a Senate vote rejecting the nomination.

# Final Vote on Whether to Confirm the Nomination

## Number of Days from Nomination to Final Vote

Historically, there has been variation in the length of time from a President nominating a person for a vacancy on the Supreme Court to a final Senate vote on that person's nomination. For nominees since 1975 who have received a final floor vote, **Figure 1** shows the number of calendar days that elapsed from the date on which the nomination was formally submitted to the Senate to the date on which the Senate voted whether to approve the nomination.[56]

Of the 15 nominees listed in the figure, Robert Bork waited the greatest number of days (108) from nomination to a final Senate vote—followed by Clarence Thomas (99), while John Paul Stevens waited the fewest number of days (19)—followed by Sandra Day O'Connor (33).[57]

Overall, the average number of days from nomination to final Senate vote is 70.8 days (or approximately 2.3 months), while the median is 71.0 days.[58]

Of the 8 Justices currently serving on the Court, the average number of days from nomination to final Senate vote is 77.8 days (or approximately 2.6 months), while the median is 77.5 days. Among the current Justices, John Roberts waited the fewest number of days from nomination to confirmation (62), while Clarence Thomas waited the greatest number of days (99).

[55] Ibid.

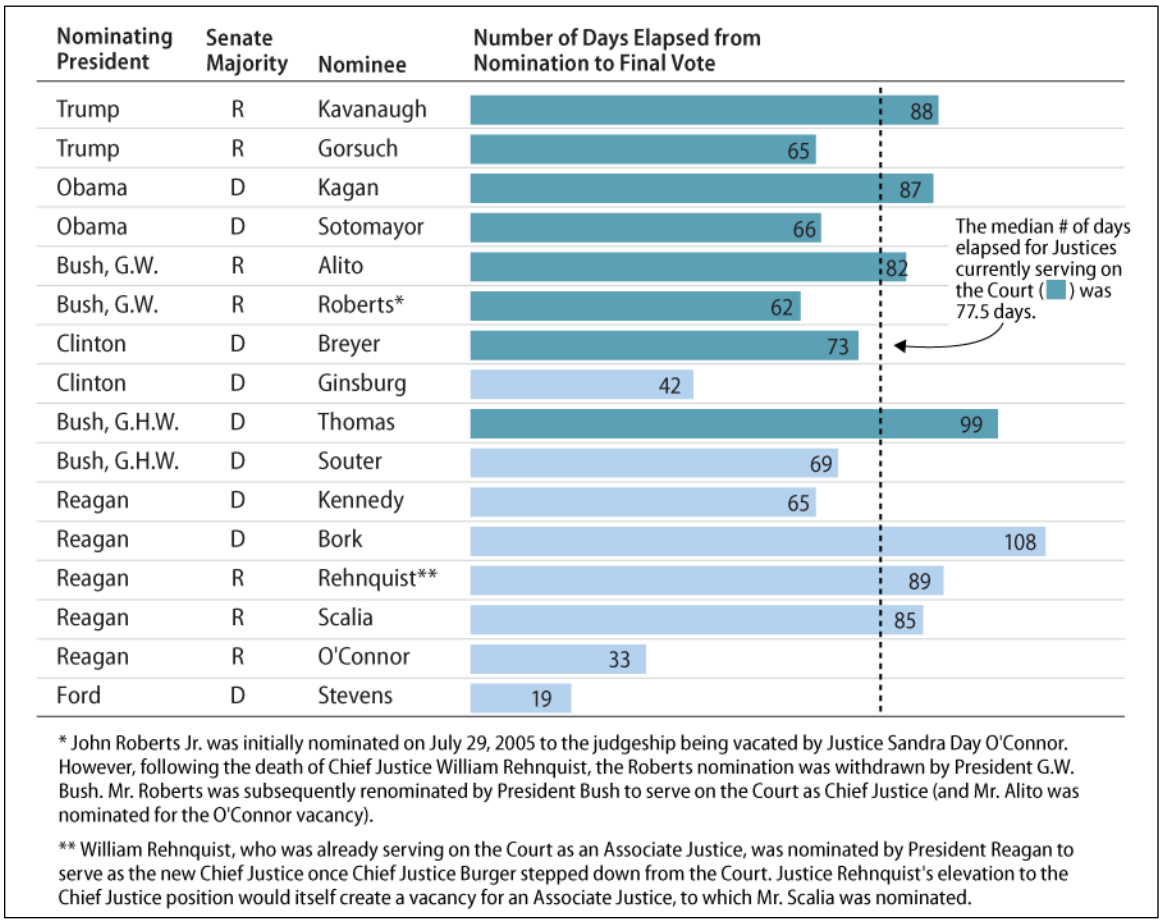
[56] It is not uncommon for a President to announce his choice for a vacancy prior to formally submitting the nomination to the Senate. For the purposes of **Figure 1**, the date on which the nomination is formally submitted (not the date on which the President announces whom he intends to nominate) is used in the calculation. Using the date the nomination is submitted provides a better measure of how long a nominee waits for a final vote once his or her nomination has formally been submitted to the Senate for consideration.

[57] For some nominees, the number of days from nomination to a final Senate vote increases as a result of a congressional recess or break intervening between the date the nomination is submitted to the Senate and the date of the Senate vote. For example, Samuel Alito was nominated on November 10, 2005. The Senate was not in session during a number of days in November and December of 2005 (as well as in January of 2006)—the days that the Senate was not in session during this period likely increased the number of days from Alito's nomination to the Senate's final vote on his nomination (which occurred on January 31, 2006).

[58] The average is calculated by adding a group of numbers and then dividing that value by how many numbers there are, while the median is the middle value for a particular set of numbers (i.e., half of the numbers are above the median and half are below it). Although the average is a more commonly used measure, the median is less affected by outliers or extreme cases (e.g., nominees for whom the time from nomination to final vote was relatively much shorter or longer than it was for other nominees). Consequently, the median might be a better measure of central tendency.

**Figure 1. Number of Days from Nomination to Final Vote**

(Nominees Receiving a Final Vote from 1975 to Present)




**Source:** Congressional Research Service.

**Notes:** This figures shows, for nominees to the Supreme Court who received a final floor vote from 1975 to the present, the number of calendar days that elapsed from the date a nomination was submitted to the Senate to the date on which the Senate voted whether to approve the nomination.

## Number of Days from Committee Report to Final Vote

There has also been variation in the length of time nominees to the Court have waited for a final vote after being reported by the Judiciary Committee. **Figure 2** shows, for nominees since 1975 who received a final floor vote, the number of calendar days that elapsed from the date on which the nomination was reported by the Judiciary Committee to the date on which the Senate voted whether to approve the nomination.

Of the 15 nominees listed in the figure, William Rehnquist and Antonin Scalia waited the greatest number of days (34) from committee report to a final Senate vote, while Neil Gorsuch waited the fewest number of days (4). The nominations of Rehnquist (to be Chief Justice) and Scalia (to be Associate Justice) were reported by the committee the day before the start of the August recess in

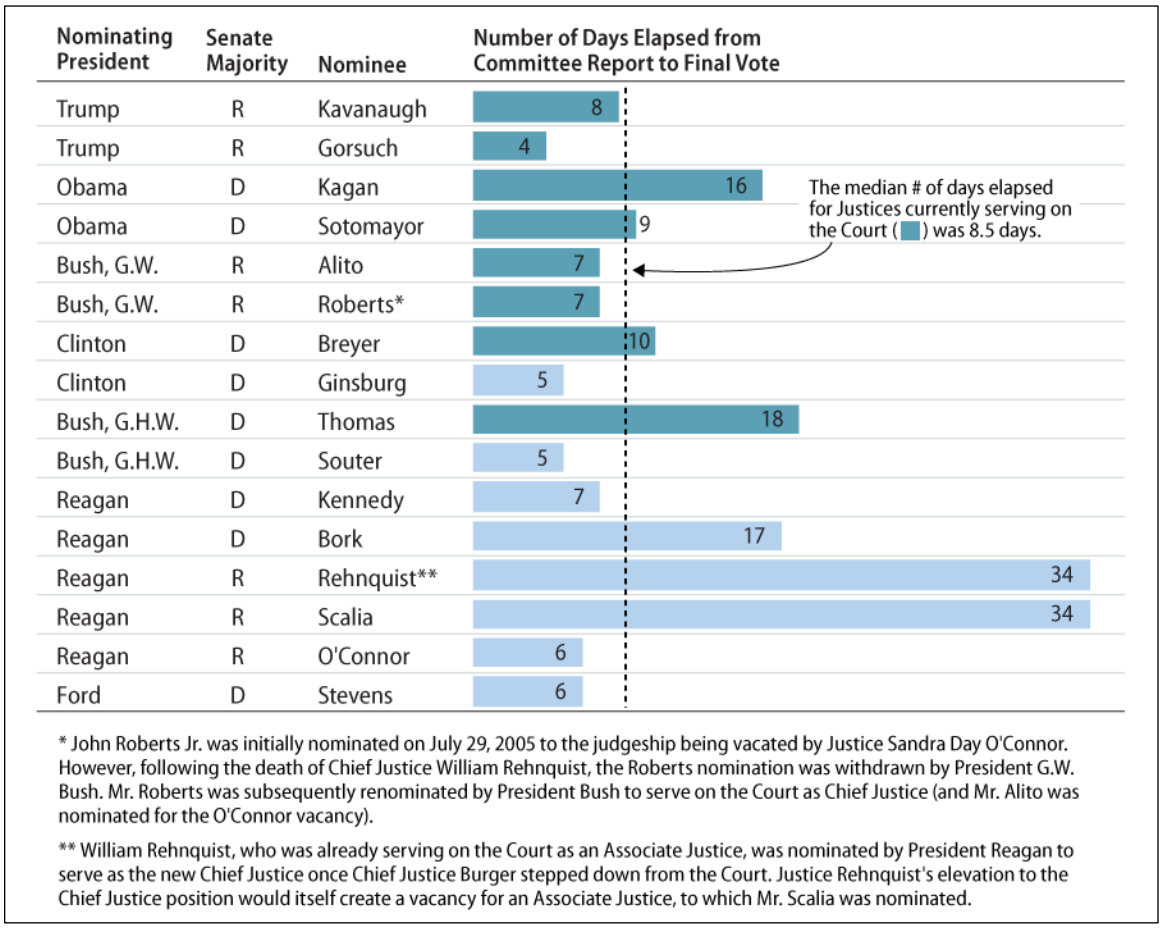
1986, which likely lengthened the amount of time from committee report to final vote for both nominations.[59]

Overall, the average number of days from committee report to final Senate vote is approximately 12 days, while the median is 7.5 days.

Of the eight Justices currently serving on the Court, the average number of days from committee report to final Senate vote is approximately 10 days, while the median is 8.5 days. Among the current Justices, Neil Gorsuch waited the fewest number of days from committee report to confirmation (4), while Clarence Thomas waited the greatest number of days (18).

**Figure 2. Number of Days from Committee Report to Final Vote**

(Nominees Reported by Judiciary Committee from 1975 to Present)




**Source:** Congressional Research Service.

**Notes:** This figures shows, for nominees to the Supreme Court who received a final floor vote from 1975 to the present, the number of calendar days that elapsed from the date on which the nomination was reported by the Judiciary Committee to the date on which the Senate voted whether to approve the nomination. Note that the Rehnquist and Scalia nominations were reported by the committee on August 14, 1986. The Senate's August recess was from August 15, 1986, to September 8, 1986—the intervening recess lengthened the amount of time from committee report to final vote for both nominations.

[59] The Rehnquist and Scalia nominations were reported by the committee on August 14, 1986. The Senate's August recess was from August 15, 1986 to September 8, 1986.

## Type of Vote

When floor debate on a nomination comes to a close, the presiding officer puts the question of confirmation to a vote. In doing so, the presiding officer typically states, "The question is, Will the Senate advise and consent to the nomination of [nominee's name] of [state of residence] to be an Associate Justice [or Chief Justice] on the Supreme Court?"[60]

A roll-call vote to confirm requires a simple majority of Senators present and voting, a quorum being present.[61] Since 1967, every Senate vote on whether to confirm a Supreme Court nomination has been by roll call.[62] Prior to 1967, by contrast, fewer than half of all of Senate votes on whether to confirm nominees to the Court were by roll call, with the rest by voice vote.[63]

For roll-call votes on Supreme Court nominations, the formal procedure by which Senators cast their votes on the floor has varied over the years. In recent decades prior to 1991, it was the usual practice for Senators, during the calling of the roll, to be free to come and go, and not have to be present in the Senate chamber for the entire calling of the roll. However, for several recent Supreme Court nominations to receive final Senate votes on confirmation the majority leader or the presiding officer, immediately prior to the calling of the roll, has asked all of the Senate's Members to remain seated at their desks during the entire vote—with each Senator rising and responding when his or her name is called.[64] Voting from the desk during roll calls is in keeping with a standing order of the Senate,[65] which rarely, however, is actually enforced;[66] nevertheless, the rule has been applied by Senate leaders, in recent years, to roll-call votes on Supreme Court nominations, to mark the special significance for the Senate of deciding whether to confirm an appointment to the nation's highest court.[67]

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[60] The wording of the question is provided for by Rule XXXI, paragraph 1, *Standing Rules of the Senate*, at http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI, which provides that "the final question on every nomination shall be, 'Will the Senate advise and consent to this nomination?"

[61] See CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki. This quorum requirement is derived from Article I, Section 5, clause 1 of the Constitution, which states in part that "a Majority of each [House] shall constitute a Quorum to do Business.... " Hence, the quorum for conducting business in a Senate of 100 Members is 51 Senators.

[62] Of the 23 nominations since 1967, 5 received 0 nay votes (Kennedy, Scalia, O'Connor, Stevens, Blackmun), 3 received fewer than 5 nay votes (Ginsburg, Powell, Burger), 3 received between 6 and 11 nay votes (Breyer, Souter, Marshall), 9 received between 20 and 49 nay votes (Kavanaugh, Gorsuch, Kagan, Sotomayor, Roberts, Alito, Thomas, and both of Rehnquist's nominations), and 3 received more than 50 nays (Bork, Carswell, Haynsworth).

[63] The most recent voice votes by the Senate on Supreme Court nominations were those confirming Abe Fortas in 1965 (to be an Associate Justice) and Arthur J. Goldberg and Byron R. White, both in 1962. Of the 137 Senate votes cast in all, from 1789 to 2018, on whether to confirm a Supreme Court nominee, 64 were done by roll-call votes, and the other 73 by voice votes or unanimous consent.

[64] For example, during the confirmation votes on the nominations of Sonia Sotomayor and Elena Kagan, Senators remained at their desks during the calling of the roll.

[65] S.Res. 480, approved by the Senate on October 11, 1984, provided: "Resolved, That it is a standing order of the Senate that during yea and nay votes in the Senate, each Senator shall vote from the assigned desk of the Senator." See U.S. Congress, Senate, *Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*, S. Doc. 107-1, 107th Cong., 1st sess. (Washington: GPO. 2002), p. 151.

[66] "Senators are required to vote from their desks, but this requirement rarely is enforced. On occasion, when a vote of special constitutional importance, such as a vote to convict in an impeachment trial, is about to begin, the majority leader will ask all Senators to come to the floor before the vote begins and then to vote from their desks, each Senator rising and responding when his or her name is called." CRS Report 96-452, *Voting and Quorum Procedures in the Senate*, coordinated by Elizabeth Rybicki, p. 7.

[67] Immediately prior to the Senate's roll-call vote in 1994 on whether to confirm Stephen G. Breyer to be an Associate Justice, Majority Leader George J. Mitchell (D-ME) stated to his colleagues on the floor that "it has been the practice

## Vote Outcome and Number of Nay Votes

Historically, vote margins on Supreme Court nominations have varied considerably. Most votes have been overwhelmingly in favor of confirmation.[68] Some recorded votes, however, either confirming or rejecting a nomination, have been close.[69]

For nominations receiving a final floor vote since 1975, **Figure 3** shows whether the nomination was confirmed by the Senate or not confirmed. For nominations approved, the level of support among Senators voting on the nomination is indicated as follows: (1) unanimous support (i.e., no nay votes cast on the nomination); (2) some opposition (fewer than 10 nay votes cast on the nomination); (3) some opposition (more than 10 nay votes cast on the nomination, but at least half of the Senators not belonging to the President's party still voted aye on the nomination); and (4) party opposition (a majority of Senators not belonging to the President's party cast nay votes on the nomination). The number of dots at the top of each column indicates the number of nominees in each category.

Of the 16 nominations receiving a final floor vote, 15 were confirmed. Of the 15 nominations approved by the Senate, 7 were approved despite receiving nay votes from a majority of Senators not belonging to the President's party.[70] These seven include the five most recent nominations to the Court, those of Brett Kavanaugh (2018), Neil Gorsuch (2017), Elena Kagan (2010), Sonia Sotomayor (2009), and Samuel Alito (2006). Additionally, a majority of Senators not belonging to the President party's voted against the Clarence Thomas nomination (1991), as well as the nomination of William Rehnquist to be Chief Justice (1986).

In only one of the seven cases identified above did the President's party not also hold a majority of seats in the Senate. Specifically, in 1991, President George H. W. Bush (a Republican) nominated Thomas—who was opposed by a majority of Democratic Senators (and whose party

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that votes on Supreme Court nominations are made from the Senator's desk. I ask that Senators cast their votes from their desks during this vote." *Congressional Record*, July 29, 1994, p. 18704. Again, in 2006, moments before the Senate's vote on nominee Samuel A. Alito Jr., the importance of a Supreme Court nomination was cited by the Senate's majority leader in applying the Senate rule that Members vote from their desks on a roll-call votes: "So, momentarily, we will vote from our desks, a time-honored tradition that demonstrates, once again, how important and consequential every Member takes his duty under the Constitution to provide advice and consent on a Supreme Court nomination and to give the nominee the fair up-or-down vote he deserves." Sen. Bill Frist, "Nomination of Judge Samuel Alito to the U.S. Supreme Court," remarks in the Senate, *Congressional Record*, daily edition, January 31, 2006, p. 348.

[68] The most lopsided of these votes were the unanimous roll calls confirming Morrison R. Waite to be Chief Justice in 1874 (63-0), Harry A. Blackmun in 1970 (94-0), John Paul Stevens in 1975 (98-0), Sandra Day O'Connor in 1981 (99-0), Antonin Scalia in 1986 (98-0), and Anthony M. Kennedy in 1988 (97-0); and the near-unanimous votes confirming Noah H. Swayne in 1862 (38-1), Warren E. Burger in 1969 to be Chief Justice (74-3), Lewis F. Powell Jr. in 1971 (89-1), and Ruth Bader Ginsburg in 1993 (96-3).

[69] The closest roll calls ever cast on Supreme Court nominations were the 24-23 vote in 1881 confirming Stanley Matthews, the 25-26 vote in 1861 rejecting a motion to proceed to consider the nomination of Jeremiah S. Black, and the 26-25 Senate vote in 1853 to postpone consideration of the nomination of George E. Badger. Since the 1960s, the closest roll calls on Supreme Court nominations were the 50-48 vote in 2018 confirming Brett Kavanaugh, the 52-48 vote in 1991 confirming Clarence Thomas, the 45-51 vote in 1970 rejecting G. Harrold Carswell, the 45-55 vote in 1969 rejecting Clement Haynsworth Jr., the 54-45 vote in 2017 confirming Neil Gorsuch, the 58-42 vote in 2006 confirming Samuel A. Alito Jr., and the 42-58 vote in 1987 rejecting Robert H. Bork. Several of these votes are presented in **Figure 5**, "Ten U.S. Supreme Court Nominations Approved by the Senate That Had Greatest Percentage of Senators Voting Against Nomination." Also noteworthy was the 45-43 vote in 1968 rejecting a motion to end debate on the nomination of Abe Fortas to be Chief Justice; however, the roll call was not as close as the numbers by themselves suggested, since passage of the motion required a two-thirds vote of the Members present and voting.

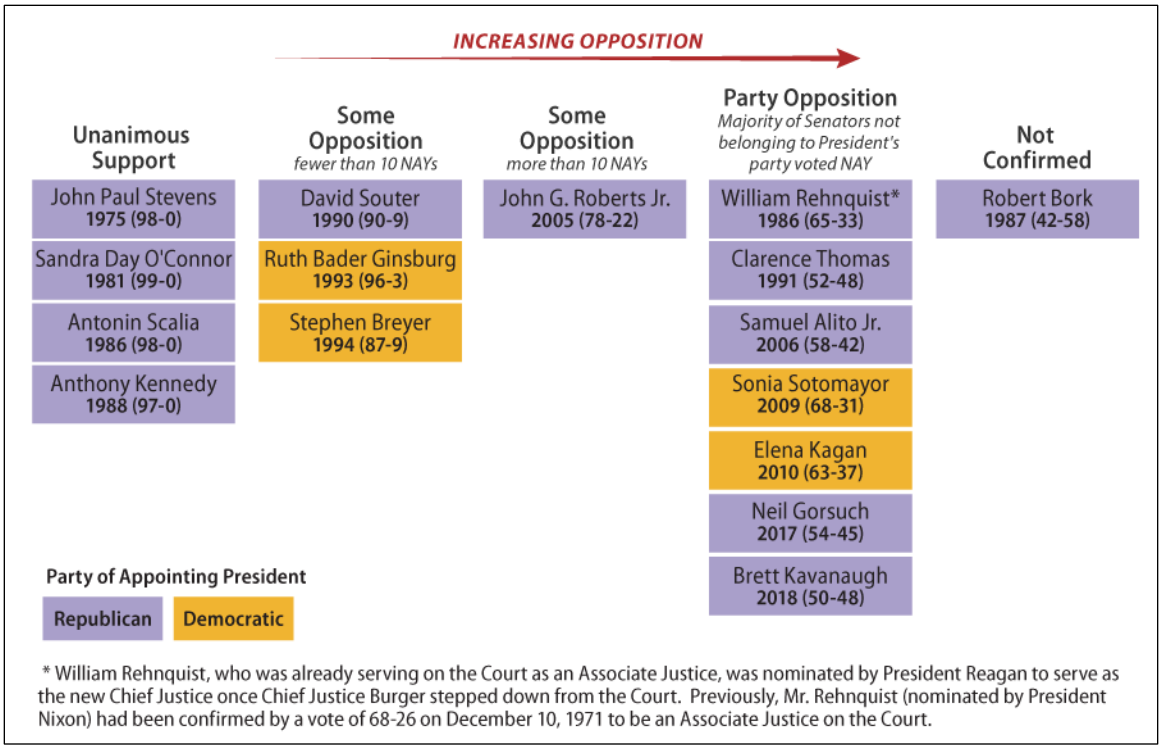
[70] The nomination of John G. Roberts was nearly opposed by a majority of Senators not belonging to the President's party. Roberts, nominated by President George W. Bush, had 22 Democrats vote in favor of his nomination and 22 Democrats vote in opposition to it.

was also the majority party in the Senate). In each of the other six cases, the majority of Senators opposed to the nomination belonged to the minority party in the Senate (i.e., Democrats were the minority party in 1986, 2006, 2017, and 2018, while Republicans were the minority party in 2009 and 2010).

Of the 16 nominations presented in **Figure 3**, 7 were approved by the Senate either unanimously or with fewer than 10 nay votes—but the last nomination to fall into either one of these categories was that of Stephen Breyer (nominated by President Clinton in 1994).

**Figure 3. U.S. Supreme Court Nominees Receiving Final Vote**

(1975 to Present)




**Source:** Congressional Research Service.

**Notes:** This figure shows, for nominees whose nominations received a final floor vote since 1975, whether the nomination was approved by the Senate. For nominations approved, the level of opposition—measured as the number of nay votes received during a final floor vote on the nomination—is indicated (e.g., whether a nomination received unanimous support on the floor or was voted against by a majority of Senators not belonging to the President's party).

Note that Senators not belonging to President G.W. Bush's party (i.e., Democratic Senators) split 22-22 in voting to confirm Mr. Roberts. This was the only 50/50 vote split for a political party's Senators on one of the nominations included in **Figure 3**.

**Figure 4** provides some additional historical context for the number of nay votes received by the six most recent nominations to the Court (Kavanaugh, Gorsuch, Kagan, Sotomayor, Alito, and Roberts). Specifically, the figure identifies, of the 35 nominations since 1945 that received a final floor vote, the 10 nominations that received the greatest number of nay votes.[71]

[71] Of the 35 nominations, 13 (37%) were approved by voice vote or unanimously by roll call vote—the most recent being Anthony Kennedy's nomination in 1988 (which was approved 97-0). An additional 6 nominations (17%)

Of the 10 nominations listed in the **Figure 4**, 7 were confirmed by the Senate and 3 were rejected (the Bork, Haynsworth, and Carswell nominations).[72]

**Figure 4. Ten U.S. Supreme Court Nominations That Received Greatest Number of Nays During Final Vote**

(1945 to Present)

| Nominating President | Nominee | Year of Final Vote | # of AYEs | # of NAYs |
|---|---|---|---|---|
| Reagan | *Bork* | 1987 | 42 | 58 |
| Nixon | *Haynsworth* | 1969 | 45 | 55 |
| Nixon | *Carswell* | 1970 | 45 | 51 |
| Trump | **Kavanaugh** | 2018 | 50 | 48 |
| Bush, G.H.W. | **Thomas** | 1991 | 52 | 48 |
| Trump | **Gorsuch** | 2017 | 54 | 45 |
| Bush, G.W. | **Alito** | 2006 | 58 | 42 |
| Obama | **Kagan** | 2010 | 63 | 37 |
| Reagan | Rehnquist* | 1986 | 65 | 33 |
| Obama | **Sotomayor** | 2009 | 68 | 31 |

*Italicized names:* Nominees not confirmed
**Bold names:** Justices currently serving

* William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Justice Rehnquist's elevation to the Chief Justice position would itself create a vacancy for an Associate Justice, to which Mr. Scalia was nominated.

**Source:** Congressional Research Service.

**Notes:** This figure identifies the 10 Supreme Court nominations since 1945 that received the greatest number of nay votes during the final floor vote on the nomination.

Of the 7 nominations that were approved, 6 were for individuals currently serving on the Court—including the 5 most recent nominees (Kavanaugh, Gorsuch, Kagan, Sotomayor, and Alito).[73] The relatively high number of nay votes received by recent nominations approved by the Senate for

received fewer than 10 nays—the most recent being Stephen Breyer's nomination in 1994 (which was approved 87-9).

[72] Historically, individuals nominated to the Court have more likely than not been confirmed. From 1789 through 2018, there were 132 individuals nominated to be an Associate Justice on the Supreme Court. Of the 132 individuals, 103 (78.0%) were confirmed by the Senate; 2 (1.5%) had their nominations withdrawn, were renominated to be Chief Justice, and were confirmed by the Senate; 5 (3.8%) declined the nomination or, if confirmed, declined the appointment to the Court; and the remaining 22 (16.7%) were not confirmed for one reason or another (e.g., the nominee's nomination was rejected by the Senate, the Senate took no action on the nomination, or the President withdrew the nomination prior to Senate action). The current nominee, Amy Coney Barrett, is the 133rd individual to be nominated to be an Associate Justice on the Court.

During this same period, 21 individuals were nominated to be Chief Justice of the Court. Of the 21 individuals, 15 (71.4%) were confirmed by the Senate; 1 individual was confirmed by the Senate, served as Chief Justice, stepped down from service, was later renominated to be Chief Justice, and declined the nomination; 1 individual declined the nomination; and another 4 (19.0%) individuals were not confirmed for one reason or another (e.g., the nominee's nomination was rejected by the Senate or withdrawn by the President). The most recent instance of an individual not being confirmed to the Chief Justice position was in 1968, when the Senate failed to invoke cloture on the nomination of Abe Fortas to be Chief Justice (consequently, President Lyndon Johnson withdrew the nomination).

[73] Additionally, William Rehnquist's nomination to be Chief Justice in 1986 (33 nays) ranks in the top 10 in terms of the number of nay votes received during a final floor vote.

the Supreme Court is atypical historically (see further discussion below).[74] Specifically, the relatively high number of nay votes received by recent nominations reflects greater opposition than in the past by Senators not belonging to a President's party to nominations to the Court.[75]

## Percentage of Nays

The level of opposition to Supreme Court nominations *approved* by the Senate, as measured by the percentage of Senators voting against a nomination, has been relatively greater in recent years than in the past. Since 1789 there have been 51 nominations that received an up-or-down roll call vote on the Senate floor that *also* resulted in the nomination being approved by the Senate[76] Of these 51 nominations, **Figure 5** identifies the 10 for which the greatest percentage of Senators voted to oppose it.[77]

[74] Of the 35 nominations with a final floor vote during this period (1945 to the present), 24, or 69%, were approved by roll call vote. The average number of nay votes received for the 24 nominations was approximately 18, while the median number of nay votes received was 11. Note that the number of nay votes received by each of the five most recent nominations to the Court was greater than both the historical average and median number of nays received by a nomination.

[75] Specifically, the Kavanaugh nomination was supported by 49 Republicans and 1 Democrat; opposed by 48 Democrats. The Gorsuch nomination was supported by 51 Republicans and 3 Democrats; opposed by 45 Democrats. The Kagan nomination was supported by 58 Democrats and 5 Republicans; opposed by 1 Democrat and 36 Republicans. The Sotomayor nomination was supported by 59 Democrats and 9 Republicans; opposed by 31 Republicans. The Alito nomination was supported by 54 Republicans and 4 Democrats; opposed by 1 Republican and 41 Democrats. The Roberts nomination was supported by 56 Republicans and 22 Democrats; opposed by 22 Democrats. In contrast, Senators supported the nominations of Justices Scalia, Kennedy, Breyer, and Ginsburg either unanimously or by overwhelming majorities within both parties. If a Senator was elected as an Independent, he is included with the political party he caucused with in the numbers reported above.

[76] Prior to the confirmation of Thurgood Marshall during the Lyndon Johnson presidency, it was relatively common for Supreme Court nominees to be confirmed by voice vote. The last nominee to be approved by the Senate in this manner was Abe Fortas in 1965 (to the Associate Justice position vacated by Arthur Goldberg).

[77] During this period of time, the Senate varied in size from 22 seats to 100 seats. For the purposes of this report, the percentage of Senators voting in opposition to a nomination is calculated as a percentage of all Senators voting on a nomination (not as a percentage of the number of Senate seats, although for practical purposes the number of Senators voting on a nomination was typically the same as or similar to the number of Senate seats).

**Figure 5. Ten Supreme Court Nominations Approved by the Senate That Had Greatest Percentage of Senators Voting Against Nomination**

(1789 to Present)

| Nominating President | Nominee | Year of Final Vote | % Voting AYE | % Voting NAY |
|---|---|---|---|---|
| Trump | **Kavanaugh** | 2018 | 51.0% | 49.0% |
| Garfield | Matthews | 1881 | 51.1% | 48.9% |
| Bush, GHW | **Thomas** | 1991 | 52.0% | 48.0% |
| Buchanan | Clifford | 1858 | 53.1% | 46.9% |
| Cleveland | Lamar, L. | 1888 | 53.3% | 46.7% |
| Trump | **Gorsuch** | 2017 | 54.5% | 45.5% |
| Bush, GW | **Alito** | 2006 | 58.0% | 42.0% |
| Obama | **Kagan** | 2010 | 63.0% | 37.0% |
| Jackson | Catron | 1837 | 65.1% | 34.9% |
| Taft | Pitney | 1912 | 65.8% | 34.2% |

**Bold names:** Justices currently serving

**Source:** Congressional Research Service.

**Notes:** This figure identifies, of the 51 Supreme Court nominations since 1789 that were approved by roll call vote in the Senate (rather than by voice vote), the 10 nominations for which the percentage of Senators voting against the nomination was greatest.

Of the 10 individuals listed in the figure, 5 are currently serving on the Court. The nominations of Justices Kavanaugh, Thomas, Gorsuch, Alito, and Kagan were opposed by 49.0%, 48.0%, 45.5%, 42.0%, and 37.0% of Senators, respectively. Additionally, the nominations of two other current Justices, Sonia Sotomayor and John Roberts Jr., rank among the 20 nominations (of 51) that received the most opposition (at 31.3% and 22.0%, respectively).[78]

# Reconsideration of the Confirmation Vote

After a Senate vote to confirm a Supreme Court nomination, a Senator who voted on the prevailing side may, under Senate Rule XXXI, move to reconsider the vote.[79] Under the rule, only one such motion to reconsider is in order on each nomination, and the tabling of the motion prevents any subsequent attempt to reconsider. The Senate typically deals with a motion to reconsider a Supreme Court confirmation in one of two ways. Immediately following the vote to confirm, a Senator may move to reconsider the vote, and the motion is promptly laid upon the table by unanimous consent.[80] Alternatively, well before the vote to confirm, in a unanimous

[78] The most recent Supreme Court nominee approved by roll call vote and whose nomination received zero nay votes was Anthony Kennedy in 1988.

[79] "According to Senate Rule XXXI, any Senator who voted with the majority on the nomination has the option of moving to reconsider a vote on the day of the vote or the next two days the Senate meets in executive session." CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (under subheading "Consideration and Disposition").

[80] For example, immediately after the votes to confirm David Souter in 1990, Clarence Thomas in 1991, John G. Roberts Jr. in 2005, and Samuel A. Alito Jr. in 2006, a motion in each case was made to reconsider the vote, followed by a motion "to lay that motion on the table," which was agreed to without objection by the Senate. See *Congressional*

consent agreement, the Senate may provide that, in the event of confirmation, the motion to reconsider be tabled.[81] The Senate, it should be noted, has never adopted a motion to reconsider a Supreme Court confirmation vote.

# Calling Upon the Judiciary Committee to Further Examine the Nomination

Sometimes, after a Supreme Court nomination has been reported, the Senate may delay considering or voting on the nomination, in order to have the Senate Judiciary Committee address new issues concerning the nominee or more fully examine issues that it addressed earlier. Opponents of a nomination may also seek such delay, through recommittal of the nomination to the committee, to defeat the nomination indirectly, by burying it in committee.

## Recommittals of Supreme Court Nominations

Although the Senate has never adopted a motion to reconsider a Supreme Court nomination after a confirmation vote, there have been at least eight preconfirmation vote attempts to recommit Supreme Court nominations to the Judiciary Committee.[82] Only two of those were successful. In the first of these two instances, in 1873-1874, the nomination, after being recommitted, stalled in committee until it was withdrawn by the President. In the second instance, in 1925, the Judiciary Committee re-reported the nomination, which the Senate then confirmed.

On December 15, 1873, on the second day of its consideration of the nomination of Attorney General George H. Williams to be Chief Justice, the Senate ordered the nomination to be recommitted to the Judiciary Committee.[83] The nomination had been favorably reported by the committee only four days earlier. During that four-day interval, however, various allegations were made against Williams, including charges that while Attorney General he had used his office to influence decisions profiting private companies in which he held interests.[84] In ordering the nomination to be recommitted, the Senate authorized the Judiciary Committee "to send for

*Record*, October 2, 1990, p. 26997; October 15, 1991, p. 26354; September 29, 2005, p. S10650; and January 31, 2006, p. S348. A slight variation of this procedure occurred in 2010, after the vote to confirm Elena Kagan, when the Senate's presiding officer, stated, "A motion to reconsider the vote is considered made and laid on the table." *Congressional Record*, daily edition, August 5, 2010, p. S6830.

[81] For example, by unanimous consent the Senate in 1993, 1994, and 2009 agreed that the motion to reconsider be tabled upon confirmation, respectively, of the Supreme Court nominations of Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor. See "Unanimous-Consent Agreement," *Congressional Record*, July 30, 1993, p. 17996; "Unanimous-Consent Agreement," *Congressional Record*, July 28, 1994, p. 18544; and "Unanimous Consent Agreement—Executive Calendar," *Congressional Record*, daily edition, August 5, 2009, pp. S8887-S8888.

[82] Besides the successful attempts in the Senate to recommit the nominations of George H. Williams as Chief Justice in 1873 and Harlan F. Stone as Associate Justice in 1925, six other unsuccessful attempts to recommit Supreme Court nominations were recorded—specifically, the motions to recommit President Ulysses S. Grant's nomination of Joseph P. Bradley in 1870, President Warren G. Harding's nomination of Pierce Butler in 1922, President Herbert Hoover's nomination of Charles Evans Hughes as Chief Justice in 1930, President Franklin D. Roosevelt's nomination of Hugo L. Black in 1937, President Harry S. Truman's nomination of Sherman Minton in 1949, and President Richard M. Nixon's nomination of G. Harrold Carswell in 1970. *Congressional Quarterly Almanac, 1970*, vol. 26 (Washington: Congressional Quarterly, Inc., 1971), p. 161.

[83] U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, vol. 19 (Washington: GPO, 1901), p. 189. (Hereinafter cited as *Senate Executive Journal*.)

[84] J. Myron Jacobstein and Roy M. Mersky, *The Rejected* (Milpitas, CA: Toucan Valley Publications, 1993), p. 86. (Hereinafter cited as Jacobstein and Mersky, *The Rejected*.)

persons and papers"[85]—in evident reference to the new allegations made against the nominee. Although the Judiciary Committee held hearings after the recommittal, it did not re-report the nomination back to the Senate. Amid press reports of significant opposition to the nomination both in the Judiciary Committee and the Senate as a whole,[86] the nomination, at Williams's request, was withdrawn by President Ulysses S. Grant on January 8, 1874.[87]

On January 26, 1925, the Senate recommitted the Supreme Court nomination of Attorney General Harlan F. Stone to the Judiciary Committee. Earlier, on January 21, the Judiciary Committee had favorably reported the nomination to the Senate. However, one historian wrote, "Stone's unanimous Judiciary Committee approval ran into trouble when it reached the Senate floor."[88] A principal point of concern to some Senators was the decision made by Stone as Attorney General in December 1924 to expand a federal criminal investigation of Senator Burton K. Wheeler (D-MT)—an investigation initiated by Stone's predecessor as Attorney General, Harry Daugherty. Stone's most prominent critic on this point, Montana's other Democratic Senator, Thomas J. Walsh, demanded that the nomination be returned to the Judiciary Committee.[89] By unanimous consent the Senate agreed, ordering the nomination to be "rereferred to the Committee on the Judiciary with a request that it be reported back to the Senate as soon as practicable."[90] Two days after the recommittal, on January 28, the Judiciary Committee held hearings, with the nominee, at the committee's invitation, taking the then-unprecedented step of appearing before the committee. Under lengthy cross examination by Senator Walsh and several other Senators, the nominee defended his role in the Wheeler investigation.[91] On February 2, 1925, the Judiciary Committee again reported the Stone nomination favorably to the Senate, "by voice vote, without dissent,"[92] and on February 5, 1925, the Senate confirmed Stone by a 71-6 vote.

## Delay for Additional Committee Hearings Without Recommitting the Nomination

In 1991, during debate on Supreme Court nominee Clarence Thomas, the Senate—without recommitting the nomination to the Judiciary Committee—delayed its scheduled vote on the nomination specifically to allow the committee time for additional hearings on the nominee. On October 8, 1991, after four days of debate, the Senate, by unanimous consent, rescheduled its vote on the Thomas nomination, from October 8 to October 15. The purpose of this delay was to allow the Judiciary Committee to hold hearings on sexual harassment allegations made against the nominee by law professor Anita Hill, which had come to public light only after the Judiciary Committee had ordered the Thomas nomination to be reported, without recommendation, on

[85] *Senate Executive Journal*, vol. 19, p. 189.

[86] See, for example, "The Chief Justiceship," *New York Tribune*, January 6, 1874, p. 1, which reported that the President "has at last discovered that the nomination of Mr. Williams to be Chief-Justice of the Supreme Court is not only a very unpopular one, but that his confirmation will be impossible.... " See also Jacobstein and Mersky, *The Rejected*, pp. 84-86.

[87] *Senate Executive Journal*, vol. 19, p. 211.

[88] Henry J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*, new and rev. ed. (New York: Rowman & Littlefield Publishers, 1999), p. 147. (Hereinafter cited as Abraham, *Justices, Presidents and Senators*.)

[89] James A. Thorpe, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," *Journal of Public Law*, vol. 18, 1969, p. 372. (Hereinafter cited as Thorpe, *Appearance of Supreme Court Nominees*.)

[90] *Senate Executive Journal*, vol. 63, p. 293.

[91] Thorpe, *Appearance of Supreme Court Nominees*, pp. 372-373.

[92] Abraham, *Justices, Presidents and Senators*, p. 147.

September 27.[93] Following three days of hearings, on October 11, 12, and 13, 1991, at which the Judiciary Committee heard testimony from Judge Thomas, Professor Hill, and other witnesses, the Senate, pursuant to its unanimous consent agreement, voted on the Thomas nomination as scheduled, on October 15, 1991, confirming the nominee by a 52-48 vote.

# After Senate Confirmation

Under the Constitution, the Senate alone votes on whether to confirm presidential nominations, the House of Representatives having no formal involvement in the confirmation process. If the Senate votes to confirm the nomination, the Secretary of the Senate then attests to a resolution of confirmation and transmits it to the White House.[94] In turn, the President signs a document, called a commission, officially appointing the individual to the Court. Next, the signed commission "is returned to the Justice Department for engraving the date of appointment (determined by the actual day the president signs the commission) and for the signature of the attorney general and the placing of the Justice Department seal."[95] The department then arranges for expedited delivery of the commission document to the new appointee.

Once the President has signed the commission, the incoming Justice may be sworn into office.[96] In fact, however, the new Justice actually takes two oaths of office—a judicial oath, as required by the Judiciary Act of 1789,[97] and a constitutional oath, which, as required by Article VI of the Constitution, is administered to Members of Congress and all executive and judicial officers.

Until recently, the most common practice of new appointees had been to take their judicial oath in private, usually within the Court, and, as desired by the Presidents who nominated them, to take their constitutional oaths in nationally televised ceremonies at the White House.[98] In 2009,

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[93] In October 8, 1991, floor remarks, Senate Majority Leader George J. Mitchell (D-ME) explained the need to delay the Thomas vote: "It is most unfortunate that we have been placed in this situation. But events which are unpredictable, unplanned, and unfortunate can and frequently do intervene and cause a change in the plans of human beings. That has now occurred in this matter, in my judgment. For that reason, I believe the action we have taken to change the time of the scheduled vote until next Tuesday [October 15], and to give time for further inquiry into this matter by the Judiciary Committee, is an appropriate action." Sen. George J. Mitchell, "Unanimous Consent Agreement," remarks in the Senate, *Congressional Record*, vol., 137, October 8, 1991, p. 25920.

[94] If, on the other hand, the Senate votes against confirmation, a resolution of disapproval is forwarded to the President.

[95] Sheldon Goldman, *Picking Federal Judges; Lower Court Selection form Roosevelt Through Reagan* (New Haven, CT: Yale University Press, 1997), p. 12.

[96] Sometimes, the swearing into office occurs before the new Justice actually receives the commission document. This, for instance, happened in 2005 with Chief Justice appointee John G. Roberts Jr. Immediately after President George W. Bush signed Roberts's commission, the new Chief Justice was sworn into office—receiving his commission document afterwards, when the Justice Department arranged for it to be hand-delivered to him at the Court.

[97] The Court itself regards the date a Justice takes the judicial oath as the beginning of his or her service, "for until that oath is taken he/she is not vested with the prerogatives of the office." Supreme Court, *Supreme Court of the United States*, p. 23.

[98] A news account noted the relatively recent advent of this pattern, when Justice Ruth Bader Ginsburg, on August 10, 1993, took her two oaths—the judicial oath, in private ceremony in the Court's conference room, and the constitutional oath, in a nationally televised ceremony in the White House's East Room. "Supreme Court appointees," the article observed, "always have taken both oaths, but only since 1986, when Ronald Reagan held a ceremony for the investiture of Associate Justice Antonin Scalia and Rehnquist, has the constitutional oath become part of a White House ceremony." Joan Biskupic, "Ginsburg Sworn In as 107th Justice and 2nd Woman on Supreme Court," *The Washington Post*, August 11, 1993, p. A6.

After Justice Ginsburg's appointment, the next three Court appointees took the judicial oath in private (though each in a different setting) and the constitutional oath in public (all at the White House). The judicial oath was administered to Stephen G. Breyer in private in 1994 by Chief Justice William H. Rehnquist at the latter's vacation home in

however, in a departure from that practice, Supreme Court nominee Sonia Sotomayor, after Senate confirmation, took both her constitutional and judicial oaths of office at the Supreme Court—with the constitutional oath administered in a private ceremony, and the judicial oath broadcast on television ("marking the first live coverage of such a ceremony in the institution's history").[99] This break from the practice of administering one of the oaths at the White House was attributed, in one report, to President Obama "heeding concerns expressed by some justices—most recently John Paul Stevens—that a White House ceremony sends the inappropriate message that justices are beholden to their appointing president."[100] Following Sonia Sotomayor's example, President Obama's second Supreme Court nominee, Elena Kagan, took both her constitutional and judicial oaths of office at the Supreme Court as well.[101] In contrast, Neil Gorsuch took the judicial oath of office at a public ceremony at the White House and the constitutional oath of office in a private ceremony in the Justices' Conference Room at the Supreme Court building.[102] Most recently, Brett Kavanaugh took, on the same day, both the judicial oath of office and constitutional oath in a private ceremony in the Justices' Conference Room at the Court.[103]

Subsequently, the Court itself, in its courtroom, also affords public recognition to the new Justice's appointment, in a formal ceremony called an "investiture," at which the Justice is sworn in yet again. This invitation-only event, for which reserved press seating is made available, is attended by the Court's other Justices, by family, friends, and former associates of the new Justice, and by outside dignitaries who may include the President and the Attorney General.[104]

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Greensboro, VT; to John G. Roberts Jr. in a private ceremony at the White House by Justice John Paul Stevens; and to Samuel A. Alito Jr. in private at the Supreme Court's conference room in 2006 by Chief Justice Roberts. On the same occasions that they took their judicial oaths in private, Roberts and Alito took their constitutional oaths as well—while, however, also taking their constitutional oaths a second time, in televised White House ceremonies.

[99] Amy Goldstein, "Sotomayor Reaches Pinnacle of Law with Historic Oath," *The Washington Post*, August 9, 2009, p. A3. Chief Justice John G. Roberts Jr., a Court news release specified, would administer both the constitutional oath, "in a private ceremony in the Justices' Conference Room attended by members of the Sotomayor family," and the judicial oath, in the Court's East Conference Room "before a small gathering of Judge Sotomayor's family and friends," Untitled Press Release, August 6, 2009, Supreme Court of the United States, at http://www.supremecourtus.gov. The press release specified that the Court would allow televising of the latter ceremony by "pool coverage." See also Charlie Savage, "Sotomayor, After a Pair of Oaths, Officially Joins the Nation's Highest Court," *The New York Times*, August 9, 2009, p. 10.

[100] Tony Mauro, "In Divided Vote, Senate Confirms Sotomayor for High Court," *The National Law Journal*, August 7, 2009, at http://www.law.com. Three days later, Mauro reported that "[a]t least one of the oaths taken by every current justice from Clarence Thomas on has been televised, but those events took place at the White House, not the Court. A White House source indicated Friday [August 7] that notwithstanding that practice, President Barack Obama made it clear from the start that, out of respect for the Court's independence, the entire ceremony should be at the Court, not the White House. As *The National Law Journal* reported last week, that's likely to be welcome news at the Court, where justices over the years have disapproved of White House oath-taking." Tony Mauro, "Cameras Come to the Supreme Court—in HD, No Less," August 10, 2009, *The National Law Journal*, at http://www.law.com.

[101] On August 7, 2010, Justice Kagan "was administered two oaths: the first, the Constitutional Oath in the Justice's Conference room, was attended by members of the Kagan family and several Justices; the second, the Judicial Oath, was in the West Conference Room before a small gathering of family and friends." "Swearing-In Ceremony for Kagan," *The Third Branch*, vol. 42, August 2010, p. 1.

[102] Debra Cassens Weiss, "Gorsuch takes two oaths of office to become a Supreme Court justice," *ABA Journal*, April 10, 2017, online at http://www.abajournal.com/news/article/gorsuch_takes_constitutional_oath_of_office.

[103] Greg Stohr, "Kavanaugh Takes Oath From Roberts, Becomes New Top Court Justice," Bloomberg, October 6, 2018, online at https://www.bloomberg.com/news/articles/2018-10-06/kavanaugh-takes-oath-from-roberts-becomes-new-top-court-justice.

[104] See, for example, Linda Greenhouse, "A Ceremonial Start to the Session as the Supreme Court Welcomes a New Chief Justice," *The New York Times*, October 4, 2005, p. 25.

The investiture typically occurs before the new Justice publicly takes his or her courtroom seat alongside the other members of the Court.[105]

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## Acknowledgments

The author thanks Denis Steven Rutkus, former Specialist on the Federal Judiciary, for his work on a prior version of this report; Amber Wilhelm, Graphics Specialist in the Publishing and Editorial Resources Section of CRS, for her work on the figures included in this report; and Raymond Williams, former Research Assistant, for his work on this report.

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[105] The investiture ceremony for Justice Brett Kavanaugh took place in the Supreme Court's courtroom on November 8, 2018. During the ceremony, Kavanaugh initially took a seat on a chair used by former Chief Justice John Marshall, before being led to his seat on the bench alongside the other Justices. Ariane de Vogue, "Trump gets another chance to celebrate Kavanaugh at court ceremony," CNN, November 8, 2018, online at https://www.cnn.com/2018/11/08/politics/kavanaugh-trump-investiture/index.html.

The investiture ceremony for Justice Elena Kagan took place in the Supreme Court's courtroom on October 1, 2010, three days before the start of the Court's new term, on Monday, October 4.

The September 8, 2009, investiture for Justice Sonia Sotomayor, "marked the first time she joined her eight colleagues in the court's historic chambers…. " Robert Barnes, "Sotomayor Officially Takes Her Place on Supreme Court," *The Boston Globe*, September 9, 2009, p. 12. The event occurred a day before Justice Sotomayor and her eight colleagues were scheduled to hear oral arguments in an unusual summer session of the Court. See Adam Liptak, "The Newest Justice Takes Her Seat," *The New York Times*, September 9, 2009, p. 12.

Justice Samuel A. Alito Jr., who initially took his judicial and constitutional oaths of office on January 31, 2006, had "already been on the job two weeks and been sworn in twice" before his investiture on the Court on February 16, 2006, at which he "joined colleagues in the courtroom for the first time." Gina Holland, Associated Press, "New Justice Samuel Alito Welcomed at Supreme Court," *San Diego Union-Tribune*, February 16, 2006, at http://www.signonsandiego.com.