

Barack Obama Supreme Court candidates

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Chapter 1

Barack Obama Supreme Court candidates



U.S. Supreme Court building.

President Barack Obama has made two successful appointments to the Supreme Court of the United States. The first was Judge Sonia Sotomayor^[1] to fill the vacancy created by the retirement of Justice David H. Souter.^[2] Sotomayor was confirmed by the United States Senate on August 6, 2009, by a vote of 68–31. The second appointment was that of Solicitor General Elena Kagan to replace the retired John Paul Stevens. Kagan was confirmed by the United States Senate on August 5, 2010, by a vote of 63–37.

Obama nominated Judge Merrick Garland to the Supreme Court in March 2016, a month after the death of Justice Antonin Scalia.^[3]

During most of Obama's presidency, there has been speculation about the potential retirement of Justice Ruth Bader Ginsburg,^{[4][5]} who turned 80 in 2013 and was previously diagnosed with colon cancer and pancreatic cancer.^{[6][7]}

1.1 Politics

1.1.1 Obama opposition to Bush nominees

During the 109th Congress, then-Senator Obama voted against both of President George W. Bush's nominees to the Supreme Court. In a speech announcing his opposition to John Roberts, Obama stated:



Barack Obama and Joe Biden with Supreme Court justices in the court's conference room, on January 14, 2009, the week before the inauguration. Shown are Chief Justice Roberts and Justices Stevens, Thomas, Ginsburg, and Souter

The problem I face ... is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases – what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those 5 percent of hard cases, the constitutional text will not be directly on point.... In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions, ... in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.... The problem I had is that when I examined Judge Roberts' record and history of public service, it is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak.^[8]

In explaining his opposition to Samuel Alito, Obama further evaluated the qualities he found important in a Supreme Court justice:

I have no doubt that Judge Alito has the training and qualifications necessary to serve. He's an intelligent man and an accomplished jurist. And there's no indication he's not a man of great character. But when you look at his record – when it comes to his understanding of the Constitution, I have found that in almost every case, he consistently sides on behalf of the powerful against the powerless; on behalf of a strong government or corporation against upholding Americans' individual rights.^[9]

1.1.2 Obama comments during 2008 presidential campaign

In a speech on July 17, 2007, before the *Planned Parenthood Action Fund*, he elaborated even more:

I think the Constitution can be interpreted in so many ways. And one way is a cramped and narrow way in which the Constitution and the courts essentially become the rubber stamps of the powerful in society. And then there's another vision of the court that says that the courts are the refuge of the powerless. Because oftentimes they can lose in the democratic back and forth. They may be locked out and prevented from fully participating in the democratic process. ... And we need somebody who's got the heart – the empathy – to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor or African-American or gay or disabled or old – and that's the criteria by which I'll be selecting my judges.^[10]

In November 2007, Obama was asked about the kind of justices he would appoint to the Supreme Court. He responded:

I taught constitutional law for 10 years, and . . . when you look at what makes a great Supreme Court justice, it's not just the particular issue and how they rule, but it's their conception of the Court. And part of the role of the Court is that it is going to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout.

. . . [S]ometimes we're only looking at academics or people who've been in the [lower courts]. If we can find people who have life experience and they understand what it means to be on the outside, what it means to have the system not work for them, that's the kind of person I want on the Supreme Court.^[11]

Later in March 2008, while on the campaign trail in Ohio, Obama again addressed the traits he would look for in a Supreme Court justice, suggesting he might leaven legal scholarship with practical political experience. He held up *Earl Warren*, a former governor of California who later became *Chief Justice*, as an example. Mr. Warren, he said, had had the wisdom to recognize that segregation was wrong less because of precise sociological effects and more so because it was immoral and stigmatized blacks:

I want people [like Earl Warren] on the bench who have enough empathy, enough feeling, for what ordinary people are going through.^[12]

Later, however, Obama seemed to step away from the example of Warren. In an interview with the editorial board of the *Detroit Free Press* on October 2, 2008, Obama said:

There were a lot of justices on the Warren Court who were heroes of mine ... Warren himself, Brennan, (Thurgood) Marshall. But that doesn't necessarily mean that I think their judicial philosophy is appropriate for today. . . . In fact, I would be troubled if you had that same kind of activism in circumstances today.^[13]

Instead, Obama mentioned then current justices *David Souter* and *Stephen Breyer* as examples of people he would like to nominate to the Supreme Court in the future:

. . . [W]hen I think about the kinds of judges who are needed today, it goes back to the point I was making about common sense and pragmatism as opposed to ideology.

I think that Justice Souter, who was a Republican appointee, Justice Breyer, a Democratic appointee, are very sensible judges. They take a look at the facts and they try to figure out: How does the Constitution apply to these facts? They believe in fidelity to the text of the Constitution, but they also think you have to look at what is going on around you and not just ignore real life.

That, I think is the kind of justice that I'm looking for – somebody who respects the law, doesn't think that they should be making law ... but also has a sense of what's happening in the real world and recognizes that one of the roles of the courts is to protect people who don't have a voice.^[13]

In the third and final presidential debate with Republican nominee *John McCain* on October 15, 2008, Obama also implied that he would look for a Supreme Court nominee with previous judicial experience:

I will look for those judges who have an outstanding judicial record, who have the intellect, and who hopefully have a sense of what real-world folks are going through.^[14]

1.1.3 Court demographics

Main article: [Demographics of the Supreme Court of the United States](#)

Demographic considerations have played into the appointment of Supreme Court justices since the institution was established. Starting in the 20th century, these concerns shifted from geographic representation to issues of gender and ethnicity.^[15]

Prior to the 2008 presidential election, many court watchers suggested that the next president would be under significant pressure to appoint another woman or ethnic minority to the court.^{[16][17]} The calls for naming more women were particularly widespread given the recent retirement of Sandra Day O'Connor and the rapidly changing demographics of the legal community, with women now accounting for about a fifth of all law partners and law school deans, a quarter of the federal bench, and nearly half of all law school graduates.^{[7][18]} Shortly before the election, for example, NPR reported, "Most observers of the Supreme Court agree about one thing: The next nominee is likely to be a woman".^[19] Furthermore, after Obama's presidential election victory, Hispanic legal interests groups such as the Hispanic National Bar Association began urging Obama to nominate a Hispanic justice.^[20]

Given the relative youth of the most recent Republican appointments, it was also noted that Democrats had "a strong incentive to pick younger justices this time around".^[17] Age proved to be an important consideration for Obama, who was "looking for a justice who will be an intellectual force on the court for many years to come".^[21] As a result, Obama did not seriously consider candidates such as Jose Cabranes, Amalya Kearse, Diana Gribbon Motz, David Tatel, and Laurence Tribe, all of whom he respected but were older than 65 when Obama was looking to replace David Souter.^[21]

With the retirement of Justice Stevens, some commentators directed focus on the religious make-up of the court.^[22] Upon Justice Stevens' retirement, the Court lacked any Protestant members, marking the first time in its history that it will be exclusively composed of Jewish and Catholic Justices.^[23]

1.2 Sonia Sotomayor nomination

Main article: [Sonia Sotomayor Supreme Court nomination](#)

On May 26, 2009, Obama announced Second Circuit appeals court judge Sonia Sotomayor as his choice to replace retiring Associate Justice David H. Souter.^[1] Sotomayor's nomination was submitted to the United States Senate on June 1, 2009, when the 111th Congress reconvened after its Memorial Day recess. Sotomayor was confirmed by the Senate on August 6, 2009, by a vote of 68–31,^[24] and was sworn in as an Associate Justice on August 8, 2009.^[25]

1.2.1 David Souter retirement

Long before the election of President Obama, Associate Justice David H. Souter had expressed a desire to leave Washington, D.C., and return to his native New Hampshire.^{[26][27]} The election of a Democratic president in 2008 made Souter more inclined to retire, but he did not want to create a situation in which there would be multiple vacancies at once.^[26] Souter apparently became satisfied that no other justices planned to retire at the end of the Supreme Court's term in June 2009.^[26] As a result, in mid-April 2009 he privately notified the White House of his intent to retire from the Supreme Court at the conclusion of its business for that term.^[28] Souter submitted a resignation letter to Obama on May 1, who later that day made an unscheduled appearance during the daily White House press briefing to publicly announce Souter's retirement.^[2]

1.2.2 Short list

Obama began the process of identifying potential Supreme Court nominees shortly after his election in 2008, before a Supreme Court vacancy was actually known.^[28] White House Counsel Greg Craig helped assemble an early list of possible names.^[28] Once the White House had learned of Souter's plans to retire, two members of the Vice President's staff, Chief of Staff Ron Klain and Counsel Cynthia Hogan, ran the daily operations of the selection process.^[28]

Within a week of Souter's announcement the White House had formalized its short list of candidates to replace Souter, with Judge Sonia Sotomayor of the Second Circuit, Judge Diane Pamela Wood of the Seventh Circuit, and Solicitor General Elena Kagan reportedly leading contenders for the nomination.^[29] Homeland Security Secretary Janet Napolitano, California Supreme Court Justice Carlos Moreno, and Michigan Governor Jennifer Granholm were also reportedly on the short list of candidates under serious consideration by the White House.^[30] Chief Justice Leah Ward Sears of the Georgia Supreme Court, Judge Merrick B. Garland of the United States Court of Appeals for the District of Columbia Circuit, and Judge Ruben Castillo of the Federal District Court for the Northern District in Illinois were also on the final

list of nine candidates.^[31]

1.2.3 Interviews

Obama had not interviewed any of the candidates before May 18,^[32] but that week saw a flurry of activity and speculation surrounding possible interviews of candidates. Jennifer Granholm attended a CAFE standards meeting at the White House on May 19 and spoke with Obama, but officials would not comment on whether the two discussed a potential court appointment.^[32] On May 20, Diane Wood and Elena Kagan attended a conference on judicial independence at Georgetown University hosted by retired Associate Justice Sandra Day O'Connor.^[33] Ultimately, Obama winnowed his list to four individuals, all of them women: Sotomayor, Wood, Kagan, and Napolitano.^[34] Obama conducted hour-long one-on-one interviews with the four finalists, meeting with Wood and Kagan on May 19, and Sotomayor and Napolitano on May 21.^[35] Vice President Joe Biden also interviewed the four finalists.^[35]

Obama telephoned Judge Sotomayor at 9 pm EST on May 25 to alert her that she was his choice.^[35] Later that night, he called the other three finalists and informed them of his decision.^[35] Obama announced the nomination the next morning in the East Room of the White House in a press conference alongside Sotomayor and Joe Biden.^[1]

1.3 Elena Kagan nomination

Main article: [Elena Kagan Supreme Court nomination](#)

On May 10, 2010, Obama nominated Elena Kagan, the Solicitor General of the United States, to replace retiring Associate Justice John Paul Stevens. Solicitor General Elena Kagan was confirmed by the Senate by a 63-37 vote.^[36]

1.3.1 John Paul Stevens retirement

On April 9, 2010, Associate Justice John Paul Stevens announced that he would retire at the conclusion of the Supreme Court's term in June 2010.^[37] This announcement had been widely anticipated since September 2009 when Stevens confirmed that he had hired only a single law clerk for the Supreme Court term beginning in October 2010.^[38] (Full-time associate justices are allowed up to four law clerks while retired justices have only one.^[38])

1.3.2 Short list

Before the announcement, the White House had been preparing for another possible Supreme Court vacancy,

with White House Press Secretary Robert Gibbs responding to speculation about a possible Stevens retirement by saying "We'll be ready."^[39] After Stevens announced his retirement, an anonymous White House official said that about ten people were under consideration.^[37] The leading contenders to replace Stevens were said to include Seventh Circuit Judge Diane Pamela Wood and Solicitor General Elena Kagan, both of whom had been interviewed for the David Souter vacancy, and D.C. Circuit Judge Merrick B. Garland, who had also been considered for the Souter vacancy.^[37] Others mentioned include Ninth Circuit Judge Sidney Runyan Thomas, former Georgia Chief Justice Leah Ward Sears, Michigan Governor Jennifer Granholm and Homeland Security Secretary Janet Napolitano.^[40]

1.3.3 Interviews

Early in April 2010, Obama conducted a White House interview with Merrick Garland.^{[41][42]} On April 29, 2010, Obama and Vice President Joe Biden each met separately with Sidney Thomas at the White House to discuss the vacancy.^[41] Elena Kagan was interviewed the following day,^[43] and Diane Wood the following week on May 4.^[44]

1.4 Merrick Garland nomination

Main article: [Merrick Garland Supreme Court nomination](#)

On March 16, 2016, Obama nominated Merrick Garland, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, to replace Antonin Scalia.^[45] On February 23, 2016, the 11 Republican members of the Senate Judiciary Committee signed a letter to Senate majority leader Mitch McConnell stating their intention to withhold consent on any nominee made by President Obama, and that no hearings would occur until after January 20, 2017, when the next president takes office.^[46] The 11 members are Committee Chair Chuck Grassley, Iowa;^[47] Orrin Hatch and Mike Lee, Utah; Jeff Sessions, Alabama; Lindsey Graham, South Carolina; John Cornyn and Ted Cruz, Texas; Jeff Flake, Arizona; David Vitter, Louisiana; David Perdue, Georgia; and Thom Tillis, North Carolina. After Garland's nomination, Senate Majority Leader Mitch McConnell reiterated his position that the Senate would not confirm any Supreme Court nomination from Obama.^[45] Garland's nomination is currently pending before the Senate.

1.4.1 Antonin Scalia death

On February 13, 2016, Associate Justice Antonin Scalia was found dead while vacationing at Cibolo Creek Ranch

near Marfa, Texas.^[48] President Obama stated that he planned to nominate someone to replace Scalia on the Supreme Court.^[3] Scalia's death marked just the second time in sixty years that a sitting justice died.^[49]

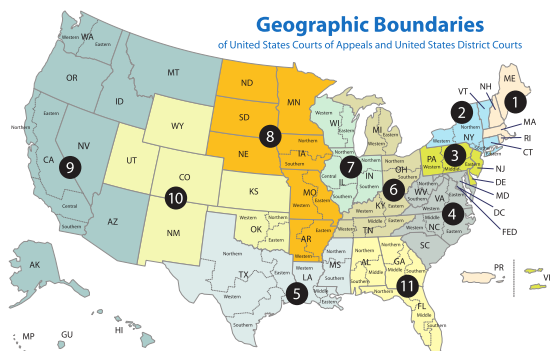
1.4.2 Short list

The White House vetted a number of candidates that had previously received broad support from Republicans, including D.C. Circuit Judges Merrick Garland and Sri Srinivasan,^[50] Eighth Circuit Judge Jane L. Kelly,^[51] Ninth Circuit Judge Paul J. Watford,^[52] and Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia.^[53] On March 11, Reuters reported that Obama had narrowed his list down to three candidates: Srinivasan, Garland, and Watford.^[54]

1.5 Names mentioned as likely nominees

Following is a list of individuals who have been mentioned in various news accounts as the most likely potential nominees for a Supreme Court appointment under Obama:

1.5.1 United States Courts of Appeals



Courts of Appeals

- Court of Appeals for the D.C. Circuit
 - **Merrick Garland** (born 1952)^{[6][16][55][56][57][58][59][60][61][62][63][64]} (**nominated**)
 - **Sri Srinivasan** (born 1967)^{[55][60][62][63][64][65][66][67]}
 - **Patricia Ann Millett** (born 1963)^{[55][60][63][64][65]}
 - **Robert L. Wilkins** (born 1963)^{[55][63][67]}

- Court of Appeals for the 1st Circuit
 - **David Barron** (born 1967)^{[55][65][68]}
- Court of Appeals for the 2nd Circuit
 - **Sonia Sotomayor** (born 1954)^[11] (**nominated and confirmed**)
 - **Robert Katzmann** (born 1953)^{[69][70]}
- Court of Appeals for the 7th Circuit
 - **Ann Claire Williams** (born 1949)^{[71][72]}
 - **Diane Wood** (born 1950)^{[4][6][7][16][26][27][29][56][57][58][72][73][74][75][76][77][78][79][80][81]}
- Court of Appeals for the 8th Circuit
 - **Jane Louise Kelly** (born 1964)^{[55][63][65][91]}
- Court of Appeals for the 9th Circuit
 - **M. Margaret McKeown** (born 1951)^{[92][93]}
 - **Jacqueline Nguyen** (born 1965)^{[55][63][94]}
 - **Johnnie B. Rawlinson** (born 1952)^{[95][96]}
 - **Sidney Runyan Thomas** (born 1953)^{[40][41][97][98]}
 - **Kim McLane Wardlaw** (born 1954)^{[16][20][27][59][95][99]}
 - **Paul J. Watford** (born 1967)^{[55][60][64][65][67][91][100]}
- Court of Appeals for the 11th Circuit
 - **Adalberto Jordan** (born 1961)^{[101][102]}

1.5.2 United States District Courts

- **Ketanji Brown Jackson** (born 1970) - District Judge, United States District Court for the District of Columbia^{[53][102]}
- **Christine Arguello** (born 1955) – District Judge, United States District Court for the District of Colorado^{[96][103]}
- **Ruben Castillo** (born 1954) – District Judge, United States District Court for the Northern District of Illinois^{[20][57]}

1.5.3 State Supreme Courts

- **Mariano-Florentino Cuéllar** (born 1972) - Associate Justice, Supreme Court of California^{[104][105][106][107][108][109][110]}
- **Goodwin Liu** (born 1970) – Associate Justice, Supreme Court of California^{[55][91][111]}

- Carlos R. Moreno (born 1948) – United States Ambassador to Belize, former Associate Justice, Supreme Court of California; former Judge, United States District Court for the Central District of California^{[30][99]}
- Leah Ward Sears (born 1955) – Former Chief Justice, Georgia Supreme Court^{[27][57][95][112]}

1.5.4 Executive Branch

- Hillary Clinton (born 1947) – 67th Secretary of State; former Senator from New York, First Lady and Chair of the Legal Services Corporation^{[17][19][56][75][113]}
- **Elena Kagan** (born 1960) – 45th Solicitor General; former Dean of Harvard Law School^{[6][7][16][17][19][26][27][29][56][57][58][71][73][74][75][76][95][113][114]} (**nominated and confirmed**)
- Harold Hongju Koh (born 1954) – Former Legal Adviser of the Department of State; former Dean of Yale Law School^{[6][34][57][59][71][74][95]}
- Loretta Lynch (born 1959) – 83rd and current United States Attorney General^{[55][60][64]}
- Janet Napolitano (born 1957) – President of the University of California; 3rd Secretary of Homeland Security; former Governor of Arizona; former Arizona Attorney General; former United States Attorney for the District of Arizona^{[34][115]}
- Kathryn Ruemmler (born 1971) – Former White House Counsel; former Principal Associate Deputy Attorney General^{[116][117]}
- Ken Salazar (born 1955) – 50th Secretary of the Interior; former Senator from Colorado; former Colorado Attorney General^{[20][118]}
- Cass Sunstein (born 1954) – Former Administrator of the Office of Information and Regulatory Affairs^{[6][56][57][59][71][74]}

1.5.5 United States Senators

- Cory Booker (born 1969) – Senator from New Jersey; former Mayor of Newark, New Jersey^{[64][119]}
- Amy Klobuchar (born 1960) – Senator from Minnesota; former County Attorney for Hennepin County, Minnesota^{[120][121]}
- Claire McCaskill (born 1953) – Senator from Missouri; former State Auditor of Missouri; former County Prosecutor for Jackson County, Missouri; former member of the Missouri House of Representatives^{[120][121]}

1.5.6 United States Governors

- Jennifer Granholm (born 1959) – 47th Governor of Michigan; former Michigan Attorney General; former Assistant United States Attorney^{[19][27][57][76][115][120]}
- Deval Patrick (born 1956) – 71st Governor of Massachusetts; former Assistant Attorney General for the Civil Rights Division^{[6][55][57][59][74][91][114][115][122]}
- Brian Sandoval (born 1963) – 29th Governor of Nevada; former District Judge, United States District Court for the District of Nevada; former Nevada Attorney General^{[123][124]}

1.5.7 State Executive Branches

- Kamala Harris (born 1964) – California Attorney General^{[55][91][125]}

1.5.8 Supreme Court litigators

- Caitlin Halligan (born 1966) – Former judicial nominee for the United States Court of Appeals for the District of Columbia Circuit; former Solicitor General of New York^{[94][126]}
- Seth P. Waxman (born 1951) – Partner with WilmerHale; former Solicitor General^{[116][61][75]}

1.5.9 Academics

- Pamela S. Karlan (born 1959) – Professor, Stanford Law School^{[34][55][76][91][127]}
- Kathleen Sullivan (born 1955) – Professor and former dean, Stanford Law School; partner with Quinn Emanuel^{[7][27][34][59][71][75][95]}

1.6 See also

- United States federal judge
- Federal judicial appointment history

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Chapter 2

Sonia Sotomayor

Sonia Maria Sotomayor (/ˈsoʊnjə ˈsoʊtəˌmaɪər/, Spanish: [ˈsonja sotomaˈjor]^[5] born June 25, 1954) is an Associate Justice of the Supreme Court of the United States, serving since August 2009. She has the distinction of being its first justice of Hispanic heritage, the first Latina, its third female justice, and its twelfth Roman Catholic justice.^[4] Sotomayor, along with John Roberts and Elena Kagan, is one of the youngest justices on the Supreme Court.

Sotomayor was born in The Bronx, New York City, to Puerto Rican-born parents. Her father died when she was nine, and she was subsequently raised by her mother. Sotomayor graduated *summa cum laude* from Princeton University in 1976 and received her J.D. from Yale Law School in 1979, where she was an editor at the *Yale Law Journal*. She was an advocate for the hiring of Latino faculty at both schools. She worked as an assistant district attorney in New York for four and a half years before entering private practice in 1984. She played an active role on the boards of directors for the Puerto Rican Legal Defense and Education Fund, the State of New York Mortgage Agency, and the New York City Campaign Finance Board.

Sotomayor was nominated to the U.S. District Court for the Southern District of New York by President George H. W. Bush in 1991; confirmation followed in 1992. In 1997, she was nominated by President Bill Clinton to the U.S. Court of Appeals for the Second Circuit. Her nomination was slowed by the Republican majority in the United States Senate, but she was eventually confirmed in 1998. On the Second Circuit, Sotomayor heard appeals in more than 3,000 cases and wrote about 380 opinions. Sotomayor has taught at the New York University School of Law and Columbia Law School.

In May 2009, President Barack Obama nominated Sotomayor to the Supreme Court following the retirement of Justice David Souter. Her nomination was confirmed by the Senate in August 2009 by a vote of 68–31. Sotomayor has supported, while on the court, the informal liberal bloc of justices when they divide along the commonly perceived ideological lines. During her tenure on the Supreme Court, Sotomayor has been identified with concern for the rights of defendants, calls for reform of the criminal justice system, and making impassioned dis-

sents on issues of race, gender and ethnic identity.

2.1 Early life



Sotomayor and her parents



Sotomayor as a young girl

Sonia Maria Sotomayor^[6] was born in the New York City borough of The Bronx.^[7] Her father was Juan Sotomayor (born c. 1921),^[8] from the area of Santurce, San Juan, Puerto Rico,^{[9][10][11]} and her mother was Celina Báez (born 1927),^[12] an orphan^[13] from the neighborhood of Santa Rosa in Lajas, a still mostly rural area on Puerto Rico's southwest coast.^[11]

The two left Puerto Rico separately, met, and married during World War II after Celina served in the Women's Army Corps.^{[14][15]} Juan Sotomayor had a third-grade education, did not speak English, and worked as a tool and die worker;^[9] Celina Baez worked as a telephone opera-

tor and then a practical nurse.^[8] Sonia's younger brother, Juan Sotomayor (born c. 1957), later became a physician and university professor in the Syracuse, New York, area.^{[16][17]}

Sotomayor was raised a Catholic^[4] and grew up in Puerto Rican communities in the South Bronx and East Bronx; she self-identifies as a "Nuyorican".^[14] The family lived in a South Bronx tenement^[18] before moving in 1957 to the well-maintained, racially and ethnically mixed, working-class Bronxdale Houses housing project^{[18][19][20]} in Soundview (which has over time been thought as part of both the East Bronx and South Bronx).^{[21][22][23]} Her relative proximity to Yankee Stadium led to her becoming a lifelong fan of the New York Yankees.^[24] The extended family got together frequently^[18] and regularly visited Puerto Rico during summers.^[25]

Sonia grew up with an alcoholic father and a mother who was emotionally distant; she felt closest to her grandmother, who she later said gave her a source of "protection and purpose".^[13] Sonia was diagnosed with type 1 diabetes at age seven,^[9] and began taking daily insulin injections.^[26] Her father died of heart problems at age 42, when she was nine years old.^{[8][18]} After this, she became fluent in English.^[9] Sotomayor has said that she was first inspired by the strong-willed Nancy Drew book character, and then after her diabetes diagnosis led doctors to suggest a different career from detective, she was inspired to go into a legal career and become a judge by watching the *Perry Mason* television series.^{[9][24][26]} She reflected in 1998: "I was going to college and I was going to become an attorney, and I knew that when I was ten. Ten. That's no jest."^[24]

Celina Sotomayor put great stress on the value of education; she bought the *Encyclopædia Britannica* for her children, something unusual in the housing projects.^[14] Despite the distance between the two, which became even worse after her father's death and which was not fully reconciled until decades later,^[13] Sotomayor has credited her mother with being her "life inspiration".^[27] For grammar school, Sotomayor attended Blessed Sacrament School in Soundview,^[28] where she was valedictorian and had a near-perfect attendance record.^{[23][29]} Although underage, Sotomayor worked at a local retail store and a hospital.^[30] Sotomayor passed the entrance tests for and then attended Cardinal Spellman High School in the Bronx.^{[4][31]} Meanwhile, the Bronxdale Houses had fallen victim to increasing heroin use, crime, and the emergence of the Black Spades gang.^[18] In 1970, the family found refuge by moving to Co-op City in the Northeast Bronx.^[18] At Cardinal Spellman, Sotomayor was on the forensics team and was elected to the student government.^{[4][31]} She graduated as valedictorian in 1972.^[14]

2.2 College and law school

Sotomayor entered Princeton University on a full scholarship,^[32] by her own later description gaining admission in part due to her achievements in high school and in part because affirmative action made up for her standardized test scores not being fully comparable to those of other applicants.^{[33][34]} She would later say that there are cultural biases built into such testing^[33] and praise affirmative action for fulfilling "its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."^[35]

She would describe her time at Princeton as a life-changing experience.^[36] Initially, she felt like "a visitor landing in an alien country"^[37] as her exposure had been limited to the Bronx and Puerto Rico.^[38] Princeton had few women students and fewer Latinos (about 20).^{[14][39]} She was too intimidated to ask questions during her freshman year;^[37] her writing and vocabulary skills were weak, and she lacked knowledge in the classics.^[40] She put in long hours in the library and over summers, worked with a professor outside of class, and gained skills, knowledge, and confidence.^{[14][39][40]} She became a moderate student activist^{[31][41]} and co-chair of the *Acción Puertorriqueña* organization, which served as a social and political hub and sought more opportunities for Puerto Rican students.^{[14][42][43]} She worked in the admissions office, traveling to high schools and lobbying on behalf of her best prospects.^[44]

As an activist, Sotomayor focused on faculty hiring and curriculum, since Princeton did not have a single full-time Latino professor nor any class on Latin American studies.^{[45][46]} A meeting with university president William G. Bowen in her sophomore year saw no results,^[43] leading to Sotomayor's saying in a *New York Times* story at the time that "Princeton is following a policy of benign neutrality and is not making substantive efforts to change."^[47] So, *Acción Puertorriqueña* filed a formal letter of complaint in April 1974 with the Department of Health, Education and Welfare, saying the school discriminated in its hiring and admission practices.^{[42][45][47]} Sotomayor wrote opinion pieces for the *Daily Princetonian* with the same theme.^[14] The university began to hire Latino faculty,^{[41][45]} and Sotomayor established an ongoing dialogue with Bowen.^[44] Sotomayor also successfully persuaded historian Peter Winn to create a seminar on Puerto Rican history and politics.^[45] Sotomayor joined the governance board of Princeton's Third World Center and served on the university's student-faculty Discipline Committee, which issued rulings on student infractions.^{[44][48]} She also ran an after-school program for local children^[41] and volunteered as an interpreter for Latino patients at Trenton Psychiatric Hospital.^{[14][38][49]}

A history major, Sotomayor received almost all A's in her final two years of college.^[48] Sotomayor wrote her senior thesis at Princeton on Luis Muñoz Marín, the first



Sotomayor's 1976 Princeton yearbook photo

democratically elected governor of Puerto Rico, and on the territory's struggles for economic and political self-determination.^[14] The 178-page work, "La Historia Ciclica de Puerto Rico: The Impact of the Life of Luis Muñoz Marin on the Political and Economic History of Puerto Rico, 1930–1975",^[50] won honorable mention for the Latin American Studies Thesis Prize.^[51] As a senior, Sotomayor won the Pyne Prize, the top award for undergraduates, which reflected both strong grades and extracurricular activities.^{[14][31][48]} In 1976, she was elected to Phi Beta Kappa^{[14][52]} and awarded an A.B. from Princeton, graduating *summa cum laude*.^[53] She was influenced by the then-fashionable critical race theory, which would be reflected in her later speeches and writings.^[54]

On August 14, 1976, just after graduating from Princeton, Sotomayor married Kevin Edward Noonan, whom she had dated since high school,^{[10][14]} in a small chapel at St. Patrick's Cathedral in New York.^[4] She used the married name **Sonia Sotomayor de Noonan**.^{[55][56][57]} He became a biologist and a patent lawyer.^[14]

Sotomayor entered Yale Law School in the fall of 1976, once more on a scholarship.^[24] While she believes she again benefited from affirmative action to compensate for somewhat lower standardized test scores,^{[33][34]} a former dean of admissions at Yale has said that given her record at Princeton, it probably had little effect.^[44] At Yale she fit in well^{[19][56]} although she found there were again few Latino students.^[43] She was known as a hard worker but she was not considered among the star students in her class.^{[19][56]} Yale General Counsel and professor José A. Cabranes acted as an early mentor to her to

successfully transition and work within "the system".^[58] She became an editor of the *Yale Law Journal*^[10] and was also managing editor of the student-run *Yale Studies in World Public Order* publication (later known as the *Yale Journal of International Law*).^[59] Sotomayor published a law review note on the effect of possible Puerto Rican statehood on the island's mineral and ocean rights.^{[14][31]} She was a semi-finalist in the Barristers Union mock trial competition.^[59] She was co-chair of a group for Latin, Asian, and Native American students, and her advocacy to hire more Hispanic faculty was renewed.^{[39][43]}

Following her second year, she gained a job as a summer associate with the prominent New York law firm Paul, Weiss, Rifkind, Wharton & Garrison.^[60] By her own later evaluation, her performance there was lacking.^[61] She did not receive an offer for a full-time position, an experience that she later described as a "kick in the teeth" and one that would bother her for years.^{[60][61]} In her third year, she filed a formal complaint against the established Washington, D.C., law firm of Shaw, Pittman, Potts & Trowbridge for suggesting during a recruiting dinner that she was at Yale only via affirmative action.^{[31][43]} Sotomayor refused to be interviewed by the firm further and filed her complaint with a faculty–student tribunal, which ruled in her favor.^{[43][45]} Her action triggered a campus-wide debate,^[58] and news of the firm's subsequent December 1978 apology made the *Washington Post*.^[55]

In 1979, Sotomayor was awarded a J.D. from Yale Law School.^[10] She was admitted to the New York Bar the following year.^{[57][62]}

2.3 Early legal career

On the recommendation of Cabranes, Sotomayor was hired out of law school as an assistant district attorney under New York County District Attorney Robert Morgenthau starting in 1979.^{[10][58]} She said at the time that she did so with conflicted emotions: "There was a tremendous amount of pressure from my community, from the third world community, at Yale. They could not understand why I was taking this job. I'm not sure I've ever resolved that problem."^[63] It was a time of crisis-level crime rates and drug problems in New York, Morgenthau's staff was overburdened with cases, and like other rookie prosecutors, Sotomayor was initially fearful of appearing before judges in court.^[64] Working in the trial division,^[65] she handled heavy caseloads as she prosecuted everything from shoplifting and prostitution to robberies, assaults, and murders.^{[10][14][66]} She also worked on cases involving police brutality.^[32] She was not afraid to venture into tough neighborhoods or endure squalid conditions in order to interview witnesses.^{[66][67]} In the courtroom, she was effective at cross examination and at simplifying a case in ways to which a jury could relate.^[66] In 1983 in her highest profile case she helped convict the "Tarzan Murderer" (who acrobatically

entered apartments, robbed them, and shot residents for no reason).^{[64][68]} She felt lower-level crimes were largely products of socioeconomic environment and poverty, but she had a different attitude about serious felonies: “No matter how liberal I am, I’m still outraged by crimes of violence. Regardless of whether I can sympathize with the causes that lead these individuals to do these crimes, the effects are outrageous.”^[63] Hispanic-on-Hispanic crime was of particular concern to her: “The saddest crimes for me were the ones that my own people committed against each other.”^[9] In general, she showed a passion for bringing law and order to the streets of New York, displaying special zeal in pursuing child pornography cases, unusual for the time.^[31] She worked 15-hour days and gained a reputation for being driven and for her preparedness and fairness.^{[24][64][69]} One of her job evaluations labelled her a “potential superstar”.^[67] Morgenthau later described her as “smart, hard-working, [and having] a lot of common sense,”^[70] and as a “fearless and effective prosecutor.”^[32] She stayed a typical length of time in the post^[63] and had a common reaction to the job: “After a while, you forget there are decent, law-abiding people in life.”^[71]

Sotomayor and Noonan divorced amicably in 1983;^[67] they did not have children.^[22] She has said that the pressures of her working life were a contributing factor, but not the major factor, in the breakup.^{[69][72]} From 1983 to 1986, Sotomayor had an informal solo practice, dubbed Sotomayor & Associates, located in her Brooklyn apartment.^[73] She performed legal consulting work, often for friends or family members.^[73]

In 1984, she entered private practice, joining the commercial litigation practice group of Pavia & Harcourt in Manhattan as an associate.^{[9][74]} One of 30 attorneys in the law firm,^[74] she specialized in intellectual property litigation, international law, and arbitration.^{[9][32][75][76]} She later said, “I wanted to complete myself as an attorney.”^[24] Although she had no civil litigation experience, the firm recruited her heavily, and she learned quickly on the job.^[74] She was eager to try cases and argue in court, rather than be part of a larger law firm.^[74] Her clients were mostly international corporations doing business in the United States;^[31] much of her time was spent tracking down and suing counterfeiters of Fendi goods.^{[14][74]} In some cases, Sotomayor went on-site with the police to Harlem or Chinatown to have illegitimate merchandise seized, in the latter instance pursuing a fleeing culprit while riding on a motorcycle.^{[14][74]} She said at the time that Pavia & Harcourt’s efforts were run “much like a drug operation”, and the successful rounding up of thousands of counterfeit accessories in 1986 was celebrated by “Fendi Crush”, a destruction-by-garbage-truck event at Tavern on the Green.^[77] At other times, she dealt with dry legal issues such as grain export contract disputes.^[74] In a 1986 appearance on *Good Morning America* that profiled women ten years after college graduation, she said that the bulk of law work was drudgery,

and that while she was content with her life, she had expected greater things of herself coming out of college.^[72] In 1988 she became a partner at the firm;^{[40][59]} she was paid well but not extravagantly.^[78] She left in 1992 when she became a judge.^[10]

In addition to her law firm work, Sotomayor found visible public service roles.^[79] She was not connected to the party bosses that typically picked people for such jobs in New York, and indeed she was registered as an independent.^[79] Instead, District Attorney Morgenthau, an influential figure, served as her patron.^{[70][79]} In 1987, Governor of New York Mario Cuomo appointed Sotomayor to the board of the State of New York Mortgage Agency, which she served on until 1992.^[80] As part of one of the largest urban rebuilding efforts in American history,^[80] the agency helped low-income people get home mortgages and to provide insurance coverage for housing and AIDS hospices.^[9] Despite being the youngest member of a board composed of strong personalities, she involved herself in the details of the operation and was effective.^{[70][79]} She was vocal in supporting the right to affordable housing, directing more funds to lower-income home owners, and in her skepticism about the effects of gentrification, although in the end she voted in favor of most of the projects.^{[79][80]}

Sotomayor was appointed by Mayor Ed Koch in 1988 as one of the founding members of the New York City Campaign Finance Board, where she served for four years.^{[9][81]} There she took a vigorous role^[79] in the board’s implementation of a voluntary scheme wherein local candidates received public matching funds in exchange for limits on contributions and spending and agreeing to greater financial disclosure.^[82] Sotomayor showed no patience with candidates who failed to follow regulations and was more of a stickler for making campaigns follow those regulations than some of the other board members.^{[70][79]} She joined in rulings that fined, audited, or reprimanded the mayoral campaigns of Koch, David Dinkins, and Rudy Giuliani.^[79]

Based upon another recommendation from Cabranes,^[70] Sotomayor was a member of the board of directors of the Puerto Rican Legal Defense and Education Fund from 1980 to 1992.^[83] There she was a top policy maker^[9] who worked actively with the organization’s lawyers on issues such as New York City hiring practices, police brutality, the death penalty, and voting rights.^[83] The group achieved its most visible triumph when it successfully blocked a city primary election on the grounds that New York City Council boundaries diminished the power of minority voters.^[83]

During 1985 and 1986, Sotomayor served on the board of the Maternity Center Association, a Manhattan-based non-profit group which focused on improving the quality of maternity care.^{[84][85][86]}

2.4 Federal district judge

2.4.1 Nomination and confirmation

Sotomayor had wanted to become a judge since she was in elementary school, and in 1991 she was recommended for a spot by Democratic New York senator Daniel Patrick Moynihan.^[9] Moynihan had an unusual bipartisan arrangement with his fellow New York senator, Republican Al D'Amato, whereby he would get to choose roughly one out of every four New York district court seats even though a Republican was in the White House.^{[36][87][88][89]} Moynihan also wanted to fulfill a public promise he had made to get a Hispanic judge appointed for New York.^[22] When Moynihan's staff recommended her to him, they said "Have we got a judge for you!"^[9] Moynihan identified with her socioeconomic and academic background and became convinced she would become the first Hispanic Supreme Court justice.^{[14][79]} D'Amato became an enthusiastic backer of Sotomayor,^[90] who was seen as politically centrist at the time.^{[9][22]} Of the impending drop in salary from private practice, Sotomayor said: "I've never wanted to get adjusted to my income because I knew I wanted to go back to public service. And in comparison to what my mother earns and how I was raised, it's not modest at all."^[9]

Sotomayor was thus nominated on November 27, 1991, by President George H. W. Bush to a seat on the U.S. District Court for the Southern District of New York vacated by John M. Walker, Jr.^[7] Senate Judiciary Committee hearings, led by a friendly Democratic majority, went smoothly for her in June 1992, with her pro bono activities winning praise from Senator Ted Kennedy and her getting unanimous approval from the committee.^{[9][90][91]} Then a Republican senator blocked her nomination and that of three others for a while in retaliation for an unrelated block Democrats had put on another nominee.^{[90][92]} D'Amato objected strongly;^[92] some weeks later, the block was dropped, and Sotomayor was confirmed by unanimous consent^{[65][90]} of the full United States Senate on August 11, 1992, and received her commission the next day.^[7]

Sotomayor became the youngest judge in the Southern District^[93] and the first Hispanic federal judge in New York State.^[94] She became the first Puerto Rican woman to serve as a judge in a U.S. federal court.^[95] She was one of seven women among the district's 58 judges.^[9] She moved from Carroll Gardens, Brooklyn, back to the Bronx in order to live within her district.^[9]

2.4.2 Judgeship

Sotomayor generally kept a low public profile as a district court judge.^[24] She showed a willingness to take anti-government positions in a number of cases, and

during her first year in the seat, she received high ratings from liberal public-interest groups.^[22] Other sources and organizations regarded her as a centrist during this period.^{[9][22]} In criminal cases, she gained a reputation for tough sentencing and was not viewed as a pro-defense judge.^[96] A Syracuse University study found that in such cases, Sotomayor generally handed out longer sentences than her colleagues, especially when white-collar crime was involved.^[97] Fellow district judge Miriam Goldman Cedarbaum was an influence on Sotomayor in adopting a narrow, "just the facts" approach to judicial decision-making.^[58]

As a trial judge, she garnered a reputation for being well-prepared in advance of a case and moving cases along a tight schedule.^[22] Lawyers before her court viewed her as plain-spoken, intelligent, demanding, and sometimes somewhat unforgiving; one said, "She does not have much patience for people trying to snow her. You can't do it."^[22]

2.4.3 Notable rulings

On March 30, 1995, in *Silverman v. Major League Baseball Player Relations Committee, Inc.*,^[98] Sotomayor issued a preliminary injunction against Major League Baseball, preventing it from unilaterally implementing a new collective bargaining agreement and using replacement players. Her ruling ended the 1994 baseball strike after 232 days, the day before the new season was scheduled to begin. The Second Circuit upheld Sotomayor's decision and denied the owners' request to stay the ruling.^{[24][99][100]} The decision raised her profile,^[14] won her the plaudits of baseball fans,^[24] and had a lasting effect on the game.^[101] In the preparatory phase of the case, Sotomayor informed the lawyers of both sides that, "I hope none of you assumed ... that my lack of knowledge of any of the intimate details of your dispute meant I was not a baseball fan. You can't grow up in the South Bronx without knowing about baseball."^[102]

In *Dow Jones v. Department of Justice* (1995),^[103] Sotomayor sided with the *Wall Street Journal* in its efforts to obtain and publish a photocopy of the last note left by former Deputy White House Counsel Vince Foster. Sotomayor ruled that the public had "a substantial interest"^[104] in viewing the note and enjoined the U.S. Justice Department from blocking its release.

In *New York Times Co. v. Tasini* (1997), freelance journalists sued the New York Times Company for copyright infringement for the *New York Times'* inclusion in an electronic archival database (LexisNexis) of the work of freelancers it had published. Sotomayor ruled that the publisher had the right to license the freelancers' work. This decision was reversed on appeal, and the Supreme Court upheld the reversal; two dissenters (John Paul Stevens and Stephen Breyer) took Sotomayor's position.^[105]

In *Castle Rock Entertainment, Inc. v. Carol Publishing*

Group (also in 1997), Sotomayor ruled that a book of trivia from the television program *Seinfeld* infringed on the copyright of the show's producer and did not constitute legal fair use. The United States Court of Appeals for the Second Circuit upheld Sotomayor's ruling.

2.5 Court of Appeals judge

2.5.1 Nomination and confirmation



Judge Sonia Sotomayor with her godson at the United States Court of Appeals signing ceremony in 1998

On June 25, 1997, Sotomayor was nominated by President Bill Clinton to a seat on the U.S. Court of Appeals for the Second Circuit, which was vacated by J. Daniel Mahoney.^[7] Her nomination was initially expected to have smooth sailing,^{[24][106]} with the American Bar Association Standing Committee on the Federal Judiciary giving her a “well qualified” professional assessment.^[107] However, as *The New York Times* described, “[it became] embroiled in the sometimes tortured judicial politics of the Senate.”^[108] Some in the Republican majority believed Clinton was eager to name the first Hispanic Supreme Court justice and that an easy confirmation to the appeals court would put Sotomayor in a better position for a possible Supreme Court nomination (despite there being no vacancy at the time nor any indication the Clinton administration was considering nominating her or any Hispanic). Therefore, the Republican majority decided to slow her confirmation.^{[19][106][108]} Radio commentator Rush Limbaugh weighed in that Sotomayor was an ultraliberal who was on a “rocket ship” to the highest court.^[106]

During her September 1997 hearing before the Senate Judiciary Committee, Sotomayor parried strong questioning from some Republican members about mandatory sentencing, gay rights, and her level of respect for Supreme Court Justice Clarence Thomas.^[91] After a long wait, she was approved by the committee in March 1998, with only two dissensions.^{[91][106]} However, in June 1998, the influential *Wall Street Journal* editorial page opined that the Clinton administration intended to “get her on to the Second Circuit, then elevate her to the Supreme

Court as soon as an opening occurs”; the editorial criticized two of her district court rulings and urged further delay of her confirmation.^[109] The Republican block continued.^{[24][106]}

Ranking Democratic committee member Patrick Leahy objected to Republican use of a secret hold to slow down the Sotomayor nomination, and Leahy attributed that anonymous tactic to GOP reticence about publicly opposing a female Hispanic nominee.^{[106][110]} The prior month, Leahy had triggered a procedural delay in the confirmation of fellow Second Circuit nominee Chester J. Straub—who, although advanced by Clinton and supported by Senator Moynihan, was considered much more acceptable by Republicans—in an unsuccessful effort to force earlier consideration of the Sotomayor confirmation.^[111]

During 1998, several Hispanic organizations organized a petition drive in New York State, generating hundreds of signatures from New Yorkers to try to convince New York Republican senator Al D'Amato to push the Senate leadership to bring Sotomayor's nomination to a vote.^[112] D'Amato, a backer of Sotomayor to begin with and additionally concerned about being up for re-election that year,^[112] helped move Republican leadership.^[14] Her nomination had been pending for over a year when Majority Leader Trent Lott scheduled the vote.^[108] With complete Democratic support, and support from 25 Republican senators including Judiciary chair Orrin Hatch,^[108] Sotomayor was confirmed on October 2, 1998, by a 67–29 vote.^[113] She received her commission on October 7.^[7] The confirmation experience left Sotomayor somewhat angry; she said shortly afterwards that during the hearings, Republicans had assumed her political beliefs based on her being a Latina: “That series of questions, I think, were symbolic of a set of expectations that some people had [that] I must be liberal. It is stereotyping, and stereotyping is perhaps the most insidious of all problems in our society today.”^[24]

2.5.2 Judgeship

Over her ten years on the Second Circuit, Sotomayor heard appeals in more than 3,000 cases and wrote about 380 opinions where she was in the majority.^[14] The Supreme Court reviewed five of those, reversing three and affirming two^[14]—not high numbers for an appellate judge of that many years^[19] and a typical percentage of reversals.^[114]

Sotomayor's circuit court rulings led to her being considered a political centrist by the *ABA Journal*,^{[76][115]} and other sources and organizations.^{[76][93][115][116][117][118]} Several lawyers, legal experts, and news organizations identified her as someone with liberal inclinations.^{[119][120][121]} In any case, the Second Circuit's caseload typically skewed more toward business and securities law rather than hot-button social or con-

stitutional issues.^[19] Sotomayor tended to write narrow, practiced rulings that relied on close application of the law to the facts of a case rather than import general philosophical viewpoints.^{[19][122]} A **Congressional Research Service** analysis found that Sotomayor's rulings defied easy ideological categorization, but did show an adherence to precedent and an avoidance of overstepping the circuit court's judicial role.^[123] Unusually, Sotomayor read through all the supporting documents of cases under review; her lengthy rulings explored every aspect of a case and tended to feature leaden, ungainly prose.^[124] Some legal experts have said that Sotomayor's attention to detail and re-examination of the facts of a case came close to overstepping the traditional role of appellate judges.^[125]

Across some 150 cases involving business and civil law, Sotomayor's rulings were generally unpredictable and not consistently pro-business or anti-business.^[126] Sotomayor's influence in the federal judiciary, as measured by the number of citations of her rulings by other judges and in law review articles, increased significantly during the length of her appellate judgeship and was greater than that of some other prominent federal appeals court judges.^[127] Two academic studies showed that the percentage of Sotomayor's decisions that overrode policy decisions by elected branches was the same as or lower than that of other circuit judges.^[128]

Sotomayor was a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts.^[105] In October 2001, she presented the annual Judge Mario G. Olmos Memorial Lecture at UC Berkeley School of Law;^[17] titled "A Latina Judge's Voice"; it was published in the *Berkeley La Raza Law Journal* the following spring.^{[129][130]} In the speech, she discussed the characteristics of her Latina upbringing and culture and the history of minorities and women ascending to the federal bench.^[131] She said the low number of minority women on the federal bench at that time was "shocking".^[43] She then discussed at length how her own experiences as a Latina might affect her decisions as a judge.^[131] In any case, her background in activism did not necessarily influence her rulings: in a study of 50 racial discrimination cases brought before her panel, 45 were rejected, with Sotomayor never filing a dissent.^[43] An expanded study showed that Sotomayor decided 97 cases involving a claim of discrimination and rejected those claims nearly 90 percent of the time.^[132] Another examination of Second Circuit split decisions on cases that dealt with race and discrimination showed no clear ideological pattern in Sotomayor's opinions.^[133]

In the Court of Appeals seat, Sotomayor gained a reputation for vigorous and blunt behavior toward lawyers appealing before her, sometimes to the point of brusque and curt treatment or testy interruptions.^{[14][134]} She was known for extensive preparation for oral arguments and for running a "hot bench", where judges ask lawyers plenty of questions.^{[134][135]} Unprepared lawyers suffered

the consequences, but the vigorous questioning was an aid to lawyers seeking to tailor their arguments to the judge's concerns.^[135] The 2009 *Almanac of the Federal Judiciary*, which collected anonymous evaluations of judges by lawyers who appear before them, contained a wide range of reactions to Sotomayor.^[14] Comments also diverged among lawyers willing to be named. Attorney Sheema Chaudhry said, "She's brilliant and she's qualified, but I just feel that she can be very, how do you say, temperamental."^[134] Defense lawyer **Gerald B. Lefcourt** said, "She used her questioning to make a point, as opposed to really looking for an answer to a question she did not understand."^[134] In contrast, Second Circuit Judge **Richard C. Wesley** said that his interactions with Sotomayor had been "totally antithetical to this perception that has gotten some traction that she is somehow confrontational."^[134] Second Circuit Judge and former teacher **Guido Calabresi** said his tracking showed that Sotomayor's questioning patterns were no different from those of other members of the court and added, "Some lawyers just don't like to be questioned by a woman. [The criticism] was sexist, plain and simple."^[134] Sotomayor's law clerks regarded her as a valuable and strong mentor, and she said that she viewed them like family.^[53]

In 2005, Senate Democrats suggested Sotomayor, among others, to President George W. Bush as an acceptable nominee to fill the seat of retiring Supreme Court Justice Sandra Day O'Connor.^[136]

2.5.3 Notable rulings

Abortion

In the 2002 decision *Center for Reproductive Law and Policy v. Bush*,^[137] Sotomayor upheld the Bush administration's implementation of the **Mexico City Policy**, which states that "the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations."^[138] Sotomayor held that the policy did not constitute a violation of **equal protection**, as "the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds."^[137]

First Amendment rights

In *Pappas v. Giuliani* (2002),^[139] Sotomayor dissented from her colleagues' ruling that the New York Police Department could terminate from his desk job an employee who sent racist materials through the mail. Sotomayor argued that the **First Amendment** protected speech by the employee "away from the office, on [his] own time", even if that speech was "offensive, hateful, and insulting", and that therefore the employee's **First Amendment** claim should have gone to trial rather than being dismissed on summary judgment.^[140]

In 2005, Sotomayor wrote the opinion for *United States v. Quattrone*.^[141] Frank Quattrone had been on trial on charges of obstructing investigations related to technology IPOs. Some members of the media had wanted to publish the names of the jurors deciding Quattrone's case, and a district court had issued an order to forbid the publication of the jurors's names. In *United States v. Quattrone*, Sotomayor wrote the opinion for the Second Circuit panel striking down this order on First Amendment grounds, stating that the media should be free to publish the names of the jurors. The first trial ended in a deadlocked jury and a mistrial, and the district court ordered the media not to publish the names of jurors, even though those names had been disclosed in open court. Sotomayor held that although it was important to protect the fairness of the retrial, the district court's order was an unconstitutional prior restraint on free speech and violated the right of the press "to report freely on events that transpire in an open courtroom".^[141]

In 2008, Sotomayor was on a three-judge panel in *Doninger v. Niehoff*^[142] that unanimously affirmed, in an opinion written by Second Circuit Judge Debra Livingston, the district court's judgment that Lewis S. Mills High School did not violate the First Amendment rights of a student when it barred her from running for student government after she called the superintendent and other school officials "douchebags" in a blog post written while off-campus that encouraged students to call an administrator and "piss her off more".^[142] Judge Livingston held that the district judge did not abuse her discretion in holding that the student's speech "foreseeably create[d] a risk of substantial disruption within the school environment",^[143] which is the precedent in the Second Circuit for when schools may regulate off-campus speech.^[142] Although Sotomayor did not write this opinion, she has been criticized by some who disagree with it.^[144]

Second Amendment rights

Sotomayor was part of the three-judge Second Circuit panel that affirmed the district court's ruling in *Maloney v. Cuomo* (2009).^[145] Maloney was arrested for possession of nunchucks, which are illegal in New York; Maloney argued that this law violated his Second Amendment right to bear arms. The Second Circuit's *per curiam* opinion noted that the Supreme Court has not, so far, ever held that the Second Amendment is binding against state governments. On the contrary, in *Presser v. Illinois*, a Supreme Court case from 1886, the Supreme Court held that the Second Amendment "is a limitation only upon the power of Congress and the national government, and not upon that of the state".^[145] With respect to the *Presser v. Illinois* precedent, the panel stated that only the Supreme Court has "the prerogative of overruling its own decisions,"^[146] and the recent Supreme Court case of *District of Columbia v. Heller* (which struck down the district's gun ban as unconstitutional) did "not invalidate this

longstanding principle".^[145] The panel upheld the lower court's decision dismissing Maloney's challenge to New York's law against possession of nunchucks.^[147] On June 2, 2009, a Seventh Circuit panel, including the prominent and heavily cited judges Richard Posner and Frank Easterbrook, unanimously agreed with *Maloney v. Cuomo*, citing the case in their decision turning back a challenge to Chicago's gun laws and noting the Supreme Court precedents remain in force until altered by the Supreme Court itself.^[146]

Fourth Amendment rights

In *N.G. & S.G. ex rel. S.C. v. Connecticut* (2004),^[148] Sotomayor dissented from her colleagues' decision to uphold a series of strip searches of "troubled adolescent girls" in juvenile detention centers. While Sotomayor agreed that some of the strip searches at issue in the case were lawful, she would have held that due to "the severely intrusive nature of strip searches",^[148] they should not be allowed "in the absence of individualized suspicion, of adolescents who have never been charged with a crime".^[148] She argued that an "individualized suspicion" rule was more consistent with Second Circuit precedent than the majority's rule.^[148]

In *Leventhal v. Knapek* (2001),^[149] Sotomayor rejected a Fourth Amendment challenge by a U.S. Department of Transportation employee whose employer searched his office computer. She held that, "Even though [the employee] had some expectation of privacy in the contents of his office computer, the investigatory searches by the DOT did not violate his Fourth Amendment rights"^[149] because here "there were reasonable grounds to believe" that the search would reveal evidence of "work-related misconduct".^[149]

Alcohol in commerce

In 2004, Sotomayor was part of the judge panel that ruled in *Swedenburg v. Kelly* that New York's law prohibiting out-of-state wineries from shipping directly to consumers in New York was constitutional even though in-state wineries were allowed to. The case, which invoked the 21st Amendment, was appealed and attached to another case. The case reached the Supreme Court later on as *Swedenburg v. Kelly* and was overruled in a 5–4 decision that found the law was discriminatory and unconstitutional.^[150]

Employment discrimination

Sotomayor was involved in the high-profile case *Ricci v. DeStefano* that initially upheld the right of the City of New Haven to throw out its test for firefighters and start over with a new test, because the City believed the test had a "disparate impact"^[151] on minority firefighters. (No black firefighters qualified for promotion under

the test, whereas some had qualified under tests used in previous years.) The City was concerned that minority firefighters might sue under Title VII of the Civil Rights Act of 1964. The City chose not to certify the test results and a lower court had previously upheld the City's right to do this. Several white firefighters and one Hispanic firefighter who had passed the test, including the lead plaintiff who has dyslexia and had put much extra effort into studying, sued the City of New Haven, claiming that their rights were violated. A Second Circuit panel that included Sotomayor first issued a brief, unsigned summary order (not written by Sotomayor) affirming the lower court's ruling.^[152] Sotomayor's former mentor José A. Cabranes, by now a fellow judge on the court, objected to this handling and requested that the court hear it *en banc*.^[153] Sotomayor voted with a 7–6 majority not to rehear it and a slightly expanded ruling was issued, but a strong dissent by Cabranes led to the case reaching the Supreme Court in 2009.^[153] There it was overruled in a 5–4 decision that found the white firefighters had been victims of racial discrimination when they were denied promotion.^[154]

Business

In *Clarett v. National Football League* (2004),^[155] Sotomayor upheld the National Football League's eligibility rules requiring players to wait three full seasons after high school graduation before entering the NFL draft. Maurice Clarett challenged these rules, which were part of the collective bargaining agreement between the NFL and its players, on antitrust grounds. Sotomayor held that Clarett's claim would upset the established "federal labor law favoring and governing the collective bargaining process".^[156]

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit* (2005),^[157] Sotomayor wrote a unanimous opinion that the Securities Litigation Uniform Standards Act of 1998 did not preempt class action claims in state courts by stockbrokers alleging misleading inducement to buy or sell stocks.^[114] The Supreme Court handed down an 8–0 decision stating that the Act did preempt such claims, thereby overruling Sotomayor's decision.^[114]

In *Specht v. Netscape Communications Corp.* (2001),^[158] she ruled that the license agreement of Netscape's Smart Download software did not constitute a binding contract because the system didn't give "sufficient notice" to the user.^[159]

Civil rights

In *Correctional Services Corp. v. Malesko* (2000),^[160] Sotomayor, writing for the court, supported the right of an individual to sue a private corporation working on behalf of the federal government for alleged violations of that individual's constitutional rights. Reversing a lower court decision, Sotomayor found that an existing Supreme

Court doctrine, known as "Bivens"—which allows suits against individuals working for the federal government for constitutional rights violations—could be applied to the case of a former prisoner seeking to sue the private company operating the federal halfway house facility in which he resided. The Supreme Court reversed Sotomayor's ruling in a 5–4 decision, saying that the Bivens doctrine could not be expanded to cover private entities working on behalf of the federal government. Justices Stevens, Souter, Ginsburg, and Breyer dissented, siding with Sotomayor's original ruling.

In *Gant v. Wallingford Board of Education* (1999),^[161] the parents of a black student alleged that he had been harassed due to his race and had been discriminated against when he was transferred from a first grade class to a kindergarten class without parental consent, while similarly situated white students were treated differently. Sotomayor agreed with the dismissal of the harassment claims due to lack of evidence, but would have allowed the discrimination claim to go forward. She wrote in dissent that the grade transfer was "contrary to the school's established policies" as well as its treatment of white students, which "supports the inference that race discrimination played a role".

Property rights

In *Krimstock v. Kelly* (2002),^[162] Sotomayor wrote an opinion halting New York City's practice of seizing the motor vehicles of drivers accused of driving while intoxicated and some other crimes and holding those vehicles for "months or even years" during criminal proceedings. Noting the importance of cars to many individuals' livelihoods or daily activities, she held that it violated individuals' due process rights to hold the vehicles without permitting the owners to challenge the City's continued possession of their property.

In *Brody v. Village of Port Chester* (2003 and 2005),^[163] a takings case, Sotomayor first ruled in 2003 for a unanimous panel that a property owner in Port Chester, New York was permitted to challenge the state's Eminent Domain Procedure Law. A district court subsequently rejected the plaintiff's claims and upon appeal the case found itself again with the Second Circuit. In 2005, Sotomayor ruled with a panel majority that the property owner's due process rights had been violated by lack of adequate notice to him of his right to challenge a village order that his land should be used for a redevelopment project. However, the panel supported the village's taking of the property for public use.^[164]

In *Didden v. Village of Port Chester* (2006),^[165] an unrelated case brought about by the same town's actions, Sotomayor joined a unanimous panel's summary order to uphold a trial court's dismissal – due to a statute of limitations lapse – of a property owner's objection to his land being condemned for a redevelopment project. The ruling further said that even without the lapse, the

owner's petition would be denied due to application of the Supreme Court's recent *Kelo v. City of New London* ruling. The Second Circuit's reasoning drew criticism from libertarian commentators.^{[166][167]}

2.6 Supreme Court justice

2.6.1 Nomination and confirmation

Main article: [Sonia Sotomayor Supreme Court nomination](#)

Since President Barack Obama's election there was spec-



President Barack Obama meets with Judge Sonia Sotomayor and Vice President Joseph Biden prior to an announcement in the East Room, May 26, 2009

ulation that Sotomayor could be a leading candidate for a Supreme Court seat.^{[76][115][116][168]} New York Senators Charles Schumer and Kirsten Gillibrand wrote a joint letter to Obama urging him to appoint Sotomayor, or alternatively Interior Secretary Ken Salazar, to the Supreme Court if a vacancy should arise during his term.^[169] The White House first contacted Sotomayor on April 27, 2009, about the possibility of her nomination.^[170] On April 30, 2009, Justice David Souter's retirement plans leaked to the media, and Sotomayor received early attention as a possible nominee for Souter's seat to be vacated in June 2009.^[171] On May 25, Obama informed Sotomayor of his choice; she later said, "I had my [hand] over my chest, trying to calm my beating heart, literally."^[172] On May 26, 2009, Obama nominated her.^[173] She became only the second jurist to be nominated to three different judicial positions by three different presidents.^[174] The selection appeared to closely match Obama's presidential campaign promise that he would nominate judges who had "the heart, the empathy, to recognize what it's like to be a teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old."^[175]

Sotomayor's nomination won praise from Democrats and liberals, and Democrats appeared to have sufficient votes to confirm her.^[176] The strongest criticism of her nomination came from conservatives and some Republican sen-

ators regarding a line she had used in similar forms in a number of her speeches, particularly in a 2001 Berkeley Law lecture.^{[131][176]} "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."^[17] Sotomayor had made similar remarks in other speeches between 1994 and 2003, including one she submitted as part of her confirmation questionnaire for the Court of Appeals in 1998, but they had attracted little attention at the time.^{[177][178]} The remark now became widely known.^[179] The rhetoric quickly became inflamed, with radio commentator Rush Limbaugh and former Republican Speaker of the House of Representatives Newt Gingrich calling Sotomayor a "racist" (although the latter later backtracked from that claim),^[180] while John Cornyn and other Republican senators denounced such attacks but said that Sotomayor's approach was troubling.^{[181][182]} Backers of Sotomayor offered a variety of explanations in defense of the remark,^[183] and White House Press Secretary Robert Gibbs stated that Sotomayor's word choice in 2001 had been "poor."^[181] Sotomayor subsequently clarified her remark through Senate Judiciary Committee chair Patrick Leahy, saying that while life experience shapes who one is, "ultimately and completely" a judge follows the law regardless of personal background.^[184] Of her cases, the Second Circuit rulings in *Ricci v. DeStefano* received the most attention during the early nomination discussion,^[185] motivated by the Republican desire to focus on the reverse racial discrimination aspect of the case.^[179] In the midst of her confirmation process the Supreme Court overturned that ruling on June 29.^[154] A third line of Republican attack against Sotomayor was based on her ruling in *Maloney v. Cuomo* and was motivated by gun ownership advocates concerned about her interpretation of Second Amendment rights.^[179] Some of the fervor with which conservatives and Republicans viewed the Sotomayor nomination was due to their grievances over the history of federal judicial nomination battles going back to the 1987 Robert Bork Supreme Court nomination.^[186]

A Gallup poll released a week after the nomination showed 54 percent of Americans in favor of Sotomayor's confirmation compared with 28 percent in opposition.^[187] A June 12 Fox News poll showed 58 percent of the public disagreeing with her "wise Latina" remark but 67 percent saying the remark should not disqualify her from serving on the Supreme Court.^[188] The American Bar Association gave her a unanimous "well qualified" assessment, its highest mark for professional qualification.^[107] Following the *Ricci* overruling, Rasmussen Reports and CNN/Opinion Research polls showed that the public was now sharply divided, largely along partisan and ideological lines, as to whether Sotomayor should be confirmed.^{[189][190]}

Sotomayor's confirmation hearings before the Senate Judiciary Committee began on July 13, 2009, during which



Sotomayor before the Senate Judiciary Committee for the first day of hearings on July 13, 2009

she backed away from her “wise Latina” remark, declaring it “a rhetorical flourish that fell flat” and stating that “I do not believe that any ethnic, racial or gender group has an advantage in sound judgment.”^{[191][192]} When Republican senators confronted her regarding other remarks from her past speeches, she pointed to her judicial record and said she had never let her own life experiences or opinions influence her decisions.^[193] Republican senators said that while her rulings to this point might be largely traditional, they feared her Supreme Court rulings – where there is more latitude with respect to precedent and interpretation – might be more reflective of her speeches.^{[194][195]} Sotomayor defended her position in *Ricci* as following applicable precedent.^[191] When asked whom she admired, she pointed to Justice Benjamin N. Cardozo.^[196] In general, Sotomayor followed the hearings formula of recent past nominees by avoiding stating personal positions, declining to take positions on controversial issues likely to come before the Court, agreeing with senators from both parties, and repeatedly affirming that as a justice she would just apply the law.^[197] On July 28, 2009, the Senate Judiciary Committee approved Sotomayor’s nomination; the 13–6 vote was almost entirely along party lines, with no Democrats opposing her and only one Republican supporting her.^[198] On August 6, 2009, Sotomayor was confirmed by the full Senate by a vote of 68–31.^[199] The vote was largely along party lines, with no Democrats opposing her and nine Republicans supporting her.^[200]

President Obama commissioned Sotomayor on the day of her confirmation;^[201] Sotomayor was sworn in on August 8, 2009, by Chief Justice John Roberts.^[202] Sotomayor is the first Hispanic to serve on the Supreme Court.^{[199][200][203][204]} Some attention has been given to Justice Benjamin Cardozo – a Sephardic Jew believed to be of distant Portuguese descent – as the first Hispanic on the court when appointed in 1932, but his roots were uncertain, the term “Hispanic” was not in use as an ethnic identifier at the time, and the Portuguese are generally excluded from its meaning.^{[204][205][206]} Sotomayor is among four women to have historically served on the

Court, together with Sandra Day O’Connor, Ruth Bader Ginsburg and Elena Kagan, the last of whom won confirmation a year after Sotomayor by a comparable 63–37 vote.^[207] Sotomayor’s appointment gives the Court a record six Roman Catholic justices serving at the same time.^[4] Sotomayor became one of the three youngest of the justices sitting on the Court, along with John Roberts and Elena Kagan.^[208]

2.6.2 Justiceship



The four women who have served on the Supreme Court: Sandra Day O’Connor, Sotomayor, Ruth Bader Ginsburg, and Elena Kagan

Sotomayor cast her first vote as an associate Supreme Court justice on August 17, 2009, in a stay of execution case.^[209] She was given a warm welcome onto the Court^[210] and was formally invested in a September 8 ceremony.^[211] Sotomayor’s inaugural case in which she heard arguments was on September 9 during a special session, *Citizens United v. Federal Election Commission*. It involved the controversial aspect of the First Amendment and the rights of corporations in campaign finance;^[212] Sotomayor dissented.^{[213][214]} In her vigorous examination of Floyd Abrams, representing the First Amendment issues in the case, Sotomayor challenged him, questioning 19th century rulings of the Court and saying, “What you are suggesting is that the courts, who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court’s error to start with ... [imbu]ing] a creature of State law with human characteristics.”^{[212][215]}

Sotomayor’s first major written opinion was a dissent in the *Berghuis v. Thompkins* case dealing with Miranda rights.^{[213][216]} As her first year neared completion, Sotomayor said she felt swamped by the intensity and heavy workload of the job.^[216] During the oral arguments for *National Federation of Independent Business v. Sebelius*, Sotomayor showed her increasing familiarity with the Court and its protocols by directing the opening questions of the arguments to Donald Verrilli, the Solicitor General who was representing the government’s position.^[217]

In succeeding Justice Souter, Sotomayor had done lit-

tle to change the philosophical and ideological balance of the Court.^{[213][214][216]} While many cases are decided unanimously or with different voting coalitions, Sotomayor has continued to be a reliable member of the liberal bloc of the court when the justices divide along the commonly perceived ideological lines.^[218] Specifically, her voting pattern and judicial philosophy has been in close agreement with that of Justices Breyer, Ginsburg and Kagan.^[219] During her first couple of years there, Sotomayor voted with Ginsburg and Breyer 90 percent of the time, one of the highest agreement rates on the Court.^{[213][220]} Justices Roberts, Scalia, Kennedy, Thomas, and Alito have comprised the identifiable conservative constituents of the Court.^[221] Although, five of the justices on the Supreme Court self-identify themselves as having Roman Catholic affiliation, Sotomayor's voting history identifies her singly among them with the liberal bloc of the Court. However, there is a wide divergence among Catholics in general in their approaches to the law.^[4] Due to her upbringing and her past jobs and positions, Sotomayor has brought one of the more diverse set of life experiences to the court.^[222]

There have been some deviations from the ideological pattern. In a 2013 book on the Roberts Court, author Marcia Coyle assessed Sotomayor's position on the Confrontation Clause of the Sixth Amendment as a strong guarantee of the right of a defendant to confront his or her accusers.^[219] Sotomayor's judicial philosophy on the issue is seen as being in parity with Elena Kagan and, unexpectedly for Sotomayor, also in at least partial agreement with the originalist reading of Antonin Scalia when applied to the clause.

On January 20 and 21, 2013, Sotomayor administered the oath to Vice President Joe Biden for the inauguration of his second term. Sotomayor became the first Hispanic and fourth woman to administer the oath to a president or vice president.^[223]

By the end of her fifth year on the court, Sotomayor had become especially visible in oral arguments and in passionate dissents from various majority rulings, especially those involving issues of race, gender and ethnic identity.^[224] Sotomayor has shown her individuality on the Court in a number of decisions. In her reading of the constitutionality of the Obama health care law favoring the poor and disabled, she sided with Ginsburg against fellow liberals Breyer and Kagan.^[225] In dealing with the Chief Justice, Sotomayor had no difficulty in responding to his statement that “the way to stop discrimination on the basis of race is to stop discrimination on the basis of race,” by stating, “I don't borrow Chief Justice Roberts's description of what color-blindness is... Our society is too complex to use that kind of analysis.”^[226] In the manufacturer liability case of *Williamson v. Mazda*, which the court decided unanimously, she wrote a separate concurring opinion.^[227] Sotomayor's rapport with her clerks is seen as more formalistic than some of the other justices as she requires detailed and rigorous evaluations of cases

she is considering with a table of contents attached.^[228] When compared to Kagan directly, one of their colleagues stated, “Neither of them is a shrinking violet”. Coyle, in her 2013 book on the Roberts Court stated that: “Both women are more vocal during arguments than the justices whom they succeeded, and they have energized the moderate-liberal side of the bench.”^[229]

During her tenure on the court, Sotomayor has also become recognizable as being among the court's strongest voices in supporting the rights of the accused.^[230] She has been identified by Laurence Tribe as the foremost voice on the court calling for reforming criminal justice adjudication – in particular as it relates misconduct by police and prosecutors, abuses in prisons, concerns about how the death penalty is used, and the potential for loss of privacy – and Tribe has compared her will to reform in general to that of past Chief Justice Earl Warren.^[231]

2.6.3 Notable rulings

J.D.B. v. North Carolina was a 2011 case in which the Supreme Court of the United States held that age is relevant when determining police custody for *Miranda* purposes. Sotomayor was assigned to write the majority opinion in the case. J.D.B. was a 13-year-old student enrolled in special education classes whom police had suspected of committing two robberies. A police investigator visited J.D.B. at school, where he was interrogated by the investigator, a uniformed police officer, and school officials. J.D.B. subsequently confessed to his crimes and was convicted. J.D.B. was not given a *Miranda* warning during the interrogation, nor an opportunity to contact his legal guardian. During the trial, attempts to suppress the statements given by J.D.B. because he was not given a *Miranda* warning were denied on the grounds that J.D.B. was not in police custody. The case was appealed and the Supreme Court agreed to hear the case. Sotomayor's opinion for the Court held that a child's age properly informs the *Miranda* custody analysis. Her opinion underscored the dangers of not applying age to the custody analysis, writing: “to hold... that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.”^[232] The opinion cited *Stansbury v. California* where the Court held that a child's age “would have affected how a reasonable person” in the suspect's position “would perceive his or her freedom to leave”. *Yarborough v. Alvarado* was also cited, where the Court wrote that a child's age “generates commonsense conclusions about behavior and perception”. Finally, Sotomayor's opinion pointed out that the law reflects the idea that a child's judgment is not the same as an adult's, in the form of legal disqualifications on children as a class (e.g. limitations on a child's ability to marry without parental consent). Sotomayor's opinion was challenged by Associate

Justice Samuel Alito who wrote a dissenting opinion for four Justices.

A particularly fractious United States Supreme Court case was 2012's *United States v. Alvarez*, involving judicial review in which the Court struck down the Stolen Valor Act, a federal law that criminalized false statements about having a military medal. The law had been passed as an effort to stem instances where people falsely claimed to have won the medal in an attempt to protect the "valor" of those who really had. While a 6-3 majority of the Supreme Court agreed that the law was unconstitutional under the First Amendment's free speech protections, it could not agree on a single rationale. Sotomayor was among four justices, along with Justices Roberts, Ginsburg and Kennedy, who concluded that a statement's falsity is not enough, by itself, to exclude speech from First Amendment protection. Justices Breyer and Kagan concluded that while false statements were entitled to some protection, the Stolen Valor Act was invalid because it could have achieved its objectives in less restrictive ways. Justices Scalia, Thomas and Alito were in dissent.^[233]

Most visibly during the 2012 term, in *National Federation of Independent Business v. Sebelius*, Sotomayor was part of a landmark 5-4 majority that upheld most of the provisions of the Patient Protection and Affordable Care Act (while being part of a dissent against the reliance upon the Constitution's Taxing and Spending Clause rather than Commerce Clause in arriving at the support). Legal writer Jeffrey Toobin wrote, "Sotomayor's concerns tended toward the earthbound and practical. Sometimes, during oral arguments, she would go on tangents involving detailed questions about the facts of cases that would leave her colleagues stupefied, sinking into their chairs. This time, though, she had a simple line of inquiry. States require individuals to buy automobile insurance (implicitly suggesting the unavoidable comparison to health insurance and the fairness of the applying the same principle to health insurance as well)."^[234] Sotomayor concluded with the incisive rhetorical flourish in the Court directed at the attorneys: "Do you think that if some states decided not to impose an insurance requirement that the federal government would be without power to legislate and require every individual to buy car insurance?" For Toobin, this distinction drawn by Sotomayor was the heart of the argument for the case in which she was part of the prevailing majority opinion.^[234]

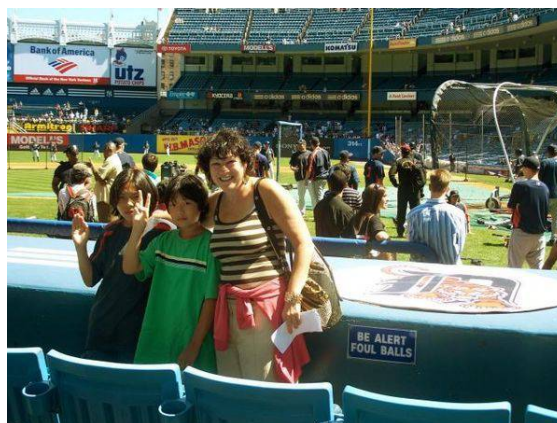
In another high-profile June 2012 decision at the end of her third term, Sotomayor was part of a 5-3 majority in *Arizona v. United States* that struck down several aspects of the Arizona SB 1070 anti-illegal immigration law.^[235] The *Arizona* case was decided as a compromise verdict with Sotomayor joining Justices Roberts, Kennedy, Ginsburg and Breyer in the majority, with Justice Kagan not participating.^[236]

In 2013, Sotomayor's unjoined concurrence in the prior

year's *United States v. Jones* decision, in which she said that in the digital age, "It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," was cited by federal judge Richard Leon in his ruling that the National Security Agency's bulk collection of Americans' telephony records likely violated the Fourth Amendment.^[237] Law professors Adam Winkler and Laurence Tribe were among those who said that Sotomayor's *Jones* concurrence had been influential in calling out the need for a new basis in understanding privacy requirements in a world, as she wrote, "in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."^[237]

On July 3, 2014, six justices ordered an injunction that allowed Wheaton College of Illinois, a religiously affiliated university, an exemption from complying with Affordable Care Act's mandate on contraception.^[238] It came in the immediate wake of the Court's 5-4 decision in *Burwell v. Hobby Lobby*, in which the conservative bloc had prevailed, and was opposed by the court's three female members: Sotomayor, Ginsburg and Kagan. They suggested that the Hobby Lobby decision was not the Court's conclusive opinion on birth control. In her dissent to the injunction, Sotomayor wrote that, "Those who are bound by our decisions usually believe they can take us at our word ... Not today." Sotomayor stated further her opinion that the decision compromised "hundreds of Wheaton's employees and students of their legal entitlement to contraceptive coverage."^[238]

2.7 Other activities



Sotomayor with her nephews at Yankee Stadium in 2007

Sotomayor was an adjunct professor at New York University School of Law from 1998 to 2007.^[239] There she taught trial and appellate advocacy as well as a federal appellate court seminar.^[239] Beginning in 1999, she was also a lecturer in law at Columbia Law School in a paying, adjunct faculty position.^{[85][240]} While there she created

and co-taught a class called the Federal Appellate Externship each semester from 2000 until her departure; it combined classroom, moot court, and Second Circuit chambers work.^[240] She became a member of the Board of Trustees of Princeton University in 2006, concluding her term in 2011.^{[49][241]} In 2008, Sotomayor became a member of the *Belizean Grove*, an invitation-only women's group modeled after the men's *Bohemian Grove*.^[242] On June 19, 2009, Sotomayor resigned from the *Belizean Grove* after Republican politicians voiced concerns over the group's membership policy.^[243]

Sotomayor has maintained a public presence, mostly through making speeches, since joining the federal judiciary and throughout her time on the Supreme Court.^{[244][245]} She gave over 180 speeches between 1993 and 2009, about half of which either focused on issues of ethnicity or gender or were delivered to minority or women's groups.^[244] While on the Supreme Court she has been invited to give commencement addresses at a number of universities including New York University (2012),^[246] Yale University (2013),^[247] and the University of Puerto Rico (2014).^{[245][248]} Her speeches have tended to give a more defined picture of her worldview than her rulings on the bench.^[170] The themes of her speeches have often focused on ethnic identity and experience, the need for diversity, and America's struggle with the implications of its diverse makeup.^[170] She has also presented her career achievements as an example of the success of affirmative action policies in university admissions, saying "I am the perfect affirmative action baby" in regard to her belief that her admission test scores were not comparable to those of her classmates.^{[33][34]} During 2012 while already on the Supreme Court, Sotomayor made two appearances as herself on the children's television program *Sesame Street*, explaining what a vocational career is in general and then demonstrating how a judge hears a case.^{[249][250]}

Sotomayor long lived in *Greenwich Village* in New York City and had few financial assets other than her home.^[170] She enjoys shopping, traveling, and giving gifts and helps support her mother and her mother's husband in Florida.^[251] Regarding her short financial disclosure reports prior to her Supreme Court nomination, she has said, "When you don't have money, it's easy. There isn't anything there to report."^[53] As a federal judge, she is entitled to a pension equal to her full salary upon retirement.^[251] Upon joining the Supreme Court, she took up residence in Washington but sorely missed the faster-paced life of New York.^[60] After renting in the *Cleveland Park* neighborhood for three years, in 2012 she purchased a condominium in the *U Street Corridor*.^[252] She said, "I picked [that area] because it's mixed. I walk out and I see all kinds of people, which is the environment I grew up in and the environment I love."^[60]

She takes several daily insulin injections,^[253] and her diabetes is considered to be well controlled.^[254] Sotomayor does not belong to a Catholic parish or attend Mass, but

does attend church for important occasions.^[4] She has said, "I am a very spiritual person [though] maybe not traditionally religious in terms of Sunday Mass every week, that sort of thing. The trappings are not important to me, but, yes, I do believe in God. And, yes, I do believe in the commandments."^[60]

She maintains ties with Puerto Rico, visiting once or twice a year, speaking there occasionally, and visiting cousins and other relatives who still live in the *Mayagüez area*.^{[11][12][15]} She has long stressed her ethnic identity, saying in 1996, "Although I am an American, love my country and could achieve its opportunity of succeeding at anything I worked for, I also have a Latina soul and heart, with the magic that carries."^[25]

Sotomayor said of the years following her divorce, that "I have found it difficult to maintain a relationship while I've pursued my career."^[69] She has talked of herself as "emotionally withdrawn" and lacking "genuine happiness" when living by herself; after becoming a judge, she said she would not date lawyers.^[67] In 1997, she was engaged to New York construction contractor Peter White, but the relationship had ended by 2000.^{[10][67]}

In July 2010, Sotomayor signed a contract with Alfred A. Knopf to publish a memoir about the early part of her life.^[255] She received an advance of nearly \$1.2 million for the work,^[256] which was published in January 2013 and titled *My Beloved World*^[60] (*Mi mundo adorado* in the simultaneously published Spanish edition). It focuses on her life up to 1992, with recollections of growing up in housing projects in New York and descriptions of the challenges she faced.^[60] It received good reviews, with Michiko Kakutani of the *New York Times* describing it as "a compelling and powerfully written memoir about identity and coming of age. ... It's an eloquent and affecting testament to the triumph of brains and hard work over circumstance, of a childhood dream realized through extraordinary will and dedication."^[257] She staged a book tour to promote the work,^[258] and it debuted atop the *New York Times* Best Seller List.^[259]

On December 31, 2013, Sotomayor pressed the ceremonial button and led the final 60-second countdown at the *Times Square New Year's Eve* ball drop, being the first United States Supreme Court justice to perform the task.^{[260][261]}

2.8 Awards and honors

Sotomayor has received honorary law degrees from Lehman College (1999),^[105] Princeton University (2001),^[105] Brooklyn Law School (2001),^[105] Pace University School of Law (2003),^[262] Hofstra University (2006),^[85] Northeastern University School of Law (2007),^[263] Howard University (2010),^[264] St. Lawrence University (2010),^[265] New York University (2012),^[246] Yale University (2013),^[247] and the

University of Puerto Rico (2014).^[248]

She was elected a member of the American Philosophical Society in 2002.^[266] She was given the Outstanding Latino Professional Award in 2006 by the Latino/a Law Students Association.^[267] In 2008, *Esquire* magazine included Sotomayor on its list of “The 75 Most Influential People of the 21st Century”.^[268] In 2013, Sotomayor won the Woodrow Wilson Award at her alma mater Princeton University.^[269]

In June 2010, the Bronxdale Houses development, where Sotomayor grew up, was renamed after her. The Justice Sonia Sotomayor Houses and Justice Sonia Sotomayor Community Center comprise 28 buildings with some 3,500 residents. While many New York housing developments are named after well-known people, this was only the second to be named after a former resident.^[270] In 2011, the Sonia M. Sotomayor Learning Academies, a public high school complex in Los Angeles, was named after her.^[271]

In 2013, a painting featuring her, Sandra Day O'Connor, Ruth Bader Ginsburg, and Elena Kagan was unveiled at the Smithsonian's National Portrait Gallery in Washington, D.C.^[272] According to the Smithsonian at the time, the painting was on loan to the museum for three years.^[272]

In May 2015 she received the Katharine Hepburn medal from Bryn Mawr College.^[273] The Katharine Hepburn Medal recognizes women who change their worlds: those whose lives, work, and contributions embody the intelligence, drive, and independence of the four-time Oscar winner and her namesake mother, an early feminist activist.^[273]

2.9 Publications

Books

- *My Beloved World*. Alfred A. Knopf (2013) ISBN 0-307-59488-2.

Articles

- "Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights", 88 *Yale Law Journal* 825 (1979)^[105]
- "Returning Majesty to the Law and Politics: A Modern Approach" (with Nicole A. Gordon), 30 *Suffolk University Law Review* 35 (1996)^[105]
- “La Independencia Judicial: Que Necesitamos Para Conservarla” 60 *Revista Colegio de Abogados de Puerto Rico* 59 (1999)^[274]

Forewords

- “Foreword”, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* by Daniel Terris, Cesare P. R. Romano, and Leigh Swigart, University Press of New England (2007)^[274]

Speeches

- "A Latina Judge's Voice" (Judge Mario G. Olmos Memorial Lecture), in symposium “Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation”, *Berkeley La Raza Law Journal* (Spring 2002)^[129]
- “Tribute to John Sexton” 60 *NYU Annual Survey of American Law* 23 (2004)^[274]

2.10 See also

- Barack Obama Supreme Court candidates
- Bill Clinton judicial appointment controversies
- Demographics of the Supreme Court of the United States
- George W. Bush judicial appointment controversies
- List of Puerto Ricans
- List of Justices of the Supreme Court of the United States
- List of law clerks of the Supreme Court of the United States
- List of Roman Catholic United States Supreme Court justices
- List of U.S. Supreme Court Justices by time in office

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- [3] says she’s no Democrat, eager to show her independence on court
- [4] Goodstein, Laurie (May 30, 2009). “Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There”. *The New York Times*. Retrieved May 31, 2009.
- [5] Audio file of Sotomayor’s pronunciation of her name. For an English adaptation, see inogolo: pronunciation of Sonia Sotomayor.
- [6] Sotomayor has used Maria as a middle name in the past but seems to have discontinued its use. See Princeton yearbook image. In her 2009 questionnaire response to the Senate Judiciary Committee considering her nomination, she listed “Sonia Sotomayor” as her current name, and “Sonia Maria Sotomayor”, “Sonia Sotomayor de Noonan”, “Sonia Maria Sotomayor Noonan”, and “Sonia Noonan” as former names. See *United States Senate Committee on the Judiciary: Questionnaire for Judicial Nominees*, reprinted in proceedings of Senate Hearing no. 111-503, *Confirmation Hearing On The Nomination Of Hon. Sonia Sotomayor, To Be An Associate Justice Of The Supreme Court Of The United States*, p. 152. Retrieved February 13, 2012.
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- Sonia Sotomayor at Ballotpedia
- Sonia Sotomayor Photo Gallery from The White House website
- Associate Justice of the U.S. Supreme Court – Sonia Sotomayor – Questionnaire at the Wayback Machine (archived June 11, 2009) materials given to Senate Judiciary Committee
- CV from Pace University 2003 Commencement
- ABA Profile, National Hispanic Heritage Month 2000
- SCOTUSBlog: Judge Sotomayor’s Appellate Opinions in Civil Cases at the Wayback Machine (archived June 6, 2009)

Chapter 3

Elena Kagan

Elena Kagan (pronounced /'keɪgən/; born April 28, 1960)^[2] is an Associate Justice of the Supreme Court of the United States. Kagan is the Court's 112th justice and fourth female justice.

Kagan was born and raised in New York City. After attending Princeton, Oxford, and Harvard Law School, she completed federal Court of Appeals and Supreme Court clerkships. She began her career as a professor at the University of Chicago Law School, leaving to serve as Associate White House Counsel, and later as policy adviser, under President Clinton. After a nomination to the United States Court of Appeals for the D.C. Circuit, which expired without action, she became a professor at Harvard Law School and was later named its first female dean.

President Barack Obama appointed her Solicitor General on January 26, 2009. On May 10, 2010, Obama nominated her to the Supreme Court to fill the vacancy from the impending retirement of Justice John Paul Stevens, and she resigned her position as Solicitor General on May 17, 2010.^[3] After Senate confirmation, Kagan was sworn in on August 7, 2010, by Chief Justice John G. Roberts. Kagan's formal investiture ceremony before a special sitting of the United States Supreme Court took place on October 1, 2010.^[4]

3.1 Personal life and education

Kagan was born in New York City, the middle of three children, on the city's Upper West Side. Her father, Robert Kagan, was an attorney, and her mother, Gloria (Gittelman) Kagan, taught at Hunter College Elementary School.^{[5][6]} Kagan's two brothers are public school teachers.^[7]

Kagan and her family lived in a third-floor apartment at West End Avenue and 75th Street^[8] and attended Lincoln Square Synagogue.^[9] Kagan was independent and strong-willed in her youth and, according to a former law partner, clashed with her Orthodox rabbi over aspects of her bat mitzvah.^[8] "She had strong opinions about what a bat mitzvah should be like, which didn't parallel the wishes of the rabbi," said her former colleague. "But they fi-

nally worked it out. She negotiated with the rabbi and came to a conclusion that satisfied everybody." Kagan's rabbi, Shlomo Riskin, had never performed a ritual bat mitzvah before.^[9] "Elena Kagan felt very strongly that there should be ritual bat mitzvah in the synagogue, no less important than the ritual bar mitzvah. This was really the first formal bat mitzvah we had," said Riskin. Kagan asked to read from the Torah on a Saturday morning but ultimately read on a Friday night, May 18, 1973, from the Book of Ruth.^[9] Today, she identifies with Conservative Judaism.^[9]

Childhood friend Margaret Raymond recalled that Kagan was a teenage smoker but not a partier. On Saturday nights, she and Kagan "were more apt to sit on the steps of the Metropolitan Museum of Art and talk."^[8] Kagan also loved literature and re-read Jane Austen's *Pride and Prejudice* every year.^[8] In her Hunter College High School yearbook of 1977, Kagan was pictured in a judge's robe and holding a gavel.^[10] Next to her photo was a quote from former Supreme Court Justice Felix Frankfurter: "Government is itself an art, one of the subtlest of arts."^[11]

After graduating from high school, Kagan attended Princeton University, where she earned an A.B., *summa cum laude* in history in 1981. Among the subjects she studied was the socialist movement in New York City in the early 20th century. She wrote a senior thesis under historian Sean Wilentz titled "To the Final Conflict: Socialism in New York City, 1900–1933". In it she wrote, "Through its own internal feuding, then, the SP [Socialist Party] exhausted itself forever. The story is a sad but also a chastening one for those who, more than half a century after socialism's decline, still wish to change America."^[12] Wilentz insists that she did not mean to defend socialism, noting that she "Was interested in it. To study something is not to endorse it."^[13] Wilentz called Kagan "one of the foremost legal minds in the country, she is still the witty, engaging, down-to-earth person I proudly remember from her undergraduate days."^[14]

As an undergraduate, Kagan also served as editorial chair of *The Daily Princetonian*. Along with eight other students (including Eliot Spitzer, who was student body president at the time), Kagan penned the Declaration of the Campaign for a Democratic University, which called for

“a fundamental restructuring of university governance” and condemned Princeton’s administration for making decisions “behind closed doors”.^[15]



Kagan graduates from Harvard Law School in 1986.

In 1980, Kagan received Princeton’s Daniel M. Sachs Class of 1960 Graduating Scholarship,^[16] one of the highest general awards conferred by the university, which enabled her to study at Worcester College, Oxford. She earned a Master of Philosophy in Politics at Oxford in 1983.^[17] She received a Juris Doctor, *magna cum laude*, at Harvard Law School in 1986, where she was supervisory editor of the *Harvard Law Review*. Friend Jeffrey Toobin recalled that Kagan “stood out from the start as one with a formidable mind. She’s good with people. At the time, the law school was a politically charged and divided place. She navigated the factions with ease, and won the respect of everyone.”^[18]

Kagan is not married and has no children.^[19]

3.2 Early legal and academic career

Kagan was a law clerk for Judge Abner J. Mikva of the United States Court of Appeals for the District of Columbia Circuit in 1987 and for Justice Thurgood Marshall of the U.S. Supreme Court in 1988. Marshall nicknamed the 5 foot 3 inch Kagan “Shorty”.^[8] She later entered private practice as an associate at the Washington, D.C., law firm of Williams & Connolly.^[2]

Kagan joined the faculty of the University of Chicago Law School as an assistant professor in 1991 and became a tenured professor of law in 1995.^[20] While at the University of Chicago, she published a law review article on the regulation of First Amendment hate speech in the wake of the Supreme Court’s ruling in *R.A.V. v. City of St. Paul*;^[21] an article discussing the significance of governmental motive in regulating speech;^[22] and a review of a book by Stephen L. Carter discussing the judicial confirmation process.^[23] In the first article, which became highly influential, Kagan argued that the Supreme Court should examine governmental motives when deciding First Amendment cases,^[24] and analyzed historic

draft-card burning and flag burning cases in light of free speech arguments.^[25]

According to her colleagues, Kagan’s students complimented and admired her from the beginning, and she was granted tenure “despite the reservations of some colleagues who thought she had not published enough.”^[26]

3.3 White House and judicial nomination

Kagan served as Associate White House Counsel for United States President Bill Clinton from 1995–1996, beginning when her mentor Judge Mikva served as White House Counsel. From 1997–1999 she worked as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council. Kagan worked on topics like budget appropriations, campaign finance reform, and social welfare issues. Her work is cataloged in the Clinton Library.^[27] Kagan co-authored a 1997 memo urging Clinton to support a ban on late-term abortions: “We recommend that you endorse the Daschle amendment in order to sustain your credibility on HR 1122 and prevent Congress from overriding your veto.”^[28]

On June 17, 1999, Clinton nominated Kagan to the U.S. Court of Appeals for the District of Columbia Circuit, to replace James L. Buckley, who had taken senior status in 1996. The Senate Judiciary Committee’s Republican Chairman Orrin Hatch scheduled no hearing, effectively ending her nomination. When Clinton’s term ended, her nomination to the D.C. Circuit Court lapsed, as did the nomination of fellow Clinton nominee Allen Snyder.^[29]

3.4 Return to academia

After her service in the White House and her lapsed judicial nomination, Kagan returned to academia in 1999. She initially sought to return to the University of Chicago Law School; however, she had given up her tenured position during her extended stint in the Clinton Administration. Thus, she needed to be rehired and the school chose not to do so, reportedly because of doubts about her commitment to academia.^[30] Kagan quickly found a position as a visiting professor at Harvard Law School. While at Harvard, she authored a law review article on United States administrative law, including the role of aiding the President of the United States in formulating and influencing federal administrative and regulatory law, which was honored as the year’s top scholarly article by the American Bar Association’s Section on Administrative Law and Regulatory Practice, and is being developed into a book to be published by Harvard University Press.^[31]



Kagan as Dean of Harvard Law School

In 2001, she was named a full professor and in 2003 was named Dean of the Law School by Harvard University President Lawrence Summers.^[32] She succeeded Robert C. Clark, who had served as dean for over a decade. The focus of her tenure was on improving student satisfaction. Efforts included constructing new facilities and reforming the first-year curriculum as well as aesthetic changes and creature comforts, such as free morning coffee. She has been credited for employing a consensus-building leadership style, which surmounted the school's previous ideological discord.^{[33][34][35]}



Kagan's official portrait as Dean of Harvard Law School

In her capacity as dean, Kagan inherited a \$400 million capital campaign, "Setting the Standard", in 2003. It ended in 2008 with a record breaking \$476 million raised, 19% more than the original goal.^[36] Kagan made a number of prominent new hires, increasing the size of the faculty considerably. Her coups included hiring legal scholar Cass Sunstein away from the University of Chicago^[37] and Lawrence Lessig away from Stanford.^[38] She also broke a logjam on conservative hires by bringing in scholars such as Jack Goldsmith, who had been serving in the Bush administration.^[34]

According to Kevin Washburn, dean of the University of New Mexico School of Law, Kagan transformed Harvard Law School from a harsh environment for students to one that was much more student-centric.^[39]

During her deanship, Kagan upheld a decades-old policy barring military recruiters from the Office of Career Services because she felt that the military's "Don't Ask, Don't Tell" policy discriminated against gays and lesbians. According to Campus Progress,

As dean, Kagan supported a lawsuit intended to overturn the Solomon Amendment so military recruiters might be banned from the grounds of schools like Harvard. When a federal appeals court ruled The Pentagon could not withhold funds, she banned the military from Harvard's campus once again. The case was challenged in the Supreme Court, which ruled the military could indeed require schools to allow recruiters if they wanted to receive federal money. Kagan, though she allowed the military back, simultaneously urged students to demonstrate against Don't Ask, Don't Tell.^{[40][41]}

In October 2003, Kagan transmitted an e-mail to students and faculty deploring that military recruiters had shown up on campus in violation of the school's anti-discrimination policy. It read, "This action causes me deep distress. I abhor the military's discriminatory recruitment policy." She also wrote that it was "a profound wrong—a moral injustice of the first order."^[42]

From 2005 through 2008, Kagan was a member of the Research Advisory Council of the Goldman Sachs Global Markets Institute and received a \$10,000 stipend for her service in 2008.^[43]

By early 2007, Kagan was a finalist for the presidency of Harvard University as a whole after Lawrence Summers' resignation the previous year, but lost out to Drew Gilpin Faust. She was reportedly disappointed not to be chosen, and supportive law school students threw her a party to express their appreciation for her leadership.^[44]

3.5 Solicitor General

For the Senate's roll call vote on confirmation, see Elena Kagan Supreme Court nomination#Full Senate.

On January 5, 2009, President-elect Barack Obama announced he would nominate Kagan to be Solicitor General.^{[45][46]} Before this appointment she had never argued a case before any court.^[47] At least two previous solicitors general, Robert Bork and Kenneth Starr, also had no previous Supreme Court appearances, though Starr was a judge on the United States Court of Appeals for the

District of Columbia Circuit before becoming Solicitor General.^[48]

Kagan was confirmed by the U.S. Senate on March 19, 2009, by a vote of 61 to 31,^[49] becoming the first woman to hold the position. She made her first appearance before the Supreme Court on September 9, 2009, in *Citizens United v. Federal Election Commission*.^[50]

The First Amendment Center and the Cato Institute later expressed concern over arguments Kagan advanced as a part of her role as Solicitor General. For example, during her time as Solicitor General, Kagan prepared a brief defending a law later ruled unconstitutional that criminalized depictions of animal cruelty.^{[51][52]} During her confirmation hearing, she said that “there is no federal constitutional right to same-sex marriage.” Also during her confirmation hearing, she was asked about the Defense of Marriage Act, pursuant to which states were not required to recognize same-sex marriages originating in other states. Kagan indicated that she would defend the act “if there is any reasonable basis to do so”.^[53]

3.6 Supreme Court

3.6.1 Nomination



Obama nominates Kagan.

Main article: [Elena Kagan Supreme Court nomination](#)

Prior to the election of President Barack Obama, Kagan was the subject of media speculation regarding her potential to be nominated to the Supreme Court of the United States if a Democratic president were elected in 2008.^{[54][55][56][57][58]} This speculation increased after the retirement announcement of Associate Justice David H. Souter, effective at the start of the Court’s summer 2009 recess.^[59] Upon the death of Justice Antonin Scalia in 2016, CNN political commentator and former senior advisor to Obama David Axelrod reported that Scalia had personally recommended Kagan as an adequate replacement for Souter.^[60]

It was speculated that her position as Solicitor General would increase Kagan’s chances for nomination, since Solicitors General have been considered potential nominees

to the Supreme Court in the past. On May 13, 2009, the Associated Press reported that Obama was considering Kagan, among others, for possible appointment to the United States Supreme Court.^[61] On May 26, 2009, however, Obama announced that he was nominating Sonia Sotomayor to the post.^[62]



Kagan meets with Obama in the Oval Office, April 2010.

On April 9, 2010, Justice John Paul Stevens announced that he would retire at the start of the Court’s summer 2010 recess, triggering new speculation about Kagan’s potential nomination to the bench.^[63] In a *Fresh Dialogues* interview, Jeffrey Toobin, a Supreme Court analyst and Kagan’s friend and law school classmate,^[64] speculated that Kagan would likely be President Obama’s nominee, describing her as “very much an Obama type person, a moderate Democrat, a consensus builder.”^[65] This possibility alarmed many liberals and progressives, who worried that “replacing Stevens with Kagan risks moving the Court to the right, perhaps substantially to the right.”^[66]

While Kagan’s name was mentioned as a possible replacement for Justice Stevens, the *New York Times* noted that she “has supported assertions of executive power.”^[67] This view of vast executive power has caused some commentators to fear that she would reverse the majority in favor of protecting civil liberties on the Supreme Court were she to replace Stevens.^[68]

On May 10, 2010, Obama nominated Kagan to the Supreme Court to fill the vacancy left by Justice Stevens.^[69] The deans of over one-third of the country’s law schools, sixty-nine people in total, endorsed Kagan’s nomination in an open letter in early June. It lauded what it considered her coalition-building skills and “understanding of both doctrine and policy” as well as her written record of legal analysis.^[70]

The confirmation hearings began June 28. Kagan’s testimony and her answers to the Senate Judiciary Committee’s questions on July 20 were uneventful, containing no new revelations about her character or background. Arlen Specter of Pennsylvania cited an article Kagan had published in the *Chicago Law Review* in 1995, criticizing the evasiveness of Supreme Court nominees in their



Kagan, Obama, and Roberts before her investiture ceremony

hearings.^[71] Kagan, noted Specter, was now practicing that very evasiveness.^[72] On July 20, 2010, the Senate Judiciary Committee voted 13–6 to recommend Kagan’s confirmation to the full Senate. On August 5 the full Senate confirmed her nomination by a vote of 63–37.^[73] The voting was largely on party lines, with five Republicans (Richard Lugar, Judd Gregg, Lindsey Graham, Susan Collins, and Olympia Snowe) supporting her and one Democrat (Ben Nelson) opposing. The Senate’s two independents voted in favor of confirmation. She was sworn in by Chief Justice John Roberts on Saturday August 7, in a private ceremony.^{[4][74]}

Kagan is the first justice appointed without any prior experience as a judge since William Rehnquist in 1972.^{[75][76][77]} She is the fourth female justice in the Court’s history (and, for the first time, part of a Court with three female justices) and the eighth Jewish justice,^[78] making three of the eight current justices Jewish.

3.6.2 Tenure as Justice



Elena Kagan with Jeanne Shaheen

Kagan’s first opinion, *Ransom v. FIA Card Services*, was filed on January 11, 2011. In an 8–1 decision, Kagan found that an individual declaring bankruptcy could not count expenses for a car he had paid off in his “applicable monthly expenses”.^{[79][80]}

3.7 Recognition

In 2013, a painting featuring Kagan, Sonia Sotomayor, Ruth Bader Ginsburg, and Sandra Day O’Connor was unveiled at the Smithsonian National Portrait Gallery in Washington, D.C. According to the Smithsonian at the time, the painting was on loan to the museum for three years.^[81]

3.8 See also

- Barack Obama Supreme Court candidates
- Bill Clinton judicial appointment controversies
- Demographics of the Supreme Court of the United States
- List of law clerks of the Supreme Court of the United States

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3.10 External links

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- Elena Kagan at the *Biographical Directory of Federal Judges*, a public domain publication of the Federal Judicial Center.
- Elena Kagan at Ballotpedia
- Issue positions and quotes at OnTheIssues
- Elena Kagan Through the Years – slideshow by *ABC News*
- Appearances on C-SPAN

Chapter 4

Merrick Garland

Merrick Brian Garland (born November 13, 1952) is the chief judge of the United States Court of Appeals for the District of Columbia Circuit. He has served on that court since 1997.

A native of the Chicago area, Garland graduated *summa cum laude* as valedictorian from Harvard College and graduated *magna cum laude* from Harvard Law School. After serving as a law clerk to Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and Justice William J. Brennan, Jr. of the Supreme Court of the United States, he practiced corporate litigation at Arnold & Porter and worked as a federal prosecutor in the U.S. Department of Justice, where he played a leading role in the investigation and prosecution of the Oklahoma City bombers.

On March 16, 2016, President Barack Obama nominated Garland to serve as an Associate Justice of the Supreme Court, to fill the vacancy created by the death of Antonin Scalia.

4.1 Early life and family

Garland was born on November 13, 1952 in Chicago, Illinois.^[2] He was raised in the Chicago area,^[3] in the northern suburb of Lincolnwood.^[4]

Garland's mother Shirley (*née* Horwitz)^[5] was a director of volunteer services at Chicago's Council for Jewish Elderly; his father, Cyril Garland, headed Garland Advertising, a small business run out of the family's home.^{[3][6][7]} Born to a Jewish family, Garland was raised in Conservative Judaism.^[7] His grandparents left the Pale of Settlement in the early 20th century, fleeing antisemitism and seeking a better life for their children in the United States.^[7] Garland is a second cousin of Iowa Governor Terry Branstad.^[8]

4.2 Education and legal training

Garland attended Niles West High School in Skokie, Illinois, where he was president of the student council, acted in theatrical productions, and was a mem-

ber of the debate team.^[9] He graduated in 1970 as the class valedictorian.^{[3][4]} Garland was also a Presidential Scholar and a National Merit Scholar.^{[10][11]}

Garland attended Harvard College on a scholarship, graduating as valedictorian with an A.B. *summa cum laude* and Phi Beta Kappa in social studies in 1974.^{[3][12][13]} Garland allied himself with his future boss, Jamie Gorelick, when he was elected the only freshman on a campus wide committee.^[14] During his college summers Garland volunteered as Congressman Abner J. Mikva's speechwriter.^[14] After President Carter appointed Mikva to the D.C. Circuit, Mikva would rely on Garland when selecting clerks.^[15]

At Harvard, Garland wrote news articles and theater reviews for the *Harvard Crimson* and worked as a Quincy House tutor.^{[16][17]} Garland wrote his 235-page honors thesis on industrial mergers in Britain in the 1960s.^[14]

Garland then attended Harvard Law School, graduating with a J.D. *magna cum laude* in 1977.^[12] During law school, Garland was a member of the *Harvard Law Review*, serving as an articles editor from 1976 to 1977.^[13] As an articles editor, Garland assigned himself to edit a submission by Justice William J. Brennan, Jr.^{[15][14]} Garland ran for president of the *Review*, but lost to Susan Estrich.^[14]

Following graduation, Garland served as a law clerk for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit from 1977 to 1978, and then Justice Brennan of the U.S. Supreme Court from 1978 to 1979.^[13]

4.3 Department of Justice and private practice

Garland was special assistant to Attorney General Benjamin Civiletti from 1979 to 1981.^[3] After the Carter administration ended in 1981, Garland joined the law firm Arnold & Porter as an associate, and was a partner at the firm from 1985 to 1989.^{[3][18]} While at Arnold & Porter, the white shoe firm founded by Justice Abe Fortas, Garland mostly practiced corporate litigation.^[3] In *Motor Vehicles Manufacturers Ass'n v. State Farm Mu-*

tual Automobile Insurance Co. (1983) Garland acted as counsel to an insurance company suing to reinstate an unpopular automatic seat belt mandate.^[19] After winning the case in both the D.C. Circuit and the Supreme Court, Garland would write an eighty-seven page *Harvard Law Review* article urging courts to use a heightened “hard look” standard of review whenever an agency chooses deregulation.^[19] In 1985-86, while at Arnold & Porter, Garland was a lecturer in law at Harvard Law School, where he taught antitrust law.^{[13][20]} He has also published an article in the *Yale Law Journal* urging a broader application of antitrust immunity to state and local governments.^[21]

In 1989, desiring to return to public service and do more trial work, Garland became an Assistant U.S. Attorney in the U.S. Attorney’s Office for the District of Columbia. As a line prosecutor, Garland represented the government in criminal cases ranging from drug trafficking to complex public corruption matters.^[3] Garland was one of three principal prosecutors who handled the investigation into Washington, D.C. mayor Marion Barry’s possession of cocaine.^[22]

Garland then briefly returned to Arnold & Porter, working there from 1992 to 1993.^{[18][14]} In 1993, Garland joined the new Clinton administration as deputy assistant attorney general in the Criminal Division of the U.S. Department of Justice.^[3] The following year, then-Deputy Attorney General Jamie Gorelick—a key mentor of Garland’s^[23]—asked Garland to be her principal deputy.^[3]

In that role, Garland’s responsibilities included the supervision of high-profile domestic-terrorism cases, including the Oklahoma City bombing, Ted Kaczynski (also known as the “Unabomber”), and the Atlanta Olympics bombings.^{[3][24]}

Garland insisted on being sent to Oklahoma City in the aftermath of that attack to examine the crime scene and oversee the investigation in preparation for the prosecution.^[25] He represented the government at the preliminary hearings of the two main defendants, Timothy McVeigh and Terry Nichols.^[25] Garland offered to lead the trial team, but could not because he was needed at the Justice Department headquarters. Instead, he helped pick the team and supervised it from Washington, where he was involved in major decisions, including the choice to seek the death penalty for McVeigh and Nichols.^[25] Garland won praise for his work on the case from the Republican governor of Oklahoma, Frank Keating.^[3]

4.4 D.C. Circuit

4.4.1 Appointment

On September 6, 1995, President Bill Clinton nominated Garland to the D.C. Circuit seat vacated by his longtime mentor Abner J. Mikva.^[14] The American Bar Association (ABA) Standing Committee on the Federal Judiciary gave Garland a “unanimously well-qualified” committee rating, its highest.^[26]

On December 1, 1995, Garland received a hearing before the U.S. Senate Judiciary Committee.^[27] In Senate confirmation hearings Garland said that the Supreme Court justices whom he most admired were Justice Brennan, for whom he clerked, and Chief Justice John Marshall. Garland also expressed admiration for the writing style of Justice Oliver Wendell Holmes.^[28] Senate Republicans did not then schedule a vote on Garland’s confirmation,^[3] not because of concerns over Garland’s qualifications but because of a dispute over whether to fill the seat.^{[20][29]}

After winning the November 1996 presidential election, Clinton renominated Garland on January 7, 1997.^[30] Garland’s confirmation vote came to floor of the Republican controlled Senate on March 19, 1997. He was confirmed in a 76–23 vote and received his judicial commission the next day.^[31] The majority of Republican senators voted to confirm Garland, including Senators John McCain, Orrin Hatch, Susan Collins, and Jim Inhofe.^[32] Senators Mitch McConnell, Chuck Grassley, and Jeff Sessions were among those who voted against Garland.^[32] All of the 23 “no” votes came from Republicans, and all were based “on whether there was even a need for an eleventh seat” on the D.C. Circuit.^[33]

Garland became chief judge of the D.C. Circuit on February 12, 2013.^[34] As chief judge, Garland announced in May 2013 that the D.C. Circuit had unanimously decided to provide the public with same-day audio recordings of oral arguments in the court.^{[35][36]}

4.4.2 Notable cases

Garland is considered a judicial moderate and a centrist.^[37] Garland has been described by Nina Totenberg and Carrie Johnson of NPR as “a moderate liberal, with a definite pro-prosecution bent in criminal cases”.^[3] Tom Goldstein, the publisher of *SCOTUSblog*, wrote in 2010 that “Judge Garland’s record demonstrates that he is essentially the model, neutral judge. He is acknowledged by all to be brilliant. His opinions avoid unnecessary, sweeping pronouncements.”^[20] Garland has a reputation for collegiality, and his opinions rarely draw a dissent.^[38] Likewise, Garland has only written fifteen dissents in his two decades on the court.^[38] For comparison, Judge Brett Kavanaugh has written seventeen dissents in the past decade.^[38]

Administrative and environmental law

Garland has tended to favor deference to regulatory agencies.^[39] For example, in *In re Aiken County* (2013), Garland dissented from the D.C. Circuit's issuance of mandamus ordering the Nuclear Regulatory Commission to process the Yucca Mountain nuclear waste repository license.^[40] In *Americans for Safe Access v. Drug Enforcement Administration* (2013), Garland joined the majority in a 2-1 judgment upholding the DEA's classification of marijuana as a Schedule I drug.^[9] However, according to Goldstein, in a number of split decisions on environmental law Garland "favored contested EPA regulations and actions when challenged by industry, and in other cases he has accepted challenges brought by environmental groups."^[20] In *Rancho Viejo, LLC v. Norton* (2003), Garland found the arroyo toad was protected by the federal Endangered Species Act.^[41] Then-Circuit Judge John Roberts dissented from the denial of rehearing en banc, writing that Congress's interstate commerce power cannot reach "a hapless toad that, for reasons of its own, lives its entire life in California."^[42]

Criminal law and whistleblower protection

While on the bench, Garland has proven to be deferential to the government in criminal cases, siding with prosecutors in ten of the fourteen criminal cases in which he disagreed with a colleague. For example, in *United States v. Watson* (1999), Garland dissented from the court's conclusion that the prosecutor's closing argument was unduly prejudicial.^[43] In 2007, Garland dissented when the en banc D.C. Circuit reversed the conviction of a Washington, D.C. police officer who had accepted bribes in an FBI sting operation.^[44]

Garland has taken a broad view of whistleblower protection laws, such as the False Claims Act (FCA),^[45] which is an important anti-fraud statute used by the federal government.^[44] For example, in *United States ex rel. Yesudian v. Howard University* (1998), Garland wrote for the court in holding that the plaintiff, who claimed that he had been fired from Howard University because of whistleblowing, could pursue an FCA retaliation action against the university.^[20] In *United States ex rel. Totten v. Bombardier Corp.* (2004), Garland dissented from the court's holding that FCA liability required the false claim to be submitted directly to the government.^[45] The majority, in an opinion written by then-Judge John Roberts, held that the Amtrak was not the government and so the FCA did not apply, prompting a lengthy dissent by Garland.^[44] Roberts justified his narrow reading by citing a book by Circuit Judge Henry Friendly.^[46] In dissent, Garland (who like Roberts had clerked for Friendly), cited Friendly's book as supporting the use of legislative intent.^[44] Garland wrote that Roberts was relying on "'canons' of statutory construction, which serve here as 'cannons' of statutory destruction."^[47] Garland

stated that the court's ruling would impede the government's ability to pursue false claims cases against federal grantees.^[45] Garland's dissent, expressing concerns about FCA loopholes, is credited with sparking the enactment several years later of the Fraud Enforcement and Recovery Act of 2009 (FERA), which eliminated the loophole.^[45] During confirmation hearings the next year Senator Chuck Grassley would sharply question Roberts on why he hadn't adopted Garland's reading.^[44]

National security

During Garland's tenure, the D.C. Circuit has reviewed some cases involving legal issues arising from the Guantanamo Bay detention camp. In *al Odah v. United States* (2003), a panel that included Garland unanimously held that federal courts could not hear challenges from Guantanamo detainees.^[20] In *Parhat v. Gates* (2008), Garland wrote for a unanimous panel that overturned the Combatant Status Review Tribunal's determination that a captured Uyghur was an enemy combatant.^[48] In *Saleh v. Titan Corp.* (2009), Garland dissented from the court's holding that former Iraqi detainees at the infamous Abu Ghraib prison could not sue private military contractors who participated in torture and other illegal acts. Garland wrote that the suit should be allowed to proceed because "no act of Congress and no judicial precedent" immunized the contractors from tort liability, the Federal Tort Claims Act specifically excludes contractors, and tort liability would not interfere with government operations.^{[49][50][51]}

First Amendment

According to Goldstein, Garland has "tended to take a broader view" of First Amendment rights compared to other justices on the Court.^[20] In cases involving the Freedom of Information Act and similar provisions related to government transparency, "Judge Garland's rulings reflect a preference for open government."^[20] In *Lee v. Department of Justice* (2005), which arose from the Wen Ho Lee investigation, Garland dissented from the denial of rehearing in banc after the D.C. Circuit panel decision affirmed the district court's order holding reporters in contempt of court for refusing to testify about their anonymous sources.^{[51][52]} Garland wrote that the panel had erred in failing to "weigh the public interest in protecting the reporter's sources against the private interest in compelling disclosure" and that this "undermined the Founders' intention to protect the press 'so that it could bare the secrets of government and inform the people.'"^[52] In *Initiative & Referendum Institute v. U.S. Postal Service* (2005), Garland wrote for the court, holding that a U.S. Postal Service regulation banning signature-gathering for petitions at post offices violated the First Amendment.^{[20][52]} Garland found the regulation to be facially overbroad and not narrowly tailored.^[52]

In cases involving campaign finance reform laws, Garland has applied *Citizens United v. Federal Election Commission* when he believed that he was compelled to do so, but he has not sought to extend its holding.^[51] In *Wagner v. Federal Election Commission* (2015), Garland wrote for a unanimous court in upholding a prohibition on campaign contributions from federal contractors because of the governmental interest in preventing corruption.^{[51][53]} In *National Association of Manufacturers v. Taylor* (2009), Garland wrote for the court in a decision upholding the constitutionality of lobbyist disclosure requirements under the Honest Leadership and Open Government Act.^{[53][35]} Professor Rick Hasen, an election-law expert, writes that Garland's opinions on election law are characterized by careful application of precedent and indicate that Garland believes in reasonable regulation.^[53]

Garland has addressed a number of religious freedom cases while on the D.C. Circuit, although several of these have been decided on procedural grounds.^[54] In 2002, Garland joined a unanimous court in ruling for two federal prisoners who were denied the right to consume communion wine.^{[54][55]} In 2010, Garland wrote the decision for a unanimous court in favor an Interior Department employee who brought a religious-discrimination claim after the Interior Department refused to allow her to work weekdays rather than Sunday, when she wishes to attend church and Bible study.^{[54][56]}

Second Amendment

In 2007, Garland voted in favor of en banc review of the D.C. Circuit's panel decision in *Parker v. District of Columbia* invalidating the D.C. handgun ban, which the Supreme Court subsequently affirmed 5–4 in an opinion by Justice Scalia.^[20] Goldstein commented, “Garland did not take a formal position on the merits of the case” and “even if he had concluded that the statute was constitutional, that view of the case would have conformed” to widespread views under-then existing Supreme Court precedent.^[20] Trevor Burrus of the Cato Institute nonetheless wrote that libertarians and conservatives should be concerned about Garland's stance on gun rights.^[57]

Other cases

In *Alexander v. Daley* (2003), Garland joined a decision (authored by Judge Colleen Kollar-Kotelly), rejecting a challenge brought by District of Columbia residents seeking D.C. congressional voting rights.^{[58][22]}

In *Hutchins v. District of Columbia* (1999) (en banc), Garland agreed with four other D.C. Circuit judges that D.C.'s Juvenile Curfew Act of 1995 implicated at least some significant right of minors.^[59] He joined parts of a plurality opinion written by Judge Laurence Silber-

man that upheld the juvenile curfew under intermediate scrutiny and a vagueness challenge. Garland also joined the part of Judge Judith W. Rogers's opinion (concurring in part and dissenting in part) holding that a fundamental right to intrastate travel exists.^[60]

4.5 Supreme Court nomination

Garland was considered twice for the U.S. Supreme Court, in 2009 and in 2010, before being nominated by President Barack Obama in 2016.^[61]

4.5.1 2009 and 2010 considerations

In 2009, following the announcement by Justice David Souter that he would retire, Garland was considered as one of nine finalists for the post, which ultimately went to Sonia Sotomayor, then a judge of the Second Circuit.^[62]

After the April 2010 announcement by Justice John Paul Stevens that he would retire, Garland was again widely seen as a leading contender for a nomination to the Supreme Court of the United States.^{[63][64][65]} President Obama interviewed Garland, among others, for the vacancy.^[37] In May 2010, Senator Orrin G. Hatch, Republican of Utah, said he would help Obama if Garland was nominated, calling Garland “a consensus nominee” and predicting that Garland would win Senate confirmation with bipartisan support.^{[66][67]} Obama nominated Solicitor General of the United States Elena Kagan, who was confirmed in August 2010.^[37]

4.5.2 Scalia vacancy and 2016 nomination

Main article: Merrick Garland Supreme Court nomination

On February 13, 2016, Justice Antonin Scalia died.^[68] Later that day, Senate Republicans led by Majority Leader Mitch McConnell issued a statement that they would not consider any nominee put forth by Obama, and that a Supreme Court nomination should be left to the next President.^{[69][70][71]} President Obama responded that he intended to “fulfill my constitutional duty to appoint a judge to our highest court,”^{[72][73]} and that there was no “well established tradition” that a president could not fill a Supreme Court vacancy during the president's last year in office.^[74]

On March 4, *The New York Times* reported that Garland was being vetted by the Obama administration as a potential nominee. A week later, Garland was named as one of three judges on the President's “short list” (along with Judge Sri Srinivasan, also of the D.C. Circuit, and Judge Paul J. Watford of the Ninth Circuit). Obama interviewed all three leading contenders, as well as two others who were being considered: Judge Jane L. Kelly of the



Garland with Barack Obama at his Supreme Court nomination, 2016

Eighth Circuit and Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia.^[75]

On March 11, 2016, Senator Orrin Hatch, president pro tempore of the United States Senate and the most-senior Republican Senator, predicted that President Obama would “name someone the [liberal Democratic base] wants” even though he “could easily name Merrick Garland, who is a fine man.”^{[76][77]} Five days later, on March 16, Obama formally nominated Garland for Supreme Court Justice.^{[78][79]}

Garland has more federal judicial experience than any Supreme Court nominee in history,^[32] and is currently the oldest Supreme Court nominee since Lewis F. Powell, Jr. in 1971.^[80]

4.6 Memberships and committee service

Garland served as co-chair of the administrative law section of the District of Columbia Bar from 1991 to 1994.^{[13][81]}

Garland is a member of the American Law Institute.^[13]

In 2003, Garland was elected to the Harvard Board of Overseers, completing the unexpired term of Deval Patrick, who had stepped down from the board.^[82] Garland served as president of the overseers for 2009–10.^[83]

4.7 Personal life

Garland and his wife, Lynn, have been married since 1987. Lynn Garland’s grandfather, Samuel Irving Rosen-

man, was a justice of the New York Supreme Court (a trial-level court) and a special counsel to Presidents Franklin D. Roosevelt and Harry S. Truman.^[6] Garland and his wife have two daughters, Rebecca and Jessica; both are graduates of Yale University.^[84]

Garland is a resident of Bethesda, Maryland.^[85] Garland’s financial disclosures forms indicate that his net worth is between \$6 million and \$23 million.^[15] Garland is partially colorblind so he uses a list to match his suits and ties.^[15] In 2000 Garland performed the Nantucket marriage ceremony between his former top aide, Beth Wilkinson, and television journalist David Gregory.^[15]

4.8 Selected publications

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4.9 See also

- Barack Obama Supreme Court candidates
- List of law clerks of the Supreme Court of the United States
- List of nominations to the Supreme Court of the United States

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4.11 External links

- Appearances on C-SPAN
- *Meet Merrick Garland, President Obama’s Supreme Court Nominee*. The White House. March 16, 2016.

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