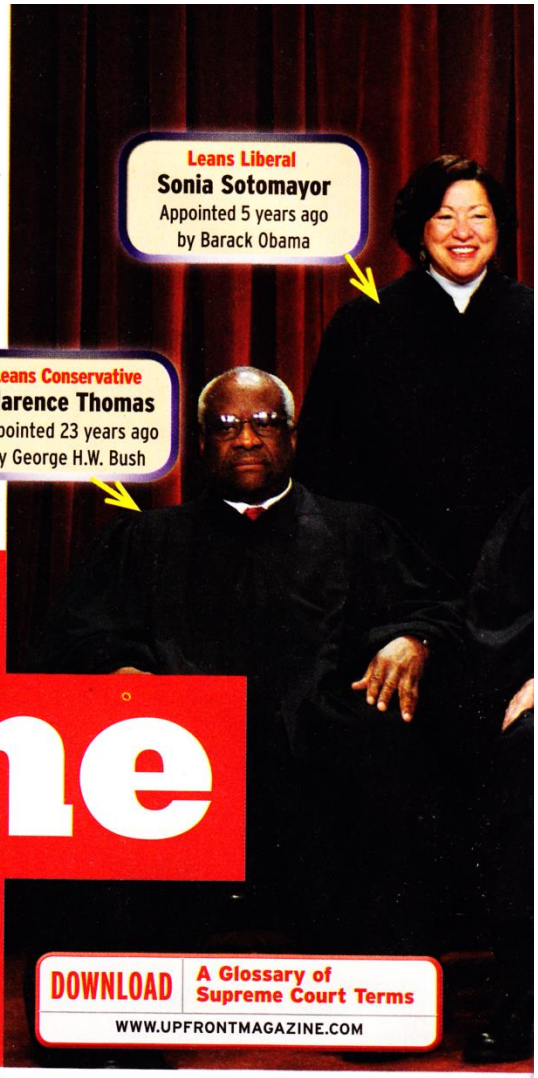
Kyle – U.S. History

5 THINGS YOU NEED TO KNOW ABOUT THE Supreme Court



DOWNLOAD A Glossary of Supreme Court Terms
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How does the nation's highest court really work? Here are the basics from former *New York Times* Supreme Court correspondent Linda Greenhouse.

PART 1 of 2

The Supreme Court is at the center of many of today's most important and controversial issues: health care, affirmative action, crime and punishment, campaign finance, same-sex marriage, and religion. In fact, Americans have often called on the Court to answer society's toughest questions.

Yet despite its critical role in our democracy, the Supreme Court remains a mystery to most people. In an era of nonstop streaming video and hundreds of cable TV channels, cameras are not allowed in the Court, so few people know what its proceedings look like. The nine justices rarely give interviews or explain their legal thinking other than in the lengthy opinions the Court issues.

But in some ways, the Supreme Court is actually the most transparent of the three branches of American government. While the justices deliberate in private, cases are argued in public and the justices place all their decisions on the record. They sign their opinions. Every piece of paper that arrives at the Court and every step in the procedural process is part of the public record and easily accessible on the Court's website, supremecourt.gov. Compare this to the White House or Congress, where it's often impossible to know who's behind a proposal and where entire agendas can disappear without a fingerprint.

What the Supreme Court needs is a bit of demystifying. Here and in the next issue of *Upfront*, we'll examine 5 questions that reveal the basics and the behind-the-scenes of how the Court works—and why it matters so much.

LOOK FOR PART 2

In the Feb. 3, 2014, issue of *Upfront*: Five more Q&As on the role of the chief justice, the confirmation process, diversity on the Court, and more.

TIM SLOAN/AFP/GETTY IMAGES

1 Why do justices get their jobs for life?

The Constitution says federal judges, including Supreme Court justices, serve during "good behavior." This has always been understood as a guarantee of life tenure, to protect them from fear of political reprisal for unpopular decisions.

Most other judges don't enjoy the same benefit. Only one state, Rhode Island, provides life tenure for its high-court judges. Among the world's emerging democracies, many of which have borrowed aspects of the American constitutional system, not one has adopted life tenure for its high court.

Life tenure for Supreme Court justices has come under fire—probably because justices are serving so much longer than they used to, often into advanced old age. Between 1789 and 1970, justices served an average of 15 years. Between 1970 and 2005, the average jumped to more than 26 years.

Of course, longevity isn't necessarily a problem. Justice John Paul Stevens, who retired in 2010 at the age of 91 after 34 years on the Court, was fully engaged in the Court's work until his retirement. But Justice William O. Douglas remained on the Court for nearly a year after suffering a serious stroke in 1974, finally retiring at his colleagues' urging.

One consequence of life tenure is unpredictability in the occurrence of vacancies. President Jimmy Carter had no Supreme Court vacancies to fill. President Richard Nixon had four in three years.

The randomness with which vacancies occur raises the stakes for each one, since no one knows when the next will come. The system also encourages justices to retire when a president from the political party they favor can name their successor.

"Justices have a conflicting set of obligations," says Geoffrey R. Stone, a law professor at the University of Chicago. "They have an obligation to serve their terms as long as they feel it's in the interest of the nation, and as long as they feel they can do the job well. But they have a conflicting desire, which is to perpetuate their view on the Court."

Longest Serving Justices

36 YEARS

William O. Douglas *(1939-75)*

34 YEARS

John Marshall *(1801-35)*

Joseph Story *(1812-45)*

Stephen J. Field *(1863-97)*

John Marshall Harlan *(1877-1911)*

Hugo L. Black *(1937-71)*

John Paul Stevens *(1975-2010)*

SOURCE: *THE SUPREME COURT: A VERY SHORT INTRODUCTION*, BY LINDA GREENHOUSE

2 How do cases get to the Supreme Court?

52%

PERCENTAGE of Americans who view the Supreme Court favorably, down from 72 percent in 2007.

SOURCE: PEW RESEARCH CENTER

You've probably heard or read about someone vowing to take a case "all the way to the Supreme Court." But the threat usually turns out to be an empty one. The justices accept only about 1 percent of the 8,000 or so cases that reach them each year. Last term, that amounted to 73 cases.

Why are they so selective? Because when the justices agree to hear a case, they're sending a signal that the question it raises is one that only the Supreme Court can resolve, often because the various federal courts around the country have issued conflicting rulings. They're also promising a substantial investment of their time.

The Court hears appeals from the 13 federal appeals courts, the high courts of all 50 states, and occasionally other courts like the military justice system's high court. It takes only four of the nine justices to place a case on the docket, but that typically doesn't happen unless the four are reasonably certain they can pick up a fifth vote to decide the case the way they think it should be decided.

How do the justices sort through the thousands of petitions for review that arrive at the rate of 150 a week? Law clerks. Each justice has four of them, usually graduates of top law schools in their mid-20s who spend a year helping the justices with their research and writing. Ultimately the justices themselves vote on which cases to accept, but the much-smaller pile they consider has been prescreened by their clerks, who work long hours when the Court is in session.

"The Court is pretty strict in determining which cases get in the door," says Kannon Shanmugam, who once clerked for Justice Antonin Scalia and now argues cases before the Court. "I think any experienced Supreme Court litigator can point to at least one case where the Court should have granted review but it didn't. But, by and large, the Court gets it right."

3 How do the justices decide cases?

A Supreme Court oral argument is a unique kind of theater. For high-profile cases, people line up for hours—sometimes overnight—to get one of the 200 seats set aside for the public in the surprisingly small courtroom in Washington, D.C.

Each argument lasts an hour—30 minutes for each side. Experienced lawyers know they'll be questioned closely and interrupted frequently. Justices often get so involved that they interrupt one another, and the lawyer has to struggle to get a word in edgewise. To argue a case successfully, a lawyer needs an intimate knowledge of the case and the relevant precedents—along with nerves of steel. Reading from a prepared text is frowned on.

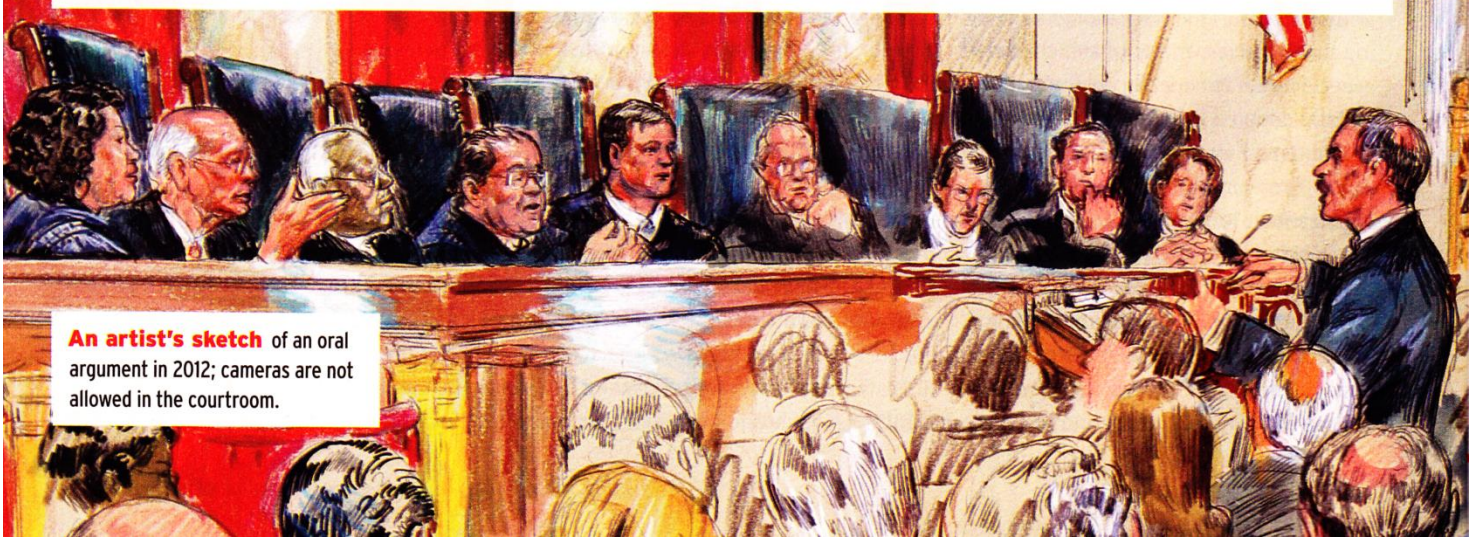
"It's nerve-racking the first time," says Neal Katyal, who has argued 19 cases before the Court. "You're about eight feet from the chief justice. If you miss a spot shaving, he sees it. More to the point, if you sweat, he sees it."

Within days of the oral argument, the justices meet in private to discuss the case and take a straw vote. If the chief justice is in the majority of this nonbinding vote, he decides who will write the opinion. But if he isn't in the majority, then the senior justice (by length of service) in the majority makes the assignment.

Writing an opinion usually begins with the law clerks, who prepare an initial draft, incorporating their own research and the points that the justice wants to make. When the justice has edited and approved the draft, it's sent to the eight other justices. They might sign onto the opinion immediately, or they could request changes—minor or major—as the price of agreement.

The same process plays out with the dissenting opinion. Perhaps the dissenting opinion will be so persuasive that one of the majority justices will switch sides and the outcome will change. Or a dissenter might come over to the majority.

This internal process can take anywhere from six weeks to more than six months before a final decision is issued.



An artist's sketch of an oral argument in 2012; cameras are not allowed in the courtroom.

4 Why are so many decisions 5 to 4?

By historical measures, the current Supreme Court is unusually polarized. There are four conservative justices: Chief Justice John G. Roberts Jr., and Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr. There are four liberal justices: Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan. In the middle is the so-called "swing justice," Anthony M. Kennedy, whose vote often decides which side wins.

As recently as the 1980s, there were three or four justices in the middle, meaning that outcomes were less predictable and lawyers needed to craft arguments designed to persuade a broad middle, not just one justice.

Now, as longtime Court observer Tom Goldstein puts it, "It's Justice Kennedy's world, and we're just living in it."

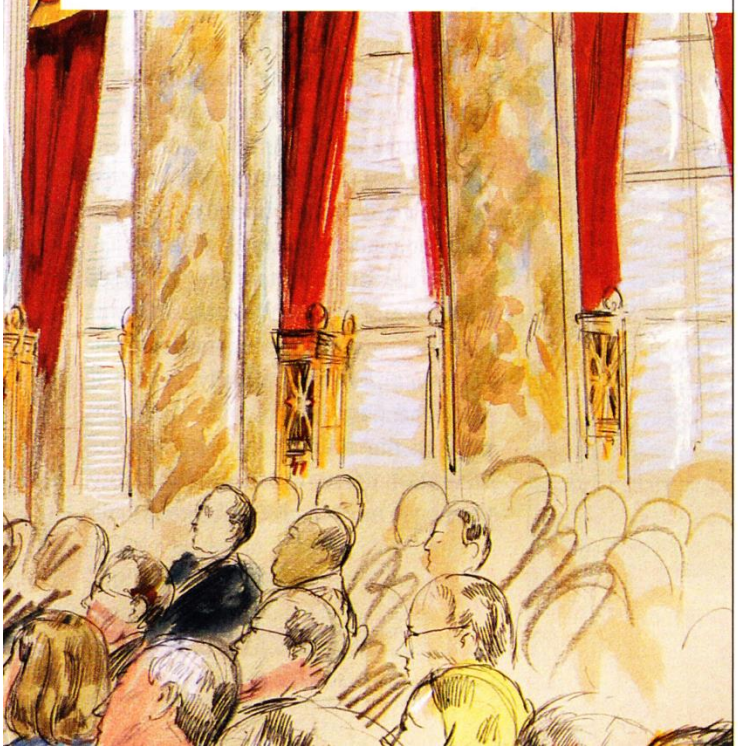
Last term, Justice Kennedy's vote was critical in three high-profile 5-to-4 rulings that involved issues on which Americans are deeply divided: The Court rejected a challenge to the federal government's national security wiretapping program, invalidated a key provision of the Voting Rights Act, and struck down the Defense of Marriage Act, which had prohibited the federal government from giving same-sex married couples the same benefits as any married couple.

While these kinds of controversial cases get all the attention, it's important to keep in mind that the Court actually decides almost half its cases unanimously—44 percent last year, compared with 31 percent of cases decided by 5-to-4 votes.

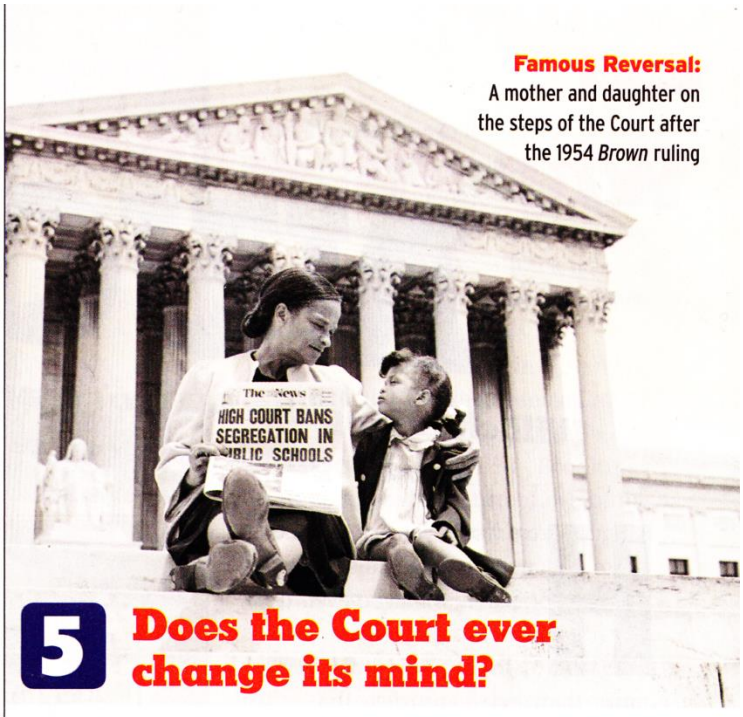
6

ORIGINAL NUMBER of Supreme Court justices. Congress raised the number to nine in 1869.

SOURCE: U.S. SUPREME COURT



DANA VERKOUTEREN/AP PHOTO (ILLUSTRATION); BETTMANN/CORBIS (RIGHT)



Famous Reversal: A mother and daughter on the steps of the Court after the 1954 *Brown* ruling

5 Does the Court ever change its mind?

The American legal system (like the British system it's based on) is built on the concept of precedent. Judges decide new cases by the principles established in earlier ones. The Latin phrase for this is *stare decisis* ("to stand by what has been decided"). But there are times when a precedent no longer seems worth preserving—perhaps because it's out of step with current ideas of justice.

The 1954 decision *Brown* v. *Board of Education* is probably the most famous of all reversals. The Court unanimously overturned a decision from 1896, *Plessy* v. *Ferguson*, that permitted government-imposed racial segregation as long as the facilities offered to blacks and whites were equal. This "separate but equal" doctrine had provided the constitutional underpinning for racial segregation in the Jim Crow South.

This reversal happened gradually. Changes in American society following World War II paved the way, including the integration of the military in 1948. In the courts, civil rights lawyer Thurgood Marshall, who later became the first black justice, conducted a strategic litigation campaign designed to undermine the foundations of "separate but equal." Aware that integrating public schools would spark huge resistance, Marshall started with law schools, winning a ruling from the Supreme Court in 1950 that the University of Texas couldn't exclude a black applicant.

By the time the Court ruled four years later that public school segregation was also unconstitutional, any other decision was unthinkable. Chief Justice Earl Warren worked behind the scenes to ensure a unanimous *Brown* decision, which was seen as an important signal to the nation that times had changed.

"I held off a vote from conference to conference while we discussed it," Warren later recalled. "*Brown* was argued in the fall of 1953, and I did not call for a vote until the middle of the following February, when I was certain it would be unanimous. We took one vote and that was it." •

Additional reporting by Sheryl Gay Stolberg of The New York Times and by Patricia Smith.

NATIONAL

5

MORE THINGS YOU NEED TO KNOW ABOUT

The Supreme Court

PART 2 of 2

How does the nation's highest court really work? Here are more of the basics from former *New York Times* Supreme Court correspondent Linda Greenhouse.

See Question 2

Protesters for and against Obamacare outside the Court in 2012; the justices later ruled the law constitutional.

1 Does public opinion influence the Court?

As the late Chief Justice William Rehnquist once said, it would be remarkable if judges were *not* influenced by public opinion. They live in the world, they go home to their families, they watch television, read newspapers, and many surf the Web.

The idea that the Supreme Court "follows the election returns"—that its decisions tend to move in line with popular sentiment—is true in the sense that presidents, who are elected, are likely to make at least one Supreme Court appointment. If Barack Obama had lost the 2008 presidential election to John McCain, it's a safe bet that the liberal-leaning justices, Sonia Sotomayor and Elena Kagan, would not have been appointed to fill the two most recent vacancies. A Republican president would likely have appointed conservative-leaning justices, which would have sharply shifted the Court to the right.

But does public opinion on specific issues influence the Court? Consider race. There's no doubt that the growing sense in much of the country in 1954 that segregation was fundamentally wrong paved the way for the Court's 9-to-0 ruling in *Brown* v. *Board of Education*, which barred segregation in public schools. The social revolution of the 1960s and the widespread entry of women into the workplace certainly played a role in the Court's decisions, beginning in the early 1970s, prohibiting discrimination against women. The Defense of Marriage Act, passed by Congress in 1996, barred same-sex couples married under state law from receiving the same federal benefits heterosexual couples get. It's quite possible the Court wouldn't have struck down the law last year if a dozen states hadn't already legalized same-sex marriage by the time the justices ruled.

As former Justice Benjamin N. Cardozo observed in the 1920s, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

2 Has the presence of women and minorities changed the Court?

The Old Days: In 1965, the Warren Court was all white men.

Until Thurgood Marshall, who was black, was sworn in as the 96th justice in 1967, only white men had sat on the Supreme Court. With a few exceptions, the justices were all Protestants. In the 47 years since, things have changed dramatically.

The Court today consists of one African-American (Clarence Thomas); one Hispanic (Sotomayor); six Catholics (John G. Roberts Jr., Anthony M. Kennedy, Antonin Scalia, Samuel Alito, Thomas, and Sotomayor); three Jews (Ruth Bader Ginsburg, Stephen G. Breyer, and Kagan); and three women (Ginsburg, Sotomayor, and Kagan).

The look of the Court has certainly changed, but a justice's race or gender doesn't necessarily predict his or her legal reasoning. Justices Thomas and Marshall, though both black, could not be more different in their outlook, including on issues related to race. Justice Marshall was a strong defender of affirmative action, while Justice Thomas believes that such programs stigmatize minority students and hurt their chances for success. The first woman to serve on the Court, Sandra Day O'Connor, named by President Ronald Reagan in 1981, was a moderate Republican who was more conservative than the second woman, Justice Ginsburg. But during the decade the two served together, they found common ground in decisions that advanced women's rights.

Whether or not it changes the Court's rulings, some argue that the greater diversity on the Court today does have an impact beyond the courtroom.

"When a nine-person institution looks a little more like the country, it has greater credibility," Justice Kagan said a few months ago. "People can identify with it a little bit better, and those things are important."

51%

PERCENTAGE of all justices since 1789 who've attended an Ivy League school.

SOURCE: *THE NEW YORK TIMES*

PAGE 12: NICK ANDERSON/WASHINGTON POST WRITERS GROUP/CARTOONIST GROUP; PAGE 13 CLOCKWISE FROM TOP LEFT: CHRIS MADDALONI/CQ-ROLL CALL GROUP/GETTY IMAGES; MLADEN ANTONOV/AFP/GETTY IMAGES; BETTMANN/CORBIS

3 What's the role of the chief justice?

The Constitution says almost nothing about the office of chief justice. In fact, we know only by inference that the Framers meant to create the position. Article I says that the chief justice presides over any presidential impeachment trial in the Senate. There have been only two such trials in American history (of Andrew Johnson in 1868 and Bill Clinton in 1999), so that responsibility doesn't account for much of a chief justice's time.

But the chief still has plenty to do. Of course, in terms of the Court's most important work—deciding cases—he's only one of nine votes.

"His judgment has no more weight, and his vote no more importance, than those of any of his brethren," wrote Chief Justice Salmon P. Chase in 1868.

In other ways, however, he (all 17 chief justices have been men) is a powerful figure. He decides who writes the majority opinion in cases in which he's in the majority. He runs the meetings at which the justices discuss cases. And he selects federal judges to serve on the Foreign Intelligence Surveillance Court, a special court that meets in secret to evaluate government requests for foreign wiretaps. (This is the court that approved the phone and Web surveillance that former National Security Agency contractor Edward Snowden leaked to the press last year.)

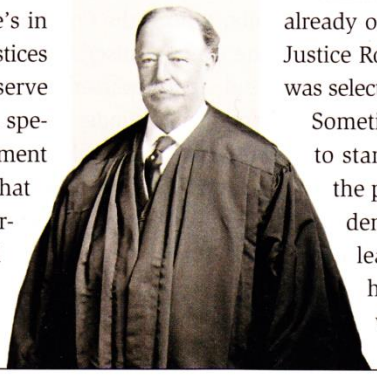
The Constitution says nothing about how the chief justice is appointed, but when President George Washington appointed the first justices, he specifically named John Jay as chief justice, establishing the precedent of separate nomination to the post. A nominee for chief justice can be someone who's already on the Court or an outsider, such as Chief Justice Roberts, who was a federal judge when he was selected by President George W. Bush in 2005.

Sometimes the name of a powerful chief comes to stand for the Court's distinctive role during the period. The "Warren Court," for example, denotes not only Chief Justice Earl Warren's leadership from 1953 to 1969, but also the huge expansion of individual rights over which he presided.

Chief Justice Roberts swears in President Obama for his second term in 2013.

William Howard Taft

President from 1909 to 1913, Taft later served as chief justice from 1921 to 1930. He is the only person to have held both positions.



4 Why are the justices so camera shy?

"The day you see a camera come into our courtroom, it's going to roll over my dead body," retired Justice David H. Souter once declared. Many countries, including England and Canada, and many states allow their high court proceedings to be televised. While audio and transcripts of Supreme Court arguments are available online, the justices have resisted TV and video.

The usual explanation is some variation of "if it ain't broke, don't fix it." And it's not hard to understand the justices' concern that selective video clips from a lively oral argument could make the Court look more like a squabbling debate club than a serious institution conducting the nation's most important business.

Justice Breyer has said that televised arguments could mislead the public. It might appear that oral arguments are the most important part of the process of deciding a case; in reality, most of the work takes place behind the scenes as drafts of opinions are circulated among the justices over a period of months *(see Part I of this article)*.

Breyer has a point, but there would be a vast audience for televised oral arguments in important cases. People would get to see the Court in action and would, for the most part, come away impressed by the unscripted exchanges between the justices and the lawyers for both sides.

One thing is certain: The lack of TV coverage lets the justices retain a degree of privacy almost unthinkable for such powerful figures. Few people recognize them. A tourist once handed a camera to former Justice Byron R. White outside the Court's public cafeteria. He had no idea that the tall gray-haired man was one of the justices, and asked him to take his family's picture. White, who retired in 1993, wordlessly complied.

Elena Kagan at her Senate confirmation hearings in 2010

PAGE 14-15 CLOCKWISE FROM LEFT: THE GRANGER COLLECTION, NEW YORK (TAFT); CHRISTY BOWE/IMAGECATCHER NEWS/CORBIS; WIN MCNAMEE/GETTY IMAGES; SHUTTERSTOCK

5 What's gone wrong with the confirmation process?

In 1975, the Senate unanimously confirmed Supreme Court nominee John Paul Stevens by a vote of 98 to 0—after just five minutes of polite discussion.

Today, the hearings have become big political spectacles geared to the TV audience. They're broadcast live and last for days as senators prod nominees to discuss specific cases and their judicial philosophies. But the nominees have learned that they gain little—and risk a lot—by saying much of anything.

Hearings have become big political spectacles geared to TV.

Confirmation hearings have "never been terribly illuminating, but these days the job of the nominee is to make sure he or she says nothing that the opposition can latch onto," says Lucas Powe, a law professor at the University of Texas.

Many people attribute the change to the nomination of Robert H. Bork by President Reagan in 1987. Bork was a well-known conservative judge with a long "paper trail"—writings and speeches in which he criticized many landmarks of modern constitutional law. He gave extensive answers to questions about his judicial beliefs, which made it clear he would have shifted the Court to the right. Democrats, who controlled the Senate, were determined to defeat him, and the nomination failed. Reagan later nominated the more moderate Anthony Kennedy, who today is considered the Court's swing vote.

A Supreme Court confirmation hearing is politics at its worst. The stakes are very high, especially if the nomination can shift the Court's ideological balance. The hearings are essentially billboards onto which politicians try to project their own agendas. Senators hostile to the president try to catch the nominee in an inconsistency or slip-up of some kind. Even friendly senators take the opportunity to lecture the nominee on what they think the Court should be doing.

"Their whole purpose is to get some television time for senators," says Powe. "We'd be better off if there were no hearing and they just voted." •

Additional reporting by Patricia Smith.