NATIONAL

5 THINGS YOU NEED TO KNOW ABOUT THE Supreme Court

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 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.

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.

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

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."

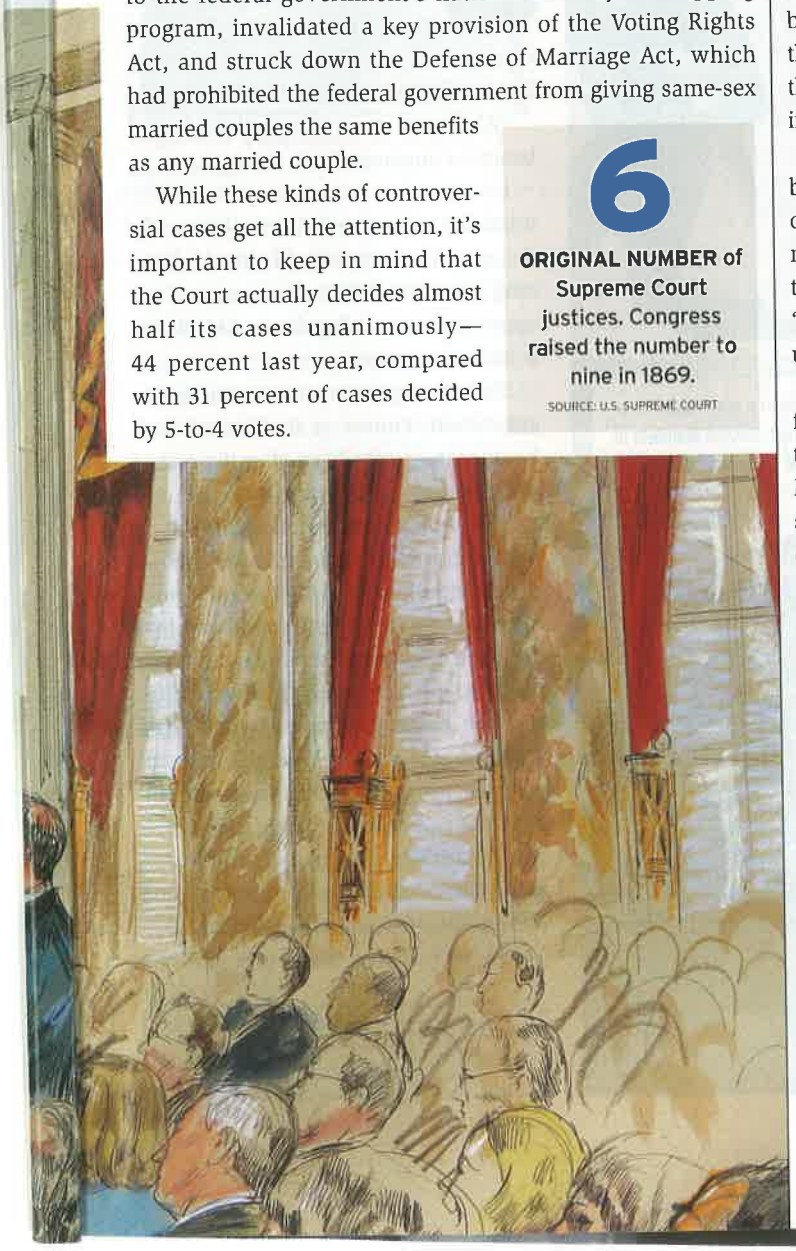
Last term, Justice Kennedy's vote was critical in three high-profile 5-to-4 rulings that involved issues on which Americans are deeply divided: The Court rejected a challenge to the federal government's national security wiretapping program, invalidated a key provision of the Voting Rights Act, and struck 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.

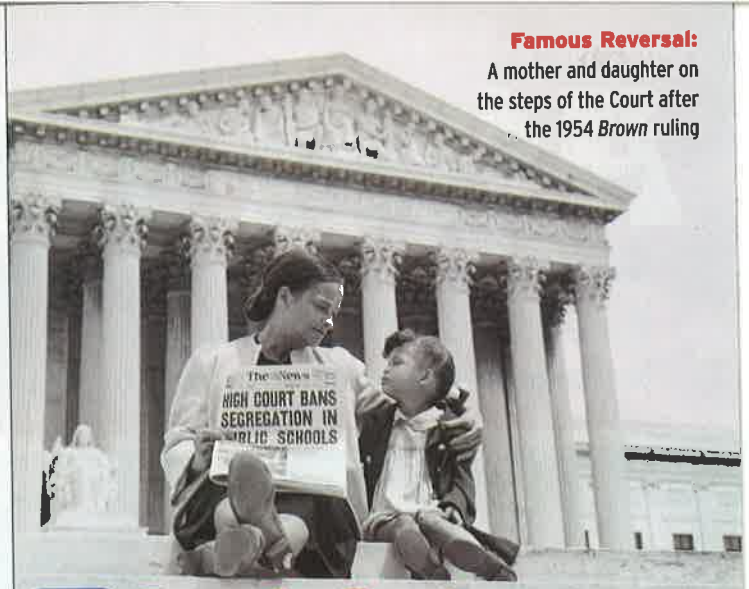
6

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.