In 1981, Sandra Day O’Connor became the first female justice on the United States Supreme Court after centuries of male appointments, a watershed moment in the long struggle for gender equality. Yet few know about the remarkable women considered in the decades before her triumph. Shortlisted tells the overlooked stories of nine extraordinary women—a cohort large enough to seat the entire Supreme Court—who appeared on presidential lists dating back to the 1930s. Florence Allen, the first female judge on the highest court in Ohio, was named repeatedly in those early years. Eight more followed, including Amalya Kearse, a federal appellate judge who was the first African American woman viewed as a potential Supreme Court nominee. Award-winning scholars Renee Knake Jefferson and Hannah Brenner Johnson cleverly weave together long-forgotten materials from presidential libraries and private archives to reveal the professional and personal lives of these accomplished women.

In addition to filling a notable historical gap, the book exposes the harms of shortlisting—it reveals how adding qualified female candidates to a list but passing over them ultimately creates the appearance of diversity while preserving the status quo. This phenomenon often occurs with any pursuit of professional advancement, whether the judge in the courtroom, the CEO in the corner office, or the coach on the playing field. Women, and especially female minorities, while as qualified as others on the shortlist (if not more so), find themselves far less likely to be chosen. With the stories of these nine exemplary women as a framework, Shortlisted offers all women a valuable set of strategies for upending the injustices that still endure. It is a must-read for those seeking positions of power as well as for the powerful who select them in the legal profession and beyond.
PRAISE FOR SHORTLISTED

“This fascinating book reconstructs a chapter of women’s history that has been hiding in plain sight: the numerous qualified women whose names were floated for the Supreme Court but who never got there. Just as they were overlooked, so have their individual stories been—until now.”

—Linda Greenhouse, New York Times contributing columnist

“[Shortlisted] tells the political and personal sagas of women publicly considered for appointment to the Supreme Court but never actually nominated by a president... With fresh research, the authors effectively humanize the women who never received the nominations they deserved.”

—Kirkus Reviews

“Stunningly original in its focus and its careful research, Shortlisted is beautifully written and an important addition to the literature about the Supreme Court, the process of nominating justices, and the role of gender in American law.”

—Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law

“Shortlisted is remarkable not only for what it tells us about the women who made the presidential shortlists of potential Supreme Court nominees but for what it tells us about how our nation then and now continues to struggle with understanding equality. May the stories of these extraordinary women and the demonstrated leadership of the women who have made it to the pinnacle of the legal profession through service on our highest court drive us each to realize the great potential of our country that still awaits us.”

—Judy Perry Martinez, American Bar Association President

“This is a major contribution to the story of women lawyers.”

—The Honorable Nancy Gertner, United States District Court Judge (Ret.) and Senior Lecturer, Harvard Law School
“Utilizing meticulous empirical research, *Shortlisted* masterfully tells the story of the women who were considered for nomination to the U.S. Supreme Court. Through the stories of these women *Shortlisted* teaches us about the evolution of gender subordination, including what it looks like today and what we can do to combat it. It is a must read for all who are interested in anti-subordination and gender equality.”

— Carla Pratt, Dean of Washburn University School of Law and former Associate Justice for the Supreme Court of the Standing Rock Sioux Tribe, North Dakota

“Piecing together their personal papers and archives, as well as relevant news coverage, [the authors] introduce readers to the ambitious women who built influential legal careers and advanced a female presence in the federal courts, especially the Supreme Court... The authors compellingly argue that representation of diverse women in leadership positions is in everybody’s best interest. An excellent contribution... and essential for anyone who values diversity.”

— Library Journal

“Legal scholarship that creates new avenues of inquiry is inherently appealing, but when it also reveals obscured narratives of power in American society, you have the makings of a truly important contribution. *Shortlisted* ... is all that and an engaging read besides. … While the bulk of the women shortlisted for the high court are white, [the authors] are aware of pitfalls of colorblind feminism, and they highlight the intersectionality barriers that women of color face in gaining status commensurate to their experience and talents. … [T]he book has ignited a brain buzz that is still simmering.”

— Melissa Mortazavi, Professor of Law, University of Oklahoma, Jotwell Review

“*Shortlisted* is fresh, timely, and written in a way readers will love. It’s a great book.”

— Corinna Lain, Professor of Law, University of Richmond
Introduction — 2
Part 1 — 3
Chapter 1 — 4
Chapter 2 — 5
Chapter 3 — 6
Chapter 4 — 7
Part 2 — 8
Chapter 5 — 9
Chapter 6 — 10
Chapter 7 — 11
Chapter 8 — 12
Conclusion — 13
About the Authors — 14
Interview with the Authors — 15
Teaching Slides — 24
INTRODUCTION

The introduction to the book begins by telling a story about Mildred Lillie, a California judge who was shortlisted by President Nixon but never nominated to the Supreme Court. The chapter illustrates through statistics and examples the pervasive gender inequality and dearth of women in leadership roles that characterize the legal profession. This chapter also explains the research methodology for selecting the cohort of shortlisted women featured in the book, and provides a general overview of the chapters that follow.
PART ONE

The Shortlisted Sisters: An Untold “Her”story of the Supreme Court

This section introduces part one of the book, in which the authors tell a new Supreme Court history—“her”story—to include the important, and overlooked, narratives of the women who were shortlisted but not selected for the Court. It situates these stories in the historical context of feminism, women’s rights, and the suffrage movement, telling the stories of bathing beauties, lesbians, mistresses, and more who repeatedly went from shortlisted to selected for positions of power as lawyers before being considered to fill the ultimate role of Supreme Court justice. The legacy of these women offers many lessons for modern feminism and the future of women’s rights movements.
CHAPTER ONE

The First Shortlisted Woman

Florence Allen was the first woman ever considered for a seat on the U.S. Supreme Court. She accomplished many historical firsts during her lifetime: she was a legal aid attorney, prosecutor, common pleas judge, state supreme court justice, suffragette, author, and speaker. All of this occurred before she was appointed to the U.S. Court of Appeals for the Sixth Circuit, eventually becoming its chief judge. This chapter explores both the historical context in which she was officially considered by multiple presidents (Hoover, FDR, and Truman) and the support she received from those outside the oval office. It also delves into Allen’s personal background and traces her professional accomplishments through her lifetime.

DISCUSSION QUESTIONS

1. What would have been the impact of Allen’s appointment to the Supreme Court as early as the 1930s on judicial decision-making and the path for women in professional and leadership roles?

2. What were Justice Black’s holdings in Korematsu v. United States and Griswold v. Connecticut? How might have these been similarly or differently authored by Allen, had she been appointed instead of Justice Black?

3. How did gendered traditions impact the lack of women appointed to the Supreme Court and other high judicial and political positions?

4. Consider the traditional gender roles of the 1930s to 1950s. Why were many successful career women considered “asexual” or “genderless” during this period? Did this benefit or impede women?
CHAPTER TWO

The Shortlists before the First Nominee

Three decades passed before another woman would be considered for a vacancy on the Supreme Court after Florence Allen. This chapter explores the shortlisting experiences of five women: Soia Mentschikoff, Sylvia Bacon, Mildred Lillie, Carla Hills, and Cornelia Kennedy. Soia Mentschikoff finally made the list in the John F. Kennedy administration in 1962 and again later that same year for a vacancy that arose under Lyndon B. Johnson’s presidency. This began a new pattern of presidents regularly considering women, though it would be another two decades before a woman would go from shortlisted to selected. This chapter considers the shortlisting processes and presidential histories of Presidents Kennedy, Johnson, Nixon, and Ford, which are as compelling as the stories of the shortlisted sisters. All of these presidents faced substantial pressure on multiple fronts to place a woman on the Court, but these five women never moved off of their shortlists. This chapter further explores the personal and professional paths of these five women. Like Allen before them, this cohort of shortlisted sisters possessed impeccable professional credentials that situated them as fierce contenders for the Court. But for their gender, these women would easily have moved from shortlisted to selected.

DISCUSSION QUESTIONS

1. What role, if any, did political affiliations play in women being contemplated for a Supreme Court nomination?

2. Many presidents faced substantial pressure on multiple fronts to place a woman on the Court. What are some actions that are, or could be, taken today to encourage more diversity on the Court and in other leadership positions?

3. What are some commonalities among the women who were shortlisted between Allen and O’Connor?

4. How did gender affect the leadership opportunities—apart from the Supreme Court nominations—of these shortlisted sisters? How were their experiences different from their male counterparts?
CHAPTER THREE

From Shortlisted to Selected

When Justice Stewart publicly resigned in June 1981, Cornelia Kennedy’s name appeared on the shortlist for the Supreme Court, along with four other women: Sandra Day O’Connor, Amalya Lyle Kearse, Joan Dempsey Klein, and Susie M. Sharp. They formed the largest group of women considered simultaneously for a seat on the Court. This chapter traces President Reagan’s efforts to shortlist and finally select the first woman to serve on the Court, and also considers the professional and personal backgrounds of all the women shortlisted contemporaneously with O’Connor. This chapter also explores O’Connor’s nomination and the many considerations that went into her appointment over that of Kennedy. Many of these women had similar experiences, both positive and negative, including providing mentorship to other women lawyers and self-shortlisting.

DISCUSSION QUESTIONS

1. Amalya Kearse “self-shortlisted” herself regarding an opportunity for a district court clerkship. What is self-shortlisting, and what are some examples of it? Is this a common phenomenon? Do we see any of the other shortlisted sisters self-shortlisting to some degree?

2. How did these shortlisted sisters’ color, age, and political leanings further affect the decision to appoint these women?

3. In what ways did these women pave the way for their successors? Were each of them an activist in some way?

4. Justice Sandra Day O’Connor was arguably a token female appointment for the Reagan administration. How do her qualifications and the gender inconsistency in the evaluations of qualifications play into this?
CHAPTER FOUR

The Shortlists following O’Connor: A Long Way from Nine

O’Connor’s ascendancy to the Court marked the end of decades of women who were passed over, discounted, and never nominated. But the story does not end with the achievement of this “first.” Her nomination, to the contrary, marked the beginning of a new chapter in a decades-old saga that continues to unfold today. This chapter examines the backgrounds of the women who appeared on President Reagan’s subsequent shortlists after the nomination of O’Connor, and the women who, like O’Connor, eventually made it off the lists and onto the Court during future presidential administrations. The women featured in this chapter include Cynthia Holcomb Hall, Edith Jones, Pamela Rymer, Ruth Bader Ginsberg, Harriet Miers, Sonia Sotomayor, and Elena Kagan.

DISCUSSION QUESTIONS

1. Can the American public have confidence that the Federal judiciary represents them? How do gender and diversity play into this?

2. What perceived benefit did President Reagan receive by filling the Supreme Court and other federal judiciaries with white men? Could any of these benefits have been met by a more diverse hiring pattern?

3. Would those who appear on the shortlist differ if the shortlisting process were more public? What if the “networks of private relationships” needed to be disclosed?

4. How does the term “motherhood” affect women differently than the term “fatherhood” for men when referring to those on the Supreme Court?
PART TWO

Their Stories Are Our Stories: Transcending Shortlists

This section introduces the second part of the book, which shifts away from the historical narrative about how the women found their ways onto presidential shortlists. It explains how the chapters in part two change course to explore the women’s experiences in the context of unique themes that cut across generations and stories about how they navigated challenges, to inspire modern readers to more effectively move from shortlisted to selected in their own lives.
CHAPTER FIVE

After Shortlisted, Tokenism

This chapter explores how tokenism, or the practice of placing a singular woman or minority into a leadership role to give the appearance of diversity, is harmful to individuals and society. All of the women profiled in this book were tokens in various ways, whether merely considered or ultimately selected for the Supreme Court. This chapter delves further into their lives to explore the harmful consequences that derive from tokenism by first exploring how tokenism obstructs equal representation. It next considers the reality that tokenism results in the lone woman or minority bearing the burden of being perceived as representative of all women or all minorities. And finally, the chapter looks at how tokenism does nothing to correct rampant gender disparity in the workplace, thereby allowing harms like sexual harassment to proliferate in an environment that remains heavily dominated by men.

DISCUSSION QUESTIONS

1. Have any students experienced tokenism, either at a job or internship? What words or actions gave that impression?

2. What are some harmful consequences that flow from tokenism?

3. What are some of the institutional factors that place female lawyers into vulnerable positions burdened by the coercive power dynamics in the legal profession?

4. How did the #MeToo movement affect the legal field? What were some of the changes the #MeToo movement brought?
CHAPTER SIX
Challenging Double Binds and Unifying Double Lives

This chapter considers how women are frequently confronted with double binds, or choices that represent a false dichotomy, meaning there is no desirable choice to be made. Undesirable consequences attach to both of the two choices, which often come at the cost of sacrificing one’s authenticity. Double binds explain in part the difficulty of challenging sexism and inequality. This chapter is organized around common themes that characterize the lives of the book’s shortlisted sisters. It explores double binds, conundrums, and contradictions as they relate to feminism/racism, appearance/femininity/respectability, friendships and professional and intimate relationships, motherhood/competing careers, and age.

DISCUSSION QUESTIONS

1. What are some examples of the way women are confronted with “double binds?”

2. Describe how the diversity among women and minorities reinforces the problems with tokenism.

3. Is it surprising that some of the shortlisted sisters, though feminists in their own right, held openly racist views? Why or why not?

4. What were some of the strategies adopted by the shortlisted sisters when faced with questions surrounding how to dress and present themselves?

5. Compare and contrast the challenges and binds that women and men confront across professional contexts which impede their ascendance into leadership positions.
CHAPTER SEVEN

No Longer Zero

This chapter helps to understand the difference women make in leadership roles by speculating about how the appointment of one or more of the shortlisted sisters might have changed the Supreme Court, its judicial opinions, the legal profession, and women’s placement in positions of leadership beyond law. It attempts to answer a number of questions. Would a Court with more women have expedited the nation’s progress toward gender equality? How might seeing female justices have impacted women’s ascendance to positions of leadership and power in other professional contexts? Would a female chief justice or president already be part of the nation’s history and seem less like a novelty? Would it have affected the types of cases selected by the Court for review and the opinions the justices subsequently rendered? This chapter examines these questions by exploring the impact female judges have had both on case outcomes and the administration of justice.

DISCUSSION QUESTIONS

1. Would seeing a woman on the Supreme Court as early as the 1930s have changed hiring practices through the 1940s to today?

2. Would gender and/or minority equality have been expedited if the Court had more women and/or minorities throughout its history?

3. Other than empathy, what qualities have we seen in this book that, while championed for men, were liabilities for women?

4. Would a mandatory quota, similar to that of Ethiopia, be a helpful solution to place more diverse members on the Court? Why or why not?
CHAPTER EIGHT

Surmounting the Shortlist

This chapter offers pragmatic strategies for moving beyond the bias and discrimination perpetuated against women when they aspire to positions of leadership and power. It helps women move from shortlisted to selected by using examples from the personal and professional experiences of the shortlisted women featured in the book. These women sought elite roles when no women before had held the positions they sought and men actively worked to keep them in their subordinate place. Each went from shortlisted to selected, repeatedly, during her ascendance to positions of power, whether or not she ultimately made it off the shortlist for the Supreme Court. This chapter relies on their stories and crafts eight succinct strategies that modern women can use to surmount the shortlist in their own lives.
CONCLUSION

This chapter offers final reflections on the pages that precede it by briefly revisiting the problems with shortlisting and affirming the need to work diligently to transcend this practice. It is grounded in the discriminatory and sexist context reflective of the era in which it was written.
ABOUT THE AUTHORS

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INTERVIEW WITH THE AUTHORS

Ron Collins, Ask the authors: The long and winding road from shortlisted to selected for female Supreme Court nominees, SCOTUSblog (Jun. 4, 2020, 10:00 AM)

The following is a series of questions posed by Ronald Collins to Renee Knake Jefferson and Hannah Brenner Johnson in connection with their new book, Shortlisted: Women in the Shadows of the Supreme Court (New York University Press, 2020), which tells the untold stories of women that presidents considered as justices for the Supreme Court in the decades before Sandra Day O’Connor’s confirmation.

Renee Knake Jefferson of law and the Joanne and Larry Doherty Chair in Legal Ethics and Director of Law Center Outcomes and Assessments at the University of Houston Law Center. She is an author of two casebooks: “Professional Responsibility: A Contemporary Approach” (2020) and “Legal Ethics for the Real World: Building Skills Through Case Study” (2018).

Hannah Brenner Johnson is Vice Dean for Academic and Student Affairs and an associate professor of law at California Western School of Law. Her research interests include gender-based violence and gender inequality in the legal profession.

Johnson and Jefferson are also the authors of Gender, Power, Law & Leadership (2019).

Welcome, Renee and Hannah, and thank you both for taking the time to participate in this question-and-answer for our readers. And congratulations on the publication of your latest book.

Question: Yours is a collaborative effort. Tell us about that and how the two of you work.

Jefferson & Johnson: We have a longstanding friendship and collaborative working relationship that extends over the course of the last decade to the time when we both taught at Michigan State University College of Law. Our first research project grew out of personal hallway conversations and emails that we exchanged in the year between Justice Sonia Sotomayor’s nomination and confirmation to the Supreme Court in August of 2009 and Justice Elena Kagan’s nomination and confirmation in 2010.

We were both shocked by some of the media coverage of these two incredibly qualified women as they were being vetted for a position on the nation’s highest court (things like commentary on their sexuality, appearance and marital status). These conversations led us to create an empirical research project and, in its wake, solidified our relationship as both co-authors and friends. It also provided opportunity for our children to develop
their own friendships as we spent time writing together and traveling to present our scholarship at conferences, often with the kids in tow.

In those early years we also co-directed the Frank J. Kelley Institute of Ethics at Michigan State and planned a number of conferences, including a symposium that addressed gender inequality in the legal profession. And of course we began working on the shortlisted project. We’ve stayed committed to this work, and our collaboration has continued even after moving across the country to join the faculties at different law schools. Our writing process may be different from how others engage in collaborations; we have long enjoyed sharing drafts of our work and editing each other’s words early on in the process. This was intimidating the very first time we started writing together, as the sharing of preliminary unedited drafts requires a certain vulnerability; but we learned that we could trust each other.

We believe this practice leads to a more uniform voice for all of our work. Often, when we look back at our work, it is impossible for either of us to remember who wrote what. True to our practice, we took the same approach in answering the questions for this Q&A!

**Question:** Your book takes a close look at the stories of women who were considered – but not selected – for a seat on the US Supreme Court. In the last chapter you offer eight strategies “for counteracting the biases and prejudices that endure” against professional women in largely male-dominated fields. Is that your target audience?

**Jefferson & Johnson:** Our target audience is fairly broad but yes, it definitely includes women who are navigating their professional paths. We are also trying to reach those who occupy positions of power and have the ability to help move women from shortlisted to selected. It is important to note that while some of the strategies we identify may be useful on an individual basis, we are perhaps even more interested in encouraging more systemic or structural change. Much of the book, though, will appeal to anyone interested in the history of this country or the Supreme Court selection process.

We also wrote the book with our children in mind as the audience, though when we started our youngest couldn’t even read yet! But we knew our daughters and sons would grow up in a world in which gender inequality endures. We wanted them to be inspired by the histories of these trailblazing women and to equip them with strategies for the work that remains. So, needless to say, our target audience is quite broad. And it’s been a particular joy to see our now-teenaged children reading the book.

**Question:** This book has its empirical roots in a study the two of you conducted about gendered portrayals of Supreme Court nominees. Tell us about that.

**Jefferson & Johnson:** As we mentioned, our first interaction with each other involved our shared outrage surrounding the media’s sexist coverage of Supreme Court nominees.
We channeled this energy into a research study that explored how the media portrayed nominees to the Supreme Court as far back as President Richard Nixon’s efforts to fill the vacancies that ultimately went to William Rehnquist and Lewis Powell.

This project involved the systematic evaluation of over 4,000 newspaper articles published in the New York Times and Washington Post. We read and coded every single article for a series of variables that ranged from the sex of the reporter to whether the article mentioned the nominee’s appearance, sexuality, parental status and more. We surmised that the way Supreme Court nominees were being discussed in mainstream media would reveal the experience of women leaders generally and provide insight into the barriers and obstacles that impede their advancement into positions of leadership and power.

The study exposed a pattern of gendered portrayals of the female nominees. It also uncovered long-forgotten presidential shortlists, one of which included two women a decade before O’Connor became the first woman to join the Supreme Court. We immediately wondered, were other women considered? Who was the first president to include a woman on his shortlist? This book shares what we discovered as we searched for answers.

**Question:** On October 14, 1971, there was an unsigned piece in the *New York Times* on potential Supreme Court nominees Nixon was then considering. Share with us how that fits into your experience in writing “Shortlisted.”

**Jefferson & Johnson:** It was in the midst of our Supreme Court media study that we stumbled upon that article. We were shocked to learn that Nixon had shortlisted Sylvia Bacon, a judge from Washington, D.C., and Mildred Lillie, a judge from California, as he was faced with two vacancies on the court. We had never heard of these women and were unaware that any women had been considered for the court before O’Connor. We were shocked at the way Lillie was described by the author as having “maintained a bathing beauty figure.” It was absurd that an individual considered as a nominee for the nation’s highest court would be critiqued based on her appearance in a swimsuit. We also were struck by the author’s reference to her childless status.

Although we understood that this commentary was consistent with the pervasive sexism of that era (and the findings of our media study), we were more curious about the notion that other women had been shortlisted before O’Connor. And so began our journey through presidential papers, news accounts and private archives. We learned that indeed, nine women had been shortlisted but never selected for the Supreme Court, dating back as far as the 1930s.

**Question:** You acknowledge your indebtedness to Professor Christine Nemacheck. What was her work and how did it influence yours?
INTERVIEW WITH THE AUTHORS

Jefferson & Johnson: Unlike for other positions in government, there is no unified system of selecting—or shortlisting—individuals to serve on the Supreme Court. In fact, the Supreme Court judicial selection process is well known by scholars to be one of the most difficult to study. Presidents have not kept uniform records of whom they considered for the court. President Donald Trump was the first to make public his shortlist, which was prominent in his campaign and officially posted on the White House website [website] after his election.

Nemacheck is a political scientist who has researched Supreme Court nominees and, as a starting place, we relied on her excellent book, “Strategic Selection: Presidential Nomination of Supreme Court Justices From Herbert Hoover Through George W. Bush,” to discern who, exactly, may have appeared on presidential shortlists. However, we departed from Nemacheck’s method in two places. We identified Florence Ellinwood Allen, and not Soia Mentschikoff, as the first woman to be shortlisted, and added Sylvia Bacon to the list. Through this project we developed a profound appreciation for historians and scholars like Nemacheck, as it can be incredibly challenging to piece together accurate reflections of the past. We discovered competing accounts of history and tried to point these out to our readers.

We included a note about this process in the book’s appendix, and call for other scholars to continue this effort to better account for untold and/or long-forgotten aspects of our history, especially women’s history.

Question: A number of women are profiled in your book. How do these women fit into what you refer to as “collective storying telling”? Tell us more about what you mean by that and your call for systemic change.

Jefferson & Johnson: In addition to the nine shortlisted before O’Connor, we also include three women who appeared on President Ronald Reagan’s subsequent shortlists and the five women who went on to be nominated. Each of the women profiled in our book could be the subject of an entire research study. They are all incredibly gifted, accomplished, complex women who have blazed uncharted paths into positions of leadership and power. Some have previously been studied, though only two of the women shortlisted before O’Connor have been the subject of books. We believe that one of the most powerful aspects of this project is the collective story that we tell about this cohort of women who were qualified to serve on the Supreme Court, but never selected.

We have written about common themes that unite them, but in many respects they could not be more different from one another. They represent, collectively, the importance of diverse representation on the Supreme Court and beyond. In telling their stories in this way, we uncovered a phenomenon we did not set out to find—what we define as a nominee who is “qualified for a position but not selected from a list that creates the appearance of diversity but preserves the status quo.”
This concept of being “shortlisted” helps explain why it took so long for a woman to make it onto the court, and we think that it also helps explain why women are not reflected in numbers equal to men in all positions of leadership and power. It’s not the only explanation, but it is one structural source of continued inequality. If one only looks at an individual woman’s story, it’s hard to see this phenomenon. But looking at their stories together? It is impossible to ignore it.

**Question:** There are some notable female appellate judges who were never formally shortlisted but were informally considered and whose names circulated in the press. Can you tell us a little bit about those women and their fates?

**Jefferson & Johnson:** Our list of shortlisted women in the book includes only the women for whom we could find actual documentation of being formally considered by a president. But, absolutely, as you suggest, there were a number of other exceptionally qualified women whose names were circulated in the media and also sent to presidents for consideration, including Chief Judge Alice Batchelder of the US Court of Appeals for the 6th Circuit, Priscilla Owen of the US Court of Appeals for the 5th Circuit, Shirley Hufstedler of the US Court of Appeals for the 9th Circuit and Patricia Wald of the US Court of Appeals for the District of Columbia Circuit, just to name a few. President Jimmy Carter was widely known to have considered Hufstedler as his first choice for the court, but of course he never had a vacancy to fill.

**Question:** Share with us how your example of Carter, who never nominated anyone to the Supreme Court, and Judge Amalya Kearse, who was never nominated to that court, illustrates one of the strategies for change recommended in your book’s last chapter.

**Jefferson & Johnson:** One of our overarching recommendations in this book is to encourage systemic transformation, not just change at the individual level. Carter exemplified this approach when he issued an executive order that established judicial nominating commissions for the federal circuit courts in 1977. Thirteen panels were created representing regions across the country, with a specific mandate that each include men, women and minorities. The panels were directed to nominate candidates who had actively championed diversity. Thus, the panels asked:

- “How have you worked to further civil rights, women’s rights, or the rights of other disadvantaged groups on a national, state or local level?”
- “How many women attorneys and minority attorneys does your office or law firm include?”
- “How many women partners?”
- “Minority partners?”
“What do you think the most crucial legal problems of women and minorities will be over the next few years?”

“How should these problems be remedied?”

Panel members included Kearse, who at the time was still practicing law at Hughes, Hubbard & Reed in New York. She would later go on to be selected by one of those commissions, and she was confirmed to the US Court of Appeals for the 2nd Circuit on June 25, 1979.

Carter understood that one of the most powerful roles of a president is the appointment of judges, who last long beyond the president’s term. By the end of his presidency, Carter had appointed and the Senate had confirmed 41 women, more than all presidents before him combined.

**Question:** You write of the “potential harms of being shortlisted.” As you see it, is it better or worse to be shortlisted, and why?

**Jefferson & Johnson:** Well, it’s best to be both shortlisted and selected. Our concern is that a shortlist can manipulate the public into believing that its creator has placed no gender or race barriers to a coveted position even though the ultimate aim was always to preserve the status quo. Of course, one needs to be on the shortlist to be selected. It is a necessary and important first step toward being chosen. It is an honor. But, when the shortlisting of women and minorities is a hollow gesture, it demeans not only the individual, but society’s belief that merit should override gendered and racial prejudices.

The message that is sent by systemic shortlisting may deter others from putting themselves forward. The dearth of women and minorities on the Supreme Court and in other positions of leadership and power signals that these opportunities are just not available and not worth enduring the often grueling scrutiny that comes from being on the shortlist.

**Question:** Before the 2016 election, then-candidate Trump publicly announced his shortlist of possible candidates for the Supreme Court.

On the one hand, you seem skeptical of this: Such lists, you write, lend “the auspices of diversity and equality to the nomination process but ultimately preserve[e] the status quo.” On the other hand, you argue that “[s]unlight is needed on the shortlists … [and we] need accurate data and transparency about who is shortlisted, not just for the Supreme Court, but across professions and in all positions of leadership and power.”

Can you say a bit more about your thinking on this matter?

**Jefferson & Johnson:** We think that these sentiments are both true. We absolutely need transparency surrounding who makes it onto the shortlist, as this practice is revelatory and may in fact encourage those who are doing the selecting to be more
inclusive. Such transparency allows us to better understand what is actually happening and whether shortlisted women and minorities are mere window dressing or actual legitimate candidates. It also allows us to examine who ascends. We also acknowledge that even transparency only goes so far.

It is worth noting that the current president’s shortlists have thus far resulted in the appointment of more men, and fewer minorities, to the federal bench than his recent predecessors from both parties. By contrast, presumptive Democratic presidential nominee, Joe Biden, has committed to select both his vice president and a Supreme Court justice, should he have the opportunity to fill a vacancy, from all-female shortlists.

**Question:** Although duly appreciative of the achievements of the four “waves of feminism,” you nonetheless take exception to “a common omission in each wave of women’s rights since [its] early gathering [in Seneca Falls]”: the consideration of minority women. Would you elaborate?

**Jefferson & Johnson:** The voices of women of color have frequently been left out of the feminist movement. Most of the grievances expressed by the women at Seneca Falls were focused on white middle class women. Many of the activists in the suffrage movement were willing to exclude their black sisters out of concern that race would impede their ability to gain the right to vote. “Women” has not been synonymous with the experience of all women, and too often feminism has failed to acknowledge the many layers of our intersectional identities.

**Question:** The late Judge Cornelia Kennedy was nominated to a federal district court in 1970 by Nixon, and later elevated in 1979 by Carter to serve on the 6th Circuit. Presidents Gerald Ford and Reagan both considered her for the Supreme Court. Yet nothing ever came of it. Why?

Please also tell our readers how Kennedy changed one of the Supreme Court’s long-standing traditions.

**Jefferson & Johnson:** It’s hard to know exactly why Kennedy was never selected. She seems to have come closer than anyone else in our study. When Reagan was deciding between Kennedy and O’Connor, longevity on the court was likely a factor: Kennedy was six years older than O’Connor. This was Kennedy’s partial explanation. But we also suspect that politics and lobbying behind the scenes impacted Reagan’s decision.

Our nation’s history has many examples of physical structures mirroring social policy. “Colored” and “whites-only” train depots; men-only clubs; the forced relocation of Japanese American citizens during World War II. Similarly, many physical structures in place when shortlisted women were considered assumed that men were singularly qualified to occupy positions of leadership. For example, there was no private bathroom for O’Connor when she joined the Supreme Court. But that was not the only structural
impediment that needed attention.

Historically, Supreme Court justices were referred to as “Mr. Justice” both on the bench and on the nameplates on their office doors. Kennedy found herself participating in a law school moot court competition with Justice John Paul Stevens. The student participants repeatedly referred to Kennedy as “Madam Justice.” Kennedy became irritated with this reference and questioned the need for the gendered honorific rather than simply the word “Justice.” This interlude sparked something in Stevens, who took the message back to Washington and, long story short, convinced the justices that it was time to remove the honorific “Mr.” from their chamber doors as well as from their references to each other.

**Question:** As you note in chapter three, Chief Justice Warren Burger played a role in helping to get O’Connor on the court. Among other things, while O’Connor was still a state appellate judge, Burger placed her on several national and international judicial panels in order to give her greater national visibility. Plus, it helped that on the eve of her nomination she published an article in the William and Mary Law Review on the relationship between federal and state courts. All of this points to a circuitous route to securing a seat on the court. How does that figure into your strategic calculus for someone hoping to secure a nomination to the Supreme Court?

**Jefferson & Johnson:** In addition to qualifications, connections matter both in the creation of a shortlist and in elevation from it. Some routes are direct; some are circuitous; but none should bar selection based on an immutable characteristic like gender. Thus, we admire Mentschikoff’s professional and personal relationship with Karl Llewellyn, who undoubtedly opened doors. But without her commanding intellect and her principal role as reporter to the American Law Institute on its Uniform Commercial Code publication, she would never have been considered for a position on the Supreme Court.

To be sure, securing a seat on the Supreme Court requires certain credentials, along with a bit of luck and the right timing. We don’t mean to suggest in any way that the strategies of the women profiled in our book or the recommendations we make in the final chapter offer a sure-fire path to the bench. But there are lessons to be learned for securing leadership roles, not only on the court but also well beyond it.

**Question:** In addition to the aspirational side of your book, I sense that there may be a kind of realist mindset at work. For example, you counsel that women “[c]hoose personal partners – whether in friendship or in romance – who value one’s professional life and allow for the possibility of non-traditional relationships.”

Are you saying that the personal is political?

**Jefferson & Johnson:** We gleaned a lot from our exploration of the personal lives of the
shortlisted women and how their personal lives affected their successful professional trajectories. Relationships matter in the attainment of positions of leadership and power. All of the women on our shortlist relied on their academic, family, personal and/or public ties to achieve success. This was also true of the more than 100 men who preceded O’Connor. The difference is that the men’s attributes, combined with their personal and political relationships, secured seats on the highest court in the land.

Our message is that women, like their male counterparts, should not shy away from nurturing relationships that advance their ascension to pinnacles of power. Our personal, intimate lives can have a direct bearing on what we do professionally. And, whether we like it or not, politics often plays a role in what we can do at home and at work.

**Question:** Now that “Shortlisted” is out, what are your plans? For example, have you given any thought to doing a study (see here also) of female lawyers who have argued before the Supreme Court?

Jefferson & Johnson: Right now we are reveling in the birth of this book, although many of our plans are casualties of the coronavirus. We had several book talks scheduled that have been postponed or transitioned to Zoom sessions. But yes, we are intrigued by the examples of women arguing before the Supreme Court, by the dozens of women who have led their state courts as chief justice and by the continuing suppression of minority women in these roles. And our readers, like you, have given us much food for thought. Stay tuned!

**Question:** You close your book with this: “When President Obama greeted Justice Ginsburg at Justice Kagan’s swearing in, he asked, ‘Are you happy that I brought you two women?’ She replied, ‘Yes, but I’ll be happier when you bring me five more.’” Why stop at eight?

Jefferson & Johnson: Great question! A court that reflects the diversity of our profession and the people it serves is an important goal. We should also work hard to resist the concept of a monolithic “woman’s voice.” Looking at the court’s rich history, we don’t attach one viewpoint or singular identity to the male justices or to the two African American justices who have served.

We would absolutely like to see an increasingly diverse court filled with women and minority justices whose perspectives on the law are informed by differences in geography, education, race, gender, ethnicity, life experience and more.

We wish Presidents Herbert Hoover or Franklin Roosevelt had been bold enough to nominate Florence Allen in the 1930s. Imagine how a decision like that would have changed the course of her story, and of history.
The authors have prepared the following teaching slides for you to incorporate into your own course!
Shortlisted
WOMEN IN THE SHADOWS OF THE SUPREME COURT
Renee Knake Jefferson & Hannah Brenner Johnson

"With fact research, the authors effectively humanize the women who never
made it to the final list for Supreme Court justice. Their stories are
engaging and their insights valuable."—LINDA GREENHOUSE

"This fascinating book reconstructs a chapter of women’s history that has been
fading in the public eye. It’s a story that is now due for recognition.”—KARA
BROWN, New York Times Book Review

"Shortlisted is remarkable not only for what it tells us about the women who never
made it to the final list for Supreme Court justice, but also for what it tells us
about our nation’s struggles and continue to struggle with. It is a must-read for
anyone interested in the history of women’s rights in the United States."
—JUDY PEREZ MARTINEZ, Author of "On The Court: The Supreme Court Women"

"Shortlisted is a major contribution to the study of women lawyers."—
NANCY CARTIER, former Dean of the University of California, Berkeley School of Law

"Shortlisted is beautifully written and an important addition to the literature about
the role of women in the political process. It should be required reading for
anyone interested in the history of women in American government."—
EDWIN CLARKE, Professor of Political Science, University of California, Berkeley

"With Shortlisted, Knake Jefferson and Brenner Johnson have produced a
landmark work that will be essential reading for anyone interested in
women’s history and the role of women in American government."—
Jeanette Lee, Professor of History, University of California, Berkeley
shortlisted, adj. qualified for a position but not selected from a list that creates the appearance of diversity but preserves the status quo
Women Enter the Profession in Equal Numbers to Men But Only Represent…

- 25% Fortune 500 General Counsels
- 20% Law Firm Equity Partners (only 3% women of color)
- 4% Law Firm Managing Partners
- 38% Law Review Editor in Chiefs
- 32% Law School Deans
- 36% State Court Judges

(Data from 2018-19)
PROGRESS?
Sotomayor: A Single Supreme?

President Obama nominated Sonia Sotomayor yesterday to succeed David Souter on the Supreme Court. (AP Photo/Doug Mills/The New York Times/Bloomberg News)

The Washington Post

Then Comes the Marriage Question

The Supreme Court needs more mothers

By Ann Gerhart
Washington Post Staff Writer

The Washington Post
ECONOMIC SCENE

A Labor Market Punishing to Mothers

From left, Elena Kagan, Sonia Sotomayor and Harriet Miers were all single and without children when they were nominated to the Supreme Court, in contrast to the previous three male nominees.

By DAVID LEONHARDT
Published: August 3, 2010
ELENA KAGAN V. SONIA SOTOMAYOR: WHO WORE IT BETTER?
RETHINKING GENDER EQUALITY IN THE LEGAL PROFESSION’S PIPELINE TO POWER: A STUDY ON MEDIA COVERAGE OF SUPREME COURT NOMINEES

84 TEMPLE L. REV. 325 (2012)
Mildred Loree Lillie

Best known for her work as presiding judge of the Domestic Relations Court of Los Angeles, where she was the nation's Number One moderator of domestic discord. Born in Ida Grove, Iowa. Moved as a child with her mother to a small farm in California after her parents parted. Worked in a canning factory to earn money to go to the University of California, Berkeley. Started out to be an artist, then turned to law, obtaining her degree in 1938. Became an Assistant United States Attorney in 1942 as a reward for her activities in the Democratic party. Married her co-worker, the late Cameron Lillie, who kept urging her to seek a judgeship. Finally was appointed by then Gov. Earl Warren to Municipal Court. Later became a Superior Court judge and then the first woman to head the Domestic Relations Court in Los Angeles. Now is a Court of Appeal judge for Second Appellate District in Southern California. She and her second husband, A. V. Falcone, a lawyer, live near Beverly Hills. Has no children. In her mid-50's, she still has a bathing beauty figure.
Chapter 1: The First Shortlisted Woman, Florence Allen

Chapter 2: The Shortlists Before the First Nominee, Soia Mentschikoff, Sylvia Bacon, Mildred Lillie, Carla Hills, and Cornelia Kennedy

Chapter 3: From Shortlisted to Selected, Amalya Lyle Kearse, Joan Dempsey Klein, Susie M. Sharp, and Cornelia Kennedy and Sandra Day O’Connor

Chapter 4: The Shortlists Following O’Connor—A Long Way from Nine, Cynthia Holcomb Hall, Edith Jones, and Pamela Rymer, Ruth Bader Ginsburg, Harriet Miers, Sonia Sotomayor, and Elena Kagan
CHAPTER 1
President Roosevelt's Shortlist

MEMORANDUM IN RE SUPREME COURT.

August 3, 1937.

1. There is one vacancy in the Supreme Court caused by the resignation of Mr. Justice VanDevanter, of Wyoming, which State is located in the Tenth Circuit.

2. The remaining Justices of the Supreme Court are as follows:

   Chief Justice Hughes, of New York, located in the SECOND Circuit.
   Mr. Justice McReynolds, of Tennessee, located in the SIXTH Circuit.
   Mr. Justice Brandeis, of Massachusetts, located in the FIRST Circuit.
   Mr. Justice Sutherland, of Utah, located in the TENTH Circuit.
   Mr. Justice Butler, of Minnesota, located in the EIGHTH Circuit.
   Mr. Justice Stone, of New York, located in the SECOND Circuit.
   Mr. Justice Roberts, of Pennsylvania, located in the THIRD Circuit.
   Mr. Justice Cardozo, of New York, located in the SECOND Circuit.

3. It will thus be noted that the following circuits have no representation on the Supreme Court, to wit: the FOURTH, the FIFTH, the SEVENTH, and the NINTH.

4. The FOURTH Circuit includes the States of Maryland, North Carolina, South Carolina, Virginia, West Virginia.

   The FIFTH Circuit includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Canal Zone.

   The SEVENTH Circuit includes the states of Illinois, Indiana, Wisconsin.

   The NINTH Circuit includes the states of Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Alaska, Hawaii.

SUGGESTIONS FROM VARIOUS SOURCES FOR MEMBERSHIP ON THE SUPREME COURT.

Circuit Judge Martin T. Manton, of New York, located in the Second Circuit.
Circuit Judge Edwin R. Holmes, of Mississippi, located in the Fifth Circuit.
Circuit Judge Evan A. Evans, of Wisconsin, located in the Seventh Circuit.
Circuit Judge Seth Thomas, of Iowa, located in the Eighth Circuit.
Circuit Judge Clifton Matthews, of Arizona, located in the Ninth Circuit.
Circuit Judge Albert Lee Stephens, of California, located in the Ninth Circuit.
Circuit Judge Samuel H. Sibley, of Georgia, located in the Fifth Circuit.
Circuit Judge William Healy, of Idaho, located in the Ninth Circuit.
Circuit Judge Augustus N. Hand, of New York, located in the Second Circuit (suggested by William Draper Lewis).

Circuit Judge Florence E. Allen, of Ohio, located in the Sixth Circuit.
Circuit Judge Sam G. Eratton, of New Mexico, located in the Tenth Circuit.
Circuit Judge William Denman, of California, located in the Ninth Circuit.
Circuit Judge Joseph C. Hutcheson, Jr., of Texas, located in the Fifth Circuit (suggested by William Draper Lewis).
Circuit Judge John J. Parker, of North Carolina, located in the Fourth Circuit.
Circuit Judge John Biggs, Jr., of Delaware, located in the Third Circuit.
Circuit Judge Kimbrough Stone, of Missouri, located in the Eighth Circuit.
I don’t cook, or sew, or shop for the simple reason that I haven’t the time or energy for these things, any more than men judges have.
CHAPTER 2
Soft spoken and informal in appearance, she could be devastating in legal dispute, crushing her opponents with precise reasoning.

-George Volsky
I couldn’t have lived for going on to 76 years, with my background and all the things that I have done, and my exposure to the critical comments, prejudices, and biases of others, without being aware of the inequalities suffered by females from the beginning of recorded history.
SYLVIA BACON

Bacon would probably appear to be just a little too young. I don’t know, what do you think? She isn’t by my standards. I wonder if something could be said, John, for appointing a woman who represents the younger generation, not only a woman, but the youngest [justice] ever appointed.

—President Nixon to White House Counsel John Dean
President Ford’s Shortlist

- Vincent Lee McKusick, Born 1921, Maine
- Dallin Oaks, B. 1932, President of Brigham Young
- Philip Areeda, b. 1930
- Robert Bork, b. 1927
- Philip Kurland, b. 1921 (Illinois)
- Bennett Boskey, b. 1916 (Washington, D.C.)
- Antonin Scalia, 1936
- Robert P. Griffin
- Charles E. Wiggins
- Judge J. Clifford Wallace, Ninth Circuit, 46 (Cal.)
- Judge Alfred T. Goodwin, Ninth Circuit, 52 (Oregon)
- Judge Paul ROSS., Fifth Circuit, 53 (Fla)
- Judge Philip Tuna, 7th Circuit, 52 (Ill.)
- Judge William Webster, Eighth Circuit, 51 (Mo.)
- Judge Arlin M. Adams, Third Circuit, 54 (Pa.)
- Judge John Paul Stevens, 7th Circuit, 55 (Illinois)
- Judge Malcolm R. Wilkey, D.C. Circuit, 56 (Texas)
- Judge Clarke
- Judge Kennedy
- Edith Kalita

James H. Wilson, Jr.
Atlanta, Georgia
Born 1920
Harvard,
CARLA HILLS

She’s willowy, brunette and capable of turning on a Mary Tyler Moore smile. She’s also our new secretary of Housing and Urban Development.

-John Betz
If you want to know about Judge Cornelia Kennedy . . . and the future of women in general, ask her husband.

-WASH. POST
CHAPTER 3
The President is absolutely right to recognize the need for diversity on the Supreme Court. Judge Kearse is a woman and an African American.

- Jon O. Newman
She urged women who have become judges to take an even more active role in the bar, “so that our male peers can be aware of us as judges who do not have two heads but who do have brains, education, ability, egos—yes, egos—and ambition.”

-David Margolick
SUSIE SHARP

Sharp was a woman of apparent contradictions: An advocate for equal opportunities for women, she nevertheless believed married women with children ought to stay home. A stickler for separating politics from her role as a judge, she so strongly opposed the Equal Rights Amendment that she inappropriately lobbied legislators for its defeat.

-Douglas Clark
CHAPTER 4
PART II: TRANSCENDING SHORTLISTS
SHORTLISTED
PART II
THEIR STORIES ARE OUR STORIES—TRANSCENDING SHORTLISTS

Chapter 5: After Shortlisted, Tokenism

Chapter 6: Challenging Double Binds and Unifying Double Lives

Chapter 7: No Longer Zero

Chapter 8: Surmounting the Shortlist
CHAPTER 5
AFTER SHORTLISTED, TOKENISM
CHAPTER 6
CHALLENGING DOUBLE BINDS AND
UNIFYING DOUBLE LIVES

Sketch of Judge Lillie

To the Editor:

Your description of the “qualifications” of Judge Mildred Loree Lillie [biographical sketches of Supreme Court nominees Oct. 14] illustrates perfectly the absurd sexist prejudices to which all women are persistently subjected. I refer to the last sentence: “In her mid-50’s she still has a bathing beauty figure.”

Why did you choose to objectify this woman and diminish her accomplishments by including such a totally irrelevant and subjective item? You implied that Judge Lillie’s body was just as significant as any single professional attribute she possesses.

There was no discussion of the health—much less the physique—of any of the other possible nominees. Perhaps you could rectify this inequality by printing a discussion of the extent to which Senator Byrd has retained his schoolboy figure or the manner in which Herschel Friday fills his swim suit. BARBARA B. MARTIN New York, Oct. 14, 1971
CHAPTER 7
NO LONGER ZERO
CHAPTER 8
SURMOUNTING THE SHORTLIST

Shortlisted-to-Selected Strategies

1. Leverage Legal Education
2. Partner with Friends and Lovers Who Value Our Professional Lives
3. Collaborate to Compete
4. Create Meaningful Opportunity, Don’t Wait for It
5. Demand and Document Equality for All
6. Provide Child Care as a Public Good
7. Use Caution in Self-Shortlisting
8. Find Mentors in ‘Her’ Story