



JUSTICES  
AND  
PRESIDENTS

A Political History  
of Appointments to the Supreme Court

*Second Edition*

Henry J. Abraham

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**TO MY FAMILY:**  
**Mil, Phil, and Pete**

## Preface to the Second Edition

A dozen years have gone by since the publication of this work's first edition—years that not only witnessed the departure of several members of the Court, including one of its most influential figures, William O. Douglas, but the arrival of the first woman Justice of the Supreme Court of the United States, Sandra Day O'Connor. They constituted years, moreover, that were characterized by the continuing recognition of the verities of the Court's role as a policymaker, of its tripartite role as a legal, a governmental, and, yes, a political institution. Those years also demonstrated that, contrary to the expectations, hopes, or fears of those who profess to understand the Court and its role best, the Burger Court and its Justices did not—with the arguable exception of aspects of the realm of criminal justice—"undo" the jurisprudence of the Warren Court and its Justices. Indeed, the Court has continued to manifest its embrace of an activist role, of judicial legislating, of lawmaking, of judicial activism, even if some of its nuances may well be distinguished from its predecessor tribunals.

Far more than merely a revision, let alone a mere updating, of the first *Justices and Presidents*, the second edition is essentially a new book. Not only has it been expanded by more than a third in terms of its coverage, but it also features two brand-new, additional chapters: one (Ch. 1) discusses the criteria, evaluations, and judgments that constitute the basic model, the theme of the work; the other (Ch. 11) treats the Burger Court and its Justices (the first edition having gone only as far as Justice Thurgood

Marshall) through the 1983–1984 term. Chapters 9 (F.D.R. and Truman) and 10 (from Ike to L.B.J.) have been totally rewritten, and Chapter 8 (from Theodore Roosevelt to Herbert Hoover) almost entirely. Chapters 3 and 4—the *how* and *why* Supreme Court Justices are nominated and appointed—have also been thoroughly restructured and redesigned, and all of the several remaining chapters reflect the myriad changes and new data that have come to life since the earlier version of this tome. Additional appendixes, dealing with diverse statistics and rankings of both Presidents and Justices, augment the textual materials, as do an extensive bibliography and two indexes.

Once again I am delighted to acknowledge, with abiding gratitude, the manifold kindness and assistance by a host of colleagues, members of the Court, research assistants, and graduate students—far too generously numerous to identify. But I should like to express particular appreciation to Chief Justice Burger and Associate Justices Brennan and Powell; to my colleagues Dennis D. Dorin, David Fellman, Robert J. Harris, Dick A. E. Howard, David M. O'Brien, John R. Schmidhauser, Lane Sunderland, and Tinsley E. Yarbrough; to Susan Rabiner and Henry Krawitz of Oxford University Press; to my erstwhile students and now members of the worlds of academe and/or law in their own right, Gary J. Aichele, Vincent M. Bonventre, Stanley C. Brubaker, Peter M. Dodson, Jan Horbaly, Francis Graham Lee, Gary L. McDowell, James J. Magee, Walter R. Markham, Gary E. Mullin, and Bruce A. Murphy; and to my faithful, tireless, devoted research assistants, Barbara A. Perry (who also compiled the index) and James S. Todd—without whom this book would not have been completed. I am also profoundly grateful for the generous financial aid extended to me by the Mayer & Arlene Mitchell and Abraham A. Mitchell Fund, the Robert W. and Patricia T. Gelfman Fund, and the Earhart Foundation.

And while the first edition's dedicatees, like the author, are now twelve years older, the dedication is restated with much love.

*Charlottesville, Virginia*  
*November 1984*

H.J.A.

## Preface to the First Edition

This work has its genesis in a series of graduate seminars in constitutional law and the judicial process that I conducted at the University of Pennsylvania in the mid- and late 1950s. The subject matter had always fascinated me, and while I lay aside writing this book in favor of other publications during the ensuing years, the project was never dormant. I gathered a host of data, developing a separate file for each of the one hundred individuals that have served on the highest court of the land, until the end of the Warren Court era in 1969 determined me to write what had been gestating for almost two decades.

What I had initially conceived as a fairly straightforward analysis of Presidential motivations in the appointment of the several Chief Justices and Associate Justices of the Supreme Court of the United States, gradually evolved into a far more ambitious undertaking as the book took shape. Backed by the advice and counsel of sundry colleagues, it seemed almost artificial merely to cite reasons for an individual's selection without concurrently evaluating his subsequent performance on the bench. Thus, the book addresses itself also to the nominee's work on the Court, both in terms of Presidential expectations and in those of my own perception of his performance. Quite naturally the book expanded further by comprising what, in effect, is a "mini-history" of the Court itself—and an attempt briefly to encapsulate and categorize the Presidential performance as well as that of his nominees.

Inexorably, aspects of the book are subjective: judgment of



performance inevitably involves value orientation. Yet I have endeavored to be objective and scholarly in my analyses and evaluations. Temptations to be "cute" are omnipresent; but they serve little purpose in what, after all, is a historical-political account of the reasons why Justices were appointed and how they lived up to their nominators' expectations. What follows, then, represents serious judgment based on carefully gathered and pondered evidence. Admittedly, perhaps many of the explanations and evaluations will prove to be at once controversial and less than astonishing or thrilling. Yet they are based on more than two decades of teaching and research in the field and on lasting interest as well as fascination with an exciting aspect of our system of government.

My research was conducted in the traditional mold of going to the most reliable sources available. That meant both primary and secondary written data; but it also meant personal interviews with a great many individuals in and out of government, including a number of Justices of the Supreme Court, who were truly helpful. Some of the gathered information developed diametrically opposite assertions or evidence (for example, the real reasons for Mr. Justice Goldberg's decision to relinquish his post on the Court) necessitating the kind of judgment Mr. Justice Frankfurter was fond of styling as "inescapable." Accordingly, the book contains numerous such judgments; but they are judgments based on carefully weighed conclusions. As the Bibliographical Note indicates, the sources of my information were indeed broad and numerous, yet—given the unavailability of the papers of many among the Justices—new or different revelations may well lie in the future. In the meanwhile I hope that my account will shed at least some light on a subject that continues to prove to be at once intriguing and challenging.

No work of this kind could have been written without the deeply appreciated aid and comfort of my colleagues in the disciplines of government and politics, history, and law. So many have been of so much help that it would be presumptuous to attempt to list them all. But I should like to acknowledge specifically, and with particular gratitude, the unfailingly wise counsel and support extended to me through the years of gestation by Professors Robert J. Harris, David Fellman, Wallace Mendelson,

Alpheus Thomas Mason, and William M. Beaney. They were always there—be it for a quick quare or as a sounding board, or as a critic. For invaluable aid in the formative stages of the project I am lastingly indebted to my former student and subsequent colleague, René Peritz, without whose tireless efforts it would never have gotten under way and without whose dedication it would never have come to fruition.

Acknowledged with genuine affection are the research assistants who do the legwork and the typists who produce the manuscript. The research assistants were Peter B. Harkins, Rocco D'Amico, Robert G. Badal, Paul Lutzker, Judith F. Lang, Gilbert E. Gel-don, Steven S. Fadem, Norman H. Levine, Mark A. Aronchick, Frank C. Lindgren, Andrew B. Cohn, Perri Beth Madow, Susan J. Dlott, Michael E. Marino, James J. Magee, Michael K. Duffey, John W. Epperson, and Eston E. Melton. Those who so faithfully did the typing were, above all, Rosemary Cicchetti, and Theresa L. Brunson, Marie M. Cross, Bonnie L. Foster, Edna C. Mitchell, Cora L. Pitts, and Lena G. Garrison.

There remains a special thank you to two mainstays at the Oxford University Press: to my superb editor, James C. Amon, whose expertise, encouragement, and insight were essential; and to Joyce Berry, whose sensitivity, literateness, and intelligence atoned for her omnipotent red pencil. I could not have written the book without their dedication.

More than in any other of my writings to date I hasten to post the obvious caveat: that all errors are my own responsibility.

*Keswick, Virginia*  
*January 1974*

H. J. A.

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# Introductory Reflections:

## Of Criteria, Evaluations, and Judgments

Any effort, such as this work, to establish criteria for standards of merit as a basis for selection of individuals qualified to serve on our courts is not only difficult, it is definitionally controversial. The same fact of life applies to an attempt to evaluate a jurist's performance and to render a judgment in terms of both the jurist-nominator's perception and the perceptions of qualified Court watchers. Still, establishment of criteria for qualification and selection and for bases for evaluative judgments of performance cannot be escaped, and the ensuing pages will endeavor to meet the challenge.

Notwithstanding vast differences in approaches to perceived standards of qualification for judicial office and in ultimate verdicts of performance in that office, any examination of published (or verbalized) analyses demonstrates a remarkable degree of agreement, both as to definitions of what constitutes merit and to on-bench performance judgments. Although prescription of merit may well lie, like smut, in the eye of the beholder, and judgments of performance may well be tailored to the observer's *Weltanschauung*, demonstrable consensus exists in both realms.

It is, hence, not at all impossible to advance certain standards that, at least in theory, ought to govern eligibility, regardless of

the degree to which a President's motivation may permit such standards to play a governing role in his decision to make a particular appointment. Thus, Professor Sheldon Goldman, a close observer of the judicial selection process—particularly at the trial and intermediate appellate levels—identified, in a recent *Annals* article,<sup>1</sup> “eight qualities, characteristics, or traits that most,” or so he argued warmly, “would agree are associated with the ideal type of a judge.” The eight are, in his language: “1. Neutrality as to the Parties in Litigation. 2. Fair-mindedness. 3. Being Well Versed in the Law. 4. Ability to Think and Write Logically and Lucidly. 5. Personal Integrity. 6. Good Physical and Mental Health. 7. Judicial Temperament. 8. Ability to Handle Judicial Power Sensibly.” It is hard to argue with the octet. To apply it to specific instances of selection, however, makes for considerably more complexity and introduces controversy in at least some of the stated components. The same observation may well apply to the somewhat shorter roster of six components of merit I had suggested as *de minimis* qualification guidelines in the Seventh Annual Address to the Supreme Court Historical Society in 1982:<sup>2</sup>

One, demonstrated judicial temperament. Two, professional expertise and competence. Three, absolute personal as well as professional integrity. Four, an able, agile, lucid mind. Five, appropriate professional educational background or training. Six, the ability to communicate clearly, both orally and in writing, especially the latter.<sup>3</sup>

Others have amply voiced similar requirements and qualifications.

And that the above may be broadly attainable in whole or in part is demonstrated by the composite of the 101 men and the lone woman who have to date sat on our Supreme Court of the United States. If the Holmesian tongue-in-cheek aphorism that the job of a jurist requires a “combination of Justinian, Jesus Christ and John Marshall”<sup>4</sup> may not always have been attainable—it is apposite to note that with one possible exception even that trio may not have been perfect! If political party affiliation has almost always played a role—well, there are but nine positions on the highest bench—F.D.R. had to wait four and one half years ere a



vacancy occurred at last!—and there are just as many qualified Democrats as there are qualified Republicans, and just as many qualified Republicans as there are qualified Democrats. Nor is there any gainsaying a nominator's justification to select a nominee with whom he or she is ideologically and jurisprudentially comfortable, always assuming the presence of threshold merit.

It may be helpful to identify what history demonstrates as the ascertainable decisional reasons or motivations for the Presidential selections of members of the Supreme Court. A quartet of steadily occurring criteria would appear to emerge quite clearly, notwithstanding specific assertions or analyses to the contrary. In no particular order of avowal or significance, that quartet embraces: first, objective merit; second, personal friendship; third, balancing “representation” or “representativeness” on the Court; and fourth, “real” political and ideological compatibility.<sup>5</sup> Obviously, more than one of these factors—and, indeed, sundry others—were present in most nominations to the Court, and in some cases all four were. Yet it is entirely possible to point to one as the overriding one. Thus, a classic and well-known illustration of Presidential selection based purely on the first category, objective merit *qua* merit, is that of Democrat Benjamin Nathan Cardozo by Republican Herbert Hoover to succeed Justice Holmes early in 1932. That public opinion and Senatorial insistence practically had to put the President on a rack to prompt him to choose Cardozo is beside the point. He did—and he would ultimately be credited for it as “the finest act of his career as President.”<sup>6</sup>

Examples that point to the second category, that is, personal and political friendship as the overriding causation for Presidential choice, abound. Among the several illustrations that come to mind quickly, yet were nonetheless unquestionably characterized by merit, is President Andrew Jackson's selection—or, more accurately, selections—of Roger Brooke Taney for Associate Justice (unsuccessful) and Chief Justice (successful). Taney had been Jackson's long-time close friend, loyal adviser, and confidant. President Truman's four appointments (Harold H. Burton, Fred M. Vinson, Tom C. Clark, and Sherman Minton) fall into this category, as do, to cite three other Chief Executives: those by