The Supreme Court

Justice and the Law

THIRD EDITION

Congressional Quarterly Inc.

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Editor's Note. *The Supreme Court, Justice and the Law, Third Edition,* concentrates on the court during the era of Chief Justice Warren E. Burger — the period beginning in 1969 — to illustrate the operation of the separation of powers in the federal government and the system of checks and balances. The first chapter introduces the contemporary court — the current concerns of the justices and trends as reflected in recent decisions, membership changes and a comparison with the court under Chief Justice Earl Warren. Chapter 2 examines the relationship between the court and the chief executive, particularly the ebb and flow of presidential influence during the court's 194-year history. Chapter 3 looks at the court's relations with Congress, the powers of each over the other. It discusses the powers Congress possesses to overturn decisions of the court and traces the history of the court's influence, particularly its use of judicial review to judge the constitutionality of legislation passed by Congress. The last chapter probes the positions and concerns of the sitting justices through quotes from some of their most important decisions. The chapter contains summaries of some of the important rulings of the court affecting every facet of American life over the past 14 years. An appendix contains excerpts from *Marbury v. Madison* and more recent landmark court decisions, a list of all nominations to the court since 1789, the acts of Congress declared unconstitutional, biographies of all justices since 1969, the text of the U.S. Constitution and all ratified amendments, a glossary of common legal terms and a selected bibliography. Both a subject index and a case index are provided. *The Supreme Court, Justice and the Law* is one of CQ's public affairs books, which are designed as timely reports to keep journalists, scholars and the public informed about national issues, events and trends.

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The Contemporary Court

The United States came into being as a protest against tyranny. To preclude a recurrence of the sort of autocratic rule that sparked the American Revolution, the men who drafted the outlines of the new national government in Philadelphia during the steamy summer of 1787 divided national power among three branches — the executive, headed by the president; the legislative, embodied in Congress; and the judicial, a national court system headed by the Supreme Court.

Congress was given authority to make the laws; the president, to see that they were faithfully executed; and the Supreme Court, to interpret and apply the law and to resolve disputes between certain specified parties.

The Weakest Branch ...

Writing in *The Federalist Papers* in 1788, during the campaign for ratification of the new Constitution by the states, Alexander Hamilton described the court as "beyond comparison the weakest of the three departments of power ... it can never attack with success either of the other two; and ... all possible care is requisite to enable it to defend against their attacks." Hamilton added:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Concluding this unflattering description of the court, Hamilton added that "from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches," and thus, Hamilton argued, life tenure for its members was essential to protect its independence.

Notwithstanding this pathetic portrait of the judiciary, Hamilton then went on to claim for this weakest branch the power and duty "to declare all acts contrary to the manifest tenor of the Constitution void."

Nothing in the Constitution gave the court this power of judicial review, and scholars still wrangle over whether or not it was in the original scheme of things for the court to have such authority.

To all intents and purposes, however, the debate has been irrelevant ever since 1803 when the court first exercised this power to strike down an act of Congress, declaring that "it is, emphatically, the province and duty of the judicial department to say what the law is," The significance for American government of this ruling in *Marbury v. Madison* cannot be overestimated.

It is in *Marbury* that the court, in addition to exercising for the first time its power vis-a-vis Congress, also put the president on notice that his actions, too, were subject to judicial review. Chief Justice John Marshall's opinion reprimanded President Thomas Jefferson for failing to deliver commissions to certain judicial officers who had been nominated by his predecessor, John Adams, and confirmed before Jefferson took office.

... And the Most Powerful Court

It is this extraordinary power, wielded with care, that has enabled the weakest branch of the federal government to become the most powerful court of law in history.

The Supreme Court's orders are enforced by little power other than that of public opinion. Yet the court can override the will of the majority embodied in acts of Congress. It can forcefully remind the president that in the United States all persons are subject to the rule of law. It can require the states to redistribute political power among their citizens. And it can persuade the nation's citizens that the fabric of their society must be rewoven into new and fairer patterns.

The court's rulings have done much to shape the character of the federal government and the manner in which it relates to the states and to individual citizens. One view of its effect was set out early in the 20th century by constitutional historian Charles Warren. Warren wrote that without the court's power to check Congress,

> [T]he Nation could never have remained a Federal Republic. Its government would have become a consolidated and centralized autocracy. Congress would have attained supreme, final and unlimited power over the Executive and the Judiciary branches, and the States and the individual citizens could have possessed only such powers and rights as Congress chose to leave or grant to them.

The Balance Wheel

The court is the nation's balance wheel, continually tilting the flow of power away from one sufficiently powerful branch of the national government to another and to or from the individual and the states.

In his published lectures, *The Supreme Court in the American System of Government*, Justice Robert H. Jackson, a member of the court from 1941 to 1954, made this point with particular clarity:

> In a society in which rapid changes tend to upset all equilibrium, the court, without exceeding its own limited powers must strive to maintain the great system of balances upon which our free government is based. Whether those balances and checks are essential to liberty elsewhere in the world is beside the point; they are indispensable to the society we know. Chief of these balances are: first, between the Executive and Congress; second, between the central government and the States; third, between state and state; fourth, between authority, be it state or national, and the liberty of the citizen, or between the rule of the majority and the rights of the individual.

Recent Court Trends

It is not difficult to apply Jackson's categories to some of the major rulings issued by the court since 1969. The balance between the executive branch and Congress was adjusted with the court's ruling in a 1975 decision holding that the president could not impound (refuse to spend) funds approved by Congress for specific programs, and it could be altered again when the court rules on issues raised by the so-called legislative veto. *(Details, box, p. 52)*

The balance between national power and the rights of the states is at the heart of numerous modern-day rulings. Considered the most notable of these is the court's 1976 decision that Congress may not require states to compensate their own employees at salary levels dictated by the federal minimum wage law. As it has done since 1790, the court resolves disputes between states over land, water and, more recently, energy.

The most controversial of the court's decisions in the 1969-82 period, however, have been those that readjusted the balance between the authority of the government and the liberty of the individual. Among these opinions were the 1973 decision guaranteeing women a right of privacy in deciding whether or not to have an abortion, and the series of decisions in the late 1970s on the issue of "affirmative action." *(Details, pp. 113, 114)*

The Post-Warren Court

The court of the 1970s is often referred to as the Burger court, but for a variety of reasons the label has not stuck. A more accurate label might be the post-Warren court.

Chief Justice Warren E. Burger took his seat in June 1969, upon the retirement of Chief Justice Earl Warren. To all outward appearances it was a smooth transition, but the court was a different place without Warren, whose personality had dominated it during his 16-year tenure.

Burger differed from Warren in many ways; each had his own strengths and his own view of the duties and responsibilities of the chief justice.

Earl Warren, who had a long career in politics before he was appointed chief justice, focused his energy and considerable political skill upon his colleagues on the court, encouraging a creative exchange of views among the eight other independent justices and working to cajole or reason an effective court majority into being.

Warren was not the greatest intellect on the court in the 1950s and 1960s, but no one questioned his role as its chief, its leader, and the first among equals.

Warren Burger had been a judge, not a politician, when he was chosen to be chief justice. Often a dissenter himself in his earlier judicial career, he was content to speak and vote as one of the nine justices, eschewing the Warren role of consensus-maker. One result was an increase in the number of splintered rulings — those without the backing of even a solid five-member majority on the court — and multiple opinions, factors that sometimes generated more confusion than clarity on the issues involved.

Burger views himself primarily as the head of the federal judicial system, and he devotes a considerable amount of time and energy to questions of judicial administration and efficiency. He frequently speaks out to Congress and legal groups urging action to modernize the courts and better equip them to deal with the ever-growing volume of cases coming before them. This role for the chief justice is not without precedent, but Burger has been criticized for some of his activities. *(Details, box, pp. 70-71)*

Controversy and Stability

The 1970s began for the court amid bitter controversy. Abe Fortas had resigned as an associate justice in May 1969, a month before Burger was sworn in.

Liberal resentment at the circumstances that forced Fortas to resign flared into a fierce confirmation battle later in the year, culminating in the Senate's rejection of President Richard M. Nixon's choice of Clement F. Haynsworth, a noted appeals court judge, as Fortas' successor. Not since 1930 had a president's nominee to the court been rejected outright.

Matters went from bad to worse the next year. In April 1970 the Senate, after another brutal confirmation fight, also rejected Nixon's misguided choice of G. Harrold Carswell to fill the Fortas seat.

Both of the rejected nominees were Southern conservatives.

But peace finally was restored when the Senate then confirmed Nixon's third choice for the seat — Harry A. Blackmun, a court of appeals judge and close friend of Chief Justice Burger's.

The court, now with two Nixon appointees as members, soon issued a decision that set off a drive in Congress to enact a constitutional amendment to lower the voting age to 18. In December 1970 the justices agreed with the administration's argument that Congress lacked the power

to lower, by statute, the voting age in state and local elections. This decision, in the case of *Oregon v. Mitchell*, led directly to approval and ratification of the 26th Amendment on July 1, 1971.

The 1970 court term was an eventful one in other ways. In February the court issued a ruling in the case of *Harris v. New York* indicating that it might indeed be ready to back off somewhat from the strict requirements of the controversial 1966 *Miranda v. Arizona* decision denying prosecutors the use of evidence obtained from a suspect who had not been warned of his constitutional rights.

In April the court ruled unanimously in the case of *Swann v. Charlotte-Mecklenburg County Board of Education* that busing was a permissible interim means of desegregating the nation's public schools, a position directly at odds with that of the Nixon administration. And in June the court found itself head-to-head with the White House in the so-called Pentagon Papers case. The administration ultimately lost its bid for injunctions to halt publication of articles based on a classified history of U.S. military involvement in Vietnam. *(Details, pp. 27, 131)*

In September 1971, just days before the beginning of the new court term, veteran Justices Hugo L. Black and John Marshall Harlan retired in poor health. Black's retirement marked the end of an era; he had been President Franklin D. Roosevelt's first appointee to the Supreme Court in 1937.

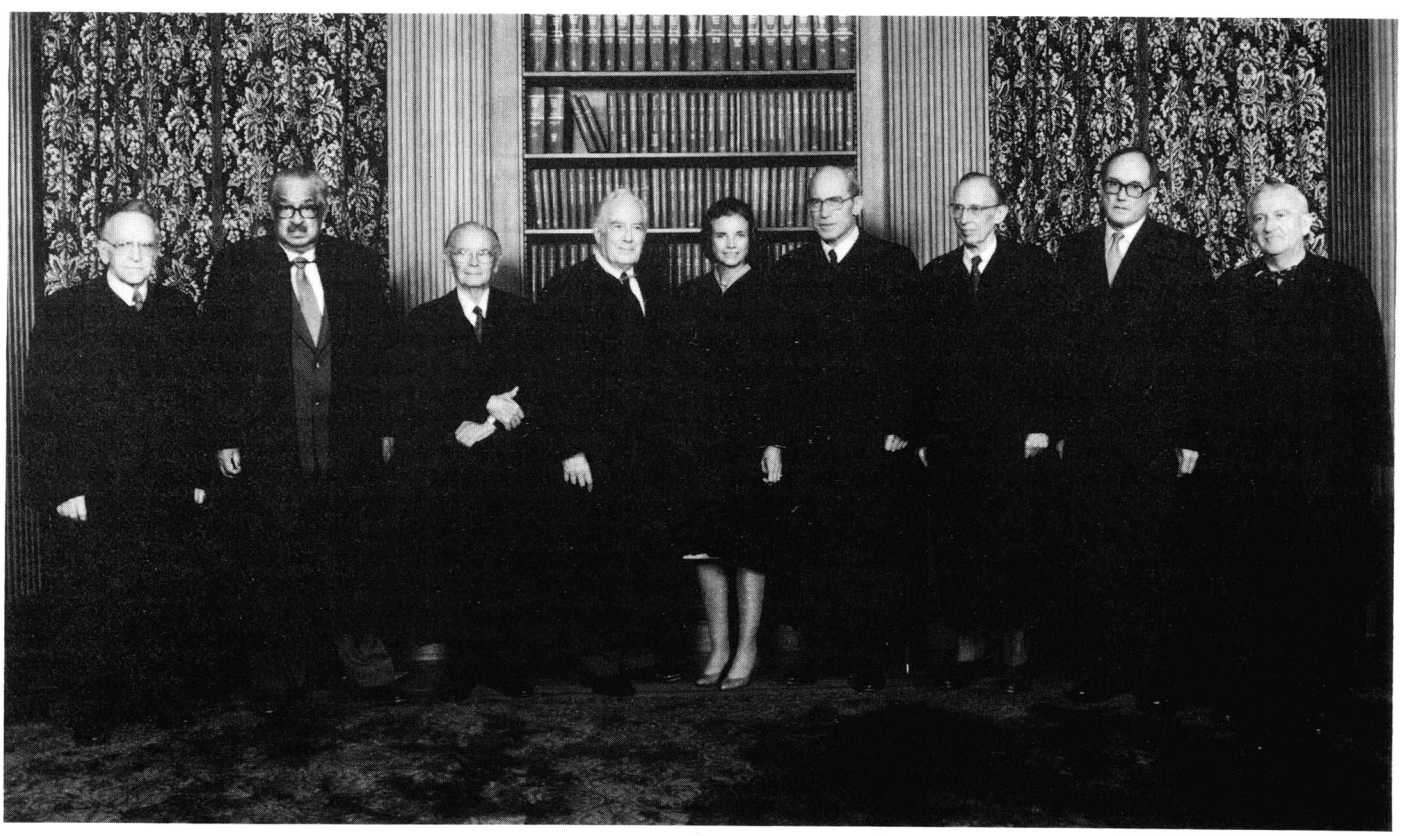
After the earlier confirmation battles, Nixon acted more cautiously in selecting his nominees to fill these seats. In October he named former American Bar Association President Lewis F. Powell Jr. and Assistant Attorney General William F. Rehnquist. Both men were approved with little controversy. Powell glided through the confirmation process; the path was bumpier for Rehnquist, but Senate approval was never in doubt.

The remaining years of the post-Warren period saw other major developments. In the October 1971 term it issued the first in a long line of rulings striking down state and federal laws that discriminated unfairly between men and women. The next year was notable for the court's decision that effectively struck down all existing state capital punishment laws. In 1973, the first year of Nixon's second term, the court issued its landmark abortion decision — *Roe v. Wade*. The following year brought the Watergate tapes ruling and the premature end of the Nixon presidency.

In November 1975 Justice William O. Douglas retired. He had been appointed in 1939. In serving on the court for more than 36 years, Douglas easily surpassed all previous justices in length of service.

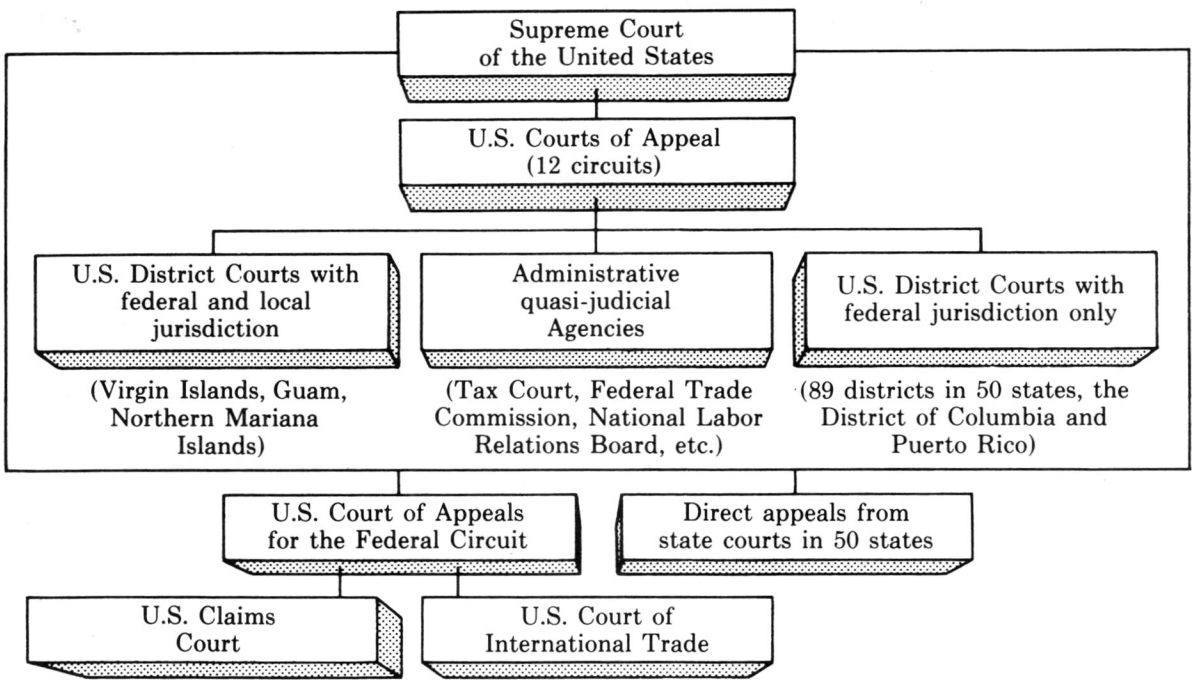
Douglas' retirement brought the post-Warren era to an end. His departure now reduced the number of Warren court justices to fewer than a majority; only Justices William J. Brennan Jr., Potter Stewart, Thurgood Marshall and Byron R. White had served with Warren.

President Gerald R. Ford, who once led an abortive attempt to impeach Douglas, appointed his successor — John Paul Stevens, a federal appeals court judge from Chicago. Stevens was easily confirmed and took his seat in December 1975.



From left: Harry A. Blackmun, Thurgood Marshall, William J. Brennan Jr., Chief Justice Warren E. Burger, Sandra Day O'Connor, Byron R. White, Lewis F. Powell Jr., William H. Rehnquist, John Paul Stevens

Federal Judicial System



The Contemporary Court

Three major rulings in the first half of 1976 set the tone for the work of the Supreme Court for the remainder of the 1970s and the early 1980s.

The care with which the contemporary court examines its cases and draws distinctions was evident in two of these. In *Buckley v. Valeo*, the court considered a challenge to the constitutionality of a long list of provisions of the federal campaign finance law that Congress approved in 1974. The court upheld some of the challenged sections of that law, including provisions limiting campaign contributions, while striking down others, including spending ceilings; the court ruled that the latter violated the First Amendment guarantee of free speech.

Five months later, the court upheld some revised state death penalty laws that were enacted in the wake of its 1972 ruling. However, it struck down others on constitutional grounds. *(Details, p. 100-101)*

When it struck down a 1974 law that required states to pay their employees according to the dictates of the federal minimum wage law, the court put Congress on notice that states' rights arguments would once again receive a sympathetic hearing at the "marble palace." *(Details, p. 51)*

During this period, the court was presented with numerous challenges to acts of Congress and decisions of the president. It upheld a 1977 federal strip mining law, struck down one portion of the 1970 federal occupational safety and health law, backed the decision of Congress to exclude women from the military draft, invalidated a key portion of a 1978 bankruptcy reform law, and upheld the legality of the extraordinary 1981 Iran agreements resolving the American hostage crisis.

While refusing to grant absolute immunity to public officials faced with civil damage suits from individuals who claimed they have been injured by official action, the court in 1982 again affirmed the special position of the president by granting him that immunity. *(Details, box, p. 28)*

In other areas, the court reaffirmed its support of women's efforts to be treated equally before the law, striking down various statutes and regulations that unfairly treated men and women differently. And it upheld the major landmarks of the Warren era: the decisions on civil rights and criminal law as well as the laws passed by Congress designed to realize for the nation's black citizens the constitutional promise of equal protection. In that area the court did more than stand pat. For example, it expanded the scope of civil rights protections to include aliens as well as native-born residents. The court ruled in 1982 that states could not deny a public education to alien children illegally living in the United States.

There were no changes in the membership of the court after the Stevens' appointment in 1975 until July 1981, when Justice Potter Stewart retired. To succeed Stewart, President Ronald Reagan picked Sandra Day O'Connor, the first woman ever nominated to be a Supreme Court justice. She was confirmed by the Senate in time to begin the October 1981 term. *(Details, p. 37)*

2

The Court and the President

To travel from the White House to the Supreme Court building, one must cross or circumvent Capitol Hill. The massive marble dome topping the legislative chambers of Congress stands between the president's offices and the marble edifice east of the Capitol where the justices work.

The president selects the members of the court as vacancies occur. To an outsider, this would seem to make the Supreme Court simply an adjunct of the executive, a rubber stamp in the president's hip pocket. History quickly dispels such an image.

Before Supreme Court nominees can take their seat on the court, they must be confirmed by the Senate. Once they become justices, they are insulated from presidential pressure by life tenure — subject to good behavior — and no justice has ever behaved so badly that Congress felt it necessary to remove him from office. An additional guarantee of independence is the Constitution's assurance that Congress cannot reduce the justices' salaries while they remain on the bench.

In the landmark 1803 ruling claiming for the court the power to hold acts of Congress unconstitutional, Chief Justice John Marshall chided President Thomas Jefferson for withholding commissions from certain justices of the peace. One hundred and seventy-one years later, in the Watergate coverup case, President Richard M. Nixon was ordered by the court to comply with a prosecutor's subpoena, an order that eventually forced him to resign his office in disgrace. The man Nixon had chosen to be chief justice wrote that decision.

From time to time the court reviews particular actions or claims by the president, as in the Watergate case and the Iran agreements case of 1981. This is another aspect of the court's power of judicial review, first used to nullify an act of Congress 180 years ago. It is the court's primary task, Chief Justice Warren E. Burger reminded President Nixon in 1974, "to say what the law is" and to apply it to the other two branches of the national government when they overstep its bounds.

An Arms-Length Relationship

The court reviews presidential actions far less frequently than it considers challenges to acts of Congress. But when presidential claims and decisions do come up for review, a critical element in the court's consideration of the matter is the position of Congress.

When Congress, explicitly or implicitly, backs the president — as in the Iran agreements case — the president is quite likely to win his case. But when Congress is silent, or clearly at odds with the president's position, the chief executive is on shaky ground, as Nixon discovered in the Watergate case.

When Washington was a new town, and the federal government was composed of a small group of bureaucrats without a great deal to do, it was not unusual for the justices to be frequent guests at the White House, and many were unofficial advisers to the president. Chief Justice John Jay often filled such a role for President Washington, who sent Jay, while he was still chief justice, on a diplomatic mission to Europe. In those days the justices did not move their families to Washington, but came to the capital only for the duration of the court's relatively short term.

But since the Civil War and the accompanying growth in the size of the national government, such familiarity has become the exception rather than the rule. Today, justices and presidents are seldom on more than polite speaking terms. There are exceptions, but these tend to draw particular attention and usually generate controversy. Recent examples include the relationships between Justice Felix Frankfurter and Franklin D. Roosevelt and between Justice Abe Fortas and Lyndon B. Johnson.

In October 1982 President Ronald Reagan revived the custom of meeting with the members of the court before the beginning of each term on the first Monday in October. He used the occasion to tell the justices he recognized the inevitable tension underlying the relationship between the two branches. "It's neither surprising nor disturbing that our citizens may at times side with the dissenters," he said. "It's even rumored that presidents sometimes disagree with particular Supreme Court decisions." But Reagan added that on "one point, at least, there can be no disagreement whatsoever: the Supreme Court must continue to demonstrate the independence and integrity that have always been its hallmarks. . . ."

During the term that followed, Reagan's own policies were before the court in numerous cases as diverse as abortion and tax policy.

History provided little doubt that the court, in dealing with those cases, would continue to display the independence to which Reagan referred.

Supreme Court Membership, 1969-83*

Name	State	Date of Birth	Nominated By	To Replace	Date of Appointment	Date Confirmed	Date Retired
Hugo L. Black	Ala.	2/27/1886	Roosevelt	Van Devanter	8/12/37	8/17/37	9/17/71
William O. Douglas	Conn.	10/16/1898	Roosevelt	Brandeis	3/20/39	4/4/39	11/12/75
Earl Warren**	Calif.	3/19/1891	Eisenhower	Vinson	9/30/53	3/1/54	6/23/69
John M. Harlan	N.Y.	5/20/1899	Eisenhower	Jackson	1/10/55	3/16/55	9/23/71
William J. Brennan Jr.	N.J.	4/25/1906	Eisenhower	Minton	11/14/57†	3/19/57	
Potter Stewart	Ohio	1/23/1915	Eisenhower	Burton	1/17/59††	5/5/59	7/3/81
Byron R. White	Colo.	6/8/1917	Kennedy	Whittaker	3/30/62	4/11/62	
Abe Fortas	Tenn.	6/19/1910	Johnson	Goldberg	7/28/65	8/11/65	5/14/69†††
Thurgood Marshall	N.Y.	7/2/1908	Johnson	Clark	6/13/67	8/30/67	
Warren E. Burger**	D.C.	9/17/1907	Nixon	Warren	5/21/69	6/9/69	
Harry A. Blackmun	Minn.	11/12/1908	Nixon	Fortas	4/14/70	5/12/70	
Lewis F. Powell Jr.	Va.	9/19/1907	Nixon	Black	10/21/71	12/6/71	
William H. Rehnquist	Ariz.	10/1/1924	Nixon	Harlan	10/21/71	12/10/71	
John Paul Stevens	Ill.	4/20/1920	Ford	Douglas	11/28/75	12/17/75	
Sandra Day O'Connor	Ariz.	3/26/1930	Reagan	Stewart	8/19/81	9/21/81	

** as of March 10, 1983*
*** chief justice*
† following recess appointment on 10/16/56
†† following recess appointment on 10/14/58
††† resigned, did not retire

The Political Factor

Politics invariably plays a part in the selection of all Supreme Court nominees. The fact that a president serves for a limited term while justices may serve for a lifetime makes it inevitable that politics will be involved in these choices. Every president has his own ideas about how the government should operate, and he wants to see his policies perpetuated in government decisions for as long as possible. This sometimes can be accomplished by the appointment of relatively young men to the court who share that same view and may serve for decades after the appointing president leaves office.

Washington left the White House in 1797, but one of the justices he appointed remained on the court until 1811. Even more notable was John Adams' selection of John Marshall as chief justice in 1801, near the end of Adams' only term as president. Adams was the last Federalist president, but Marshall, committed to the Federalist viewpoint, served as chief justice until 1835. In that post he exercised a vast influence upon the development of the new nation through a long list of court decisions encouraging the development of federal power and authority.

As already noted, however, presidents often are disappointed in the rulings their hand-picked justices produce. Nixon's conservative nominees did indeed provide the votes for some conservative rulings to Nixon's liking, but on some critical issues — including the death penalty and abortion — the court rejected Nixon's positions.

The Power Factor

As the power of the president has grown, an increasing number of challenges to the manner of its exercise have come before the court. The president comes to the court in a position of strength. Generally, he is a popular — and thus influential — figure. The justices approach challenges to his power with caution, well aware that the effective enforcement of their rulings depends heavily upon public opinion and that a president is able to mobilize that power far more effectively than the Supreme Court.

When possible, the justices usually sidestep a head-on collision with the chief executive by separating the person from his policy, thus hoping to avoid alienating the former even while invalidating the latter.

Twice in modern times that distinction became impossible. When the controversy over President Harry S Truman's seizure of the steel mills reached the court in 1952 and when Nixon's claim of privilege to withhold the White House tape recordings demanded by the Watergate special prosecutor came before the court 22 years later, both presidents' deep personal involvement was clearly evident.

Both times, the court ruled against the chief executive. Truman dropped his effort to take over the steel mills, and Nixon complied with the prosecutor's subpoena. Compliance by these immensely powerful men with the decision of nine black-robed judges backed by the Constitution affirmed once again the rule of law and the pre-eminent role of the court in saying what that rule requires.

PRESIDENTS, POLITICS AND JUSTICES

It is the president's prerogative to nominate justices for the Supreme Court whenever vacancies occur. The only road to a career on that bench is through the White House.

Presidents select justices with a variety of considerations in mind, but invariably it is a highly political and very personal choice. This power gives the president a major opportunity to influence the philosophical leanings and performance of the court, and presidents have been well aware that the justices they select may have an immeasurable impact on the shape of public policy.

Few chief executives have been willing to delegate that responsibility, realizing that the persons appointed may sit on the court for many years after they leave the White House.

The number of Supreme Court nominations a president makes is entirely a matter of chance. A vacancy occurs on the average about every two years, but both Franklin D. Roosevelt and Jimmy Carter served an entire four-year term without any change occurring in the membership of the court.

The performance of a Supreme Court justice is rarely predictable, as president after president has learned. Despite great care in selecting individuals who seemed to share their views, many presidents have been disappointed as their nominees, once confirmed, displayed a staunch independence of mind.

Political scientist Robert M. Scigliano, in his 1971 book, *The Supreme Court and the Presidency*, describes the intersecting relationship between the court and the president:

> In their contemporary relationship, the Presidency has gained considerable influence over the Supreme Court.
>
> Yet the President cannot be said to dominate the Court. . . .
>
> Tension continues to exist between the two institutions. . . . A President cannot be sure that he is getting what he thinks he is getting in his appointments, a person may change his views after joining the Court, and the judicial obligation calls upon a justice to heed the Constitution and the laws, and not Presidential positions.

The Selection Process

Presidents consider a variety of criteria in selecting justices. Among the most consistently weighed factors in these selections have been merit, friendship, geographical and religious balance, and ideology.

Presidents as a rule have been in agreement that a nominee for the court should have some legal training, but judicial experience has not been considered particularly important. Many distinguished appointees — including eight chief justices of the United States — had no prior judicial experience.

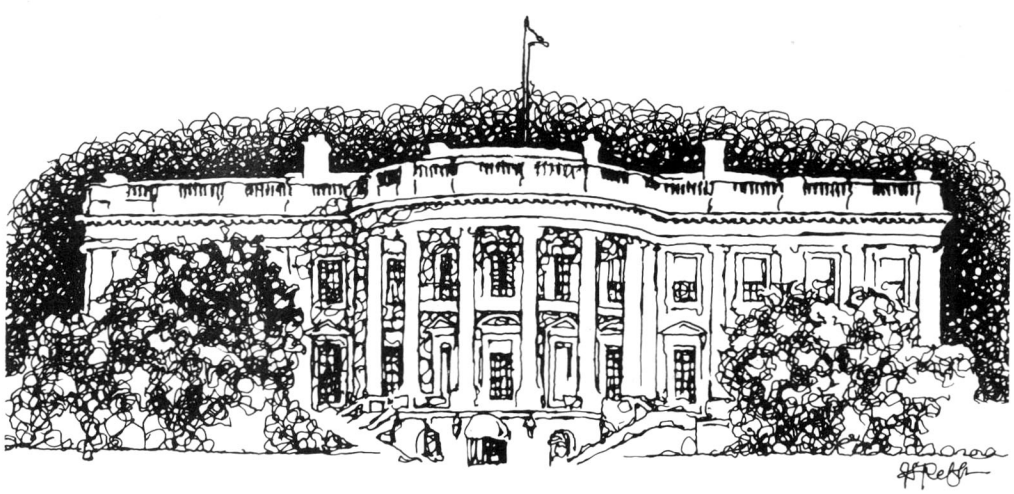
Of the modern presidents, Franklin D. Roosevelt appointed six men who had no judicial experience: Chief Justice Harlan Fiske Stone and Associate Justices Stanley F. Reed, Felix Frankfurter, William O. Douglas, James F. Byrnes and Robert H. Jackson. President Eisenhower, after appointing Earl Warren as chief justice, insisted that all future nominees have judicial experience. (Warren had none.)

Harry S Truman appointed two men without judicial experience: Harold H. Burton and Tom C. Clark. Neither of President John F. Kennedy's two appointees, Byron R. White and Arthur J. Goldberg, had judicial experience; nor did Abe Fortas, Lyndon B. Johnson's appointee, or William H. Rehnquist and Lewis F. Powell Jr., Nixon nominees.

Merit

Almost every one of the 102 persons who have served on the Supreme Court had some record of public service prior to their appointment. Many had held offices in the executive branch or had served as state or federal judges, U.S. senators, members of the House of Representatives, governors or law professors.

High ethical standards, as well as experience in public life, usually are criteria presidents seek in a nominee. Louis D. Brandeis' nomination successfully weathered a challenge that stemmed from charges he had engaged in improper practices as an attorney. But the nominations of



The only road to a career on the Supreme Court is through the White House.

Clement F. Haynsworth as associate justice and Abe Fortas as chief justice failed to win Senate approval mainly because of questions involving possible conflicts of interest.

Friendship, Geography

Personal friendship has been a key factor in several nominations to the court. William Howard Taft's nomination of Horace H. Lurton, Woodrow Wilson's selection of Brandeis, Truman's choice of Harold H. Burton and John F. Kennedy's preference for Byron R. White all had some basis in personal friendships. President Johnson selected a reluctant Abe Fortas for the bench in 1965 on the basis of a long friendship.

Justices of the Supreme Court have come from 31 of the 50 states (as of 1983). States have not been represented in any substantially equal pattern. New York has been the home of 15 justices, Pennsylvania has had 11 residents nominated to the court, Massachusetts 10, Ohio nine, and Virginia and Kentucky six. No other states have been so frequently represented.

Early in the court's history, geographical balance was a major consideration in selecting nominees. Because of the justices' function as circuit judges, it was usually felt that each geographic area should have a spokesman on the court. Until the Civil War, this resulted in a "New England seat," a "Virginia seat," a "New York seat" and a "Pennsylvania seat." With the nation's post-Civil War expansion and the end of the justices' circuit-riding duties, this tradition faded.

Religious Balance

The notion of sectarian religious representation on the court developed out of the fact that Americans are a pluralistic society and a politically group-conscious people. Thus the idea of a "Roman Catholic seat" and a "Jewish seat" on the court developed as a way of acknowledging the role of these religious minority groups in the nation.

The 'Catholic Seat.' Chief Justice Roger B. Taney was the first to hold the "Catholic seat." Since Grover Cleveland appointed Edward D. White to that seat in 1894, it has been held by Joseph McKenna, Pierce Butler, Frank Murphy and William J. Brennan Jr.

Truman's appointment of Tom C. Clark in 1949 after Murphy's death interrupted the tradition, but Eisenhower's appointment of Brennan in 1956 restored the notion of a "Catholic seat." The selection was regarded, in part, as an appeal to Catholic voters.

The 'Jewish Seat.' The "Jewish seat," established in 1916 with the appointment of Louis D. Brandeis, was filled by Justices Felix Frankfurter (1938), Arthur J. Goldberg (1963) and Abe Fortas (1965). (Benjamin N. Cardozo, also a Jew, served along with Brandeis.)

In 1969 President Nixon again broke the tradition by nominating three Protestants in succession to the seat Fortas vacated.

Other Factors

The special representational concerns of the Republican and Democratic parties govern, to some extent, the choice of nominees to the court.

Black and Jewish support for the Democratic Party enhances the likelihood that Democratic presidents will continue to consider those groups in making their selections.

In 1967 President Lyndon B. Johnson nominated Thurgood Marshall to be the first black justice of the Supreme Court. Marshall had been counsel for the National Association for the Advancement of Colored People (NAACP) and one of the attorneys responsible for arguing successfully the case of *Brown v. Board of Education* — the landmark 1954 school desegregation case. Marshall served as solicitor general of the United States before his appointment to the court.

Women's groups had been urging the appointment of a woman to the court for more than a decade before President Ronald Reagan in 1981 selected Sandra Day O'Connor. Reagan had promised during his campaign for the White House in 1980 to place a woman on the court, if given the opportunity.

Such a pledge coming from a conservative candidate was clear evidence of the increasing political clout that women's groups could wield over candidates for national office.

Ideology has been a significant factor in many presidents' appointments to the high bench. President Theodore Roosevelt wrote to Sen. Henry Cabot Lodge, R-Mass., that he was considering a Democrat, Horace H. Lurton, to fill a vacancy on the court, explaining that Lurton was "right" on all the important issues:

> The nominal politics of the man has nothing to do with his actions on the bench. His real politics are all important. . . . On every question that would come before the bench, he has so far shown himself to be in much closer touch with the policies in which you and I believe.

Lodge agreed, but wondered why a Republican who held the same opinions could not be found for the post. He suggested William H. Moody, the attorney general, and Roosevelt in 1906 agreed to appoint Moody. Lurton subsequently was nominated to the court in 1909 by William Howard Taft.

Party Loyalty

Although presidents generally nominate members of their own party to the court, members of the opposition party occasionally are nominated.

Republican presidents have appointed nine Democratic justices, and Democratic presidents have named three Republicans to the court. Whig President John Tyler appointed Democrat Samuel Nelson. Republican Presidents Abraham Lincoln, Benjamin Harrison, William Howard Taft, Warren G. Harding, Herbert Hoover, Dwight D. Eisenhower and Richard M. Nixon appointed nominal Democrats.

Taft appointed Democrats Horace H. Lurton, Edward D. White (promoted to chief justice) and Joseph R. Lamar. The other GOP presidents who nominated Democrats were Lincoln (Stephen J. Field), Benjamin Harrison (Howell E. Jackson), Harding (Pierce Butler), Hoover (Benjamin Cardozo), Eisenhower (William J. Brennan Jr.) and Nixon (Lewis F. Powell Jr.).

Democratic presidents who selected Republican justices were Woodrow Wilson, who appointed Louis D. Brandeis, Franklin D. Roosevelt, who promoted Justice Harlan Fiske Stone to the chief justiceship, and Harry S Truman, who chose Republican Sen. Harold H. Burton, R-Ohio, for the court. *(List of members of Congress who have been appointed to the court, box, p. 21)*

Presidential Nominees to the Court Often Fail to Live Up to Expectations

Despite their best efforts to name persons to the court who share their views, presidents frequently have been disappointed. Once on the court, justices often display an independence in their court opinions that frequently diverges from the political philosophy of the president who appointed them.

Donning the court robe does seem to make a difference in the appointees' views. Justice Felix Frankfurter, when asked if a person changed his views once he was appointed to the court, allegedly retorted: "If he is any good he does."[1]

Chief Justice Earl Warren, reflecting on his 16 years on the court, did not see "how a man could be on the Court and not change his views substantially over a period of years . . . for change you must if you are to do your duty on the Supreme Court."[2]

Charles Warren, historian of the court, wrote that "nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the President appointing him are disappointed."[3]

Jefferson and Marshall

Presidents Thomas Jefferson and James Madison would have agreed. They repeatedly registered their disappointment at the failure of the judges they appointed to the court to resist the powerful and dominating influence of Chief Justice John Marshall.

Madison failed to heed Jefferson's advice not to appoint Joseph Story to the court. Jefferson warned that Story would side with Marshall on important legal issues, which proved to be correct.

Roosevelt and Holmes

Theodore Roosevelt named Oliver Wendell Holmes Jr. to the court in 1902; Holmes then voted against the administration's antitrust efforts — most notably in the 1904 *Northern Securities v. United States* case. Holmes' dissent left the government with a narrow 5-4 majority upholding the dissolution of the Northern Securities railroad conglomerate.

After the decision, Roosevelt, referring to Holmes' defection, said that he "could carve out of a banana a Judge with more backbone than that!" Holmes reportedly smiled when told of the remark. Later, at a White House dinner, Holmes remarked to a labor leader and fellow guest: "What you want is favor, not justice. But when I am on my job, I don't give a damn what you or Mr. Roosevelt want."[4]

Woodrow Wilson had reason to regret the appointment of James C. McReynolds to the bench when that justice proved to hold the opposite of Wilson's viewpoint on almost every question.

Calvin Coolidge's sole appointee, Harlan F. Stone, within a year of his appointment sided with the liberal Holmes-Brandeis wing of the court.

President Harry S Truman noted that "packing the Supreme Court simply can't be done . . . I've tried and it won't work. . . . Whenever you put a man on the Supreme Court he ceases to be your friend."[5]

And Truman knew from experience. In the *Steel Seizure Case* of 1952, the four Truman appointees divided 2-2 in the case, which ruled the president's seizure of the steel mills to be unconstitutional.

Eisenhower and Warren

President Eisenhower later described as a "mistake" his decision to appoint Earl Warren chief justice. Warren's leadership commenced a judicial "revolution" that greatly disturbed the president.

But Warren's appointment made good political sense in 1953. Warren had delivered California delegates to "Ike" at the Republican national nominating convention in 1952. Warren's removal from the California political scene, where he had proven an immensely popular three-term governor, placated conservative California Republican leaders, including Vice President Richard M. Nixon and Senate Majority Leader William F. Knowland, both of whom disliked Warren's progressive Republican views.

But when Eisenhower was asked if he had made any mistakes during his presidency he quipped, "Yes, two, and they are both sitting on the Supreme Court." The former president thus registered his disappointment at the liberalism of Earl Warren and Justice William J. Brennan Jr.[6]

Nixon and Watergate

Former President Richard M. Nixon had ample cause to disagree with the decisions of the court to which he appointed four men. Although the justices Nixon selected held views consonant with his on many issues, some of them voted to reject Nixon's positions on abortion, aid to parochial schools, school desegregation, busing and electronic surveillance.

Nixon's most dramatic confrontation with the court came in 1974, when it ruled against his claim of an absolute executive privilege to withhold White House tapes sought as evidence in the trial of his former aides. The vote was 8-0. The ruling led to Nixon's resignation two weeks later.

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[1] Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1974), p. 63.

[2] Anthony Lewis, "A Talk with Warren on Crime, the Court, the Country," *New York Times Magazine*, Oct. 19, 1969, pp. 128-129.

[3] Charles Warren, *The Supreme Court in United States History*, rev. ed., 2 vols. (Boston: Little, Brown & Co., 1922, 1926), I:22.

[4] Abraham, *Justices and Presidents*, p. 62.

[5] Ibid., p. 63.

[6] Ibid., p. 246.

Taft: Champion Kingmaker

William Howard Taft was the only president to become chief justice of the United States, thus enjoying a unique double opportunity to influence the personnel and work of the court. As president, Taft named six justices, including his promotion of associate justice Edward White to chief justice. Then, during Warren G. Harding's presidency, Taft either suggested or gave his approval to three of the four men Harding appointed to the court — George Sutherland, Pierce Butler and Edward T. Sanford.

Taft also had lobbied for his own appointment as chief justice. In 1920 the former president let it be known to newly elected President Harding that he wanted the job. Taft had named White chief justice and, Taft told Harding, "many times in the past ... [White] had said he was holding the office for me and that he would give it back to a Republican administration." On June 30, 1921, Harding nominated Taft as chief justice, succeeding White, who had died in office.

Taft's most prodigious subsequent lobbying effort on presidential appointments resulted in Pierce Butler's appointment to the court. He orchestrated a letter-writing campaign recommending Butler, who was from Minnesota, and played down the talents of other potential nominees. Taft dismissed the candidacy of Judge Benjamin N. Cardozo of the New York Court of Appeals because, Taft wrote, Cardozo was "a Jew and a Democrat ... [and] ... a progressive judge." Judge Learned Hand, Taft warned, "would almost certainly herd with Brandeis and be a dissenter."

The chief justice sought and obtained endorsements for Butler from the Minnesota congressional delegation, members of the church hierarchy — Butler was a Roman Catholic — and from local bar associations across the nation. Harding succumbed to the pressure and sent Butler's nomination to the Senate where, despite considerable opposition from Senate progressives, he won approval.

When Mahlon Pitney resigned in 1922, Taft heartily approved of Harding's choice, Edward T. Sanford. Taft and Sanford had been acquaintances since Theodore Roosevelt's administration. Some observers felt that Sanford was so close to Taft that the chief justice had two votes on the bench. Their friendship and judicial affinity had a final coincidence: they died on the same day in 1930.

Chief Justice Taft's influence over Harding's appointments to the court gave that body a decidedly conservative majority during the 1920s and 1930s — ending only with Franklin D. Roosevelt's appointments to the court beginning in 1937.

Outside Influences

The appointment of a justice to the Supreme Court involves a complex pattern of personal and political transactions between the president and the individuals and interest groups seeking to influence that nomination.

Among the more important centers of influence are the members of the president's administration, the sitting justices of the Supreme Court and the legal community.

The Attorney General

The president normally seeks the advice of his chief legal officer, the attorney general. In 1840 the attorney general assumed responsibility for judicial appointments, taking over that function from the secretary of state. Since then, the attorney general has become the president's liaison with the principal interest groups, members of Congress and other citizens involved in the screening and selection of qualified candidates for appointment to the court.

The Justices

Sitting justices rarely have hesitated to voice their suggestions of especially qualified nominees for vacant seats. Some justices have offered negative advice. Joseph P. Bradley, in the 1890s, prepared a report about those who would be qualified to succeed him and concluded that no candidate from his native New Jersey possessed the necessary qualifications.

In the 19th century justices often lobbied presidents to urge appointment of certain candidates. Justices John Catron and Benjamin R. Curtis, for example, succeeded in convincing President Franklin Pierce to nominate John A. Campbell to the court. Their representations to Pierce included letters of support for Campbell from all the other sitting justices.

Other justices who successfully urged presidents to appoint certain individuals to the court were: Robert C. Grier in support of William Strong in 1870, Noah H. Swayne for Joseph P. Bradley in 1870, Morrison R. Waite for William B. Woods in 1880, Samuel F. Miller for David J. Brewer in 1889 and Henry B. Brown for Howell E. Jackson in 1893.

William Howard Taft, president and later chief justice (1921-30), was by all measures the most successful of the court's members at influencing presidential court nominations.

Chief Justice Charles Evans Hughes counseled three presidents on appointments. Herbert Hoover sought Hughes' advice in naming a replacement for Oliver Wendell Holmes in 1931. The president was interested particularly in Hughes' opinion of fellow New Yorker Benjamin N. Cardozo.

In 1941 Hughes wanted President Franklin D. Roosevelt to name Harlan Fiske Stone his successor as chief justice. President Truman also consulted Hughes in 1946 on his choice of a chief justice after Stone's death that year.

Hoover also had sought and obtained Stone's advice on filling the Holmes seat. Stone was so convinced of Cardozo's qualifications that he sent several memorandums to Hoover recommending Cardozo in preference to alternate candidates. Stone tried to overcome Hoover's reservations about appointing another Jewish justice, even offering his own resignation from the court to make room for Cardozo.

Hoover nominated Cardozo on Feb. 15, 1932, and he