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Justices and Presidents: A Political History of Appointments to the Supreme Court (2d edition)

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JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (2d edition). By *Henry J. Abraham*. New York: Oxford University Press. 1985. Pp. xi, 430. \$24.95.

The judicial nominating process has always been inexact, as many presidents have discovered to their chagrin. For example, after Oliver Wendell Holmes failed to support him in a major antitrust case, Theodore Roosevelt declared that "I could carve out of a banana a Judge with more backbone than that!" (p. 69). And when a biographer asked Dwight D. Eisenhower if he had made any mistakes while president, he replied, "Yes, two, and they are both sitting on the Supreme Court" (p. 263). Eisenhower was referring to Chief Justice Earl Warren and Justice William Brennan. Yet a great deal of consideration preceded each of the above nominations, apparently to no avail.

On crucial issues, Justices and their appointing presidents have often disagreed. Why is this so? What are the decisional criteria surrounding Supreme Court appointments? What should they be? Can presidents know in advance how their nominees will respond to the questions before them, and to those not yet before them? These are the questions which Henry J. Abraham¹ poses, and they merit answers. Unfortunately, he never answers them.

In *Justices and Presidents: A Political History of Appointments to the Supreme Court*, Professor Abraham surveys nearly two hundred years of presidential nominations of Supreme Court Justices and corresponding judicial performance. The result is a highly accessible compendium of the process by which 37 presidents have nominated 139 Justices, of whom 102 actually served. But while Abraham stresses the personal nature of the nomination process, his work is short on illustrative anecdotes. And while he purports to be writing a history, Abraham never manages to place this multifaceted process within the context of a unitary theory of history. The omissions are

1. James Hart Professor of Government and Foreign Affairs at the University of Virginia.

keenly felt. Like Chinese food, *Justices and Presidents* is momentarily filling, but leaves one hungry for more soon afterwards.

Structurally, *Justices and Presidents* is divided into three parts. First, the author devotes several chapters to the hows and whys of the appointment process, reflecting upon the process generally. Abraham then devotes the bulk of his work to a brief, informal analysis of each nomination to the Supreme Court, including unsuccessful ones. Finally, Abraham appends the results of several surveys attempting to assess the performance of Justices and presidents. Among these surveys is a 1970 study wherein 65 prominent academics, including Abraham, rated the Justices in categories ranging from "great" to "failure."² The author refers to this survey throughout as a benchmark of judicial competence.

In Abraham's estimation, four considerations dominate the nomination process: objective merit, personal relationships, balancing representation on the Court, and "real" political and ideological compatibility with the President. Not surprisingly, the four overlap somewhat, and more than one may be relevant to a single nomination. However, Abraham hypothesizes that *most* nominations are attributable primarily to one of these criteria. For example, Republican President Herbert Hoover's nomination of Democrat Benjamin Cardozo is deemed a "classic" merit-based appointment, and "the finest act of his career as President" (p. 5). In contrast, President Johnson's selection of Thurgood Marshall and President Reagan's selection of Sandra Day O'Connor reflect the perceived need for black and female representation, respectively (p. 6). Political and ideological compatibility has been a threshold consideration in a large majority of appointments (p. 6).

Although recognizing the legitimacy of numerous decisional criteria, Abraham questions the importance accorded factors other than objective merit in the appointment process. His primary concern is that these factors not deprive the Court of Justices "professionally, intellectually, and morally qualified to serve," whatever their other characteristics (p. 341). Citing near consensus among "qualified observers of the judicial function at its apex," Abraham argues that objective merit can be identified and anticipated in potential nominees (p. 11). The author's meaning is clear; since merit can be measured, it ought not be transcended by other decisional criteria. As examples of the risk of using other criteria, Abraham notes the failure to appoint the obviously meritorious Learned Hand and the long service of the bigoted James McReynolds, whom Abraham terms "a disgrace" (p. 176).

2. The complete results of this survey were published in book form in 1978. A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* (1978).

In defining objective merit, the author refers to a speech he gave before the Supreme Court Historical Society in 1982. There he listed six factors which he deemed "de minimis qualification guidelines" for Supreme Court Justices: "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."³ Certainly Abraham's list is appealing. All the qualities he lists are objectively desirable. The question is whether they can actually be objectively defined.

Therefore, the first problem with Abraham's analysis is that he never sufficiently develops his concept of what objective merit entails. What exactly is "an able, agile, lucid mind"? Does the answer reflect a way of thinking or a type of thinking? What is an "appropriate professional educational background"? Is it a degree from the University of Virginia, where Abraham teaches; or is it a degree from Bob Jones University, recently maligned for its policy of segregation? Thus Abraham ignores the probability that any definition of objective merit necessarily would take account of just those subjective factors which he seeks to exclude. After all, the reference point from which one judges excellence is inevitably one's own analysis. Jerry Falwell and Jesse Jackson are unlikely to overlap much in their definitions of "objective" merit. But even if it were possible to define merit objectively, other considerations have a legitimate place in the process.

Indeed, despite the author's rather dubious assertion that the Founding Fathers expected merit alone to determine Supreme Court appointments (p. 25), any modern observer would be astounded by a president's failure to consider personal relationships and political ideology in making nominations. Supreme Court appointments are for life. Naturally, presidents take the opportunity to fill the Court with Justices in their own images. To expect otherwise is both unreasonable and unrealistic.

Abraham sets out to chronicle "the motivations that underlie the process of presidential selection and appointment, the degree and kind of fulfillment of presidential hopes or expectations, and the professional performance of those entrusted with the responsibilities of the business of judging" (p. 12). He proceeds chronologically, after inexplicably starting with a case study of President Nixon's appointments to the Supreme Court. Presumably, Abraham sees the Nixon era as a microcosm of the appointment process generally. Certainly, Nixon's nominees ran the gamut from highly qualified to wholly undeserving,

3. P. 4. An adapted version of the address was published as Abraham, "A Bench Happily Filled:" *Some Historical Reflections on the Supreme Court Appointment Process*, 66 JUDICATURE 282 (1983).

from judicially experienced to wholly inexperienced, and from readily confirmed to summarily rejected.

Nixon's first opportunity to appoint a Justice came swiftly, with the retirement of Chief Justice Earl Warren. Immediately, Nixon turned to Warren Burger of the District of Columbia Circuit, a "prototype" Nixon jurist known for his tough law and order views. To Abraham, Burger represents an ideal combination of ideological compatibility with the President and objective merit, evidenced by his 13 years on the federal bench.⁴ To Nixon, however, objective merit seems to have been beside the point (pp. 13-14).

Next, Abraham begins to develop his notion that presidents ignore objective merit at their peril. He does so by tracing Nixon's unsuccessful efforts to place Clement Haynesworth, Jr., and later G. Harold Carswell in the seat vacated by Abe Fortas' retirement. To Abraham, the ease with which Burger gained confirmation reinforced Nixon's fundamental misunderstanding of the appointment process, and precipitated an ongoing battle, during which the Senate repeatedly constrained the President from making unqualified appointments (pp. 14-21).

The controversy raged until Nixon completed his four appointments to the Court, nominating Eighth Circuit Judge Harry Blackmun, former American Bar Association President Lewis Powell, and Assistant Attorney General (and former Supreme Court clerk) William Rehnquist. And had it not been for the potential damage to the Court's prestige, "one might have regarded these struggles as a salutary educational experience for America's citizenry" (p. 23). Apparently, the lesson is the danger of mediocrity.

Few American presidents have misunderstood the appointment process as fundamentally as Richard Nixon, according to the author. Some, like Franklin Roosevelt, focused on a nominee's support for the President's immediate goals. Others, like George Washington, emphasized a nominee's basic philosophy of government. But essentially all presidents at least considered merit, despite relying on other criteria in the final analysis.

However, even more than merit, presidents tend to emphasize factors related to significant contemporary political problems. Abraham's narrative demonstrates the multiplicity of influences to which presidents have responded. By and large, these influences are pressing and immediate. Rarely do they leave room for the kind of purity of process which Abraham seeks.

For example, George Washington limited his appointments to out-

4. Abraham's high esteem for the Burger nomination is surprising in light of his generally low opinion of President Nixon. Pp. 13-23. For a decidedly different assessment of the Burger nomination and tenure, see B. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

spoken advocates of the Constitution, a new and unexplained document. In fact, seven of Washington's ten appointees had participated in the Constitutional Convention of 1787 (p. 72). Chief Justice John Jay did not participate, but he played an active role in gaining New York's ratification. More typical was James Wilson, an initial appointee who later became the nation's first law professor.⁵ Wilson not only signed the Declaration of Independence and took part in the Constitutional Convention, but is widely regarded as the architect of judicial independence (p. 73). In nominating men like Jay and Wilson, Washington sought to invigorate the Constitution, and to establish the judiciary as a viable and effective branch of government.

John Adams appointed only three men to the Court, but among them was Chief Justice John Marshall, the only Justice unanimously ranked "great" in the 1970 survey (p. 81). A lame duck at the time of the vacancy, Adams saw his Secretary of State as a Federalist counterweight to the incoming Thomas Jefferson. Presumably, Adams delighted at saddling his rival with a man to whom Jefferson liked to refer as "that gloomy malignity" (p. 82). Later, Adams would call Marshall's appointment "the proudest act of my life" (p. 82). Abraham would certainly agree, despite Adams' apparent failure to consider the "objective" merit of his nominee.

The Civil War dominated Abraham Lincoln's presidency, and likewise dominated his Supreme Court appointments. Thus Lincoln concerned himself almost entirely with a nominee's possible impact on the conduct of the war. And this went beyond just constitutional outlook. For example, Noah Swayne and Samuel Miller were Southerners who opposed slavery, so Lincoln trusted their politics. But Lincoln's principal purpose in appointing a Virginian and Kentuckian was to induce the Border States and upper South to rejoin the Union (p. 116). Swayne and Miller had no effect on the duration of the Civil War, but they remain striking examples of necessity taking primacy over idealized notions of "objective" merit.

Amongst survey respondents, Woodrow Wilson is almost unanimously considered a "great" President. Moreover, Wilson's presidency is replete with examples of idealized concerns transcending practical ones, most notably during the League of Nations fiasco. Like his presidency, Wilson's nominations bred both triumph and failure. In fact, Wilson nominated what some consider both the best and worst justices of this century — Louis Brandeis and James McReynolds.

Abraham spends considerable time assessing the tenures of these two justices, ultimately blaming politics for McReynolds' nomination, while crediting principle for Brandeis'. This seems too pat an explanation. Nonetheless, the two were complete opposites. McReynolds led

5. Wilson taught at the University of Pennsylvania. P. 73.

the "Four Horsemen" who delayed the New Deal, and was notoriously conservative. Brandeis was a liberal whom some labeled radical. McReynolds was an anti-Semite; Brandeis was a Jew. McReynolds is rated a "failure"; Brandeis is rated "great" (pp. 377-79). That the same president, presumably using the same criteria, nominated both men, represents one of the more interesting aspects of Supreme Court history. Moreover, it raises serious questions as to the validity of Abraham's underlying belief in predictability.

No modern president has faced greater controversy in his dealings with the Court than did Franklin Roosevelt. Furious with the Court's rejection of several New Deal programs, Roosevelt hatched his infamous Court-packing plan. But before the plan could be voted on by Congress, the Court began to uphold central New Deal programs, including the National Labor Relations Act⁶ and the Social Security Act.⁷ Thus the logjam was broken and the Court-packing plan rendered moot (pp. 207-09).

Despite this inauspicious beginning, Roosevelt eventually played a greater role in shaping the Supreme Court than any president since Washington; his nine appointments were second only to Washington's ten. And according to Abraham, Roosevelt's nominees were excellent. Among his appointees were two "great" Justices, Hugo Black and Felix Frankfurter, and three "near great" Justices, William O. Douglas, Robert Jackson, and Wiley Rutledge (p. 210). Yet like most presidents, Roosevelt chose his nominees primarily for their support of his short term goals. For example, Senator Hugo Black sponsored the Fair Labor Standards Act, and was a long-time congressional advocate of the New Deal. Felix Frankfurter helped draft New Deal legislation. And on the eve of World War II, Roosevelt turned to his Attorney General, Robert Jackson.

As these brief summaries indicate, Supreme Court history is replete with stories with unexpected endings. The great strength of Abraham's work is the ease with which he relates those stories. Whatever its limitations, *Justices and Presidents* was a labor of love; one which demonstrates the author's deep respect for and understanding of its subjects. Abraham knows his subjects intimately; so much so that the narrative often resembles a personal recollection rather than collected research. Yet in the end, Abraham has done a better job of introducing the players than he has of explaining the game they play. One finishes with a familiarity with Justices and presidents, but with little understanding of their places in history. No unifying theme emerges to lend coherence to two hundred years of interesting but disjointed vignettes. Nor is there any demonstrated correlation between

6. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

7. See *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the tax and benefits provisions); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment provisions).

“merit”-based appointments and ultimate performance. One cannot help feeling that something is missing; that the author knows far more than he has told.

— *James S. Portnoy*