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YOU CAN'T ALWAYS GET WHAT YOU WANT... : PRESIDENTIAL ELECTIONS AND SUPREME COURT APPOINTMENTS

Paul Finkelman[†]

The President elected in 2000 could have as many as four quick appointments to the Supreme Court. When the new president takes office, in January, 2001, Justice John Paul Stevens will be 80 and Chief Justice Rehnquist will be 76 years old, both well past retirement age. Justices Sandra Day O'Connor and Ruth Bader Ginsberg have both fought off cancer and on inauguration day they will be 71 and 67 years old, respectively. It is not unreasonable to fear that either or both might have to leave the bench for health reasons. The rest of the Court, on the other hand, is relatively young, ranging from Justice Clarence Thomas who will be 52 to Justices Antonin Scalia and Anthony Kennedy who will both be 64.¹

On the other hand, it is also possible that no one will leave the high court in the next four years. Consider the Court Franklin Roosevelt inherited when he became President in 1933. Louis D. Brandeis, the most liberal member of the court was 77. Chief Justice Charles Evans Hughes, a centrist, was 71. The Four Horsemen -- those conservative troglodytes, who based on their ideology might more appropriately have been called the four dinosaurs -- were nearly as old as their social and economic theories: Pierce Butler, the youngest was 67; James McReynolds was 70; George Sutherland was 71, and Willis Van Devanter was 74. Harlan Fiske Stone at 61 and Benjamin Cardozo at 63 seemed like youngsters. Only Justice Owen Roberts, at 58, was under sixty.

It is important to note that these ages, in 1933, were far "older" than they are today. In 1930, for example, the life expectancy in the United States for men was 58.1 and for women it was 61.6. Retirement age under the first Social Security law was 62. By 1940 this had increased to 60.8 for men and 65.2 for women. However, in 1996 the life expectancy was 73 for men and 79 for women.² By 1940 this had

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1. Birth dates of the Supreme Court Justices:

Stevens- April 20, 1920
Rhenquist- October 1, 1924
O'Connor-March 26, 1930
Ginsburg-March 15, 1933
Scalia-March 11, 1936
Kennedy-July 23, 1936
Breyer-Aug. 15, 1938
Souter-Sept. 17, 1939
Thomas-June 23, 1948

increased to 60.8 for men and 65.2 for women.

Despite the aged Court, F.D.R. got no appointments in his first term, and by the time he suggested his court packing plan in 1937, the Court was older than ever. Three Justices were in their sixties, five were in their seventies, and one, Brandeis, in his eighties. Yet even at these advanced ages, few seemed ready to move on. Van Devanter retired in 1937, although he lived until 1941 and presumably, could have stayed on the bench until then. Sutherland retired in 1938, but he too lived a few more years. Cardozo's death in 1938 took one of the younger men from the court and gave FDR a third appointment. Butler died at age 73 in 1939 and Brandeis left the court that same year at age 83, although he lived on until 1941. FDR had remade the Court by the end of his second term. However, had three justices not retired, but rather hung on until they died, FDR's court would not have emerged until the first year of his third term.

The significant point here, of course, is that we can never predict when justices will retire. They hold the job for life, and some of them have taken that term to heart. A number of Justices, starting with Chief Justices John Marshall (1801-1835), who died in office at age 80, and Roger Brooke Taney (1835-1864), who died in office at age 87, have stayed on the bench a remarkably long time. In addition to Marshall and Taney, Justices Bushrod Washington, William Johnson, Joseph Story, John McLean, James M. Wayne, Stephen J. Field, John Marshall Harlan, Oliver Wendell Holmes, Jr., Hugo Black, William O. Douglas, William J. Brennan, and Byron White all served thirty or more years. If everyone on the Court were to strive for a full thirty years, and all lived to do so, the next president would get just one appointment, replacing Chief Justice Rehnquist in 2002.

I. MODERN JUDICIAL TENURE AND WORKLOAD

While there is no reason to believe that every justice will want to remain on the bench until his or her eighties, we should expect the length of judicial tenure to increase over time. Of the Justices appointed since 1956 only four -- Charles Whittaker, Arthur Goldberg, Abe Fortas and Lewis Powell served less than twenty years. People live longer, and are more vigorous in old age. Even the Social Security Administration has raised the age for full benefits to 67. Life expectancy, as noted above, is increasing. Moreover, if we factor in such variables as income status, access to health care, and lack of work related injury, it seems likely that our Supreme Court Justices will live longer and longer. In many professions, including college teaching, there is no mandatory retirement. If professors can hang on into our seventies and beyond, why not judges? Justice William J. Brennan retired in 1990 at the age of 84, and Harry Blackman left in 1994 at 85. There is no reason to think Justice Stevens, who is healthy and intellectually vigorous, might not stay on well into his 80s. Justice Oliver Wendell Holmes, Jr. left the bench in 1932, at

2. We have now moved to 67 as the retirement age for full social security benefits. Nevertheless, with mandatory retirement gone from many fields, people are working longer because they are living longer.

age 91, and then lived another three years. Modern advances in medicine and gerontology should lead to some Justice breaking Holmes's record for age. The next "Strom Thurmond" of American politics could be sitting on the Supreme Court today.

Moreover, sitting on the Supreme Court has never been easier. The justices of the Roosevelt era still wrote most of their own opinions. Their clerks were generally little more than research assistants. Justices were appointed to write opinions, and they did so, often drafting them in long hand. In the 1940s, for example, Chief Justice Fred Vinson "was anomalous in 'writing with his hands in his pockets,' telling his clerks generally what he wanted and then criticizing drafts and suggesting revisions."³ But, by the 1990s, "the anomaly would be to find a justice regularly writing his or her own opinions."⁴ At the present time only Justice John Paul Stevens regularly "writes his own first drafts" of his opinions.⁵

Today, it seems clear, that none of the justices draft all of their opinions, and some do little or no drafting at all. Clerks do the drafting, and sometimes all the writing. Meanwhile, computers, electronic databases like Lexis-Nexis and Westlaw, more clerks, and a small army of helpers have lessened the work load of justices. The court also seems intent on lightening its own work load, as every year it seems to take fewer and fewer cases. In the October 1976 term the court heard 176 cases; in 1977 it heard 172 cases; and in 1978 it heard 168 cases.⁶ In 1979 this dropped to 156 cases and in 1980 to 154 cases.⁷ From 1981 to 1984, however, the number of cases argued during the term fluctuated between 175 and 184.⁸ Since then the reduction in cases heard has been enormous.

The reduction in the number of cases granted review and resulting signed opinions was dramatic into the 1990s; in the October 1986 term the Court issued 145 opinions; in 1987, it issued 139; in 1988, 133; in 1989, 129; in 1990, 112; in 1991, 107; in 1992, 107; in 1993, 84; in 1994, 82; in 1995, 75.⁹

In the last half of the 1990s the caseload has remained stable. The Court granted review in 74 cases in 1996-97; 75 in 1997-98; and 74 in 1998-99.¹⁰ Given the workload, why quit? Who else in America, we might ask, has so much prestige, so much authority (if not power), and has so little strenuous work?

Whether we want the court to hear more cases is quite another matter. It would certainly make my life more difficult if the Court suddenly ratched-up the

3. Bryan A. Garner, *Opinions, Style of*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 609-10 (Kermit L. Hall ed., 1992).

4. *Id.* at 610.

5. *Id.*

6. See Reports of the proceedings of the Judicial Conference of the United States held in Washington, D.C., MARCH 12 AND 13, 1981 and September 24 AND 25, 1981 345 (1981).

7. See *id.*

8. See Reports of the Proceedings of the Judicial Conference of the United States held in Washington, D.C., MARCH 6 AND 7, 1985 AND SEPTEMBER 17 AND 18, 1985 243 (1985).

9. JOAN BISKUPIC & ELDER WITT, 2 GUIDE TO THE U.S. SUPREME COURT 794 (3d ed. 1996).

10. See 68 U.S.L.W. 3069 (July 20, 1999).

case load. More to read, more to understand, and more to teach. Moreover, with so many concurring and dissenting opinions in so many cases, it may be that the work load has not diminished all that much. Justices may hear fewer cases, but they may actually be delivering more opinions. But, those opinions are all discretionary. If a justice is tired of editing what the clerks write, he or she can simply stop writing dissenting or concurring opinions as often, and at such length, and coast for a few terms. Thus, it seems to me that we can no longer assume retirement or death will give the next president any more appointments. Jimmy Carter got no appointments in his four years; Bill Clinton has had none in his second term. It is hard to know how many, if any, the next president will get.

II. HOW APPOINTMENTS ARE MADE

Assuming for the moment that the next president gets between one and four appointments, will that affect the court? The answer depends greatly on the political views of the next president, the ability of that president to choose well, and of course who leaves the court. For the short term, a Democrat in the White House will have far greater opportunity to change the jurisprudential and ideological direction of the Court than a Republican. For the long term, of course, any new justice is likely to be on the bench for a long time, and the long term impact of a justice can be significant.

We currently have a Republican court that is conservative on most issues, and moderate on some. The cases discussed in this symposium bear that out quite clearly. Thus, a George W. Bush presidency is not likely to have any immediate affect on the Court. If Justice Stevens, for example, is replaced by a more conservative Republican, we may see fewer 5-4 decisions and more 6-3 decisions. It is possible that such a change could affect the endless debate over abortion, but, it is not at all clear that is the case, for only three justices, Rehnquist, Scalia and Thomas, seem intent on totally overturning *Roe v. Wade*.¹¹ It would take two more like-minded justices (or three if one replaced Rehnquist) to change this situation. Furthermore, it is improbable that Bush, the likely Republican nominee, would appoint justices absolutely committed to overturning *Roe*. Presidents Ronald Reagan and George Herbert Walker Bush, for example, were unalterably opposed to abortion, and seemingly made the issue a litmus test of their administrations, and yet only two of their five appointees were such ideological purists.

The long term affect of a Republican presidency could of course be significant. It would not alter the direction of the court, but it would preserve it. If a new Republican president is able to replace the three oldest members of the Court with three significantly younger Justices, then the conservative thrust of the Court will be strengthened and preserved, for the next quarter century. On the other hand, if a Republican is only able to replace one justice, the long-term effects will be minimal, and the short-term result hardly noticeable.

11. 410 U.S. 113 (1973).

This, of course, presumes a Republican victory in 2000, but that presumption is not a prediction. No one expected George Bush the First to win in 1988, and no one expected him to lose in 1992. He managed to do both. Al Gore is clearly a plausible candidate to win in 2000. We enter the 2000 campaign with virtual full employment, a raging stock market, huge gains in real income, almost invisible inflation, low interest rates, a strong housing market, and relative world peace. We can only wonder if American voters will risk all this, merely because Al Gore is a little stiff. Moreover, the primaries and Convention in August 2000 energized Gore, turning him into a formidable candidate.

A Gore victory is likely to change the Court far more than a Bush victory. If a Democrat replaces both Rehnquist and O'Connor, for example, and also appoints a younger liberal or moderate to replace Stevens, then the shift in voting will be more clear; the 5-4 decisions will be 5-4 or 6-3 the other way. Moreover, for the long-term, younger moderates will be around to contest the interpretation of the Constitution with the now graying conservatives, like Thomas and Scalia.

III. GETTING WHAT YOU WANT FIRST PRESUMES YOU KNOW WHAT YOU WANT

All of this, of course, presumes, not only that judges will vote as the presidents appointing them *expect* them to vote, but that the president has some expectation of how he wants a judge to vote. Some presidents clearly have such goals. In 1968 Richard M. Nixon ran as much against Chief Justice Earl Warren as he did against Hubert Humphrey. Nixon's goal was to reverse the decisions of the Warren Court, and he poetically began by appointing Warren Earl Burger to replace Earl Warren.

However, most presidents do not have such a clear vision of the judicial outcome they seek. We cannot, for example, know exactly how someone like George W. Bush would even want a justice to vote. Had John McCain been the nominee, we know that he believes deeply in campaign finance reform, but would he make opposition to *Buckley v. Valeo*¹² a litmus test for a Supreme Court appointment? Hard as I have tried, I cannot quite figure out what George W. Bush believes in, other than living in the White House and getting revenge for Bill Clinton's temerity in beating his father in 1992. But, suppose Bush does have a firm belief in something, we can only wonder if this would lead to a hard and fast rule in appointments.

Gore is equally hard to categorize. Surely he would want nominees who support *Roe v. Wade*, and are generally "liberal." But these days, what does that mean, in terms of Supreme Court politics? Will Gore seek a justice who reflects the civil liberties interests of some of his constituents, or will he look for a justice who reflects Tipper Gore's advocacy of a "bad tendency" test for regulating song lyrics? Al Gore may, or may not, have invented the internet, but what will he seek in judicial nominees with regard to free speech on the net? Gore, like Clinton, seems

12. 424 U.S. 1 (1976).

committed to improving race relations in America. But, would a President Gore seek justices who will support the traditional civil rights agenda of integration and a respect for *Brown*? Or, would Gore seek justices committed to different approaches to race, that might allow resegregation in the name of Afro-centrism?

I haven't a clue on any of these issues, with regard to any of the candidates. Moreover, I suspect, with the possible exception of Gore, that none of the candidates who campaigned for their party's nomination in 2000 had any deep thoughts about what they are looking for in the way of a judicial appointment. My civil procedure professor used to say that the definition of a federal judge was "a lawyer who knew a senator" and by extension, a supreme court justice was often a lawyer who knew a president. That has changed somewhat in recent years, but there is no reason to think the change is permanent. Two members of the current Court, Rehnquist and Thomas, served the administrations that appointed them.

Yet, assuming that the next President does get to make between one and four appointments, does this necessarily mean that the Court will change, or change in the direction the President wants?

IV. WHO YOU CHOOSE IS NOT ALWAYS WHO YOU GET

Even if a president knows exactly what kind of justice he wants, can he achieve this result? The most obvious lesson of Supreme Court history is that who you choose is not always who you get. I don't mean this in the simple way, that you can't always get your nominee confirmed. Obviously Richard Nixon chose Clement Haynesworth and G. Harold Carswell, and did not get them; similarly, Ronald Reagan never saw Robert Bork confirmed.

What I mean is that even if the candidate is confirmed, the Justice may be a different sort of person than the nominee. A number of important examples from Supreme Court history illustrate this.

The first obvious "mistake" on the Supreme Court was Joseph Story, appointed by James Madison in 1811. Madison, a Jeffersonian Republican, was looking for a Justice with a strong intellect to counter the obvious genius of John Marshall. Madison wanted a fellow Republican¹³ who would be hostile to the expansive nationalist approach of John Marshall. In the end, of course, Story turned out to be every bit the nationalist that Marshall was, if not more so. His opinion in *Martin v. Hunter's Lessee*¹⁴, which thoroughly antagonized Jefferson, was perhaps the most nationalist of any Supreme Court opinion during that period, and was certainly a direct slap at the states' rights doctrines that Jefferson and Madison so dearly loved. Similarly, Story spent his whole career trying to create a federal common law, which even Marshall did not attempt. Story not only attempted it, but succeeded in two ways. First, in *Swift v. Tyson*¹⁵, he created a federal common law

13. Not to be confused with the party of today.

14. 14 U.S. (1 Wheat.) 304 (1816).

15. 41 U.S. (16 Pet.) 1 (1842).

for civil litigation, which remained good law until it was finally reversed by *Erie Railroad v. Tompkins*¹⁶. That same term, Story nationalized slavery and gave masters a federal common law right to recapture runaway slaves in *Prigg v. Pennsylvania*¹⁷. Although Jefferson, the master of Montecello, would doubtless have applauded Story's proslavery jurisprudence in *Prigg*, he would nevertheless have been extremely uncomfortable with *Swift*.

Another example of a "mistake" was Jackson's appointment of John McLean. Jackson was probably the first president to impose a litmus test of judicial appointees, striving to discover whether they supported the enforcement of the Fugitive Slave Law of 1793. His appointees were mostly firm supporters of slavery, including Chief Justice Roger B. Taney, and Associate Justice Philip P. Barbour, James M. Wayne, John Catron, and John McKinley. McLean, however, turned out to be the only committed opponent of slavery on the Court from the time of his appointment until the Civil War. He wrote the lone dissent in *Prigg v. Pennsylvania*, opposing Story's nationalization of slavery and expressing his belief that the fugitive slave law of 1793 was in fact unconstitutional. His dissent in *Dred Scott v. Sandford*¹⁸ was in many ways more powerful and thoughtful than the more famous dissent of Justice Benjamin R. Curtis. Moreover, it was more firmly grounded in antislavery theory. Appointed by a slaveholding planter who represented the party of slavery, McLean surely disappointed Jackson and his party. By 1856 McLean was an active Republican, and a sworn enemy of the pro-slavery national Democratic Party.

Abraham Lincoln also made two appointments, which for different reasons, might have disappointed him, had he lived long enough to see the justices in action. When he appointed Salmon P. Chase to replace Taney as Chief Justice, Lincoln was certain that Chase would vote "right" on the two most pressing issues of the moment: Emancipation and the right of the national government to issue paper currency during the Civil War. Chase was a committed abolitionist, and as Chief Justice never wavered on this position. Chase was indeed "right" on the question of black freedom. And as a Justice he upheld an expansive view of freedom whenever he could.¹⁹ As Secretary of the Treasury during the first part of the Civil War, Chase had come up with the idea of paper money to help finance the government and the military crusade against slavery. But as Chief Justice, Chase struck down his own handiwork. In *Hepburn v. Griswold*,²⁰ Chase speaking for a 4-3 majority, declared that the Legal Tender Act of 1862 was unconstitutional. Chase's reasoning was strained and Lincoln's other three appointees, Samuel F. Miller, Noah H. Swayne, and David Davis, dissented. A year later, in the second legal tender case,²¹ the court went the other way, by a vote of 5-4. The two most

16. 304 U.S. 64 (1938).

17. 41 U.S. (16 Pet.) 539 (1842).

18. 60 U.S. (19 How.) 393 (1856).

19. Slaughterhouse Cases, 83 U.S. (16 Wall.) at 96 (1872) (discussing Chief Justice Chase's view of racial freedom).

20. 75 U.S. (8 Wall.) 603 (1869).

21. See Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).

recent appointees, Joseph P. Bradley and William Strong, joined the majority. Here President Grant's justices did exactly what he hoped they would do.

Samuel F. Miller, Lincoln's other disappointing justice, was "right" in the currency issue, but tragically wrong on Civil Rights. Miller is best remembered for his cramped reading of the Fourteenth Amendment in *The Slaughterhouse Cases*,²² and his support for similar readings of the amendment in *United States v. Cruikshank*,²³ and *Civil Rights Cases*.²⁴ Miller's *Slaughterhouse* opinion eviscerated the promise of the privileges and immunities clause of the Fourteenth Amendment and helped set the stage for the courtier-revolution that undermined black freedom in the late nineteenth century.

President Woodrow Wilson brought the promise of progressive reform to America. His greatest gift to America was undoubtedly his second appointment to the U.S. Supreme Court, Louis D. Brandeis, the "People's Lawyer." Few Presidents have been more successful than Wilson was with this appointment. Wilson put on the court a man who reflected most of his views,²⁵ was a powerful intellect, and stayed on the Court long enough (1916-1938) to have a major impact on jurisprudence. Brandeis stands in marked contrast to Wilson's other two appointments: James McReynolds and John H. Clarke.

Clarke might have been a successful judge who mirrored Wilson's social and political goals. A solid progressive, Clarke showed great promise. But, unlike Brandeis, he left the court after only six years on the bench (1916-1922) and allowed for the appointment of one of the great anti-progressive reactionaries of the era, George Sutherland, who remained on the bench until 1938, steadfastly standing in the way of all progressive legislation and jurisprudence, and actively trying to lead the United States back into the nineteenth century. Ironically, Clarke lived until 1945, and thus might have remained on the bench throughout the twenties and thirties, and in the process reversing a number of 5-4 decisions, and perhaps even changing the balance on some 6-3 decisions.²⁶ With Clarke on the Court the "Four Horsemen"²⁷ the solid reactionary block on the court, would have only been a troika. Thus, Clarke was a failed appointment, not because he voted in ways that Wilson would have opposed, but because he did not have the personal and intellectual toughness to stick it out on the bench.

James McReynolds, Wilson's other Supreme Court appointment, was one of

22. 83 U.S. (16 Wall.) 36 (1872).

23. 92 U.S. 542 (1875).

24. 109 U.S. 3 (1883).

25. The only areas where Wilson and Brandeis parted company involved freedom of speech in wartime and civil rights. Brandeis concurred in Holmes' dissent in *Abrams v. United States*, 250 U.S. 616 (1919), objecting to the Wilson administration's prosecution of an insignificant opponent of American foreign policy towards the recently created Soviet Union. See generally RICHARD POLENBERG, *FIGHTING FAITHS* (1987). Brandeis also supported civil rights causes and generally opposed segregation. Wilson, as president, brought segregation to federal facilities and in general opposed racial equality.

26. There is some evidence that Chief Justice Charles Evans Hughes voted with the majority in some 6-3 cases, because he felt it important for him to help control the court, and because as a Chief Justice in the majority he could assign the opinion of the court.

27. McReynolds, Sutherland, Butler and Van Devanter.

the main reasons Clarke left the bench. McReynolds was probably the nastiest, most bigoted, least pleasant justice in the history of the court. McReynolds "was so nasty to Clarke that his attitude helped prompt Clarke's resignation. McReynolds refused to sign the official letter expressing regret at Clarke's departure."²⁸ In addition to chasing Clarke from the bench, and setting the stage for the appointment of one of the Horsemen, McReynolds was of course himself the most dispiriting of the Horsemen. McReynolds was vicious, antisemitic, racist, and utterly insensitive to the social condition of the nation. He was equally hostile to his Jewish colleagues (Brandeis, Cardozo, and Frankfurter) and to women attorneys, who he thought did not belong in the courtroom. Although a trust buster under Wilson, he came to oppose almost all forms of state or national power; unless that power was directed at suppressing radicals, labor unions, opponents of World War I, or others who challenged the status quo. Wilson's choice of McReynolds remains one of the monumental failures in judicial appointments. Except on the wartime suppression of radicals, and racial segregation, which both Wilson and McReynolds supported, McReynolds supported almost nothing in the Wilsonian or progressive tradition.

Wilson was not the only progressive president to significantly misread one of his appointees. When President Franklin Delano Roosevelt appointed Felix Frankfurter to the high bench no one could have predicted he would emerge as one of the most conservative justices of his era, and that in the end his influence on the Court would be minimal. Frankfurter was a darling of the progressive forces in America at the time of his appointment. As a young and brilliant professor at Harvard Law School, Frankfurter had been an advisor to the young civil rights movement,²⁹ a leader of the protest against the injustice of the conviction and execution of Sacco and Vanzetti,³⁰ a supporter of progressive causes and police reform,³¹ and a defender of the poor, the downtrodden, and the minority. An immigrant himself, and a Jew who faced antisemitism in his own career, Frankfurter seemed to be the embodiment of the New Deal. People expected he would provide a voice on the court for progressive causes, reform, and the protection of minorities. But, as we know, it proved to be otherwise. Justice Frankfurter was a different creature from Professor Frankfurter. Once on the bench, Frankfurter turned into a pedantic, narrow jurist, paralyzed by his own power. Shaped by the Four Horsemen who struck down all manner of social legislation that touched on the economic power of the elite, Frankfurter fell into an almost mechanistic deference to state legislatures, even when they turned on powerless minorities. Fortunately for Roosevelt, his other appointees, Hugo Black, William O. Douglas, Robert Jackson, and Frank Murphy, carried the progressive torch forward, and Frankfurter was unable to cause too much harm to the causes his President favored.

Harry S. Truman had the opportunity to make four appointments. With the

28. AVIAM SOIFER, CLARKE, JOHN HESSIN, *THE OXFORD COMPANION TO THE COURT OF THE UNITED STATES*, *supra* note 4 at 156.

29. See RICHARD KLUGER, *SIMPLE JUSTICE* (1977).

30. See FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1954).

31. See FELIX FRANKFURTER, *LAW AND POLITICS* (1939).

exception of Tom Clark, they were profoundly uninspired choices. Chief Justice Fred Vinson and Associate Justices Harold Burton and Sherman Minton are hardly household names. They served for relatively short times: Vinson and Minton were only on the Court for seven years (1946-1953 and 1949-1956 respectively), and Burton lasted just thirteen years (1945-1958). They more or less reflected Truman's policies and goals. But, on the bench they seemed mostly to reflect the oath physicians take, "to do no harm."³² On the other hand, from Truman's perspective that may have been what he desired. They were mainstream New Dealers who did little to change the direction of the Court.

Dwight Eisenhower allegedly claimed that his worst mistake was appointing Earl Warren as Chief Justice. There is, however, no serious support for this allegation, and much to suggest that it was not so. Eisenhower was surely uncomfortable with some of Warren's decisions, particularly on First Amendment protections for Communists. But, in the long run none of Eisenhower's appointees were terribly distant from his own moderate, progressive views. Eisenhower took few initiatives on civil rights, but it is clear his administration did not oppose civil rights. In the end, it was Ike who sent troops to Little Rock, supporting the Court. It is possible that Eisenhower thought both Warren and William J. Brennan were too liberal for his tastes, but in retrospect, it is clear they were never far from the liberal Republican movement that included such politicians as Nelson Rockefeller, Edward Brooke, John Chafee, and Jacob Javits. In the "big tent" of that Republican Party, Brennan and Warren made sense, as did Justices John Marshall Harlan (II) and Charles Whitaker.

Neither John Kennedy nor Lyndon Johnson made any appointments that were particularly out of line with their philosophy. Byron White fit well into the conservative side of the New Frontier, Arthur Goldberg represented the more liberal side. Kennedy might have been disappointed that his Supreme Court legacy was so quickly truncated because Goldberg left the court so soon. There are various explanations for his departure: he was bored with the job or did not feel up to it; he had higher political ambitions; he was unable to just say no to Johnson's request to move to the U.N. But, whatever the reason, Kennedy's mistake was in appointing a man who in the end was unable to follow-through on the great opportunity he had. Johnson's great mistake, of course, was appointing someone who, in fact, was too much like Johnson. Abe Fortas was forced from the Court for his inability to understand the impropriety of his actions. He was, like Johnson, too much of a man on the make, too ready to take the risk, to make the deal, even when he had no financial need to do so.

In 1968 Richard M. Nixon ran for president *against* the Supreme Court. His campaign promised to change the court. He started by appointing Warren Earl Burger to replace Earl Warren. Burger was a midwesterner, a loyal Republican, solid, conservative, and frankly dull. This was no intellectual. His law degree was from a virtually unknown night school program. There could be no surprises here.

32. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 662 (14th ed. 1981).

Nixon followed up with Harry Blackmun, also from the midwest, and equally conservative and dull. Blackmun had a Harvard law degree, and he was clearly smarter than Burger, but he was no eastern radical. He had proper corporate credentials, representing among other entities, the Mayo Clinic. The "Minnesota Twins," as they were called, were going to undo the excesses of the Warren court; they would rewrite the law. But, where they did so, it was hardly in ways that Nixon could have predicted or expected. Nor, often, in ways he would have wanted. Indeed, it is possible to see the Burger court as simply an extension of the Warren court; less flamboyant; less extravagant. But, the revolution in law Nixon wanted did not happen. And, of course, Blackmun wrote the decision in *Roe v. Wade*,³³ which Burger signed on to. By the time Blackmun left the bench he had evolved into a staunch defender of individual liberties and an opponent of the death penalty. This was hardly what Nixon had intended. Burger, on the other hand, remained more or less an accurate reflection of Nixon's own policies.

V. FINAL THOUGHTS

The president elected in 2000 may very well put a stamp on the Supreme Court that will shape its direction well into the Twenty-first Century. A conservative president could continue the current direction of the court with a few youngish justices, especially if one of those replaced is the more liberal John Paul Stevens. A moderate or more liberal president could shift the balance back toward the less ideological era of the Burger and Warren Courts. But, it is also possible that the next president will get no appointments, as did Roosevelt in his first term or Jimmy Carter in his only term. And, as we have seen, many presidents make appointments which are singularly unsuccessful.

Despite this history, many of us will vote with the Court -- or the courts -- in mind. In fact, the vast number of district and appeals court appointments a president makes can have a significant impact on the judiciary and the way law is implemented in America. Presidents Ronald Reagan and George Bush were notably successful in filling the lower courts with strong-minded ideologues who have pushed a conservative agenda in such areas as segregation, affirmative action, criminal due process, environmental protection, and firearms. President Clinton has been less successful in countering this, in part because so much of his attention has been elsewhere during his two terms. With many seats unfilled, Clinton will hand his successor a great opportunity to shape the lower federal courts. The ideological agenda of that successor will undoubtedly shape the federal courts for the next decade or more.

33. 410 U.S. 113 (1973).
