THE FIRST ONE HUNDRED EIGHT JUSTICES

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DEDICATION

"Towering genius disdains a beaten path.
It seeks regions hitherto unexplored."

Abraham Lincoln, Speech, Jan. 27, 1838.

This book is dedicated to:

Justice Ruth Bader Ginsburg
United States Supreme Court

and

Judge Richard S. Arnold
United States Court of Appeals (8th Cir.)

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PREFACE*

William Bader and Roy Mersky have given the legal profession, and more importantly, the general public, a study of the justices of the Supreme Court that is a true feast of information. Everyone who is interested in the Court—and this ought, literally, to mean *everyone*—will immensely enjoy *The First 108 Justices.*

If the book contained only the first chapter, it would still be of great interest. This chapter presents in interesting and accessible form a multitude of data about the justices, including their ages at time of appointment and departure from the Court, their occupational background, their political affiliation before appointment, their legal education, and their family circumstances. Consider just a few examples. The youngest appointees were Joseph Story and William Johnson, appointed at age 32. The oldest were Chief Justices Harlan F. Stone and Charles Evans Hughes, age 68 and 67, respectively, but, in each of these cases, the appointments to be chief justice came after service as an associate justice. The oldest at the time of their initial appointments were Horace Lurton, 65, and Lewis Powell, 64. The longest serving justice was William O. Douglas, whose tenure lasted from 1939 to 1975, 36 years, breaking the record previously held by Stephen J. Field. Twelve justices served until they were over 80. An unusual instance is Justice John H. Clarke, who resigned in 1922 at age 65 after only five years of service, saying that he wanted to read books, travel, and serve his neighbors. All of these facts are perhaps what would be called trivia in other contexts, but the word is hardly appropriate when applied to the Supreme Court. The information is clearly presented and, to any student of the Court, full of fascination.

Later chapters involve matters of more substance. Of great interest are the histories of those who were nominated but did not serve. Eight nominees did not serve, although they were confirmed by the Senate. An example is John Quincy Adams who, probably wisely, concluded that he was more suited to political life. Twelve nominations were formally rejected, and the Senate failed to act on six. Ten others were, in practical effect, denied confirmation. There seems to be a sort of tide in these matters, which of course are highly political, and almost always have been. In the 19th century, it was not uncommon for a nominee to be rejected, and for purely political reasons. A good example is Henry Stanbery, nominated by President Andrew Johnson in 1865. The plain fact was that the Senate

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was not going to confirm anybody nominated by that president. Stanbery had great merit. He was Johnson's attorney general and had strongly supported Lincoln. But the Senate was angry about a Supreme Court decision holding that no one could be tried in a military court in areas where civil courts were in operation. The Republican majority in the Senate would confirm a nominee only if they were confident he would vote to overrule this case. (Does any of this sound familiar?) Finally, Congress simply voted to reduce the number of Supreme Court justices from ten to nine, thus neatly eliminating the vacancy.

Another good example is Ebenezer Hoar, nominated by President Grant, certainly a more popular figure with Congress, at least at the beginning of his tenure. Like Stanbery, Hoar was attorney general at the time of his nomination. His legal learning was beyond question. Apparently the major objection to Hoar was that he was too principled. He refused to recommend to the president certain nominees for the lower courts proposed by members of the Senate, believing that they were not well qualified. In addition, he seems to have been rather too frank in denouncing injustice and dishonesty. His nomination was rejected.

Between 1894 and 1968, only one nominee, John J. Parker, was rejected. He was opposed by labor and the NAACP. He had voted to sustain a decision upholding a so-called "yellow dog" contract. Labor could not forgive him, even though, as Judge Parker himself stated, his conclusion was compelled by Supreme Court precedent.

Modern examples are familiar. We seem to have returned to the judicial politics of an earlier, more controversial age. The savage rejection of Judge Robert H. Bork (1987) is the leading example. And, as everyone who reads the newspapers now knows, the next Supreme Court nomination will apparently be so controversial, no matter who the nominee is, that interest groups and citizens on all sides are already girding themselves for the battle, even though there is no vacancy. Before 1894, the Senate had refused to confirm more than one-fourth of all Supreme Court nominees. We may be returning to the level of conflict characterized by this earlier period.

Perhaps the most fascinating part of this book is the attempt to rate Supreme Court justices, and to develop some kind of objective or neutral method for doing so. The difficulty, as with all rating systems, is that the ideology of those doing the rating inevitably plays a big role. As the authors point out, those justices who, according to present-day lights, seem to be "politically correct" get the highest ratings. Of course, as someone has said, history is written by the winners. But perhaps we're entitled to expect better from legal scholars. One's views of the quality of a judge's work will always be affected by one's opinion of the results that the judge's opinions have reached. There is no avoiding that. But are there not at least some

neutral principles that could be agreed upon for judging the judges? Some examples might be craftsmanship, promptness in decisionmaking, regard for colleagues, and clarity of writing. To be sure, all of these criteria contain subjective elements, and it will not be possible to put altogether out of one's mind the political or legal philosophy of the judges.

Chapter Four of this book is a particularly perceptive commentary on these problems. The example of Justice Levi Woodbury is an excellent one. He served only six years, from 1845 to 1851, and is rated as only "average" by legal scholars. Chapter Four's careful examination of Woodbury's record demonstrates that he deserves better. No doubt a number of other examples could be found. This sort of study should be encouraged. A judge's reputation should be based not merely on whether his or her views seem to accord with contemporary values twenty years, or even 100 years, later. Instead, judges ought to be evaluated in the context of their own times and for broader qualities, some of which I have mentioned.

This preface cannot begin to do the book justice. It is important not only as a compendium of facts, though facts are crucial. It is important also because it seeks to put the work of Supreme Court justices in some kind of proper perspective. What makes a good justice? Politics will always play a role, but there must be more to it than that. The public should feel a great debt of gratitude to William Bader and Roy Mersky for raising these questions and providing sound answers. The book is both edifying and instructive. But it's more than that: it's *fun*. No student of American government should be without it.