

The Influence of Sitting and Retired Justices on Presidential Supreme Court Nominations

By

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AND

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Introduction

Since the publication of the senior author's *Justices and Presidents: A Political History of Appointments to the Supreme Court*¹ considerable interest has been expressed regarding the degree and kind of involvement that sitting and retired United States Supreme Court justices exercise in the nomination and appointment of persons to fill vacancies on the Court. The present article endeavors to examine that involvement, detailing specifically not only its range and extent but also the methods utilized by justices to exert pressure and the degree of their success. Because of the surprising plentitude of such judicial involvement, our essay constitutes a necessarily summary account rather than an individual examination of each instance.²

Perhaps because it was commonly taken for granted, given the textbook conceptualization of the existence and application of the principles and practices of the separation of powers, that sitting or even retired justices would shun involvement in the highly political selection

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1. H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (1974) [hereinafter cited as H. ABRAHAM].

2. The efforts of sitting and retired Supreme Court justices to influence the appointment of lower court judges are not covered in these pages, but they appear to be similarly extensive. See, e.g., C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890*, at 341, 370-71 (1939) [hereinafter cited as C. FAIRMAN]; C. SWISHER, *ROGER B. TANEY 438-40* (1935); Murphy, *Chief Justice Taft and the Lower Court Bureaucracy—A Study in Judicial Administration*, 24 J. POL. 460 (1962).

process, very little formal research has been undertaken on the subject to date.³ However, sprinkled throughout the literature on the history of the Supreme Court and that of the biographies of some of its justices are the patterns of Supreme Court decisionmaking, this figure includes several incidents of pressure activity of the kind examined here. Some works have discussed these activities in detail, others have merely hinted at the existence of unexplored primary material. Our own research methodology involved a thorough search of all pertinent secondary sources for chronicles of such incidents of pressure⁴ and an examination of selected primary sources. In view of the unexpectedly large number of verifiable instances uncovered, we compiled chart "A" to identify the actors and the nature of their attempt to influence the nomination and appointment processes. The chart does not document the very common occurrence of a justice's simple expression of a desire to see a certain individual appointed to the Court. To be listed in the chart a *specific action* on behalf of a candidate had to be undertaken by a justice either voluntarily or at the request of the president or a member of his administration, in an attempt to effectuate the desired selection. For example, although it is generally known that Justice Oliver Wendell Holmes, Jr., desired to have Benjamin N. Cardozo succeed him to the bench in 1932, we did not include it as one of the charted instances of judicial pressure since Holmes took no action himself to influence President Hoover's selection. Instead, he merely lent moral and intellectual support to the efforts of Associate Justice Harlan F. Stone in that case. Further, we consciously excluded from the chart mere "rumors" of judicial pressure in favor of certain candidates, and relied exclusively on examples documented by primary or secondary sources. Therefore, for example, the rumors of letters written by Associate Justices Field and/or Miller for their own elevation to the chief justiceship after the deaths of Chief Justices Salmon P. Chase and Melville W. Fuller are not recorded because, while it is beyond question that both men fervently desired the posts,⁵ no hard evidence could be found of any specific actions taken by them in their own behalf. Nor did we include efforts

3. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 S. CT. REV. 159-93, is one of the few such studies on the subject.

4. The biographical sources in H. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* (3d ed. 1975) were used as a basis for this survey and yielded the information presented in chart A.

5. F. FAIRMAN, *supra* note 2, at 265; W. KING, *MELVILLE WEST FULLER, CHIEF JUSTICE OF THE UNITED STATES 1888-1910* (1950) [hereinafter cited as W. KING]; C. SWISHER, *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* (1969).

to influence presidential action by individuals *not yet* on the Court, such as Harlan F. Stone who, as attorney general, sponsored the Cardozo appointment.⁶ Because Stone later did so as a sitting associate justice that action is, of course, listed.

I. Motivations of Justices

There are many possible motives for the involvement of sitting or retired justices in the appointment process of putative future justices. A primary motivation of interceding justices may be their desire to see presidents select colleagues who will be supportive of their own jurisprudential postures on major constitutional issues. Such was clearly true of the efforts of Chief Justice Taft to influence Presidents Harding and Coolidge in their Supreme Court nominations: Taft actively worked for the appointments of "conservative" justices.⁷ The appointments of future Justices Cardozo⁸ and Tom C. Clark,⁹ and the efforts of sitting Associate Justice Miller to have his candidates appointed¹⁰ are other prime examples. Another motivating factor has been the feeling of professional competence on the part of individual justices to judge the qualifications of a Supreme Court nominee in contrast to the lack of judicial expertise possessed by appointing presidents, none of whom except Taft had ever served on the Court. Numerous efforts of retired and retiring justices motivated by such concerns are documented.¹¹ A third factor is the natural concern of justices for the Court's continuing institutional tradition and the maintenance of its high professional integrity. Here the justice may see himself in the role of neutral and impartial adviser cooling the political passions of the appointment process and directing the president toward a worthy selectee. Stone's efforts when he was

6. Burlingham, *Harlan Fiske Stone*, 32 A.B.A.J. 322, 323 (1946).

7. Chief Justice Taft's recommendations for appointments to the Supreme Court (and to the lower federal courts) were so highly respected by President Harding and his attorney general, Harry Daugherty, that he was virtually able to shape the Court according to his own ideological outlook. See generally D. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964); A. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* (1965); H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939); Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 S. CT. REV. 159-93.

8. Carmen, *The President, Politics, and the Power of Appointments: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 616 (1969) [hereinafter cited as Carmen].

9. See R. ALLEN AND W. SHANNON, *THE TRUMAN MERRY-GO-ROUND* 388 (1950); Dutton, *Mr. Justice Tom C. Clark*, 26 IND. L.J. 169 (1951).

10. See C. FAIRMAN, *supra* note 2, at 15, 264, 339-44, 349-54, 384.

11. See, e.g., Frank, *Supreme Court Justice Appointments: II*, 1941 WISC. L. REV. 343, 367.

CHART "A"

YEAR OF ACTIVITY	VACANT S.C. POSITION	INCUMBENT PRESIDENT	PRESSURING JUSTICE	S.C. & POSITION	SUPREME COURT ASPIRANT	SPONSOR'S AIM	SPONSOR'S METHOD	DEGREE OF PRESSURE EXERTED	AIM ACHIEVED
1798	A.J. Wilson ¹	Adams	Iredell	Sit. A.J.	none	E.	Letter - thru Sec. of State to Pres.	Light	—
1828	A.J. Trimble ²	J.Q. Adams	Marshall	Sit. C.J.	J.J. Crittenden	For - N.	Letter - thru Senator to Pres.	Light	Yes (Sen. postponed)
1829	A.J. Washington ³	Jackson	Story	Sit. A.J.	J.B. Gibson (C.J. of Pa.)	Vs. - N.	Recommendation	Light	Yes
1836	A.J. Duvall ⁴	Jackson	Duvall	A.J. Ret.	R.B. Taney	For - N.	"Successor Deal"	Medium	Partially (not confirmed)
1836	A.J. Duvall ⁵	Jackson	Marshall	Cit. C.J.	R.B. Taney	For - C.	Letter to senator	Light	No
1853	A.J. McKinley ⁶	Pierce	Entire Ct.	—	J.A. Campbell	For - N.	Letters from <i>all</i> Justices <i>personally</i> delivered by Justices Catron and Curtis	Very Heavy	Yes
1862	A.J. McLean ⁷	Lincoln	McLean	A.J. Ret.	N. Swayne	For - N.	Recommend Successor	Medium	Yes
1863	C.J. Taney ⁸	Lincoln	"Majority of Justices" (incl. Swayne)	—	A.J. N.H. Swayne	For - N.	Personal visit by A.J. Davis	Light	No
1864	C.J. Taney ⁹	Lincoln	Davis	Sit. A.J.	A.J. N.H. Swayne	For - N.	Two letters - to President	Medium	No
1864	C.J. Taney ¹⁰	Lincoln	Grier	Sit. A.J.	A.J. N.H. Swayne	For - N.	Personal visit	Light	No

1864	C.J. Taney ¹¹	Lincoln	Field	Sit. A.J.	S.P. Chase	For - N.	Telegram - to President	Light	Yes
1864	C.J. Taney ¹²	Lincoln	Miller	Sit. A.J.	S.P. Chase	For - N.	Letter - to President from future Calif. Gov.	Light	Yes
1869	New Post ¹³	Grant	Miller	Sit. A.J.	H.C. Caldwell (U.S. Dist. Ct. Judge)	For - N.	Recommendation and work with Senate to change circuits	Heavy	No
1869	A.J. Grier ¹⁴	Grant	Grier	A.J. Ret.	J.P. Bradley	For - N.	Successor Deal	Light	No
1873	C.J. Chase ¹⁵	Grant	Swayne	Sit. A.J.	A.J. N.H. Swayne	For - N.	Sent others to lobby the President (possibly against Miller, too)	Heavy	No
1873	C.J. Chase ¹⁶	Grant	Miller	Sit. A.J.	C. Cushing (possibly for A.J. S.F. Miller, too)	Vs. - C.	Stories printed in son-in-law's newspaper	Heavy	Yes
1877	A.J. Davis ¹⁷	Hayes	Miller	Sit. A.J.	W.P. Ballinger	For - N.	Intense Lobbying	Heavy	No
1877	A.J. Davis ¹⁸	Hayes	Bradley	Sit. A.J.	"Mr. Hamilton"	For - N.	Personal visit Recommendation	Light	No
1880-81	A.J. Swayne ¹⁹	Hayes	Swayne	A.J. Ret.	W. B. Woods	For - N.	Successor Deal	Light	No
1880	A.J. Strong ²⁰	Hayes	Waite	Sit. C.J.	W. B. Woods	For - N.	Recommendation	Light	Yes
1881	A.J. Clifford ²¹	Arthur	Miller, Harlan & Whole Court	—	C.J. H. Gray (of Mass.)	For - N.	Personal visit	Medium	Yes
1888	C.J. Waite ²²	Cleveland	"Whole Court"	—	none	E.	Request by President	Light	—
1888	C.J. Waite ²³	Cleveland	"Some of Ct."	—	either A.J. S.J. Field or A.J. S.J. Miller	For - N.	Recommendation	Light	No

(See p. 49 for Code for Chart A; see p. 50-52 for footnotes to Chart A)

CHART "A" (continued)

YEAR OF ACTIVITY	VACANT S.C. POSITION	INCUMBENT PRESIDENT	PRESSURING JUSTICE	S.C. & POSITION	SUPREME COURT ASPIRANT	SPONSOR'S AIM	SPONSOR'S METHOD	DEGREE OF PRESSURE EXERTED	AIM ACHIEVED
1888	C.J. Waite ²⁴	Cleveland	Harlan	Sit. A.J.	M.W. Fuller	For - N.	Recommendation	Light	Yes
1889	A.J. Matthews ²⁵	Harrison	Miller— (& "some of other Justices)	Sit. A.J.	W. McCrary (Sec. of War) (also D.I. Brewer as 2nd choice)	For - N.	Request - by administration	Light	Yes
1892	A.J. Bradley ²⁶	Harrison	Bradley	A.J. Ret.	All possible N.J. candidates suggested to succeed him.	Vs. - N.	Sent memo and letter from Chief Justice of Pa. Supreme Court - to Dept. of Justice (Shiras named in the letter - he was picked)	Medium	Yes
1893	A.J. L.Q.C. Lamar ²⁷	Harrison	Henry B. Brown	Sit. A.J.	H.E. Jackson	For - N.	Recommendation - (reciprocity for his rec.)	Medium	Yes
1897	A.J. Field ²⁸	McKinley	Field (and Brewer)	Sit. A.J.	J. McKenna	For - N.	Successor deal	Medium	Yes
1897	A.J. Field ²⁹	McKinley	Fuller	Sit. C.J.	J. McKenna	Vs. - N.	Sent letters opposing - to President	Heavy	No
1902	A.J. Gray ³⁰	T. Roosevelt	Gray	A.J. Ret.	W.H. Moody	For - N.	Successor deal	Light	No
1902	A.J. Gray ³¹	T. Roosevelt	Fuller	Sit. C.J.	O.W. Holmes, Jr.	For - C.	Personal visit to Sen. Hoar - Requested by Sen. Lodge	Medium	Yes
1902	General Query ³² (No particular post open then)	T. Roosevelt	Harlan	Sit. A.J.	H.H. Lurton	For - N.	Request for comment - by President	Light	Yes

Year	Justice	President	Color	Ret.	Justice	Justice	For - N.	Consultation - with President	Medium	Yes
1906	A.J. Brown ³³	T. Roosevelt	Brown	A.J. Ret.	P.C. Knox (then W.H. Moody)	For - N.	Consultation - with President	Medium	Yes	
1906	A.J. Brown ³⁴	T. Roosevelt	Day	Sit. A.J.	H.H. Lurton	For - N.	Recommendation - (and with Taft "push hard")	Heavy	No	
1909	A.J. Peckham ³⁵	Taft	Harlan	Sit. A.J.	H.H. Lurton	For - C.	Personal visit - own initiative to Sen. Nelson	Medium	Yes	
1910	C.J. Fuller ³⁶	Taft	White	Sit. A.J.	none	E.	Investigation of possible nominees - Request by President	—	—	
1910	C.J. Fuller ³⁷	Taft	Moody	A.J. Ret.	none	E.	Consultation with President	—	—	
1910	C.J. Fuller ³⁸	Taft	Whole Court	—	A.J. E.D. White	For - N.	Atty. Gen. sent to request opinions	Heavy	Yes	
1910	C.J. Fuller ³⁹	Taft	Harlan	Sit. A.J.	A.J. W.R. Day	For - N.	Letter - to President	Medium	No	
1910	A.J. Moody ⁴⁰	Taft	H.B. Brown	Ret'd A.J.	J. R. Lamar	For - N.	Letter - to President	Light	Yes	
1910-12	All available ⁴¹ posts	Taft	Lurton	Sit. A.J.	G. Sutherland	For - N.	Letter - to President	Light	No	
1916	A.J. C.E. Hughes ⁴²	Wilson	Brandeis	Sit. A.J.	J. H. Clarke	For - N.	Recommendation	Light	Yes	
1921	C.J. White ⁴³	Harding	—	—	Wm. H. Taft	For - N.	Intense lobbying	Heavy	Yes	
1922	A.J. Clarke ⁴⁴	Harding	Taft	Sit. C.J.	G. Sutherland	For - N.	Approval of nomination (also got OK from Presi. to ask Day to retire)	Light	Yes	

(See p. 49 for Code for Chart A; see p. 50-52 for footnotes to Chart A.)

CHART "A" (continued)

YEAR OF ACTIVITY	VACANT S.C. POSITION	INCUMBENT PRESIDENT	PRESSURING JUSTICE	S.C. & POSITION	SUPREME COURT ASPIRANT	SPONSOR'S AIM	SPONSOR'S METHOD	DEGREE OF PRESSURE EXERTED	AIM ACHIEVED
1922	A.J. Day ⁴⁵	Harding	Taft	Sit. C.J.	Wm. Miller	For - N.	Recommendation thru Atty. Gen. to President	Heavy	No*
1922	A.J. Day ⁴⁶	Harding	Taft	Sit. C.J.	J.W. Davis	For - N.	Letter - to President	Heavy	No*
1922	A.J. Day ⁴⁷	Harding	Van Devanter	Sit. A.J.	J.W. Davis	For - N.	Supports Davis and sent by Taft to see if Davis would accept post	—	—
1922	A.J. Day ⁴⁸	Harding	Taft	Sit. C.J.	Judge M.T. Manton	Vs. - N.	Intense lobbying with both Atty. Gen. and President - organized campaign against him	Very Heavy	Yes
1922	A.J. Day ⁴⁹	Harding	Taft	Sit. C.J.	Judge N. Phillips	Vs. - N.	Several letters and lobbying against him	Heavy	Yes
1922	A.J. Day ⁵⁰	Harding	Taft	Sit. C.J.	P. Butler	For - N.	Letters to and meeting with the President - lobby for and advise Butler on actions	Very Heavy	Yes
1922	No particular ⁵¹ position	Harding	Taft	Sit. C.J.	Judge N. Phillips	For - N.	Letter with recommendation to President	Light	No
1922	A.J. Day ⁵²	Harding	Van Devanter	Sit. A.J.	P. Butler	For - N.	Secures good recommendation from Judge Walter Sanborn (used by Taft with President)	Light	Yes

Year	A.J. Day	Harding	Day	A.J. Ret.	Judge N. Phillips	Vs. - N.	Checks out with friends on Phillips qualifications	Light	Yes
1922	A.J. Day ⁵³	Harding	Day	A.J. Ret.	Judge N. Phillips	Vs. - N.	Checks out with friends on Phillips qualifications	Light	Yes
1922	A.J. Day ⁵⁴	Harding	Taft	Sit. C.J.	P. Butler	For - C.	Arrange Senate Committee vote	Light	Yes
1922	A.J. Pitney ⁵⁵	Harding	Taft	Sit. C.J.	M. Bullitt H. Anderson	For - N.	Letter - to President	Light	No
1922	A.J. Pitney ⁵⁶	Harding	Taft	Sit. C.J.	H.L. Stimson	Neutral - N.	Letter - to President	Light	--
1922	A.J. Pitney ⁵⁷	Harding	Taft	Sit. C.J.	C. Pound Judge F.E. Crane R. von Moschizsker (C.J. of Pa.) B.N. Cardozo L. Hand	Vs. - N. Neutral - N. Vs. - N. Vs. - N. Vs. - N.	Letter - to President	Medium	Yes
1922	A.J. Pitney ⁵⁸	Harding	Taft	Sit. C.J.	Judge W. Grubb Judge C. Hough	For - N. For - N.	Letter and conversation with President	Medium	No
1922	A.J. Pitney ⁵⁹	Harding	Taft	Sit. C.J.	E.T. Sanford	For - N.	Conversation with Atty. Gen. - Letter to President	Light	Yes
1922	A.J. Pitney ⁶⁰	Harding	Day	Ret'd A.J.	E.T. Sanford	For - N.	Reply to request for information by Atty. Gen. Daugherty	Light	Yes
1925	A.J. McKenna ⁶¹	Coolidge	Taft	Sit. C.J.	H. F. Stone	For - N.	Recommended him - Stone sent by President to see him to talk him into accepting	Heavy	Yes
1930	C.J. Taff ⁶²	Hoover	Stone	Sit. A.J.	B.N. Cardozo	For - N.	Personal visit - at request of President	Medium	No

(See p. 49 for Code for Chart A; see p. 50-52 for footnotes to Chart A)

CHART "A" (continued)

YEAR OF ACTIVITY	VACANT S.C. POSITION	INCUMBENT PRESIDENT	PRESSURING JUSTICE	S.C. & POSITION	SUPREME COURT ASPIRANT	SPONSOR'S AIM	SPONSOR'S METHOD	DEGREE OF PRESSURE EXERTED	AIM ACHIEVED
1930	C.J. Taft ⁶³	Hoover	Stone	Sit. A.J.	C. Coolidge	Neutral	Opinion requested by President at personal visit	Light	—
1930	C.J. Taft ⁶⁴	Hoover	Stone	Sit. A.J.	C. E. Hughes	Vs. - N.	Same personal interview with President and two conversations with Atty. Gen.	Medium	No
1930	A.J. Sanford ⁶⁵	Hoover	Van Devanter	Sit. A.J.	W.D. Mitchell (attorney general)	For - N.	"Vigorously sponsored"	Heavy	No
1930	A.J. Sanford ⁶⁶	Hoover	Stone	Sit. A.J.	J.J. Parker	Vs. to Neutral - N.	Personal visit - warns Hoover he would not pass Senate	Light	No
1930	A.J. Sanford ⁶⁷	Hoover	Stone (& Hughes)	Sit. A.J. Sit. C.J.	O.J. Roberts	For - N.	Advice sought by Hoover - Letter, too	Medium	Yes
1930	C.J. Taft ⁶⁸	Hoover	Van Devanter and Butler	Sit. A.J. Sit. A.J.	C.E. Hughes	For - N.	Visit aspirant at request of Atty. Gen.	Light	Yes
1930	C.J. Taft ⁶⁹	Hoover	Taft	C.J. Ret.	C.E. Hughes (over H.F. Stone)	For - N.	Approval requested	Light	Yes
1932	A.J. Holmes ⁷⁰	Hoover	Stone	Sit. A.J.	Judge O. Phillips	Vs. - N.	Letter and critical materials sent - to President	Heavy	Yes
1932	A.J. Holmes ⁷¹	Hoover	Stone	Sit. A.J.	B.N. Cardozo (or L. Hand or N.D. Baker)	For - N.	Intense lobbying - personal visits (offer to resign)	Very Heavy	-- Yes

1932	A.J. Holmes ⁷²	Hoover	VanDevanter Butler Sutherland McReynolds Roberts Hughes	Sit. A.J. Sit. A.J. Sit. A.J. Sit. A.J.	W.D. Mitchell (attorney general)	For - N.	Intense lobbying - personal visit by C.J. Hughes to President saying "majority of court is with him"	Very Heavy	No
1932	A.J. Holmes ⁷³	Hoover	Hughes	Sit. C.J.	B.N. Cardozo	For - N.	Asked by President to approve	Light	Yes
1939	A.J. Brandeis ⁷⁴	F.D. Roosevelt	Brandeis	A.J. Ret.	W.O. Douglas	For - N.	Recommend succe- sor in personal visit to President	Light	Yes
1939	A.J. Cardozo ⁷⁵	F.D. Roosevelt	Stone	Sit. A.J.	F. Frankfurter	For - N.	Sent for by and personal visit with F.D.R.	Medium Heavy	Yes
1941	C.J. Hughes ⁷⁶	F.D. Roosevelt	Hughes	C.J. Ret.	A.J. H.F. Stone (over R.H. Jackson)	For - N.	Requested by President to consult with him	Heavy	Yes
1941	C.J. Hughes ⁷⁷	F.D. Roosevelt	Frankfurter	Sit. C.J.	A.J. H.F. Stone (over R.H. Jackson)	For - N.	Requested by President to consult with him	Light	Yes
1942	A.J. Byrnes ⁷⁸	F.D. Roosevelt	Stone	Sit. C.J.	L. Hand (or other lower federal judge, e.g., W. Rutledge, W.J. Parker or S. Bratton)	For - N.	Consulted - Recom- mendation given	Medium	No
1942	A.J. Byrnes ⁷⁹	F.D. Roosevelt	Frankfurter	Sit. A.J.	L. Hand	For - N.	Intense lobbying with several letters and personal visits and phone calls to President	Very Heavy	No
1942	A.J. Byrnes ⁸⁰	F.D. Roosevelt	Black Douglas Murphy	Sit. A.J. Sit. A.J. Sit. A.J.	W. Rutledge	For - N.	Request to approve nomination by Atty. Gen. Biddle	Light	Yes

(See p. 49 for Code for Chart A; see p. 50-52 for footnotes to Chart A)

CHART "A" (continued)

YEAR OF ACTIVITY	VACANT S.C. POSITION	INCUMBENT PRESIDENT	PRESSURING JUSTICE	S.C. & POSITION	SUPREME COURT ASPIRANT	SPONSOR'S AIM	SPONSOR'S METHOD	DEGREE OF PRESSURE EXERTED	AIM ACHIEVED
1945	A.J. Roberts ⁸¹	Truman	Stone	Sit. C.J.	H.H. Burton	For - N.	Choice "cleared" by President	Light	Yes
1946	C.J. Stone ⁸²	Truman	Hughes	Ret'd C.J.	R.H. Jackson	For - N.	Requested by President to consult with him	Light	No
1946	C.J. Stone ⁸³	Truman	Roberts	Ret'd A.J.	F.M. Vinson	For - N.	Sent for by President	Light	Yes
1946	C.J. Stone ⁸⁴	Truman	Black Douglas &/or Murphy	Sit. A.J. Sit. A.J. Sit. A.J.	R.H. Jackson	Vs. - N.	Word leaked to Press of possible resultant resignations	Very Heavy	Yes
1946	C.J. Stone ⁸⁵	Truman	Frankfurter	Sit. A.J.	S.F. Reed and Wm. O. Douglas	Vs. - N.	Recommendation	Light	Yes
1949	A.J. Murphy ⁸⁶	Truman	Vinson	Sit. C.J.	T.C. Clark	For - N.	Recommendation - "engineered" nomination with President	Heavy	Yes
1962	A.J. Frankfurter ⁸⁷	Kennedy	Frankfurter	A.J. Ret.	A.J. Goldberg	For - N.	Request to approve the nomination	Light	Yes
1962	A.J. Frankfurter ⁸⁸	Kennedy	Warren	Sit. C.J.	A.J. Goldberg	For - N.	Recommendation	Light	Yes
1962	A.J. Whitaker ⁸⁹	Kennedy	Warren	Sit. C.J.	B.R. White	For - N.	Consultation with C.J. by Atty. Gen.	Medium	Yes
1968	C.J. Warren ⁹⁰	L.B. Johnson	Warren	C.J. Ret.	A. Fortas	For - N.	Recommendation	Heavy	No
1969	C.J. Warren ⁹¹	Nixon	Stewart	Sit. A.J.	A.J. P. Stewart	Vs. - N.	Personal visit with President - took name out of consideration	Heavy	Yes

Year	A.J. Fortas ⁰²	Nixon	Burger	Sit. C.J.	C.F. Haynsworth	For - C.	Lobby in Senate for confirmation - Personal visit	Medium	No
1969	A.J. Fortas ⁰³	Nixon	Burger	Sit. C.J.	G.H. Carswell	For - C.	Personal visit - Lobby in Senate for confirmation	Medium	No
1969	A.J. Fortas ⁰⁴	Nixon	Burger	Sit. C.J.	H.A. Blackmun	For - N.	Recommendation - Suggested name to Atty. Gen. Mitchell	Heavy	Yes

*Candidates decided to withdraw from consideration for personal reasons subsequent to pressure exerted by C.J. Taft in their behalf.

CODE FOR CHART "A"

SUPREME COURT POSITION:

Sit. A.J. or C.J.
A.J. or C.J. Ret.
Ret'd A.J. or C.J.

Sitting Associate or Chief Justice
Retiring Associate or Chief Justice
Retired Associate or Chief Justice

SPONSOR'S AIM(S):

E Action taken by a Justice to "educate" the President on a particular philosophy of appointments, but not necessarily with any particular candidate in mind.
N Action taken by a Justice during the Presidential nomination stage.
C Action taken by a Justice during the Senatorial confirmation stage.

AIM ACHIEVED?:

— Signifies no specific candidate or specific aim

SEE TEXT FOR EXPLANATION OF OTHER COLUMNS

(See p. 49 for Code for Chart A; see p. 50-52 for footnotes to Chart A)

Footnotes for Chart A

1. L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1789-1969*, at 248 (1969) [hereinafter cited as L. FRIEDMAN & F. ISRAEL].
2. D. McHargue, *Appointments to the Supreme Court, 1789-1932* 77, May 1949 (unpublished Ph.D dissertation in University of California, Los Angeles Library) [hereinafter cited as McHargue].
3. *Id.* at 85.
4. C. SWISHER, ROGER B. TANEY 311-12 (1935); Swisher, *The Taney Period 1836-1864*, in 5 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 22-23 (1974).
5. C. SWISHER, ROGER B. TANEY 313 (1935); K. UMBREIT, *OUR ELEVEN CHIEF JUSTICES* 227 (1938).
6. R. NICHOLS, FRANKLIN PIERCE: YOUNG HICKORY OF THE GRANITE HILLS 253 (1931); H. O'CONNOR, JOHN ARCHIBALD CAMPBELL 17 (1920).
7. W. KING, LINCOLN'S MANAGER: DAVID DAVIS 192 (1960); Frank, *The Appointment of Supreme Court Justices*, 1941 WIS. L. REV. 178-79.
8. Fairman, *Reconstruction and Reunion 1864-1888*, in 6 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE UNITED STATES 11-12, 16-17 (1971); D. McHargue, *supra* note 2, at 189.
9. D. SILVER, LINCOLN'S SUPREME COURT 191 (1956).
10. Fairman, *supra* note 8, at 12.
11. *Id.* at 14, 18.
12. *Id.* at 15; D. SILVER, LINCOLN'S SUPREME COURT 200-01.
13. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at 339-44 (1939) [hereinafter cited as C. FAIRMAN].
14. Fairman, *supra* note 8, at 719-27; Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 990-99 *passim* (1941); D. McHargue, *supra* note 2, at 222.
15. C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 7 (1963), D. McHargue, *supra* note 2, at 227.
16. C. FAIRMAN, *supra* note 13, at 264-75; B. POORE, 2 REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS 299-301 (1886).
17. C. FAIRMAN, *supra* note 13, at 349-54.
18. *Id.* at 362.
19. *Id.* at 380-83.
20. B. TRIMBLE, CHIEF JUSTICE WAITE, DEFENDER OF THE PUBLIC INTEREST 140 (1938).
21. C. FAIRMAN, *supra* note 13, at 384; F. LATHAM, THE GREAT DISSENTER: JOHN MARSHALL HARLAN 1833-1911, at 82 (1970) [hereinafter cited as F. LATHAM].
22. G. PARKER, RECOLLECTIONS OF GROVER CLEVELAND 367-68 (1911).
23. W. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES 1888-1910, at 106 (1950) [hereinafter cited as W. KING].
24. F. LATHAM, *supra* note 21, at 84.
25. Note, *Mr. Justice David Brewer*, 22 WEEKLY L. BUL. 384 (1889).
26. Frank, *The Appointment of Supreme Court Justices*, 1941 WISC. L. REV. at 367-68; McHargue, *supra* note 2, at 313-14.
27. C. KENT, MEMOIR OF HENRY BILLINGS BROWN 28-29 (1915); W. KING, *supra* note 23, at 180-81; F. LATHAM, *supra* note 21, at 85-86.
28. C. SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 444 (1969).
29. W. KING, *supra* note 23, at 227-29.

Footnotes for Chart A (continued)

30. D. McHargue, *supra* note 2, at 357-58.
31. W. KING, *supra* note 23, at 284-86.
32. Murphy, *Marshalling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 653 (1962).
33. C. KENT, *supra* note 27, at 33; D. McHargue, *supra* note 2, at 357-58.
34. L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 1815; 5 THE LETTERS OF THEODORE ROOSEVELT 368 (1951). R. Burke, *The Path to the Court: A Study of Federal Judicial Appointments* (unpublished Ph.D. Dissertation) (1958).
35. McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. POL. 486 (1950).
36. W. KING, *supra* note 23, at 309-10.
37. 2 A. BUTT, TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 438-39 (1930), McHargue, *supra* note 35, at 490-91.
38. 1 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 534-35 (1939). See also 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 170 (1941) (indicates support of Holmes only).
39. McHargue, *supra* note 35, at 492 n.51.
40. *Id.* at 500.
41. McHargue, *supra* note 2, at 442.
42. A. MASON, BRANDEIS: A FREE MAN'S LIFE 513 (1946).
43. D. DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED 29-35 (1964) [hereinafter cited as D. DANELSKI]; A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 158-60 (1964) [hereinafter cited as A. MASON—Taft].
44. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159, 167-77 [hereinafter cited as Murphy].
45. *Id.* at 168-69; D. DANELSKI, *supra* note 43, at 43.
46. D. DANELSKI, *supra* note 43, at 43; Murphy, *supra* note 44, at 168-69.
47. D. DANELSKI, *supra* note 43, at 43.
48. *Id.* at 47.
49. *Id.* at 78-84.
50. *Id.*
51. *Id.* at 84.
52. *Id.* at 49-50.
53. *Id.* at 82.
54. *Id.* at 129.
55. Murphy, *supra* note 44, at 179.
56. *Id.* at 180-81.
57. *Id.* at 178.
58. *Id.* at 177-79.
59. *Id.* at 177-83.
60. D. McHargue, *supra* note 2, at 452, 458.
61. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 300 (1956) [hereinafter cited as A. MASON—STONE]; 2 H. PRINGLE, *supra* note 38, at 1043; Murphy, *supra* note 44, at 186-87.
62. A. MASON, *supra* note 43, at 297-98; Carmen, *The President, Politics, and the Power of Appointments: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 616, 623 (1969) [hereinafter cited as Carmen].
63. A. MASON—TAFT, *supra* note 43, at 297-98.
64. *Id.*

Footnotes for Chart A (concluded)

65. Carmen, *supra* note 62, at 638.
66. A. MASON—STONE, *supra* note 61, at 300; Carmen, *supra* note 62, at 625.
67. Carmen, *supra* note 62, at 625; R. Burke, *supra* note 34, at 136.
68. 2 M. PUSEY, CHARLES EVANS HUGHES 650-51 (1951) [hereinafter cited as M. PUSEY].
69. A. MASON—TAFT, *supra* note 43, at 278.
70. A. MASON—STONE, *supra* note 61, at 336; Carmen, *supra* note 62, at 637-38.
71. A. MASON—STONE, *supra* note 61, at 335.
72. Carmen, *supra* note 62, at 637-38.
73. *Id.* at 643.
74. W. DOUGLAS, GO EAST, YOUNG MAN: (THE EARLY YEARS) THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 449 (1974).
75. 2 H. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 550-52 (1954); A. MASON—STONE, *supra* note 61, at 566.
76. E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 230 (1958) [hereinafter cited as E. GERHART]; A. MASON—STONE, *supra* note 61, at 566; 2 M. PUSEY, *supra* note 68, at 787-88.
77. E. GERHART, *supra* note 76, at 230; A. MASON, *supra* note 61, at 566-67; 2 M. PUSEY, *supra* note 68, at 787-88.
78. A. MASON—STONE, *supra* note 61, at 592; Brant, *Mr. Justice Rutledge The Man*, 35 IOWA L. REV. 559 (1950); Murphy, *supra* note 44, at 191 & n.127.
79. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 671-75 (1967).
80. F. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 25 (1965).
81. J. Ashby, Supreme Court Appointments Since 1937, at 159 (unpublished Ph.D. dissertation at Notre Dame University Library, 1971).
82. 2 M. PUSEY, *supra* note 68, at 801-02.
83. E. GERHART, *supra* note 76, at 281.
84. *Id.* at 258; C. PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947, at 26 (1969). *But see* J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 124-25 (1949).
85. W. DOUGLAS, *supra* note 74, at 458; F. RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 298 (1955).
86. R. ALLEN AND W. SHANNON, THE TRUMAN MERRY-GO-ROUND 338 (1950); Dutton, *Mr. Justice Tom C. Clark*, 26 IND. L.J. 169 n.8 (1951).
87. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 22, 257 (1974).
88. *Id.* at 22.
89. J.E. CLAYTON, THE MAKING OF JUSTICE: THE SUPREME COURT IN ACTION 51 (1964).
90. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENT TO THE SUPREME COURT 22, 257 (1974).
91. 4 L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 3118.
92. NEWSWEEK, Nov. 17, 1969, at 31.
93. R. HARRIS, DECISION 173 (1971).
94. TIME, July 14, 1975, at 40; NEWSWEEK, Apr. 27, 1970, at 28-29; NEW YORK TIMES, Apr. 15, 1970, col. 3, at 34.

chief justice were in this vein.¹² A fourth motivation may simply be that of friendship for the proposed candidate; friendship seems to have prompted the actions of many nineteenth century justices.¹³

Whatever the overriding or collective motivations may be, chart "A" demonstrates that the number of justices involved in actively pressuring for Supreme Court appointments has been extensive and encompasses justices of widely diverse judicial philosophies and eras. Fully forty-eight of the 101 individuals who have sat on the Supreme Court as of this writing have exerted ascertainable pressure on behalf of some candidate or some philosophy of judicial selection. Not at all surprisingly, given their interest in the appointment process and its influence on the patterns of Supreme Court decisionmaking, this figure includes eleven chief justices, with only Chief Justices Jay, Ellsworth, Rutledge and Chase refraining from such direct activity. It should be noted that efforts by the forty-eight justices were not directed toward just a few appointments, but involved forty-three vacancies, comprehending recommendations for candidates in ninety-four separate instances. Since some justices have obviously been particularly active, chart "B" was designed to indicate the leading activists, acting singly or collegially, and their success ratios.

CHART "B"*
Justices Most Active
in

Attempted Pressure in Presidential Selection of Future Justices

JUSTICE	NUMBER OF ATTEMPTS	NUMBER OF SUCCESSES	PERCENTAGE OF SUCCESS
Taft†	18	14**	77%
Stone†§	9	5	55%
Harlan I	6	5	83%
Hughes†§	6	4	67%
Miller	6	4	67%
Frankfurter	4	3	75%
Van Devanter	4	2	50%
Field	3	3	100%
Brown	3	3	100%
Warren†	3	2	67%
Bradley	3	2	67%
Day	3	2	67%
Burger†	3	1	33%
Swayne	3	0	0%

* Charts "B" through "E" were compiled from the information in chart "A".
 ** Does not include candidacies of John W. Davis and William Miller who, although strongly backed by Taft, decided to withdraw from consideration for personal reasons.

† Chief Justice.

§ Active attempts both as Chief Justice and Associate Justice.

12. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW *passim* (1956) [hereinafter cited as A. MASON].

13. W. KING, *supra* note 5, at 180.

Chart "B" demonstrates the extensiveness of involvement of several of our chief justices and underscores what has been generally suspected:¹⁴ that Chief Justice Taft is the unquestioned leader among the activist justices in the appointment influence game. Perhaps the most surprising revelation, given his professed reluctance to become involved in influencing the judicial selection process,¹⁵ is Chief Justice Stone's ranking as the second most active justice therein. Because of the considerable differences in method in the various recorded incidents of judicial involvement, a closer examination of these is in order.

II. Methods of Pressure

A simple list of the times a justice urged a candidate's appointment cannot be complete without some examination of the type of pressure he exerted. A plain letter of recommendation in favor of a candidate written by a justice to the president cannot be, and is not, as important or effective as the persistent pressure exerted by Chief Justice Taft, for example, who resorted to letters, phone calls, personal visits, enlisted other justices on behalf of his candidate, and secured sundry recommendations from nonjudicial personnel for his favorites.¹⁶ Further, it makes a vast difference whether there is just one or several justices pushing for a candidate. Accordingly, chart "C" details the types of pressures and the frequency of their use by sitting and retired justices.

A crucial distinction should be made, in this examination of the techniques of pressure, between justices acting to promote appointments and those opposing them. Whether due to personal dislike of a candidate, dissatisfaction with his professional qualifications, or disagreement with the candidate's personal or political philosophy, justices have lobbied *against* selections in eighteen of the ninety-four instances of pressure—a significant number since many of these cases represented personal voluntary efforts by justices in their quest for what they regarded as the preservation of the Court's integrity.¹⁷

Another basic consideration *cum* distinction is whether a single justice or several justices labor in support of, or in opposition to, the candidate. Influence exerted by more than one justice is presumably

14. See note 7 *supra*.

15. Chief Justice Stone said in a letter to Charles C. Burlingame, "Despite your persuasive plea . . . I feel that I should not volunteer my advice on the matter of judicial appointments." A. MASON, *supra* note 12, at 592.

16. See generally H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* (1939); Murphy, note 3 *supra*.

17. See A. MASON, note 12 *supra*.

CHART "C"
METHODS EMPLOYED BY JUSTICES TO PRESSURE
FOR APPOINTMENTS

<u>METHOD</u>	<u>NUMBER OF TIMES USED</u>
Simple letter of recommendation	34
Personal visit by justice to either president or attorney general	20
Request, by president or attorney general, to justice for information or personal consultation with justice	13
Intensive lobbying efforts (letters, phone calls, personal visits, all in various combinations)	7
Simple approval of candidate already decided on is requested of justice by president	6
Attempt by justice to "educate" the president as to a particular philosophy of action, not as to a particular candidate	5
Successor "Deal"	5
Justice sends letter plus packet of other information on candidate	3
Justice secures recommendation for his candidate from another person and sends it to the president	3
Specific recommendation of a successor	2
Use of newspaper stories which are planted and written about candidate	2
Sending of personal emissary for the justice himself	1

more persuasive than solitary action. On occasion, the entire body of sitting justices has acted on behalf of a candidacy.¹⁸ Of nineteen ascertainable instances in which more than one justice supported a candidate, fifteen proved successful¹⁹—a telling manifestation of their collective influence.

Letter of Recommendation

The most basic tactic used by justices is the simple letter of recommendation pointing to the Court's needs and candidate's qualifications. Normally, these letters are written directly to the president, although they are sometimes directed to others who are close to the chief executive and whom a justice believes to be more influential than he.²⁰ Usually exerted very early in the selection process, the letter approach

18. This occurred in three instances over the history of the Court: the appointments of John A. Campbell (1853), Joseph P. Bradley (1869) and Horace Gray (1881). See notes 6 *supra* & 21 *infra*; C. FAIRMAN, *supra* note 2, at 726; Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 990-99 *passim* (1941).

19. See chart A *supra*.

20. *Id.*

has often proved to be a low-key but effective mode of influence when used alone.

Personal Visit

A more potent form of pressure might be expected to be a personal visit by the justice to the president or, on occasion, to the attorney general, if for no other reason than that the justice would appear to be extending himself a bit further on the candidate's behalf than he would with the dispatch of a simple letter. Surprisingly, however, this more direct pressure has not resulted in a greater degree of success: recommendations by justices made by letter and in person were both heeded in precisely 50 percent of the cases.²¹

Requested Advice

Advice has been requested of sitting or retired justices by presidents directly or through members of their administrations. Modes of contact on this delicate subject have differed intriguingly. President Taft dispatched his attorney general, George W. Wickersham, to consult with the entire Court on a successor to Chief Justice Fuller in 1910.²² On another occasion, Associate Justice Harlan's opinion was sought by President Theodore Roosevelt at a dinner party.²³ However, as a rule, the entry of justices into the selection process in these instances came later than it did when advice was volunteered, for the president or the attorney general have normally settled on at least a group of candidates from which they intend to choose before requesting justices' opinions of persons already under consideration. Whereas the justice volunteering a letter or personal visit is usually "suggesting" a name, or "placing a hat in the ring," in these "advice-seeking" cases he often serves more to confirm, deny or amplify information already in hand. Thus, even if the justice's candidate is ultimately selected, his practical effect on the selection process may have been at best marginal.

Request for Approval

At times, a justice is consulted *after* a choice has been made by the president but before it is forwarded to the Senate for confirmation. Such

21. Seventeen of thirty-four attempts to persuade by letter and ten of twenty attempts to persuade by personal visit resulted in success. See *id.*

22. W. KING, *supra* note 5, at 309-10; H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 534-35 (1939).

23. But the query posed by the president in this case was a general one relating to any vacancy which might occur in the future. Murphy, *Marshalling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 653 (1962) [hereinafter cited as Murphy].

a consultation customarily serves as a final check by the president to protect himself against unwelcome surprises in the Senate confirmation proceedings. In all such recorded instances, the consultations involved selections favored by the sponsoring justices.²⁴ No proof exists of the results of any negative feedback of a presidentially consulted justice.

Actions by Retiring Justices

Justices who retire from the bench frequently take an active interest in the choice of their successor whether it be for altruistic or egotistical reasons. This pressure may take the shape of a simple "nomination" of a successor by the retiring justice, as occurred in the case of Justice Brandeis' successful recommendation of William O. Douglas for his position on the bench.²⁵ A much more persuasive form of pressure, however, is the "deal" characterized by a justice's avowed offer to retire in favor of a particular candidate of his choice or at least of his approval. Although this effort is not always successful, it is especially persuasive when prospects are good that the president will have no selection at all if the justice determines to survive the incumbent president's term. A prime example of such a "successor deal" arrangement was Associate Justice Field's retirement after thirty-four years on the bench. In a deal actually sponsored and arranged by Associate Justice Brewer, Field's nephew, Joseph McKenna was persuaded to resign from his life tenure on the United States Circuit Court of Appeals to become attorney general under newly elected President William McKinley. In return, he was promised that Associate Justice Field would resign during McKinley's term of office in favor of McKenna.²⁶ Field evidently concurred in this game-plan in order to assure California's continued "representation" on the Court by a successor whose political and philosophical commitments would be similar to his own.²⁷

Later developments underscored the potency of "successor deal" arrangements. When Chief Justice Fuller felt compelled to oppose McKenna's nomination in view of incontrovertible evidence, provided by federal judges from California, attesting to McKenna's utter incompetence while serving on the circuit bench,²⁸ Fuller's effort failed and

24. This was true in all six of the cases which have occurred over the Court's history. See chart A *supra*.

25. W. DOUGLAS, *GO EAST, YOUNG MAN: (THE EARLY YEARS) THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 449 (1974).

26. C. SWISHER, *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* 44 (1969).

27. D. McHargue, *Appointments to the Supreme Court 1789-1932* 342, May 1949 (unpublished thesis in University of California, Los Angeles Library).

28. W. KING, *supra* note 5, at 227-29.

the Brewer-Field-McKenna deal was consummated with the latter's appointment to the Supreme Court.

Needless to say, the success of these "deals" depends upon the willingness of all the actors involved to participate. One fascinating instance, in which one of the participants ultimately refused to do so, involved the planned nomination of Joseph Bradley to the Court in a "deal" arranged by his friend, George Harding, who thought he had obtained the aged Justice Robert Grier's agreement to resign from the bench in Bradley's favor. But Grier backed out at the last minute and Bradley had to await the creation of an additional seat on the Court under the Reorganization Act of 1869.²⁹

Intense Lobbying

There are numerous cases on record in which a justice has actively promoted a candidate almost in the manner of a manager during a political campaign. As alluded to earlier, this is the sort of pressure which Chief Justice Taft exerted so skillfully on behalf of and/or against candidates to the Court.³⁰ Professor Danelski's examination of the Pierce Butler nomination provides an excellent account of the type of pressure activities Taft undertook with alacrity, because of what he regarded as his unique expertise and position on the bench.³¹ Taft, the champion lobbyist for his own point of view, succeeded admirably.

On occasion, intense lobbying has taken the form of collective action on the part of several justices and it has usually been crowned with success. Such was the case in 1853 when all of the sitting justices wrote individual letters to President Pierce on behalf of John A. Campbell's appointment to the vacancy resulting from the death of Associate Justice McKinley. Justices Catron and Curtis were designated as the Court's personal emissaries to deliver the missives.³²

A variety of possible reasons may underlie intense lobbying efforts by justices. First, as was true of Taft, the justice may be so firmly convinced that he knows what is best for the Court that he sees no reason to be subtle in his approach. Alternatively, he may see the

29. The intriguing story of this attempt at arranging a successor deal is well told in Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977 (1941).

30. See note 7 *supra*.

31. D. DANELSKI, *A SUPREME COURT JUSTICE IS APPOINTED passim* (1964).

32. See R. NICHOLS, *FRANKLIN PIERCE: YOUNG HICKORY OF THE GRANITE HILLS* 253 (1931); H. O'CONNOR, *JOHN ARCHIBALD CAMPBELL* 17 (1920); C. SWISHER, *ROGER B. TANEY* 446 (1935).

appointment as a challenge to his own personal power and ability to help guide, if not control, the Court's activities. Such seems to have been the motivation for Associate Justice Samuel Miller's intense efforts to have his brother-in-law, William Pitt Ballinger, and Federal District Court Judge Henry Clay Caldwell placed on the bench.³³ On occasion the vacant position itself is such a crucial one that it breaks down all of the justices' normal compunctions about becoming involved in what is, after all, a highly political selection process. This clearly has been a motivation for the intense lobbying efforts by justices on behalf of aspirants to the chief justiceship. It was markedly true of attempts to influence the filling of the vacancy by Chief Justice Roger B. Taney's death in 1864.³⁴ The crucialness of the vacancy has motivated justices to intercede, with varying degrees of emphasis, in almost every vacancy of the center chair since 1864, and in more than one instance it has given rise to rather nasty internecine warfare among the members of the Court. For example, witness the unedifying struggle to succeed Stone in 1946.³⁵

A final motivation may be found in the generally vigorous resolve by the pressuring justice to secure the appointment of colleagues with a similar personal and judicial *Weltanschauung*. Since factions almost always abound on the high bench, it is not at all unusual for a president to receive understandably diverse recommendations, occasionally resembling political convention nominating proceedings. Such was the case in the famous and fascinating example of the nomination of Judge Cardozo to replace retiring Justice Oliver Wendell Holmes, Jr.³⁶ Justice Stone was so intent on securing Cardozo's elevation to the Court that, when faced with President Hoover's geographical objection to appointing a third New Yorker to the Court (Hughes and Stone were also from

33. C. FAIRMAN, *supra* note 2, at 338-40, 349-62.

34. In this instance the Court split behind different candidates. Part of the Court, sending Justice Davis as their emissary to President Lincoln, favored the elevation of Associate Justice Swayne, and the other part of the Court favored the appointment of Salmon P. Chase. Associate Justices Field and Miller were originally part of the Swayne contingent, but later switched and notified Lincoln of their support for Chase. See C. FAIRMAN, 1 RECONSTRUCTION AND REUNION, 1864-1888 (1971) (part of the Oliver Wendell Holmes Devise History of the Court); H. FOOTE, CASKET OF REMINISCENCES 413-14 (1974); D. SILVER, LINCOLN'S SUPREME COURT 190-201 (1956).

35. Several of the associate justices are credited with preventing by their actions (including threats of resignation) the elevation of certain of their brother justices during President Truman's consideration of candidates to replace the deceased Chief Justice Stone. See J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS 124-27 (1949); E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON chapter 16 (1958); M. PUSEY, CHARLES EVANS HUGHES 801-02 (1951).

36. Carmen, *supra* note 8, *passim*.

the Empire State), Stone offered to resign in Cardozo's favor.³⁷ What is not so widely known is that opposing both Stone and the acclamation of almost the entire American legal profession were none other than six of the sitting Supreme Court Justices, including Chief Justice Hughes, who objected to the appointment of a confessed "liberal" to the Court. The six undertook an active campaign which included letters and a personal visit by the chief justice to the president, even before Holmes had resigned, pleading that "a majority" of the Court supported Attorney General William Mitchell—a candidate, however, who did not really want the post.³⁸ Stone, in turn, became so worried about the nomination that he worked actively toward the rejection of other candidates under consideration by the president, even to the extent of having his law clerk prepare a detailed report on the opinions of lower court Judge Orie Phillips.³⁹ Still, while Cardozo was eventually selected, there is doubt as to Justice Stone's actual impact on his nomination. A good case can be made for the contention that Senator William E. Borah of Idaho was far more influential in pressuring Hoover into making Cardozo's appointment.⁴⁰

It is axiomatic that such intensive pressure by justices may well turn out to be counterproductive. For example, when Justice James Byrnes resigned from the Court in 1942, his colleague, Felix Frankfurter, undertook a very elaborate campaign to secure the elevation of the distinguished Judge Learned Hand of the United States Court of Appeals for the Second Circuit.⁴¹ In addition to numerous phone calls, letters and personal visits to President Franklin D. Roosevelt, he succeeded in enlisting the support of Chief Justice Stone in his endeavor.⁴² F.D.R. evidently became annoyed with these judicial efforts to influence his selection—perhaps because he chose to become annoyed—and se-

37. A. MASON, *supra* note 12, at 336. However, Murphy, note 23 *supra*, doubts that this offer was given seriously.

38. Justice Van Devanter, when faced with the repeated refusals of the attorney general to express an interest in the position attributed this behavior to modesty on the part of Mitchell and worked even harder to realize his goal. Carmen, *supra* note 8, at 637-39.

39. A. MASON, *supra* note 12, at 336.

40. Murphy, *supra* note 23, at 652, notes that although Justice Frankfurter gave credit for the nomination of Cardozo to Justice Stone at the time, he later changed his mind. See also H. ABRAHAM, *supra* note 1, at 192; C. JOHNSON, BORAH OF IDAHO 452 (1936).

41. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945 671-75 (M. Freedman ed. 1967).

42. A. MASON, *supra* note 12, at 592-93.

lected Wiley Rutledge instead.⁴³ The president specifically pointed to Hand's advanced age at the time of the appointment—a position consistent with his criticism of aged justices in the Court Packing Fight of 1937.⁴⁴ Still, the suspicion that Roosevelt's strongly negative reaction may have been elicited by the persistently strong pressures of Frankfurter and Stone is supported by the knowledge that F.D.R. had evinced the same negative reaction to then Associate Justice Stone's warm efforts on behalf of Felix Frankfurter to replace Associate Justice Cardozo in 1938,⁴⁵ although Roosevelt chose Frankfurter in spite of his annoyance.⁴⁶

Time Dimension

It is possible to summarize generally the different methods of lobbying by differentiating between the particular stages of the process at which the justices enter the pressure fray. If a justice enters too late, he may well have no effect at all, even if his particular candidate happens to be selected. Chart "D" represents an attempt to order these methods on the time dimension.

Although it has been theorized that entrance at the Senate confirmation stage would be of almost no import because of the tardiness of the hour,⁴⁷ there is evidence that efforts have been made by justices in instances of clearly troublesome confirmation proceedings. The confirmation battles involving nominees Taney and, more than a century later, Haynsworth and Carswell, all resulting in rejections of presidential nominees, provide at least some evidence of involvement by sitting justices.⁴⁸ In the seven attempts on record at that stage, four were crowned with success.⁴⁹ The relatively small number of these efforts reflects the unlikelihood of the justices' triumph at that advanced level of the appointment process.

43. F. HARPER, *JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION* 23-25 (1965).

44. Roosevelt wrote to Frankfurter: "[S]ometimes a fellow gets estopped by his own words and his own deeds—and it is not fun for the fellow himself when that happens." ROOSEVELT AND FRANKFURTER, *supra* note 41, at 674.

45. H. THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* 36 (1960).

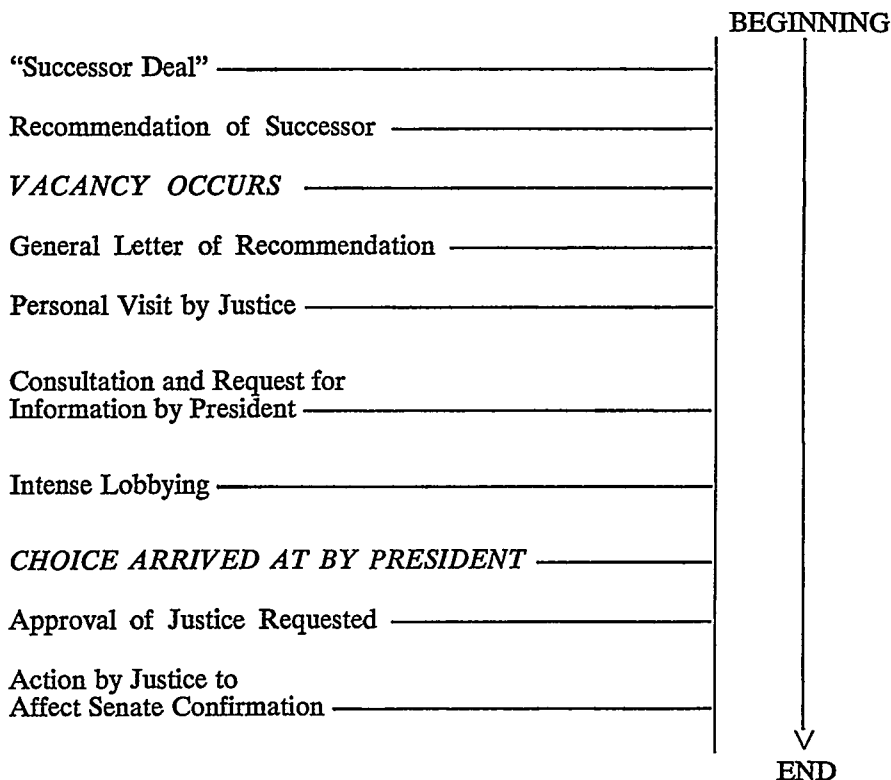
46. Perhaps the strong bond of friendship between these two men overrode such annoyance.

47. Joel Grossman is an advocate of this theory. See J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE PROCESS OF JUDICIAL SELECTION* 43-45 (1965).

48. See chart A *supra*.

49. *Id.*

CHART "D"
**TIME LINE METHODS OF PRESSURE USED
 BY JUSTICES TO INFLUENCE JUDICIAL SELECTION**



Conclusion

Any conclusions regarding the actual degree of success that justices have achieved by exerting influence on a president's choice of Supreme Court nominees are necessarily highly speculative. Chart "E" represents a simple numerical box score of the number of sponsored candidates achieving nomination. However, the mere fact that the justice's candidate was nominated in no way indicates that the justice was instrumental in that individual's selection. The effort by a justice is, after all, just one of several different influences which interact and affect the selection made by the president⁵⁰ who of course may ignore some or even all of these pressures. Actually, the success of the justices' influence may be somewhat greater than the chart indicates, for seven nominees who ultimately attained the Court—Bradley, Woods, Lurton (twice), Sutherland, Moody, J.R. Lamar and Cardozo—had been rec-

50. H. ABRAHAM, *supra* note 1, *passim*.

CHART "E"
SUMMARY OF EFFORTS BY JUSTICES
TO INFLUENCE SUPREME COURT NOMINATIONS

	NUMBER OF ATTEMPTS	NUMBER OF SUCCESSSES	PERCENTAGE OF SUCCESS
IN FAVOR OF CANDIDATES	76	46	60%
AGAINST CANDIDATES	18	15	83%
TOTALS	94	61	65%

ommended by sitting or retired justices for earlier vacancies for which they were not then selected.⁵¹ Nonetheless, the sixty-five percent overall success rate is indeed impressive.

Justices are apparently much more successful when they endeavor to exercise a veto in the appointment process than when they act affirmatively, although the incidents of affirmative action are far more numerous than negative action. Another observation which can be made is that, despite many rumors of active self-generated candidates by sitting associate justices for elevation to the chief justiceship, only one such case is in fact demonstrable and it is a marginal one.⁵² Our research indicates that the nature of the described pressure is self-perpetuating: recipients of successful efforts by sitting justices are prone to repay the favor in the instance of future candidates to the Court. The major conclusion emerging from this study, however, is that the influence of sitting and retired justices in the selection of future members of the Supreme Court is indubitably far more extensive than had heretofore been believed. It is a political fact of life that can no longer be ignored in any attempt to detail and analyze the fascinating, complex process of selecting nominees to serve as justices of the Supreme Court of the United States.

51. See chart A *supra*.

52. Here Associate Justice Swayne used the offices of Senator James Garfield to attempt to remind President Grant in 1873 that he had earlier been promised elevation to the chief justiceship. C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 7 (1963); D. McHargue, Appointments to the Supreme Court 1789-1932 77, May 1949 (unpublished Ph.D. dissertation in University of California, Los Angeles Library).