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## Presidential Predictions of Supreme Court Justices' Behavior

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With the retirement of Justice Douglas, President Ford was confronted with the dilemma of choice. Amid speculation over whether a female would be appointed to the Court, the President had to bear in mind the necessity of choosing a person who would hold policy views compatible with those of the President. Obviously, presidents have in their Supreme Court appointments the opportunity to affect future policy choices long after their administration has ended. Justice Douglas' retirement graphically demonstrated this fact since his tenure covered thirty six years—thirty of those since the end of President Roosevelt's administration. Therefore, the choice is both more important and more difficult than other presidential appointments. The importance lies with the Court's ability to veto policies but even more importantly to shape the terms of the political debate. The difficulty exists in that you are projecting into an unknown future with an appointee you can not fire if the results are contrary to your expectations.<sup>1</sup>

Henry Abraham has overviewed the entire historical process in his work *Justices and Presidents* with the explicit purpose of evaluating whether particular justices met the expectations of the appointing president.<sup>2</sup> The record was found to be generally mixed primarily because of other factors such as friendship, lobbying campaigns, political expediency, and presidential inattention diluted the concern with policy views (at least explicit concern). One difficulty in evaluating judicial performance though is that the evidence tends to be relatively impressionistic.<sup>3</sup>

An alternative approach that exists for evaluating relative judicial behavior is presented by the materials in Schubert's *The Judicial Mind Revisited*.<sup>4</sup> As a result of this analysis of voting behavior, a series of ideo-

<sup>1</sup> Robert Scigliano has an excellent discussion of the process and its inherent difficulties. See *The Supreme Court and the Presidency* (New York: The Free Press, 1971), Ch. 4 and 5. For lower federal courts, see Harold W. Chase, *Federal Judges: The Appointing Process* (Minneapolis: University of Minnesota Press, 1972).

<sup>2</sup> Henry J. Abraham, *Justices and Presidents* (New York: Penguin Books, Inc., 1975), Ch. 3.

<sup>3</sup> Dennis Thompson, "The Kennedy Court: Left and Right of Center," 26 *Western Political Quarterly* (1973), 263-279.

<sup>4</sup> Glendon Schubert, *The Judicial Mind Revisited* (New York: Oxford University Press, 1974).

logical types have been generated within which each justice is placed upon that individual's performance upon the Court. The empirical types identified break the Justices down into two broad groupings of liberals and conservatives with several subsets within each grouping. The placements were extended into the Burger Court although the data base was less complete.<sup>5</sup> Table 1 presents the placements as abstracted from *The Judicial Mind Revisited*.

TABLE 1. Scale Vector Types\*

<i>Ecolib</i>	<i>Modern</i>			<i>Modern</i>		
	<i>Lib</i>	<i>Polib</i>	<i>Econs</i>	<i>Cons</i>	<i>Pcons</i>	
	Black	Brennan	Frankfurter	Burton	Clark	
	Douglas	Fortas	Jackson	Harlan	Minton	
	Murphy	Goldberg	Stewart	Whittaker	Reed	
	Rutledge	Marshall	Powell	Burger	Vinson	
	Warren			Rehnquist	White	
					Blackmun	

\* Material abstracted from Table 5.4, *The Judicial Mind Revisited*, p. 86-87.

ECOLIB—economic liberalism

MODERN LIB—modern liberalism

POLIB—political liberalism

ECONS—economic conservatism

MODERN CONS—modern conservatism

PCONS—political conservatism

The question then becomes one of determining what expectations the president had when appointing the particular justice. The difficulty which becomes readily apparent is that the evidence is so sketchy and oft self-serving that one is left at a loss as to what the "real" motivation was in a particular instance.<sup>6</sup> Therefore, the level of analysis here shifts from the particular to the general: what was the general domestic policy orientation of the appointing president: *i.e.* liberal or conservative. Analysis at this level obviously ignores certain affective elements in the appointment process but those can be conceptualized as explanations for failure to predict judicial performance successfully. Based on this procedure, the appointing presidential administrations were classified generally as either liberal (Roosevelt, Truman, Kennedy, and Johnson) or conservative (Eisenhower and Nixon). Table 2 presents a breakdown of appointments by administration.

<sup>5</sup> *Ibid.*, 88-89.

<sup>6</sup> David J. Danelski, *A Supreme Court Justice Is Appointed* (New York: Random House, 1964), Ch. 6-8.

TABLE 2. Justice Ideology

Administration:	Liberal	Conservative
Roosevelt . . . . .	4 Black, Douglas, Murphy, Rutledge	3 Frankfurter, Jackson, Reed
Truman . . . . .	0	4 Burton, Vinson, Clark, Minton
Eisenhower . . . . .	2 Warren, Brennan	3 Harlan, Whittaker, Stewart
Kennedy . . . . .	1 Goldberg	1 White
Johnson . . . . .	2 Fortas, Marshall	0
Nixon . . . . .	0	4 Burger, Blackmun, Powell, Rehnquist
	—	—
	9	15

What is clear is that the liberal presidents have had the greatest difficulty in successfully predicting judicial performance (8 of 15 unsuccessful predictions) in terms of the appointee's liberalism/conservatism. The two conservative presidents were much more successful (7/9 successful predictions). The two unsuccessful predictions by President Eisenhower occurred for somewhat similar reasons: *i.e.* political expediency. Chief Justice Warren was an apparent implicit political payoff for past party support while Justice Brennan's appointment was linked to presidential electoral calculations. Brennan was selected during the 1956 presidential campaign in an attempt to solidify Eastern Catholic support for Eisenhower.<sup>7</sup>

The failure of the liberal presidents to successfully predict is primarily a function of friendship and historical change. Both Kennedy and especially Truman selected individuals on the basis of personal friendship ties—a factor which in effect negated pure policy or ideological considerations. Franklin Roosevelt's apparent inability to select congruent appointees is a function of the changed environment within which the appointees found themselves after the New Deal was constitutionally triumphant. Justice Jackson for example underwent a dramatic change in behavior after his experiences at the Nuremberg Trials.<sup>8</sup> Justices Reed and Frankfurter were ardent New Dealers initially but by 1946 (when Schubert's analysis begins) had shifted to the more moderate and con-

<sup>7</sup> Abraham, 236-237 and 245-246.

<sup>8</sup> Glendon Schubert, "Jackson's Judicial Philosophy: An Exploration in Value Analysis," 59 *American Political Science Review* (1965) 940-963.

servative positions which characterized both until retirement.<sup>9</sup> Both were in effect overtaken by events. President Truman's apparent failure to select apparent liberals is in part an artifact of the categories given the dichotomy that existed between the administration's liberal social-economic programs and its hardline repressive position on subversives. Justice Clark represents the best example of the dichotomy in his relative economic liberalism with a strong position in favor of government authority to repress dissidents and punish criminals.

The general thrust of this short note is that presidential predictions of supreme court appointees' future behavior is very accurate over the short run. One must remember that the individuals selected normally have had extensive and varied professional careers which usually establish a clear ideological pattern. Inability to predict is a function of other extraneous (though important) variables entering the selection process such as friendship ties or political expediency. Where the president is not diverted by such considerations—the predictions are very successful. When you consider the appointments within the first five years—there were no wrong predictions except for when the other variables intervened. In fact, the most successful (and obvious) examples of prediction are President Eisenhower after the 1956 election and President Nixon in his announced campaign to restructure the Court.<sup>10</sup> Unfortunately for the presidents, politics and friends exist so that ideological proclivities are an important consideration but need not be the dominant one.

<sup>9</sup> This shift was documented earlier by C. Herman Pritchett in *The Roosevelt Court* as he traced the shift of Frankfurter especially but also Reed and Jackson to more conservative position on the Court relative to the other Roosevelt appointees. (New York: The Macmillan Company, 1948), Ch. 9 and 10.

<sup>10</sup> Abraham, Ch. 1.