

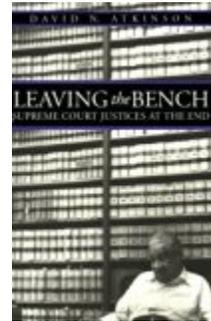
H-Net Reviews

in the Humanities & Social Sciences

Henry J. Abraham. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton.* New and revised edition. Lanham, MD: Rowman & Littlefield Publishers, 1999. xiii + 429 pp. \$75.00 (cloth), ISBN 978-0-8476-9605-5.

David N. Atkinson. *Leaving the Bench: Supreme Court Justices at the End.* Lawrence: University Press of Kansas, 1999. xiii + 248 pp. \$29.95 (cloth), ISBN 978-0-7006-0946-8; \$16.95 (paper), ISBN 978-0-7006-1058-7.

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Comings and Goings

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As of this writing, the U.S. Supreme Court has had the same membership for six years – the longest such period in the Court’s history in over a century. Observers of the Court have noted, based on the ages of the older Justices, the likelihood that the next five years will witness one, two, or even three vacancies on the Court. The closely-divided nature of the Court combines with the approach of a Presidential election and a national contest for control of the Senate to give urgency to issues of the Court’s composition.

Two recent books deserve to be read together as valuable resources for anyone contemplating how Justices come to the Court and how they go. Of these books, *Justices, Presidents, and Senators* tells the more familiar story. This latest edition of a book that first appeared in 1974 has become an indispensable reference for historians of the Court, and retains its character as a lively and useful examination of Supreme Court appointments and the evolution of the appointments process over time. Henry J. Abraham, now James Hart Professor of Government and Foreign Affairs, Emeritus, at the University of Virginia, has thoroughly revised and overhauled his book, the last edition of which appeared in 1992. His modification of the title is apt and valuable; indeed, Senators

have played a large, and increasingly important, role in staffing the High Court. At the same time, his dropping of the adjective “political” from the book’s title is unfortunate, as one of the enduring lessons of *Justices, Presidents, and Senators* is the ever-present reality of politics of all sorts in the naming of Justices to the High Court.

With commendable even-handedness and good humor, Abraham has recounted the stories of the one hundred eight successful nominations to the Court and the many failed nominations (some obscure, some spectacular). Abraham also includes a photo insert depicting all the Justices of the Court from John Jay to Stephen Breyer, as well as appendixes tabulating the various recent attempts to rate both Presidents and Supreme Court Justices. In sum, *Justices, Presidents, and Senators* is a welcome revision of a book that belongs on the shelf of any scholar – whether historian, political scientist, or jurist – who regularly assesses the Court and its workings.

Abraham does, however, slight one issue that has plagued at least one recent President. Although Bill Clinton’s appointees to the Court – Justices Ruth Bader Ginsburg and Stephen Breyer – came with distinguished records as legal academics, attorneys, and federal appellate judges, he expressed on several occasions his regret that he could not name to the Court someone with the

broad political experience that characterized such Justices as Earl Warren and Hugo L. Black, Jr. Abraham does note the emerging profile to which future nominees to the Court likely will have to conform (pp. 327-330), but he does not address the fading of significant political experience from the list.

The creation of vacancies on the Court is an integral part of the story of appointments to the Court, of course, and Abraham does address such painful episodes as the debility of Justices Robert Grier, Stephen J. Field, and William O. Douglas. However, Abraham's book bears out the rueful comment of retiring Justice Sherman Minton in 1956 that far more people would be interested in who would take his place than in the man making room.

David N. Atkinson (who has written a series of valuable articles scrutinizing Minton's Court career), has now presented us with *Leaving the Bench*, a book unique in the literature of the Court; this study focuses on the ways in which Justices have left the Court from the 1790s to the present. Atkinson, Curators' Distinguished Teaching Professor of Political Science at the University of Missouri-Kansas City, is also professor of political science and law at the School of Law. His prose is clear and refreshingly free of jargon. Like Abraham, he arranges his narrative chronologically. His first chapter assesses why Justices leave the Court; his next five discuss the departures of Justices from the bench; and his last examines proposals dealing with the problems of Justices who ought to step down but refuse to do so.

Leaving the Bench is weakest in the early phases of the Court's history. Almost at the outset, Atkinson's paragraph (p. 4) assessing the impeachment and trial of Justice Samuel Chase presents a garbled and severely flawed account of the Chase impeachment, in particular the charges on which Chase was impeached and tried and the reasons that his trial ended in his acquittal. Almost as problematic, Atkinson's accounts of departures from the Court during the years from 1789 to 1864 are scanty and monotonous, perhaps reflecting the paucity of sources for all but a handful of the Court's early members. Even with such notable figures as Joseph Story and Roger B. Taney, we get little sense of the Justices as anything but ailing men in middle or late middle or old age who succumb to illness, bad medical attention, or boredom.

Atkinson's story picks up as he approaches the present, and his narrative is enlightening and appalling by turns. It is painful to read his account of Justice William O. Douglas's last days on the Court, which were

an ordeal for him, for his colleagues, and for the nation. It is equally painful to read his account of Justice Thurgood Marshall's last years on the Court; Atkinson tactfully but firmly suggests that Marshall stayed on the bench too long and that, in his last years as a Justice, he left nearly all of the work to his clerks. Perhaps the most painful story of all is that of Charles E. Whittaker, who was named to the Court in 1958 only to step down four short years later. Atkinson reveals that Whittaker suffered from depression, a mental illness that was an arcane mystery to the medical profession in the 1950s, yet one that, Atkinson suggests, would have barred Whittaker from even being nominated to the Court today.

Atkinson's story is almost entirely one of Justices responding to the encroachments of age and illness; occasionally, a Justice left the Court due to boredom with its work or ambition to succeed in the political realm. Atkinson scants another way in which Justices might leave the Court but have never done so – impeachment. To be sure, only one Justice, Samuel Chase, actually was impeached and stood trial; however, there were threats of impeachment against Chief Justice John Marshall (who was on the Jeffersonian Republicans' shopping list as the next target after Chase), and Associate Justices William O. Douglas and Abe Fortas. Indeed, in Fortas's case, the threat of impeachment was enough to induce Fortas to resign from the Court to spare the nation a constitutional confrontation. Readers might wish, especially in light of the valuable scholarship on the history of impeachment, that Atkinson had devoted a few more pages to assessing the declining significance of impeachment as a threat to Justices.

Readers will wish that Atkinson had done more to assess how the changing nature of the Court and its place in American life have changed issues of judicial tenure and the quandaries of when a Justice should step down. He suggests that the Douglas and Marshall cases indicate a disturbing regression in the Court towards conditions as they were in the last third of the nineteenth century, when Justices refused to step down long after they not only became incapable of doing their jobs but even after they had trouble recognizing the faces of their colleagues or their families. In particular, he notes the possibility that Justices have not only relied more and more on their law clerks, but that the law clerks have become a shield for those Justices who are no longer up to the job.

But the balance of the story he tells – of a Court blessed with statutory provisions allowing Justices to retire on salary and with access to the latest medical ad-

vances, and perhaps cursed with increasing and increasingly severe attention from the media and the public – suggests that no Justice will ever be able to stay on the Court when he or she is manifestly unable to discharge his or her duties and responsibilities. Indeed, at the same time that Atkinson worries about future Justices refusing to go, he also notes that such Justices as Lewis F. Powell, Harry A. Blackmun, and Byron White stepped down when they still were healthy and up to the challenge, and that Justice William J. Brennan, Jr., lost no time after his

1990 stroke in deciding that it was time for him to go and acting on that decision. In sum, *Leaving the Bench* suggests that there is more reason to hope that Justices will step down when the time is right than to fear that they will not.

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