

**THE CHIEF JUSTICES:  
THE SEVENTEEN MEN OF THE CENTER  
SEAT, THEIR COURTS, AND THEIR TIMES**

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by  
Daniel A. Cotter



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*Dedication*

*To Ann, the love of my life, and to my sons, John and Tim.  
You make me better by being part of my daily life. Thank  
you for your love and support.*

*Also to my mom and dad, who sacrificed much and  
did without so their kids could do, and to my dad for  
instilling in me an insatiable appetite to read often  
and a wide variety.*



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Stacy was a professor at my alma mater, Monmouth College, when I was first considering a book on the SCOTUS. She informed me that her former professor, Lew Gould, was a Visiting Distinguished Professor at Monmouth College. I reached out to him and when I brought my son, Tim, down for sports camp in the summer, we visited and he read some of my materials and gave me strong encouragement, and inscribed a copy of his book: “For Dan, With hopes that his own writing will prosper.” Thank you, Stacy and Lew.

Finally, for making this book a reality, I am forever indebted to Steve Errick and Twelve Tables Press.



# Preface

While writing this book, and telling stories of the chief justices, I am often asked what has led me to this process. The subject of the Supreme Court and the people who have sat on the highest court in the nation has interested me from the weeks before I started law school. If anything, it has only grown since. I follow the Supreme Court closely, I tweet about it, I write about it. A number of factors have influenced my desire to write this book. When I attended law school, I worked full-time and went to law school at night. I had received a postgraduate scholarship from the National Football Foundation. Six months after my marriage to my wife, Ann, I received a letter from the foundation informing me that my scholarship was about to expire. I had successfully completed the Certified Public Accountant examination and tried to figure out what to do with the scholarship. I called every law school in Chicago and asked to audit their classes. The response was universal—we don't do that. Take the LSAT examination. I called the foundation—was it possible to obtain an extension? They granted me a six-month extension until January 1991. The game was afoot.

I signed up for the exam immediately and went to the bookstore. I bought all the study guides I could find and at

night, did practice exams. I did well on the exam and then contacted the two schools in Chicago that had night programs starting in January: Chicago-Kent College of Law at Illinois Institute of Technology and The John Marshall Law School. I ended up accepting the offer from John Marshall, literally two blocks from my employer.

There, I discovered something right away—the law is in many ways a mystery and indecipherable, even for lawyers. Or at least not transparent. We received some pre-class materials that had numbering systems at the top like “549 N.E.2d 9.” I had never been exposed to anything like this, and had not idea what I had gotten myself into.

Then classes started. I bought the few hundred dollars worth of books. I read the first fifty pages or so for my first night of class, Torts I. I underlined and highlighted and briefed them, including noting the court that rendered the opinion. And then quickly learned something—professors spent very little or no time on the jurisdiction where the case was decided, or the judges who wrote the opinions. No time was spent on the general societal factors that may have weighed in on the decision or explained the background for it, or the times and circumstances that may have influenced the jurisprudence.

I put that in the back of my head and saved it for later. I wanted to know more about the opinion writers, the times, and the decisions made. As a graduate from a liberal arts college, I was taught to be “intellectually curious” and a

“lifelong learner” and to make connections between various points of information. I started to write about the founding of our nation and the Supreme Court, hoping to at least on a micro basis educate and promote a discussion. I also wanted to learn more about the third branch of our government.

I have been studying our nation’s founding and history and the Supreme Court for many years. I have an extensive library on my personal library shelves (six shelves and growing) of SCOTUS books. In addition, I have taught *SCOTUS Judicial Biographies* since 2012. I originally designed the course as an exploration of the chief justice position (in a manner similar to how the 17 chief justices are portrayed in this book), but it was approved as a course designed to compare and contrast one chief justice and one associate justice from different eras. The proposal arose from my law school experience, one that was not atypical in that we never considered cultural context and did not pay much attention to the justices who issued the landmark cases being studied and analyzed by us. In addition, I write an almost weekly column for the *Chicago Daily Law Bulletin* and have written more than 150 columns on the Supreme Court and the nation’s founding. In 2017, I wrote more than twenty columns for *Constituting America* on their Supreme Court series and in 2016, wrote many columns on the presidential elections, including SCOTUS involvement. As of publication of this book, I have penned more

than forty essays for the Constituting America “90 Day Studies.”<sup>1</sup> I often visit high schools and other settings to discuss our courts and the constitution. I am a merit badge counselor for the three Citizenship Merit Badges in Scouts and also present on the Constitution. I recently became a member (and currently co-chair) of the Chicago Lawyer Chapter of American Constitution Society.

I have been writing in the *Chicago Daily Law Bulletin*, a five-day-a-week legal publication that many lawyers in Chicago receive, for approximately six years. At first, I wrote monthly, then biweekly, then almost weekly. The topics ranged, but many of the columns explore the Supreme Court<sup>2</sup> and others have addressed various moments in our nation’s history of note, such as the addition of the phrase, “under God,” to the Pledge of Allegiance.

I have also taught the curriculum from the American Constitution Society, and several years ago, started the Twitter account, @scotusbios. At the Twitter handle, each

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1. As with the *Chicago Daily Law Bulletin*, I have used some of the materials I wrote for Constituting America as starting points or additions for this book. Those too appear in the bibliography. The first two series I participated in were “The Intrigue of Presidential Elections” (2016) and “The Supreme Court” (2017). Essays can be found at <http://constitutingamerica.org>.

2. In many instances, the initial “skeleton” for a justice’s chapter was a column or more that I had written at the *Chicago Daily Law Bulletin* for my column, “Cotter’s Corner.” The bibliography contains many of those original columns. Special thanks to my former colleagues at Butler Ruben Saltarelli & Boyd LLP, whose Publication Committee was kept busier than they might have liked because of the amount of stuff I sent their way on a not quite daily basis. At one point, the committee politely requested that from that time forward, I only submit one piece per week. That was no easy task for me.



morning I review the historical events that transpired on that date in history, including trying to find nuggets about the Supreme Court and its justices.

My writings have received a wide range of feedback and thoughts, mostly positive. My goal has at least been partially achieved—to educate about this co-equal branch of government. My goal with this book is to educate further, and permit some thoughtful discussions about the Supreme Court, its chief justices, and how each has shaped jurisprudence and the Court.

But there was more than just teaching. There was a goal to make the Supreme Court and its workings accessible. No, the previous sentence is not missing the word “more” before “accessible.” The Court is not accessible to the average person; we know very little of the justices or the work that the Supreme Court does. Of the eighty or so opinions released each year, only the most controversial constitutional issues raise the public’s interest. Yet, the Supreme Court to a very large extent even then is seen almost as nine black-robed Oracles at the Delphi.<sup>3</sup> There is an easy example of the inaccessibility of the Court. When the Supreme Court issued its opinion in *King v. Burwell*<sup>4</sup> on June 25, 2015, the initial reports were that the Patient Protection and Affordable Care Act aka ACA aka Obamacare had been struck down by the Supreme Court. Chief Justice

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3. The Delphi Oracle was the high priestess of the Temple of Appollo at Delphi, someone who provided wise and insightful counsel or prophetic predictions.

4. *King v. Burwell*, 576 U.S. \_\_\_\_ (2015).

John Roberts' opinion began by concluding that the ACA did not survive a Commerce Clause challenge. Reporters who were handed the multi-paged majority opinion, with a long dissent from then-Associate Justice Antonin Scalia, immediately read the first paragraphs of Chief Justice Roberts' opinion and reported that the ACA was overturned. However, the next page gave the real decision of the majority—that Congress had powers under its ability to tax and the ACA was upheld.

Eric J. Segall wrote an excellent piece, “Invisible Justices: How Our Highest Court Hides from the American People,”<sup>5</sup> that describes this inaccessibility of the Supreme Court. His law review article opens with:

The Supreme Court of the United States is one of the least transparent governmental institutions in the United States. The Justices' reluctance to show themselves on camera has been debated and criticized at length but is only one small part of a more disturbing and consistent pattern of secrecy. The Court acts in mysterious ways across a broad range of official duties. This Article examines how the Court uses that secrecy to hide important aspects of its work from the American public.<sup>6</sup>

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5. Segall, available at: <http://readingroom.law.gsu.edu/gsulr/vol32/iss4/1>.

6. *Id.* at 787.

In 2016, I developed a proposal to write this book. I did not want to write the traditional judicial biography. I have read more than one hundred of those, and they tend to be recitations of the cases that the courts decided during a particular term or under a series of justices. A great book in that method is a biography/autobiography written by one of my judicial idols, Justice John Paul Stevens. The book, *Five Chiefs: A Supreme Court Memoir*, covers the five chiefs Stevens worked for as a clerk or that were chiefs during his long career in Chicago, then his years on the Circuit Court of Appeals for the Seventh Circuit and finally during his long tenure on the SCOTUS. This book is not that kind of book—while for each “Court” I do write about a case or so for each justice, the main focus here is on who these seventeen individuals were, how they operate their Courts and what influences and legacies they left. My goal here is not to write another book about the details of how the Court came down on various issues, but to look at a broader level at the culture and context and experiences of that chief justice and address the continuum that way.

As we have seen repeatedly during election cycles and when the Supreme Court issues controversial decisions, the legal community and the general public do not fully understand the Supreme Court, how it functions, or the position of chief justice. The intent is that this book is designed to look at the chiefs not through case studies or through a more legalistic approach but to put the court, its decisions, and its role in our nation in a more cultural context. I believe

that lawyers and non-lawyers alike are interested in the topic.

Most Americans do not know or understand civics or history. A major goal of this book is to provide an accessible, entertaining, interesting book that the general population will enjoy. But one also that the law student and law practitioner will find interesting and useful. I have been reading judicial biographies and the history of our Court and constitution for more than twenty-five years, and to my knowledge, this book is unique in its breadth of covering the entire Supreme Court through the center seat of chief justice and exploring some of the peaks and valleys of the Supreme Court from the beginning to present. We hope that the book will be used as a resource in that regard as well.

What connects the seventeen chief justices is a prominence in the legal community. For example, the first four chief justices were heavily engaged in our nation's founding, all having a role in the proposal that is the U.S. Constitution. However, prominence and legal successes are not sufficient. All of them also share a participation in politics at some level. The reality is that to sit on the highest court in the land, a job that currently only nine people at a time can have (and that only 114 have had the opportunity in the history of the Supreme Court), a lawyer must distinguish oneself from the pack of attorneys, and that involves political participation. But prior to the last thirty years or so, there were numerous appointees who after being seated did not always adhere to the nominating party's policies and

procedures. For example, and most recently, David Souter and Sandra Day O'Connor come to mind. Seldom does that happen any longer.<sup>7</sup>

Beginning with the Reagan administration and continuing with the George W. Bush administration, the Republican Party has been very effective in screening federal judge nominees for being allegiant to the party line.<sup>8</sup> It is likely not a coincidence that the Reagan administration's counselor to the president, Edwin Meese III, has been involved in the Federalist Society for Law and Public Policy Studies from or near its inception, or that the Federalist Society was formed in 1982. The first Supreme Court Justice who sat on the Court and was a Federalist Society adviser and member was Antonin Scalia, confirmed in 1986 by a unanimous Senate vote, with the main focus being on Associate Justice William Rehnquist and his nomination to the chief justice position. As Jeffrey Toobin has explained:

“For two generations, since the liberal heyday of Chief Justice Earl Warren, the Court was largely controlled by the moderate wing of the Republican Party. . . . The conservative ascendancy at the Court owes much to

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7. Several reasons can be pointed to. One is the invoking of the nuclear option for SCOTUS nominees by Senate Majority Leader Mitch McConnell. Another reason is the vetting process taking place of each nominee to ensure they are dedicated and committed to the positions of the party nominating the candidate.

8. President Trump and his team might be the most effective yet. For SCOTUS, as discussed in this book, President Trump compiled a list of potential nominees and for his first two vacancies, selected from the list as modified.

Republican victories in presidential elections and well-funded sponsors but also to the power of ideas.”<sup>9</sup>

What has changed most recently is the extreme politicization of the nomination process and also of the Court, reflecting to a large degree the deeply divided partisanship that has become a major thread of our nation’s fabric. The Court has become politicized. And the backing by dark money spent in the last three nominations, on the nominations of Merrick Garland, Neil Gorsuch, and Brett Kavanaugh, is staggering.<sup>10</sup>

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9. Toobin, *The Oath*, p. 17.

10. The Judicial Crisis Network spent \$7 million to block the nomination of Merrick Garland in 2017. Sessa-Hawkins & Perez, available at <https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee>. See also Eisman, available at <https://www.commoncause.org/democracy-wire/anonymous-donor-footed-most-costs-in-gorsuch-fight/#> (reporting that \$10 million was spent backing the Gorsuch nomination); see also Kroll, available at <https://www.rollingstone.com/politics/politics-news/brett-kavanaugh-supreme-court-dark-money-727706>. One must ask the question of what such money means for the appearance of neutrality and how it creates substantial conflicts, especially when groups such as the Chamber of Commerce appear regularly before the Court and dark money groups are backing various challenges. In addition to Judicial Crisis Network, the Ethics and Public Policy Center and, in particular, its president, Ed Whelan, have been very involved in the process. During the Kavanaugh hearings, for example, Whelan engaged in a series of tweets naming a classmate of Kavanaugh’s as a potential doppelganger for Kavanaugh in relation to alleged sexual assault. Whelan apparently worked with CRC Public Relations in developing the theory. Johnson, available at <https://www.politico.com/story/2018/09/21/ed-whelan-kavanaugh-tweets-pr-firm-836405>. Whelan and CRC are not new to the Supreme Court nomination process. When Roberts was going through his confirmation process, both names show up in news as well. For example, on August 16, 2005, *The New York Times* reported, “Mr. Whelan’s statement of unqualified support was distributed by Creative Response Concepts, a public relations firm here with a prominent role in the confirmation effort.” Greenhouse, available at

Anyone who disagrees about how politicized the Court and nomination process have become should carefully watch the opening statement of Supreme Court nominee Brett Kavanaugh on September 27, 2018, when the Senate Judiciary Committee held hearings regarding the sexual assault allegations of Christine Blasey Ford. Kavanaugh spoke of the Clintons and a left-wing conspiracy and smear campaign led by Democrats who were still angry about the election of President Donald J. Trump. The two parties were obvious in their views of how things were going to come out depending on the party. But the statements by Kavanaugh should raise concerns about someone who may sit on the Supreme Court for years, attacking a party and calling the prior hearings an embarrassment by the Democrats. When pushed on that by Senator Mazie Hirono, Kavanaugh did not answer.<sup>11</sup> On a partisan vote, Kavanaugh's

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<https://www.nytimes.com/2005/08/16/politics/politicsspecial1/robertss-files-from-80srecall-big-debates-of-era.html?mtrref=undefined&gwh=A87B29FB01B938B7FB7748FCB85340E8&gwt=pay>. This is not to suggest that the nominees by Democratic presidents have not been supported financially by various outside groups.

11. Eric Segall, noted Supreme Court expert, tweeted on September 27, 2018, at 12:27 PM, during the referenced hearings, "My first tweets about Kavanaugh weeks ago were that he was the most partisan judge to be nominated in a long time. He is proving that with this speech. He hated Dems and loved W and Ken Starr. He is GOP all the way down and has been for decades." Segall has been self-described and otherwise "as extreme a critic of the Supreme Court as there is." Rosenberg (quoting Segall), available at <https://www.salon.com/2018/09/30/can-the-supreme-court-be-saved-kavanaugh-hearings-could-be-a-turning-point>. Segall has asserted that the Supreme Court is not a court but "their decisions resemble the work of a political veto council much more than a court of law." *Id.* Segall is especially critical of the judicial philosophy of originalism, referring to it as a "popular mask that for political decisions," albeit not the only jurisprudence

nomination was advanced to the Senate floor, 11-10, with the caveat from Senator Jeff Flake that an FBI investigation of up to one week take place before a vote by the entire Senate. After an expedited, limited investigation was conducted, Kavanaugh was approved by the Senate, 50-48, the second closest margin of votes in Senate history for a Supreme Court nominee.<sup>12</sup>

Finally, we take to heart the words of Philip B. Kurland, former professor extraordinaire at the University of Chicago Law School, who noted about judicial biographies:

“A judicial biography requires of the biographer a thorough knowledge of the experiences of the subject’s life; of the mores of the time, public as well as private; of judicial precedents and decisions; of relationships of the subject to other individuals, to groups, and to institutions. If there were a checklist, it would be almost endless. But why write judicial biography at all?”<sup>13</sup>

The short answer is, civics is why we write judicial (or any) biography. We must understand our nation’s history, the good, the bad, and the ugly. Biography can help us understand where we have been and the leaders who

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trick justices use. *Id.* For an excellent analysis of why originalism is not a tenable approach, see Segall’s book, *Originalism as Faith*.

12. As discussed elsewhere, not all nominees to the Supreme Court have been voted on with tallies. Many were done by voice vote or Senate acclamation, although that is not likely in the future.

13. Kurland, at 489, 497.



guided and shaped the path. With that in mind, I have attempted to learn as much about the chiefs, reading primary and secondary sources, reading cases, reviewing contemporary accounts of the Courts during their times, and trying to be objective and non-judgmental in my portrayal of each chief justice and their contemporaries. We hope that you will come away from reading this book with a better understanding of who these seventeen men were (and in Roberts case, who he is) and how they helped shape the future of this great nation, the greatest place on earth. Not perfect, but great.

