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SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS

JAMES E. LEAHY, MCFARLAND & CO., 1999

REVIEWED BY EDWARD B. REINHARDT, JR.*

"Supreme Court Justices Who Voted With the Government: Nine Who Favored the State Over Individual Rights" is James E. Leahy's fourth book about the United States Supreme Court.¹ This book analyzes the voting records of nine past and present Supreme Court justices who, in Mr. Leahy's view, "have not been at the vanguard of protecting constitutional liberties."² Its coverage is limited to justices who served on the Supreme Court in the twentieth century, with particular emphasis on the post-World War II Court.³ The book also serves as a counterpoint to his 1996 book, "Freedom Fighters of the United States Supreme Court: Nine Who Championed Individual Liberty."⁴

The book begins with the premise that "[m]any of the cases which the Supreme Court hears involve a person who is asserting a constitutional right against some branch of the federal or state government alleged to have violated that right."⁵ Mr. Leahy is quick to share his opinion that "most justices of the United States Supreme Court . . . have not been guardians of our rights or protectors of our liberty."⁶ Following

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1. The other three books are: JAMES E. LEAHY, *THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM* (1991); JAMES E. LEAHY, *LIBERTY, JUSTICE, AND EQUALITY: HOW THESE CONSTITUTIONAL GUARANTEES HAVE BEEN SHAPED BY UNITED STATES SUPREME COURT DECISIONS SINCE 1789* (1992); JAMES E. LEAHY, *FREEDOM FIGHTERS OF THE UNITED STATES SUPREME COURT: NINE WHO CHAMPIONED INDIVIDUAL LIBERTY* (1996). Leahy is a 1949 graduate of the University of North Dakota School of Law and is currently a lawyer, author and lecturer in Fargo, North Dakota.

2. JAMES E. LEAHY, *SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS* 321 (1999).

3. Oliver Wendell Holmes is the only pre-World War II justice in the book; he served from 1902-1932. Felix Frankfurter (1939) and Robert Jackson (1941) were appointed before the United States entered World War II but served the bulk of their terms during and after the war.

4. JAMES E. LEAHY, *FREEDOM FIGHTERS OF THE UNITED STATES SUPREME COURT: NINE WHO CHAMPIONED INDIVIDUAL LIBERTY* (1996).

5. JAMES E. LEAHY, *SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS* 3 (1999).

6. *Id.* at 4.

this track, Leahy categorizes all Supreme Court justices as either "freedom fighters" or "justices for the government."⁷ Freedom fighters are "strong supporters of First Amendment rights, as well as the rights of privacy and equal protection for voters, illegitimate children, aliens, and persons of both genders and all races."⁸ Justices for the government, on the other hand, are those who vote "to uphold government restrictions or limitations on these rights."⁹

"Supreme Court Justices Who Voted With the Government" focuses on nine such justices for the government: Oliver Wendell Holmes, Felix Frankfurter, Robert Jackson, John M. Harlan,¹⁰ Byron White, Warren Burger, William Rehnquist, Sandra Day O'Connor, and Antonin Scalia. The book is structured into nine chapters, one for each justice. The chapters are arranged chronologically, in the order in which the justices were appointed to the Court.¹¹ Each chapter stands as an individual unit and does not have to be read in conjunction with other chapters to be understandable. The discussion of each justice begins with a short biographical essay covering his or her childhood, education, marriage, and career prior to the Supreme Court. In general, the profiles do not discuss how each justice arrived at his or her judicial philosophy, although there are a few exceptions.¹²

The second portion of each chapter comprises a discussion of the justices' voting records and writings in three major areas. First are various First Amendment guarantees: free exercise of religion, freedom of speech, freedom of the press, the right of assembly, the right to petition the government for redress of grievances, and the right of association.¹³ The next area encompasses various components of the liberty interest contained in the Due Process Clauses of the Fifth and Fourteenth Amendments: the right of privacy, the right to travel and the

7. *Id.* at 1.

8. *Id.*

9. *Id.*

10. There have been two justices named John M. Harlan on the Supreme Court. Leahy focuses on the second. The first was a contemporary of Holmes and was more liberal than his grandson, with whom he shared his name. *Id.* at 26-30, 113.

11. Hence, Oliver Wendell Holmes (Associate Justice from 1902-1932) is first, and Antonin Scalia (Associate Justice from 1986 to the present) is last.

12. Exceptions are Justice Holmes, *Id.* at 11-12, Chief Justice Rehnquist, *Id.* at 244, and Justice Scalia, *Id.* at 299-300.

13. *Id.* at 3. The First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." U.S. CONST. amend. I. Notably, the book does not address the establishment clause of the First Amendment.

right to work.¹⁴ Finally, Leahy address the Fourteenth Amendment's guarantee of equal protection.¹⁵

These major areas are divided into specific issues, discussion of which constitutes the bulk of each profile. Some issues are common to all the justices: Each chapter discusses free exercise of religion; freedom of speech, press, and association; the pursuit of liberty; and equal protection. Issues unique to a particular era are also included in the chapters on the justices of that era. For example, the Court heard cases during World War II concerning restrictions placed on citizens of Japanese ancestry.¹⁶ Felix Frankfurter and Robert Jackson served on the Court during World War II, and their profiles contain sections dealing with this issue.¹⁷ Similarly, the issue of whether the Bill of Rights should be applied to the states appears only in the first five profiles.¹⁸ Each profile concludes with a summary of the justice's voting record and reasons why he or she is classified as a justice for the government.

The book also contains an Appendix, consisting of a chart listing each justice's votes on issues discussed in the text. The Appendix includes cases not specifically discussed in the text. This allows a reader to count votes and determine which justice is, according to Leahy's

14. LEAHY, *supra* note 2, at 3. The Fifth Amendment's Due Process Clause reads as follows: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend V. The Fourteenth Amendment also contains a Due Process Clause: "No state shall . . . deprive any person of life, liberty or property, without due process of law . . ." U.S. CONST. amend XIV.

15. LEAHY, *supra* note 2, at 3. The 14th Amendment's Equal Protection Clause provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

16. *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944) are the two cases discussed in the book. *Hirabayashi* dealt with the imposition of curfews on people of Japanese ancestry. JAMES E. LEAHY, SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS 107-08 (1999). *Korematsu* upheld the conviction of one such Japanese American who disobeyed an order to move to a relocation center. *Id.* at 108.

17. *Id.* at 74-75, 107-08.

18. This issue appears in the profiles of Justice Holmes, *Id.* at 27-29; Justice Frankfurter, *Id.* at 72-74; Justice Jackson, *Id.* at 106-07; Justice Harlan, *Id.* at 147-48; and Justice White, *Id.* at 201-02. The discussion stops after 1969, when Chief Justice Burger began his tenure. Coincidentally, the most recent case on this issue that appears in the Appendix, *zx*, 395 U.S. 784 (1969), was decided June 23, 1969, the same day Burger was sworn in as Chief Justice.

terms, the most (Chief Justice Rehnquist) and least (Justice White) conservative.¹⁹

"Supreme Court Justices Who Voted with the Government" is not purely a history; Leahy often takes the opportunity to express his opinion on the views of a particular justice. His opinions generally consist of brief remarks, such as "[Justice Holmes] held a rather narrow view of freedom of the press"²⁰ and "[u]npopular speech was not popular with Chief Justice Rehnquist."²¹ Occasionally, however, Leahy makes more in-depth arguments against a particular position. For example, immediately after summarizing Justice Frankfurter's view that courts should defer to the legislative process, Mr. Leahy asserts that Frankfurter's position contains two errors and discusses them in some detail.²²

While he clearly is philosophically opposed to justices for the government, Mr. Leahy does note that they voted against the government on occasion.²³ For example, "With the exception of the obscenity cases, [Justice Scalia] voted a few more times for freedom of the press than he voted against it."²⁴ Justice White generally "had a good voting record in cases dealing with equal protection of the law."²⁵ Justice Holmes approved government regulation of speech when he created the "clear

19. According to the chart, Justice Rehnquist voted in favor of individual freedom only about 23% of the time, making him the most conservative. *See id.* app. at 323-54. In second place is Justice Holmes, who voted for individual freedom 35% of the time. *See id.* Chief Justice Burger and Justice Scalia tied for third place; they voted for individual freedom 38% of the time. Justice White, who voted for individual freedom almost 54% of the time, is the most liberal justice. *See id.* The chart is also useful for comparing the votes of different justices in the same case or group of cases. *See id.* For example, in *Turner v. Safley*, 482 U.S. 78 (1987), a right of privacy case, Justices White, Burger, Rehnquist, O'Connor and Scalia all voted for individual freedom, but all voted against it two years later, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *Id.* app. at 347.

20. JAMES E. LEAHY, SUPREME COURT JUSTICES WHO VOTED WITH THE GOVERNMENT: NINE WHO FAVORED THE STATE OVER INDIVIDUAL RIGHTS 31 (1999).

21. *Id.* at 249.

22. *Id.* at 75-76.

23. Neither Madison's prediction that justices would be 'guardians' of our rights, nor Hughes' assertion that the 'judiciary is a safeguard of our liberty,' has proven to be correct. Throughout our history most justices of the United States Supreme Court, for example, have not been guardians of our rights or protectors of our liberties.

Id. at 4.

24. *Id.* at 319.

25. *Id.* at 207. Justices White and Frankfurter actually voted for individual rights more often than not, according to the data in the Appendix. *See generally id.* app. at 323-54. White voted for the individual almost 54% of the time, and Frankfurter voted for the individual almost 51% of the time. *See generally id.*

and present danger” test, yet he dissented in a later case applying that test.²⁶

“Supreme Court Justices Who Voted With the Government: Nine Who Favored the State Over Individual Rights” provides a good overview of the positions taken by each of the nine justices on certain issues. It is not, nor does it claim to be, an exhaustive treatise on each justice’s voting record or writings. It is an overview, discussing sample cases in particular areas rather than every case in which a justice participated. For those looking for a snapshot of the views of nine justices on the First Amendment, along with certain aspects of due process and equal protection issues, it is a good starting point.

26. *Id.* at 13, 16. The “clear and present danger” test appeared in *Schenck v. United States*, 249 U.S. 47, 48-49 (1919). In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court affirmed the conviction of Gitlow for advocating overthrow of the government. Holmes dissented, saying that even under the “clear and present danger test” there was no danger that Gitlow and his followers would overthrow the government. *Id.* at 672-73.

