ARTICLES

JUSTICES DENIED: THE PECULIAR HISTORY OF REJECTED UNITED STATES SUPREME COURT NOMINEES

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I. INTRODUCTION

Throughout the 2016 election year's drive to the White House, a far different building loomed large in the passenger's side window. More than any presidential candidates in recent memory, the 2016 election year's aspirants for the nation's highest executive office focused their rhetoric upon the kingpin of the federal judiciary. During the election, now-President Donald Trump publicly vowed to "appoint justices to the United States Supreme Court who [would] uphold our laws and our Constitution," stated that "Second Amendment people" could stop Hillary Clinton's Supreme Court picks, and released a list of justices whom he purportedly planned to consider nominating to the Court's bench.[1] On the other hand, Democratic nominee Hillary Clinton declared that she would nominate only justices who were willing to overturn the Court's controversial *Citizens United* decision regarding corporate campaign contributions, criticized the Court's precedent regarding the Second Amendment, and denounced Trump's list of prospective nominees

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[1] *See* Josh Blackman, *Cautiously Optimistic about Trump's SCOTUS Shortlist*, NAT'L REV., May 19, 2016; Nick Corasanti & Maggie Haberman, *Donald Trump Suggests 'Second Amendment People' Could Act against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html?_r=0; Annie Z. Yu, *The Best Lines from Donald Trump's Speech, According to California Republicans*, L.A. TIMES (July 22, 2016), http://www.latimes.com/nation/la-na-pol-best-trump-lines-20160722-snap-htmlstory.html.

as littered with "extreme ideologues."[2] Other candidates on both sides of the political aisle provided similarly pointed comments throughout the primary season.[3]

In this manner, the arm of government that Alexander Hamilton once called the least dangerous branch in the federal system stole the spotlight in the 2016 election.[4] The group of arbiters whom Hamilton hoped would lack both "the power of the executive branch and the political passions of the legislature" proved in 2016 that it wields enough power to consume the minds of executive branch candidates and inflame arguably more political passions than the entire Congress.[5] One could reasonably argue that the 2016 election demonstrated that the Supreme Court today occupies a more unabashedly prominent place in American politics than the body has ever held at any prior point in history.[6]

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[2] *See* Citizens United v. FEC, 558 U.S. 310 (2010); Sahil Kapur, *Hillary Clinton Opposes* Heller *Gun Rights Ruling, Adviser Says*, BLOOMBERG (May 20, 2016), http://www.bloomberg.com/politics/articles/2016-05-20/hillary-clinton-believes-pivotal-gun-rights-ruling-was-wrong-adviser-says; Cal Thomas, *Trump and the Supreme Court*, WASH. TIMES (May 23, 2016), http://www.washingtontimes.com/news/2016/may/23/cal-thomas-donald-trump-and-the-supreme-court/; David Weigel, *Clinton Will Push Constitutional Amendment to 'Overturn* Citizens United,' WASH. POST (July 16, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/16/clinton-will-push-constitutional-amendment-to-overturn-citizens-united/.

[3] *See, e.g.*, Emily Atkin, *Ted Cruz Promises to Create the Most Right-Wing Supreme Court in History*, THINKPROGRESS (Jan. 30, 2016), https://thinkprogress.org/ted-cruz-promises-to-create-the-most-right-wing-supreme-court-in-history-3e009e23f98c#.pvf9r7pkq; Eric Bradner, *Bernie Sanders' Supreme Court Litmus Test: Overturn* Citizens United, CNN, http://www.cnn.com/2015/09/28/politics/bernie-sanders-chicago-koch-brothers-scotus/ (last updated Sept. 29, 2015); *John Kasich Talks Supreme Court Nominations after Town Hall in St. George*, FOX 13 NOW (Mar. 20, 2016), http://fox13now.com/2016/03/20/john-kasich-talks-supreme-court-nominations-after-town-hall-in-st-george/; Ariane de Vogue, *GOP Candidates Split Decision over the Supreme Court*, CNN, http://www.cnn.com/2015/09/17/politics/republican-debate-supreme-court/ (last updated Sept. 17, 2015).

[4] *See* Mark E. Andersen, *The 2016 Election is Not about the Presidency. It is about the Supreme Court*, DAILY KOS (Apr. 19, 2015), http://www.dailykos.com/story/2015/4/19/1377580/-The-2016-election-is-not-about-the-presidency-It-is-about-the-Supreme-Court;
Ariane de Vogue, *What 2016 Means for the Supreme Court*, CNN, http://www.cnn.com/2015/09/11/politics/supreme-court-2016-election/ (last updated Sept. 11, 2015); Lydia Wheeler, *Election to Shape Supreme Court*, HILL (July 17, 2016), http://thehill.com/homenews/campaign/287828-election-to-shape-supreme-court.

[5] Alexander Hamilton devoted *Federalist No. 78* to a detailed reassurance to skeptics about the limits of the Supreme Court's power and influence. *See* THE FEDERALIST NO. 78, at 393 (Alexander Hamilton) (Garry Wills ed., 1982). His commentaries about the Court and the need for limits upon its power remain a central focus of many advocates for "judicial restraint" in the present day. *See, e.g.,* Ian Millhiser, *We May Be Living in the Final days of the Supreme Court of the United States*, THINKPROGRESS (Nov. 1, 2016), https://thinkprogress.org/we-may-be-living-in-the-final-days-of-the-supreme-court-of-the-united-states-acdcd26e745d#.7pb3059it.

[6] *See, e.g.*, Ari Berman, *The Supreme Court is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/; Dave Helling, *Courts, Judges Become Top*

President Donald Trump, the victor of the 2016 election, has almost certainly claimed as a prize an embarrassment of judicial spoils.[7] First on the list was the seat vacated by the unexpected death in February 2016 of Justice Antonin Scalia, the longtime ideological heart of the Court's conservative wing.[8] When the United States Senate refused to entertain former President Obama's nomination of Merrick Garland to fill this suddenly open position, claiming that it was improper to do so in an election year, the ability to replace Scalia shifted to the White House's newest inhabitant, who responded by appointing conservative jurist Neil Gorsuch to the bench.[9] This appointment alone represented an opportunity that would please any Republican President and his or her political party—the chance to solidify a predictable right-wing vote.[10]

Political Targets in 2016 Elections, KAN. CITY STAR (June 17, 2016), http://www.kansascity.com/news/politics-government/article84374182.html; Paul Waldman, *The Supreme Court Reminds Everyone Why It's the Most Important Issue in the 2016 Election*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/06/23/the-supreme-court-reminds-everyone-why-its-the-most-important-issue-in-the-2016-election/?utm_term=.8e3dd80271ab.

[7] *See* Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html; *see, e.g.*, Andersen, *supra* note 4; Jess Bravin, *Presidential Election Will Shape Supreme Court, and National Policies, for Years to Come*, WALL STREET J. (July 22, 2016), http://www.wsj.com/articles/presidential-election-will-shape-supreme-court-and-national-policies-for-years-to-come-1469207258; Wheeler, *supra* note 4.

[8] *See* Stephen Collinson, *Justice Antonin Scalia's Death Quickly Sparks Political Battle*, CNN, http://www.cnn.com/2016/02/13/politics/antonin-scalia-supreme-court-replacement/ (last updated Feb. 14, 2016).

[9] The question of whether the Senate should vote on Obama's nomination of Garland inflamed an intense debate on both sides of the political article. *See, e.g.*, Barack Obama, *Merrick Garland Deserves a Vote—For Democracy's Sake*, WALL STREET J. (July 17, 2016), http://www.wsj.com/articles/merrick-garland-deserves-a-votefor-democracys-sake-1468797686; Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), http://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/; Nina Totenberg, *170-Plus Days and Counting: GOP Unlikely to End Supreme Court Blockade Soon*, NPR (Sept. 6, 2016), http://www.npr.org/2016/09/06/492857860/173-days-and-counting-gop-unlikely-to-end-blockade-on-garland-nomination-soon.

[10] As of July 2014, Scalia and conservative Justice Clarence Thomas agreed on ninety-one percent of the Supreme Court's signed decisions in which both of these Justices cast a vote. *See* Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often,* N.Y. TIMES, http://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html (last updated July 3, 2014). Using the same metrics, Scalia and conservative Chief Justice John Roberts agreed on ninety percent of the Court's signed decisions. *See id.* Scalia's conservative impact, however, extended far beyond statistical agreements, as observers widely recognized him as "the intellectual leader" of the Court's conservative Justices. Tony Mauro, *Justice Antonin Scalia, Leader of Court's Conservative Wing, Dies at 79*, NAT'L L. J. (Feb. 13, 2016), http://www.nationallawjournal.com/id=1202749702587/Justice-Antonin-Scalia-Leader-of-Courts-Conservative-Wing-Dies-at-79?mcode=120261540

Barring an unexpected turn of events, however, more openings on the Court is most likely to soon arise for the new President. On Inauguration Day in 2017, liberal leader Justice Ruth Bader Ginsburg had reached the age of eighty-three.[11] Justice Anthony Kennedy, by far the most unpredictable voter on the bench, is eighty years old.[12] Justice Stephen Breyer, generally a steady liberal voter, is seventy-eight.[13] Of course, nothing requires any of these Justices to leave their seats if they do not chose to do so, and precedent exists for Supreme Court Justices to serve as late as the age of ninety.[14] Still, the odds are good that at least one of these older Justices—and possibly all three—will decide to retire from the bench at some point within the next four years.[15]

2746&curindex=1&back=CT&slreturn=20160819205942; *see* Robert Barnes, *U.S. Supreme Court Justice Antonin Scalia Dead at 79*, CHI. TRIBUNE (Feb. 13, 2016), http://www.chicagotribune.com/news/ct-supreme-court-scalia-dead-20160213-story.html; *see generally* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE (2014) (describing in great detail the central role that Scalia occupied in all affairs involving the Court in recent years). Replacing such a titanic figure upon the Court is likely to leave an impact that may last for a generation or more.

[11] *See* Danielle Burton, *10 Things You Didn't Know about Ruth Bader Ginsburg*, U.S. NEWS & WORLD REP. (Oct. 1, 2007), http://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-ruth-bader-ginsburg (stating that Justice Ginsburg was born on March 15, 1933); *see also* Joan Biskupic, *Justice Ginsburg Reflects on Term, Leadership Role*, USA TODAY, http://usatoday30.usatoday.com/news/washington/judicial/2011-07-01-supreme-court-ginsburg_n.htm (last updated June 30, 2011) ("[Ginsburg is] the most senior member of the Supreme Court's liberal wing.").

[12] *See Anthony Kennedy Biography,* ACAD. ACHIEVEMENT, http://www.achievement.org/autodoc/page/ken0bio-1 (last updated June 26, 2015) (stating that Justice Kennedy was born on July 23, 1936); *see generally* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005 (providing just one of a seemingly endless number of commentaries describing Kennedy's influential position as the Court's current "swing vote.").

[13] *See* Ken I. Kersch, *Stephen Gerald Breyer*, *in* BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES 74 (Melvin I. Urofsky ed., 2006) (stating that Justice Breyer was born on August 15, 1938). In the words of one writer, Breyer has evolved into "a worthy liberal intellectual counterpart—and sparring partner—to conservative [J]ustice Antonin Scalia." *Id.* In certain areas, however, such as freedom of speech jurisprudence, Breyer proved through the years to be nearly as much of a "swing voter" as Kennedy, if not more so. *See* Benjamin Pomerance, *An Elastic Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Freedom of Speech*, 79 ALB. L. REV. 403, 479 (2016) (examining Breyer's widely varied record in freedom of speech decisions).

[14] Oliver Wendell Holmes and John Paul Stevens both remained members of Court until after their ninetieth birthday. *See* Laura Hambleton, *What Does a Supreme Court Justice Do in Retirement?,* WASH. POST (Nov. 18, 2011), https://www.washingtonpost.com/national/health-science/what-does-a-supreme-court-justice-do-in-retirement/2011/11/04/gIQAapIFZN_story.html.

[15] More than a year ago, prior to Scalia's death, observers already noted the likelihood that Supreme Court nominees would become a keystone issue in the 2016 presidential election. *See, e.g.*, Philip Klein, *Supreme Court Will Weigh Heavily in Next Presidential Election*, WASH. EXAMINER (Oct. 6, 2014), http://www.washingtonexaminer.com/supreme-court-will-weigh-heavily-in-next-presidential-election/article/2554313; Bill Whalen, *The Supreme Court May be the Sleeper Issue of the 2016 Election*, FORBES (Oct. 18, 2015), http://www.forbes.com

If Justices Ginsburg, Kennedy, and Breyer all leave the bench during President Trump's term of office, President Trump will hold the power of appointing a total of four Supreme Court Justices.[16] No President since Ronald Reagan has filled four or more vacancies on this powerful bench.[17] Yet the impact of the new slate of nominees extends far beyond mere numbers. If the above-described scenario comes true, President Trump would replace the Court's longstanding conservative leader (Scalia), the Court's two more influential liberal Justices (Ginsburg and Breyer), and—perhaps most importantly—the swing voter on whom so many 5-4 decisions in recent years have hinged (Kennedy).[18] With such a slate of nominees, the President could re-cast the Court's overall decision-making tendencies in a way that could reverberate for decades to come.[19]

For example, if President Trump decides to appoint reliably conservative Justices to fill all four roles, it would give the Court a substantial conservative majority, with the four new conservatives joining Justice Clarence Thomas, Justice Samuel Alito, and Chief Justice John Roberts to reach a 7-2 conservative advantage.[20] Conversely, if President Trump appointed four Justices who unexpectedly turned out to be reliably liberal voters, it would establish a definite liberal majority on the Court, with the four new jurists joining Justice Sonia Sotomayor and Justice Elena Kagan to form a 6-3 liberal lead.[21] The nation's future direction on multiple keystone issues—immigration reform, gun control, affirmative

/sites/billwhalen/2015/10/18/with-maybe-two-seats-to-fill-does-the-high-court-becomes-supremely-huge-in-2016/#6bcd06137ef5.

[16] *See* Totenberg, *supra* note 9.

[17] *See Supreme Court Nominations, 1789-Present*, U.S. SENATE, https://www.senate.gov/pagelayout/reference/nominations/reverseNominations.htm (last visited Nov. 19, 2016) [hereinafter *Supreme Court Nominations*].

[18] *See supra* text accompanying notes 8–13.

[19] *See* Andersen, *supra* note 4; Berman, *supra* note 6; Bravin, *supra* note 7; Cathleen Decker, *Scalia's Death Puts Supreme Court at the Center of the Presidential Campaign*, L.A. TIMES (Feb. 14, 2016), http://www.latimes.com/nation/la-na-scalia-campaign-20160213-story.html; Albert R. Hunt, *The Supreme Court Really Matters in This Election*, BLOOMBERG (July 3, 2016), https://www.bloomberg.com/view/articles/2016-07-03/the-supreme-court-really-matters-in-this-election; Paul Waldman, *Why 2016 Will Be A Supreme Court Election*, WEEK (July 7, 2015), http://theweek.com/articles/564891/why-2016-supreme-court-election; Wheeler, *supra* note 4.

[20] *See* Hannah Fairfield & Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html.

[21] *See id.*; *see generally* Adam Liptak, *The Right-Wing Supreme Court That Wasn't*, N.Y. TIMES (June 28, 2016), http://www.nytimes.com/2016/06/29/us/politics/supreme-court-term.html (listing Justices Sotomayor and Kagan as liberals on the Court).

action, freedom of expression, campaign finance, and many more—hangs in the balance of President Trump's selections to rebuild the bench.[22]

Yet one fundamental entity could block President Trump's opportunity to reshape the Court: the checks and balances of the United States Senate.[23] As of this writing, Republicans hold a 52-48 advantage over Democrats in this legislative chamber.[24] However, multiple Senate seats are sure to be contested in future interim elections over the next four years, potentially causing a noticeable shift in the balance of power.[25] When the dust settles on these interim elections, President Trump will need to quickly ascertain how to best work with this newly constituted collection of senators to gain their consent for any of his potential judicial nominees.[26]

[22] *See* Berman, *supra* note 6; Decker, *supra* note 19.

[23] The U.S. Constitution provides that the President "by and with the Advice and Consent of the Senate, . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. CONST. art. II, §2, cl. 2. This is frequently called the "Appointments Clause." *See, e.g.,* Jonathan H. Adler, *Are the SEC's Administrative Law Judges Unconstitutional*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/28/are-the-secs-administrative-law-judges-unconstitutional/?utm_term=.e5d73ef8d98a. The actual extent of the Senate's role regarding Supreme Court nominees has long been the subject of debate. *See, e.g.,* Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 560. To some commentators, the Senate should "consent" to the President's nomination unless the nominee is blatantly unfit for office, perhaps explaining why "the Senate has normally limited its inquiry to whether a nominee's background included training, experience and judicial temperament deemed appropriate for the position." *Id.* at 559; *see also Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 100th Cong. 2916 (1987) (statement of Prof. Paul M. Bator) ("[The Senate should maintain] a heavy presumption in favor of the President's nominee if that person possesses outstanding professional, intellectual[,] and moral qualifications for the office of Supreme Court Justice."). Others argue that such a limited interpretation amounts to an abdication of the Senate's constitutional duties, and call for a far more rigorous vetting of Court nominees. *See* Grossman & Wasby, *supra,* at 560 ("It should be emphasized at the outset that any such view of the Senate's function with respect to nominations for the separate judicial branch of the government is wrong and simply does not square with the precedents or with the intention of those who conferred the 'advice and consent' power upon the Senate."); *see also* Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 660 (1970) (holding that senators should consider the prospective justices' policy inclinations in deciding whether or not to approve the nominee to the Court).

[24] *See* Jake Miller, *2016 By the Numbers: Where does the Battle for the Senate Stand?*, CBS (Aug. 17, 2016), http://www.cbsnews.com/news/2016-by-the-numbers-where-does-the-battle-for-the-senate-stand/. The Democratic count listed above includes two Independents, both of whom caucus with the Senate's Democrats.

[25] *Id.*

[26] Prior to the 2016 election, at least one commentator believed that the politically polarized Senate could provide a tremendous stumbling block for the next President's Supreme Court nominees. *See, e.g.,* Bob Egelko, *Senate a Major Roadblock for Next President's Supreme Court Picks*, S.F. CHRON. (Jan. 3, 2016), http://www.sfchronicle.com

The ideological composition of the Senate could—and, viewed solely through a lens of basic political realism, should—influence the way that President Trump makes his choices for the Court's future. In particular, if the party controlling the Senate differs from the party controlling the White House, one would expect various compromises from President Trump to avoid facing roadblocks and rejections.[27] With such an important opportunity at stake, these are nominations to be handled with particular care.

To shed greater light on key considerations regarding this process, this article investigates the types of situations that any President would most likely wish to avoid. Twelve times in this nation's history, the Senate voted to reject the President's nominee for the Supreme Court.[28] This article examines each of these nominees and the factors surrounding their rejections. For each unsuccessful nominee, this article studies the political dynamics of the time: the nominee's political party, the nominating President's party, the controlling party in the Senate, and the controlling party on the Supreme Court. The article also looks at the political party membership of the Justice whom the new nominee would replace, as

/politics/article/Senate-a-major-roadblock-for-next-president-s-6734458.php ("With relations between the parties at their most toxic in recent memory, the next Supreme Court nominee may be in for a rough ride.").

[27] Indeed, the entire process began through a vision of compromise, with the framers reaching a middle ground between delegates who wanted all of the appointment power to stay in the executive branch and delegates who wanted all of the appointment power to rest in the legislative branch. *See* LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, THE IMPORTANCE OF THE SENATE'S CONSIDERATION OF A U.S. SUPREME COURT NOMINEE 4 (2016), https://lawyerscommittee.org/wp-content/uploads/2016/03/LCCRUL-Supreme-Court-Vacancy-Report-March-11_Final.pdf. From the outset, this was meant to be a sharing of powers between these two branches, ensuring that neither party could dominate the appointments process and requiring compromise to reach consensus. *See id.*

[28] *Supreme Court Nominations*, *supra* note 17. This article focuses exclusively upon those nominees that the Senate voted to reject. In addition, the Senate has taken no action on ten nominees to the Court: Reuben Walworth (nominated by President John Tyler), John Read (Tyler), Edward Bradford (Millard Fillmore), William Micou (Fillmore), Henry Stanbery (Andrew Johnson), Stanley Matthews (Rutherford Hayes) (later confirmed), William Hornblower (Grover Cleveland) (later formally rejected), Pierce Butler (Warren Harding) (later confirmed), John Harlan (Dwight Eisenhower) (later confirmed), and, most recently, Merrick Garland. *Id.* The Senate has postponed a vote on three additional nominees: John Crittenden (nominated by John Quincy Adams), Roger Taney (Andrew Jackson) (later confirmed), and Edward King (John Tyler). *Id.* Finally, twelve nominees have withdrawn their nomination before the Senate could vote on them: William Paterson (nominated by George Washington) (later confirmed), Ruben Walworth (twice) (nominated both times by John Tyler), John Spencer (Tyler), Edward King (Tyler), George Badger (Millard Fillmore), George Williams (Ulysses Grant), Caleb Cushing (Grant), Abe Fortas (Lyndon Johnson), Homer Thornberry (Johnson), John Roberts, Jr. (George W. Bush) (withdrew from the nomination to replace Sandra Day O'Connor because William Rehnquist passed away and Bush subsequently nominated Roberts to become the Court's new Chief Justice instead) (later confirmed), and Harriet Miers (Bush). *Id.*

well as any unique factors of the former Justice—membership in a racial, ethnic, or religious minority, for instance—that might influence both the President's and the Senate's opinions regarding the new Justice.

From there, the article moves on to review the nominating President's record of prior nominations to the Supreme Court and, given the recent issues regarding the unsuccessful nomination of Merrick Garland, takes note of the number of years between the nomination year and the year of the next presidential election. Last, the article reviews the nominee's overall record, examining the nominee's judicial body of work and political body of work, and takes note of any widely disseminated public sentiments about the nominee.

The article concludes by reviewing the data collected in the preceding sections and identifying trends, parallels, patterns, and characteristics that are common to Supreme Court nominees that the Senate rejected. Through this review, this article will help illuminate pitfalls that President Trump should avoid as well as attributes that he should seek when selecting Supreme Court nominees to place before the Senate's scrutiny.[29] The historical commonalities identified in the next sections of this article could become particularly useful in evaluating the likelihood of confirmation success for the nominees put forth to create a new Court.

II. REJECTED SUPREME COURT NOMINEES AND SOME REASONS WHY

A. John Rutledge

The Senate's first Supreme Court rejection occurred less than a decade after the Constitution's ratification.[30] With a man who warned against partisan politics serving as the chief executive, America's inaugural political divisions emerged in force during the Senate's refusal to confirm John Rutledge to the office of Chief Justice of the Supreme Court.[31] The South Carolina native belongs

[29] Of course, the correlations discussed in this article may not always hold true. Politics is a volatile game, and Supreme Court nominations are, at their core, political. Depending on the President, the Senate, and the various extraneous interests involved, some or all of the trends identified here might not hold true. However, given that the patterns found here encompass twelve nominations occurring across more than two centuries of history, Presidents deciding whom to nominate should grant these factors discussed here careful consideration.

[30] *See Supreme Court Nominations*, *supra* note 17.

[31] *See* Dennis Jamison, *George Washington's Views on Political Parties in America*, WASH.

on any honest list of the most influential Founding Fathers of the United States, with a legacy of leadership from the Stamp Act Congress to the First Continental Congress to the constitutional convention.[32] He held high political and judicial posts on both the federal level and the state level.[33] He even previously served briefly as an Associate Justice on the Supreme Court.[34] Yet despite this background—or, perhaps, because of it—this was the first man whom the Senate deemed unfit to approve to the highest judicial post.[35]

Nominee's Political Party: Federalist.[36]

Nominating President's Political Party: Technically speaking, George Washington remained independent of any party affiliation during his tenure in office.[37] However, the nation's first President unquestionably tended to favor Federalist viewpoints.[38]

Majority Party in Senate: Federalist.[39]

Majority Party on United States Supreme Court: Federalist.[40]

Predecessor's Political Party: Federalist.[41]

President's Previous Nominations to United States Supreme Court: In addition to Jay and Rutledge, Washington had successfully appointed William Cushing, James Wilson, John Blair, James Iredell, Thomas Johnson, and William Patterson to the Court prior to nominating Rutledge for the Chief Justice's seat.[42] Another

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TIMES (Dec. 31, 2014), http://www.washingtontimes.com/news/2014/dec/31/george-washingtons-views-political-parties-america/; *Senate History: December 15, 1795: Chief Justice Nomination Rejected*, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/A_Chief_Justice_Rejected.htm (last visited Nov. 19, 2016) [hereinafter *Chief Justice Nomination Rejected*].

[32] *See generally* JAMES HAW, JOHN & EDWARD RUTLEDGE OF SOUTH CAROLINA 14, 29, 35, 71 (1997) (providing a thorough look at Rutledge's multiple contributions in the formative years of the United States of America).

[33] *See infra* notes 44–68 and accompanying text.

[34] *See infra* notes 44–46 and accompanying text.

[35] *See* HAW, *supra* note 32, at 255–56.

[36] *See* WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 429 (2016).

[37] *See* Jamison, *supra* note 31.

[38] *See, e.g.*, RUSSELL ROBERTS, THE LIFE AND TIMES OF THOMAS JEFFERSON 35 (2007) (noting Washington's consistent pro-Federalist leanings during his time as President).

[39] *See id.* (discussing the Federalist Party's dominance); *see also* William F. Swindler, *The Politics of "Advice and Consent,"* 56 A.B.A. J. 533, 534 (1970) (charting the Senate composition during Washington's tenure).

[40] *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 386 (1985) (listing the party affiliation of each Justice appointed to the Supreme Court by Washington); *see also Supreme Court Nominations*, *supra* note 17 (providing a list of George Washington's appointees, all of them Federalist Party members).

[41] *See* BIRD, *supra* note 36, at 429 (noting that Jay, like Rutledge, was a Federalist).

[42] *See Supreme Court Nominations*, *supra* note 17.

nominee, Robert Harrison, voluntarily declined the appointment, citing health reasons.[43]

Time Between Nomination Year and Next Presidential Election Year: Approximately eleven months.[44]

Nominee's Prior Legal Record: Rutledge studied law at London's Middle Temple and rapidly rose to become one of South Carolina's most sought-after attorneys.[45] Washington's decision to appoint Rutledge to the Supreme Court in 1789 was unsurprising, given the widespread respect that his legal acumen commanded.[46] Yet Rutledge's tenure on the Court was marked by chronic absenteeism, as the new Justice routinely failed to attend the Court's meetings and paid little attention to the Court's business.[47] After just eighteen months on the bench, he resigned to become Chief Justice of South Carolina's Court of Common Pleas.[48]

When Jay resigned from the Chief Justice's chair, however, Rutledge openly lobbied to become his replacement.[49] In a letter to Washington, Rutledge declared that he had "no objection to take the place which [Jay] holds."[50] The tone of the South Carolina man's correspondence then became even more audacious, brazenly stating that Washington should have originally chosen him over Jay so that he could have become the nation's first Chief Justice,[51] writing:

> [M]any of my friends were displeased at my accepting the office of Associate Judge, . . . conceiving (as I thought, very justly) that my pretensions to the office of Chief Justice were at least equal to Mr. Jay's in point of law-knowledge, with the additional weight of much longer experience and much

[43] *See* Matthew P. Harrington, *The Jay and Ellsworth Courts*, *in* 1 THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 59, 60 (Paul Finkelman ed., 2014).

[44] *See Presidential Elections*, HISTORY, http://www.history.com/topics/us-presidents/presidential-elections (last visited Nov. 25, 2016); *Supreme Court Nominations*, *supra* note 17.

[45] *See* BIRD, *supra* note 36, at 429; HAW, *supra* note 32, at 13–14; Harrington, *supra* note 43, at 52.

[46] *See* HAW, *supra* note 32, at 221. In response to Washington's offer of this seat on the Court, Rutledge responded that he had intended to spend the remainder of his life at home in "[e]ase and [r]etirement," but would accept the job for the good of the nation. *Id.*

[47] *See id.* at 221–22.

[48] *See* Harrington, *supra* note 43, at 55; Swindler, *supra* note 39, at 534. While such a career move might seem odd today, it made perfect sense in an era in which the United States Supreme Court had yet to gain national prestige. *See* Harrington, *supra* note 34, at 55 ("For many jurists of the day, a position on the states' highest courts offered more lucrative and prestigious employment than service as a member of a federal court that offered little to do and rigorous circuit duty.").

[49] *See* Swindler, *supra* note 39, at 534.

[50] *Id.*

[51] *See id.*

greater practice.[52]

Washington apparently agreed with Rutledge's own letter of recommendation.[53] On July 1, 1795, he informed Rutledge that his commission as the nation's new Chief Justice would take effect immediately.[54] With the Senate in recess, Rutledge could assume his new role right away.[55] Still, the recess appointment only delayed the inevitable question of what the legislators would do with Rutledge when they returned.[56]

Nominee's Prior Political Record: Rutledge's political prominence in North America began before the United States of America existed.[57] In 1761, he won election to the provincial assembly, establishing himself as a strong public speaker and skillful debater.[58] When unrest grew among the colonists, he initially favored reconciliation with the British.[59] At the Stamp Act Congress, he chaired a committee that sent a petition to the House of Lords demanding significant economic reforms, yet continued to advocate for the Crown's governance throughout the colonies.[60]

At both the First and Second Continental Congresses, Rutledge sustained a moderate stance on most issues related to Great Britain.[61] Yet after the colonies declared their independence, he

[52] *Id.* Silently, Rutledge had harbored these feelings since the day that Washington offered the inaugural Chief Justice's seat to Jay, whom Rutledge deemed under-qualified for the position. *See* HAW, *supra* note 32, at 221.

[53] *See* RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES: 1787 TO 2002, at 21 (2006).

[54] *See* 1 HENRY FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 632 (1874).

[55] *See* Swindler, *supra* note 39, at 534 ("[Washington] hastened to accede to Rutledge's suggestion and grant him a recess appointment, directing that the Secretary of State prepare his commission forthwith.").

[56] *See id.* ("Having taken the first and third steps in the appointing process, Washington placed himself in a position of depending utterly upon the Senate to take the indispensable middle step."). Washington strictly relied upon six factors in deciding who to nominate to the Court: "(1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on lower tribunals; (5) either a 'favorable reputation with his fellows' or personal ties with Washington himself; [and] (6) geographical 'suitability.'" ABRAHAM, *supra* note 40, at 71–72.

[57] *See, e.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 253 (1996) ("[John Rutledge's] distinguished career stretched back over twenty-five years [prior to Washington nominating him to the Court].").

[58] *See* Harrington, *supra* note 43, at 52.

[59] Importantly, Rutledge believed that the colonists' arguments arose solely from their rights as Englishmen, not from the "natural rights" theories favored by individuals such as John Jay and Richard Henry Lee. *See* Neil L. York, *The First Continental Congress and the Problem of American Rights*, 122 PENN. MAG. HIST. & BIOGRAPHY 353, 360 (1998).

[60] *Id.* at 363 n.27; *see* BAKER, *supra* note 53, at 21; HAW, *supra* note 32, at 31–32.

[61] *See, e.g.*, Harrington, *supra* note 43, at 52 ("In Congress, Rutledge, like John Jay, was a reluctant revolutionary. He was hesitant about severing all ties with Great Britain and thus supported the Galloway plan of union rather than Patrick Henry's drive for a complete

helped draft South Carolina's first state constitution.[62] In 1779, he became the state's Governor.[63] The Revolutionary War was still raging, and Rutledge seized such a broad range of emergency wartime powers for the state's executive branch that South Carolinians began calling him "Dictator John."[64] Despite his heavy-handed ways, he guided South Carolina through the remainder of the war, and oversaw the process of rebuilding the government of a now-independent state.[65]

Yet Rutledge left his most noticeable political impression at the constitutional convention.[66] Chairing the Committee on Detail and serving on five committees in all, he again distinguished himself as an orator and an indefatigable advocate.[67] Like most southern landowners of that era, Rutledge owned slaves, and vigorously insisted that the new federal Constitution refrain from interfering with the slave trade.[68] He successfully opposed proposals that only land owners possess the right to vote, but simultaneously argued that the nation should allow only land owners to hold political office.[69] Less successful was his proposition for a lower house in Congress elected by the state legislatures and an upper house elected by members of the lower house.[70]

Controversial Topics On Which Nominee Held Publicized Stance: Many of Rutledge's viewpoints that would seem divisive today were not considered particularly troubling in the mid-1790s. Thus, Rutledge's publicly known opinions about topics such as slavery, electing public officials by processes beyond the popular vote, increasing the power of the state governments in relation to the centralized federal government, and requiring land ownership as a

break.").

[62] *See* BAKER, *supra* note 53, at 21.

[63] *See* Harrington, *supra* note 43, at 53.

[64] Robert W. Barnwell, Jr., *Rutledge, "The Dictator,"* 7 J. SOUTHERN HIST. 215, 216–17 (1941); *see, e.g.*, RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 268 (2009) (referring to John Rutledge as "Dictator John").

[65] *See* Barnwell, Jr., *supra* note 64, at 221, 223, 224; Harrington, *supra* note 43, at 53.

[66] *See* JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 265 (2006) ("John Rutledge was one of the most active and most influential delegates at the Philadelphia [c]onstitutional [c]onvention.").

[67] *See* WALTER EDGAR, SOUTH CAROLINA: A HISTORY 250 (1998).

[68] *See* HARLOW GILES UNGER, JOHN MARSHALL: THE CHIEF JUSTICE WHO SAVED THE NATION 155 (2014); *see also* EDGAR, *supra* note 67, at 249 ("Any attempt to strike at the heart of the state's economic well-being [including reduction or elimination of the slave trade] would determine, as Rutledge bluntly put it, 'whether the southern states shall or shall not be parties to the Union.'").

[69] *See* MORTON, *supra* note 66, at 268, 269.

[70] *See* Harrington, *supra* note 43, at 54.

prerequisite to attaining political office evidently did not cause him any trouble when the Senate considered his nomination to the Chief Justice's seat.[71]

The issues that did turn Rutledge into an object of controversy emerged from one of America's earliest forays into partisanship politics.[72] Within Congress, the Federalist Party gradually split into two parts.[73] One faction, the "High Federalists," tended to side with the viewpoints expressed by Alexander Hamilton, including adopting the call for war against France after France tried to recoup money that it had loaned to Americans during the American Revolution.[74] The other component, the "[M]oderate Federalists," tended to respect France as one of America's first allies and turned their suspicions on the British government instead.[75]

Rutledge broke away from the Federalist mainstream and became part of the "moderate" splinter group.[76] This move, by itself, angered a number of High Federalist senators.[77] Yet Rutledge did not stop there. In 1795, a two-thirds majority of the Senate ratified "Jay's Treaty," an agreement that divided up territory with Great Britain and established other conditions meant to bring about peace with America's one-time rival.[78] Certain Moderate Federalists joined the rising Anti-Federalist movement in a strong dislike for Jay's Treaty.[79] To them, the document granted too many concessions to the British, an action which inherently served as a slap in the face to France, the nation that played a pivotal role in supporting the American cause during the Revolution.[80]

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[71] None of the sources consulted for this article mention anything about Rutledge's viewpoints on any of these topics interfering with his nomination chances.

[72] *See generally* Swindler, *supra* note 39, at 535 (discussing controversy surrounding Rutledge and Jay's Treaty).

[73] *See* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 29, 30, 121–24 (2007).

[74] *See* Thomas M. Ray, *Election of 1800*, *in* THE EARLY REPUBLIC AND ANTEBELLUM AMERICA: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY 322, 322–23 (Christopher G. Bates ed., 2010).

[75] *See id.* at 322; *see also* BIRD, *supra* note 36, at 429, 430 (discussing views on France and Britain). Pleased by this rapidly deepening schism within the Federalist ranks were the Anti-Federalists, who were now beginning to organize themselves as a separate political party that would ultimately become the Democratic-Republicans. *See* Swindler, *supra* note 39, at 535.

[76] *See* BIRD, *supra* note 36, at 429.

[77] *See id.* at 430–31.

[78] *See* James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments,* 56 U. CHI. L. REV. 337, 358–59 (1989); Swindler, *supra* note 39, at 535.

[79] *See generally* BIRD, *supra* note 36, at 431 (stating that Jay's Treaty tested the loyalty of many Federalists).

[80] *See* JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 35 (2002) ("The Jay Treaty became the

Yet no Moderate Federalist or Democratic-Republican publicly employed rhetoric as extreme as the statements that Rutledge delivered on July 16, 1795.[81] At a public meeting protesting Jay's Treaty, the newly appointed Chief Justice of the United States rose to speak.[82] He began by disparaging the treaty as: "[A]n humble acknowledgment of our dependence upon [the king]; a surrender of our rights and privileges, for so much of his gracious favour as he should be pleased to grant."[83] He announced that the treaty made America appear weak on the international stage.[84] He even declared that "[h]e had rather the President should die, dearly as he love[d] him, than he should sign that treaty."[85]

When news of Rutledge's statements about Jay's Treaty reached the public, the Chief Justice suddenly became one of the new nation's most controversial public figures.[86] In the words of Rutledge historian James Haw, "Rutledge had unwittingly put himself in outspoken opposition to a major initiative of the administration that had just nominated him to high office."[87] His judicial career—and, indeed, his life—would never be the same again.

Public Sentiment Regarding Nominee: Until July 1795, Rutledge was publicly regarded as one of the finest statesmen of the era.[88] Although he was outspoken, his viewpoints were considered well-reasoned, and he received respect even from most of the people with

political fault line between Federalists and supporters of Jefferson's newly formed Democratic-Republican party . . . ."). Some Moderate Federalists left their party entirely and joined Jefferson's Democratic-Republicans solely over the issue of Jay's Treaty. *See generally*, Swindler, *supra* note 39, at 535 (describing the number of Democratic-Republicans at the time of the Rutledge vote and Jay's Treaty).

[81] *See* BAKER, *supra* note 53, at 21; Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1385 (2006).

[82] *See* Harrington, *supra* note 43, at 55.

[83] HAW, *supra* note 32, at 248.

[84] *See* Gauch, *supra* note 78, at 359; *see generally* EDGAR, *supra* note 67, at 253 (stating that Rutledge denounced the treaty).

[85] HAW, *supra* note 32, at 249.

[86] *See, e.g.*, BAKER, *supra* note 53, at 21 ("Rutledge seemed blind to the fact that the [P]resident had supported—and the Senate had recently consented to—that difficult treaty."); EDGAR, *supra* note 67, at 253 (stating that Rutledge's rejection occurred solely because of his public opposition to Jay's Treaty); Swindler, *supra* note 39, at 535 ("[A] speech by a man just advanced to the nation's highest judicial post by the administration, and himself at least nominally a Federalist, stunned the administration followers in the Senate."); Gauch, *supra* note 78, at 359 ("Because Washington's followers regarded support of the treaty as 'the touchstone of true Federalism,' they opposed the nomination [of Rutledge to the position of Chief Justice] despite Washington's support.").

[87] HAW, *supra* note 32, at 250.

[88] *See, e.g.*, *supra* notes 31–33, 57–66 and accompanying text.

whom he disagreed.[89] While he gained a reputation for heavy-handed behavior during his tenure as South Carolina's Governor, his ability to successfully lead South Carolina during a time of war ultimately led to overall public forgiveness for such tactics.[90]

All of this changed after Rutledge spoke against Jay's Treaty. As soon as the public learned what Rutledge had said, key Federalist leaders turned against the newly appointed Chief Justice, even though he was a member of their party.[91] "Rutledge's worst enemies became the Federalist newspapers," wrote historian Wendell Bird.[92] Articles in the Federalist papers proclaimed that his speech consisted of "the silliest expressions that ever fell from human lips."[93] One widely reprinted piece attacked his competency, stating that his legal abilities were "not very far above mediocrity."[94] Others called him "deranged in his mind" and spread rather vague rumors about Rutledge's alleged immorality and fraudulent past.[95]

Several leading Federalists lined up to distance themselves from Rutledge. Hamilton published editorials in several newspapers ostracizing Rutledge, stating that Rutledge's "delirium of rage" over the Jay Treaty had brought "mortification" upon the Federalist Party.[96] Oliver Wolcott called Rutledge a "driveller and fool."[97] William Davie, a future American envoy to France, asked sarcastically whether Rutledge "raves on the bench as he does at a town meeting."[98] Even John Adams referred to Rutledge's behavior as "seditious."[99]

The criticism of Rutledge's fateful speech was not unanimous, though. Individuals who shared Rutledge's distaste for Jay's Treaty and who were willing to risk their careers by agreeing to share this

[89] *See supra* notes 31–34 and accompanying text.

[90] *See supra* notes 62–65 and accompanying text.

[91] *See* BAKER, *supra* note 53, at 21; HAW, *supra* note 32, at 250; Harrington, *supra* note 43, at 56.

[92] BIRD, *supra* note 36, at 431.

[93] *Id.*

[94] *Id.* at 432.

[95] *Id.*

[96] *Id.* at 431.

[97] *Id.*

[98] *Id.* Still another declaration against Rutledge's sanity came from William Bradford, who wrote in a letter to Hamilton: "The crazy speech of Mr. Rutledge joined to certain information that he is daily sinking into debility of mind [and] body, will probably prevent him to receiving the appointment I mentioned to you." Trevor Parry-Giles, *To Produce a "Judicious Choice": Presidential Responses to the Exercise of Advice and Consent by the U.S. Senate on Supreme Court Nominations*, *in* THE PROSPECT OF PRESIDENTIAL RHETORIC 99, 106 (James Arnt Aune & Martin J. Medhurst eds., 2008).

[99] BIRD, *supra* note 36, at 431.

belief wrote letters or went to the press.[100] In particular, Robert Livingston wrote that he was "sorry for the mortification Rutledge will feel in being made the sport of a party."[101] On the whole, however, Rutledge's opponents simply outnumbered these other groups.[102]

In the end, the Senate followed these vehement anti-Rutledge opinions. Fourteen senators voted against Rutledge's appointment, compared with ten senators voting to confirm him.[103] Only three of the ten senators who voted in favor of Rutledge were Federalists.[104] Three Federalist senators did not show up at all, perhaps preferring not to cast their votes against a nominee from their own political party but not willing to vote in Rutledge's favor, either.[105] To this day, Rutledge remains the only presidential recess appointment to the Court to be later rejected by Congress.[106] Yet even Rutledge's longtime acquaintance John Adams claimed that the move was necessary. "[It] gave me pain for an old [f]riend, though I could not but think he deserved it," Adams wrote to his wife, Abigail.[107] "C[hief] Justices must not go to illegal [m]eetings and become popular orators in favour of [s]edition, nor inflame the popular discontents which are illfounded, nor propagate [d]isunion, [d]ivision, [c]ontention, and delusion among the People."[108]

For Rutledge, the entire ordeal was too much to bear.[109] Returning to South Carolina, he unsuccessfully attempted suicide in December 1795 by jumping off a wharf.[110] He spent much of the remainder of his life withdrawn and rather isolated in Charleston.[111] Meanwhile, Washington attempted to soothe the various injuries imposed during this battle by reaching into the Senate and nominating the popular Senator Oliver Ellsworth to

[100] *See id.*

[101] *Id.*

[102] *See* BAKER, *supra* note 53, at 21; EDGAR, *supra* note 67, at 253; HAW, *supra* note 32, at 250; Harrington, *supra* note 43, at 56; Swindler, *supra* note 39, at 535.

[103] *See Supreme Court Nominations*, *supra* note 17.

[104] *See* Swindler, *supra* note 39, at 535.

[105] *See id.*

[106] *See Chief Justice Nomination Rejected*, *supra* note 31.

[107] Letter from John Adams to Abigail Adams (Dec. 17, 1795), *in* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 813, 813 (Maeva Marcus et al. eds., 1985).

[108] Parry-Giles, *supra* note 98, at 106.

[109] *See generally*, HAW, *supra* note 32, at 257 (discussing Rutledge's mental and emotional instability).

[110] *See id.* at 257–58.

[111] *See id.* at 259; *see also John Rutledge, South Carolina*, CONSTITUTION DAY, http://www.constitutionday.com/rutledge-john-sc.html (last visited Nov. 27, 2016) (describing Rutledge's final years in which he lived in a secluded setting).

replace John Jay as Chief Justice, a nomination that the Senate overwhelmingly confirmed.[112]

B. Alexander Wolcott

By the time James Madison was inaugurated as America's fourth President in 1809, the political partisanship that showed its roots in Rutledge's rejection had blossomed into full bloom. The once-dominant Federalist Party had declined significantly in strength.[113] Madison and Thomas Jefferson had founded their new Democratic-Republican Party in 1792, creating what most historians consider to be the first formalized opposition party in United States politics, yet it was not until Jefferson defeated John Adams in the bitterly contested presidential election of 1800 that this new party truly gained legitimacy among the American populace.[114] Initially, the Democratic-Republicans utilized a remarkably well-organized and united mechanism among party loyalists to gain swift dominance in the federal government.[115] Yet this unity and organization would not last long. When Madison entered the White House, he received something that most Presidents would consider a great gift: a Congress controlled by members of his own political party.[116] A closer look at that Congress, however, revealed that the Democratic-Republicans were already splintering into their own factions.[117]

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[112] *See Chief Justice Nomination Rejected*, *supra* note 31; *see also Supreme Court Nominations*, *supra* note 17 (stating that Ellsworth was confirmed by a vote of 21-1).

[113] *See* 4 THE UNITED STATES: ITS BEGINNINGS, PROGRESS AND MODERN DEVELOPMENT 444 (Edwin Wiley & Irving E. Rines eds., 1912) ("[By 1798] the Federalists had become separated into two wings, which differed almost as widely as did the more moderate Federalists from the Republicans."); *see also id.* at 444–46 (providing a venerable account of the downfall of the Federalist Party).

[114] *See id.* at 469. Jefferson frequently referred to his victory as the "Republican Revolution of 1801." *See id.*

[115] *See* LARSON, *supra* note 73, at 45, 51. Some Federalists even tried to use the extreme unity of the Democratic-Republican Party as a tool to attack its members, claiming that they were more loyal to the party line than to the well-being of the nation. "The whole body [of the Democratic-Republican Party] act with a union to be expected only from men in whom no moral principles exist," proclaimed one Republican leader in 1800. *Id.* at 51.

[116] *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 98 (1985) (stating that the Senate's composition at the time of Alexander Wolcott's nomination consisted of twenty-eight Democratic-Republicans and only six Federalists); *see also* Swindler, *supra* note 39, at 536 (showing the composition of the Senate).

[117] "The friends of this administration will put it down faster than its enemies," proclaimed Senator Jesse Bledsoe shortly after Madison's election to the presidency. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA & A FOUNDER OF THE NATION 146 (2012). According to Broadwater: "Divisions among Republicans may have done more damage to Madison's presidency than did his Federalist opponents." *Id.* Factions within the Democratic-Republicans during Madison's presidency included the "Invisibles" engaged in "backstage

Recognizing these divisions, Madison fought to retain unity among the Democratic-Republican voices.[118] Too often, this effort to keep the party together resulted in the President appointing or retaining less-than-competent individuals simply because of their purported party loyalty.[119] Perhaps the most egregious of these decisions occurred when Madison appointed James Wilkinson, a military commander who had previously conspired with Aaron Burr to abscond from the United States and carve out a brand new nation in the Southwest, as the leader of the effort to protect the Louisiana coastline from invasion.[120] From the outset of this appointment, Wilkinson proved completely ineffective and even harmful to his own soldiers.[121] When enough complaints arrived in Washington, Congress spent two years investigating Wilkinson's military actions, but still failed to reach any conclusive decisions about whether he should remain in command.[122] Ultimately, the final decision rested on Madison's shoulders.[123] After weighing the options, Madison allowed Wilkinson to keep his post—not because the President trusted the commander's aptitude or good character, but rather because Wilkinson was a Democratic-Republican who

maneuvers" from Pennsylvania, Maryland, and Virginia; the "Old Republicans" demanding more limits on federal powers and a preservation of the nation's agrarian origins; the followers of George Clinton and DeWitt Clinton from New York objecting to Jefferson's protectionist economic policies; and the "[R]egular Republicans," who loyally supported Jefferson and Madison and for whose attention the various splinter groups competed throughout Jefferson and Madison's administrations. *See* GARRY WILLS, JAMES MADISON 69–70 (2002).

[118] *See*, *e.g.*, WILLS, *supra* note 117, at 70 ("[Madison's] temperament and experience made him omnidirectionally deferential. . . . This became apparent with matters like Supreme Court appointments, Yazoo land, the Bank of the United States, and the Floridas.").

[119] *See*, *e.g.*, BROADWATER, *supra* note 117, at 147 ("Madison's tendency to try to work around his opponents, rather than confronting them directly, helps explain his lackluster Cabinet, which contributed to his difficulties.").

[120] *See The Burr Conspiracy*, PBS, http://www.pbs.org/wgbh/amex/duel/sfeature/burrconspiracy.html (last visited Jan. 23, 2017). Two authors provide both an early look at, and a more modern account of, the extent of Wilkinson's consistently detrimental behavior and continuing rewards. *See* ANDRO LINKLATER, AN ARTIST IN TREASON: THE EXTRAORDINARY DOUBLE LIFE OF GENERAL JAMES WILKINSON (2010); ROYAL ORNAN SHREVE, THE FINISHED SCOUNDREL: GENERAL JAMES WILKINSON, SOMETIME COMMANDER-IN-CHIEF OF THE ARMY OF THE UNITED STATES, WHO MADE INTRIGUE A TRADE AND TREASON A PROFESSION 14, 15 (1933). Overall, both authors concur about the extent of Wilkinson's treacherous and dangerous actions and his astonishing ability to continue receiving praise and benefits rather than punishments. *See* LINKLATER, *supra*, at 3; SHREVE, *supra*, at 14–15.

[121] *See* LINKLATER, *supra* note 120, at 286; WILLS, *supra* note 117, at 65–67. Half of the soldiers entrusted to Wilkinson's care either deserted or died from diseases (particularly malaria) after Wilkinson insisted on encamping his troops in a swamp. *See* WILLS, *supra* note 117, at 66.

[122] *See* LINKLATER, *supra* note 120, at 288, 291, 294.

[123] *See id.* at 295.

successfully played upon his multiple political influences.[124]

Madison evidently viewed the United States Supreme Court through similarly politicized eyes. Unlike the legislative and executive branches, the Court had not yet completely shifted to the control of the Democratic-Republicans.[125] Thus, the death of Justice William Cushing, a George Washington appointee who served for twenty-one years on the Court's bench,[126] became for the President a key political opportunity.[127] Jefferson even sent a long letter to Madison calling Cushing's passing a "circumstance of congratulation."[128] Madison now possessed the power to give his party its long-awaited control over the third branch of government.[129] All he needed to do was make the right choice.

At first, Madison seemingly had identified the perfect selection.[130] Levi Lincoln had served as Jefferson's first Attorney General and commanded wide respect for his legal knowledge.[131] "He is a sound lawyer," stated Caesar Rodney, Madison's Attorney General, "and what is more, an upright honest man."[132] Furthermore, Lincoln was "a firm unequivocating Republican" who had founded the *National Aegis*, one of the most influential Democratic-Republican newspapers in all of New England.[133] Thus, Madison felt that the

[124] *See* BROADWATER, *supra* note 117, at 148; WILLS, *supra* note 117, at 66, 67.

[125] *See* WILLS, *supra* note 117, at 70 ("Jefferson had been unable to break the Federalist stronghold on the Supreme Court, since he had no opportunity to replace a [J]ustice.").

[126] *See William Cushing, 1790-1810*, SUPREME CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_cushing.html (last visited Nov. 27, 2016). Cushing was the last member of Washington's original Court remaining on the bench. *See Supreme Court Nominations*, *supra* note 17.

[127] *See* WILLS, *supra* note 117, at 70.

[128] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 404 (rev. ed. 1928).

[129] In a letter to Albert Gallatin, Jefferson again exalted at this newfound opportunity for the Democratic-Republican Party: "At length, then, we have a chance of getting a Republican majority in the Supreme Judiciary. For ten years that [b]ranch has braved the spirit and will of the [n]ation after the [n]ation has manifested its will by a complete reform in every branch depending on them." *Id.* at 403. He went on to call Cushing's death and the ensuing Court vacancy a "Godsend." *Id.*

[130] *See id.* Madison, however, evidently harbored initial doubts about Lincoln's fitness to serve as a judge. Jefferson acknowledged this in a letter to the President, stating: "I know you think lightly of him as a lawyer; and I do not consider him as a correct common lawyer, yet as much so as anyone which ever came, or ever can come, from one of the eastern [New England] states." WILLS, *supra* note 117, at 71.

[131] *See* ABRAHAM, *supra* note 40, at 88; BROADWATER, *supra* note 117, at 148; THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 586–87 (Kermit L. Hall et al. eds., 2d ed. 2005) [hereinafter OXFORD COMPANION].

[132] *See* WARREN, *supra* note 128, at 404 n.2.

[133] *See id.* at 404 n.1; *see also* ABRAHAM, *supra* note 40, at 88 ("[Lincoln's] dedication to Democrat-Republicanism was beyond question."); 2 CHARLES NUTT, HISTORY OF WORCESTER AND ITS PEOPLE 1116 (1919) (stating that *National Aegis* was founded as a means of support for Jefferson and that Levi Lincoln was one of its editors).

man from Massachusetts possessed the ideal combination of characteristics: a stellar reputation that would prevent even Federalist politicians from opposing him and a devotion to his party that would give the Democratic-Republicans a steadfast advantage on the Court.[134]

There was only one problem. Lincoln was sixty-two years old at the time of Cushing's death, and his health was failing noticeably.[135] In particular, his eyesight had declined so much that he was nearly blind.[136] This fact did not bother Madison, who proceeded to nominate Lincoln to the Court anyway.[137] Yet it certainly troubled Lincoln, who feared that he lacked the physical capacity to properly conduct himself as a Justice of the Court.[138] After a lengthy personal deliberation, and after multiple attempts by Madison, Rodney, and many other influential Democratic-Republicans, Lincoln ultimately decided to decline the appointment.[139]

Lincoln's declination sent Madison's prospects for altering the Court into a sudden tailspin.[140] He wanted to nominate a New England man to the bench, partly because he wanted to replace the Massachusetts-born Cushing with another New Englander and partly because he wanted to establish Democratic-Republican control throughout that region.[141] Unfortunately, with Lincoln now out of the picture, New England offered Madison very few palatable alternatives.[142]

Federalists still controlled much of the bench and bar in the New

[134] Without a doubt, Jefferson's fingerprints were deeply embedded in this viewpoint and the decision to nominate Lincoln to the Court. *See*, *e.g.*, WARREN, *supra* note 128, at 402–04 (stating that Lincoln was Jefferson's first choice and that Jefferson wrote to Madison to advocate for the nomination of Lincoln, citing Lincoln's republicanism and integrity).

[135] *See* ABRAHAM, *supra* note 40, at 88. This fact was of no surprise to Madison, who was forewarned that Lincoln might decline the appointment to the Court because of age and increasing infirmity. *See id.*

[136] *See* WILLS, *supra* note 117, at 71.

[137] *See* WARREN, *supra* note 128, at 409.

[138] *See id.*

[139] *See id.* at 408–10; OXFORD COMPANION, *supra* note 131, at 586–87.

[140] *See* HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF JAMES MADISON 249 (Earl N. Harbert ed., 1986) (describing the various machinations that occurred after Lincoln declined Madison's offer); *see also* OXFORD COMPANION, *supra* note 131, at 587 (noting the likely ideological effect on the Court if Lincoln had decided to accept the President's appointment); WARREN, *supra* note 128, at 410–11 (discussing the events after Lincoln declined the appointment).

[141] BROADWATER, *supra* note 117, at 148. Furthermore, given that Supreme Court Justices were obligated during this era to "[ride] circuit in their districts," replacing the departed Cushing with another jurist from his geographic region was a logistically sensible move. *See* WILLS, *supra* note 117, at 70.

[142] *See, e.g.*, ADAMS, *supra* note 140, at 249 (summarizing the scarcity of qualified candidates among Democratic-Republicans in the New England states).

England states.[143] At one time, former Massachusetts Attorney General Barnabas Bidwell might have been a logical pick, but allegations that he had illegally used state resources had sent him fleeing into hiding in Canada.[144] Gideon Granger, a Connecticut lawyer known for his fiery essays defending Democratic-Republican causes, was another possibility, but Madison ultimately vetoed him because Granger had represented several plaintiffs in a particularly controversial land claims case in Georgia, thus making him a candidate to be rejected by senators from the South.[145] A third option was Joseph Story, a young but unquestionably brilliant Massachusetts attorney.[146] Yet Story was extraordinarily outspoken, and was unafraid to object vociferously even to Democratic-Republican positions on important issues.[147] In particular, his multiple attacks on Jefferson's Embargo Act of 1807 irreparably soured his relationship with the third President.[148] As soon as Story's name surfaced as a potential candidate for the Court, Jefferson told Madison that Story would never be an acceptable Justice.[149]

Finally, on February 4, 1811, Madison announced his appointment of Alexander Wolcott to become the Court's newest member.[150] To say that the politicians and the public greeted the news with shock would be a colossal understatement.[151] Wolcott, a longtime Collector of Customs in his home state of Connecticut, was known by few people but seemed to be disliked by many of the people who did know him.[152] He was indeed a devoted Democratic-Republican from New England who solidly supported the party's platform.[153] Yet in nominating Wolcott to the Court, Madison had

[143] *See* WILLS, *supra* note 117, at 70. Additionally, even the Democratic-Republicans from this region tended to break with their party on certain crucial issues, including opposing the Embargo Act, the drafting and enactment of which Jefferson had overseen. *See* OXFORD COMPANION, *supra* note 131, at 983.

[144] *See* ADAMS, *supra* note 140, at 249. Initially, Lincoln recommended Bidwell to replace him as the nominee. WILLS, *supra* note 117, at 71.

[145] *See* WARREN, *supra* note 128, at 404–05.

[146] *See* ADAMS, *supra* note 140, at 249.

[147] *See, e.g.*, OXFORD COMPANION, *supra* note 131, at 983, 984.

[148] *See* ADAMS, *supra* note 140, at 249; BROADWATER, *supra* note 117, at 148–49; OXFORD COMPANION, *supra* note 131, at 983.

[149] *See* WARREN, *supra* note 128, at 406. Among other things, Jefferson referred to Story as "a tory" and claimed that Story was "too young" to serve on the Court. *Id.*

[150] *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 188 (2006).

[151] *See* ADAMS, *supra* note 140, at 249; WARREN, *supra* note 128, at 411.

[152] *See* BROADWATER, *supra* note 117, at 148.

[153] *See* WILLS, *supra* note 117, at 71–72 ("One specimen, Alexander Wolcott, met the criteria all too well—he had organized the Republican Party in Connecticut and been a

chosen a man who was in many ways Levi Lincoln's antithesis.[154] The Democratic-Republican-controlled Senate now needed to decide what to do with this member of their own ranks.

Nominee's Political Party: Democratic-Republican.[155]

Nominating President's Political Party: Democratic-Republican.[156]

Majority Party in Senate: Democratic-Republican.[157]

Majority Party on the United States Supreme Court: None. The seven-member Court was (after Cushing's death) even divided among Federalists John Marshall, Bushrod Washington, and Samuel Chase, and Democratic-Republicans Henry Livingston, William Johnson, and Thomas Todd.[158]

Predecessor's Political Party: Federalist.[159]

President's Previous Nominations to United States Supreme Court: Levi Lincoln (declined).[160]

Number of Years between Nomination Year and Next Presidential Election: Approximately twenty months.[161]

Nominee's Prior Legal Record: Wolcott had never served in a judicial post prior to his nomination to the Supreme Court.[162] As a lawyer, his overall reputation as a private practitioner in Massachusetts and Connecticut paled in comparison with that of Levi Lincoln, as well as that of Joseph Story.[163]

Nominee's Prior Political Record: From 1796 to 1801, Wolcott served as the Democratic-Republican leader in the Connecticut General Assembly.[164] After Jefferson's presidential triumph in the election of 1800, Wolcott's political influence in his home state

ferocious pamphleteer for the whole Jeffersonian program, creating friction by his demands for ideological discipline.").

[154] *Compare supra* notes 150–53 and accompanying text (describing Wolcott), *with supra* notes 130–33 and accompanying text (describing Lincoln).

[155] *See* WILLS, *supra* note 117, at 71.

[156] *See id.* at 72.

[157] *See Party Division in the Senate, 1789-Present*, U.S. SENATE, http://www.senate.gov/history/partydiv.htm (last visited Jan. 23, 2017) [hereinafter *Party Division in the Senate*].

[158] *Supreme Court Nominations*, *supra* note 17.

[159] *See* WILLS, *supra* note 117, at 70.

[160] *Supreme Court Nominations*, *supra* note 17.

[161] *See id.; see also Presidential Elections*, HISTORY, http://www.history.com/topics/us-presidents/presidential-elections (last visited Jan. 23, 2017) (stating that the following presidential election wasn't until 1812).

[162] *See generally* WARREN, *supra* note 128, at 411 (stating that Wolcott was not qualified).

[163] *See* BROADWATER, *supra* note 117, at 148; TRIBE, *supra* note 116, at 98; *see generally* OXFORD COMPANION, *supra* note 131, at 1095 (stating Wolcott's occupation and areas of practice).

[164] *See To Thomas Jefferson from Alexander Wolcott*, *18 March 1803*, NAT'L ARCHIVES: FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-40-02-0068 (last updated Oct. 5, 2016).

increased further, serving as one of the primary people whom Jefferson's Administration consulted regarding political appointments in Connecticut.[165]

Wolcott's primary political role, however, came as the Collector of Customs in Middletown, a position that Jefferson granted to him in July 1801.[166] Wolcott would hold this job until his death.[167] These lucrative positions were often a highly prized reward for party loyalty, and there is no reason to suspect that Wolcott's appointment to this post came because of any alternative reasons.[168] However, Wolcott's devotion to Democratic-Republican—and, in particular, Jeffersonian—positions would ultimately become his downfall, as he supported a particular Jeffersonian policy with an unquestioning vigor that even certain members of his own party could not stomach.[169]

Controversial Topics On Which Nominee Held Publicized Stance: As a customs inspector, Wolcott was an inherently controversial figure.[170] Many individuals at the time displayed the type of disdain for such individuals that the Christian Bible reserved for tax collectors and money changers.[171] Wolcott, however, appeared to be even more disliked than most customs inspectors because of his dogmatic party loyalties and, in particular, because of his unyielding enforcement of the Embargo Act of 1807.[172]

When tensions between France and Great Britain inflamed in the early 1800s, the two European countries engaged in a bitter economic struggle.[173] Each nation imposed a series of fiscal obstructions, sanctions, and even blockades enforced by military power, aimed at starving the other land into submission.[174] Caught

[165] *See id.*; *see also* OXFORD COMPANION, *supra* note 131, at 1095 (discussing Wolcott's impact on politics in Connecticut).

[166] *See To Thomas Jefferson from Alexander Wolcott*, *supra* note 164.

[167] *See id.*

[168] The ignominious tradition of handing out customs collector positions in exchange for political favors continued unimpeded for several decades until President Rutherford B. Hayes launched an investigation into these corrupt practices. Ironically, one of the customs collectors whom Hayes's investigation targeted was Chester Alan Arthur, a "party hack" who gained affluence by a political appointment as a customs collector in New York—and the man who would become the nation's twenty-first President only a couple of years after Hayes's investigation published its findings. *See* ZACHARY KARABELL, CHESTER ALAN ARTHUR 28–29 (2004).

[169] *See, e.g.*, Swindler, *supra* note 39, at 535.

[170] *See* Charles W. Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 551 (2011).

[171] *See generally id.* (describing the rejection of antebellum nominees).

[172] *See* GEYH, *supra* note 150, at 188.

[173] *See, e.g.*, JOYCE APPLEBY, THOMAS JEFFERSON 125, 126 (2003).

[174] *See id.*; *see, e.g.*, R.B. BERNSTEIN, THOMAS JEFFERSON 167 (2003); JON MEACHAM,

in the middle of this costly chess game was the United States, whose trade vessels were seized by naval warships from both nations.[175]

In an attempt to force Britain and France to respect American neutrality and to allow the United States to trade in Europe unscathed, Jefferson brought to Congress a measure that closed all American ports to export shipping.[176] Congress quickly passed this embargo, which went into effect immediately.[177] The following year, Jefferson enacted a new law ensuring that any Embargo Act violators were punished harshly.[178] Under these extreme restrictions on trade, American farmers suffered financially.[179] Mercantile leaders in New England and New York faced newfound hardships as well.[180] Among these large groups, the Embargo Act was not only an extraordinarily unpopular measure, but an example of the type of economic downfall that an overbearing centralized government could create.[181]

As a customs inspector, Wolcott dealt with the Embargo Act's provisions on a daily basis.[182] By all accounts, his enforcement of the Act was "robust" and "vigorous."[183] His force in enforcing the letter of this law made him unpopular not only among political rivals, but among certain Democratic-Republican leaders as well.[184] Thus, Wolcott came before the Senate as a Supreme Court nominee who had become the face of one of the most unpopular political

THOMAS JEFFERSON: THE ART OF POWER 427 (2012).

[175] *See* MEACHAM, *supra* note 174, at 425.

[176] *See id.* at 430.

[177] *See id.*

[178] *See id.* at 430, 431.

[179] *See* PATRICIA L. DOOLEY, THE EARLY REPUBLIC: PRIMARY DOCUMENTS ON EVENTS FROM 1799 TO 1820, at 201 (2004). New England residents engaged in the fishing and seafaring trade quickly suffered adverse effects from the embargo, too. *See id.*

[180] *See* APPLEBY, *supra* note 173, at 127–28; DOOLEY, *supra* note 179, at 201.

[181] *See* DOOLEY, *supra* note 179, at 205–06; MEACHAM, *supra* note 174, at 431 ("The embargo turned American politics upside down. Jefferson became the explicit advocate of strong central power. Republicans who favored less government became the most meddlesome of regulators.").

[182] *See* PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW 159 & n.37 (2010) (stating that Wolcott was well paid from the Democratic-Republican leadership to carry out these laws. He made approximately three thousand dollars per year in fees, nearly as much as a United States Supreme Court Justice made during this era); GEYH, *supra* note 150, at 188.

[183] *See* Rhodes, *supra* note 170, at 551 ("President James Madison's nomination of Alexander Wolcott was likewise rebuffed in part due to the Senate's objections to his robust partisan enforcement of the Embargo and Non-Intercourse Acts as a United States custom inspector."); OXFORD COMPANION, *supra* note 131, at 935.

[184] *See* GEYH, *supra* note 150, at 188; Rhodes, *supra* note 170, at 551; Swindler, *supra* note 39, at 535.

moves in the young nation's history.[185]

Public Sentiment Regarding Nominee: Media criticism toward Wolcott quickly became even stronger than the press's sentiments about Rutledge.[186] "Even those most acquainted with modern degeneracy were astounded at this abominable nomination," exclaimed the editors of *The Columbia Sentinel*.[187] A journalist opined that Wolcott was "barely qualified to discharge the duties of a justice of the peace in a country town," and thus was certainly unfit to "decide in the first instance upon commercial and legal questions of the greatest extent and consequence."[188] The *New-York Gazette Advertiser* published similar views immediately after learning of Wolcott's nomination: "Oh degraded Country! How humiliating to the friends of moral virtue—of religion and of all that is dear to the lover of his Country!"[189]

In his home state of Connecticut, the press exhibited particular venom toward Wolcott, levying strong words at the man who had for years collected tariffs, levied fines, and rigorously instituted the Embargo Act's provisions in their region.[190] "We hope that even in the ranks of democracy, a man might have been found, whose appointment would have been less disgusting to the moral sense of the community," declared the *Connecticut Courant*.[191] A separate article in the same newspaper went a step further, painting Wolcott as an enemy of free trade and commerce who became wealthy on others' misfortunes:

> For about ten years past, this man has been fattening upon an office, the emoluments of which were derived solely from commerce. Yet such is his hostility to the merchants, . . . that in a public place in this City, a short time since, he remarked "that the merchants of this country had governed it long enough, that they must be put down." . . . Whether

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[185] *See* GEYH, *supra* note 150, at 188; WARREN, *supra* note 128, at 412; Rhodes, *supra* note 170, at 551; Swindler, *supra* note 39, at 535.

[186] *Compare infra* notes 187–92 and accompanying text (providing media criticism of Wolcott), *with supra* notes 86–89 and accompanying text (providing media criticism of Rutlegde).

[187] WARREN, *supra* note 128, at 411 & n.1.

[188] *Id.*

[189] David Holzel, *8 Nominees Who Didn't Go to the Supreme Court*, CNN, http://www.cnn.com/2009/LIVING/wayoflife/07/14/mf.supreme.court.rejections/index.html?iref=nextin (last updated July 14, 2009); *see* GEYH, *supra* note 150, at 189 ("[T]he more the man is known, the greater . . . will be our astonishment. Can the public have any confidence in his legal knowledge? Have his friends, of the law, of any party, ventured to hint a word in his favour in this particular?").

[190] *See* WARREN, *supra* note 128, at 411, 412.

[191] *Id.* at 411 & n.3.

> these sentiments or his lamblike temper, his winning manners, his moral character and his legal science were his principal recommendation for the high office to which he is nominated, we shall not attempt to decide.[192]

Some loyal Democratic-Republicans attempted to defend the nominee,[193] but uncovered few grounds upon which they could do so. Even Levi Lincoln, the man but for whose declination Wolcott's nomination never would have occurred, struggled to justify Madison choice.[194] Finally, Lincoln concluded a long letter to Madison with a statement that simultaneously said nothing and everything: "Whatever, therefore, may be his present attainments and legal habits, an industrious application to professional studies and official duties will soon place him *on a level at least*—with his Associates [on the Court]."[195] From one devout Democratic-Republican to another, it was hardly a ringing endorsement.

Ultimately, the Senate demonstrated that their faith in Wolcott was no greater than any of the public proclamations against the man had indicated. With an overwhelming vote of 24-9, the senators rejected Wolcott's nomination.[196] In this era of rancorous partisanship, the vote surprisingly reached across the aisle, with nineteen of the twenty-eight Democratic-Republican senators voting against a Democratic-Republican nominee put forth by a President who helped found the Democratic-Republican Party.[197]

By all measures, the situation proved to be a tremendous embarrassment for Madison.[198] Attempting to rebound quickly from the stinging rebuke, he rapidly announced a new nominee to the

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[192] *Id.* at 412 n.1.

[193] *See* Swindler, *supra* note 39, at 535.

[194] *See id*.

[195] WARREN, *supra* note 128, at 412–13. Modern commentators continue to struggle regarding justifications for Wolcott's legal merits. *See, e.g.*, OXFORD COMPANION, *supra* note 131, at 935 ("Despite the partisanship of these attacks, they were not far off the mark, and even Republicans found it difficult to defend Wolcott."); TRIBE, *supra* note 116, at 98 ("[Wolcott] was not up to snuff."); Swindler, *supra* note 39, at 535–37 ("[E]ven a Jeffersonian Senate could not swallow so mediocre a nominee.").

[196] *See* OXFORD COMPANION, *supra* note 131, at 935.

[197] *See* Anthony Shane Dolgin, The Expanding Role of the United States Senate in Supreme Court Confirmation Proceedings (Apr. 1997) (unpublished M.A. thesis, McGill University), http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp01/MQ37201.pdf.

[198] *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 232 (2005); ADAMS, *supra* note 140, at 249 ("[Madison] is said to have felt great mortification at this result. The truth seems to be that he is President *de jure* only. Who exercises the office *de facto* I know not, but it seems agreed on all hands that 'there is something behind the throne greater than the throne itself.'").

Court: the former Federalist John Quincy Adams.[199] When Adams received this news, he was thousands of miles away from Washington, serving in St. Petersburg as the American minister to Russia.[200] Not wanting to make a transatlantic journey back to Washington with his pregnant wife, Adams turned down Madison's offer.[201] Finally, desperate to fill Cushing's seat with a New England Democratic-Republican, Madison realized that he had no other viable choice.[202] Much to his chagrin and Jefferson's irritation, he nominated the outspoken Story.[203] Within a few days, the man whom Jefferson never wanted to see on the Court received the Senate's confirmation to join his new colleagues on the bench.[204]

C. John Spencer

On the bitterly cold day of March 4, 1841, William Henry Harrison delivered the longest inaugural address of any President in the history of the United States.[205] One month later, Harrison passed away from pneumonia.[206] For the first time, a Vice President rose to the nation's highest executive office because of an elected President's death.[207]

To many Americans, including many American politicians, the new man in the White House was not a genuine President, ascending to the position because of another's misfortune rather than by the popular vote.[208] Yet John Tyler, suddenly the new

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[199] *See* ADAMS, *supra* note 140, at 249.

[200] *See* BROADWATER, *supra* note 117, at 148.

[201] *See* ACKERMAN, *supra* note 198, at 232–33; BROADWATER, *supra* note 117, at 148.

[202] *See id.*

[203] *See* BROADWATER, *supra* note 117, at 148–49. In doing so, Madison had to act over Jefferson's objections, a move that was likely quite difficult for him. *See id.*

[204] Story received confirmation via a voice vote in the Senate on November 18, 1811, just three days after his nomination to the Court. *See Supreme Court Nominations*, *supra* note 17.

[205] *See April 04, 1841: Harrison Dies of Pneumonia*, HISTORY, http://www.history.com/this-day-in-history/harrison-dies-of-pneumonia (last visited Jan. 7, 2017).

[206] *See id.* Harrison's illness is also attributable to being caught in a downpour while taking a long walk to avoid all of the eager office-seekers who crowded around the White House after his election, angling for a political appointment. *See* GARY MAY, JOHN TYLER 2–3 (2008). When doctors attempted to treat the President with practically every method known to medicine at that time, the "cures" likely contributed to Harrison's death as well. *See id.* at 3.

[207] *See* MAY, *supra* note 206, at 1 ("For the first time in American history, a [P]resident had died in office and no one knew precisely what to do about it.").

[208] *See* EDWARD P. CRAPOL, JOHN TYLER: THE ACCIDENTAL PRESIDENT 9 (2006) ("Also of little guidance was the wording of the Constitution, which was vague and ambiguous on the question of succession. It was unclear whether the [V]ice [P]resident became [P]resident in his own right, or whether he was to be the acting [P]resident until a new chief executive was duly elected."); MAY, *supra* note 206, at 5.

President of the United States, took no notice of the detractors who sarcastically anointed him: "His Accidency."[209] On his first day in office, he even delivered an inaugural address, vowing his adherence to a strict interpretation of the Constitution and pledging to fight anyone who attempted to supersede the law of the land.[210] From that day forward, he demanded and exercised every right, power, and privilege that any other President had ever received.[211]

At first, members of Tyler's political party, the Whigs, believed that they had gained a loyal partisan in the White House.[212] Tyler, however, rapidly demonstrated that the optimism of these Whigs was badly misplaced.[213] "I am the [P]resident, and I shall be held responsible for my Administration," he informed the members of his Cabinet.[214] "I shall be pleased to avail myself of your counsel and advice. But I can never consent to being dictated to. . . . [You] must choose between giving [me your] cooperation—or [your resignations]."[215]

The Whigs in Congress tested the courage of Tyler's convictions quickly. Henry Clay, a brilliant orator and the unquestioned alpha dog in the Whig pack, demanded that Tyler sign legislation that would re-charter the Second National Bank of the United States.[216] Tyler, however, believed that the bill violated the rights of the individual states.[217] When he vetoed the legislation, proclaiming

[209] CRAPOL, *supra* note 208, at 9 ("Tyler's whole course of conduct in the first few days after he arrived in the capital demonstrated plainly that he acted with conscious deliberation to establish himself as a President in his own right and not as a mere caretaker for the departed Harrison."); *see also* MAY, *supra* note 206, at 73 (noting the widespread use of the pejorative nickname 'His Accidency' to describe Tyler).

[210] *See* MAY, *supra* note 206, at 62; *see also* John Tyler, *Address upon Assuming the Office of President of the United States*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=533 (last visited Jan. 24, 2017) (providing the full text of Tyler's inaugural address). Interestingly, while Tyler constantly billed himself as an ardent strict constructionist, he demonstrated a willingness to interpret the Constitution loosely in his first constitutional choice while in office: the decision that he would serve as a bona fide President rather than merely an acting President. *See* CRAPOL, *supra* note 208, at 9.

[211] *See* CRAPOL, *supra* note 208, at 9–10. Still, for several leading American politicians, including John Quincy Adams and Andrew Jackson, Tyler never attained the legitimacy of an elected President. *See* MAY, *supra* note 206, at 5.

[212] *See* MAY, *supra* note 206, at 5 ("Others believed that Tyler's mild, patrician manner meant that he would be easily controlled . . . . The Whigs believed in a weak presidency dominated by a strong Congress, and [Henry] Clay planned to govern the country from the Senate.").

[213] *See, e.g.*, Jeff Jacoby, *John Tyler is a Good Reminder: Running Mates Matter*, BOS. GLOBE (Feb. 14, 2016), https://www.bostonglobe.com/opinion/editorials/2016/02/14/john-tyler-good-reminder-running-mates-matter/auVgQF6C9axD4qov2QDXqO/story.html.

[214] *Id.*

[215] *Id.*; *see* CRAPOL, *supra* note 208, at 10.

[216] *See* CRAPOL, *supra* note 208, at 18–19.

[217] *See id.* at 18.

that he questioned whether Congress ever possessed authority under the Constitution to charter a national bank, leaders in the Whig Party publicly denounced Tyler as a traitor.[218]

Yet Tyler remained unbowed. When the Whigs drafted and passed another bill regarding the National Bank, this time imposing significant limitations on the proposed bank's powers in an effort to curry Tyler's favor, the President again vetoed the measure.[219] Two days later, every member except one in Tyler's Cabinet resigned.[220] Two days after that, several Whigs in Congress held a meeting at which they proclaimed that Tyler was threatening to "overthrow the present division of [political] parties in the country" and announced that they would seek constitutional amendments to limit the President's powers based solely on their desire to curb Tyler's authority.[221]

From that day forward, Tyler experienced perhaps the most acrimonious relationship that any President has ever held with any Congress.[222] The fact that this Congress was dominated by members of his own political party made these hostilities all the more ironic.[223] Yet the Whigs refused to forgive Tyler for vetoing the bank bills.[224] Meanwhile, other politicians in Congress, upset about Tyler's support for Whig-initiated measures such as a national bankruptcy act that helped thirty-four thousand Americans discharge $441 million in debts,[225] expressed their dislike for Tyler as well.[226] As a consequence for ardently following

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[218] *See id.* at 19; Jacoby, *supra* note 213.

[219] *See* MAY, *supra* note 206, at 72–73.

[220] *See id.* at 74.

[221] *William Henry Harrison and John Tyler—Tyler's Conflicts with Clay's Whigs*, PROFILES U.S. PRESIDENTS, http://www.presidentprofiles.com/Washington-Johnson/William-Henry-Harrison-and-John-Tyler-Tyler-s-conflicts-with-clay-s-whigs.html (last visited Nov. 22, 2016) [hereinafter *Tyler's Conflicts with Clay's Whigs*]; *see* MAY, *supra* note 206, at 72, 76.

[222] *See, e.g.*, CRAPOL, *supra* note 208, at 20 ("In addition to being castigated as a traitor, Tyler also faced assassination threats and was officially drummed out of the Whig Party for allegedly having betrayed the will of the people. Not satisfied with making President Tyler a political outcast, wrathful House Whigs later censured him and unsuccessfully sought his impeachment.").

[223] *See, e.g.*, Jacoby, *supra* note 213. Even Tyler himself recognized the historic proportions of his rivalry with Congress and with his own party: "I am abused, in Congress and out, as a man never was before," he wrote in 1842. *Id.*

[224] *See* CRAPOL, *supra* note 208, at 20.

[225] *See, e.g.*, PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 23 (1974); ROBERT V. REMINI, HENRY CLAY: STATESMAN FOR THE UNION 597 (1991); *Tyler's Conflicts with Clay's Whigs*, *supra* note 221.

[226] *See, e.g.*, Joshua Kendall, *Have We Ever Had a President Like Donald Trump?*, NEW REPUBLIC (Mar. 25, 2016), https://newrepublic.com/article/132031/ever-president-like-donald-trump (describing the reasons why Whigs and Democrats alike united over their desire to

his beliefs regarding good government and good governance, Tyler became one of the most politically unpopular Presidents in history.[227]

Thus, when the time came to nominate someone to the Supreme Court after the death of Justice Smith Thompson, Tyler must have known that he was destined for a fight.[228] Perhaps with this impending battle in mind, the President selected for his nominee a longtime ally whose legal qualifications were unquestioned: John C. Spencer of New York.[229] If the Senate intended to reject whomever Tyler put forward for this position, they would be forced to do so for reasons other than aptitude about the law.[230]

Nominee's Political Party: Whig.[231]

Nominating President's Political Party: Whig.[232]

Majority Party in Senate: Whig.[233]

Majority Party on United States Supreme Court: The Court was solidly Democratic at this time.[234] Chief Justice Roger Taney, as well as Justices Peter Daniel, John McKinley, Joseph Story, John Catron, James Wayne, and Henry Baldwin were all members of the Democratic Party.[235] Only Justice John McLean, who changed party affiliation several times during his career, identified with the Whigs at the time of Spencer's nomination to the bench.[236]

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force Tyler out of the White House).

[227] *See* CRAPOL, *supra* note 208, at 20. In fact, Tyler was forced to form his own political party just to attempt a campaign to win the presidency by popular vote after he finished serving the remainder of Harrison's term. *Id.*

[228] *See, e.g.*, 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 381 (1922) ("The bitter political feud between President Tyler and the Whigs was now at its height . . . . [A]ny nomination for the [b]ench which he might make was certain to be subjected to searching scrutiny by the Senate.").

[229] *See* 3 ALDEN CHESTER & E. MELVIN WILLIAMS, COURTS AND LAWYERS OF NEW YORK: A HISTORY 1609–1925, at 1370 (1925) ("[Spencer was] a brilliant New York lawyer.").

[230] However, Spencer was not Tyler's original choice. Initially, Tyler contemplated nominating a different New Yorker: former President Martin van Buren. At that time, van Buren was contemplating another run for the White House, and Tyler hoped to dissuade him from this enterprise by offering him a seat on the Court. *See, e.g.*, WARREN, *supra* note 228, at 381–82. Only when New York Senator Silas Wright stated that such a maneuver would "give the whole country a broader, deeper, heartier laugh than it ever had, and at his own expense," did Tyler decide to nominate Spencer instead. CHESTER & WILLIAMS, *supra* note 229, at 1370.

[231] *See* Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L. Q. 1, 3 (1991).

[232] *See id.* at 2.

[233] *See id.* at 3.

[234] *See Compare Supreme Court Justices*, INSIDEGOV, http://supreme-court-justices.insidegov.com/ (last visited Nov. 26, 2016) [hereinafter *Compare Supreme Court Justices*]; *Supreme Court Nominations*, *supra* note 17.

[235] *See Compare Supreme Court Justices, supra* note 234.

[236] *See* Andrew P. Palmer, *John McLean, Associate Supreme Court Justice*, WORDPRESS

Predecessor's Political Party: Democratic.[237]

Number of Years between Nomination Year and Presidential Election Year: Virtually eleven months remained between the date that Tyler nominated Spencer (January 9, 1844) and the end of the next presidential election (December 4, 1844).[238]

Nominee's Prior Legal Record: Spencer was born into a legally-minded household, as his father, Ambrose Spencer, served as Chief Justice of the New York State Supreme Court.[239] He began his legal practice in the rural community of Canandaigua and quickly emerged as a leader in that region's bar.[240] He became District Attorney for New York's five western counties in February 1818, "a position of great responsibility and labor" that the still-young lawyer performed with "great alacrity and success."[241] From there, he entered the political realm in both the state and federal governments.[242]

Still, while Spencer never held a judgeship, he remained quite active in legal affairs even during his years as a politician.[243] In 1826, he received an appointment from the New York legislature as a special prosecutor to investigate the case of William Morgan, a man kidnapped and murdered for publicly revealing secrets about Masonic rituals.[244] His work on this case led him to become one of the early members of the Anti-Mason political party, a short-lived organization that the Whigs ultimately annexed.[245] Later, after leaving politics following the presidential election of 1852, he became one of three commissioners to oversee revisions of New York State's legal code—a position, according to at least one commentator, that he received because of his "high standing" as one

(July 27, 2012), https://andrewppalmer.wordpress.com/2012/07/27/john-mclean-associate-supreme-court-justice/.

[237] *See Compare Supreme Court Justices*, *supra* note 234.

[238] *See, e.g.*, *Dates of U.S. Presidential Election "Events": 1789 to the Present*, THEGREENPAPERS, http://www.thegreenpapers.com/Hx/PresidentialElectionEvents.phtml (last visited Nov. 26, 2016); *Supreme Court Nominations*, *supra* note 17.

[239] *See* GEORGE R. HOWELL & JONATHAN TENNEY, BICENTENNIAL HISTORY OF ALBANY: HISTORY OF THE COUNTY OF ALBANY, N.Y., FROM 1609 TO 1886, at 141 (1886); *Spencer, Ambrose*, U.S. HOUSE REPRESENTATIVES, http://history.house.gov/People/Detail/22028 (last visited Nov. 30, 2016).

[240] *See* HOWELL & TENNEY, *supra* note 239, at 141.

[241] *See id.* at 142.

[242] *See id.*

[243] *See id.*

[244] *See id.*; *see also* Andrew Burt, *The Mysteries of the Masons*, SLATE (May 15, 2015), http://www.slate.com/articles/news_and_politics/history/2015/05/masons_and_american_history_the_1826_kidnapping_allegedly_by_freemasons.html (describing the circumstances surrounding Morgan's disappearance).

[245] *See* HOWELL & TENNEY, *supra* note 239, at 142.

of "the most learned" attorneys in the state.[246]

Nominee's Prior Political Record: Spencer first attained national political office in 1817.[247] Running as a Democratic-Republican, he won election to the United States House of Representatives.[248] During his tenure in this position, he was a member of a committee that reported unfavorably about the activities of the national bank, a fact that likely pleased Tyler when he later reviewed Spencer's credentials.[249]

From 1820 to 1822, Spencer served in the New York State Assembly, beginning a career in New York State politics that would see him serve in the state's Senate from 1825 to 1828, the Assembly again from 1831 to 1833, and Secretary of State from 1839 to 1841.[250] During this period in his life, Spencer joined forces with skilled New York politicians such as William H. Seward and Thurlow Weed to become a leader in the state's Whig Party.[251] His position among the Whigs became prominent enough that he played a leading role in successfully campaigning for Harrison's election to the presidency—and, by extension, Tyler's election to the vice presidency.[252]

After Harrison's death, Spencer initially joined the other Whigs in criticizing Tyler's policies.[253] Yet the two men evidently reconciled their differences, as Tyler soon appointed Spencer to the Cabinet position of Secretary of War.[254] Unlike the majority of Whig politicians, Spencer refused to break ranks with Tyler at any point following this Cabinet appointment.[255] In a demonstration of faith in Spencer's abilities and loyalty, Tyler shifted Spencer from leading the War Department to the Treasury Department in 1843.[256] As the

[246] *See id.*

[247] *See* OXFORD COMPANION, *supra* note 131, at 816.

[248] *See John Canfield Spencer*, U.S. ARMY CTR. MIL. HIST. (Mar. 1, 2001), http://www.history.army.mil/books/sw-sa/Spencer.htm.

[249] *See id.*

[250] *See id.*

[251] *See* HOWELL & TENNEY, *supra* note 239, at 142; OXFORD COMPANION, *supra* note 131, at 953–54.

[252] *See* HOWELL & TENNEY, *supra* note 239, at 142.

[253] *See id.*; WARREN, *supra* note 128, at 384–85.

[254] *See* HOWELL & TENNEY, *supra* note 239, at 142; WARREN, *supra* note 128, at 385.

[255] *See* HOWELL & TENNEY, *supra* note 239, at 142 ("[T]hough the Whig party dissolved all connection with Tyler, Spencer continued to adhere to him through his administration."); WARREN, *supra* note 128, at 385 (stating that Spencer's opposition to Henry Clay as a presidential candidate led to Spencer's decision to align himself with Tyler).

[256] *See* CHESTER & WILLIAMS, *supra* note 229, at 1370; OXFORD COMPANION, *supra* note 131, at 954. While both of Spencer's Cabinet appointments were prestigious positions, the fact that Tyler entrusted Spencer to handle some of the most publicly sensitive issues of the day as Secretary of the Treasury seems to have demonstrated the President's faith in Tyler's

Secretary of the Treasury, Spencer grappled with a multitude of divisive financial issues, several of which concluded with Spencer receiving enmity from every side of the political aisle.[257]

Controversial Topics On Which Nominee Held Publicized Stance: Given Spencer's long career in both state and national politics, his engagement in controversial issues was inevitable at the time Tyler nominated him to the Supreme Court.[258] In particular, his actions as Tyler's Secretary of the Treasury became the subjects of great debate and much opposition.[259] With the federal government facing a mounting fiscal deficit, Spencer insisted that the government impose tariffs on imported goods from foreign nations rather than raising taxes.[260] His advocacy of substantial duties on items such as coffee and tea proved to be a hotly contested idea.[261] Likewise, his issuance of $850,000 in treasury notes to help cover the national government's debt was unpopular among many politicians.[262]

The fact that Spencer was one of the few northerners in a leading federal post at a time when southern interests dominated much of the national government's debates also contributed to his evolving unpopularity in Washington.[263] With the issue of slavery increasing in national prominence, he fervently opposed admitting Texas to the Union as a slave state, a stance that certainly did not help his reputation among many politicians from slaveholding states.[264]

Yet Spencer's greatest controversy was his continued loyalty to Tyler.[265] The fact that he ultimately remained part of Tyler's Cabinet while other Whigs denounced the President as a traitor did not win Spencer any friends within his own party.[266] Thus, much like Tyler, Spencer faced his greatest political challenges from the very politicians whom he once considered his closest allies.[267]

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abilities.

[257] *See* WARREN, *supra* note 128, at 385–86; *John C. Spencer (1843-1844)*, U.S. DEP'T TREASURY, https://www.treasury.gov/about/history/Pages/jcspencer.aspx (last updated Nov. 11, 2010) [hereinafter *John C. Spencer*].

[258] *See supra* text accompanying notes 241–56.

[259] *See John C. Spencer*, *supra* note 257.

[260] *See id.*

[261] *See* WILLIAM EDMUNDS BENSON, A POLITICAL HISTORY OF THE TARIFF 1789-1861, at 111 (2010); *John C. Spencer*, *supra* note 257.

[262] *See* JOHN JAY KNOX, UNITED STATES NOTES: A HISTORY OF THE VARIOUS ISSUES OF PAPER MONEY BY THE GOVERNMENT OF THE UNITED STATES 52 (rev. 2d ed. 1885).

[263] *See John C. Spencer*, *supra* note 257.

[264] *See id.* Ultimately, Spencer's stance on this issue led to his decision to resign from Tyler's Cabinet in 1844. *See id.*

[265] *See, e.g.*, HOWELL & TENNEY, *supra* note 239, at 142; GEYH, *supra* note 150, at 192; OXFORD COMPANION, *supra* note 131, at 954.

[266] *See* OXFORD COMPANION, *supra* note 131, at 954; Massey, *supra* note 231, at 3.

[267] *See* Massey, *supra* note 231, at 3.

Public Sentiment Regarding Nominee: As Tyler predicted, no one mounted any serious challenges to Spencer's legal knowledge or overall qualifications to serve on the Court.[268] A correspondent from the *New York Herald* criticized those senators who opposed Tyler's nomination, going as far as stating: "[A]ll acknowledge his legal ability to fill with honor the office."[269] Nathan Sargent, one of the leading political historians of the era, wrote that Spencer had carried out his duties as Secretary of the Treasury "with an ability, assiduity, integrity[,] and faithfulness seldom equalled since the days of [Alexander] Hamilton."[270]

Still, Spencer's decision to stay with Tyler after originally criticizing him struck many Whigs, including Clay, as the ultimate form of party betrayal.[271] Clay asked: "[D]oes any man believe him true or faithful or honest?"[272] Erastus Root of New York claimed that he had "no confidence in the political integrity of Mr. Spencer."[273] Another political leader from Spencer's home state, Francis Granger, claimed that ninety percent of all Whigs in New York opposed Spencer's nomination to the Court, adding that the nominee "developed a character that should not be approved by an appointment to one of the most dignified positions in the world."[274] Whigs were ready to desert the party if Spencer was confirmed, Granger continued, stating that the prevailing public attitude was: "[I]f such treachery is to be rewarded by the votes of those who have been betrayed, we do not see any necessity for political integrity."[275]

In the end, these political considerations carried the day. On January 31, 1844, the Senate turned down Spencer by a vote of 26-21.[276] "The [s]enators felt . . . that our Supreme Court is our last bulwark, our fortress, our rock and tower of defence when all else fails[,]" wrote the *New York Herald*, "and the vacancy must be filled with a man of diamond purity, and adamantine integrity."[277] Whig Senator John J. Crittenden wrote to Grainger that "the rejection of

[268] *See, e.g.*, CHESTER & WILLIAMS, *supra* note 229, at 1370. Indeed, quite the opposite was true, as journalists and politicians alike praised Spencer's track record as a practitioner of law. *See, e.g.*, WARREN, *supra* note 128, at 386.

[269] WARREN, *supra* note 128, at 386 & n.1.

[270] *Id.* at 385 & n.1.

[271] *See infra* text accompanying notes 272–76.

[272] GEYH, *supra* note 150, at 192. Clay went on to proclaim: "[I]f Spencer [is] . . . confirmed he will have run a short career of more profligate conduct and good luck than any man I recollect." WARREN, *supra* note 128, at 385.

[273] CHESTER & WILLIAMS, *supra* note 229, at 1370.

[274] WARREN, *supra* note 128, at 385–86.

[275] *Id.*

[276] *See Supreme Court Nominations*, *supra* note 17.

[277] WARREN, *supra* note 128, at 386.

Spencer [was] one of the very best acts of the Senate," and claimed that "the people everywhere approve his rejection."[278] Certain people, however, were not so certain. "I perceive that the die is cast and that our friend Spencer is rejected," wrote Eliphalet Nott, the Presbyterian minister who led New York's Union College.[279] "So be it, I only hope that a worse man may not be forced, through party animosity, upon the country."[280]

The rejection appeared not to greatly worry Spencer, who remained in Washington politics for a while and then returned to New York, where he lived comfortably and involved himself again with the state's legal affairs.[281] For Tyler, however, Spencer's rejection was only the beginning of an unhappy period where he put forward eight more Supreme Court nominations—including Spencer for a second time—with the Senate approving only one of them, the uncontroversial New York Democrat Samuel Nelson.[282] Interestingly, the Senate never formally rejected Tyler's other nominees.[283] Instead, they either publicly declared their intentions to vote against the nominees until Tyler withdrew them or simply did nothing until the session of Congress expired with no action taken.[284]

D. George Washington Woodward

James Knox Polk was never supposed to become President of the United States.[285] When he declared his candidacy for the election of 1844, most knowledgeable political observers considered him nothing more than a sacrificial lamb.[286] After dominating debates

[278] *Id.*

[279] *Id.* at 386 n.2; *see* Stefan Bielinski, *Eliphalet Nott*, N.Y. ST. MUSEUM, https://exhibitions.nysm.nysed.gov/albany/bios/n/elnott.html (last visited Jan. 17, 2017).

[280] WARREN, *supra* note 128, at 386 n.2. Nott was not isolated in this sentiment. Even Thurlow Weed, Spencer's friend-turned-political-rival in New York, confessed that he had doubts about voting against Spencer's nomination. "Spencer has terrible but just punishment," Weed wrote. *Id.* at 386. "But it was hard, killing him. He made a tremendous struggle for confirmation." *Id.*

[281] *See* HOWELL & TENNEY, *supra* note 239, at 142; *John Canfield Spencer*, *supra* note 248.

[282] *See* Massey, *supra* note 231, at 3; *Supreme Court Nominations*, *supra* note 17.

[283] *See Supreme Court Nominations*, *supra* note 17.

[284] *See* Massey, *supra* note 231, at 3; *Supreme Court Nominations*, *supra* note 17. As with the Senate's rejection of Spencer, the Senate's decisions to take no actions regarding Tyler's other nominees were motivated by political considerations rather than by the fitness of the nominees to serve on the Court. *See* Massey, *supra* note 231, at 3; *Supreme Court Nominations*, *supra* note 17.

[285] *See* JOHN SEIGENTHALER, JAMES K. POLK 80, 91 (2004).

[286] *See* EUGENE IRVING MCCORMAC, JAMES K. POLK: A POLITICAL BIOGRAPHY 248, 249–51 (1922); REMINI, *supra* note 225, at 647.

in Congress for years, Henry Clay had declared his candidacy for the White House, and the smart money was unquestionably on the Whig leader to win easily over his largely unknown opponent.[287] Clay and the Whigs even laughed at Polk's anonymity, hanging large campaign banners bearing the slogan: "Who is James K. Polk?"[288]

Yet Polk, the first bona fide "dark horse" candidate in an American presidential election, shocked everyone, capturing a narrow victory over the once-cocky Whigs.[289] The fact that Polk publicly pledged to serve only one term, and thus was a "lame duck" chief executive from the outset, only fueled the Whigs' desires to limit Polk's impact during the next four years before defeating some new opponent for the presidency.[290]

In the context of this ongoing political rancor, Polk faced a stiff political challenge upon entering office because of the death of Justice Henry Baldwin.[291] A "political maverick" who frequently departed from the views of his Democratic Party brethren and from the ideas of his fellow Justices, Baldwin espoused a rigid interpretation of the Constitution and rejected the trajectory of expanding powers that the Court had taken since the days of John Marshall.[292] Replacing such a jurist carried significant jurisprudential and political importance for the nation, not unlike today's questions that arose about who would take the seat formerly held by the "originalist" Antonin Scalia after his passing.[293] Given that Tyler had already tried unsuccessfully to replace Baldwin's seat on the Court, only to have the Senate ignore his nominees, one

[287] *See* REMINI, *supra* note 225, at 647; *see, e.g.*, MCCORMAC, *supra* note 286, at 250 ("Clay was conceded a place in the first rank of statesmen, while many, even of Polk's supporters, did not claim for their candidate more than second-rate ability. . . . Polk was not possessed of spectacular qualities, and he never tried to cultivate them."); SEIGENTHALER, *supra* note 285, at 91 ("It is likely that the Whigs believed that Clay's charm, compared to Polk's prudish personality, gave them an enormous edge. They were campaigning against a humorless, straitlaced little prig from Tennessee. He was, they thought, a fit subject for ridicule.").

[288] *See, e.g.*, SEIGENTHALER, *supra* note 285, at 92.

[289] *See* MCCORMAC, *supra* note 286, at 251 ("Polk was the first 'dark horse' ever nominated for President by a political party."); SEIGENTHALER, *supra* note 285, at 91, 98–99 (noting that Polk's victory was even more improbable given that he could not even carry the popular vote in his home state of Tennessee).

[290] *See* MCCORMAC, *supra* note 286, at 253–54.

[291] *See* AMERICAN POLITICAL LEADERS, 1789-2009, at 51 (CQ Press ed. 2010).

[292] *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012, at 95, 96 (3d ed., Clare Cushman ed. 2013).

[293] *See id.* at 96; Telephone Interview by Michel Martin, NPR Host, Words You'll Hear, with Nina Totenberg (Feb. 14, 2016), http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy ("[Antonin Scalia] was [originalism's] most fierce proponent.").

can only imagine that Polk knew that he was in for a struggle when he nominated George Washington Woodward to do this job.[294]

Adding to the political intrigue was the death of Justice Joseph Story on September 10, 1845.[295] From 1812 until the day that he passed away, Story had proved to be just as outspoken and influential on the Court as Jefferson and Madison had feared.[296] During his years on the Marshall Court, only Chief Justice Marshall himself had authored more opinions than Story.[297] As the Court shifted and transitioned during Roger Taney's tenure as Chief Justice, Story became recognized as one of the "old statesmen" on the bench, constantly returning to the theme of preserving a stable Union but also remaining an ardent advocate for preserving private property rights.[298] He, too, would be a difficult jurist to replace.[299]

Polk nominated veteran Democratic Party lawyer, politician, and Cabinet member Levi Woodbury to replace Story on the same day that he nominated Woodward to fill Baldwin's seat.[300] The way that the Senate would react to both of these men would substantially affect the Court's future.

Nominee's Political Party: Democratic.[301]

Nominating President's Political Party: Democratic.[302]

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[294] *See generally* Massey, *supra* note 231, at 3 (discussing Tyler's struggles to fill the vacancies).

[295] *See* OXFORD COMPANION, *supra* note 131, at 985; *Members of the Supreme Court of the United States*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 27, 2016).

[296] *See, e.g.*, OXFORD COMPANION, *supra* note 131, at 984, 985.

[297] *See* TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 75 (2001).

[298] *See generally* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 138, 343 (1986) (providing an excellent review of Story's role on the Court and discussing Story's belief in a strong national union and using American Law to preserve property).

[299] In the words of at least one scholar: "Joseph Story, as a member of the Marshall Court, was a judicial pillar of almost equal dimension to Chief Justice Marshall." Robert H. Duesenberg, *Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court*, 6 VAL. U. L. REV. 233, 233 (1972) (book review). He "remained a force on the Taney Court," cautioning against what he believed were an overabundance of federal judicial concessions to states' rights but fiercely guarding the preservation of key personal liberties, particularly the right to property. *See* OXFORD COMPANION, *supra* note 131, at 985; *see also* Calvin Woodard, *Joseph Story and American Equity*, 45 WASH. & LEE L. REV. 623, 623 (1988) ("Joseph Story was a giant of a man, and assessing the nature and extent of his influence on modern U.S. law is an overwhelming task.").

[300] *See Supreme Court Nominations*, *supra* note 17; *Woodbury, Levi, (1789-1851)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=w000711 (last visited Nov. 27, 2016).

[301] *See* OXFORD COMPANION, *supra* note 131, at 1099.

[302] *See James K. Polk*, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/

Majority Party in Senate: Democratic.[303]

Majority Party on the United States Supreme Court: Democratic.[304] The Court's composition was identical to its membership at the time of Spencer's nomination,[305] with two exceptions: the addition of Samuel Nelson (Democrat) and the death of Joseph Story.[306]

Predecessor's Political Party: Democratic.[307]

President's Previous Nominations to United States Supreme Court: None.[308]

Number of Years between Nomination Year and Next Presidential Election Year: Three.[309]

Nominee's Prior Legal Record: Like the man whom he was nominated to replace, Woodward was a Pennsylvanian.[310] He began practicing law in the state's Wyoming Valley, a region that was rapidly evolving into a hub for mining anthracite coal.[311] While still in his twenties, members of the area's bar recognized him as a "bright, articulate, and up-and-coming" attorney "with 'a large and lucrative practice.'"[312] Becoming friends with the state's Governor, Democratic Party member James Porter, helped Woodward obtain a commission as the President Judge of the state's Fourth Judicial District, a post that Woodward held from 1841 to 1851.[313]

Nominee's Prior Political Record: Woodward's political involvement began at the age of twenty-eight.[314] Selected to represent his district at the 1837 convention to modernize Pennsylvania's outdated state constitution, Woodward's oratorical skills rapidly gained him the reputation of "one of the strongest, if not the strongest man of his party in the convention."[315] For better

jamespolk (last visited Nov. 20, 2016).

[303] *See* Daniel J. Curran, *Polk, Politics, and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court*, 121 PENN. MAG. HIST. & BIOGRAPHY 163, 163 (1997).

[304] *See Compare Supreme Court Justices*, *supra* note 234 (indicating that all of the members of the Court at the time were democrats).

[305] *See id.*

[306] *See id.* (indicating that Samuel Nelson had joined the Court and Joseph Story had left).

[307] *See id.* (indicating that Henry Baldwin was a Democrat).

[308] *See generally Supreme Court Nominations*, *supra* note 17 (indicating no previous nomination by Polk).

[309] *See id.* (indicating that the Woodward nomination was on December 23, 1845, which was three years before the 1848 presidential election).

[310] *See* OXFORD COMPANION, *supra* note 131, at 1098.

[311] *See* Curran, *supra* note 303, at 166.

[312] *Id.*

[313] *See id.* at 168.

[314] *See id.* at 166.

[315] *See id.* at 166, 167.

or for worse, this stature encouraged Democratic Party leaders throughout Pennsylvania to seek Woodward's favor, quickly dragging him into the political dysfunction that plagued the party throughout the state at that time.[316] "[A]crimonious infighting" characterized Democratic politics in Woodward's home county, with deep divisions forming over the area's transition from a longtime agricultural economy to a growing industrial center dominated by coal.[317] Woodward quickly plunged into this fray, joining and then leaving various statewide alliances and factions on multiple political issues, particularly economic concerns.[318] These maneuverings furthered Woodward's rise as an influential voice in Pennsylvania's political affairs, but also earned him several enemies.[319]

Such enemies likely contributed to Woodward's failure to win a bid for the United States Senate in 1845.[320] "[Woodward] gave in caucus a long judiciary opinion why he was the greatest Democrat in creation but he could not make the boys believe it," proclaimed rival Democrat William S. Ross.[321] Ultimately, the Pennsylvania Democrats fell back upon the incumbent senator, a far more "cautious and inoffensive" individual who was a "political lightweight" who had the benefit of offending far fewer people than Woodward.[322]

When another Pennsylvania Democrat, James Buchanan, resigned from his Senate seat in February 1845, Woodward again sought the national legislative office.[323] This time, a significant number of Democrats boycotted the caucus entirely.[324] Other Democratic Party members joined a cadre of Whig leaders and voted for Simon Cameron, a wealthy pro-business candidate who favored extreme protectionist measures that he felt would preserve large American enterprises, including those businesses in which he had substantial holdings.[325] Shortly after that loss, Polk's Vice President, George M. Dallas, described Cameron's political

[316] *See, e.g.*, *id.* at 168, 169, 170, 173.
[317] *See id.* at 168.
[318] *See, e.g.*, *id.* at 168–69, 173.
[319] *See, e.g.*, *id.* at 168, 169, 171, 173.
[320] *See id.* at 173.
[321] *See id.*
[322] *Id.*
[323] *See id.* at 173–74.
[324] *See id.* at 174 ("Only [forty-eight] of the [seventy-three] eligible members participated; and, of this number, a scant [twenty-five] settled on . . . Woodward as their preference.").
[325] *See id.* at 165, 174.

maneuvering to Polk in great detail.[326] Angered by what he heard, and impressed by Woodward's "Jeffersonian" inclinations, Polk soon nominated Woodward to the Court.[327]

Controversial Topics On Which Nominee Held Publicized Stance: Many of Woodward's most controversial viewpoints began as localized issues in Pennsylvania that eventually spread to the national spotlight.[328] His political adversaries in the state ultimately came back to haunt him when he displayed aspirations at the federal level, including his two already-discussed resounding defeats for the Senate.[329] Politicians like Cameron devoted plenty of energy to depicting Woodward as an individual hostile to protective tariffs and other pro-business measures, claiming that Woodward would champion uninhibited trade and thus damage localized financial interests.[330] Beyond these economic issues, Woodward also spoke in Pennsylvania about his preference for imposing limits upon judicial tenure, a stance that angered many judges who saw such a stance as a threat to their job security.[331]

On certain topics, Woodward's views demonstrated some surprising southern sympathies. For instance, he objected to the "interference of slavery where it legally existed."[332] He favored strong localized governments rather than a powerful federal system, pledging his support for "maintaining in their full vigor the reserved rights of the States."[333] Southern statesmen such as John C. Calhoun would soon put forth similar arguments in justifying the need for their home states to secede from a Union with a centralized

[326] *See id.* at 175–76.

[327] *See id.* at 179–81. Polk's initial choice for the Court was a different Pennsylvanian, James Buchanan. *See* Parry-Giles, *supra* note 98, at 109. However, when Buchanan rejected this opportunity, Polk ultimately turned to Woodward. *See id.* Buchanan objected to this decision, advocating ardently for Polk to select Pennsylvania Federalist John M. Read. *See id.* When Polk declined to follow Buchanan's advice, Buchanan complained that the President refused to listen to his Cabinet in making this judicial selection. *See* Curran, *supra* note 303, at 165 n.3. In response, Polk declared that he "had a perfect right to make [appointments] without consulting [his] Cabinet, unless [he] desired their advice." *See* Parry-Giles, *supra* note 98, at 109.

[328] *See* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 35 (1998).

[329] *See supra* text accompanying notes 320–25.

[330] *See generally* Curran, *supra* note 303, at 187–88 (discussing Woodward's stance on trade).

[331] *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 24–25 (1960); *see also* Curran, *supra* note 303, at 167 & n.11 (noting that Woodward said that the first day that he gained bona fide enemies in government was the day that he spoke at Pennsylvania's constitutional convention in favor of judicial tenure limits).

[332] Curran, *supra* note 303, at 181.

[333] *Id.*

government that, in their view, had grown far too mighty.[334]

Last, this promoter of "old time Jeffersonian democracy"[335] maintained an unyielding stance regarding "foreigners" living in the United States.[336] During the Pennsylvania constitutional convention, Woodward had promoted a state constitutional amendment that would "prevent any foreigner who may arrive in the [s]tate after the 4th of July, 1841, from acquiring the right to *vote* or to hold office in [Pennsylvania]."[337] Irish-Americans became a particular target of his animosity.[338] He supported the Know-Nothing Party, a political faction that vowed to "purify" American politics by ridding the political system of all immigrants and all non-Protestant religions.[339] Although he later softened his views in this area, Woodward would remain linked to this stringent perspective for the rest of his political career, with many commentators even referring to him as "the father of nativism."[340]

Public Sentiment Regarding Nominee: Unsurprisingly, a certain degree of public attention focused on Woodward's support of the Know-Nothings and his overall approval of nativist policies.[341] The Philadelphia *Spirit of the Times*, for example, published an article anonymously quoting several foreign-born Democratic members of the Senate who allegedly declared Woodward "unfit" for such a high judicial office.[342] Other complaints dealt with the public impressions of Woodward's background, with one Pennsylvania judge declaring that "it would shock the bar, the bench[,] and the public, to learn that a judge of an inferior court in the woods without any evidence of great legal condition, has been translated to the Supreme Court of the United States."[343]

The most prominent public concern, however, centered on Woodward's opinions regarding protective tariffs.[344] Just as he had done in knocking Woodward out of the Senate race, Cameron and

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[334] *See generally* AUGUST O. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN (1951) (providing a thorough review of Calhoun's viewpoints on this issue).

[335] Curran, *supra* note 303, at 180.

[336] *Id.* at 166.

[337] *Id.* at 166–67.

[338] THE SUPREME COURT: A TO Z 112 (2d ed., Kenneth Jost ed., 1998).

[339] *See* NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 42 (1998); Gordon Harris, *1845: Anti-Immigrant Know Nothing Party Sweeps Massachusetts Election*, STORIES FROM IPSWICH (Dec. 19, 2015), https://storiesfromipswich.org/2015/12/09/know-nothing/.

[340] Curran, *supra* note 303, at 167.

[341] *See, e.g.*, Parry-Giles, *supra* note 98, at 109.

[342] *See* Curran, *supra* note 303, at 186–87.

[343] VIEIRA & GROSS, *supra* note 339, at 42–43.

[344] *See* Curran, *supra* note 303, at 187.

his allies stirred up a tremendous public outcry by painting Woodward as an avowed free trade man who would strike down any tariff immediately.[345] When a flood of letters and lobbyists opposing Woodward's nomination descended upon Washington, Woodward wrote to Polk and asked whether the President wanted to withdraw his nomination.[346] Polk never responded to this letter, opting instead to silently let the proceedings continue.[347]

Woodward did find some allies in the public and the press. In particular, his reputation as a knowledgeable and fair-minded jurist received a vigorous defense from some circles, with proponents praising his "high talents and sterling ability."[348] Still, as the time for a vote on his nomination drew near, Woodward himself began realizing the hopelessness of his position.[349] Without any powerful patrons in the Senate willing to stand in his corner, Cameron and his followers were able to spread their opposition of Woodward virtually unimpeded.[350]

Ultimately, this was enough to sink Woodward's nomination. The Democratic-dominated Senate voted 29-20 against him.[351] The entire Whig membership of the Senate opposed him, as did six Democratic Party members, spurred on by Cameron's public attacks against the nominee.[352] Woodward's political wars from Pennsylvania had followed him all the way to Washington.[353]

The defeat was a bitter political pill for both Woodward and Polk to swallow.[354] Woodward returned to Pennsylvania, shortly thereafter becoming an Associate Justice and eventually Chief

[345] See i*d.* at 187–88.

[346] *See id.* at 189–90.

[347] *See id.* at 190.

[348] *See* VIEIRA & GROSS, *supra* note 339, at 42.

[349] *See* Curran, *supra* note 303, at 190.

[350] *See* MALTESE, *supra* note 329, at 35; Curran, *supra* note 303, at 189–90; Parry-Giles, *supra* note 98, at 109.

[351] *See* Parry-Giles, *supra* note 98, at 109.

[352] *See* Curran, *supra* note 303, at 163.

[353] *See id.* at 199 ("[T]o antagonize a sizable segment of the Pennsylvania Democracy by the ennoblement of one of their enemies was bound to touch off a retaliatory response."); *see also* MALTESE, *supra* note 329, at 35 ("The opposition of Democratic Senator Simon Cameron from Woodward's home state of Pennsylvania sealed the defeat of the nomination.").

[354] *See* SEIGENTHALER, *supra* note 285, at 129; VIEIRA & GROSS, *supra* note 339, at 42. Perhaps most upsetting for both the President and his nominee was the degree to which political disputes overtook any consideration of Woodward's fitness for the position. *See* Curran, *supra* note 303, at 192 ("Like most of the Democratic deserters, the Whigs disdained any consideration of the professional distinction, legal talent, or personal merit of the Pennsylvania jurist. They focused strictly on his outlook, position, and professional beliefs relative to the Constitution and his place on the political spectrum.").

Justice of the Pennsylvania Supreme Court.[355] In 1867, he won election to Congress, holding his seat in the House of Representatives until 1871.[356] As for Polk, the President faced far less opposition with his nomination to fill Story's vacant seat with Woodbury, with the Senate confirming the new Justice just nine days after their rejection of Woodward.[357] The following year, Polk nominated another Pennsylvanian, Robert Grier, to fill Baldwin's seat.[358] Initially, Polk had voiced concerns about Grier because of Grier's early alliances with the Federalist Party.[359] Yet Grier possessed far fewer enemies than Woodward and held far fewer controversial viewpoints.[360] Perhaps even more importantly, Grier received Cameron's approval early in the nomination process.[361] On August 4, 1846, he was confirmed to the Court with ease.[362]

E. Jeremiah Black

Slavery and states' rights dominated the national debates leading up to the presidential election of 1856.[363] As with the nomination and ultimate rejection of Woodward, and the subsequent nomination and approval of Grier, the Keystone State played a keystone role in these increasingly volatile conversations. This time, Pennsylvanian James Buchanan won the White House, providing the nation with a chief executive possessing an unusual combination of characteristics: alliances in the North but certain distinct sympathies with causes in the South.[364] Buchanan believed that the federal government did not possess power under the Constitution to abolish slavery within the individual states.[365]

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355 *See* OXFORD COMPANION, *supra* note 131, at 1099.

356 *See id.*; *Woodward, George Washington*, BIOGRAPHICAL DIRECTORY U.S. CONGR., http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000730 (last visited Nov. 27, 2016).

357 *Supreme Court Nominations*, *supra* note 17.

358 *See id.*; WARREN, *supra* note 128, at 421.

359 *See* Curran, *supra* note 303, at 198; *see generally* Parry-Giles, *supra* note 98, at 109 (discussing the reluctance to nominate a Federalist).

360 *See* Curran, *supra* note 303, at 198.

361 *See id.* Furthermore, Buchanan, whom Polk continued to blame for supposed behind-the-scenes machinations leading to Woodward's rejection, quickly endorsed Grier. *Id.*

362 *Supreme Court Nominations*, *supra* note 17.

363 *See generally* JEAN H. BAKER, JAMES BUCHANAN 46, 66, 71, 72 (2004) (describing in detail this election and the dominant role that state's rights—and, in particular, states' rights regarding slavery—played in the voters' decisions).

364 *See* ELBERT B. SMITH, THE PRESIDENCY OF JAMES BUCHANAN 17, 143 (1975). Under a states' rights philosophy, Buchanan had publicly aligned himself with southern causes as early as the 1830s. *Id.* at 143. Among his most notable gestures was his opposition to the Wilmot Proviso, which, if enacted, may have banned slavery in the territories. *See id.* at 17.

365 *See* BAKER, *supra* note 363, at 71. In an 1836 speech before the Senate, he declared his viewpoint on this issue in unequivocal terms:

Furthermore, while he opposed the concept of any states seceding from the Union, Buchanan also felt that it was unconstitutional for the federal government to force any state to remain in the United States.[366] Consequently, as seven states seceded from the Union during Buchanan's tenure in office, the President made no attempts to demand or even persuade the leaders of these states to remain part of the Union.[367]

In 1857, Justice Benjamin Curtis resigned from the Supreme Court in the aftermath of the Court's decision in *Dred Scott v. Sandford*,[368] a case preventing the federal government from regulating slavery in federal territories formed after the United States's creation and holding that any "negro, whose ancestors were . . . sold as [slaves]," could not become an American citizen.[369]

> [T]his question of domestic slavery is the weak point in our institutions. . . . Although, in Pennsylvania, we are all opposed to slavery in the abstract, yet we will never violate the Constitutional compact which we have made with our sister States. . . . Under the Constitution it is their own question, and there let it remain.

James Buchanan, *Mr. Buchanan's Administration on the Eve of Rebellion*, *in* THE WORKS OF JAMES BUCHANAN: COMPRISING HIS SPEECHES, STATE PAPERS, AND PRIVATE CORRESPONDENCE 1, 6–7 (John Bassett Moore ed., 1960). He devoted considerable time to this issue during his presidential inaugural address, too, declaring that Congress had no place interfering in individual territories' decisions regarding slavery. BAKER, *supra* note 363, at 81.

366 *See* BAKER, *supra* note 363, at 125; *see also* SMITH, *supra* note 364, at 17 ("Disunion is a word which ought not to be breathed amongst us even in a whisper. . . . Our children ought to be taught that it is a sacrilege to pronounce it.").

367 *See* BAKER, *supra* note 363, at 125 ("Buchanan extended an encouraging olive branch to seceding states in his denial of federal authority over their actions. They could go in peace, for neither he nor Congress had the power to declare and make war on them."); *Secession*, HISTORY, http://www.history.com/topics/american-civil-war/secession/print (last visited Jan. 20, 2017).

368 *See* Scott v. Sandford, 60 U.S. 393 (1857); Toni Konkoly, *Dred Scott v. Sandford (1857),* PBS, http://www.pbs.org/wnet/supremecourt/personality/landmark_dred.html (last visited Nov. 28, 2016).

369 *Scott*, 60 U.S. at 403–04. Curtis's dissent struck at the heart of the majority's opinion. *See id.* at 572 (Curtis, J., dissenting) ("To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, *it is only necessary to know whether any such persons were citizens of either of the States under the Confederation*, at the time of the adoption of the Constitution." (emphasis added)). Since the Constitution spoke of citizenship "existing at the time of the adoption of the Constitution," Curtis held that anyone who was deemed a citizen under the Articles of Confederation must, without specific constitutional language prohibiting it, implicitly become a citizen under the Constitution. *See id.* at 571–72. He then proceeded to provide several examples of states where free blacks were considered citizens at the time of the Constitution's adoption. *See, e.g.*, *id.* at 574. Based on this, Curtis concluded: "[U]nder the Constitution of the United States, every free person born on the soil of a [s]tate, who is a citizen of that [s]tate by force of its Constitution or laws, is also a citizen of the United States." *Id.* at 576. In a letter to former President Millard Fillmore, Curtis stated that his resignation from the Court was due partly to financial considerations, as he could make more money as a private practitioner in Boston than as a Supreme Court Justice, but was due also to "the fact [that] the Court had

To replace Curtis, Buchanan nominated Nathan Clifford, a lawyer from Maine who had served as Polk's Attorney General and then later became the nation's ambassador to Mexico.[370] Clifford's pro-slavery sympathies and insistence on a rigid dividing line between federal powers and states' rights made him an extremely controversial candidate.[371] His confirmation margin of 26-23 remains one of the narrowest in history.[372]

On May 31, 1860, Justice Peter Daniel—a southern jurist who, in a concurring opinion in the *Dred Scott* decision, wrote that "the African negro race never have been acknowledged as belonging to the family of nations"[373]—passed away.[374] Once again, the issues of slavery and states' rights consumed most of the public and political deliberations regarding who Buchanan would nominate to replace this pro-slavery Justice.[375] On February 5, 1861, fewer than two months after South Carolina's secession from the Union, Buchanan announced his choice: Jeremiah Sullivan Black.[376]

Nominee's Political Party: Democratic.[377]

Nominating President's Political Party: Democratic.[378]

Majority Party in Senate: Democratic.[379]

Majority Political Party on the United States Supreme Court: The Court remained decidedly in the hands of the Democratic Party, with Democratic Justices Roger Taney, Nathan Clifford, John Campbell, Robert Grier, Samuel Nelson, John Catron, James Wayne, and John McLean on the bench.[380]

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sunk so low that his voice would not improve it." John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 176 & n.9.

370 *See* OXFORD COMPANION, *supra* note 131, at 186.

371 *See id.*; MARK SCROGGINS, HANNIBAL: THE LIFE OF ABRAHAM LINCOLN'S FIRST VICE PRESIDENT 60 (1994) (discussing Clifford's known pro-slavery sympathies); *see also* WILLIAM BOSCH, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 123 (Melvin I. Urofsky ed., 1994) (describing the overall distrust that many leading American politicians and commentators felt toward Clifford at the time of his nomination to the Court).

372 OXFORD COMPANION, *supra* note 131, at 186; *see generally Supreme Court Nominations*, *supra* note 17 (showing the historical confirmation margins).

373 *Scott*, 60 U.S. at 469, 475 (Daniel, J., concurring).

374 *See* OXFORD COMPANION, *supra* note 131, at 248.

375 *See, e.g.*, Frank, *supra* note 369, at 177–78.

376 *See* BAKER, *supra* note 363, at 124–25; OXFORD COMPANION, *supra* note 131, at 88; *Secession*, *supra* note 367.

377 *See* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 51 (Roger K. Newman ed., 2009) [hereinafter YALE BIOGRAPHICAL DICTIONARY].

378 *See James Buchanan: Life in Brief*, MILLER CTR., http://millercenter.org/president/buchanan (last visited Nov. 28, 2016).

379 *See Party Division in the Senate, supra* note 157. The balance of power in the Senate was about to change at the time of Black's nomination, as the Senate would shift to a Republican majority on March 4, 1861.

380 *Compare Supreme Court Justices*, *supra* note 234.

Predecessor's Political Party: Democratic.[381]

President's Previous Nominations to United States Supreme Court: Nathan Clifford (narrowly confirmed).[382]

Number of Years between Nomination Year and Next Presidential Election: Buchanan nominated Black two months after Abraham Lincoln won the presidential election of 1860.[383] Thus, Buchanan was unquestionably a lame duck President at the time of this nomination.[384]

Nominee's Prior Legal Record: Black read the law with Chauncey Forward, one of the leading attorneys in Western Pennsylvania.[385] When Forward won election to Congress, Black took over Forward's law practice for a short time before becoming Deputy Attorney General for Somerset County.[386] During this time period, he met Buchanan, a friendship that would help Black for the remainder of his legal and political careers.[387]

In 1842, Black was appointed President Judge for the Sixteenth Judicial District of Pennsylvania.[388] After serving in that capacity for nine years, he was elected to the Pennsylvania Supreme Court.[389] He remained in that role until Buchanan called him to Washington.[390]

Nominee's Prior Political Record: Within a few days after Buchanan's inauguration, the new President appointed Black to become the new Attorney General of the United States.[391] For the next three years and nine months, Black served with apparent

[381] *See* OXFORD COMPANION, *supra* note 131, at 248; *Supreme Court Nominations*, *supra* note 17.

[382] *See Supreme Court Nominations*, *supra* note 17.

[383] *See* ABRAHAM, *supra* note 40, at 114–15.

[384] *See id.* at 115.

[385] *See* AMERICAN STATESMEN: SECRETARIES OF STATE FROM JOHN JAY TO COLIN POWELL 58 (Edward S. Mihalkanin ed., 2004) [hereinafter AMERICAN STATESMEN]; OXFORD COMPANION, *supra* note 131, at 87.

[386] *See Biographies of the Secretaries of State: Jeremiah Sullivan Black (1810-1883),* DEP'T ST. OFF. HISTORIAN, https://history.state.gov/departmenthistory/people/black-jeremiah-sullivan (last visited Nov. 17, 2016). It was Forward who first introduced Black to the leading Democratic Party members in Pennsylvania, thereby giving Black his first entry into political circles. *See* YALE BIOGRAPHICAL DICTIONARY, *supra* note 377, at 51.

[387] *See Biographies of the Secretaries of State*, *supra* note 386.

[388] *See id.*

[389] *See* OXFORD COMPANION, *supra* note 131, at 87.

[390] *See id.* Black was ultimately selected as the Chief Judge of this court, and won re-election to the court in 1854. *Id.*

[391] *See* John G. Buchanan, *Jeremiah S. Black—The Advocate*, 14 PA. HIST. 35, 35 (1947). According to this author, political observers viewed Black as "an able, well-read, humorless, self-righteous, former [C]hief [J]ustice of the Pennsylvania Supreme Court." SMITH, *supra* note 364, at 19.

distinction in this role.[392] Out of thirty cases that Black argued as Attorney General, he lost only five.[393] Particularly noteworthy were his court victories for the Buchanan Administration involving the legitimacy of Mexican land grants in California.[394]

Near the end of Buchanan's presidency, Secretary of State Lewis Cass resigned from office.[395] Buchanan then appointed Black to replace Cass as Secretary of State.[396] He had served in this position for fewer than two months when Buchanan then nominated him to the Court.[397] Still, this was enough time for Black to make a vital diplomatic move: requesting that all United States diplomatic representatives warn foreign governments about the perils of formally recognizing the new Confederacy.[398] He also joined with Stanton and Secretary of War Joseph Holt to advocate against secession.[399]

Controversial Topics On Which Nominee Held Publicized Stance: During his brief tenure as Secretary of State, Black served as Buchanan's primary advisor during the secession crisis.[400] During this time, he delivered a now-famous opinion to the President, declaring: "[T]he right of the General Government to preserve itself in its whole constitutional vigor by repelling a direct and positive aggression upon its property or its officers[,]" but also stating that the federal government could not compel a state to remain in the Union, as doing so would represent an "offensive war" that had no constitutional basis.[401] Buchanan's largely unpopular stance on the issue of secession was in large measure due to the legal advice that he received from Black.[402]

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[392] *See* Buchanan, *supra* note 391, at 35 (reviewing Black's work as Attorney General).

[393] *See id.*

[394] *See id.*; AMERICAN STATESMEN, *supra* note 385, at 58; OXFORD COMPANION, *supra* note 131, at 87.

[395] *See* BAKER, *supra* note 363, at 130. For some time before Cass's resignation, the Secretary of State had been "inattentive" to key foreign affairs, essentially leaving Buchanan to serve as his own Secretary of State. *See id.* at 107.

[396] *See* AMERICAN STATESMEN, *supra* note 385, at 59. Black agreed to this appointment on the condition that Buchanan select Edwin M. Stanton as his new Attorney General, a bargain to which Buchanan reticently agreed. *Id.*

[397] *See Biographies of the Secretaries of State*, *supra* note 386; *Supreme Court Nominations*, *supra* note 17.

[398] *See Biographies of the Secretaries of State*, *supra* note 386.

[399] *See* AMERICAN STATESMEN, *supra* note 385, at 59.

[400] *See id.* at 58–59.

[401] AMERICAN STATESMEN, *supra* note 385, at 58–59; YALE BIOGRAPHICAL DICTIONARY, *supra* note 377, at 52; Buchanan, *supra* note 391, at 36.

[402] However, Black and Buchanan did not always see eye-to-eye regarding this topic. When Major Robert Anderson requested that Buchanan send military reinforcements to Fort Sumter, Buchanan refused, a decision that provoked Cass's resignation. *See* AMERICAN

Black's most controversial public statements focused directly on the issue of slavery.[403] After the Court issued its decision in the *Dred Scott* case, he published a pamphlet that not only supported the Court's holding, but took the most extreme position imaginable in favor of pro-slavery interests.[404] Under Black's viewpoint, American territories needed to take "affirmative steps to protect slave holdings."[405] Certainly, such a stance was at odds with the majority of northern political and popular viewpoints at the time.[406]

Similarly, Black shocked many of his fellow northerners with his answer to the question about whether Kansas should enter the Union as a slaveholding state or a free state.[407] Leveraging a states' rights argument, Black stated that Kansas should enter the Union as a slave state under the pro-slavery Lecompton Constitution.[408] If the vast and vocal anti-slavery movement within Kansas wished to prevail, Black stated that proponents of this cause would need to wait until Kansas achieved statehood before they could vote to abolish slavery within their borders.[409] Buchanan adopted this stance as well.[410]

Public Sentiment Regarding Nominee: Most of the attention regarding Black's fitness to serve on the Court focused on the nominee's positions about slavery.[411] Predictably, southerners tended to favor Black's confirmation because of this paramount issue, while northerners tended to advocate for Black's rejection.[412]

STATESMEN, *supra* note 385, at 59. Black disagreed with this decision. *Id.* He also objected to Buchanan's proposed message to South Carolina's commissioners stating that South Carolina could be represented diplomatically, as if it were a recognized foreign power, in negotiations regarding the fort. *Id.* When Buchanan told Black that he had "deserted" him over this issue, Black said that he would resign from office rather than support the President's message recognizing the legitimacy of a seceded state. *Id.* In a move that demonstrated the level of respect that Buchanan held for Black's opinions, the President who typically preferred advisors who offered "no firm alternative voice" ultimately agreed to let Black help him revise the message to the South Carolina commissioners. *Id.*; BAKER, *supra* note 363, at 79.

[403] *See* OXFORD COMPANION, *supra* note 131, at 87; YALE BIOGRAPHICAL DICTIONARY, *supra* note 377, at 52.

[404] *See* YALE BIOGRAPHICAL DICTIONARY, *supra* note 377, at 52.

[405] MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 31 (2006).

[406] *See, e.g.*, SMITH, *supra* note 364, at 19.

[407] *See* THOMAS G. MITCHELL, ANTISLAVERY POLITICS IN ANTEBELLUM AND CIVIL WAR AMERICA 115 (2007).

[408] *See id.* at 114–15.

[409] *See, e.g.*, JAMES A. RAWLEY, RACE & POLITICS: "BLEEDING KANSAS" AND THE COMING OF THE CIVIL WAR 224–25, 226 (1969).

[410] *See id.* at 224–25.

[411] *See* Mark Lawrence, *Supreme Court Nominees Rejected by the Senate*, WASH. POST (Sept. 15, 1987), https://www.washingtonpost.com/archive/politics/1987/09/15/supreme-court-nominees-rejected-by-the-senate/28abe505-180f-423d-a774-adfb861ef2e0/.

[412] *See id.*

His close ties to Buchanan certainly did not help him in the North, either, as Buchanan had worn out his welcome with many northerners by this time.[413]

Yet certain media outlets and political leaders publicly focused on another issue: the question of whether it made any sense for a lame duck President to nominate a Supreme Court Justice with the inauguration of the new President-elect just weeks away.[414] Based on this rationale, widely respected northern newspaper editor Horace Greely called Buchanan's move "a flight of insolence" and proclaimed that he would oppose any nomination from the soon-to-be-departed President even if the nominee "possessed all the virtues of Marshall and Story together."[415] Other Republican newspapers joined Greeley in this call to turn down Black and allow the new incoming President to select a nominee of his own.[416]

As with Clifford's nomination, the vote was close.[417] This time, however, the vote did not turn out in favor of Buchanan's nominee.[418] The Senate rejected Black by a vote of 26-25.[419] The key difference between Clifford's victory and Black's defeat was surprisingly simple: by the time the Senate considered Black's nomination, some Democratic Party senators from southern states had resigned to join the Confederacy.[420] If these senators were still in office, all of them likely would have voted for Black, ensuring his confirmation.[421] Furthermore, many northern Democrats, upset that Black had openly opposed Douglas in the 1860 presidential election, refused to vote in Black's favor.[422] As for the Republican members of the Senate, finding an easy way to reserve this Supreme Court nomination for the incoming President from their party was an obvious choice.[423]

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413 *See, e.g.*, BAKER, *supra* note 363, at 104, 106, 107, 112.

414 *See* ABRAHAM, *supra* note 40, at 114–15.

415 Frank, *supra* note 369, at 178 n.18; *see* Swindler, *supra* note 39, at 539.

416 *See, e.g.*, ABRAHAM, *supra* note 40, at 114–15.

417 *See Supreme Court Nominations, supra* note 17.

418 *See* OXFORD COMPANION, *supra* note 131, at 88.

419 *See* Frank, *supra* note 369, at 178.

420 *See* ABRAHAM, *supra* note 40, at 114–15.

421 *See* YALE BIOGRAPHICAL DICTIONARY, *supra* note 377, at 52 (attributing the defeat of Black's nomination primarily to the absence of these southern senators).

422 *See, e.g.*, ABRAHAM, *supra* note 40, at 114; *see also* Jeffrey K. Tulis, *The Appointment Power: Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE. W. RES. L. REV. 1331, 1350–51 (1997) (describing the peculiarity of the coalition that formed to block Black's nomination: Northern Republicans and Douglas Democrats).

423 *See* ABRAHAM, *supra* note 40, at 114–15; Frank, *supra* note 369, at 178.

Years in public service had left Black virtually penniless.[424] He returned to York, Pennsylvania, and rebuilt his career as a country lawyer, working without an office or any clerical help.[425] In the end, he formed a tremendous reputation arguing before the very Court to which he could not receive confirmation, appearing in such cases as the famous Reconstruction matter of *Ex parte McCardle*;[426] the legendary patent law case of *Rubber Co. v. Goodyear*;[427] and the leading Fourteenth Amendment *Slaughter-House Cases*.[428] The Court's opinion in the last of these cases came from the pen of Justice Samuel Freeman Miller—the man whom Abraham Lincoln successfully nominated for the Supreme Court seat that Black had once hoped to fill.[429]

F. Ebenezer Hoar

The turmoil of the Civil War did not immediately end when Robert E. Lee surrendered to Ulysses S. Grant at the Appomattox Courthouse.[430] In many ways, the worst was yet to come. The Union was reunited in name only.[431] The federal government now needed to do what the military could not accomplish: determine how to politically handle these states that had separated from and taken up arms against the nation of which they were now once again a part.[432] The years of making these unprecedented determinations, a period known as "Reconstruction," became a kind of cold war throughout the country, with northerners now also fighting other northerners and southerners now also feuding with southerners about what should be done.[433]

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[424] *See* Buchanan, *supra* note 392, at 36.

[425] *See id.* at 36, 37.

[426] *Ex parte* McCardle, 74 U.S. 506 (1869); *see* Buchanan, *supra* note 392, at 36.

[427] Rubber Co. v. Goodyear, 76 U.S. 788 (1869); *see* Buchanan, *supra* note 392, at 36.

[428] Slaughter-House Cases, 83 U.S. 36 (1873); *see* Buchanan, *supra* note 392, at 36–37.

[429] *See* Slaughter-House Cases, 83 U.S. at 57; *Supreme Court Nominations*, *supra* note 17.

[430] *See, e.g.*, RECONSTRUCTION: PEOPLE AND PERSPECTIVES 51 (James M. Campbell et al. eds., 2008). One leading early twentieth century historian, Walter L. Fleming, even referred to the turmoil immediately after the Civil War as "The Sequel of Appomattox." Walter Lynwood Fleming, THE SEQUEL OF APPOMATTOX: A CHRONICLE OF THE REUNION OF THE STATES 1 (1919). This tumultuous environment extended to the United States Supreme Court, which was forced to grapple with multiple unprecedented constitutional issues, including the enactment of three powerful new constitutional amendments, during the Reconstruction Era. *See* OXFORD COMPANION, *supra* note 131, at 827–28 (describing cases and struggles that the Supreme Court faced during the Reconstruction Era).

[431] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 33–34 (Henry Steele Commager & Richard B. Morris eds., 2002).

[432] *See id.* at 17–18.

[433] *See id.* at 17–18, 33–34.

Against this backdrop, Andrew Johnson rose to the presidency after Lincoln's assassination, presiding over a country that now seemed more divided than ever before.[434] Presented with the herculean task of trying to reconcile these warring factions, he became unpopular enough that members of Congress launched an impeachment attempt against him that nearly succeeded.[435] The Republican Party had split into two groups over the issues surrounding Reconstruction, and neither approved of Johnson's policies.[436] The "Radical Republicans" demanded harsh justice for former Confederate leaders and full citizenship and suffrage rights for African-Americans.[437] More "moderate" Republicans were less concerned about African-Americans gaining the right to vote, but they did seek citizenship for African-American freedmen and sought to prevent former Confederate leaders from holding political offices.[438] Johnson failed to fully meet any of these demands, vetoing the Civil Rights Act of 1866 on states' rights grounds and allowing ex-Confederates to attain political positions in hopes of establishing a swift reconciliation between the North and the South.[439]

When Grant, the Civil War hero of the North, won the presidential election in 1868, he arrived in office to find that relations between the North and South had not improved, and had in many ways deteriorated, during Johnson's time in office.[440] To avoid conflicts among the various political interests in the legislature, Grant refused to consult with the Senate about his Cabinet positions, making his selections in secret and then submitting a list to the Senate for confirmation.[441] Many of these Cabinet appointees were Grant's personal friends, picked for their

[434] *See* HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 38 (2007) (describing Grant's accurate observation that Reconstruction had been set back an untold number of years because of Lincoln's assassination); *Andrew Johnson*, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/andrewjohnson (last visited Dec. 5, 2016).

[435] *See* RICHARDSON, *supra* note 434, at 41–42; *see also The Impeachment of Andrew Johnson (1868): President of the United States*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Johnson.htm (last visited Dec. 5, 2016).

[436] *See* RICHARDSON, *supra* note 434, at 50–51.

[437] *See id.*; *see also* FONER, *supra* note 430, at 24 (describing the broad nationalism and strong federal advocacy embraced by Radical Republicans).

[438] *See* PAUL E. TEED & MELISSA LADD TEED, RECONSTRUCTION: A REFERENCE GUIDE 4 (2015).

[439] *See* GLENNA R. SCHROEDER-LEIN & RICHARD ZUCZEK, ANDREW JOHNSON: A BIOGRAPHICAL COMPANION 33 (2001); HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 245, 246 (1989); TEED & TEED, *supra* note 438, at 40, 41–42.

[440] *See, e.g.*, RICHARDSON, *supra* note 434, at 91–93.

[441] *See* JEAN EDWARD SMITH, GRANT 465, 468 (2001).

positions primarily because of Grant's famous loyalty toward his longtime companions.[442]

While the Senate approved Grant's Cabinet appointments, some of these selections angered veteran Republican politicians who believed that their senior status merited one of these influential positions.[443] To make matters worse, a number of Grant's Cabinet members repaid their friend's confidence poorly.[444] Despite Grant's steadfast personal honesty, scandals hammered his Administration, from his Secretary of War's acceptance of bribes in exchange for granting merchants exclusive trading rights at American military bases to his Chief-of-Staff's leadership in an extensive tax fraud scheme.[445]

Yet there was one member of Grant's Cabinet who neither provoked widespread controversies nor perpetrated scandals: Ebenezer Rockwood Hoar, the President's choice for Attorney General.[446] Thus, when the membership of the Supreme Court expanded to nine Justices in 1869, Grant's decision to nominate Hoar for this newly created seat seemed like a safe choice.[447] Republicans dominated the Senate by a count of 62-12,[448] and Hoar had not engaged in the practices of graft and corruption that had tainted so many other individuals within Grant's Administration.[449] On paper, the odds seemed in favor of Hoar obtaining confirmation from the Senate without any problems.[450]

Nominee's Political Party: Republican.[451]

Nominating President's Political Party: Republican.[452]

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[442] *See, e.g., id.* at 468–70.

[443] *See id.* at 469–70.

[444] *See, e.g., id.* at 552, 553–54, 586.

[445] *See* 1 MARY ELLEN SNODGRASS, THE CIVIL WAR ERA AND RECONSTRUCTION: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY 286–87 (2011); Freeman Stevenson, *Top Scandals and Controversies of Each United States President*, DESERET NEWS (May 20, 2013), http://www.deseretnews.com/top/1512/18/Ulysses-S-Grant-Top-scandals-and-controversies-of-each-United-States-president.html.

[446] *See* SMITH, *supra* note 441, at 469 (describing Hoar's merits and noting that Hoar was one of Grant's most respected Cabinet appointments).

[447] *See id.* at 506 ("On December 14, 1869, he sent the name of [Hoar] forward, confident his attorney general would be confirmed."); *see also* Swindler, *supra* note 49, at 539 (discussing the expansion of the Court to nine Justices).

[448] *See* RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2009, at 9 (2009).

[449] *See id.*; Swindler, *supra* note 49, at 539–40.

[450] *See* BETH & PALMER, *supra* note 448, at 9; Swindler, *supra* note 49, at 539–40.

[451] *See* BETH & PALMER, *supra* note 448, at 9; *Hoar, Ebenezer Rockwood*, *(1816-1895)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000653 (last visited Nov. 16, 2016).

[452] *See* BETH & PALMER, *supra* note 448, at 9; *Ulysses S. Grant (1822-1885)*, MILLER CTR., http://millercenter.org/president/grant (last visited Nov. 16, 2016).

Majority Party in Senate: Republican.[453]

Majority Political Party on United States Supreme Court: Democratic.[454] Chief Justice Salmon Chase, a former Republican, had switched his allegiance to the Democrats in 1868.[455] Stephen Field, Nathan Clifford, Samuel Nelson, and Robert Grier—who by this point was in poor health and about to retire—comprised the rest of the Court's Democratic wing.[456] Republicans on this Court were David Davis and Noah Swayne.[457]

Predecessor's Political Party: Not applicable.[458]

Number of Years between Nomination Year and Next Presidential Election: Slightly fewer than three years.[459]

Nominee's Prior Legal Record: Born into a wealthy New England Puritan family, Hoar spent a few years teaching in Pennsylvania before returning to New England and studying law at Harvard.[460] In 1849, he became a judge on the Court of Common Pleas in Massachusetts, a position that he maintained until deciding to re-enter the private practice of law six years later.[461] While serving in this role, he gained particular attention for his opinions regarding the federal Fugitive Slave Act, a statute that he refused to charge juries to ignore despite his adamant beliefs that this law was

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[453] *See* BETH & PALMER, *supra* note 448, at 9.

[454] *See Compare Supreme Court Justices*, *supra* note 234 (noting that the Justices were: Chief Justice Salmon Portland Chase, 1864-1873, Republican; Justice Stephen Johnson Field, 1863-1897, Democrat; Justice Samuel Nelson, 1845-1872, Democrat; Justice Robert Cooper Grier, 1846-1870, Democrat; Justice Nathan Clifford, 1857-1881, Democrat; Justice Noah Haynes Swayne, 1862-1881, Republican; Justice Samuel Freeman Miller, 1862-1890, Republican; Justice David Davis, 1862-1877, Republican); *Salmon P. Chase*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Salmon-P-Chase (last visited Nov. 27, 2016) ("[I]n 1868, during [Salmon Chase's] chief justiceship, he sought the Democratic nomination [for President of the United States] as an opponent of the Radical Republicans' program of reconstructing the defeated [s]outhern states.").

[455] *See Salmon P. Chase, supra* note 454.

[456] *See Compare Supreme Court Justices*, *supra* note 234.

[457] *See id*.

[458] *See The Supreme Court of the United States and the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/courts_supreme.html (last visited Nov. 28, 2016) ("The number of sitting [J]ustices fell to eight before an act of 1869 provided for nine Justices, one for each of the judicial circuits established in 1866.").

[459] *See Ebenezer Rockwood Hoar*, FREE LEGAL ENCYCLOPEDIA, http://law.jrank.org/pages/7372/Hoar-Ebenezer-Rockwood.html (last visited Nov. 27, 2016) ("Hoar's formal nomination in December 1869 drew expected opposition from the Senate."); Richard Pallardy, *United States Presidential Election of 1872*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-1872 (last visited Nov. 27, 2016) ("[The] American presidential election [was] held November 5, 1872.").

[460] *See* MOORFIELD STOREY & EDWARD W. EMERSON, EBENEZER ROCKWOOD HOAR: A MEMOIR 8, 26–27 (1911); *Attorney General: Ebenezer Rockwood Hoar*, DEP'T JUST., https://www.justice.gov/ag/bio/hoar-ebenezer-rockwood (last visited Jan. 20, 2017).

[461] *See* OXFORD COMPANION, *supra* note 131, at 465.

unconstitutional.[462] "It has been said sometimes, and in some places, that there are laws which it is the duty of citizens to disobey or resist," he declared to one assembled jury after admitting his personal distaste for this law.[463] "But, gentlemen, it is not a question of private conscience, which determines our duties in the premises. A man whose private conscience leads him to disobey a law recognized by the community must take the consequences of that disobedience."[464]

In 1859, Hoar became an associate justice of the Massachusetts Supreme Court.[465] For the next decade, he carved out a reputation as an unremarkable but consistently high-quality member of that bench.[466] Frederic Greenhalge, the Governor of Massachusetts during Hoar's time on the bench, summed up Hoar's judicial contributions by stating: "His judgments were independent; they had about them virility, freshness and power. There was not a drop of sluggish blood in his veins . . . . He respected precedent, but he did not permit precedent to play the part of tyrant."[467]

Nominee's Prior Political Record: Before he ever heard a case on a Massachusetts court's bench, Hoar became a noted public figure throughout the state due to his fervent opposition to slavery.[468] A member of the Whig Party, he repeatedly designated himself as a "Conscience Whig," thus clearly distinguishing himself from the pro-slavery "Cotton Whigs" who were widespread in the southern states.[469] In 1846, he was elected to the Massachusetts State Senate, where he became one of the state legislature's leading voices regarding the anti-slavery movement.[470] Even after leaving this political office, he remained a staunch advocate for this cause, helping form the anti-slavery Free Soil Party and then the Republican Party in Massachusetts after the Whigs dissolved.[471]

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462 *See* STOREY & EMERSON, *supra* note 460, at 83–84.

463 *Id.* at 85.

464 *Id.*

465 *See* OXFORD COMPANION, *supra* note 131, at 465.

466 *See* STOREY & EMERSON, *supra* note 460, at 119–20.

467 *Id.* at 124.

468 *See id.* at 43–44.

469 *See id*. Hoar remained a Whig until that party disbanded, at which point he identified himself with the Republican Party for the remainder of his career. *See Ebenezer R. Hoar (1869-1870)—Attorney General*, MILLER CTR., http://millercenter.org/president/essays/hoar-1869-attorney-general (last visited Jan. 17, 2017).

470 *See Ebenezer Rockwood Hoar*, *supra* note 459; *see also Ebenezer R. Hoar, U.S. Attorney General*, GENI, https://www.geni.com/people/Ebenezer-R-Hoar-U-S-Attorney-General/6000000011060386776 (last visited Nov. 28, 2016) (discussing Hoar's role on the Massachusetts State Senate).

471 *See, e.g.*, STOREY & EMERSON, *supra* note 460, at 39–40, 43–45.

Prior to asking Hoar to become his Attorney General, Grant's meetings with the judge from Massachusetts were few and far between.[472] The appointment occurred through a rather circuitous route. After taking office, Grant offered the position of Secretary of the Interior to George S. Boutwell, the former Governor of Massachusetts.[473] Boutwell declined the appointment, but recommended that Grant select an Attorney General from Boutwell's home state.[474] "[A]nother eminent Massachusetts man who was not in Congress" suggested a jurist in whom Grant had no interest, and then mentioned Hoar's name.[475] Apparently remembering a pleasant dinner party conversation with Hoar, Grant agreed to consider him.[476] Evidently, he found Hoar's credentials satisfactory, as the President quickly added Hoar to his list of Cabinet appointees.[477]

As Grant had never held any political office prior to the presidency, Hoar soon became one of the President's key political advisors as well as his chief legal advisor.[478] Almost immediately, Hoar's abilities in both realms received a substantial test. Alexander T. Stewart, Grant's pick for Secretary of the Treasury, owned one of the nation's most prosperous retail businesses.[479] A law enacted in 1789 forbade anyone "concerned or interested in carrying on the business of trade or commerce" from leading the Treasury Department.[480] When members of the Senate objected to Stewart's appointment, Grant asked Hoar to provide his opinion on the issue.[481] Stewart proposed a compromise: he would renounce his title to any private commercial interests for the duration of his tenure as Secretary of the Treasury.[482] Hoar, however, stated that

[472] *See id.* at 163.

[473] *See id.*

[474] *See id.*

[475] *See id.*

[476] *See id.*

[477] *See id.*

[478] *See* SMITH, *supra* note 441, at 469; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalism without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 157–59 (2014).

[479] *See* SMITH, *supra* note 441, at 468.

[480] *Id.* at 470.

[481] *See id.* 469 ("As the principle legal advisor to the [P]resident, [Grant would have consulted with Hoar]."). The Senate's objection on statutory grounds arose likely because of the "feelings ruffled" of the senators who disagreed with Grant's independence and secrecy in selecting his Cabinet, and not because the objecting senators were concerned about the proper application of this old law. *See id.* at 470. Chief among the senators raising this issue was New Yorker Roscoe Conkling, whom Chester Arthur would later nominate to the Court. *See id.*; *Supreme Court Nominations*, *supra* note 17.

[482] *See* STOREY & EMERSON, *supra* note 460, at 166.

such a move was impractical, as the taint of a conflict of interest based on Stewart's prior private commercial dealings still remained.[483] Based on Hoar's stance on this issue, Stewart stepped down from this post within a few days.[484]

Controversial Topics On Which Nominee Held Publicized Stance: Without a doubt, Hoar's anti-slavery stance was controversial, particularly when viewed on a national scale.[485] His decades-old legacy as an anti-slavery reformer, however, apparently did not cause any significant objections to his nomination to the Supreme Court.[486]

More controversial than slavery were Hoar's positions regarding Andrew Johnson.[487] Hoar had publicly defended Johnson during his impeachment proceedings, stating that the President had not engaged in the level of "high [c]rimes and [m]isdemeanors" that warranted removal from office.[488] Johnson's many enemies, particularly the Radical Republicans who remained in Congress, neither forgot nor forgave Hoar's views on this issue.[489]

Hoar's most notable disputes, however, arose from his commitment to obstructing widespread political patronage, particularly in the judicial system.[490] A man known for "clinging to virtue as though it was a peculiar possession,"[491] Hoar found the horse trading of political favors extraordinarily distasteful.[492] When Congress passed a law in 1869 that established several new Circuit Court judgeships and assigned the President the responsibility of filling these positions, Hoar saw this opportunity as a personal

[483] *See id.*

[484] *See id.*

[485] *See, e.g.*, *id.* at 39–40, 43–45, 110–14, 117 (providing a thorough review of Hoar's outspoken and uncompromising stance on slavery).

[486] *See id.* at 197–98. None of the sources consulted for this article mentioned anything about Hoar's anti-slavery positions causing any problems in the political or public debates about whether to confirm him to the Court. *See, e.g., Ebenezer Rockwood Hoar*, *supra* note 459.

[487] *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RL31171, SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789-AUGUST 2010, at 8 (2010).

[488] *See* U.S. CONST. art. II, § 4; *see generally* JEFFEREY TRENT MCGILL, WHITE DARKNESS: THE FINANCIAL APOCALYPSE 227 (2005) (stating Hoar's opposition to Johnson's impeachment).

[489] *See* ABRAHAM, *supra* note 40, at 126; HOGUE, *supra* note 487, at 8.

[490] Shugerman, *supra* note 478, at 158 ("[Hoar] was famous for fighting relentlessly against patronage appointments and unqualified judicial nominees."); *see* BETH & PALMER, *supra* note 448, at 9; HOGUE, *supra* note 487, at 8; Swindler, *supra* note 39, at 539–40.

[491] Frank, *supra* note 369, at 183 n.35.

[492] *See, e.g.*, BETH & PALMER, *supra* note 448, at 9; HOGUE, *supra* note 487, at 8; Frank, *supra* note 369, at 183 n.35; Shugerman, *supra* note 478, at 158; Swindler, *supra* note 39, at 539–40.

crusade to prove the triumph of the merit system in the federal government.[493]

Grant asked Hoar to provide him with recommended nominees for each of these new judicial seats.[494] Hoar fulfilled this obligation without asking any of the senators from either party about political debts that needed to be discharged, a practice that first surprised and then angered the legislators.[495] "Nearly every senator had a candidate of his own for the Circuit Court," wrote two of Hoar's biographers, "but in almost every instance the President took the Attorney-General's advice."[496]

Without a doubt, Hoar's recommendations irritated many members of the Senate.[497] Some accounts, however, point out that the righteous manner in which Hoar conducted this merit-based process contributed to his sudden unpopularity in Washington.[498] "He had the plain speech and trying sincerity of latitude [forty-two degrees north] . . . in an extreme degree," note Hoar's biographers, "and it proved hard to bear at Washington."[499] Charles Francis Adams, a distant relative who knew Hoar well, took his description of the nominee's challenges in dealing with Washington politicians a step further:

> A slight difference in his composition—in the balance, so to speak, of his make-up—would have wholly changed the result, bringing to the front the more repellant as well as familiar attributes of those of whom he was a type. A man of intense, deep-rooted convictions—religious, political, social; of strong family and local, almost clan, feelings; seeing things most clearly from his own point of view, and not devoid of prejudices, . . . Judge Hoar was saved from that

493 *See* BETH & PALMER, *supra* note 448, at 9.

494 *See id.*

495 *See id.*; Frank, *supra* note 369, at 184.

496 STOREY & EMERSON, *supra* note 460, at 182.

497 *See, e.g.*, ABRAHAM, *supra* note 40, at 126; HOGUE, *supra* note 487, at 8 ("[While serving as Attorney General], Hoar had alienated [s]enators by recommending to Grant nominees for circuit judge without regard for the [s]enators' preferences."); OXFORD COMPANION, *supra* note 131, at 465–66 ("His high professional standards, refusal to play party politics, and advocacy of a civil service system lost for the nation a Justice of uncompromising integrity."); Shugerman, *supra* note 478, at 158 ("Attorney General Hoar carefully vetted all judicial nominations with high standards, and he rejected many of the senators' preferred candidates. His contemporaries remarked that he . . . was an 'unforgiving foe of sham, trickery, and injustice,' that he was 'absolutely uncompromising' with his enemies, and that he had opposed patronage with an 'unaccommodating . . . temperament.'").

498 *See* BETH & PALMER, *supra* note 448, at 9; Frank, *supra* note 369, at 184 ("[H]is manner was brusque and in advising Grant . . . he had been less than cooperative with the Senate spoilsmen.").

499 STOREY & EMERSON, *supra* note 460, at 182.

> Puritan sourness of disposition so often noticed, by a sense of humor and a spirit of kindliness. . . .[500]

Public Sentiment Regarding Nominee: Grant's nomination of Hoar received widespread approval from the press.[501] In Hoar, they saw a man whose honesty and apparent commitment to merit-based governance illustrated the qualities that they wanted in a Supreme Court Justice.[502]

Several politicians, however, expressed far different opinions. The Radical Republicans in the Senate formed a coalition against Hoar, making "no effort to conceal the fact that they found Hoar objectionable because he had favored a stronger civil service system."[503] Hoar's support of Johnson during the impeachment proceedings also publicly resurfaced as a keystone of Radical Republican opposition toward his candidacy.[504] Certain legislators added a new ingredient to the equation, questioning whether the new Justice should come from a "reconstructed" southern state rather than from New England.[505]

Yet perhaps no one described the situation better than Simon Cameron, the Pennsylvania senator who several years earlier played such a critical role in destroying Woodward's appointment chances.[506] Cameron asked rhetorically when questioned about Hoar's nomination: "What could you expect for a man who had snubbed seventy [s]enators?"[507] Cameron's prediction was correct. The Senate rejected Hoar by a vote of 33-24, led primarily by the Radical Republicans.[508] Shortly thereafter, Grant offered to re-nominate Hoar to the Court, but Hoar refused, instead recommending William Strong and Joseph Bradley as possible nominees.[509] Ultimately, Bradley was overwhelmingly confirmed to fill the new seat on the Court.[510] In 1870, Hoar resigned from the Cabinet at Grant's request, opening the door for Hoar to return to Pennsylvania and win election to the House of Representatives

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[500] Frank, *supra* note 369, at 183–84 n.35.

[501] *See* HOGUE, *supra* note 487, at 8; SMITH, *supra* note 441, at 469, 506.

[502] *See* HOGUE, *supra* note 487, at 8; SMITH, *supra* note 441, at 469, 506.

[503] Swindler, *supra* note 39, at 539–40.

[504] *See* MCGILL, *supra* note 488, at 227; Swindler, *supra* note 39, at 540.

[505] *See* Swindler, *supra* note 39, at 540.

[506] *See supra* notes 345, 349–52 and accompanying text.

[507] Frank, *supra* note 369, at 183 n.35.

[508] *See* OXFORD COMPANION, *supra* note 131, at 465; Swindler, *supra* note 39, at 539–40.

[509] *See* CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 121 (2010).

[510] *See Supreme Court Nominations*, *supra* note 17. Strong, too, was ultimately confirmed to the Court, selected by Grant to replace Robert Grier. *See id.*

three years later.[511]

G. William Hornblower

In 1884, Grover Cleveland became the first Democratic Party member since the Civil War to be elected to the White House.[512] After serving for four years, he lost the 1888 election to Benjamin Harrison, and then ran again for the presidency successfully in 1892.[513] Within a few months after Cleveland's second inauguration, Justice Samuel Blatchford passed away.[514] Now, the President from New York faced the chance and the challenge of replacing the New York-born Blatchford—who, coincidentally enough, had been appointed by another President from New York, Chester Alan Arthur, to replace prominent New York jurist Ward Hunt on the Court.[515] From the outset, Cleveland faced pressures to appoint somebody from his home state to fill what had become known as the "New York seat" on the Court.[516] Cleveland also had the enviable opportunity to shift the Court's political power balance by replacing Blatchford, a Republican, with someone from Cleveland's own party.[517]

During both of his presidential terms, preserving American business interests played a paramount role in Cleveland's policy interests.[518] His multiple efforts to tighten the nation's fiscal belt included attempting to impose federal regulations on the nation's railroads; refusing to use federal funds to purchase seed grain for Texas farmers plagued by severe droughts; maintaining the Treasury's gold reserve; repeatedly vetoing pensions for Civil War veterans whose disabilities were not connected to military service; and deploying the United States military to break up a railroad

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[511] *See* H. W. BRANDS, THE MAN WHO SAVED THE UNION: ULYSSES GRANT IN WAR AND PEACE 459 (2013) ("[Grant] removed Ebenezer Hoar from the cabinet to placate senators the attorney general had crossed."); OXFORD COMPANION, *supra* note 131, at 466.

[512] *See* HENRY F. GRAFF, GROVER CLEVELAND 66 (2002); *Presidential Elections, 1789-2016*, INFOPLEASE, http://www.infoplease.com/ipa/A0781450.html (last visited Jan. 28, 2017).

[513] *See* GRAFF, *supra* note 512, at 94–95, 109; *Presidential Elections, 1789-2016*, *supra* note 512.

[514] *See* OXFORD COMPANION, *supra* note 131, at 91.

[515] *See* ALYN BRODSKY, GROVER CLEVELAND: A STUDY IN CHARACTER 26 (2000); HALL, *supra* note 297, at 191; OXFORD COMPANION, *supra* note 131, at 91–92; *Supreme Court Nominations*, *supra* note 17.

[516] HALL, *supra* note 297, at 191.

[517] *See infra* notes 529–30 and accompanying text.

[518] *See, e.g.*, GRAFF, *supra* note 512, at 112 ("On [Inauguration Day], Cleveland was the honored guest of one hundred New York businessmen who had journeyed to the city on the overnight train to be his escort at the festivities. It was not lost on anyone that this spectacle would be a fitting symbol for the new administration.").

strike in Chicago.[519] This record, coupled with the fact that the United States faced a severe economic depression at the time when Cleveland returned to the White House in 1892, strongly indicates that Cleveland sought a "pro-business" jurist to replace Blatchford on the nation's highest Court.[520]

On September 19, 1893, Cleveland announced his nomination of William Butler Hornblower to become the newest Justice on the Court's bench.[521] Initially, Cleveland's choice was well-received.[522] Hornblower was a New Yorker, a Democrat, and a respected lawyer who had represented big business interests successfully for several years.[523] The Senate, however, ignored Cleveland's nomination of Hornblower completely.[524] Unbowed, Cleveland, still expecting a routine confirmation, renewed Hornblower's nomination on December 5, 1893.[525]

Nominee's Political Party: Democratic.[526]

Nominating President's Political Party: Democratic.[527]

Majority Party in Senate: Democratic.[528]

Majority Political Party on United States Supreme Court: Republicans held a slim majority, with Justices David Brewer, Henry Brown, Horace Gray, John Marshall Harlan, and George Shiras, Jr.[529] Democrats on this Court were Chief Justice Melville

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[519] *See* BRODSKY, *supra* note 515, at 181, 199, 341–42, 359; Robert Higgs, *Why Grover Cleveland Vetoed the Texas Seed Bill*, INDEP. INST. (July 1, 2003), http://www.independent.org/publications/article.asp?id=1329. Cleveland's reputation as a fiscally conservative executive leader began long before he reached the White House. During his years as the Mayor of the City of Buffalo, Cleveland shocked members of the city council by vetoing multiple small grants to civic organizations and striking down a street cleaning contract on the basis that these measures were all financially irresponsible. *See* BILL WHITE, AMERICA'S FISCAL CONSTITUTION: ITS TRIUMPH AND COLLAPSE 123 (2014). Similarly, as Governor of New York State, Cleveland vetoed a bill that would have lowered city transit fares in New York City because, in his view, such legislation constituted unlawful government interference with municipal contracts. *See id.* at 124.

[520] *See* WHITE, *supra* note 519, at 131–33.

[521] *See Supreme Court Nominations*, *supra* note 17.

[522] *See* Carl A. Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment 1893-94*, 39 TENN. L. REV. 555, 563 (1972) ("The initial response to the announcement of Hornblower's nomination must have pleased the President. The New York City bar united in support of the nominee; reporters who interviewed prominent New Yorkers heard only words of praise for the young lawyer."); *see also* GEYH, *supra* note 150, at 196 (noting that one publication even went so far as declaring that it could not find a single flaw in Hornblower as a prospective Supreme Court Justice).

[523] *See* BRODSKY, *supra* note 515, at 326; OXFORD COMPANION, *supra* note 131, at 475.

[524] *See* Pierce, *supra* note 522, at 564–65.

[525] *Supreme Court Nominations*, *supra* note 17.

[526] *See* Pierce, *supra* note 522, at 560.

[527] *See id.*

[528] *See* GRAFF, *supra* note 512, at 110.

[529] *See Compare Supreme Court Justices*, *supra* note 234.

Fuller, and Justices Howell Jackson and Stephen Field.[530]

Predecessor's Political Party: Republican.[531]

President's Previous Nominations to United States Supreme Court: None during this term in office. Cleveland had successfully nominated two Justices to the Court, Melville Fuller and Lucius Lamar, during his earlier term in the White House before losing to Harrison in 1888.[532]

Number of Years between Nomination Year and Next Presidential Election: Nearly three years.[533]

Nominee's Prior Legal Record: Hornblower was born into a family whose deep roots in law and politics extended all the way back to the Revolutionary War.[534] From an early age, he showed an interest in continuing the family's traditions, graduating with a law degree from Columbia in 1875.[535] After working for thirteen years as a bankruptcy attorney with the firm of Carter & Eaton in New York, Hornblower and two of his friends decided to develop their own practice.[536] The law office of Hornblower, Byrne & Taylor rapidly became one of New York's most influential business law firms, with a client list that included the New York Central Railroad Company, the New York Life Insurance Company, the Otis Elevator Company, and the New York Security and Trust Company.[537]

At the time of his nomination to the Court, Hornblower had never served in a judicial position of any kind, with the exception of some intermittent work as a court-appointed referee in corporate, railroad, and insurance matters.[538] Nevertheless, the forty-two-year-old New Yorker had distinguished himself in the legal realm to which Cleveland attached the greatest importance.[539] For the President, that appeared to be justification enough.

Nominee's Prior Political Record: Hornblower was a lifelong

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530 *See id.*

531 *See id.* Notably, however, Blatchford was a "swing voter" on the Court, an unpredictable centrist similar to the place that Kennedy holds on the Court today. *See* OXFORD COMPANION, *supra* note 131, at 91, 92.

532 *See* HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 511 (8th ed. 2003).

533 *See id.*; Megan W. Benett, *Rufus W. Peckham, Jr.*, HIST. SOC'Y N.Y. CTS., http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/peckham-rufus-jr.html (last visited Nov. 21, 2016).

534 *See* MILO T. BOGARD, THE REDEMPTION OF NEW YORK 381–82 (1902).

535 *See id.* at 382.

536 *See id.*

537 *See* Pierce, *supra* note 522, at 559–60.

538 *See id.* at 560.

539 *See id.* at 559, 560.

Democrat.[540] When the party divided on questions involving commercial enterprises, he consistently sided with Cleveland's positions.[541] Overall, though, Hornblower's actual involvement with political affairs was minimal, even though he knew and associated with many Democratic Party leaders in New York.[542] Prior to receiving the nomination from Cleveland, Hornblower's deepest forays into political matters came in 1890, the year that he joined a commission to propose amendments to New York State's constitution, and 1891, the year that he joined a New York City Bar Association committee that investigated election frauds allegedly perpetrated by Deputy Attorney General Isaac P. Maynard.[543]

Controversial Topics On Which Nominee Held Publicized Stance: For the most part, Hornblower was an uncontroversial and uncomplicated individual.[544] After his nomination, however, one recent contentious act reared its head again: his work on the City Bar's committee that had found Maynard responsible for election fraud.[545] Two years after the committee rendered this finding, Maynard sought a seat on the New York State Court of Appeals.[546] When his political rivals raised the committee's findings as evidence that Maynard was unethical and unfit to serve on the Court of Appeals, Maynard was defeated.[547]

One of Maynard's closest friends was Senator David B. Hill.[548] When Hill learned that Cleveland had nominated a member of the City Bar's committee that had damaged Maynard's career, he was livid.[549] Despite the fact that they belonged to the same party, Hill already disliked Cleveland because of the President's refusal to uniformly support Democratic positions in Washington.[550] Now, this nomination gave him the chance to avenge a perceived slight to a friend and publicly embarrass the President at the same time.[551]

At first, Hill attempted to only delay the nomination, hoping that

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[540] *See* BOGARD, *supra* note 534, at 382; Pierce, *supra* note 522, at 560.

[541] *See* BOGARD, *supra* note 534, at 382.

[542] *See* Pierce, *supra* note 522, at 560 ("Although a Democrat since 1872, [Hornblower] generally limited his public activity to matters concerning the legal profession.").

[543] *See id.*

[544] *See supra* notes 536–43 and accompanying text.

[545] *See* Pierce, *supra* note 522, at 560.

[546] *See id.* at 564.

[547] *See* GEYH, *supra* note 150, at 196; Pierce, *supra* note 522, at 564.

[548] *See The Black Appointment*, PITTSBURGH PRESS, Aug. 19, 1937 (describing Maynard as Hill's protégé).

[549] *See id.*

[550] *See* Pierce, *supra* note 522, at 563, 564.

[551] *See id.* ("[Hill's] defense of Maynard would necessitate an attack on Hornblower; his attack on Hornblower would be an attack on Cleveland.").

Cleveland would become frustrated and nominate somebody else.[552] When this tactic failed and Cleveland re-nominated Hornblower as soon as Congress reconvened, Hill sought to block Hornblower's nomination completely.[553] After a lengthy career that saw him rise from local ward politics in Elmira, New York, to the state Governor's office in Albany, to the United States Senate, establishing and utilizing alliances was a game that Hill knew how to play well.[554]

Public Sentiment Regarding Nominee: At first, public attention toward Cleveland's nominee was almost universally rosy.[555] The *American Law Review* announced: "[N]ot a flaw was found in his character as a lawyer or a citizen."[556] Prominent New York lawyer Frederic R. Coudert, a man whom many pundits speculated would be Cleveland's Supreme Court nominee, told the media: "Mr. Hornblower . . . is an excellent lawyer, an honorable man, and possesses the judicial mind. His appointment will do credit to the President."[557] Other reports, predominantly from Hornblower's home state, described Hornblower in similarly glowing terms.[558] Despite his comparatively young age and lack of judicial experience, most commentators followed the *Washington Post's* opinion that "notoriety is not essential [to become a good Supreme Court Justice]; prominence is not indispensable."[559]

Before long, however, Hill's campaign started hitting its mark. Gradually, he found New York lawyers who were willing to deliver statements against the nominee.[560] One attorney, Melville Day, published a pamphlet at Hill's urging that attacked Hornblower's decision as the referee in a corporate contract matter, pointing out that the New York State Court of Appeals had overruled Hornblower's holding and then claiming that the ruling demonstrated Hornblower's overall incompetence.[561] A former American Bar Association leader wrote a letter alleging:

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[552] *See id.* at 564–65.

[553] *See id.* at 565–66, 567.

[554] *See id* at 566. Adding fuel to the feud was the fact that Cleveland had defeated Hill in the 1892 Democratic presidential primary. *See* Benett, *supra* note 533.

[555] *See* GEYH, *supra* note 150, at 196.

[556] *Id.*

[557] Pierce, *supra* note 522, at 561, 563.

[558] *See id.* at 563.

[559] *Id.*; *see* GEYH, *supra* note 150, at 196; *see also The Black Appointment*, *supra* note 548 ("The nominee, only [forty-two] years of age, was one of the most highly respected members of the New York bar.").

[560] *See* Pierce, *supra* note 522, at 568–70.

[561] *See id.* at 568–69.

"[Hornblower] is neither a broad-minded man, nor does he possess . . . the strong *moral sense* which is so essential to the make[-]up of a good judge."[562] Albert Walker, a Connecticut attorney and one of Hill's friends, declared that Hornblower "is not sufficiently endowed, either by nature, or by learning, for the great work of the Supreme Court."[563]

Others, however, fought back in Hornblower's favor, with the New York City Bar Association even making the unprecedented move of publicly endorsing Hornblower's confirmation.[564] Certain media outlets, realizing that Hornblower had become a political token in a larger fight, thoroughly criticized Hill and his allies. "It is generally understood that the sole ground for rejecting [Hornblower] rests in the desire of the New York senators to 'get even' for the downfall of Maynard and to administer what they think is a rebuke to the [P]resident," stated the *New York Times*.[565] The *New York Advertiser* chastised Hill for voting against Hornblower not because Hornblower was unfit to serve on the Court, but rather "on account of the man who made [the nomination]."[566]

The seesaw battle continued throughout the Judiciary Committee's consideration of Hornblower's qualifications and spilled onto the Senate floor.[567] Finally, after five months of deliberations ended with five hours of politically charged speeches, the Senate voted 30-24 in favor of rejecting Hornblower.[568] Hill had succeeded in obtaining his vengeance against Hornblower for his

[562] *Id.* at 569–70. In this same letter, however, the author acknowledged that Hornblower "was a bright man and an excellent advocate." *Id.* at 569.

[563] *Id.* at 569.

[564] *See id.* at 573.

[565] GEYH, *supra* note 150, at 196.

[566] Pierce, *supra* note 522, at 568.

[567] *See id.* at 572–76. Cleveland defended Hornblower by pointing once again to the lawyer's lengthy dossier of legal successes. In response to the charge that the majority of these triumphs were on behalf of large corporate interests, the President responded by declaring in writing: "[A] man should not be rejected for the place simply because corporations are among his clients, and I hope you will agree with me that in these days of wildness, conservativism and steadiness should not be at a discount." Parry-Giles, *supra* note 98, at 110. Overall, however, Cleveland remained surprisingly detached from the political battles surrounding his nominee. *See, e.g.*, *The Black Appointment*, *supra* note 548 (noting Cleveland's unwillingness to use his office to pressure certain senators into voting for Hornblower's confirmation). According to one historian, Cleveland may have prevailed over Hill by personally recruiting a substantial number of senators who consistently favored protectionist pro-business policies. *See* BRODSKY, *supra* note 515, at 326. At the end of the entire process, however, Hornblower himself noted: "It was characteristic of Mr. Cleveland not only to disdain the arts of conciliation but also to ignore the personal elements in the political world." *Id.* at 326–27.

[568] *See* Pierce, *supra* note 522, at 576.

role in the Maynard affair and Cleveland for breaking ranks with the Democratic Party too often.[569] Upset by this outcome, Cleveland wanted to re-nominate Hornblower, but Hornblower declined, preferring instead to return to his profitable legal practice in New York.[570] The question of who would fill Blatchford's former seat remained an issue that the President would still need to address.

H. Wheeler Peckham

Cleveland prided himself on rarely backing down from a political fight.[571] Thus, he waited only one week after the Senate rejected Hornblower before choosing a new nominee for the Court.[572] In doing so, he fired a shot across the bow at Senator Hill. While waging his war against Hornblower, Hill had expressed his preference for New York State Court of Appeals Judge Rufus W. Peckham.[573] In selecting his new nominee, Cleveland very consciously declined to choose Rufus Peckham.[574] Instead, the President picked Wheeler Hazard Peckham—Judge Rufus Peckham's brother.[575]

Wheeler Peckham possessed certain characteristics that Hornblower had lacked. At the age of sixty, he possessed a deeper body of legal work than Hornblower, a direct counter to the critics who claimed that Hornblower was too young to serve effectively on the Court.[576] He also possessed deeper political ties in New York State, a fact that Cleveland likely hoped would prevent Hill from attacking the new nominee too severely.[577] Within only a couple of

[569] While several newspapers correctly identified Hill as the pivotal figure in the campaign to reject Hornblower, the media's reactions toward this politicking were mixed. The *New York Times* stated that the rejection "[v]indicated" Hill's support for a felonious judge in New York at the expense of a meritorious nominee to the Court. *See id.* at 576. On the other side of the spectrum, the *New York Sun* claimed that Hill's viewpoints were vital to the Senate's consideration of the nominee, as Hornblower was too insignificant for anyone outside of New York State to know anything about him. *See id.*

[570] *See* OXFORD COMPANION, *supra* note 131, at 475. Later, Hornblower was appointed to the New York State Court of Appeals, but poor health forced him to resign only one week after taking his seat on the bench. *Id.*

[571] *See* Pierce, *supra* note 522, at 580–81. He also received support from the "independent" faction in the Senate, a group that at this time was more loyal to Cleveland than his Democratic Party brethren, to resist any temptation to placate Hill's demands. *See* BRODSKY, *supra* note 515, at 327.

[572] *See Supreme Court Nominations*, *supra* note 17.

[573] *See* Pierce, *supra* note 522, at 581.

[574] *See* BRODSKY, *supra* note 515, at 327.

[575] *See id.*

[576] *See* Pierce, *supra* note 522, at 582; *see also* GEYH, *supra* note 150, at 196 (referencing misgivings about Hornblower's youth and thereby inexperience).

[577] *See* Pierce, *supra* note 522, at 582.

weeks after Cleveland nominated Peckham, the Senate put the President's latest maneuver to the test of a vote.[578]

Nominee's Political Party: Democratic.[579]

Nominating President's Political Party: Democratic.[580]

Majority Party in Senate: Democratic.[581]

Majority Party On United States Supreme Court: Republicans held a slim majority, with Justices David Brewer, Henry Brown, Horace Gray, John Marshall Harlan, and George Shiras, Jr.[582] Democrats on this Court were Chief Justice Melville Fuller, and Justices Howell Jackson and Stephen Field.[583]

Predecessor's Political Party: Republican.[584]

President's Previous Nominations to United States Supreme Court: William Hornblower (rejected).[585]

Number of Years between Nomination Year and Presidential Election Year: Slightly more than two years.[586]

Nominee's Prior Legal Record: Wheeler Peckham's father was a prominent lawyer, but it was not until spending a year traveling in Europe after leaving college that Peckham decided to enroll in law school.[587] In 1854, he graduated and began practicing law in Minnesota.[588] Before long, however, he returned to New York State and engaged in the lucrative practice of representing the legal interests of several large railroad corporations as a member of his father's law firm.[589] Peckham's strong reputation in this line of work likely helped improve his standing in Cleveland's eyes, as Cleveland was a noted defender of the corporate interests of the nation's railroads.[590]

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[578] *See Supreme Court Nominations*, *supra* note 17.

[579] *See* Benett, *supra* note 533 (stating that Wheeler Peckham was a member of the Upstate New York faction of Democrats that consistently supported Cleveland's policies against the objections of Democratic Party members from New York City and other "downstate" areas of New York).

[580] *See The First Grover Cleveland Administration: 1885-1889*, AUTHENTIC HIST., http://www.authentichistory.com/1865-1897/3-gilded/4-cleveland1/ (last updated July 21, 2012).

[581] *See Party Division in the Senate*, *supra* note 157.

[582] *See Compare Supreme Court Justices*, *supra* note 234.

[583] *See id.*

[584] *See Grover Cleveland vs Chester A. Arthur—U.S. Presidents Comparison*, INSIDEGOV, http://us-presidents.insidegov.com/compare/5-34/Grover-Cleveland-1st-Term-vs-Chester-A-Arthur (last visited Nov. 28, 2016).

[585] *See Supreme Court Nominations*, *supra* note 17.

[586] *See* Benett, *supra* note 533.

[587] *See* THE NAT'L CYCLOPEDIA OF AM. BIOGRAPHY, A BIOGRAPHICAL SKETCH OF WHEELER HAZARD PECKHAM 3 (1912) [hereinafter BIOGRAPHICAL SKETCH OF WHEELER PECKHAM].

[588] *See id.*

[589] *See id.* at 3–4.

[590] Hornblower, too, had represented large railroads in his practice prior to Cleveland

In the early 1870s, Peckham made an unexpected leap into criminal law.[591] Appointed as a "Special Deputy Attorney General" and a "Special Deputy District Attorney," he led the prosecutorial efforts against New York City Mayor Abraham Oakey Hall.[592] When these efforts proved unsuccessful, Peckham turned his sights to an even bigger prize: William "Boss" Tweed, leader of the Tammany Hall political machine that controlled the patronage appointments in New York City and throughout much of the state.[593] Peckham's dogged pursuit of Tweed and his followers eventually led to multiple convictions that broke up Tammany Hall, one of the most notable victories against political corruption in the state's history.[594]

Buoyed by these successes, Peckham campaigned to become the District Attorney of New York County.[595] Cleveland, at that time the Governor of New York State, appointed Peckham to this post in 1883.[596] Yet Peckham's health failed him, forcing him to resign only a week after taking office.[597] He returned to private practice on Wall Street, seemingly destined to devote the rest of his legal career to representing corporate interests.[598]

In the early 1890s, however, Peckham became the President of the New York City Bar Association.[599] In this role, he quickly engaged in one more key fight against political corruption: the investigation that ultimately found that Deputy Attorney General Isaac P. Maynard had perpetrated election fraud.[600]

Nominee's Prior Political Record: On paper, Peckham was a Democrat.[601] Like Cleveland, however, he was unafraid to break ranks with members of his own party if he believed that the issue at

submitting his name as a nominee to the Court. *See supra* notes 536–38 and accompanying text.

[591] *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 4.

[592] *Id.*; *Wheeler Hazard Peckham*, ALB. L. SCH. HIST., http://www.albanylaw.edu/about/history/Pages/Wheeler-Hazard-Peckham.aspx (last visited Nov. 28, 2016); *see also* MICHAEL RUBBINACCIO, ABRAHAM OAKEY HALL: NEW YORK'S MOST ELEGANT AND CONTROVERSIAL MAYOR 160 (2011) (describing Peckham's indictment of Hall before the grand jury).

[593] *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 4; *Wheeler Hazard Peckham*, *supra* note 592.

[594] *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 4; *Wheeler Hazard Peckham*, *supra* note 592.

[595] *See Wheeler Hazard Peckham*, *supra* note 592.

[596] *See id.*

[597] *See id.*

[598] *See* Benett, *supra* note 533.

[599] *See* Pierce, *supra* note 522, at 582.

[600] *See id.*

[601] *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 5.

hand demanded such a move.[602] His successful legal battles against Tammany Hall convinced him that a movement away from the old political patronage system was both possible and necessary.[603] Among his chief political allies in New York City was Seth Low, one of the city's early leaders of the Progressive Era.[604]

Despite these strong political opinions, however, Peckham spent very little time holding formal political positions.[605] Beyond his extremely brief tenure as District Attorney, and his campaign to bring down "Boss" Tweed, most of Peckham's political work occurred from his own independent initiatives rather than from the obligations of a particular governmental post.[606]

Controversial Topics On Which Nominee Held Publicized Stance: Peckham's efforts in governmental reform were the most contentious aspect of his legal career.[607] For two decades prior to his nomination to the Court, he took no prisoners in attacking the Tammany Hall leaders and other executors of "municipal degradation" in both the courts and the press.[608] At least some of his comments drew the ire of his fellow attorneys.[609] When the Senate debated Peckham's nomination, the President of the New York State Bar Association opposed him on the grounds that "Peckham often expressed his political and professional opinions in language that offended and antagonized those persons who were the object of his criticism."[610] One object of such language was Senator

602 *See, e.g.*, Benett, *supra* note 533 (discussing Peckham's political battles on Cleveland's behalf with Democrats from the "downstate" regions of New York); Swindler, *supra* note 39, at 541 ("But with [Peckham's] high professional competence went a political independence that both [Hill and fellow New York Senator Edward Murphy, who had joined with Hill in opposing Hornblower] found obnoxious, especially when coupled with their antipathy for Cleveland.").

603 *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 5.

604 *See id.*

605 *See* Pierce, *supra* note 522, at 582, 583.

606 *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 5–6; Benett, *supra* note 533; Swindler, *supra* note 39, at 541.

607 *See* Swindler, *supra* note 39, at 541; *see, e.g.*, Pierce, *supra* note 522, at 582.

608 *See* BIOGRAPHICAL SKETCH OF WHEELER PECKHAM, *supra* note 587, at 5, 7. Peckham even hosted a widely attended dinner featuring lectures on the subject of "municipal degradation," an event that included a speech by Mark Twain and called for the removal of several New York City officeholders. *See Talk at City Club Dinner: Members Criticised for Indifference—Mark Twain and Other Notable Speakers Heard*, N.Y. TIMES (Jan. 5, 1901), http://query.nytimes.com/mem/archive-free/pdf?res=9C05E6DD1330E132A25756C0A9679C946097D6CF. Serving as the program's master of ceremonies, Peckham called on city leaders to "organize a power that will overcome present conditions and put in office men who are capable and aggressively so. Vice, that has awakened such an outburst of public opinion, is but one of the things that must go." *Id.*

609 *See* Pierce, *supra* note 522, at 582, 583, 584, 585–86.

610 *Id.* at 585–86.

Hill.[611] After the Senate rejected Hornblower, Peckham told members of the media: "[S]uch things were to be expected when a reptile like Hill wallows in the dirty politics of the day."[612]

Just like Hornblower, however, Peckham's most controversial move proved to be his role on the City Bar Association's committee that exposed Maynard's fraudulent behavior.[613] Yet while Hornblower was simply one member of this group, Peckham was the man who organized the entire committee.[614] Furthermore, when Maynard campaigned for a seat on the New York State Court of Appeals in 1893, Peckham had spearheaded the opposition movement against Maynard's candidacy.[615] Thus, while Hornblower had played a key supporting role in the proceedings that had so greatly infuriated Hill, Peckham was the principal antagonist to Hill's positions in the entire matter.[616] Once again, Hill sought revenge.[617]

Public Sentiment Regarding Nominee: Most of the media attention following Peckham's nomination focused on the fight between Cleveland and Hill rather than on the nominee himself.[618] *The Nation*, a pro-Cleveland publication, declared that the conflict represented "a fight for good government, for good judges, good laws, for political purity, and the fair fame of the American people."[619] Newspapers opposing the President's administration carried statements similar to the remarks of the *Baltimore American*: "What shall be said of the President . . . who nominates men for the highest judicial office on earth chiefly for their personal hostility to Hill, the small politician?"[620]

Yet that "small politician" once again proved to be an effective coalition builder. As he had done during the struggle over Hornblower's nomination, Hill steadily gathered supporters in the battle against Peckham.[621] He had attacked Hornblower for being

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611 *See id.* at 582.

612 *Id.* Peckham went on to declare: "[W]e can get no decent politics until that man Hill is made an end of." *Id.*

613 *See* BRODSKY, *supra* note 515, at 327; Pierce, *supra* note 522, at 582.

614 *See* BRODSKY, *supra* note 515, at 327.

615 *See* Pierce, *supra* note 522, at 582. Additionally, Peckham had opposed Hill during Hill's gubernatorial campaign, breaking partisan ranks to support Hill's Republican opponent, Warner Miller. *Id.* He also "campaigned vigorously" against Hill's ultimately successful bid for the United States Senate. *See* BRODSKY, *supra* note 515, at 327.

616 *See* BRODSKY, *supra* note 515, at 327; Pierce, *supra* note 522, at 582.

617 *See* Pierce, *supra* note 522, at 583.

618 *See id.* at 583–85.

619 *Id.* at 582–83.

620 *Id.* at 584.

621 *See id.* at 585–87. If Cleveland believed that nominating Peckham to the Court would

too young; now, he criticized Peckham for being too old.[622] He highlighted the fact that Peckham's poor health forced his resignation from the District Attorney's position in New York City and questioned whether Peckham had the stamina to serve on the Court.[623] He pointed out occasions when Peckham had refused to follow mainstream Democratic Party stances on key issues and questioned Peckham's loyalty to the party.[624] He repeated some of Peckham's strongly worded attacks on the machine politicians and expressed doubts about whether the nominee possessed a true "judicial temperament."[625]

For the second time in two months, Hill's campaign proved successful.[626] The Senate rejected Peckham by a vote of 41-32.[627] Sixteen of the senators who voted against Peckham's appointment were Democrats, a blatant demonstration of the divisions within the President's party.[628] Peckham returned to his work of corporate law and municipal political reform in New York City, never to seek a judicial post again.[629] Cleveland abandoned his efforts to preserve the "New York seat" on the Court and nominated Edward Douglas

embarrass Hill into grudgingly accepting the nominee, the President had gravely miscalculated. *See* BRODSKY, *supra* note 515, at 327 ("If Cleveland thought he could shame Hill into backing down, he was carrying naiveté to Himalayan heights.").

[622] *See* GEYH, *supra* note 150, at 196; Pierce, *supra* note 522, at 586.

[623] *See* Pierce, *supra* note 522, at 586.

[624] *See id.* at 588–89. Hill's campaign on this topic convinced the *Rochester Union and Advertiser* to claim that Peckham was "just as much a Democrat, no more and no less, in the ranks of the Democratic Party . . . as Lucifer is an angel in heaven." *Id.* at 588. Unlike his stance during deliberations over Hornblower's nomination, Cleveland proved far more willing to shepherd his latest nominee through the Senate. *See* BRODSKY, *supra* note 515, at 326–27; Pierce, *supra* note 522, at 598–99. At first, the President allowed this task to fall to a cadre of Democrats who had remained loyal to the President's Administration: George Gray, William Lindsay, and William F. Vilas. *See* Pierce, *supra* note 522, at 591. Collectively, they secured nine statements contradicting Hill's attacks, including a letter from former New York City Mayor William F. Grace praising Peckham and his family for their "unvarying fidelity and constancy to the Democratic principles and to the Democratic [P]arty." *Id.* Later, he tried to appease certain Democratic senators who had grown hostile to his Administration by granting key political appointments for them and for their friends, and even withdrawing planned appointments for their rivals. *See id.* at 599–601.

[625] BRODSKY, *supra* note 515, at 327; Pierce, *supra* note 522, at 583.

[626] *See* Pierce, *supra* note 522, at 603.

[627] *See id.* at 602.

[628] *See id.* at 603. To a large extent, the rejection—and, in particular, the Democratic Party votes against Peckham—represented an indictment against Cleveland rather than a denouncement of Peckham or an even affirmation of Hill. *See, e.g.*, BRODSKY, *supra* note 515, at 328 ("Few of [the Democrats from the southern and western states] had any use for Hill; like the Republicans, they just wanted to stick it to the President."); Pierce, *supra* note 522, at 603 ("Many [s]enators, however, could not separate Wheeler H. Peckham from the President who nominated him. . . . It was eminently clear that Cleveland had seriously ruptured the Democratic Party.").

[629] *See* OXFORD COMPANION, *supra* note 131, at 727.

White of Louisiana to fill Blatchford's vacancy.[630] White was confirmed easily.[631] The following year, another Court vacancy arose.[632] Cleveland successfully nominated Rufus Peckham—Wheeler Peckham's brother whose Court appointment Hill had desired years earlier.[633]

I. John Parker

On Inauguration Day in 1929, incoming President Herbert Hoover vowed that his Administration would ensure the "[r]eform, reorganization, and strengthening of our whole judicial and enforcement system."[634] He insisted that raising the caliber of judges in the federal judiciary would be one of his top priorities.[635] By the end of Hoover's presidency, his failures in the eyes of the public to respond effectively to the most severe economic depression in history would vastly overshadow any other issues during his time in Washington, including judicial appointments.[636] At the end of Hoover's first year in office, however, the devastating impact of the stock market crash on October 29, 1929, still had not been fully felt.[637] Therefore, instead of concentrating exclusively on financial issues, many of the nation's headlines instead focused heavily on the President's handling of the Supreme Court.[638]

On February 13, 1930, Hoover faced a staunch challenge by "progressives" in Congress who opposed his nomination of Charles Evans Hughes as the Court's new Chief Justice.[639] Hughes had

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[630] *See* Paul R. Baier, *Edward Douglas White: Frame for a Portrait*, 43 LA. L. REV. 1001, 1004 (1983).

[631] *See id.*

[632] *See Supreme Court Nominations*, *supra* note 17.

[633] *See* OXFORD COMPANION, *supra* note 131, at 725–26; Pierce, *supra* note 522, at 581–82.

[634] HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933, at 267 (1952).

[635] *See id.* at 268.

[636] *See, e.g.*, RICHARD NORTON SMITH, AN UNCOMMON MAN: THE TRIUMPH OF HERBERT HOOVER 103–31 (1984).

[637] *See Herbert Hoover: Domestic Affairs*, UVA MILLER CENTER, http://millercenter.org/president/biography/hoover-domestic-affairs (last visited Mar. 8, 2017) ("[T]he fundamental business of the country, that is production and distribution, is on a sound and prosperous basis.").

[638] *See id.*; *see also* Jeff Greenfield, *The Supreme Court's Coming Paralysis*, DAILY BEAST (July 22, 2014), http://www.thedailybeast.com/articles/2014/07/22/the-supreme-court-s-coming-paralysis.html (noting that while the Great Depression was deepening when Hoover nominated Parker, the fight in the Senate regarding his nomination focused on civil rights issues and labor issues that were not necessarily directly linked to the stock market crash).

[639] *See* TREVOR PARRY-GILES, THE CHARACTER OF JUSTICE: RHETORIC, LAW AND POLITICS IN THE SUPREME COURT CONFIRMATION PROCESS 54 (2006); Richard D. Friedman, *Charles Evans Hughes*, *in* YALE BIOGRAPHICAL DICTIONARY, *supra* note 377.

been handpicked by his predecessor, William Howard Taft, who despite failing health allegedly refused to resign from the Chief Justice's seat until Hoover promised that he would select Hughes to replace him.[640] Like Taft, Hughes carried the reputation of a staunch pro-business conservative.[641] A coalition on both sides of the political aisle rose up to oppose him, arguing that Hughes would damage the nation by voting to "protect 'property rights' above 'human rights.'"[642] Ultimately, the Senate confirmed Hughes by a 52-26 vote.[643] The signals from this battle, however, were clear: an unexpected number of both Republicans and Democrats had grown weary with the Court's old ways of protecting American business interests at all costs.[644]

Less than a month after Hughes's confirmation, Justice Edward Terry Sanford died unexpectedly.[645] Immediately, questions logically emerged about whether the conflicts surrounding Hughes's confirmation would impact the President's new choice.[646] Yet Hoover seemed to pay little attention to the concerns raised by "progressives" from either party.[647] Instead, in nominating John Johnston Parker to fill Sanford's seat, Hoover seemed more concerned about geopolitics.[648] Like Sanford, Parker was a southerner.[649] Since Hoover's presidential victory included surprising wins in several southern states, the President likely wanted to continue currying favor with the South, especially since the industrial North was already growing impatient with Hoover's lack of governmental action following the stock market crash.[650]

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[640] *See* THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 77 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

[641] *See* Friedman, *supra* note 639, at 279.

[642] MALTESE, *supra* note 328, at 21.

[643] *See* Friedman, *supra* note 639, at 279.

[644] *See* PARRY-GILES, *supra* note 639, at 53–54; MALTESE, *supra* note 328, at 21.

[645] *See* THE SUPREME COURT IN CONFERENCE, *supra* note 640, at 77; Richard L. Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213, 213 (1963).

[646] *See, e.g.*, Peter G. Fish, *Perspectives on the Selection of Federal Judges Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts, and the Politics of Presidential Vengeance in Retrospect*, 77 KY. L.J. 545, 550 (1989) (discussing whether Hoover's chosen nominee would alter the Court's pro-business voting record).

[647] *See* HOOVER, *supra* note 634, at 268–69.

[648] *See* HOOVER, *supra* note 634, at 268; Fish, *supra* note 646, at 549–50; Watson, Jr., *supra* note 645, at 213.

[649] *See* OXFORD COMPANION, *supra* note 131, at 817.

[650] *See* George F. Garcia, *Black Disaffection from the Republican Party During the Presidency of Herbert Hoover, 1928-1932*, 45 ANNALS OF IOWA 462, 465–66 (1980) ("In [the 1928 election], Herbert Hoover became the first Republican [P]resident since Reconstruction to break the Solid South."); *Herbert Hoover: Domestic Affairs*, *supra* note 637.

In Parker, Hoover had nominated a southerner, a loyal Republican, and a man who possessed a resume of legal accomplishments that outclassed the vast majority of jurists in the nation.[651] With the following factors in mind, Hoover anticipated a swift confirmation.[652]

Nominee's Political Party: Republican.[653]

Nominating President's Political Party: Republican.[654]

Majority Party in Senate: Republican.[655]

Majority Political Party on United States Supreme Court: Republican.[656] The only Democrats on the Court at this time were Justices Pierce Butler and James McReynolds.[657] Chief Justice Hughes was a Republican, as were Justices Harlan Stone, George Sutherland, Louis Brandeis, Willis Van Devanter, and Oliver Wendell Holmes.[658]

Predecessor's Political Party: Republican.[659]

President's Previous Nominations to United States Supreme Court: Charles Evans Hughes (confirmed after a difficult confirmation battle within the Senate).[660]

Number of Years between Nomination Year and Next Presidential Election: Approximately two years.[661]

Nominee's Prior Legal Record: As a student at the University of North Carolina, Parker amassed one of the most remarkable academic records in the school's history.[662] Without politically connected friends, however, he initially struggled to establish himself as a lawyer.[663] Yet his extraordinary litigation skills and

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[651] *See, e.g.*, OXFORD COMPANION, *supra* note 131, at 817; Garcia, *supra* note 650, at 465–66; Watson, Jr., *supra* note 645, at 213; *see also* RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 26 (2005) (noting that notwithstanding any controversies that his nomination sparked, Parker was largely viewed as an exceptional jurist).

[652] *See* Watson, Jr., *supra* note 645, at 213; *Herbert Hoover: Domestic Affairs*, *supra* note 637.

[653] *See* Garcia, *supra* note 650, at 465.

[654] *See Presidents of the United States*, INFOPLEASE, https://www.infoplease.com/history-and-government/us-presidents/presidents (last visited Nov. 21, 2016).

[655] *See Party Division in the Senate*, *supra* note 157.

[656] *See Compare Supreme Court Justices*, *supra* note 234.

[657] *See id.*

[658] *See id.*

[659] *See William Howard Taft*, HISTORY, http://www.history.com/topics/us-presidents/william-howard-taft/print (last visited Nov. 22, 2016).

[660] *See supra* notes 639–44 and accompanying text.

[661] *See History of the Court: The Hughes Court, 1930-1941*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_court_hughes.html (last visited Nov. 22, 2016).

[662] *See* Peter G. Fish, *A "Freshman" Takes Charge: Judge John J. Parker of the United States Court of Appeals, 1925-1930*, 10 J. S. LEGAL HIST. 59, 61 (2002).

[663] *See id.*

intense devotion to his clients eventually made Parker a lawyer in high demand and a man possessing more money than he had ever seen in his lifetime.[664] His practice encompassed all manner of criminal and civil cases, with a clientele that came "from all classes of the people, including laboring people and farmers, white people and colored people."[665] His representation of these clients brought him everywhere from the lowest local trial courts to the United States Supreme Court, including a nationally recognized victory at the Court for local bankers over the Federal Reserve Bank of Richmond.[666]

A growing involvement in North Carolina's political affairs soon introduced Parker to Republican leaders in Washington, including President Warren Harding and Vice President Calvin Coolidge.[667] In 1923, Parker was appointed as a special assistant to the Attorney General, focusing on commercial frauds that members of Woodrow Wilson's Administration allegedly committed during the demobilization of World War I.[668] Although he was unable to secure convictions of the alleged wrongdoers, Parker's talents in the courtroom amazed many high-ranking members of the federal Department of Justice who publicly expressed their surprised admiration for this lawyer from rural North Carolina.[669]

When a vacancy arose on the federal Court of Appeals for the Fourth Circuit in 1925, Coolidge, now serving as the nation's President, appointed Parker to this position.[670] Parker arrived at the Fourth Circuit as one of the youngest judges ever to serve on that court's bench.[671] Once again, however, he quickly dispelled these doubts, demonstrating an uncanny ability to distill complex legal arguments to their fundamental core and gain cohesion among his previously contentious fellow judges.[672] Often, the task of writing the court's opinion for the most controversial cases fell to Parker, as he was both a "quick worker" and a natural consensus

664 *See id.* at 61–62.

665 *See id.* at 61.

666 *See id.* at 61–62.

667 *See* Watson, Jr., *supra* note 645, at 213.

668 *See* Fish, *supra* note 662, at 62–63; Watson, Jr., *supra* note 645, at 213.

669 *See* Fish, *supra* note 662, at 62–63. Among the Justice Department officials whom Parker impressed was Attorney General Harlan Fiske Stone, a future member of the Supreme Court's bench. *See id.*

670 *See* Watson, Jr., *supra* note 645, at 213.

671 *See* Fish, *supra* note 662, at 65, 70 (discussing the doubts that Parker's senior colleagues on the Fourth Circuit originally harbored toward the new judge).

672 *See id.* at 67–68.

builder.[673] By the time Hoover nominated him to the Supreme Court, Parker had authored more than one hundred and thirty opinions for the Fourth Circuit.[674] None of these opinions were ever reversed on appeal.[675]

Nominee's Prior Political Record: Early in his legal career, Parker declared his membership in the Republican Party.[676] For a young lawyer trying to build his practice, it was a curious move. Democratic Party politicians controlled most of the political offices in North Carolina at the time, a common theme throughout the southern states since the Civil War.[677] Parker, however, approved of the Republican Party's economic stances, repeatedly stating that the "New South" would benefit from the party's support for a protective tariff and for practices that promoted the interests of large industries.[678]

Believing that politics could bring him "great prestige," Parker ran repeatedly for political office in his home state.[679] As a Republican, however, his role essentially became that of a sacrificial lamb.[680] In short order, he lost a race for a Congressional seat, for the North Carolina Attorney General's office, and for Governor of North Carolina.[681] The defeats took their toll on his morale, leading him to declare: "[T]here is nothing so disappointing and heartbreaking as politics."[682] Still, he managed to gain more votes in these elections than senior Republican leaders predicted, helping Parker obtain unforeseen respect within his party.[683] In particular, his performance in the 1920 gubernatorial race, in which he polled two hundred and thirty thousand votes, led Republicans to believe that Parker could become a keystone to a new Republican foothold within the long-Democratic southern states.[684]

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673 *See id.* at 67–68.

674 *See* George W. C. McCarter, Confirmation Denied: The Senate Rejects John J. Parker (1971) (unpublished B.A. senior thesis, Princeton University), http://www.mccarterhiggins.com/Parkerthesis.pdf.

675 *See id.* at 10–11.

676 *See* Watson, Jr., *supra* note 645, at 213 (stating that Parker declared allegiance to the Republican Party shortly after his graduation from the University of North Carolina).

677 *See* Fish, *supra* note 662, at 62; Watson, Jr., *supra* note 645, at 213.

678 *See* Fish, *supra* note 662, at 62.

679 *See id.* at 59, 62; *Remembering the Fourth Circuit Judges: A History from 1941 to 1998*, 55 WASH. & LEE L. REV. 471, 503 (1998) [hereinafter *Fourth Circuit History*].

680 *See* Fish, *supra* note 662, at 62.

681 *See id.*; *Fourth Circuit History*, *supra* note 679, at 503.

682 *See* Fish, *supra* note 662, at 62.

683 *See id.*; *Fourth Circuit History*, *supra* note 679, at 503.

684 *See Fourth Circuit History*, *supra* note 679, at 503 n.241; McCarter, *supra* note 674.

Controversial Topics On Which Nominee Held Publicized Stance: The most extensive public record on Parker's positions existed within his multiple Fourth Circuit opinions.[685] Of this vast body of work, however, only one opinion caused any form of controversy after Hoover nominated Parker to the Court.[686] This opinion, however, would prove to be contentious enough to ultimately keep Parker off the federal judiciary's highest bench.[687]

In 1927, the Fourth Circuit heard the case of *United Mine Workers of America v. Red Jacket Consolidated Coal & Coke Co.*[688] At issue was an injunction that 316 mine owners in West Virginia obtained in federal district court.[689] If enforced, the injunction would prevent the United Mine Workers union from "agitating" among the workers at these mines.[690] To the owners, the injunction was justified because these miners had signed a "yellow dog contract" forbidding them from joining a union.[691] When thousands of armed union advocates organized a march protesting the owners' maneuvers, however, the issue became one of national prominence.[692] An armed force supported by the mine owners threatened the marchers, requiring the deployment of federal troops to end the threat peaceably.[693]

Originally, Parker suggested that Judge John Carter Rose, an expert in federal procedure, should write the Fourth Circuit's opinion in this matter.[694] By this time, however, Rose's health had declined, and Parker had impressed his colleagues enough that they assigned the opinion to him.[695] In a decision closely aligned with existing United States Supreme Court pro-business precedent on this issue, Parker's opinion for the unanimous court upheld the injunction against the union.[696]

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685 *See* McCarter, *supra* note 674; *see generally* Fish, *supra* note 662, at 67, 70 (describing in detail Parker's voting record as a Fourth Circuit judge).

686 *See infra* notes 697–98 and accompanying text.

687 *See* Fish, *supra* note 662, at 70.

688 United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927).

689 *See id.* at 843, 847, 850.

690 *See id.* at 848–49.

691 *See* MALTESE, *supra* note 328, at 56–57.

692 *See id.*

693 *See id.* at 56.

694 *See* Fish, *supra* note 662, at 68.

695 *See id.* at 68–70.

696 *See* United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 845, 849–50 (4th Cir. 1927); MALTESE, *supra* note 328, at 57. Parker's opinion steadfastly followed the logic established by the Supreme Court a decade earlier in *Hitchman Coal & Coke Co. v. Mitchell*, in which the Court upheld an injunction preventing interference with a "yellow-dog contract" by means of "peaceful persuasion." *See United Mine Workers*, 18 F.2d at

Shortly following Hoover's announcement of Parker's nomination, American Federation of Labor President William Green declared that his national alliance of labor unions had found Parker unfit to serve on the Court.[697] Based solely upon Parker's opinion in the *United Mine Workers* case, Green stated that Parker was clearly adverse to all labor interests—a position that Green would ultimately repeat innumerable times to multiple other labor leaders, to the Senate's Committee on the Judiciary, and to the full Senate itself.[698]

At the same time, Parker's nomination had raised concerns for Walter White, the Secretary of the National Association for the Advancement of Colored People ("NAACP").[699] Already, the NAACP had opposed Hoover's apparent lack of interest in racial issues on the national level, criticizing him for running a "'lily-white'" White House.[700] After telegraphing friends in North Carolina with questions about Parker's reputation, White received from an anonymous sender a clipping from the *Greensboro Daily News* that quoted Parker's speech accepting the Republican nomination in the 1920 gubernatorial race, stating: "[T]he Negro as a class does not desire to enter politics."[701] Parker further stated: "The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government."[702]

Such a declaration was reason enough for White to announce the NAACP's opposition to Parker on racial grounds.[703] While no

848–49 (citing Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261 (1917)). The union, according to Parker, had engaged in a systematic attempt to induce non-unionized workers "in violation of their contracts, to join the union and go on a strike." *United Mine Workers*, 18 F.2d at 849. To Parker, these activities represented an unlawful attempt to inhibit the interstate commerce activities of the mines, just as similar activities had violated the owners' rights to engage in interstate commerce in *Hitchman*. *See id.* at 845.

697 *See* MALTESE, *supra* note 328, at 57–58.

698 *See id.* at 58; CRAIG PHELAN, WILLIAM GREEN: BIOGRAPHY OF A LABOR LEADER 46 (1989); STEPHEN W. STATHIS, LANDMARK DEBATES IN CONGRESS: FROM THE DECLARATION OF INDEPENDENCE TO THE WAR IN IRAQ 303 (2009).

699 *See* MALTESE, *supra* note 328, at 59, 60; STATHIS, *supra* note 698, at 303.

700 *See* MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 96 (2014).

701 *See* MALTESE, *supra* note 328, at 59.

702 LEWIS L. GOULD, THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE 119 (2005). In this same political campaign speech, Parker stated: "[T]he participation of the negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican party of North Carolina." MALTESE, *supra* note 328, at 59.

703 *See* GOULD, *supra* note 702, at 120; Garcia, *supra* note 650, at 466.

further documents surfaced to paint Parker as a bigot against any particular racial groups, the damage had been done. Parker's seemingly invincible nomination would face national opposition on the grounds that he was both a racist and an enemy to organized labor.[704]

Public Sentiment Regarding Nominee: Initially, Parker received almost universal acclimation as an excellent candidate.[705] Unlike Hughes, Parker's prior record did not declare him as an unquestionably pro-business jurist.[706] Furthermore, the diverse mix of his clientele during his successful years practicing law in North Carolina indicated to some people that Parker might even become a relatively progressive member of the Court over time.[707] While some initial questions emerged over his young age of forty-four years, these issues were dispelled by reviews of his solid record on the Fourth Circuit and during his years in practice.[708]

Even Green's strenuous objections about the *United Mine Workers* decision did not immediately shift public sentiment against Parker.[709] Even John L. Lewis, the President of the United Mine Workers, saw no reason to take an antagonistic stance toward the nominee.[710] The first President of the North Carolina Federation of

[704] *See* GOULD, *supra* note 702, at 120; Garcia, *supra* note 650, at 466. To an extent, such opposition based on two statements in Parker's entire political and legal career was a narrow-minded maneuver for all parties involved. As Parker later pointed out, authoring an opinion in the *Red Jacket* case that attempted to reverse *Hitchman* almost certainly would have been overturned by the Supreme Court. MALTESE, *supra* note 328, at 57. Indeed, his opinion tempered the broad brushes with which the Court painted its decision in *Hitchman*, refusing to follow *Hitchman*'s ruling that forbade "even *undefined* hampering of the operations of businesses using constitutionally protected indeterminate employment contracts." Fish, *supra* note 662, at 75 (emphasis added). Through this narrower holding, Parker actually demonstrated that he was more willing to grant rights to the unions than the majority of the *Hitchman* Court. *See id.* Regarding his single known speech denouncing integration in political participation, Parker's statements were responses to criticisms that, because he belonged to "the party of Reconstruction," he was "courting black votes" for the Governor's office. MALTESE, *supra* note 328, at 59. In that same speech, Parker said: "[T]here is no more dangerous or contemptible enemy of the state than the man who for personal or political advantage will attempt to kindle the flame of racial prejudice or hatred." *Id.* at 60. Thus, while these remarks certainly did not demonstrate empathy toward the cause of racial integration, one could reasonably wonder whether they were the product of political expediency rather than a genuine expression of deeply rooted racial hatred, particularly given the apparent lack of similar comments from Parker throughout his career. *See id.*

[705] *See, e.g.*, WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930-1941, at 16 (2007).

[706] *See* ROBERT E. CONOT, JUSTICE AT NUREMBERG 62 (1983); ROSS, *supra* note 705, at 16; Fish, *supra* note 662, at 81.

[707] *See* MALTESE, *supra* note 328, at 57; Fish, *supra* note 662, at 61; *Fourth Circuit History*, *supra* note 679, at 504.

[708] *See* McCarter, *supra* note 674.

[709] *See id.*

[710] *See id.*

Labor likewise criticized Green's position, stating that Parker was "reasonably progressive, and entirely trustworthy and honest."[711]

When the NAACP entered the fray, however, public opinion about Parker started to shift.[712] With civil rights leaders and labor leaders both opposing him on a national scale, a number of progressives eventually came to the conclusion that Parker simply could not be the right choice.[713] While Parker retained plenty of supporters, the controversies about these two issues concerned a number of senators who feared that a vote for Parker would cause them to gain an unpleasant public image as an anti-labor racist.[714] For these senators, this concern was enough to lead them to vote against the nominee.[715]

In the end, the opposition movement led by Green and White managed to instill this strain of doubt in just enough senators' minds to win their battle.[716] The Senate rejected Parker by a 41-39 margin, with seventeen members of the party to which Parker had held lifelong loyalty joining twenty-three Democrats in voting against his confirmation.[717] A difficult opinion following Supreme Court precedent and a single speech that expressed racial prejudice had cost him a seat on the Court.[718]

The defeat clearly bothered Parker.[719] Still, he returned to the Fourth Circuit and immediately immersed himself in that court's business once again.[720] In 1931, he became that court's Chief Judge,

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[711] *Id.*

[712] *See* MALTESE, *supra* note 328, at 61; McCarter, *supra* note 674. This is not meant to imply that the labor leaders and the civil rights leaders necessarily collaborated to block Parker's nomination, as the two groups avoided interactions with one another even during the Senate hearings regarding Parker. MALTESE, *supra* note 328, at 61. Nor is this meant to imply that the racial issue necessarily outweighed labor concerns in the minds of the senators voting on Parker's nomination. Rather, it was the fact that Parker now faced opposition on two key fronts that started the downslide that ultimately led to his rejection. *See, e.g.*, STATHIS, *supra* note 698, at 303–04.

[713] *See, e.g.*, MALTESE, *supra* note 328, at 61–69; OXFORD COMPANION, *supra* note 131, at 719.

[714] *See, e.g.*, ROSS, *supra* note 705, at 17; STATHIS, *supra* note 698, at 304; McCarter, *supra* note 674.

[715] *See supra* notes 713–14 and accompanying text.

[716] *See* STATHIS, *supra* note 698, at 304 ("Had one additional [s]enator voted for Parker, Vice President Charles Curtis would have cast the tie-breaking vote that turned the tide.").

[717] MALTESE, *supra* note 307, at 68; STATHIS, *supra* note 698, at 304.

[718] Sixteen years later, the American Bar Association wrote that the Senate's rejection of Parker "was one of the most regrettable combinations of error and injustice that has ever developed as to a nomination to the great [C]ourt." MALTESE, *supra* note 328, at 69.

[719] In later years, Parker continued to seek nomination to the Court, but never received it from any subsequent President. *See* CONOT, *supra* note 706, at 62–63; OXFORD COMPANION, *supra* note 131, at 719.

[720] *See Fourth Circuit History*, *supra* note 679, at 504–05.

a position that he maintained until his death in 1958.[721] As for Hoover, just two days after the Senate rejected Parker, the President nominated Owen Roberts, a Republican lawyer who had investigated Warren Harding's involvement in the Teapot Dome oil reserve scandals.[722] Roberts received his confirmation with virtually no noticeable opposition from any member of the public or the Senate.[723]

J. Clement Haynsworth

On May 14, 1969, Abe Fortas resigned from the Supreme Court in the midst of a financial conflict of interest scandal.[724] Quickly, President Richard Nixon seized this opportunity to fulfill his campaign promise to appoint "strict constructionist" judges to the Supreme Court.[725] Already, he had delighted many conservatives by replacing liberal Chief Justice Earl Warren with the far more conservative Warren Burger to occupy the Court's center seat.[726] Now, with the liberal Fortas off the Court, the President had a second opportunity to re-make the Court with the type of Justices that he preferred.[727] His pledge to develop a "Nixon Court," an effort that united the President with leaders in the Justice Department and the FBI, appeared to be off to the best possible start.[728]

Nixon vowed that "he would not seek racial, religious, or geographical balance in making his appointments to the Supreme Court."[729] For years, the spot that Fortas occupied was informally seen as the "Jewish seat" on the Court, part of a lineage that passed from "Louis Brandeis to Benjamin Cardozo to Felix Frankfurter to

[721] *See id.* at 505, 506.

[722] *See* OXFORD COMPANION, *supra* note 131, at 860; *Supreme Court Nominations*, *supra* note 17.

[723] *Supreme Court Nominations*, *supra* note 17.

[724] *See* ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT 103–04, 105 (1992); JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 5–10 (2001).

[725] *See* Parry-Giles, *supra* note 98, at 113.

[726] *See* DEAN, *supra* note 724, at 2, 12–13; Linda Greenhouse, *Warren E. Burger is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES (June 26, 1995), http://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html?pagewanted=all.

[727] *See* DEAN, *supra* note 724, at 11–12.

[728] *See* CHARNS, *supra* note 724, at 105–07. The term "Nixon Court" was originated by John Ehrlichman, Nixon's White House Counsel. *Id.* at 106.

[729] *Id.* at 107.

Arthur Goldberg," before Fortas's appointment.[730] Nixon, however, saw no political advantage to including this tradition.[731] Yet the President did have a strategy in mind beyond appointing a "strict constructionist" jurist to the Court.[732] Like Herbert Hoover, Nixon's presidential victory occurred partly because of unexpected support from southern voters.[733] Similar to Hoover, Nixon wanted to cultivate an increasingly strong Republican base in the South.[734] Just as Hoover believed that nominating Parker represented a step toward this objective, Nixon felt that "he could do southerners no higher favor than to appoint one of their own to the highest court in the land."[735]

Nixon's advisors recommended Fourth Circuit Judge Clement Furman Haynsworth for this job.[736] Haynsworth, a South Carolina native, was a Democrat.[737] After reviewing twelve years of Haynsworth's judicial opinions, however, Rehnquist concluded that Haynsworth was a "strict constructionist"—a judge who, in Rehnquist's view, "[would generally] not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs."[738] The FBI provided a similar opinion of Haynsworth's jurisprudential stances, with FBI Agent Roland Trent telling Nixon after only a brief investigation that Haynsworth was "very conservative" and "definitely in favor of law and order."[739]

For Nixon, such commendations were all that he needed to hear.[740] On August 21, 1969, he announced his nomination of Haynsworth to replace Fortas on the Court.[741] Given that the Senate had approved Burger by an overwhelming vote of 74-3, he

730 *Id.*; *see* DEAN, *supra* note 724, at 14–15.

731 *See* DEAN, *supra* note 724, at 14–15.

732 *See id.* at 15.

733 *See* Joshua Green, *Birth of the Southern Strategy*, BLOOMBERG (Dec. 4, 2014), http://www.bloomberg.com/news/articles/2014-12-04/birth-of-the-southern-strategy; Theodore R. Johnson, *What Nixon Can Teach the GOP About Courting Black Voters*, POLITICO (Aug. 15, 2015), http://www.politico.com/magazine/story/2015/08/what-nixon-can-teach-the-gop-about-courting-black-voters-121392; *supra* notes 648–51 and accompanying text.

734 *See* Fish, *supra* note 646, at 549.

735 DEAN, *supra* note 724, at 15.

736 *See id.* at 15, 16.

737 *See Supreme Court Nomination Battles: Clement Haynsworth*, CBS NEWS, http://www.cbsnews.com/pictures/supreme-court-nomination-battles/8/ (last visited Nov. 27, 2016) [hereinafter *Supreme Court Nomination Battles*].

738 JOHN A JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 96 (2012).

739 DEAN, *supra* note 724, at 17.

740 *See id.* (explaining that Nixon quickly made his choice to nominate Haynsworth); JENKINS, *supra* note 738, at 96.

741 *See Supreme Court Nominations*, *supra* note 17.

likely planned on a similar landslide in Haynsworth's favor.[742]

Nominee's Political Party: Democratic.[743]

Nominating President's Political Party: Republican.[744]

Majority Party in Senate: Democratic.[745]

Majority Political Party on United States Supreme Court: Democratic.[746] Justices Thurgood Marshall, Byron White, Hugo Black, William Douglas, and William Brennan, Jr., comprised the Democratic wing of the Court.[747] Republicans on this Court were Justices Potter Stewart, John Harlan, and the newly appointed Chief Justice Warren Burger.[748]

Predecessor's Political Party: Democratic.[749]

President's Previous Nominations to United States Supreme Court: Warren Burger (confirmed easily by Senate).[750]

Number of Years between Nomination Year and Next Presidential Election: Slightly more than three years.[751]

Nominee's Prior Legal Record: After graduating from Harvard Law School, Haynsworth became the fifth generation of his family to practice law.[752] He joined his family's law firm in Greenville, rising to the level of senior partner in 1946.[753] He remained in this capacity until 1957, when President Dwight Eisenhower appointed

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[742] *See id.*; *see also* DEAN, *supra* note 724, at 17 (stating that Nixon proceeded with Haynsworth's nomination even though the FBI's investigation noted that Haynsworth's past included at least one ethical concern); JENKINS, *supra* note 738, at 96–97 (discussing the various troubling factors that Nixon overlooked when nominating Haynsworth to the Court); Fish, *supra* note 646, at 550 (describing Nixon's decision to nominate Haynsworth despite likely Senate challenges to his nomination).

[743] *See Supreme Court Nominations*, *supra* note 17.

[744] *See Richard Nixon—Brief Biography*, WATERGATE.INFO, http://watergate.info/nixon/richard-nixon-brief-biography (last visited Nov. 27, 2016).

[745] *See Congress Profiles: 93rd Congress (1973-1975)*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, http://history.house.gov/Congressional-Overview/Profiles/93rd/ (last visited Nov. 27, 2016).

[746] *See Compare Supreme Court Justices*, *supra* note 234 (showing that the majority of Supreme Court Justices in 1969 were members of the Democratic Party).

[747] *See id.*

[748] *See id.*

[749] *See id.*

[750] *See id.*; *Supreme Court Nominations*, *supra* note 17.

[751] *See Supreme Court Nominations*, *supra* note 17; *Historical Election Results: Electoral College Box Scores 1789-1996*, NAT'L ARCHIVES & REC. ADMIN.: U.S. ELECTORAL C., https://www.archives.gov/federal-register/electoral-college/scores.html#1972 (last visited Mar. 8, 2017) [hereinafter *Historical Election Results*].

[752] *See Nation: Judge Clement Haynsworth*, TIME (Aug. 29, 1969), http://content.time.com/time/subscriber/article/0,33009,901281,00.html.

[753] *See* Alfonso A. Narvaez, *Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat*, N.Y. TIMES (Nov. 23, 1989), http://www.nytimes.com/1989/11/23/obituaries/clement-haynsworth-dies-at-77-lost-struggle-for-high-court-seat.html.

him to the bench of the Fourth Circuit.[754]

Seven years later, President Lyndon Johnson elevated Haynsworth to Chief Judge of the Fourth Circuit.[755] At the age of fifty-two, he was the youngest circuit court Chief Judge in the nation.[756] Nevertheless, he rapidly garnered respect from his colleagues for his rational and "scholarly" jurisprudence, and for professional mannerisms that a number of commentators described as "courtly."[757] By the time Nixon nominated him to the Supreme Court, Haynsworth had participated in more than one thousand decisions on the Fourth Circuit, with more than three hundred signed opinions bearing his name.[758]

Nominee's Prior Political Record: Haynsworth was a registered Democrat.[759] However, he never held any political office in the legislative or executive branches of government, and did not appear to have any known political enemies.[760] In this manner, he seemed to be a safe selection for Nixon to make.[761]

Controversial Topics On Which Nominee Held Publicized Stance: Like Parker, the greatest record of Haynsworth's tendencies came from his extensive body of Fourth Circuit opinions.[762] In an outcome that seemed like déjà vu when viewed alongside the Parker nomination, the most damaging controversies regarding Haynsworth's publicized stances focused on a few opinions concerning two topics: civil rights and labor disputes.[763]

Regarding civil rights, Haynsworth's most contentious opinions focused on the issue of integrating public schools.[764] He wrote

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[754] *See id.*

[755] *See id.*

[756] *See id.*

[757] *See* Bart Barnes, *Rejected Nixon Appointee Clement Haynsworth Dies*, WASH. POST (Nov. 23, 1989), https://www.washingtonpost.com/archive/local/1989/11/23/rejected-nixon-appointee-clement-haynsworth-dies/c61f534c-0b15-4cbd-89fb-3238d1b0ba67/; Narvaez, *supra* note 753; *Nation: Judge Clement Haynsworth*, *supra* note 752.

[758] *See* Narvaez, *supra* note 753.

[759] *See Supreme Court Nomination Battles*, *supra* note 737.

[760] *See* Lisa Pruitt, *Clement Furman Haynsworth Jr. (1912-1989)*, *in* 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 361–62 (John R. Vile ed., 2003).

[761] *See* DEAN, *supra* note 724, at 17.

[762] *See* Pruitt, *supra* note 760, at 362.

[763] *See, e.g.*, Lewis F. Powell, Jr., *Clement F. Haynsworth, Jr.—A Personal Tribute*, 39 WASH. & LEE L. REV. 303, 304 (1982); Pruitt, *supra* note 760, at 363; Barnes, *supra* note 757; Narvaez, *supra* note 753; *see generally* Stephen L. Wasby & Joel B. Grossman, *Judge Clement F. Haynsworth, Jr.: New Perspective on his Nomination to the Supreme Court*, 1990 DUKE L.J. 74, 75–76 (providing a comparison of the many uncanny similarities between the Senate's rejection of Parker and the Senate's rejection of Haynsworth).

[764] *See, e.g.*, Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 412, 413 (1993); Pruitt, *supra* note 760, at 363–64; Narvaez, *supra* note 753.

decisions stating that tuition grants for white students who enrolled in segregated schools were constitutional, striking down the argument that these awards violated the Fourteenth Amendment.[765] Even more controversially, he affirmed officials' actions in Prince Edward County, Virginia, to shut down public schools rather than racially integrate them.[766] The majority of the United States Supreme Court did not share this viewpoint, however, resoundingly overruling Haynsworth's position in the Prince Edward County case.[767] He also wrote a dissenting opinion arguing that private hospitals receiving federal funding should not be compelled to treat African-Americans.[768] Beyond the courtroom, Haynsworth belonged to several private clubs that supported and practiced racial segregation, a fact that was common to the majority of affluent white southern men during this time period.[769]

On the labor front, Haynsworth voted seven times in favor of management over labor in cases that the Supreme Court subsequently reversed.[770] Some of these Supreme Court reversals came by unanimous vote.[771] While Haynsworth's advocates later provided the Senate a list of thirty-six cases in which the judge cast a pro-labor vote, the label of "anti-union" stuck to Haynsworth throughout the Senate's debates over his nomination.[772]

The most controversial issues surrounding Haynsworth's nomination, however, arose from senators who were still angry about the Nixon Administration's investigations into the financial scandals that ultimately forced Fortas's resignation from the Court.[773] These senators pointed to the case of *Textile Workers Union v. Darlington Manufacturing Company*,[774] a matter where Haynsworth refused to recuse himself even though he was a part-

[765] *See* Narvaez, *supra* note 753.

[766] *See* Entin, *supra* note 764, at 412–13; Pruitt, *supra* note 760, at 364.

[767] *See* Griffin v. Cty. Sch. Bd., 377 U.S. 218 (1964).

[768] *See* Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 977 (4th Cir. 1963) (Haynsworth, J., dissenting).

[769] *See* RANDALL BENNETT WOODS, QUEST FOR IDENTITY: AMERICA SINCE 1945, at 322 (2005).

[770] *See* Davison M. Douglas, *Book Review of Clement Haynsworth, the Senate, and the Supreme Court*, 36 AM. J. LEGAL HIST. 392, 393 (1992).

[771] *See id.*

[772] *See* Pruitt, *supra* note 760, at 366; *see* Barnes, *supra* note 757; Narvaez, *supra* note 753. Initially, however, experts believed that Haynsworth's labor law jurisprudence was not damaging enough by itself to produce a Senate rejection. *See* Entin, *supra* note 764, at 413 ("AFL-CIO officials anticipated no more than two dozen votes against confirmation on this ground.").

[773] *See* OXFORD COMPANION, *supra* note 131, at 427.

[774] Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (1963).

owner in a vending machine business that contracted with Darlington Manufacturing's parent company.[775] Haynsworth stated that the relationship between him and Darlington Manufacturing was too remote to warrant his disqualification from the case, and accurately pointed out that the judicial ethics canons of the day did not demand recusal.[776] He also noted that Attorney General Robert Kennedy had investigated the matter at Haynsworth's request and cleared him of any wrongdoing.[777]

Still, Haynsworth's critics stated that the *Darlington Manufacturing* case demonstrated that the judge failed to avoid the "appearance of impropriety" in his courtroom.[778] Their criticisms gained ammunition through a review of a few cases in which Haynsworth did not recuse himself even though he owned stock in one of the businesses involved in the dispute at issue.[779] In one matter, Haynsworth had even purchased shares of stock from a corporation while a case involving that enterprise was still pending at the Fourth Circuit.[780] To each critique, Haynsworth responded that he did not own enough stock to constitute a "substantial" interest in any of the corporations at issue.[781] To Haynsworth's detractors, however, these issues demonstrated that Nixon had nominated a jurist who was just as unethical and untrustworthy as the man whom Nixon had selected Haynsworth to replace.[782]

Public Sentiment Regarding Nominee: Within a few weeks after Nixon nominated Haynsworth, the nominee received widespread criticism of his record in cases involving civil rights interests.[783]

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[775] *See* Douglas, *supra* note 770, at 393; Entin, *supra* note 764, at 410–11; Narvaez, *supra* note 753.

[776] *See* Douglas, *supra* note 770, at 393; Pruitt, *supra* note 760, at 366–67.

[777] *See* Wasby & Grossman, *supra* note 763, at 79, 80.

[778] *See, e.g.*, JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 226 (1994).

[779] *See* Entin, *supra* note 764, at 410–11; Pruitt, *supra* note 760, at 366–68.

[780] *See* Pruitt, *supra* note 760, at 367–68.

[781] *Id.*; *see* Douglas, *supra* note 770, at 393. As a consequence of this controversy, the statute regarding judicial disqualification was significantly altered, removing the "substantial interest" clause and demanding recusal whenever a judge possessed "any financial interest," regardless of size or amount, in one or more parties to the case at hand. Entin, *supra* note 764, at 411 n.20.

[782] *See, e.g.*, JEFFRIES, JR., *supra* note 778, at 226 ("This argument caught and amplified the reverberations from the Fortas affair and lent an air of fine impartiality to the calumniation of Clement Haynsworth."); Douglas, *supra* note 770, at 393 ("These ethical concerns received far greater play given the fact that Haynsworth was nominated to fill the seat from which Abe Fortas had previously resigned for alleged ethical shortcomings."); Tulis, *supra* note 422, at 1344 ("In rejecting Haynsworth, Democratic [s]enators were surely paying back their Republican counterparts for their rejection of Lyndon Johnson's nominee for Chief Justice, Abe Fortas.").

[783] *See, e.g.*, Entin, *supra* note 764, at 412–13; Pruitt, *supra* note 760, at 364, 365.

Powerful civil rights organizations, including the NAACP, the National Urban League, the Southern Christian Leadership Conference, and the American Jewish Congress all opposed the nomination.[784] "If the President is seeking to reach the Negro respectability in a significant way," wrote the *St. Louis Argus*, "loading the Supreme Court with individuals who oppose the Federal Government['s] participation in civil rights programs, equal educational opportunities and protection of our democratic heritage, will not accomplish the task."[785] The *Kansas City Call* stated: "The black citizens of America have no choice but to fight the Nixon nomination," and accused Nixon of trying to "pay his political debts at the expense of young black school children and the Negro citizens of this great land."[786]

Other commentators assailed Haynsworth's record on labor matters, an attack urged by leaders of the merged American Federation of Labor-Congress of Industrial Labor.[787] Perhaps the most damning editorial, however, came from *Washington Post* journalists Frank Mankiewicz and Tom Braden, stating: "Judge Haynsworth was in clear violation of the canons of ethics for seven years on the bench, during which time he profited . . . from a company in which he was not just a casual investor, but an insider."[788] Following publication of this column, other journalists scrutinized Haynsworth's record, with some reaching the conclusion expressed by the *New York Post*: "We don't think the nation will enjoy the spectacle of a court jumping out of a Fortas frying pan into a Haynsworth fire."[789]

Recognizing that his nominee was not winning favor among the media, Nixon summoned several reporters for an "informal meeting."[790] At this gathering, he angrily accused the journalists of committing "a vigorous character assassination" against Haynsworth.[791] He then questioned whether the press used ethical allegations as a pretext because the journalists did not want a

[784] *See Opposition to Haynsworth Mounts on National Level*, WASH. AFRO-AMERICAN, Sept. 2, 1969, at 5 [hereinafter *Opposition to Haynsworth Mounts*].

[785] *Id.*

[786] *Id.*

[787] *See* Entin, *supra* note 764, at 412 ("The AFL-CIO made the defeat of Haynsworth one of its major priorities."); *see also* Pruitt, *supra* note 760, at 366 ("In addition to his record on civil rights cases, Haynsworth's relationship to labor and business became a lightning rod for opposition to his nomination.").

[788] *Opposition to Haynsworth Mounts*, *supra* note 784, at 5.

[789] *Id.*

[790] Parry-Giles, *supra* note 98, at 114.

[791] *Id.*

southern strict constructionist on the Court, lecturing the reporters: "[I]t is not proper to turn down a man because he is a southerner, because he is a Jew, because he is a Negro, or because of his philosophy."[792]

Some powerful individuals spoke in Haynsworth's favor, though. Lawrence Walsh, Chairman of the American Bar Association's Standing Committee on the Federal Judiciary, stated that the Committee was "unanimously of the opinion that Judge Haynsworth was highly acceptable from the viewpoint of professional qualification," and personally declared that Haynsworth was "beyond any reservation, [and] a man of impeccable integrity."[793] Senator Marlow Cook of Kentucky declared that Haynsworth was "a man of honesty and integrity."[794] Shortly before his brethren voted on the matter, Senator Roman Hruska posed the question to his colleagues: "Where do we go from here, if there is a rejection of the nominee? It will amount to a rejection of the President's plan to make appointments to the Supreme Court which will restore balance."[795]

The issue of restoring balance, however, evidently did not hold sway in the minds of the majority of senators.[796] Haynsworth's nomination was defeated by a vote of 55-45, despite a last-gasp all-out attempt by Nixon to sway enough legislators in the nominee's favor.[797] Seventeen Republican senators voted against the candidate put forth by the President from their political party.[798] In part, this result may have been attributable to the death of Senate Republican leader Everett Dirksen shortly before the chamber's hearings regarding Haynsworth began, leaving the party's Senate leadership in the hands of Robert Griffin and Hugh Scott.[799] Both Griffin and Scott faced impending re-election campaigns, making it

[792] *Id.*

[793] Powell, Jr., *supra* note 763, at 305. All but one of the past presidents of the American Bar Association living at the time of Haynsworth's nomination supported his confirmation to the Court. *See id.*

[794] *Haynsworth Backers Reply to Criticism*, EXPRESS & NEWS (San Antonio, Tx.), Oct. 11, 1969, at 3-A.

[795] Parry-Giles, *supra* note 98, at 114.

[796] *See infra* note 797 and accompanying text.

[797] Parry-Giles, *supra* note 98, at 114; *see* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 425 (2d ed., Kermit L. Hall & James W. Ely Jr. eds., 2009) [hereinafter OXFORD GUIDE].

[798] Narvaez, *supra* note 753. Likewise, plenty of senators from Haynsworth's own Democratic Party voted against him, in part out of spite for Nixon's efforts to force Fortas, a far more liberal Democrat than Haynsworth, off of the Court. *See* Tulis, *supra* note 422, at 1344.

[799] *See* Douglas, *supra* note 770, at 393–94.

politically impossible for them to support a judicial candidate who had been branded as an unethical anti-labor segregationist.[800]

Beyond this, however, most commentators saw Haynsworth's defeat as successful vengeance by senators embittered by the investigation leading to Fortas's resignation.[801] Evidence suggests that Nixon viewed it in this context.[802] Shortly after Haynsworth returned to his position at the helm of the Fourth Circuit, a post that he would hold until taking senior status in 1981, Nixon publicly declared that the "majority of people in the [n]ation regret" Haynsworth's rejection.[803] Then the President promised that he would employ the same criteria that he used in selecting Haynsworth to pick a new nominee to fill Fortas's vacated seat.[804]

K. George Harrold Carswell

Nixon deliberated for nearly two months before announcing his new choice to replace Fortas on the Court.[805] Initially, his selection seemed in many ways similar to Haynsworth.[806] George Harrold Carswell was a southerner, born in Georgia and residing in Florida.[807] He was a circuit court judge, serving on the Court of Appeals for the Fifth Circuit.[808] He was a conservative jurist and a "strict constructionist" within the President's parameters of these often-malleable terms.[809]

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[800] *See id.* at 394.

[801] *See, e.g.*, Pruitt, *supra* note 760, at 368; Tulis, *supra* note 422, at 1344.

[802] *See, e.g.*, DEAN, *supra* note 724, at 18 ("Nixon's advisors recognized this fact, as surely did the [P]resident."); Parry-Giles, *supra* note 98, at 114; Tulis, *supra* note 422, at 1345.

[803] Parry-Giles, *supra* note 98, at 114. Haynsworth went on to receive high acclaim for his subsequent service on the Fourth Circuit, with Congress ultimately naming the federal courthouse in Greenville, South Carolina, in his honor. *See* Pruitt, *supra* note 760, at 368.

[804] *See* Parry-Giles, *supra* note 98, at 114.

[805] The Senate voted to reject Haynsworth on November 21, 1969, and Nixon announced Carswell's nomination on January 19, 1970. *Supreme Court Nominations*, *supra* note 17.

[806] *See* WOODS, *supra* note 769, at 322.

[807] *See* John Paul Hill, *Nixon's Southern Strategy Rebuffed: Senator Marlow W. Cook and the Defeat of Judge G. Harrold Carswell for the U.S. Supreme Court*, 112 REG. KY. HIST. SOC'Y 613, 614 (2014).

[808] *See* Meredith Hindley, *Supremely Contentious: The Transformation of "Advice and Consent,"* HUMANITIES, Sept./Oct. 2009, https://www.neh.gov/humanities/2009/septemberoctober/feature/supremely-contentious.

[809] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 282–83 (2009); DOUGLAS E. SCHOEN, THE NIXON EFFECT: HOW RICHARD NIXON'S PRESIDENCY FUNDAMENTALLY CHANGED AMERICAN POLITICS 33, 34 (2016). Interestingly, Nixon first made his pledge to appoint "strict constructionist" judges before an election address televised to southern viewers, thus seemingly making the appointment of strict constructionists to the Court a component of his strategy to curry favor with voters in the South. *See* FRIEDMAN, *supra* note 809, at 282.

In one vital area, however, the President ensured that Carswell was different from Haynsworth. Before announcing Carswell's nomination, Nixon ensured that his advisors meticulously vetted the judge for any possible co-mingling of judicial duties and business interests.[810] Only after receiving repeated assurances that Carswell would not raise any comparisons with Fortas and Haynsworth in the realm of alleged financial improprieties did Nixon declare that Carswell was his choice.[811]

Yet Carswell quickly proved to be anything but controversy-free.[812] Within days, the President found himself once again embroiled in an exhaustive effort to defend his nominee's reputation on the national stage.[813]

Nominee's Political Party: Republican (but previously a Democrat).[814]

Nominating President's Political Party: Republican.[815]

Majority Party in Senate: Democratic.[816]

Majority Political Party on United States Supreme Court: Democratic.[817] Justices Thurgood Marshall, Byron White, Hugo Black, William Douglas, and William Brennan, Jr., comprised the Democratic wing of the Court.[818] Republicans on this Court were Justices Potter Stewart, John Harlan, and the newly appointed Chief Justice Warren Burger.[819]

Predecessor's Political Party: Democratic.[820]

President's Previous Nominations to United States Supreme Court: Warren Burger (confirmed easily), Clement Haynsworth (rejected by a vote of 55-45).[821]

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[810] *See* Hindley, *supra* note 808.

[811] *See* DEAN, *supra* note 724, at 19; Parry-Giles, *supra* note 98, at 115; Hindley, *supra* note 808. John Mitchell, Nixon's Attorney General, referred to Carswell as "too good to be true" for the President's "strict constructionist" and "law and order" objectives, with a record that was free of the type of financial improprieties that had helped torpedo Haynsworth's nomination. *See* DEAN, *supra* note 724, at 19.

[812] *See, e.g.*, SCHOEN, *supra* note 809, at 33; Parry-Giles, *supra* note 98, at 115; Hindley, *supra* note 808.

[813] *See, e.g.*, ELIZABETH DREW, RICHARD M. NIXON 44 (2007); Hill, *supra* note 807, at 614–15.

[814] *See* Hindley, *supra* note 808.

[815] *See id.*

[816] *See id.*

[817] *See Compare Supreme Court Justices*, *supra* note 234.

[818] *See id.*

[819] *See id.*

[820] *See id.*

[821] *See* OXFORD GUIDE, *supra* note 797, at 425.

Number of Years between Nomination Year and Presidential Election: Approximately two years.[822]

Nominee's Prior Legal Record: Carswell enrolled in law school at the University of Georgia, left school to serve in the United States Navy, and then completed his law degree at Mercer University.[823] Moving with his wife to Tallahassee, Florida, Carswell entered the private practice of law in 1948.[824] Five years later, Eisenhower appointed Carswell to become the United States Attorney for the Northern District of Florida.[825]

Five years after that, Eisenhower appointed Carswell to preside over the United States District Court in Florida's Northern District.[826] Carswell's jurisprudence received mixed reviews during his eleven years as a district court judge.[827] Forty percent of his decisions were subsequently reversed on appeal.[828] While some practitioners praised his work, others—particularly civil rights lawyers—found him abrasive and fully willing to dismiss their suits without even granting a hearing.[829]

Despite this varying record, or perhaps because of it, Nixon appointed Carswell to the Fifth Circuit on May 12, 1969. Only half a year later, Nixon nominated Carswell to the Supreme Court.[830]

Nominee's Prior Political Record: Carswell's first venture into

[822] *See Historical Election Results*, *supra* note 751; *Supreme Court Nominations*, *supra* note 17.

[823] *See Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States*: *Hearing Before the Comm. on the Judiciary*, 91st Cong. 8 (1970) [hereinafter *Nomination*].

[824] *See* Hindley, *supra* note 808.

[825] *See Carswell Nomination to Court Rejected by Senate*, CQ PRESS: CQ ALMANAC (1970), https://library.cqpress.com/cqalmanac/document.php?id=cqal70-1292761; Hindley, *supra* note 808. In this position, Carswell developed a "law and order" reputation that pleased many of the Republican politicians that had recently obtained power on the federal level. *See* DEAN, *supra* note 724, at 19.

[826] *See* DEAN, *supra* note 724, at 19; *Carswell Nomination to Court Rejected by Senate*, *supra* note 825. This appointment made the thirty-eight-year-old Carswell the youngest federal judge in the nation. *See* DEAN, *supra* note 724, at 19; *Carswell Nomination to Court Rejected by Senate*, *supra* note 825.

[827] *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 198–99 (1997); WOODS, *supra* note 769, at 322; Hill, *supra* note 807, at 615. Perhaps the most damaging moment for Carswell's reputation after his nomination to the Court came when two of his highly regarded Republican judicial colleagues, Elbert P. Tuttle and John Minor Wisdom, labeled him as a "lightweight" jurist. Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 261 (1998).

[828] *See* WOODS, *supra* note 769, at 322; Hill, *supra* note 807, at 615.

[829] *See* DEAN, *supra* note 724, at 19; WOODS, *supra* note 769, at 322; Grossman & Wasby, *supra* note 23, at 571; Hill, *supra* note 807, at 615.

[830] *See* Hindley, *supra* note 808.

politics came as a registered Democrat.[831] However, Carswell lost his attempt to win a seat in the state legislature of Georgia, stimulating Carswell to move to Florida and shift his party membership to the Republicans.[832] He retained his alliance with the conservative wing of the Republican Party for the remainder of his life.[833]

Controversial Topics On Which Nominee Held Publicized Stance: Without question, Carswell's most controversial viewpoints dealt with civil rights.[834] Two days after Nixon announced Carswell's nomination, media outlets revealed the text of a speech that Carswell delivered during his legislative campaign in Georgia.[835] "I am a southerner by ancestry, birth, training, inclination, belief, and practice," Carswell declared in that address, "I believe that segregation of the races is proper and the only practical and correct way of life in our states."[836]

After publication of this speech, the backlash against Carswell was swift and fierce.[837] Caught off guard, Nixon's Administration tried to hurriedly rehabilitate Carswell's image.[838] When Carswell spoke before the Senate Judiciary Committee, the judge renounced the words of that speech as the language of an uninformed man.[839] "I state now as fully and completely as I possibly can, that those words themselves are obnoxious and abhorrent to me," Carswell said.[840] He also stated: "I am not a racist. I have no notions, secretive, open, or otherwise, of racial superiority."[841] He continued

831 *See id.*

832 *See id.*

833 *See G. Harrold Carswell, 72, Dies*, WASH. POST (Aug. 2, 1992), https://www.washingtonpost.com/archive/local/1992/08/01/g-harrold-carswell-72-dies/09c33cbf-cdae-4468-befc-2ae54f66dbbe/ [hereinafter *Carswell Dies*].

834 *See* SCHOEN, *supra* note 809, at 33; Grossman & Wasby, *supra* note 23, at 574; Hill, *supra* note 807, at 614–15; *Carswell Dies*, *supra* note 833. According to at least one commentator, Nixon intentionally selected a nominee who was "even more anti-civil rights" than Haynsworth to demonstrate his contempt toward the Senate and his respect for the viewpoints favored in many southern states. *See* DREW, *supra* note 813, at 44.

835 *See* Hindley, *supra* note 808.

836 *Id.*

837 *See* RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 459 (2008); Hindley, *supra* note 808; *see generally* DEAN, *supra* note 724, at 20 (discussing the multitude of information dug up against Carswell).

838 *See* PERLSTEIN, *supra* note 837, at 459 (discussing a press conference at which Nixon declared that he still would have nominated Carswell even if he had known about Carswell's remarks about white superiority); Hindley, *supra* note 808 ("The White House tried to suggest that the words were merely attributed to Carswell, but the speech had been printed in the *Irwinton Bulletin*, a weekly newspaper run by Carswell while at Duke.").

839 *See* Hindley, *supra* note 808.

840 *Id.*

841 *Id.*

by calling the Georgia speech "something out of the disembodied past."[842]

Perhaps Carswell would have passed through the hearings unscathed if questions surrounding his civil rights record ended with this statement.[843] Yet more issues rapidly appeared on the radar. Carswell had helped create a private corporation to take over a public golf course facing federal orders to desegregate.[844] He had drafted a charter for a "whites only" booster club at Florida State University.[845] He had purchased and sold real estate "contain[ing] a racially restrictive covenant" in the deed.[846] Several attorneys described Carswell's overt hostility toward them in matters where they represented individual civil rights interests.[847] With each of these revelations, Carswell's confirmation chances dimmed further.[848]

Some observers also focused on the frequency at which higher courts reversed Carswell's holdings as a district court judge.[849] Some of the most egregious examples of poor judicial logic, according to members of the Judiciary Committee, came in Carswell's civil rights decisions.[850] This led to questions about whether Carswell possessed the intellect and ability to serve on the highest court in the federal system.[851]

Public Sentiment Regarding Nominee: Unsurprisingly, civil rights groups mounted a staunch opposition to Carswell's nomination.[852] Feminist leader Betty Friedan became a leading voice in the movement to reject the nominee.[853] Leroy Clark of the NAACP proclaimed that Carswell consistently behaved in an "insulting and

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[842] *Id.*

[843] *See* Grossman & Wasby, *supra* note 23, at 574 (stating that most senators were willing to forgive Carswell's campaign comments if this were the only instance of racist actions in the nominee's past).

[844] *See* PERLSTEIN, *supra* note 837, at 459; Grossman & Wasby, *supra* note 23, at 574.

[845] *See* Hill, *supra* note 807, at 614–15.

[846] Grossman & Wasby, *supra* note 23, at 574.

[847] Hill, *supra* note 807, at 615; *see* DEAN, *supra* note 724, at 20; WOODS, *supra* note 769, at 322.

[848] *See supra* notes 836–47 and accompanying text.

[849] The most widely cited study regarding this frequency of reversals came from the Ripon Society of "liberal Republicans" and Columbia University's "Law Students Concerned for the Court." *See* Hill, *supra* note 807, at 615.

[850] *See* Hindley, *supra* note 808.

[851] *See, e.g.*, DEAN, *supra* note 724, at 21; WOODS, *supra* note 769, at 322; Kalk, *supra* note 827, at 261.

[852] *See supra* notes 834, 837 and accompanying text.

[853] *See* BARBARA BURRELL, WOMEN AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK 63 (2004).

hostile" manner toward non-white lawyers.[854] Meanwhile, Carswell's supporters seemed to become increasingly subdued, both in the Senate and in the general public, with each new piece of unexpected news about Carswell's background brought to light.[855]

Additionally, many legal leaders publicly declared their concerns about Carswell's many decisions that higher courts reversed, along with the short length and scarcity of citations in many of Carswell's signed opinions.[856] Yale Law School Dean Lewis Pollack evaluated Carswell's work as representing "at very best a level of modest competence, no more than that," and declared that Carswell held "more slender credentials than any other nominee put forth this century."[857] In a now-infamous attempted rebuttal to such critics, Republican Senator Roman Hruska stated: "[E]ven if he were mediocre, there are lots of mediocre judges and people and lawyers. They're entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters and Cardozos and stuff like that out there."[858]

The Senate ended their discussions regarding Carswell after five days, seeing the writing on the wall.[859] In the end, the vote was closer than expected, but the outcome was predictable. The Senate voted 51-45 to reject Carswell, with thirteen Republican senators crossing party lines to vote against him.[860] Many of the nation's large newspapers congratulated the Senate on voting against the nominee.[861] For the second time in only a few months, Nixon was furious, announcing to the media that the Senate rejected Carswell solely because they refused to accept a Justice from the South.[862]

Carswell returned to Florida and attempted to run for a seat in the Senate, using the slogan: "This time the people decide," as his campaign's battle cry.[863] After he lost that race, he resumed work as a private practitioner of law.[864] Meanwhile, Nixon abandoned his

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854 Hindley, *supra* note 808.

855 *See* Grossman & Wasby, *supra* note 23, at 574.

856 *See* DEAN, *supra* note 724, at 21; Hindley, *supra* note 808.

857 Kalk, *supra* note 827, at 261; *see* Hindley, *supra* note 808.

858 Kalk, *supra* note 827, at 261.

859 *See* Hindley, *supra* note 808 ("The hearings were closed, after five days, when it became clear that no amount of pro-Carswell witnesses could undo the testimony given about his civil rights record.").

860 *See* DEAN, *supra* note 724, at 21.

861 *See generally In the Nation's Press: The Carswell Defeat*, CRISIS, Apr. 18, 1970, at 168–70 (providing examples of media praise from both sides of the political aisle regarding the Senate's vote to reject Carswell).

862 *See* SCHOEN, *supra* note 809, at 33.

863 Hindley, *supra* note 808.

864 *See id.*

quest to appoint a southern Justice. Minnesota Republican Harry Blackmun became the President's new choice.[865] After just a few hours of deliberation, the Senate confirmed Blackmun to the Court by a lopsided vote of 94-0.[866]

L. Robert Bork

On September 26, 1986, President Ronald Reagan presided over the investiture of two new members of the Supreme Court.[867] William Rehnquist, the new Chief Justice, had survived a moderate amount of public controversy before the Senate confirmed him by a vote of 65-33.[868] Antonin Scalia had sailed through the Senate with a unanimous vote of approval.[869] For a President who had vowed—as Nixon and Hoover had done before him—to repair the federal judiciary by appointing judges who were conservative, tough on crime, and strict constructionists, it was a glorious day.[870]

In this highly publicized moment, Reagan seized the opportunity to again declare his views about the Supreme Court's proper role.[871] "[The Founding Fathers] settled on a judiciary that would be independent and strong," Reagan declared, "but one whose power would also, they believed, be confined within the boundaries of a written Constitution and laws."[872] The need for "judicial restraint," Reagan continued, was one of the only subjects on which both Thomas Jefferson and Alexander Hamilton agreed, as a judiciary of strictly limited powers was necessary for the nation to survive.[873] He then listed Oliver Wendell Holmes as a great proponent of

[865] *See* SCHOEN, *supra* note 809, at 34. This was a choice that Nixon would ultimately deeply regret. *See id.* ("Blackmun was seen as a law-and-order man, and in the early years of his tenure, he cast mostly conservative votes. But in time, he became a key cog of the [C]ourt's liberal wing, famously writing the [*Roe v. Wade*] opinion legalizing abortion and, two decades later, coming out against the death penalty.").

[866] *See Supreme Court Nominations*, *supra* note 17.

[867] *See* Ronald Reagan, *Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States*, AM. PRESIDENCY PROJECT (Sept. 26, 1986), http://www.presidency.ucsb.edu/ws/?pid=36494.

[868] *Supreme Court Nominations*, *supra* note 17.

[869] *See id.*

[870] *See* DAVID MERVIN, RONALD REAGAN AND THE AMERICAN PRESIDENCY 146, 147 (1990); *see also* Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES (Apr. 10, 1990), http://www.nytimes.com/1990/04/10/us/bush-picking-the-kind-of-judges-reagan-favored.html ("In the Reagan Administration, candidates for the Federal bench were screened by the Justice Department's Office of Legal Policy under Attorney General Edwin Meese 3d, who was outspoken in calling for transforming the judiciary.").

[871] Reagan, *supra* note 867.

[872] *Id.*

[873] *Id.*

judicial restraint, and quoted Felix Frankfurter: "The highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."[874] "Chief Justice Rehnquist and Justice Scalia have demonstrated in their opinions that they stand with Holmes and Frankfurter on this question," the President said.[875] "I nominated them with this principle very much in mind."[876]

Eight months later, Reagan again returned to the subject of "judicial restraint."[877] This time, the subject was his nomination to replace the retiring Justice Lewis F. Powell, Jr., an unpredictable jurist who frequently cast the Court's swing vote in heavily contested cases.[878] To replace this longtime pragmatic moderate, Reagan selected Robert Heron Bork, a current member of the United States Court of Appeals for the District of Columbia and a former Solicitor General under Nixon.[879] In his press conference introducing Bork to the nation, Reagan came back to a now-familiar topic:

> Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judges' personal preferences and values should not be part of their constitutional interpretations. The guiding principle of judicial restraint recognizes that under the Constitution it is the exclusive province of the legislatures to enact laws and the role of the courts to interpret them.[880]

Outwardly, Reagan projected the impression that he expected the Senate to easily confirm Bork, just as they had done with Scalia and with Reagan's first Court selection, Sandra Day O'Connor.[881] Several senators, however, declared that Bork would face a battle far tougher than any of Reagan's nominees thus far.[882] Even before

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[874] *Id.*

[875] *Id.*

[876] *Id.*

[877] *See* Gerald M. Boyd, *Bork Picked for High Court; Reagan Cites His 'Restraint'; Confirmation Fight Looms*, N.Y. TIMES (July 2, 1987), http://www.nytimes.com/1987/07/02/us/bork-picked-for-high-court-reagan-cites-his-restraint-confirmation-fight-looms.html.

[878] *See id.*

[879] *See id.*; Richard Lacayo, *The Battle Begins*, TIME, July 13, 1987, http://content.time.com/time/magazine/article/0,9171,964975,00.html; Richard Vigilante, *Who's Afraid of Robert Bork?*, NAT'L REV., Aug. 28, 1987, at 25–30.

[880] Ronald Reagan, Remarks Announcing the Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States, PUB. PAPERS 736 (July 1, 1987).

[881] *See, e.g.*, *Reagan Urges Fast Senate Action on Bork*, L.A. TIMES (July 29, 1987), http://articles.latimes.com/print/1987-07-29/news/mn-4458_1_robert-bork.

[882] *See* Linda Greenhouse, *Washington Talk: The Bork Nomination; In No Time at All,*

Reagan had nominated Bork to the Court, the judge had firmly established himself as one of the most polarizing figures in the entire nation.[883] Already, he had delivered multiple public declarations against statutes and Supreme Court decisions involving abortions, homosexuality, affirmative action, civil rights initiatives, antitrust laws, and freedom of speech.[884] With this highly publicized record already entrenched, the notion of Robert Bork deciding cases on the highest court in the federal judiciary was too much for the leaders of many interest groups to bear.[885] The President's latest standard bearer of judicial restraint was in for an extremely unrestrained fight.[886]

Nominee's Political Party: Republican.[887]

Nominating President's Political Party: Republican.[888]

Majority Party in Senate: Democratic.[889]

Both Proponents and Opponents are Ready for Battle, N.Y. TIMES (July 9, 1987), http://www.nytimes.com/1987/07/09/us/washington-talk-bork-nomination-no-time-all-both-proponents-opponents-are-ready.html ("By the time President Reagan went before the television cameras last week to announce his choice for the Supreme Court, the campaign to persuade the Senate not to confirm Robert H. Bork was already well under way.").

[883] *See* Jamie Kalven, *Robert Bork and the Constitution*, INVISIBLE INST., http://invisible.institute/robert-bork-and-the-constitution/ (last visited Nov. 21, 2016). Criticism of Robert Bork, together with fear from many commentators that Reagan would nominate Bork to the Supreme Court, began several years before the nomination actually occurred. *See* Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html (describing the divisive effects of Bork's circuit court decisions and public proclamations about many of the most controversial topics facing the nation at the time of his confirmation hearings).

[884] *See, e.g.*, Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444, 445 (D.C. Cir. 1984); Dronenburg v. Zech, 741 F.2d 1388, 1389 (D.C. Cir. 1984); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9, 14, 20 (1971) [hereinafter Bork, *Neutral Principles*]; Gary B. Born, *Robert H. Bork's Civil Rights Record*, 9 CARDOZO L. REV. 75, 75 (1987); Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court*, 1 BELMONT L. REV. 221, 237, 245–48, 260–63 (2014); Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 23 [hereinafter Bork, *Civil Rights*]; Robert Bork, *A Murky Future*, AEI (Sept. 1, 1978), http://www.aei.org/publication/a-murky-future/print/ [hereinafter Bork, *A Murky Future*]; Bronner, *supra* note 883; Greenhouse, *supra* note 882; Kalven, *supra* note 883; Lacayo, *supra* note 879; *see generally* Pub. Citizen Litig. Grp., *The Judicial Record of Judge Robert H. Bork* (1987), *reprinted in* 9 CARDOZO L. REV. 297, 298 (1987) (describing the entirety of Bork's record with special focus on the issues outlined above).

[885] *See* Pub. Citizen Litig. Grp., *supra* note 884; Bronner, *supra* note 883; Greenhouse, *supra* note 882; Kalven, *supra* note 883; Lacayo, *supra* note 879; Vigilante, *supra* note 879.

[886] That fight, and Bork's eventual lopsided rejection by the Senate, ultimately gave birth to a new verb: "to bork," meaning "to attack a person's reputation and views unfairly." Pomerance, *supra* note 884, at 224.

[887] *See* Rupert Cornwell, *Robert Bork: Jurist who was rejected for the Supreme Court*, INDEPENDENT (Dec. 25, 2012), http://www.independent.co.uk/news/obituaries/robert-bork-jurist-who-was-rejected-for-the-supreme-court-8431146.html.

[888] *See President Ronald Reagan*, INSIDEGOV, http://supreme-court-justices.insidegov.com (last visited Nov. 21, 2016).

Majority Political Party on United States Supreme Court: Reagan's appointments had transformed the partisan balance on the Court. Republicans now held the majority of votes, with Reagan appointees Chief Justice Rehnquist and Justices Scalia, and O'Connor joining Justices John Paul Stevens and Harry Blackmun to comprise the Court's Republican membership.[890] The Court's Democratic wing consisted of Justices Byron White, Thurgood Marshall, and William Brennan, Jr.[891]

Predecessor's Political Party: Democratic.[892]

President's Previous Nominations to United States Supreme Court: Sandra Day O'Connor (unanimously confirmed), Antonin Scalia (unanimously confirmed), and William Rehnquist (confirmed by a vote of 65-33).[893]

Number of Years between Nomination Year and Next Presidential Election: One year.[894]

Nominee's Prior Legal Record: Bork received his legal training at the University of Chicago School of Law.[895] The school's leading role in the "Law and Economics" movement tremendously influenced Bork's future viewpoints, with individuals such as conservative economist Aaron Director serving as key mentors for the future judge.[896] When he entered law school, Bork planned to represent labor unions.[897] After spending time immersed in the University of Chicago's laissez-faire teachings, however, Bork abandoned those early plans and decided to devote his life to fighting antitrust legislation.[898]

Bork fulfilled this latter objective with the prestigious Chicago firm of Kirkland & Ellis.[899] Finding that the daily rigors of practice were not intellectually stimulating enough, he took a substantial pay cut to leave the firm and accept a professorship teaching constitutional law and antitrust law at Yale Law School, where he claimed that he was the only conservative on the entire faculty.[900]

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889 *See* Cornwell, *supra* note 887.

890 *See Compare Supreme Court Justices*, *supra* note 234.

891 *See id.*

892 *See id.*

893 *See Supreme Court Nominations*, *supra* note 17.

894 *See President Ronald Reagan*, *supra* note 888; *Supreme Court Nominations*, *supra* note 17.

895 *See* Pomerance, *supra* note 884, at 227–28.

896 *See id.*

897 *See id.* at 228.

898 *See id.* at 227–28.

899 *See id.* at 228.

900 *See* David Beckwith, *A Long and Winding Odyssey*, TIME, Sept. 21, 1987, http://www.time.com/time/magazine/article/0,9171,965540,00.html.

In 1972, he accepted Nixon's offer to leave the academic realm and become the Solicitor General of the United States.[901] Immediately after arriving in Washington, Bork faced the unpleasant entanglements of Nixon's infamous Watergate scandal.[902] When Special Prosecutor Archibald Cox demanded that Nixon produce tapes of conversations that occurred in the White House, Nixon ordered that his Attorney General terminate Cox's employment.[903] Both Nixon's Attorney General and Nixon's Deputy Attorney General resigned rather than carry out the President's demand.[904] Ultimately, the task of firing Cox fell to Bork—an act that the D.C. Circuit later deemed to constitute obstruction of justice.[905]

In the late-1970s, Bork returned to Yale, espousing legal stances that were more controversial than ever.[906] On February 9, 1982, Reagan appointed him to the D.C. Circuit.[907] His voting record on the D.C. Circuit demonstrated support for positions that he had advocated for prior to entering the judiciary: First Amendment protection only for speech and expression that dealt with political affairs; an extremely limited application of the Equal Protection Clause; and a suspicious view of civil rights initiatives and other programs that imposed new governmental requirements upon private businesses.[908]

Nominee's Prior Political Record: Growing up in suburban Pittsburgh, Pennsylvania, Bork originally declared that he was a Socialist.[909] By the time he graduated from the University of

[901] *See* Pomerance, *supra* note 884, at 228; Richard Lacayo, *The Law According to Bork*, TIME, Sept. 21, 1987, http://www.time.com/time/magazine/article/0,9171,965560,00.html. In an emblem befitting Bork's argumentative intellectual tendencies, his students at Yale provided him with a hard hat as a going-away gift. *See* Lacayo, *supra* note 901.

[902] *See* Anthony Lewis, *Abroad at Home: Bork and Watergate*, N.Y. TIMES, Aug. 23, 1987, at E23.

[903] *See* Pomerance, *supra* note 884, at 229.

[904] *See id.*

[905] *See* Nader v. Bork, 366 F. Supp. 104, 105, 108–09 (D.D.C. 1973); Aaron Epstein, *2 Challenge Bork on Watergate*, PHILA. INQUIRER (Sept. 30, 1987), http://articles.philly.com/1987-09-30/news/26208441_1_cox-dismissal-judge-bork-challenge-bork; Lewis, *supra* note 902, at E23.

[906] *See* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 68–72 (1989); Pomerance, *supra* note 884, at 229.

[907] *See Senate Rejects Robert Bork's Nomination to the Supreme Court*, NAT'L CONST. CTR. (Oct. 23, 1987), http://constitutioncenter.org/timeline/html/cw13_12367.html.

[908] *See* Stephen Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33, 43–47 (1987); Pomerance, *supra* note 884, at 237–38, 245–48, 260–61; Pub. Citizen Litig. Grp., *supra* note 884, at 331; David Broder, *Appraising the Judge, Not the Theorist*, CHI. TRIB. (Sept. 20, 1987), http://articles.chicagotribune.com/1987-09-20/news/8703110251_1_judge-robert-h-bork-supreme-court-warren-court.

[909] *See* Pomerance, *supra* note 884, at 227.

Chicago, such views were only a distant memory.[910] In 1964, he received praise from leaders in the Republican Party for his work on Barry Goldwater's presidential campaign.[911] He gained further acclaim for advising Nixon in the 1968 and 1972 presidential elections.[912]

Bork's appetite for direct involvement in political affairs seemed to decline somewhat during his tenure as Nixon's Solicitor General.[913] Carrying out Nixon's order to fire Cox gained him the unpleasant reputation of being "Nixon's henchman," and the overall climate in Washington during the Watergate affair bothered him significantly.[914] When he returned to teach at Yale, many people suspected that Bork preferred the academic life to a position in public service.[915] However, when Reagan offered Bork the opportunity to join the D.C. Circuit, he accepted the opportunity.[916]

Controversial Topics On Which Nominee Held Publicized Stance: Perhaps more than any other nominee examined in this article, the outspoken and unyielding Bork presented himself to the President, the Senate, and the public as an open book.[917] Multiple articles, speeches, and court opinions offered plenty of grist for the mill for both his supporters and his detractors.[918]

Bork first's widespread controversy occurred after he published an article in the *Indiana Law Journal* calling for a strictly constrained application of the First Amendment's free speech protections.[919] Under Bork's analysis, the drafters of the Bill of Rights intended the First Amendment to protect only "speech

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[910] *See id.* at 227–28.

[911] *See id.* at 228.

[912] *See id.*

[913] *See* BRONNER, *supra* note 906, at 65.

[914] *See id.* at 69. The issue of Bork's role in the "Saturday Night Massacre" emerged in full force during the Senate's questioning of Bork. *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 420–22 (1997); Lewis, *supra* note 902, at E23; Kenneth B. Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES (July 2, 1987), http://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html.

[915] *See* BRONNER, *supra* note 906, at 65, 68–71.

[916] *See* Pomerance, *supra* note 884, at 229.

[917] *See, e.g.*, John O. McGinnis, *Robert Bork: Intellectual Leader of the Legal Right*, 80 U. CHI. L. REV. DIALOGUE 235, 235 (2013); Andrew Cohen, *The Sad Legacy of Robert Bork*, ATLANTIC (Dec. 19, 2012), http://www.theatlantic.com/politics/archive/2012/12/the-sad-legacy-of-robert-bork/266456/ (suggesting how Bork laid out his views for all to see, to the detriment of his candidacy); Ronald Dworkin, *The Bork Nomination*, N.Y. REV. BOOKS (Aug. 13, 1987), http://www.nybooks.com/articles/1987/08/13/the-bork-nomination/.

[918] Some observers argue that the degree to which the Senate used Bork's past statements against him encouraged future Presidents to nominate prospective Justices with few or no known views on major issues. *See, e.g.*, Cohen, *supra* note 917.

[919] *See* Bork, *Neutral Principles*, *supra* note 884, at 26–27.

concerned with government behavior, policy or personnel."[920] This framework excised First Amendment protection for scientific theories, works of art and literature, commercial advertisements, protests advocating the overthrow of the existing form of government, educational debates about non-political themes, and several other areas of speech that existing Supreme Court caselaw safeguarded.[921] Anything short of this bright-line rule protecting only political speech, according to Bork's article, would open the door for rampant judicial activism among federal and state court judges.[922] While Bork later professed to relax his stance somewhat regarding the First Amendment, he continued to maintain a viewpoint that a limited application of the First Amendment was necessary.[923]

A second controversy arose from Bork's book, *The Antitrust Paradox: A Policy at War with Itself*.[924] Published in 1978, Bork devoted the book to his arguments against the nation's existing antitrust policies, asserting that antitrust laws actually harmed consumers by shielding shoddy businesses and consequently causing market prices to rise.[925] One commentator pointed out that *The Antitrust Paradox*, coupled with Bork's other writings from the late-1970s and early-1980s, heralded Bork's rapidly intensifying belief that "egalitarianism went hand in hand with permissiveness" and, by extension, eventual downfall and disaster for the nation.[926]

Bork wrote that *Harper v. Virginia Board of Elections*,[927] the Supreme Court decision that invalidated the use of poll taxes in state elections, represented a prime example of illegitimate judicial activism.[928] He declared that a constitutional right to privacy was "utterly specious" and "intellectually empty."[929] He stated that the concept of "one man, one vote" that governed the Court's

[920] *Id.* at 27–28.

[921] *See id.* at 27.

[922] *See id.* at 30–31.

[923] *See* Pomerance, *supra* note 884, at 245–46.

[924] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[925] *See, e.g.*, *id.* at 368–69 (demonstrating this principle in the real estate case of *Fortner Enterprises v. United States Steel Corp.*).

[926] *See* BRONNER, *supra* note 906, at 71–72.

[927] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

[928] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 324 (1990) ("I did object to the ruling in *Harper v. Virginia State Board of Elections*, which struck down a small poll tax in a case where racial discrimination was not even alleged, thus rewriting the Constitution and overturning years of consistent precedent.").

[929] Anita L. Allen, *Why Does Bork Have Trouble With a Right to Privacy?*, CHI. TRIB. (Sept. 29, 1987), http://articles.chicagotribune.com/1987-09-29/news/8703130428_1_privacy-judge-bork-protect.

jurisprudence in legislative reapportionment cases "runs counter to the text of the [F]ourteenth [A]mendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula."[930] He referred to *Roe v. Wade*,[931] the Court's 1973 decision recognizing a woman's constitutional privacy right to an elective abortion, as "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority."[932]

Yet Bork reserved his most pointed comments for civil rights measures. In one article stating that welfare rights were nowhere to be found in the Constitution, Bork stated that it was "quite dubious" that "the poor [and] the black are underrepresented politically."[933] "The poor and the [black] have had access to the political process and have done very well through it," Bork declared, justifying his assertion by noting that the United States now provided minorities and poor persons with "civil rights laws of all kinds."[934]

While Bork delivered a separate statement deeming racial classifications "invidious," he consistently chastised most statutes and judicial decisions dealing with regulations in this area as "liberal shibboleth.[935] Legislation banning racial discrimination by owners of public accommodations received condemnation from Bork on the grounds that such a law breached the "personal liberty" of business owners.[936] Activist judges, in Bork's opinion, frequently distorted the Equal Protection Clause to shield certain groups "justified only by the sentimentalities or the morals of the class to which these judges and their defenders belong."[937] Affirmative action, to Bork, would create a new ethos of group entitlement.[938] In one D.C. Circuit opinion, he held that the Constitution did not recognize a "right to engage in homosexual conduct and that, as judges, we have no warrant to create one."[939] Regarding the Civil

[930] Bork, *Neutral Principles*, *supra* note 884, at 18.

[931] Roe v. Wade, 410 U.S. 113 (1973).

[932] JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 70 (1995).

[933] Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 Wash. U. L.Q. 695, 701.

[934] *Id.*

[935] *See* Rudolph V. Vanterpool, *Subsistence Welfare Benefits as Property Interests: Legal Theories and Moral Considerations*, *in* A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 336–37 (Tommy L. Lott & John P. Pittman eds., 2003); Born, *supra* note 884, at 76.

[936] *See* Gillers, *supra* note 908, at 36.

[937] *Id.* at 46.

[938] *See* Bork, *A Murky Future*, *supra* note 884.

[939] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

Rights Act of 1964, Bork wrote that the legislation amounted to state coercion that infringed upon individual freedoms of opinion.[940] "That is itself a principle of unsurpassed ugliness," he concluded.[941]

Last, Bork took strong public stances about the functioning of the Supreme Court itself. According to Bork, the Court had engaged for decades in "judicial excesses" that he longed to temper.[942] "Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution," he wrote one year before Reagan nominated him to the Court.[943] Known as an originalist judge, he stated that the Court had decided dozens of decisions without regard to the Constitution's plain language and history.[944] An originalist Justice such as himself, Bork wrote, "would have no problem whatever in overruling" such cases.[945]

Public Sentiment Regarding Nominee: Forty-five minutes after Reagan announced the nomination, Senator Edward Kennedy released a statement, proclaiming:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids . . . and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[946]

Shortly thereafter, Reagan offered a rebuttal: "No man in America, and few in our history, [has] been as qualified to sit on the Supreme Court as Robert Bork."[947]

The battle of public opinion regarding Bork's nomination played out in much the same way, with strongly worded rhetoric carrying

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940 *See* Bork, *Civil Rights*, *supra* note 884, at 22.

941 *Id.*

942 *See* Associated Press, *Robert Bork Nomination Fight Altered Supreme Court Selection*, CLEVELAND (Dec. 19, 2012), http://www.cleveland.com/nation/index.ssf/2012/12/robert_bork_nomination_fight_a.html.

943 Robert H. Bork, *Judicial Review and Democracy*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1062 (Leonard W. Levy et al. eds., 1986).

944 *See* Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on* Ollman v. Evans, 80 U. CHI. L. REV. DIALOGUE 155, 155 (2013); Matthew J. Franck, *The Original Originalist*, NAT'L REV. (Jan. 28, 2013), https://www.nationalreview.com/nrd/articles/337354/.

945 Stuart Taylor, Jr., *Judge Bork: Restraint vs. Activism*, N.Y. TIMES (Sept. 13, 1987), http://www.nytimes.com/1987/09/13/us/judge-bork-restraint-vs-activism.html?pagewanted=all.

946 133 CONG. REC. 18,519 (1987) (statement of Sen. Kennedy).

947 Merrill Hartson, *Reagan Predicts Bork Would Be a Great Supreme Court Justice*, ASSOCIATED PRESS (July 29, 1987), http://www.apnewsarchive.com/1987/Reagan-Predicts-Bork-Would-Be-A-Great-Supreme-Court-Justice/id-a6f33bfb15db4e2e83b813b135235d5f.

the day.[948] Nobody appeared to remain neutral or indifferent about Bork's fitness for a position on the Court.[949] Mainstream media articles and law review analyses contained strong views on both sides.[950] A parade of law professors testified before the Senate Judiciary Committee regarding Bork.[951] Owen Fiss, Laurence Tribe, Cass Sunstein, Ronald Dworkin, David Richards, and Kathleen Sullivan were among the professors speaking against Bork.[952] Daniel Meador, John Simon, George Priest, Henry Monaghan, A. Leo Levin, and Thomas Sowell were among the academics who testified in Bork's favor.[953] At least three former American Bar Association presidents spoke in favor of Bork's confirmation.[954] At least two former American Bar Association presidents called publicly for Bork's rejection.[955]

After a three-month campaign before the Senate and the eyes of the nation, Bork ultimately came out on the losing end of the fight, rejected by a vote of 58-42.[956] In the opinion of many observers, it was the most visible and bitter confirmation struggle regarding a Supreme Court nominee in the nation's history.[957] Bork served for

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948 *See, e.g.*, Pomerance, *supra* note 884, at 222, 223, 224.

949 *See id.*

950 *See id.* at 222–23; *see also* Bronner, *supra* note 883 (discussing in considerable detail the public battle that stretched beyond political and legal leaders into surprising realms such as Hollywood).

951 *See* David A.J. Richards, *Originalism without Foundations*, 65 N.Y.U. L. REV. 1373, 1373–74, 1374 n.4 (1990).

952 *Id.; see* Linda Greenhouse, *Legal Establishment Divided Over Bork Nomination*, N.Y. TIMES (Sept. 26, 1987), http://www.nytimes.com/1987/09/26/us/the-bork-hearings-legal-establishment-divided-over-bork-nomination.html; Stephen B. Presser, *A New Age "New Deal,"* CHI. TRIB. (Oct. 31, 1993), http://articles.chicagotribune.com/1993-10-31/entertainment/9310310088_1_free-speech-supreme-court-campaign-spending/2.

953 *See* Lawrence C. Marshall, *Confirmation Controversy: The Selection of a Supreme Court Justice: Intellectual Feasts and Intellectual Responsibility*, 84 NW. U.L. REV. 832, 835 (1990); Asha Badrinath, *CU Law Prof Testifies in Favor of Bork*, COLUMBIA DAILY SPECTATOR, Oct. 1, 1987, at 5; Greenhouse, *supra* note 952.

954 *See* Greenhouse, *supra* note 952. Additionally, former Chief Justice Warren Burger and former President Gerald Ford testified before the Senate in Bork's favor. *See* Associated Press, *Ford to Testify in Favor of Bork*, L.A. TIMES (Sept. 14, 1987), http://articles.latimes.com/1987-09-14/news/mn-5127_1_strom-thurmond.

955 *See* Greenhouse, *supra* note 952. In the realm of pop culture, even celebrated movie star Gregory Peck got into the act, recording a widely disseminated commercial opposing Bork. *See* PFAWdotorg, *1987 Robert Bork TV Ad, Narrated by Gregory Peck*, YOUTUBE (July 16, 2008), http://www.youtube.com/watch?v=NpFe10lkF3Y.

956 *See* David Lauter, *Senate Rejects Bork for Supreme Court, 58-42: Vote is Stunning Political Setback for Reagan, Who is Expected to Submit New Name Next Week*, L.A. TIMES (Oct. 24, 1987), http://articles.latimes.com/1987-10-24/news/mn-4089_1_nominee/2.

957 *See, e.g.*, Cohen, *supra* note 917; Editorial, *Robert Bork's Legacy*, TOLEDO BLADE (Dec. 23, 2012), http://www.toledoblade.com/Editorials/2012/12/23/Robert-Bork-s-legacy.html; Susan Milligan, *Robert Bork's Legacy*, U.S. NEWS & WORLD REPORT (Dec. 19, 2012), http://www.usnews.com/opinion/blogs/susan-milligan/2012/12/19/robert-borks-legacy-nominations-

another year on the D.C. Circuit and then resigned, devoting the remainder of his life to criticizing the Court's "activist judges" with even more fervor than before.[958] Reagan pledged that he would nominate a jurist who "will share Judge Bork's belief in judicial restraint—that a judge is bound by the Constitution to interpret laws, not make them."[959] Ultimately, he settled on the U.S. Court of Appeals for the Ninth Circuit Judge Anthony Kennedy, a man whom Reagan said "seems to be popular with many senators of varying political persuasions."[960] On this last matter, Reagan was unquestionably correct. Kennedy, the man who is the least predictable voter on today's Court, received unanimous confirmation from the members of the Senate.[961]

III. TRENDS AND PATTERNS IN SENATE REJECTIONS OF UNITED STATES SUPREME COURT NOMINEES

A. Party Disloyalty

From the outset, one would reasonably assume that most rejections occur when the majority political party in the Senate differs from the nominee's political party. Indeed, many recent critiques about the confirmation of Supreme Court Justices focus on the apparent politicization of this process.[962] In light of such

blocked-for-politics; Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR (Dec. 19, 2012), http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

[958] *See* Pomerance, *supra* note 884, at 224; John Yoo, *Taming Judicial Activism: Judge Robert Bork's* Coercing Virtue, 80 U. CHI. L. REV. DIALOGUE 257, 260 (2013).

[959] Pomerance, *supra* note 884, at 224.

[960] Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all. Following Bork's rejection, Reagan nominated D.C. Circuit Judge Douglas Ginsburg, another jurist who praised the philosophies of strict construction and "judicial restraint." However, Ginsburg never even made it to the Senate for advice and consent, as Ginsburg withdrew his name just ten days later after evidence showing that he had smoked marijuana with his students while teaching at Harvard appeared in the news. *See* John M. Broder, *Collapse of the Ginsburg Nomination: At the End, Ginsburg Stood Alone—And Still a Puzzle*, L.A. TIMES (Nov. 8, 1987), http://articles.latimes.com/1987-11-08/news/mn-21569_1_doug-ginsburg; United Press International, *President on Offense for Nominee*, SUN SENTINEL (Nov. 1, 1987), http://articles-sun-sentinel.com/1987-11-01/news/8702030074_1_senate-judiciary-committee-confirmation-nomination. Only after this second failure to nominate a judge to fill Powell's seat did Reagan turn to Kennedy. Greenhouse, *supra* note 960.

[961] *See Supreme Court Nominations*, *supra* note 17.

[962] *See, e.g.*, Shannen W. Coffin, *On Scalia and the Politics of His Replacement*, NAT'L REV. (Feb. 14, 2016), http://www.nationalreview.com/corner/431295/politicization-nomination-process; Jamie Fuller, *Have American Politics Killed the Impartial Supreme Court?*, WASH.

criticism, one would expect that the Senate's actions toward Supreme Court nominees would be an area in which battle lines are drawn along party lines.

Surprisingly, however, this article demonstrates that the inverse may be true. Ten of the twelve rejected nominees were turned away by a Senate controlled by the same political party as the nominee.[963] In nine of these twelve situations, both the President and the nominee belonged to the same party that maintained the Senate's majority.[964] Only Carswell and Bork were voted down by a Senate in which a political party other than their own held the preponderance of the seats.[965] The remaining ten nominees saw enough senators cross party lines to prevent a member of their own party from ascending to the federal judiciary's highest tribunal.[966]

A closer examination reveals one potential explanation for this phenomenon. Many of the nominees were rejected in years when significant divisions arose within the political parties in power.[967] One can see this in the High Federalist versus Moderate Federalist split during Rutledge's nomination, the growing disunity within the Democratic-Republicans at the time of Wolcott's nomination, the severance of Whig ties with President Tyler and his allies around the time when Spencer was nominated, the intra-party divides over states' rights, slavery, and geographic loyalties in the years surrounding Black's nomination, and the rise of the Radical Republican faction at the time when the Senate considered Hoar's nomination.[968]

Similarly, plenty of Democrats turned their back on Cleveland, a fellow Democrat, over economic disputes.[969] On the other side of the aisle, the same thing happened to Hoover with certain "progressive" Republicans who had grown weary of national policies and Court decisions constantly protecting the interests of big businesses.[970]

POST (May 8, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/05/08/have-american-politics-killed-the-impartial-supreme-court/; John M. Walker, Jr., *The Unfortunate Politicization of Judicial Confirmation Hearings*, ATLANTIC (July 9, 2012), http://www.theatlantic.com/national/archive/2012/07/the-unfortunate-politicization-of-judicial-confirmation-hearings/259445/; Lydia Wheeler, *Supreme Court Standoff Spurs Fear of Politicization of Court*, HILL (Mar. 16, 2016), http://thehill.com/homenews/senate/271835-supreme-court-standoff-spurs-fear-of-politicization-of-court.

963 *See supra* Part II.

964 *See supra* Part II.

965 *See supra* Part II.

966 *See supra* Part II.

967 *See supra* Part II.

968 *See supra* Parts II.A, II.B, II.C, II.E, II.F.

969 *See supra* Parts II.G, II.H.

970 *See supra* Part II.I.

Based on this, one can infer that the likelihood of a Senate rejection increases when deep divides exist at the national level within one or more political parties. Such a trend is particularly noteworthy at present. An extremely contentious 2016 primary season seemed to rip open the wounds of division among both Democrats and Republicans.[971] This factionalism could spill over into Senate debates regarding Supreme Court nominees in the next four years. For instance, Tea Party Republicans could break ranks with moderate Republicans.[972] On the other side of the aisle, strong liberals could split from more middle-of-the-road Democrats about whether a particular nominee is "progressive enough."[973] The history examined in this article demonstrates that such strained intra-party relationships could sink a Supreme Court nominee regardless of that nominee's political party and irrespective of what political party controls the other branches of the federal government.

B. Timing Questions

In early 2016, the Senate's refusal to entertain President Obama's nomination of Judge Merrick Garland to replace Justice Scalia instigated questions about whether the Senate should ever confirm a nominee at the end of a President's term.[974] On certain occasions throughout America's past, the Senate followed the course that it adopted in 2016 regarding a late-term nomination to the Court,

[971] *See, e.g.*, *supra* notes 1–4 and accompanying text.

[972] This wide range of ideologies within the Republican Party garnered particular attention during the recent 2016 presidential primaries and throughout the general election. *See, e.g.*, Editorial, *The Fall—and Rise?—of Moderate Republicans*, CHI. TRIB. (Aug. 11, 2016), http://www.chicagotribune.com/news/opinion/editorials/ct-moderate-republican-libertarian-trump-johnson-bush-0813-md-20160811-story.html (noting that Republican Speaker of the House Paul Ryan is distrusted by his more conservative Tea Party colleagues); *The Republicans Opposing Donald Trump—And Voting for Hillary Clinton*, NBC NEWS (Nov. 6, 2016), http://www.nbcnews.com/politics/2016-election/meet-republicans-speaking-out-against-trump-n530696?cid=sm_tw; Manu Raju, *Swing-State Republicans Break Ranks*, POLITICO (Jan. 27, 2015), http://www.politico.com/story/2015/01/moderate-republicans-mitch-mcconnell-senate-114620.

[973] As with the Republican divisions, the question of what it truly means to be a "progressive" Democrat became a deeply divisive issue during the presidential primaries. *See, e.g.*, Clare Foran, *The 'Never Clinton' Campaign*, ATLANTIC (May 5, 2016), http://www.theatlantic.com/politics/archive/2016/05/hillary-clinton-bernie-sanders/481389/; Sam Frizell, *Sanders Suggests Clinton is not a True Progressive*, TIME (Feb. 2, 2016), http://time.com/4205149/bernie-sanders-hillary-clinton-progressive/; Kiese Laymon, *Hillary Clinton Isn't Progressive. She's Just the Lesser Evil in the General Election*, GUARDIAN (Apr. 27, 2016), https://www.theguardian.com/commentisfree/2016/apr/27/hillary-clinton-progressive-values-black-voters-lesser-evil-election-2016.

[974] *See* Barack Obama, *supra* note 9.

simply refusing to take any action whatsoever regarding the nominee.[975]

In the realm of Senate rejections, however, the amount of time between the President's nomination and the next presidential election rarely appears to carry particular importance. Seven of the ultimately rejected Court nominees—Woodward, Hoar, Hornblower, Peckham, Parker, Haynsworth, and Carswell—were nominated with two or more years remaining before the next presidential election, but were declined by the Senate anyway.[976]

In a couple of the nominations studied here, though, the length of time until the next presidential election did play a key part. Particularly noteworthy was the role of proximity to the next presidential administration in Black's nomination, where leading journalists and politicians announced that they would automatically reject any nominee put forth by President Buchanan, as Lincoln was just weeks away from entering the White House.[977] The relatively short amount of time remaining before the next election likely played a pivotal part in the Senate's rejection of Spencer, too, as many senators hoped to simply run out the clock until someone other than Tyler could appoint the new Justice.[978]

Overall, however, the majority of the rejected nominees had plenty of time between their nominations and the next presidential election.[979] In addition, many of these individuals were one of the sitting President's earliest selections for the Court. Wolcott, Spencer, Woodward, Hoar, and Hornblower all were the first nominee from their respective President's term of office.[980] The only rejected nominees from a President who had already sent multiple nominees to the Senate were Rutledge, as Washington had already

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[975] *See* Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/; *see, e.g.*, *Supreme Court Nominations*, *supra* note 17.

[976] *See Supreme Court Nominations*, *supra* note 17.

[977] *See supra* Part II.E.

[978] *See supra* Part II.C.

[979] *See* Gregor Aisch et al., *Supreme Court Nominees Considered in Election Years Are Usually Confirmed*, N.Y. TIMES, http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html (last updated Mar. 16, 2016); *see also* Daniel Victor, *Election-Year Supreme Court Nominations Are Rare*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/election-year-nominations-are-rare/ (discussing that there have only been five Supreme Court nominations during a presidential election in the last one hundred years).

[980] *See Supreme Court Nominations*, *supra* note 17. Cleveland successfully nominated Melville Fuller and Lucius Lama to the Court during his first term in office. *See id.* However, Hornblower was Cleveland's first nominee after defeating Benjamin Harrison in 1892 for his second stint in the White House. *See id.*

chosen multiple justices for the Court, and Bork, as Reagan had successfully appointed three Supreme Court Justices prior to Bork's nomination.[981]

Perhaps this pattern signifies that Presidents frequently lack savvy in dealing with the Senate at the time of their first Court nomination. Indeed, many Presidents rebound from a Senate rejection to attain future success with their Court nominees. For instance, after the Senate rejected Hoar, Grant nominated William Strong, Joseph Bradley, Ward Hunt, and Morrison Waite, all of whom were confirmed.[982] After the Senate turned down both Haynsworth and Carswell, Nixon's nominations of Harry Blackmun, Lewis Powell, and William Rehnquist all gained Senate approval.[983] Sometimes, this subsequent success resulted from the President's eventual acquiescence to interests held by key voting blocs in the Senate.[984] On other occasions, it came from a switch in the voting of certain Senate members, or from the existence of new alliances between the White House and particular senators, or even from a change in personnel within the Senate.[985] For all of these reasons, Presidents are less likely to prevail when the individual before the Senate is the President's first or second nominee to the Court.

C. Partisan Shifts in Membership

Considering the degree to which the Supreme Court can reshape national policy through its decisions, one might believe that Senate rejection might be more likely if the nominee belonged to a political party different than his or her predecessor. With only nine

[981] *See id., supra* Parts II.A, II.L.

[982] *See Supreme Court Nominations*, *supra* note 17.

[983] *See id.*

[984] For example, one can see this in Polk's successful nomination of Robert Grier, who gained Senator Simon Cameron's approval, after Cameron led the charge to reject Woodward. *See supra* Part II.D. One can witness this also in Cleveland's nomination of Edward White, a southerner with no known ties to northern business deals or New York City politics, after Senator Hill from New York successfully fought against both Hornblower and Peckham. *See supra* Parts II.G, II.H. Hoover found success nominating Owen Roberts, a nominee with a record that was more favorable to labor interests than Parker's record suggested. *See supra* Part II.I. Reagan's nomination of Anthony Kennedy did not engender anything close to the level of controversy that Bork's nomination had sparked. *See supra* Part II.L.

[985] For instance, the Whig-controlled Senate surprisingly changed course in 1845 and confirmed Samuel Nelson by a voice vote, ending the yearlong blockade on Tyler's nominees to the Court. *See Supreme Court Nominations*, *supra* note 17; *supra* Part II.C. Grant's relationship with the Senate improved following Hoar's rejection, and was measurably better by the time Grant made his subsequent Court appointments. *See Supreme Court Nominations*, *supra* note 17; *supra* Part II.F.

members, each new appointment can tilt the entire Court's balance and direction. When a nominee's party membership is the opposite of the jurist whom he or she is replacing, one would logically assume that such a nomination would receive enhanced scrutiny and attract additional controversy.

Of the twelve rejected nominees, however, only five would have replaced a Justice from an opposing political party if confirmed.[986] Correspondingly, the majority of the rejected nominees would not have altered the Court's partisan balance if the Senate had granted them the opportunity to serve.[987] Considering that all but two of these nominees faced a Senate led by members of the nominee's political party, the party members who voted against nominees from the same political party as their predecessors took an unexpected risk. By doing so, these senators risked a balance-altering appointment of a jurist from a rival party rather than preserving a seat on the Court that already belonged to one of their members.[988] The fact that party members would sacrifice this rare and important opportunity strongly indicates that other factors were at work in the decision-making process about these matters, as discussed in greater detail in the following sections.

D. Competence to Serve

The most fundamental question that one can ask of a Supreme Court nominee is whether he or she possesses the competence to serve in this position.[989] With this in mind, it is worth briefly examining whether any of the twelve rejected nominees genuinely lacked the ability to properly carry out the duties expected of a Justice on the Court.

Records demonstrate that Wolcott seemed to fall into this

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[986] The five rejected nominees fitting this description are Wolcott, Hornblower, Peckham, Carswell, and Bork. *See supra* Parts II.B, II.G, II.H, II.K, II.L. While Spencer's predecessor belonged to a political party that is different in name, the National Republican Party eventually morphed into the Whig Party, meaning that these two labels actually refer to the same party. *See* Sonia Benson et al., *Democratic-Republican Party*, GALE (2009), http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/DocumentToolsPortletWindow?displayGroupName=Reference&jsid=27c4d7c605ee78f96be9be874b8f557c&action=2&catId=&documentId=GALE%7CCX3048900171&u=oak30216&zid=9c00b8eb644b4e46de39f8a9335adc67.

[987] *See supra* note 986 and accompanying text.

[988] *See* Mark Joseph Stern, *The GOP's Supreme Court Gamble*, SLATE (Feb. 14, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/senate_republicans_should_compromise_on_antonin_scalia_s_replacement_or.html.

[989] *See, e.g.*, LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 95 (7th ed. 2013) (placing professional competence at the top of the list of standards that Presidents typically consider when deciding whether to nominate an individual to the Court).

category, partly because of his lack of any notable legal experience and partly because of his blatant willingness to put the Democratic-Republican Party above the interests of the nation overall.[990] One could also make a compelling case for Carswell, based largely on the fact that appellate courts devoted a considerable amount of time to undoing so many of the decisions that Carswell rendered during his years as a federal district court judge.[991] A number of newspapers and politicians claimed that Rutledge had gone insane and lacked the metal capacity to serve,[992] but it is difficult today to determine whether these allegations were anything more than partisan attacks.

Overall, however, the vast majority of these twelve rejected nominees possessed credentials, skill sets, and apparent abilities that strongly suggest their fitness to serve on the Court. For many of these individuals, even the smear campaigns waged by their political enemies could not convince the public that the nominee was not qualified for the job, proving that the nominee's confirmation likely would not have harmed the Court or the nation.[993] The number of times is few that the senators actually used incompetence or lack of qualifications as an on-the-record justification for rejecting any of these nominees.[994] Therefore, the senators who voted against most of these nominees did not do so because the nominees were unqualified to serve.[995] Other issues and factors had to drive the decisions to keep these individuals off the Court.

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[990] *See supra* Part II.B.

[991] *See supra* Part II.K.

[992] *See* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 998 (2000).

[993] For example, Spencer received widespread public approval, despite the efforts of the anti-Tyler Whigs to publicly pain him as a nominee who could not be trusted. *See supra* Part II.C. The press generally praised Woodward's legal acumen in spite of Senator Cannon's ultimately successful campaign against him. *See supra* Part II.D. Hoar received widespread acclaim, with many commentators of the day accurately recognizing his rejection as the work of legislators who disliked Hoar's dogged push for civil service reform and his influence over Grant. *See supra* Part II.F. Likewise, both of Cleveland's nominees gained consistent public praise, with media outlets understanding that their rejection occurred because of Senator Hill's grudges rather than a lack of qualifications from either Hornblower or Peckham. *See supra* Parts II.G, II.H. Parker, too, received substantial praise for his legal background and experience even after the questions about his views on labor and civil rights issues became a concern. *See supra* Part II.J.

[994] *See supra* Part II.

[995] *See supra* Part II.

E. Going Local

Several rejected nominees became victims of seemingly localized issues that expanded onto the national stage. For instance, Wolcott's "robust" enforcement of the Embargo Act at his customs house in Connecticut became a lynchpin for the nominee's unpopularity before the Senate, spurred on by hostile reports about Wolcott in the Connecticut newspapers.[996] Woodward's habit of making local enemies while engaging in the acrimonious infighting of Pennsylvania Democratic politics came back to haunt him when Senator Cameron almost singlehandedly blocked his confirmation.[997] Hornblower and Peckham's work on the New York City Bar Association committee that blocked Isaac P. Maynard's path to the New York State Court of Appeals gave Senator Hill reason enough to launch successful campaigns against both nominees.[998] A single speech in the North Carolina gubernatorial race was enough for the NAACP to mount a fierce opposition against Parker.[999]

An important lesson rests within this particular pattern. Often, Supreme Court candidates are presented to the public through a national lens, with particular emphasis about the candidate's apparent views on some of the weightiest issues of the day.[1000] Individuals reviewing a particular nominee, however, must perform particularly diligent legwork on the local level, learning whether the nominee has committed inappropriate acts, created enemies or formed rivalries, or engaged in any other practices that could resurface after his or her nomination. Outside the context provided by this article, one might not believe that the actions of Wolcott, Woodward, Hornblower, Peckham, and Parker in their home states were particularly egregious or even noteworthy. In each case, however, these acts were enough to spark an opposition movement against the nominee that ultimately led to his or her defeat.

F. Supreme Court Nominees as Political Pawns

In a number of situations examined in this article, members of

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996 *See supra* Part II.

997 *See supra* Part II.

998 *See supra* Part II.

999 *See supra* Part II.

1000 *See, e.g.*, Lori A. Ringhand & Paul M. Collins, *May it Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589, 631 (2011).

the Senate seemed far more interested in opposing the President of the United States than focusing on the merits of a particular nominee. The Whig-controlled Senate's rejection of Spencer was one such example: a tool for Henry Clay and his allies to further ostracize President Tyler for striking down the National Bank.[1001] The Senate's opposition of Hoar focused on punishing Hoar for recommending that the White House select new circuit court judges without engaging in political patronage and punishing President Grant for listening to Hoar.[1002] The unpopularity of some of President Cleveland's economic policies played a paramount role in Senator Hill garnering support for the rejection of Hornblower and Peckham.[1003] The rejection of Haynsworth and, to a lesser extent, Carswell originated with certain senators growing furious over the way that President Nixon handled the investigation and resignation of Justice Fortas.[1004]

Such situations illustrate the degree to which Supreme Court nominees can become political pawns. Given the rarity of Court vacancies and the long-term impact of a Court appointment, senators possess the ability to embarrass the White House by rejecting the President's choice. Certainly, the Senate's power of advice and consent plays an important checks and balances role, restricting the executive branch from absolute control over the judiciary.[1005] However, when elected legislators use that power to strike down a Court nominee primarily to seek political vengeance upon a particular President, the checks and balances system fails under the weight of such abuse. As this article shows, several potential justices lost their opportunity to serve on the Court because they were caught in the political cross-fire of fights beyond their control.

G. Limited-Issue Rejections

As already noted, most of the twelve rejected nominees were not rebuffed because they were incompetent jurists. A closer look demonstrates that the majority of these individuals were ultimately turned down because of their stances on only one or two key issues. For instance, Rutledge's rejection occurred almost solely because his

[1001] *See supra* Part II.C.

[1002] *See supra* Part II.F.

[1003] *See* Pierce, *supra* note 522, at 557; *supra* Parts II.G, II.H.

[1004] *See supra* Parts II.J, II.K.

[1005] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1980–81 (2011).

speech against Jay's Treaty enraged several highly influential members of the Federalist Party.[1006] The Radical Republicans coalesced against Hoar because they disliked his opinions about civil service reform.[1007] Black was turned away because of his well-known opinions regarding states' rights and, in particular, slavery.[1008]

Remarkably, one can even link the bulk of these rejections to the nominee's views (real or perceived) in at least one of two categories. The first of these categories is the nominee's stance on the nation's business interests. The primary issue raised against Wolcott was the extent to which he enforced the Embargo Act.[1009] Woodward was painted as an avowed free trade man who would immediately declare any protective tariff unconstitutional.[1010] Hornblower and Peckham were billed by their adversaries as reflexively pro-business disciples of Cleveland.[1011] Parker's holding in the *United Mine Workers* case caused the American Federation of Labor to declare that the nominee obviously supported yellow-dog contracts, strike breaking, unjust working conditions, and all things anti-labor.[1012] Haynsworth received similar condemnation as an "anti-union" nominee, as did Bork.[1013]

The other issue at the center of many of the rejections is civil rights. The origins to the importance attached to this topic emerged with the debates over Black's nomination, which ultimately failed because of Black's acceptance of legalized slavery.[1014] More recently, however, the subject has evolved into a principal reason for rejecting Supreme Court nominees. All of the twentieth century rejections—Parker, Haynsworth, Carswell, and Bork—occurred largely because of the nominee's purported civil rights stances.[1015] In each case, revelations that the nominee apparently held prior interests that were hostile to civil rights initiatives—ranging from integration of public schools to suffrage for African Americans to affirmative action programs—proved pivotal in many senators' decisions to vote against the nominee.[1016]

[1006] *See supra* Part II.A.
[1007] *See supra* Part II.F.
[1008] *See supra* Part II.E.
[1009] *See supra* Part II.B.
[1010] *See supra* Part II.D.
[1011] *See supra* Part II.G.
[1012] *See supra* Part II.I.
[1013] *See supra* Parts II.J, II.L.
[1014] *See supra* Part II.E.
[1015] *See supra* Parts II.I, II.J, II.K, II.L.
[1016] Interestingly, the Senate during the twentieth century never rejected a Court nominee

Regardless of whether members of the Senate genuinely consider a Supreme Court nominee's views about labor rights and civil rights to be of paramount importance, or whether these senators simply believe that voting for someone who has been branded either anti-labor or anti-civil rights reform would damage their re-election chances, the bottom line is clear. If recent history is any indication, a nominee who loses the support of either the nation's labor leaders or the nation's civil rights leaders faces an enhanced likelihood of rejection, even if that individual faces no other form of significant opposition. A nominee who receives poor marks from both civil rights groups and labor organizations will be even harder to confirm, regardless of that nominee's other viewpoints and qualifications.

IV. CONCLUSION

After an extremely volatile and divisive presidential race that raised plenty of questions about the Supreme Court's future, attention now shifts to what President Trump will actually do in the next four years regarding the federal judiciary's preeminent tribunal. By itself, selecting a replacement for Scalia represented a watershed moment for the Court. If Ginsburg, Kennedy, and Breyer decide to retire within the next four years, President Trump will become the first to select four new Justices for the Court since Reagan. Thus, the Court could become extraordinarily different in its voting patterns during the years before the next presidential election, a shift that could alter the Court's tendencies for decades to come.

Of course, any appointees to the Court must first receive the Senate's consent. While rejections are rare, this article demonstrates that they can occur at seemingly unexpected times. As the trends examined in this article show, the many intra-party factions that presently exist in Congress only amplify the likelihood that this Senate could decide to vote against President Trump's nominees. Therefore, the President must exercise even great-than-

for viewpoints of the opposite extreme. The Senate never rejected a nominee during the twentieth century for being overly favorable toward policies regarding affirmative action or other measures that establish preferences for minority groups. Likewise, the Senate never rejected a nominee during the twentieth century for taking an overly expansive view of workers' rights at the expense of business ownership interests. Painting with a broad brush, one could use this data to argue that a twentieth century nominee is considerably more likely to face rejection if he or she espouses viewpoints that are typically linked with politically conservative stances rather than viewpoints that are typically linked with politically liberal stances.

customary care in deciding whom to put before the Senate for review in the next four years.

Studying the twelve rejected nominees, certain patterns emerged about which the President would do well to take heed. Declaring simply that a nominee possesses a strong background and an excellent legal skill set is not enough to ensure the Senate's consent. Likewise, relying on support from the President's own party or the nominee's own party is far from a guarantee.

With this in mind, examining the nominee's prior dealings and reputation on the local level becomes extremely important, searching for any improprieties, rivalries, or controversial statements or actions that could resurface during the confirmation process. The nominee's past interactions with presently serving senators, and with friends of those senators, also deserve scrutiny, as a single powerful senator repaying a grudge could shift the tide of the entire chamber regarding a nominee's chance of success. Gauging the reactions of labor organizations and civil rights leaders is also essential, as the chances of a nominee's rejection increase considerably without support from either of these groups.

Of course, this article also demonstrated that all of these considerations can go for naught if enough senators decide to leverage the Supreme Court's future as a method of attacking the President. Supreme Court nominees have turned into political pawns before, rejected primarily because of a tug-of-war between the executive and legislative branches. Whether such a phenomenon will re-materialize during President Trump's time in office remains to be seen.

The history of rejected Supreme Court nominees is a peculiar one, with unexpected patterns emerging and anticipated trends frequently failing to hold true. From Rutledge to Bork, the nation's history might have changed considerably if the Senate had acted differently regarding the nominations of these twelve rejected individuals. While the Senate has not actively voted down a nominee for three decades, the specter of rejection is hardly a thing of the past. Indeed, as the nation moves into crucial years regarding the Court's future, the question of whether the Senate decides to exercise this power—and the reasons why it chooses to do so or refrain from doing so—will be likely a matter worth watching.