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The Politics of "Advice and Consent"

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Counting the rejections of Judges Haynsworth and Carswell, there are now twenty-three nominations to the Supreme Court that have been defeated or postponed by the Senate or withdrawn by the President in the face of defeat. The Senate is jealous of its "advice and consent" function, and history shows that confirmation will be withheld for a variety of reasons. The process of confirmation or rejection by the Senate is a part of the American political system—unavoidably, perennially and, perhaps, logically.

WITH THE SENATE'S rejection of Clement F. Haynsworth, Jr., last November and G. Harrold Carswell last April, the number of unsuccessful Presidential nominations for the Supreme Court of the United States over our 180 years of judicial history now stands at twenty-six. Of this total, eleven were rejected by a recorded vote and seven were withdrawn by the White House when it became clear they would not be approved. As to the other eight, the Senate either took no action or noted that action was to be "postponed" indefinitely.[1] (See the tabulation on page 536.)

What these statistics tell about the interrelationships between the legislative and executive branches of the government may be estimated best by reviewing the contemporary circumstances of the nominations. Most of the cases of declined appointments, coming in the early days of the Republic, reflected a denigration of the Court itself as a career opportunity for successful lawyers or politicians. Most of the rejections of nominees, it is apparent, were incidents to a series of party struggles, as in the case of the fierce contest between Grover Cleveland and Senator David Hill for control of the New York Democratic machine in the 1880s, or in the case of John Tyler, rejected by his own Whig Party in the bitter political divisions of 1844. A relative minority of the unsuccessful nominations turned on the merits of the individual nominees.

It may be argued that a distinction between the rejections of the nineteenth century and the four to date in the twentieth century may be made on a basis of ideologies. The cases from Washington's day through the second administration of Grover Cleveland were, almost without exception, by-products of a political antipathy between the Senate and the White House. But the rejection of President Hoover's nomination of John J. Parker in 1930, the filibuster against Lyndon Johnson's proposal of Justice Fortas to succeed Chief Justice Warren and the two Senate rejections of President Nixon's nominees were prompted, with an increasing degree of recognition of the fact, by the Senate's hostility to what is purported to be the constitutional philosophy of the candidates. Fortas's opposition couched its arguments in terms of "cronyism", but it was fairly evident that the root of the matter was his identification with broad and permissive doctrines on defendants' rights. Parker, Haynsworth and Carswell were opposed candidly for their basic convictions on socioeconomic issues of the day.

Partisanship and Politics Are Always Involved

The elements of partisanship or political consideration in the selection of judicial appointees have been present in cases of confirmation as often as in cases of rejection. "I observe that old Cushing is dead", wrote Thomas Jefferson to Albert Gallatin in 1810 when Associate Justice William Cushing passed from the scene. "At length, then, we have a chance of getting a Republican [*i. e.*, Democratic] majority in the Supreme Judiciary."[2] James Polk, writing to Martin Van Buren in 1837, observed with satisfaction that "with Judges Catron and McKinley on

1. Six others were approved by the Senate but refused to accept the appointments, while a seventh—Abraham Lincoln's Secretary of War, Edwin M. Stanton—was confirmed but died before he could be commissioned and sworn in.

2. Quoted in 1 BOUDIN, GOVERNMENT BY JUDICIARY 536 (1932).

the bench, the Court will be strong, and will have a decided Democratic bias".[3] In 1902 Theodore Roosevelt commented to Henry Cabot Lodge: "In the ordinary and low sense which we attach to the words 'partisan' and 'politician,' a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman."[4] Roosevelt, incidentally, was referring to Oliver Wendell Holmes, a prospective nominee.

The politics of "advice and consent", manifest in many confirmations as well as most rejections of Supreme Court nominees, is perhaps endemic in the process set out in Article II, Section 2, of the Constitution.[5] "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them", stated an early nineteenth century opinion of the Attorney General. "The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration."[6]

In the course of his struggle for Judge Carswell's confirmation, President Nixon wrote a manifestly ill-advised and ill-informed letter to Senator William B. Saxbe of Ohio, in which he complained that failure of the Senate to "advise and consent" to the nomination amounted to denying the Chief Executive the right "accorded all previous Presidents" to place men of his choice on the bench. Not only is this contradicted by history, but it suggests that the Senate's ratification should be little more than *pro forma*, and it confesses what traditionally has been left unsaid—that ideological and political factors are elements in the Presidential selections.

"Advice and Consent" Is an Essential Middle Step

The views of both Kent and Story were that "advice and consent" made the Senate's action an essential function of the constitutional process of appointment—the middle step between Presidential nomination and Presidential commission.[7] The realities of the process in operation have not borne out Alexander Hamilton's optimistic assumption:

> It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, of the president. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withhold their assent, that the subsequent nomination would fall upon their favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the senate would feel any other complacency towards the object of an appointment, than such, as the appearances of merit, might inspire, and the proofs of the want of it, destroy.[8]

Senate Prepares To Vote Down for the First Time

The Olympian detachment with which Hamilton assumed (or affected to assume) that the Senate would ratify or reject Presidential nominations was dispelled within six years after the Constitution went into operation. Hamilton himself wrote of the nominee for the Chief Justiceship in 1795 that "if it be really true . . . that he has exposed himself by improper conduct in pecuniary transactions", he should be rejected, while a leading New Jersey attorney added that the nominee's "insensitivity" in certain public issues made it clear that he "ought not to preside in the highest judicial Court of the Nation".[9] In these high-sounding phrases with a strangely contemporary accent, the Senate was preparing for the first time to vote down a Supreme Court nomination.

John Rutledge—like Clement Haynsworth, a South Carolinian—was in 1789 George Washington's second appointment to the Supreme Court. He had served as an Associate Justice for eighteen months and then resigned. But when Chief Justice John Jay resigned four years later, Rutledge lost no time in writing to Washington that he would "have no objection to take the place which [Jay] holds". Rutledge's letter makes clear that he felt that the Chief's chair was the one he should have had in the first place, since "many 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 greater practice".[10]

Self-seeking and self-adulating as Rutledge's words may sound, it had been rather generally recognized in 1789, when Washington was choosing the first candidates for the new Supreme Court, that fundamentally political considerations were involved. John Adams himself had advised: "If ability is desired, take Rutledge; if politics, Jay." Washington knew precisely what he wanted; he not only took Jay for his first Chief Justice, but he saw to it that every one of his appointments was a good Federalist. Now, perhaps to make amends, he hastened to accede to Rutledge's suggestion and grant him a recess appointment, directing that the Secretary of State prepare his commission forthwith.

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. The President should have recalled the

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3. *Id.* at 109.
4. 1 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918, 517 (1925).
5. The President "shall . . . nominate and, by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court".
6. 3 OP. ATT'Y GEN. 188 (1837).
7. 1 KENT, COMMENTARIES 310 (1826); 2 STORY, COMMENTARIES § 1539 (1833).
8. THE FEDERALIST NO. 66, at 449-450 (Cooke ed. 1961) (Hamilton).
9. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 137 (1922).
10. *Id.* at 127.

awkward situation into which he had gotten himself two years earlier, when he had proposed New Jersey's William Paterson for an Associate Justiceship. Paterson's name was submitted on February 27, 1793, while he was still a member of the United States Senate. He had been elected to the First Congress in 1789 and had participated in the legislation creating the Supreme Court and fixing the number of Justices.

Thus, under the terms of Article I, Section 6, of the Constitution[11] Paterson was ineligible to receive the appointment while his current term in the Senate was running. The President had to mark time. Paterson fell into the second class of Senators in the beginning of Congress, whose terms expired at the end of four years. A week later, on March 4, 1793, Washington resubmitted Paterson's name and the Senate confirmed the same day.

Rutledge Condemns Treaty and Is Condemned

The Paterson problem was a technicality that was readily remedied; the Rutledge matter was something else. It appeared that, after receiving Washington's advice of his nomination and perhaps after receiving his commission from the Secretary of State, Rutledge had delivered himself of a vehement speech condemning the treaty just signed between Great Britain and the United States. Jay's Treaty, making some concessions to Great Britain as a means of relieving the mounting pressure of animosities between the two nations, outraged many Americans when its contents became known. Anti-Federalists, who were beginning to call themselves, somewhat self-consciously, by the radical label of Democratic Republicans, denounced the treaty as an affront to the French, their onetime ally in the struggle for independence. Federalists, while not generally enthusiastic about the treaty, tended to close ranks and regard any criticism as a betrayal of loyalty to the administration. In this atmosphere, 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.

As if to compound the charges of his "insensitivity", Rutledge proceeded to Philadelphia amid the furor over his speech, took the oath as Chief Justice and formally opened the August, 1795, term of the Court. Although there were only a couple of cases on the docket, a whispering campaign of vilification was in full progress, suggesting that only a demented man would have acted as Rutledge had in recent months and adding dark hints that he ought to answer for vaguely described financial imbroglios as well. It was enough to set the stage for a swift and stern Federalist retribution when Congress opened in December of that year.

The lineup on the Rutledge vote is of some interest. Of the thirty-two senators in 1795, nineteen were Federalists and thirteen Anti-Federalists, or Democratic Republicans. On the vote, twenty-four senators were counted; the remaining eight adopted the not uncommon tactic of being conveniently absent on the occasion, all of them being administration party men who preferred not to be on record as opposing their own President's nomination. Of the ten who voted for confirmation, only three were Federalists; of the nineteen who voted to reject, only one was an Anti-Federalist and thirteen were Federalists.[12]

In 1811, when Jefferson was rejoicing at the prospect of getting a Democratic-Republican majority on the bench as a consequence of Cushing's death, President James Madison encountered his own difficulties with the Senate and its prerogative to "advise and consent". The assumption was that a choice would be made from Cushing's old circuit, which lay in strongly Federalist New England; to select an Anti-Federalist from that area would require a good deal of political adroitness.

Levi Lincoln of Massachusetts, Jefferson's Attorney General from 1801 to 1804, first was nominated by Madison and confirmed by the Senate, but he declined the position because of his failing health. Madison's objective had been clear—to find a vigorous Jeffersonian to counterbalance Marshall on the bench—and the Jeffersonian majority in the Senate had acquiesced. But the President's alternative nomination, Alexander Wolcott of Connecticut, "excited the astonishment of even Democrats", as one of them confessed. The fervor of Wolcott's partisanship—he was the political boss of his state—appeared to be the strongest qualification he could offer. Levi Lincoln himself rather lamely wrote that whatever might be Wolcott's professional record to date, he believed that "an industrious application to professional studies and official duties" might soon put the new nominee "on a level at least" with his associates. But even a Jeffersonian Senate could not swallow so me-

Thomas L. Williams Photo

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11. "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time. . . ."

12. S. Exec. Jour., December 15, 1795.

Supreme Court Nominations Rejected or Refused

In the following tabulation, details on the nominations to the Supreme Court of the United States which were declined by the nominees or acted on adversely by the Senate have been summarized. The political composition of the Senate at the time of such action is shown by major parties only: F.—Federalist; A.-F.—Anti-Federalist; D. R.—Democratic Republican; N. R.—National Republican; W.—Whig; D.—Democratic; R.—Republican.

President and Supreme Court Nominee	Senate Composition	Date of Nomination	Action on Nomination	Nature of Action
George Washington				
Robert H. Harrison	F. 17; A.-F. 9	Sept. 24, 1789	Sept. 26, 1789	confirmed; declined
William Paterson[1]	F. 17; A.-F. 13	Feb. 27, 1793	Feb. 28, 1793	withdrawn
John Rutledge, C.J.[2]	F. 19; A.-F. 13	July 1, 1795 Nov. 5, 1795	Dec. 15, 1795	rejected, 10-14
William Cushing, C.J.	F. 19; A.-F. 13	Jan. 26, 1796	Jan. 27, 1796	confirmed; declined
John Adams				
John Jay, C.J.	F. 19; D.R. 13	Dec. 18, 1800	Dec. 19, 1800	confirmed; declined
James Madison				
Levi Lincoln	D.R. 28; F. 6	Jan. 2, 1811	Jan. 13, 1811	confirmed; declined
Alexander Wolcott	D.R. 28; F. 6	Feb. 4, 1811	Feb. 13, 1811	rejected, 9-24
John Q. Adams	D.R. 28; F. 6	Feb. 21, 1811	Feb. 22, 1811	confirmed; declined
John Q. Adams				
John J. Crittenden	D.R. 28; N.R. 20	Dec. 17, 1828	Feb. 12, 1829	"postponed"
Andrew Jackson				
Roger B. Taney[3]	D. 20; W. 20	Jan. 15, 1835	March 3, 1835	"postponed", 24-21
William Smith	D. 30; W. 18	March 3, 1837	March 8, 1837	confirmed; declined
John Tyler				
John C. Spencer	W. 28; D. 25	Jan. 9, 1844	Jan. 31, 1844	rejected, 21-26
Reuben H. Walworth	W. 28; D. 25	March 13, 1844	Jan. 15, 1845 Jan. 27, 1845	"postponed" withdrawn
Edward King	W. 28; D. 25	June 5, 1844 Dec. 4, 1844	Jan. 15, 1845 Feb. 7, 1845	"postponed" withdrawn
John M. Read	W. 28; D. 25	Feb. 7, 1845		no action
James K. Polk				
George W. Woodward	D. 31; W. 25	Dec. 23, 1845	Jan. 22, 1846	rejected, 20-29
Millard Fillmore				
Edward A. Bradford	D. 35; W. 24	Aug. 16, 1852		no action
George E. Badger	D. 35; W. 24	Jan. 10, 1853	Feb. 11, 1853	"postponed"
William C. Micou	D. 35; W. 24	Feb. 24, 1853		no action
James Buchanan				
Jeremiah S. Black	D. 36; R. 26	Feb. 5, 1861	Feb. 21, 1861	rejected, 25-26
Andrew Johnson				
Henry Stanbery	R. 36; D. 26	April 16, 1866		no action
Ulysses S. Grant				
Ebenezer R. Hoar	R. 56; D. 11	Dec. 15, 1869	Feb. 3, 1870	rejected, 46-11
Edwin M. Stanton	R. 56; D. 11	Dec. 20, 1869	Dec. 20, 1869	confirmed (d. Dec. 24, 1869)
George H. Williams, C.J.	R. 49; D. 19	Dec. 1, 1873	Jan. 8, 1874	withdrawn
Caleb Cushing, C.J.	R. 49; D. 19	Jan. 10, 1874	Jan. 13, 1874	withdrawn
Rutherford B. Hayes				
Stanley Matthews[4]	D. 42; R. 33	Jan. 26, 1881		no action
Chester A. Arthur				
Roscoe Conkling	R. 37; D. 37	Feb. 24, 1882	March 2, 1882	confirmed; declined
Grover Cleveland				
William B. Hornblower	D. 44; R. 38	Sept. 17, 1893	Jan. 15, 1894	rejected, 24-30
Wheeler H. Peckham	D. 44; R. 38	Jan. 22, 1893	Feb. 16, 1894	rejected, 32-41
Herbert Hoover				
John J. Parker	R. 56; D. 39	March 21, 1930	May 5, 1930	rejected, 39-41
Lyndon B. Johnson				
Abe Fortas, C.J.	D. 64; R. 36	June 27, 1968	Oct. 7, 1968	withdrawn
Homer Thornberry[5]	D. 64; R. 36	June 27, 1968	Oct. 7, 1968	withdrawn
Richard M. Nixon				
Clement F. Haynsworth, Jr.	D. 58; R. 42	Sept. 4, 1969	Nov. 21, 1969	rejected, 45-55
G. Harrold Carswell	D. 58; R. 42	Jan. 19, 1970	April 7, 1970	rejected, 45-51

1. Paterson's name was inadvertantly submitted before his term as Senator had expired, he having been a member of the Senate which created the Court positions under the Judiciary Act of 1789, 1 Stat. 73.
2. Rutledge was commissioned, sworn in and presided over the August, 1795, Term of the Court.
3. The Senate rejected the nomination as an attempt to control the Court through Taney's Cabinet affiliation. In the 1836 election, with six additional states voting, the Democrats won control of the Senate. Taney was renominated, this time for Chief Justice, and was confirmed, 29-15.
4. The nomination, caught between Democratic control of the Senate and Senator Conkling's fight with Hayes, was pigeonholed. In the new Senate, Democrats and Republicans were evenly divided. Garfield promptly resubmitted Matthew's name, and he was confirmed, 24-23.
5. The Senate never reached this nomination, as it was tied to the effort to advance Fortas to Chief Justice.

diocre a nominee, and he was voted down, 9 to 24.[13]

Madison, having been rebuffed by too patent a political choice, then hit upon a candidate popular with everyone—John Quincy Adams, at the moment minister to Russia. Although confirmed, Adams also declined the position, confessing that he felt out of touch with the law and in any case was more interested in active politics. More or less by default, the position finally went to a New Englander who seemed at the time to be decidedly of second-level ability and little promise of intellectual perception in matters of constitutional law. His name was Joseph Story.

Outgoing Presidents Have Trouble Making Nominations

John Quincy Adams, as President, had troubles of his own with an attempted Supreme Court appointment in December, 1828. Andrew Jackson had won the Presidential election that fall, and the Democrat-dominated Senate insisted that the choice to fill the existing vacancy should be left to the incoming executive. This argument, made as recently as in the nomination of Justice Fortas for the Chief Justiceship in the summer of 1968, was to become a familiar one throughout the nineteenth century. Politically inspired charges and countercharges rang through press and Congress. Adams, on the urging of Henry Clay, nominated John J. Crittenden, an outspoken Whig and former Senator from Kentucky. The Senate, dominated by Jackson men, loudly decried the attempt of the Clay forces to place "one of his men on the Supreme Bench for life".[14]

Although the Crittenden nomination had been sent to the Senate on December 18, it was not until February 12 of the following year that the Judiciary Committee reported to the Senate floor a resolution that "it is not expedient to act upon the nomination . . . during the present session of Congress".[15] Within a few weeks, Andrew Jackson would take the oath of office as President, and the issue would be dead without the formality of a Senate rejection.

Like Adams, other outgoing Presidents have been frustrated in efforts to place their candidates on the Court on the eve of their own departure from office. Jackson himself—although apparently with Martin Van Buren's acquiescence—on March 3, 1837, nominated William Smith of South Carolina, along with John Catron of Tennessee, for two vacancies on the bench. Both men were confirmed, but Smith declined with what a Court historian calls "a public statement of refreshing frankness". Smith, a onetime United States Senator, confessed that he preferred the active political life or at least freedom to discuss political issues from public platforms, and he added that while he "believed that a judge was not bound by any moral principle to abstain from political discussions", he felt that there were "the strongest prudential motives to do so". This was because, he said, such a jurist "might, with perfect innocence, in discussing a political subject elsewhere, express an opinion which might afterwards cross his judicial path whilst on the Bench, place him in a delicate situation, and in the public estimation cast a blot upon the sacred ermine".[16]

By the mid-1840s, American politics was in another of the stages of disintegration that had prevented the coalescing of a two-party system since the opening of the century. The Presidential campaign of 1840, in fact, had been an exercise in irrationality. The Whigs, themselves a coalition of the remnants of earlier factions rather than an organized party, sought a candidate who, because he had the fewest known political principles, would displease the fewest number of voters. They found their man in William Henry Harrison of Ohio and filled out the ticket with John Tyler of Virginia, a vigorous states' rights spokesman who stood for most things the Whig leaders were against. The incongruity of the situation was glossed over by deliberately avoiding the adoption of any platform, launching an all-out campaign of abuse against the Democrat, Van Buren, and evading a discussion of the issues by resort to the campaign song of *Tippecanoe and Tyler Too*.

The Whigs won the election, but within a month lost the fruits of victory. The elderly Harrison contracted pneumonia on the day of his inaugural and died on April 4. For the first time in national history a Vice President moved into the White House. At once, Tyler made it clear that he expected to restore government to the low-keyed style it had enjoyed under the Democratic Republicans of the Jeffersonian age. Feeling betrayed, the Whigs in Congress promptly repudiated the administration and rallied around their old leader, Henry Clay, a longtime Tyler foe. That fall, all but one of the President's Cabinet resigned over a bitterly disputed banking bill. In 1842 the Whigs lost control of the House of Representatives. With the Clay forces in control of the Senate and the Democrats in the majority in the House, Tyler became a President without a party.

Tyler Fails to Nominate in Five Attempts

It was against this chaotic background that Tyler's half dozen Supreme Court nominations were attempted. In December of 1843 Justice Smith Thompson died, and the following month Tyler sent to the Senate the name of John C. Spencer of New York to fill the vacancy. Spencer was a widely known attorney, but his name was anathema to the Clay Whigs. Once he had been a leader of an anti-Clay faction in the party, and the anti-Tyler forces in the Senate poured an avalanche of invective on him. Because he once had opposed Tyler but then had accepted appointments to both the War and Treasury Departments in the Tyler Cabinet, Spencer also was denounced as an opportunist and a turncoat. His confirmation, declared Clay's lieutenant, Senator Crittenden, "would have been a plain violation of all public political morality".[17]

Even so, Spencer's nomination was rejected by a narrow margin—21 to 26. It was the closest to success of five

13. S. Exec. Jour., February 13, 1811.
14. 1 Warren, *supra* note 9, at 702-704.
15. 5 Cong. Deb. 81 (1829).
16. 2 Warren, *supra* note 9, at 41.
17. *Id.* at 111.

different nominations Tyler sent to the Capitol. The President appears to have sought earnestly for able candidates, but he was caught in an impossible situation, lacking even a minority administration group in the Senate to organize possible support for any of his nominations. His second nominee was, in professional prestige, even more highly qualified than Spencer—but, unhappily, he also was more highly vulnerable to political retribution. He was Reuben H. Walworth, chancellor of New York state, whom Thurlow Weed, New York political boss, promptly dismissed as "querulous, disagreeable, [and] unpopular".

It was a signal for the Clay Whigs in the Senate to revive their planned campaign of denigration; and now, as if to compound Tyler's troubles, a second vacancy opened on the Court with the death of Justice Henry Baldwin in the spring of 1844. With Presidential nominating conventions and election campaigns in the offing, the Whigs and Democrats alike, each confident of victory and in any case confident of getting rid of the President, acquiesced in a postponement of action on the nominations. "Better the Bench shall be vacant for a year, than filled for half a century by . . . partisans committed in advance to particular beliefs", said the *National Intelligencer*.[18]

The Tyler nominations of Walworth and Judge Edward King of Philadelphia were tabled by the Senate on June 15, 1844, and the parties turned their attention to the Presidential campaigns. The election of Democratic James K. Polk rang down the final curtain on Henry Clay's persistent efforts to get into the White House. It also left the Whigs in the Senate with a choice between confirming the Court nominations of a Whig President, even one they had repudiated, or leaving both positions to be filled by the Democrats, who would control the new Congress.

In an attempt at conciliation, Tyler early in 1845 withdrew the Walworth and King nominations—after a vain second effort to get King's name approved—and substituted two other nominees. One—Chief Justice Samuel Nelson of New York—was so conspicuously competent (and nonpolitical) that the Senate at last co-operated and confirmed him. It was to be Tyler's only success in six tries. His other nominee, John M. Read of Philadelphia, a former United States district attorney, appeared to have no political opposition, but neither did he have any strong political support. The old Congress adjourned without taking any action on him.

Justice's Seat Vacant for Eighteen Months

Justice Baldwin's seat continued unoccupied well into the administration of President Polk. By the time Congress convened in December of 1845, the position had been vacant for eighteen months. Polk, like Tyler, felt obliged to find a candidate from Pennsylvania, but now he was caught in a cross-current of state political rivalries. Polk's first thought was to nominate his Secretary of State, James Buchanan, but the future President vacillated continually. Like many another lawyer in politics, Buchanan was torn between a professional desire for the high judicial office and an unsatisfied appetite for equally high political office.

In Buchanan's place, after receiving much contradictory advice, Polk finally nominated George W. Woodward, a judge of a minor state court in Pennsylvania. Unfortunately, the President had failed to clear the nomination with the two Pennsylvania Senators, and one of them, Simon Cameron, found Woodward's candidacy "obnoxious". Following the already established Senatorial custom of deferring to such a plea by one of its colleagues, the Democratic majority rejected the nomination, 20 to 29.[19]

The old issue of a retiring President and a hostile Senate plagued the last year of Millard Fillmore's administration and resulted in three more frustrated nominations for the Supreme Court. In the summer of 1852 the long-ailing Justice John McKinley had died. It was most inopportune, for the Whigs in the Senate, who might have been expected to unite on one of their own party to replace the late Democratic incumbent, were on the verge of their final disintegration. The slavery issue was mounting in intensity toward its final crisis, and the occupant of the White House was once more without an administration bloc in the Senate.

Slavery Issue Leads to Split of Whig Party

Fillmore had come to the Presidency by the accident of Zachary Taylor's death halfway through his term. He took office in the midst of the bitter Senate struggle that produced the Compromise of 1850, a series of legislative enactments that sought to appease both the extreme slavery and antislavery factions in Congress. The most significant result of this wrangle was the split of the Whigs into factions led by Senator William H. Seward of New York, who opposed the compromise, and President Fillmore, who supported it.

Thus, when McKinley died two years later, there was every political reason why the Senate should not be enthusiastic about a Fillmore judicial appointment. The Whigs' split meant that the President would not be able to win nomination for a second term. The Democrats in the Senate, who held a fair majority, were confident that the coming elections would add to their control and insure confirmation of a jurist of their own preference recommended by a President of their own party. Accordingly, when Fillmore sent up the name of Edward A. Bradford, a well-known Louisiana lawyer, on August 16, the Senate took no action at all on the nomination and wound up its business shortly thereafter.[20]

The November, 1852, elections justified all Democratic expectations. The Whigs collapsed and soon passed into history, the Presidency went to Franklin Pierce, and the Democratic majority in the Senate rose to thirty-eight from twenty-two. With this handwriting on the wall, it was virtually a foregone conclusion that Congress would give little consideration to any more Fillmore appointees. Nor were the men he proposed able to offset their own politi-

18. Quoted in *id.*, at 117.
19. S. Exec. Jour., January 22, 1846.
20. S. Exec. Jour., February 11, 1853.

cal defects in Democratic eyes. The first, Senator George E. Badger of North Carolina, was a nationalist Whig who struck horror in the hearts of the states' rights leaders of the majority party. On February 11, 1853, after a month of desultory debate, the Senate voted, 26 to 25, to "postpone" any action on the Supreme Court vacancy until after March 4.

Fillmore, still pursuing a forlorn hope, then submitted the name of William C. Micou of Louisiana, a law partner of Judah P. Benjamin. But by now it was clear that for this Senate "advice and consent" was a simple matter of party lining. Micou's candidacy expired on March 4 without Senate action, and the incoming President Pierce, within three weeks of taking office, sent up his own nominee, John Archibald Campbell of Alabama, who was promptly confirmed.

The story was repeated at the end of Buchanan's administration in February, 1861. Justice Peter V. Daniel had died the previous June, and in November Abraham Lincoln had won in a four-party campaign for the Presidency. Now, in February, Southern Senators were almost daily resigning to follow their seceding states, and the majority held by the new Republican Party was growing by default. Under these circumstances, Buchanan's attempt at filling the Court vacancy was almost ludicrous—he nominated his own Secretary of State, Jeremiah S. Black. Although a competent enough lawyer, it was fantasy to think that the Senate at this time would accept the chief Cabinet officer of a discredited and defeated administration. Horace Greeley's *New York Tribune* called the act "a flight of insolence", and the Senate rejected it within two weeks, although by a narrow vote, 25 to 26.[21]

Reconstruction Era Sees Height of Political Color

The height, or depth, of political coloration of judicial appointments was to be reached in the Reconstruction Era. Not only the President, Andrew Johnson, but the Court itself had by then become the target of vehement Senate hatred. Intent upon destroying the civil governments Johnson had reestablished in the Southern states, planning in their place a rigid military control under which restructuring of the conquered territory would be effected before readmission to the Union, Congress had serious doubts as to the Court's reliability in any test of the constitutionality of its program. There was also the matter of the trial being conducted by a military commission in the District of Columbia of the persons accused of the assassination of President Lincoln. How would the Court rule if petitions for habeas corpus were sought by these defendants? It was rather clear that Chief Justice Salmon P. Chase was not prepared to yield an iota of the Court's constitutional independence; he already had refused to permit any of the Justices to sit on circuits in any of the Southern states (thereby, among other things, preventing the trial of Jefferson Davis for treason) until there was an express executive order affirming that the judiciary was not subject to the military authorities therein.

During Lincoln's administration the Court had been increased to ten Justices, and in May of 1865—one month after the assassination—a vacancy was created by the death of Justice Catron. Harassed from the outset of his administration, Johnson neglected to send up a nomination to replace Catron until the following April 16. The timing was doubly unfortunate; not only had the President missed the opportunity to challenge the Radical Republican opposition before it had attained its strength, but now the nomination came on the heels of the renowned decision in *Ex parte Milligan*, 4 Wall. 2 (1866), a case that appeared to forecast a judicial nullification of the Radicals' whole plan of Reconstruction. In that case the Court held unequivocally that civilians could not be tried by military courts when, as in the Southern District of Indiana where Milligan was tried, civil courts were open.

Milligan rocked a nation still in deep shock from four years of Civil War and the murder of its President. The substantial number of spokesmen who praised the opinion as a fundamental statement of constitutional rights were shouted down by Radicals everywhere. President Johnson added fuel to the flames by promptly applying the principle in *Milligan* to all cases in the South where civilians were awaiting trial by military tribunals. More incendiary matter was provided in a report that the Court would soon hear argument challenging the constitutionality of military government in the seceded states in general.

Number of Justices Reduced to Seven

In this inflamed state of public affairs, both Johnson's chance of making a judicial appointment and the composition of the Court itself became the victims of Radical vindictiveness. Without acting on the Catron replacement—Attorney General Henry Stanbery—the Senate turned its attention to a bill sponsored by Lyman Trumbull of Illinois, providing that no more appointments to the Court should be made until the number of Justices had been reduced to seven.

The crass political motivation of the Judiciary Act of 1866[22] was unmistakable; indeed, a spokesman in the House of Representatives confessed unashamedly that "this bill abolishes the Judge whose appointment the President sent to the Senate" and that this was its primary purpose. The Radicals planned to bring the Court, as well as the White House, under their control, and when the unhappy Johnson ended his term, they gave notice that his successor, Ulysses S. Grant, would fare little better, although he was, in their view, one of their own.

In 1869 the number of Justices was changed back to nine.[23] Grant, assuming that he was free to choose a candidate of his own preference, eventually submitted the name of his Attorney General, then Ebenezer R. Hoar, and immediately the worst elements of the Senate Radicals, who proved to be a substantial majority, formed a coali-

21. S. Exec. Jour., February 16, 1861.
22. Act of July 23, 1866, ch. 110, 14 Stat. 209.
23. Act of April 10, 1869, ch. 22, 16 Stat. 44.

tion against him. Some argued that the new chair should go to a nominee from the "reconstructed" South; others made no effort to conceal the fact that they found Hoar objectionable because he had favored a stronger civil service system; and the die-hards hated him for having opposed the proceedings to impeach Johnson. Eventually, Hoar was rejected by a 24-to-33 vote.[24]

Congress Demands Nomination of Stanton

Even clearer evidence of the Radicals' arrogance developed when, soon after Hoar's nomination, another vacancy developed with the retirement of Justice Robert C. Grier, which was dated to take effect February 1, 1870. A substantial majority of the members of both Houses of Congress drew up a petition and sent it to Grant, demanding the appointment of the former Secretary of War, Edwin M. Stanton. An arrogant opportunist who as a Cabinet member had intrigued with the Radicals against Johnson and who brazenly refused to resign when at last the harassed President dismissed him, Stanton was the very prototype of the men the Radicals wanted to see on the Court. In 1867 he had had the effrontry to dictate a section of the Military Appropriation Act of 1867 requiring that the President issue all military orders through the Secretary of War and that any other military commands of the Commander in Chief should be null. From February, to May, 1868, when Johnson's impeachment failed, Stanton had barricaded his office and refused to permit access to War Department records. Only when the prospect of ousting the President vanished did Stanton grudgingly give up his resistance.

Grant, hoping to appease the Radicals and preserve Hoar's candidacy, yielded to the pressure and formally nominated Stanton for Grier's position on December 20, 1869. The nomination was confirmed the same day it was received by the Senate. The legality of nominating, not to mention confirming, a candidate for a position that would not be vacant for another six weeks was not debated. The dubious taste and status of that action, as well as the question of what the Court might have become with the addition of a rancorous and domineering politician, were never to be determined. Four days after the confirmation, Stanton died.

On February 7, 1870—four days after Hoar's rejection—the Court handed down a five-to-three opinion in the first *Legal Tender Case (Hepburn* v. *Griswold)*, 8 Wall. 603 (1870), holding the wartime greenback law, as it applied to prior contracts stipulating specie payment, to be unconstitutional. On the same day Grant sent two new names to the Senate for the vacancies on the bench—William Strong of Pennsylvania and Joseph P. Bradley of New Jersey. Almost from that date there developed the story that the nominations were intended to "pack" the Court and provide two more votes for the *Hepburn* minority of three, since Grier, one of the original majority, now had retired. From the circumstances of the nominations, it seems unlikely that the administration had given this possibility any thought. On the other hand, it was well known both in the White House and on Capitol Hill that both men favored the argument that the greenback statute was valid.

Strong was confirmed on February 18, but Bradley's nomination was held up until March 21, when it was approved, 46 to 9. Neither man had strong political persuasions that enabled Radicals in the Senate to focus opposition against him, although neither was considered to be a Radical sympathizer. In any event, since the majority of the financial community and their men in Congress were hoping for a rehearing of the legal tender issue before a full Court, the choices seemed to be vindicated when, on March 25, Attorney General Hoar moved the Court to hear argument on two new legal tender cases, and the Court granted the motion on April 1. When, a year later, a five-to-four majority reversed *Hepburn,* with Strong and Bradley joining the majority opinion, the presumed "packing" appeared to have served its purpose.[25]

In May of 1873 Chief Justice Chase died. Six months later Grant bestirred himself on the matter of a replacement. Apparently he was intent on finding a political crony to place in the position, for he approached three of his closest advisers in succession to offer them the post. The first, Senator Roscoe Conkling of New York, declined. Grant then sent up the name of his current Attorney General, George H. Williams of Oregon. It was, in the view of many public and professional spokesmen, the worst selection since Madison's choice of Alexander Wolcott sixty years before.

A party wheelhorse who had voted "guilty" at Andrew Johnson's trial, Williams consistently showed up to handle some of the Radicals' most noxious assignments. In 1876 he would be one of a special task force sent to Florida by the Republican National Committee "to save the state for Hayes"—a job he was able to carry off. Now, although the public outcry did not deter the Senate Judiciary Committee from first reporting out Williams's nomination favorably, its report was called back when it received subsequent evidence that the Attorney General had removed a United States district attorney in Portland to halt the investigation of Oregon voting frauds that purportedly implicated Williams's colleague, Senator John H. Mitchell. When, on the heels of this disclosure, the New York Bar Association formally condemned the nomination, Grant reluctantly withdrew Williams's name.

Cushing's Name Withdrawn on Charge of Disloyalty

Two days later, on January 10, 1874, the President sent up another selection—Caleb Cushing of Massachusetts. An even more bizarre fate was in store for this candidacy. While much was made of Cushing's political instability—he had been over the past twenty years a Clay Whig, then a Tyler man, a Democrat, then a confidante of Andrew Johnson and finally a regular

24. S. EXEC. JOUR., February 3, 1870.
25. *Knox* v. *Lee* and *Parker* v. *Davis*, 12 Wall. 457 (1871).

Republican—none of these charges seemed likely to weigh heavily against his nomination. But then, fortuitously, someone turned up from some old Confederate documents a letter that Cushing had written in 1861 to Jefferson Davis as President of the Confederacy. While the letter was wholly nonpolitical, it was a made-to-order excuse for a suggestion of disloyalty. Three days after he had submitted Cushing's name, the President in considerable embarrassment was compelled to withdraw it.

Struggles between the White House and the Senate were to aggravate the process of judicial nomination and confirmation on three more occasions in the '80s and '90s. The first of these revolved about Chester A. Arthur—like Tyler and Fillmore in earlier eras, an accidental successor to the chief executive's position by the fact of a Presidential death. In the last months of Rutherford B. Hayes's administration, Roscoe Conkling and the White House had engaged in a violent dispute over Hayes's proposal to extend the United States Civil Service to a number of government positions in New York. Conkling regarded this as an attempt to undermine his political machine in that state, and he fought the plan. Hayes retaliated by removing one of Conkling's lieutenants—Arthur—from the lucrative post of Collector of Customs of the Post of New York. The result of this vendetta was to split the Republican Party into two warring factions on the eve of the Presidential campaign of 1880.

In what they considered a masterful compromise—but reminiscent of the action of the Whigs of 1840—the Republican Party managers selected a Hayes man, James A. Garfield, as the nominee for President, and balanced him with Arthur himself as nominee for Vice President. Thus, when Garfield was assassinated, Arthur found himself in a position uncomfortably similar to Tyler's in 1842 and Fillmore's in 1850, with his party support in Congress largely in doubt. It was at this juncture that Justice Ward Hunt resigned from the Court, and Arthur determined to make the choice of his successor a test of party strength and discipline.

The issue was made unmistakably clear in the selection of the nominee, Roscoe Conkling himself, who had just lost his control over the New York Republican machine and had retired from the Senate. On March 2, 1882, the final vote on Conkling's candidacy was taken and carried by a margin of 39 to 21. Having accomplished his purpose, Arthur was not particularly surprised or disappointed when Conkling formally declined the appointment.

Control of New York Machine Essential to Both Parties

Control of the party machinery in New York was as fundamental to Democratic as to Republican administrations, and this led to the final two rejections of Supreme Court nominations in the nineteenth century as casualties in the power struggle between Grover Cleveland and Senator David B. Hill of New York. In effect, Hill fought against the first nomination because the nominee had ruled against one of Hill's henchmen, but both Hill and Senator Edward Murphy opposed the second nominee because he was too independent of the party in any event.

In July, 1893, Justice Samuel Blatchford died, and that fall Cleveland sent up the name of William Hornblower to be his successor. Hornblower was a circumspect New York lawyer, but as an election commissioner he had ruled against one of Hill's men, and the Senator found this sufficient reason to invoke the hoary rule of "Senatorial courtesy" by pronouncing the nominee obnoxious to him. Being rebuffed in this attempt, Cleveland then selected a man even more highly regarded in New York—Wheeler H. Peckham, whose brother, Rufus, would in fact be confirmed for the Court the following year. Peckham had made his popular reputation by serving as special counsel in the prosecution of Boss Tweed in 1863, and his professional eminence was exemplified in his role as a founder of The Association of the Bar of the City of New York. But with this high professional competence went a political independence that both New York Senators found obnoxious, especially when coupled with their antipathy for Cleveland. Wheeler also was rejected.

Having twice been repulsed by his New York adversaries in the Senate, Cleveland concluded that he would have to turn to a nominee from some other state. At the same time, he had reason to assume that the Hill faction would continue to oppose him effectively unless he could turn its own tactics against it. This led to his third and final choice, a member of the very Senate in which "collegial courtesy" played such a fundamental role. Edward Douglass White of Louisiana had many political attributes in his favor—he was a Confederate veteran, a Roman Catholic and a Democrat; he would be a popular selection for the Southern wing of the party, which had enjoyed only a short-lived accommodation in the prior selection of Lucius Q. C. Lamar of Mississippi in 1888, Lamar having died within five years of ascending the bench. As a freshman Senator, White would hardly be opposed by the New York Democrats, especially with the Southern members of the party expected to unite behind him. Cleveland's strategy paid off, and the final nineteenth century struggle over the politics of "advice and consent" was settled quickly.

Twentieth Century History Lists Fewer Rejections

The nineteenth century witnessed at least one Senate rejection of a Supreme Court nominee in nine of its ten decades. While the twentieth century had only five instances in its first seventy years, this is not to suggest that politics has become an inert ingredient in the matter of judicial selection. The prolonged and obfuscating debate on the nomination of Louis D. Brandeis in 1916, with a 47-to-22 vote on confirmation being qualified by the abstention of twenty-seven other Senators, is perhaps the most blatant instance of ideological contentiousness.[26] Chief Justice William Howard Taft's

26. TODD, JUSTICE ON TRIAL (1964); MASON, BRANDEIS chs. 30 and 31 (1956).

active lobbying to secure a conservative majority on the Court through the confirmation of Pierce Butler is now well documented.[27] The considerations that led to the first New Deal appointments were highlighted in the great "court-packing" struggle of 1937.[28] And President Richard M. Nixon has been candid in declaring that he intends to seek appointees who will tend to dampen down the volatility developed on the Court during the Warren years.[29]

The rejection of Judge John J. Parker in 1930 was somewhat distinguishable from typical nineteenth century Senate rejections in that the Senate, which for most of the past decade had been frustrated by the adamant commitment of the Court's majority to a *laissez-faire* philosophy, was taking this means of expressing its dissatisfaction with the course of constitutional doctrine. After the flurry of appointments to the Court following Taft's accession as Chief Justice—George Sutherland, Pierce Butler and Edward T. Sanford within five months of each other—almost a decade had passed in which Harlan F. Stone was the only additional appointee. In the course of this decade of "normalcy", the reform-minded minority of Oliver Wendell Holmes, Brandeis and Stone vainly spoke for the legislative efforts of state and national governments to deal effectively with the corporate economy, accelerating urbanization and changing social issues.[30] Against them were aligned the phalanx of conservatives—Sutherland, Butler, Willis Van Devanter, James McReynolds, Taft and "Taft's automatic second vote", Sanford.

It was not, then, Parker himself so much as the philosophy of the Court majority at which the reformers in Congress directed their attack when Herbert Hoover sent that ill-starred nomination to the Senate. Hoover's earlier choice of Charles Evans Hughes had stirred up some protest votes, but the impeccable character and professional competence of the man made it impractical to consider a serious attempt to reject him. With Parker, character and competence were not in issue; his vulnerability lay in a record that his critics—who were more directly concerned with criticism of the Court's jurisprudence—could magnify as antilabor and anti-Negro. That considerations such as these were the touchstones of midtwentieth century economic orthodoxy was demonstrated nearly four decades later when Judge Haynsworth was confronted with similar criticisms.[31]

What Should the Senate's Role Be in Judicial Selection?

If the politics of "advice and consent" tends to shock a pristine sense of innocence, it nevertheless serves to emphasize that the American ideal of check-and-balance government is implemented in the realities of human passions and prejudices. What, in the final analysis, is the role of Congress, and particularly the Senate, in the process of judicial selection? And how may it be carried out in practice except by individuals and groups who have their own view of the qualities they seek in an appointee?

Granted, what the Senate majority may be seeking at any given point in national history may be irrelevant as a contribution to effective Supreme Court jurisprudence. The identity of the particular nominee may be all but lost in the course of the debate on his confirmation, which may be directed at the personality or policies of the President or the Court. Even when Senate inquiry focuses on the nominee's qualifications, moreover, they are evaluated subjectively in terms of each individual Senator's concept of the constitutional function of the Court.

When the President selects adequately qualified men as his nominees, the political considerations that are a part of the selection and Senate confirmation or rejection are not likely to have an adverse effect on the appointee's performance. Good jurists who are rejected for political reasons are, of course, a loss to the nation; the real injury, however, arises when a Stanton is foisted upon the country with little to recommend him except that he is the front man for a claque.

To estimate how many "good" and "bad" candidates have been either confirmed or rejected in the process of "advice and consent" over 180 years is beyond the scope of this short review. The point of the present study is to recall that the process of confirmation or rejection is unavoidably, perennially—and, perhaps, logically—a part of the American political system.

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27. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE ch. 7 (1964); DANELSKI, A SUPREME COURT JUSTICE IS APPOINTED chs. 1-7 (1964).

28. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY, 1932-1968 chs. 3-5 (1970).

29. Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 29 VAND. L. REV. 205 (1970).

30. SWINDLER, THE OLD LEGALITY, 1889-1932 chs. 12-14 (1969).

31. 115 CONG. REC. 10390-10397 (September 4, 1969).

AUTHOR'S NOTE: Much of the historical material on which this article is based is taken from the following: WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (2 volumes, 1922-1926) (the best study of the Supreme Court, pending the multivolume history being sponsored by the Oliver Wendell Holmes Devise of the Library of Congress); MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE (1965); NEVINS, ORDEAL OF THE UNION (2 volumes, 1947); and the DICTIONARY OF AMERICAN BIOGRAPHY (22 volumes, 1928-1937).