

## COMMENTARY

# Getting There: A Brief History of the Politics of Supreme Court Appointments

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The history of Supreme Court nominations is replete with controversy, acrimony, and partisan politics. Approximately one of every five nominees has failed. Twelve of the 29 failed nominations were rejected outright by the Senate. The remaining nominees either withdrew or their nominations were postponed by Senate parliamentary maneuvers until a new President assumed office. I will review this history by dividing it into the following four relevant categories: (1) failed nominations; (2) controversial but successful nominations; (3) instances in which the President nominated the Senate's choice; and (4) instances in which the President has let the Court (or an individual Justice) dictate the choice. The historical account which follows is not exhaustive;<sup>1</sup> rather, it is a somewhat impressionistic account designed to place the current battles over nominations to the Court in perspective.

Vendors of history are often asked to justify their wares in terms of their contemporary significance or utility. I have anticipated that demand by providing, in my conclusion, some thoughts about the lessons that may be drawn from this history and by proposing that nominations to the Court be confirmed only upon the approval of two-thirds of the Senators present and voting.

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1. For a thorough account, see HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985). For another useful summary, containing a valuable tabular record of nominations to the Court and their disposition, see LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

## I. Failed Nominations

Nominees have failed for a variety of reasons, but the following have been the most common: opposition to the President, not necessarily the nominee; opposition to the nominee's political views; and doubts about the ability or integrity of the nominee.

### A. Opposition to the President

Candidates for the Court are rejected based on general opposition to the President when the President is politically vulnerable for reasons unrelated to the nomination process. A few examples will illustrate this point.

The election of 1824 produced no clear victor. Although Andrew Jackson received the most electoral votes, he failed to obtain a majority. As a consequence, the election was determined by a vote of the House of Representatives, which selected John Quincy Adams to be President by a very slim margin. The election was the product of a bargain struck between Adams and Kentucky's Whig Senator Henry Clay. Clay delivered the critical votes to elect Adams as President, and Adams made Clay his Secretary of State. As a result, Adams was politically wounded from the beginning of his Presidency. Thus, although Adams nominated Kentucky's former Whig Senator John Crittenden to the Court in December 1828, it was predictable that loyal Democrats in the Senate would want to reserve the appointment for the incoming Andrew Jackson, elected the month before. The Senate did nothing until February 1829, when by a strictly partisan vote of 23 to 17 it postponed consideration of Crittenden's nomination. A month later Andrew Jackson assumed the Presidency and Crittenden's candidacy was ended. In all of this Crittenden was almost irrelevant; the contestants were Jacksonian Democrats and a lame duck President.

In 1840 the Whigs achieved presidential success with the election of the fusion ticket of Whig stalwart General William Henry Harrison as President and the former Democratic Senator from Virginia, John Tyler, who had broken with Andrew Jackson and the Democrats over the nullification crisis and the Force Bill, as Vice President. Barely a month into his term, Harrison died and Tyler assumed the Presidency. Tyler lacked a personal political base and was suspected by congressional Whigs, led by Senator Henry Clay, of being more of a Democrat than a true Whig. These suspicions were quickly fueled when Tyler twice vetoed a favorite

Whig project, revival of the Bank of the United States.<sup>2</sup>

When two vacancies on the Court developed, and Tyler was confronted with a Whig majority in the Senate, the result was predictable. Tyler's first nominee, John Spencer, was a veteran Whig who had held two cabinet posts under Tyler, but who had incurred the implacable enmity of Henry Clay. Thus, "it was with more ease than the rejection vote of 21:26 indicates that the Clay faction succeeded in blocking Spencer."<sup>3</sup> Tyler then sent up Reuben Walworth, a sitting New York judge who was opposed by both the Senate Whigs and the two Democratic Senators from New York.<sup>4</sup> The Senate voted to postpone Walworth's nomination and the also pending nomination of Judge Edward King, "a distinguished Philadelphia lawyer and legal scholar."<sup>5</sup>

It was mid-summer and the Whigs scented electoral victory in November. It would be far better for these seats to be filled by the grand old man of Whiggery, a newly inaugurated President Henry Clay, than by the pseudo-Whig John Tyler. Tyler would not quit easily, however. The Whig strategy had backfired in November, for Democrat James Polk had defeated Clay and the vacant Court seats were sure to be filled by a Democratic President. Reasoning that he ought to be the President filling the vacancies, Tyler renominated King in December but the Senate simply ignored the nomination.

Tyler tried twice more, sending up the distinguished and eminent Samuel Nelson, Chief Justice of the highest court of appeal in New York, and John Meredith Read, a former United States Attorney from Philadelphia with supporters in both the Whig and Democratic camps. The Senate quickly confirmed Nelson, probably on the basis of his professional stature, but adjourned without ever acting on Read's nomination. Tyler thus acquired the dubious record of making six nominations with only one success. His failures are attributable to his low political fortunes — as an apparent Democrat and accidental successor to a Whig President confronting a powerful Whig adversary in the form of Henry Clay — rather than to evident deficiencies in his nominees.

Lame duck Presidents, for obvious reasons, have fared poorly with Court nominations. In 1852 and early 1853, a Democratic Senate refused to consider Whig Millard Fillmore's nomination of Senator George Badger and two others in order to preserve the seats for the incoming

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2. ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845*, at 475-76 (1984).

3. ABRAHAM, *supra* note 1, at 105.

4. *Id.* at 28, 105.

5. *Id.* at 105.

Democratic President, Franklin Pierce. Badger's case was particularly touchy, for it required the Senate to spurn one of its own members, which the Senate did by a one vote margin.<sup>6</sup> After Lincoln's election, in December 1860 James Buchanan nominated his Attorney General, Jeremiah Black, and watched the Senate reject him by a single vote<sup>7</sup> because Republican Senators wanted to keep the seat for Lincoln.

Andrew Johnson found himself in a political situation akin to that of John Tyler — an accidental successor to a President from a different party — but with both passions and political stakes greatly enlarged by the end of the Civil War. Unless Johnson had administered the Presidency as dictated by the Radical Republicans in the Congress it is hard to imagine how he could have had success with any nomination to the Court. Johnson nominated his able Attorney General, Henry Stanbery, but Radical Republicans in the Senate not only blocked the nomination but abolished the seat and, for good measure, provided that the next vacancy would be abolished as well. “[I]t is doubtful that the Senate would have approved God himself had he been nominated by Andrew Johnson.”<sup>8</sup>

When Grover Cleveland reassumed the Presidency after Benjamin Harrison's interregnum, he attempted to fill the vacancy created by the death of New York's Samuel Blatchford with another New Yorker, William Hornblower, a 42 year old corporate lawyer. Cleveland failed to anticipate the reaction of New York's powerful Democratic Senator David Hill. Senator Hill insisted upon control of patronage within New York and Cleveland refused to accommodate Hill. As a consequence, and as both a measure of retribution for Cleveland's control of New York patronage and as a device to demonstrate his own determination to control New York appointments, Hill persuaded his fellow Senators to reject the appointment of Hornblower by a vote of 30 to 24. Undaunted, Cleveland then nominated Wheeler Peckham, another New Yorker who had personally alienated Senator Hill. Hill again asked his colleagues for a repudiation of Cleveland's nominee, and they again complied, rejecting Peckham by nine votes, 41 to 32. Frustrated, Cleveland filled the seat with the Senate Majority Leader, Democratic Senator Edward White of Louisiana.

Senator Hill ultimately prevailed in Cleveland's battle over nominations. When the next vacancy was created, Cleveland decided to appoint Rufus Peckham, Wheeler Peckham's younger brother. Before doing so,

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6. *Id.* at 111.

7. *TRIBE*, *supra* note 1, at 144-45.

8. *ABRAHAM*, *supra* note 1, at 123-24.

Cleveland prudently wrote a conciliatory letter to Hill, requesting him to concur, in advance, in the choice. Hill acquiesced and Cleveland was able to place his second choice of the Peckham family on the Court.<sup>9</sup>

### B. Opposition to the Nominee's Political Views

George Washington's 1791 nomination of John Rutledge, an influential member of the 1787 Constitutional Convention, for an initial seat on the Court was swiftly approved by the Senate. Rutledge never served however, preferring instead an appointment as Chief Justice of the then more important Supreme Court of South Carolina. When John Jay resigned as Chief Justice to become Governor of New York, Washington turned again to Rutledge. Since this second appointment was a recess appointment, Rutledge presided over the Court as Chief Justice during the August 1795 Term. Despite his interim service as Chief Justice, the Senate rejected Rutledge by a vote of 14 to 10 when it resumed session and considered the nomination.

Rutledge was rejected because he opposed Jay's Treaty, which was negotiated the prior year as a means of eliminating points of friction remaining between Great Britain and the United States in the wake of American independence. Federalists, who controlled the Senate, were ardent supporters of Jay's Treaty. Rutledge's position was anathema; thus, he failed the political litmus test of his time. His distinguished service to his country and his unquestioned legal abilities did not matter to his senatorial judges.

James Madison's nomination of Alexander Wolcott was rejected by the overwhelming margin of 24 to 9 because Wolcott had vigorously enforced the Embargo and Nonintercourse Acts in his role as the federal customs collector for Connecticut.

In 1845, James Polk nominated a staunchly Democratic Pennsylvania trial judge, George Woodward, who had alienated Pennsylvania's Democratic Senator Simon Cameron by virtue of his "gross . . . sentiments" in opposition to immigration, particularly from Ireland.<sup>10</sup> Five other Democrats joined Cameron and combined with the Whig opposition to reject Woodward, 29 to 20.

Ulysses Grant nominated his exemplary Attorney General, Ebenezer Rockwood Hoar, who was rejected 33 to 24 because he sought to eliminate political patronage and, even worse, had opposed Andrew Johnson's impeachment. Grant also nominated his good friend Caleb

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9. *Id.* at 144-45.

10. *Id.* at 41-42.

Cushing to be the Chief Justice, but Cushing had many political enemies because he had shifted his party affiliation no less than five times. Cushing started out as a Whig, bolted to John Tyler's Whig faction, abandoned Whiggery for the Democrats, aligned himself with Andrew Johnson's version of the Democratic Party, and finally became a Republican when it was far too late to do him any political good.<sup>11</sup> Grant quickly withdrew the nomination.

In 1930, Herbert Hoover nominated John Parker, a United States Court of Appeals Judge, who was rejected 41 to 39 by the Senate, which was influenced by a coalition of organized labor and the NAACP. Organized labor objected to Parker because he had upheld yellow dog contracts. Parker's reasonable defense to this was that he was bound by Supreme Court precedent to do so. The NAACP castigated him for some racist sentiments uttered when he had been a gubernatorial candidate in North Carolina in 1920. Ironically, Parker (who remained on the Fourth Circuit after his rejection) was one of the earliest southern judicial advocates of desegregation.<sup>12</sup>

Lyndon Johnson's nomination of Abe Fortas for the Chief Justiceship was opposed on purely political grounds. When Fortas appeared before the Senate Judiciary Committee for his confirmation hearings, a younger and more vigorous Senator Thurmond shouted at him, "Mallory! Mallory! I want that name to ring in your ears!"<sup>13</sup> Fortas had not even been on the Court when it handed down its 1957 decision in *Mallory v. United States*,<sup>14</sup> which required federal prosecutors to arraign suspects promptly in order to reduce the possibility of coerced confessions, but to Senator Thurmond, Fortas must have epitomized the Warren Court and that was good enough.

Robert Bork's 1987 rejection was due to the perception that he was hostile to the right of privacy, that his constitutional interpretive philosophy of originalism was either unworkable or likely to produce unpalatable results, and that many of his prior positions on constitutional law were sufficiently "out of the mainstream" of American constitutional law to make his confirmation politically unwise. Bork did not help his cause by turning his confirmation hearings into a national seminar on constitutional law, with himself in the role of the professor and the Senators as slightly doltish students, albeit with the important difference that the stu-

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11. *Id.* at 129.

12. *See, e.g., Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947).

13. ABRAHAM, *supra* note 1, at 44.

14. 354 U.S. 449 (1957).

dents wielded the grading power and ended up giving the professor a failing grade.

### C. Doubts about the Nominee's Ability or Integrity

When Salmon Chase died in 1873, President Grant proposed George Williams as his replacement. Williams was a former Senator and territorial governor of Oregon, and was serving as Attorney General with such indifference that he had been known to completely forget scheduled cabinet meetings.<sup>15</sup> Some said that he lacked legal talent, a charge supported by the contention that he had botched a number of important cases both in private practice and as Attorney General.<sup>16</sup> Moreover, he had used Justice Department funds to pay his household expenses, which included maintenance of the most ostentatious carriage to be seen in the capital.<sup>17</sup> Stung by the criticism, Williams asked Grant to withdraw his name from consideration.

Perhaps the nadir in ability was reached with G. Harrold Carswell. When Abe Fortas resigned in 1969 following the revelation of a number of ethical improprieties, Richard Nixon nominated Clement Haynsworth, a sitting federal appellate judge generally regarded as competent if unspectacular. However, at Haynsworth's confirmation hearings it developed that he had displayed "patent insensitivity to . . . financial and conflict-of-interest improprieties."<sup>18</sup> He was rejected by a vote of 55 to 45. The famous and volcanic Nixonian anger erupted, and he vowed to shove a nominee down the Senatorial throat. Enter Harrold Carswell, a little known Florida judge with six months of experience on the United States Court of Appeals. It turned out that Carswell was rather an ugly racist: In 1948 he had loudly declared his "firm, vigorous belief in . . . White Supremacy"<sup>19</sup> and had acted on those beliefs while he was a Florida United States Attorney by circumventing desegregation orders.

Moreover, if Haynsworth was slightly above average in terms of judicial ability, Carswell was barely above failure. Even that did not deter his proponents. Senator Roman Hruska memorialized himself by the statement: "Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that there."<sup>20</sup> Senator Russell Long of Loui-

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15. WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 389 (1981).

16. ABRAHAM, *supra* note 1, at 46.

17. MCFEELY, *supra* note 15, at 390.

18. ABRAHAM, *supra* note 1, at 15.

19. *Id.* at 16 (quoting RICHARD HARRIS, DECISION 15-16 (1971)).

20. 116 CONG. REC. 7498 (1970).

siana added that he had "had enough of these upside down, corkscrew thinkers . . . who are capable of the kind of thinking that winds up getting us a 100 percent increase in crime in this country."<sup>21</sup> Clearly, Judge Carswell was no corkscrew thinker; the problem was that he was not much of a thinker of any kind. Yale's Dean Louis Pollak testified, in masterful understatement, that Carswell possessed "more slender credentials than any Supreme Court nominee put forth in this century."<sup>22</sup> I should note, in fairness to now-Judge Pollak, that this opinion was ventured in 1970; there are still nine years to go. At any rate, Carswell was rejected 51 to 45. As if to confirm the senatorial judgment, Carswell resigned from the appellate bench, ran unsuccessfully for the United States Senate, briefly became a bankruptcy judge, then had some embarrassing encounters with the criminal law, and mercifully sank from public view.

## II. Controversial Successes

When John Marshall died in 1835, Andrew Jackson appointed Roger Taney to be his successor. This nomination was calculated to inflame the Senate: While acting as Treasury Secretary, Taney had been Jackson's point man in the destruction of the Second Bank of the United States by withdrawing all government deposits from the Bank of the United States.<sup>23</sup> The Senate reacted in an unprecedented manner by adopting resolutions censuring both President Jackson and Taney.<sup>24</sup> Moreover, Taney's service as Treasury Secretary had been as a recess appointee; when Jackson belatedly forwarded his name to the Senate for confirmation to the post the Senate rejected Taney the next day by a vote of 28 to 18.<sup>25</sup> Undeterred, Jackson nominated him seven months later, in January 1835, for the seat vacated by the utterly mediocre Gabriel Duvall.<sup>26</sup> The outraged Senate responded by waiting until the last day of its session to vote to postpone consideration of the matter and, to rub salt into Jackson's wounded hide, then voted to eliminate the vacancy altogether.

Nevertheless, upon Marshall's death in July 1835, Jackson tried to appoint Taney again. This time, Jackson plotted carefully. He coupled

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21. *Id.* at 7487.

22. ABRAHAM, *supra* note 1, at 17 (quoting HARRIS, *supra* note 19, at 16).

23. REMINI, *supra* note 2, at 105-06.

24. *Id.* at 148-52.

25. *Id.* at 170-72.

26. Duvall served 25 years on the Court and managed to utter only two words on constitutional law: "I dissent." See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 468, 470-71 n.33 (1983).



Taney's nomination for Marshall's seat with Virginian Philip Barbour's for Duvall's seat, thus defusing any opposition on grounds of geography. He waited until December 1835 to submit the nominations, for in the intervening months the combination of Democratic electoral victories, resignations, and the admission of Michigan to the Union had produced a Senate considerably more loyal to Jacksonian Democracy. The Senate debated the matter in bitter terms for three months, resisted several Whig attempts to adjourn in order to avoid the vote, but finally voted 29 to 15 to confirm Taney.<sup>27</sup>

In 1858, James Buchanan nominated his political crony Nathan Clifford to succeed the eminent and respected Benjamin Curtis, one of the *Dred Scott* dissenters, who, in effect, had resigned in protest over the *Dred Scott* decision. Clifford combined defense of slavery with endorsement of Jacksonian egalitarianism. This uneasy mixture ignited when introduced into a Senate containing abolitionists and their allies. Five weeks of acrimonious debate, the inexplicable absence at the vote of abolitionists Charles Sumner and Simon Cameron, and a last minute change of heart by Senator Allen of Rhode Island produced a cliffhanger victory for Clifford, 26 to 23.<sup>28</sup>

Two months before the end of his presidential tenure, Rutherford Hayes nominated his college classmate, Stanley Matthews, for the Court. Matthews had been Hayes' lawyer before the Electoral Commission and the House of Representatives in the disputed election of 1876. Since then he had become a Republican Senator from Ohio and chief counsel to the notorious robber baron, Jay Gould. Matthews' association with Gould caused the Senate to convulse with anger and the Judiciary Committee refused to act at all on the nomination. Amazingly, when the gullible and weak James Garfield succeeded Hayes, he promptly renominated Matthews, probably because he was unable to resist the powerful influences exerted by Jay Gould. Two months of angry debate and the deep purse of Gould produced the narrowest confirmation ever: 24 to 23. The *New York Times* called it "a sad and inexcusable error,"<sup>29</sup> but it must have been bitter fruit for Gould, for Matthews often joined the first Jus-

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27. REMINI, *supra* note 2, at 266-67, 315-16.

28. It should be noted that Professor David Currie, who has undertaken a truly exhausting and painstaking examination of the constitutional work of the Court, rates Nathan Clifford on a par with Gabriel Duvall for the coveted title of Most Insignificant Justice. Clifford's claim to the title is based on an impressively high score in Currie's category of "Inanities Per Page." In Currie's view, Clifford "wrote with less persuasive effect . . . than anyone else who ever sat on the Supreme Court bench." Currie, *supra* note 26, at 473-74.

29. ABRAHAM, *supra* note 1, at 136 (citing N.Y. TIMES March 13, 1881, at 1).

tice Harlan in opinions upholding the power of government to regulate economic activities.

Grover Cleveland's first opportunity to fill a Court vacancy in 1887 gave the Democrats their first chance since Buchanan's presidency to select a Justice. Cleveland picked Mississippi's Lucius Quintus Cincinnatus Lamar. Lamar had written Mississippi's Ordinance of Secession, served as a member of the Confederate Congress, as Confederate Ambassador to Russia, and as a Colonel in the Confederate Army. A gentleman and scholar in the old Southern tradition, he had been a Professor at the University of Mississippi, and had served as a United States Senator as well as Cleveland's Secretary of the Interior. But he was a Southerner — the first to be appointed to the Court since 1853 — and an ex-secessionist. Northern Republicans savaged him on that account, but he prevailed by four votes, 32 to 28. The margin of victory was provided by "one Independent and two Western Republican Senators, including Leland Stanford of California, who feared a vote against Lamar would be interpreted as a ban against all Confederate veterans."<sup>30</sup>

When Wilson proposed Louis Brandeis in 1916, opposition centered on Brandeis' supposed radical politics but was rooted also in a scarcely concealed anti-Semitism. From January to June 1916, ugly charges and smears were bandied about. Not enough of them stuck, for Brandeis was approved by the Judiciary Committee on a 10 to 8 vote and was subsequently confirmed by a vote of 47 to 22.

In 1937, shortly after his overwhelming re-election to a second term, Franklin Roosevelt proposed his court-packing plan. During the pendency of the proposal, Willis Van Devanter, the oldest of the "Four Horsemen," resigned. The general expectation, confirmed by Roosevelt's political confidant, Jim Farley, was that FDR would select Joseph Robinson, an Arkansas Senator who led the fight for the Court-packing bill as the Democratic Senate Majority Leader.<sup>31</sup> Anticipating Roosevelt's action, the Senate even endorsed the expected nomination of Robinson. Before he was nominated, Robinson suffered a fatal heart attack, and FDR selected another Southern Democratic Senator, Hugo Black of Alabama.

Black's chief qualification seemed to be party loyalty. His legal experience was limited to private practice in rural Alabama, as a county solicitor, and as a police court judge and prosecutor in Birmingham. Black was attacked as utterly unqualified, as a blindly partisan radical and, once it developed that he had been a member of the Ku Klux Klan a

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30. *Id.* at 140.

31. JAMES FARLEY, *JIM FARLEY'S STORY* 86 (1948).

dozen years earlier, as a racist masquerading as a phony liberal. The *Chicago Tribune* declared that Roosevelt had selected "the worst he could find."<sup>32</sup> The Senate was less disturbed; the Judiciary Committee approved Black's nomination by a vote of 13 to 4 and the entire Senate confirmed him, five days after the nomination was made, by a vote of 63 to 16.

After the confirmation, a Pittsburgh reporter disclosed that Black held a lifetime membership in the Klan. Jokes quickly spread to the effect that Black need not purchase judicial robes; he only had to dye black the color of the ones he already owned.<sup>33</sup> Black refuted the charges in a radio statement in which he admitted his former Klan membership and the fact that the Klan had sought to bestow life membership upon him. He denied that he had anything to do with the Klan and asked that he be judged on his public record. History has done so and has utterly acquitted him.

### III. Senatorial Picks

There are at least two occasions in which the Senate has done more than block a President's choice, and effectively selected the nominee. During Grant's Presidency, while his nomination of Ebenezer Rockwood Hoar was pending, another vacancy developed. A large majority of Congress demanded that Grant choose the impetuous and ardently radical Edwin Stanton, Lincoln's Secretary of War. Grant assented after striking a bargain with Senate leaders: The quid pro quo for Stanton's confirmation must be Hoar's confirmation. Stanton was confirmed the day after his nomination was made, by a vote of 46 to 11. Four days later he died of a stroke and the Senate, regarding a dead Justice of its choosing to be an insufficient half of the bargain, rejected Hoar.

In January 1932, the ninety-one year old Oliver Wendell Holmes retired. President Hoover announced that he intended to replace him with a "non-controversial western Republican."<sup>34</sup> This announcement triggered a public clamor for Benjamin Cardozo, then Chief Judge of the New York Court of Appeals. The Chairman of the Judiciary Committee, Senator Norris of Nebraska, made it quite plain that the Judiciary Committee expected Hoover to submit a judicial statesman. The entire faculty of the University of Chicago Law School, and the Deans of the law schools of Columbia, Yale, and Harvard joined in a petition urging Cardozo's appointment. Despite this, Hoover stood adamant, until Sen-

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32. JOHN P. FRANK, *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* 105 (1949).

33. GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 43 (1977).

34. ABRAHAM, *supra* note 1, at 201.

ator Borah of Idaho, whose support Hoover needed for other reasons, demanded Cardozo's appointment. Hoover summoned Borah to the White House and handed him a list in which Hoover had itemized his preferences in descending rank order. Cardozo was at the bottom. Borah studied the list and handed it back to Hoover with the comment: "Your list is all right, but you handed it to me upside down."<sup>35</sup> Hoover complied and the nation was richer for it. In his later years, Hoover declared that appointing Cardozo was "the proudest act of his career."<sup>36</sup>

#### IV. Letting the Justices Choose

The Justices themselves have influenced appointments to the Court with surprising frequency. In 1853, Justices Catron and Curtis presented themselves to President Pierce with a request, signed by all of the sitting Justices, that he appoint the accomplished and nationally known Alabama lawyer, John Campbell, to the Court. Pierce did so.

Following the Civil War the Justices intervened frequently to suggest nominees. Justice Grier lobbied successfully for Grant's appointment of William Strong; Justice Swayne persuaded Grant to appoint Joseph Bradley; Chief Justice Waite obtained Hayes' appointment of William Woods; Justice Samuel Miller persuaded Benjamin Harrison to appoint David Brewer; and Justice Brown convinced Benjamin Harrison to put Howell Jackson on the Court.

William Howard Taft was the champion manipulator. In 1910, he elevated Edward White from Associate Justice to Chief Justice, amid open regrets that propriety prevented him from appointing himself. There was public speculation that White had secured the promotion by a promise to resign during the tenure of some future Republican President in order to accommodate Taft. In a manner of speaking, White upheld his end of the bargain by dying in the early days of the Harding Presidency, whereupon Taft asserted his divine right to the job. Harding, who admitted to Columbia University's president that "I am not fit for this office and should never have been here,"<sup>37</sup> willingly capitulated to Taft. Harding made three more appointments to the Court — George Sutherland, Edward Sanford and Pierce Butler — but in each case Taft dictated the choice. When Harding displayed a surprising streak of independence

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35. *Id.* at 202-03.

36. *Id.* at 197. In this assessment Hoover was joined by his political opponents. Washington's Democratic Senator Clarence Dill declared the Cardozo appointment to be Hoover's "finest act of his career as President." *N.Y. TIMES*, Mar. 2, 1932, at 13. The Senate signalled its concurrence by confirming Cardozo unanimously, without discussion or roll call vote.

37. ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919-1933*, at 51 (1957).

and considered appointing Benjamin Cardozo, Taft skewered the idea by informing Harding that Cardozo was certain to side with that “dangerous twosome” Brandeis and Holmes, and that it was necessary to spurn Cardozo in order to “prevent the Bolsheviks from getting control” of the Court.<sup>38</sup>

Chief Justice Hughes persuaded Franklin Roosevelt to appoint Harlan Stone his successor as Chief Justice. Truman asked for the advice of the then-retired Hughes when it came time to replace Stone, but didn’t follow it when he appointed his crony, Fred Vinson, as Chief Justice. Hoover, Franklin Roosevelt, and Truman all asked Stone for advice on nominations. Louis Brandeis asked Roosevelt to select William O. Douglas as his successor and Roosevelt did so. Chief Justice Earl Warren and Felix Frankfurter were both influential in John Kennedy’s decision to appoint Arthur Goldberg as Frankfurter’s replacement. Warren was also involved in Lyndon Johnson’s decision to nominate Abe Fortas as Warren’s successor. Warren Burger gave regular advice to Presidents Nixon and Reagan on the subject of nominations.

## V. Conclusion

Some general conclusions may be made. The nomination and confirmation process is an iterative dialogue between the President, the Senate, and often the Court. Political and personal realities play a significant role in determining the relative strengths of the voices of the participants in the dialogue. There is nothing historically anachronistic in Senate rejection of Presidential appointees; indeed, the Senate has sometimes dictated the nominee. On those occasions, the Senate has sometimes demanded that the President act in a fashion transcendent of partisan politics, as in the case of Benjamin Cardozo, but it has also demanded that the President act in craven service of partisanship, as in the case of Edwin Stanton.

The process would be improved if both the President and the Senate were to recognize that they must take each other seriously. When the President or the Senate has sought to ignore, spite, humiliate, or exploit the other, acrimony and poor appointments have resulted. Andrew Jackson, for example, believed that the best way to deal with senatorial rejection of a Presidential nominee was either to leave the post vacant or to offer another nominee even less palatable than the first.<sup>39</sup> Jackson’s appointments to the Court were hardly stellar. Nixon’s attempt to emulate

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38. ABRAHAM, *supra* note 1, at 184.

39. REMINI, *supra* note 2, at 267.

Jackson's strategy produced Harrold Carswell. Mutual respect and a decent regard for governmental institutions would decrease the likelihood that pique will produce judicial disasters.

It would also be helpful to realize that some of the poorer appointments have been the product of excessive partisan zeal. For example, Taft's manipulation of the appointment process was for frankly partisan purposes. The result was that, with the exception of Charles Evans Hughes, the Justices selected by Taft, either overtly as President or covertly as Chief Justice, were lacking in distinction. One way to dampen that zeal might be to require a two-thirds vote by the Senate for confirmation.

A requirement of a two-thirds supermajority for confirmation to the Supreme Court could be accomplished by constitutional amendment, though one could plausibly argue that Congress has the power to do so by ordinary legislation. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the [S]upreme Court."<sup>40</sup> The immediately preceding clause clearly states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, *provided two-thirds of the Senators present concur.*"<sup>41</sup> Given the express two thirds requirement imposed with respect to treaty ratification, it is a reasonable inference that judicial confirmations were intended to be by a bare majority. Moreover, in the course of their deliberations, the delegates to the 1787 Convention amended the treaty ratification clause to include the two-thirds supermajority requirement. The context of the debate suggests strongly that the Framers understood the naked phrase, "advice and consent," to mean a simple majority.<sup>42</sup> However, since the judicial confirmation clause does not expressly declare that the consent required is by a simple majority, it is at least arguable that the majority necessary for exercise of the consent power bestowed on the Senate may be altered from time to time by ordinary legislation. In any event, were Congress to enact legislation creating a two-thirds consent requirement, it is possible that the validity of that action would be a nonjusticiable political question.<sup>43</sup>

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40. U.S. CONST. art. II, § 2.

41. *Id.* (emphasis added).

42. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 540-41 (Max Farrand ed., Yale Univ. Press 1937).

43. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (finding the power of the President unilaterally to abrogate a treaty to be nonjusticiable); *Coleman v. Miller*, 307 U.S. 433 (1939) (efficacy of the purported state ratification of a constitutional amendment is a nonjusticiable political question).

However accomplished, such a change would require the President to select a nominee with broad public support. In most cases, it would require the President to pick someone with a healthy modicum of bipartisan support. It is true that a two-thirds rule would have little impact when the President and an overwhelming proportion of the Senate are of the same party. Such moments have been relatively rare in our history and, in any case, the idea behind this proposal is not to achieve perfection but to dampen excess.

A two-thirds rule would inevitably increase the impact of special interest groups because they would be able to block any nomination if they could garner the support of one third of the Senate's members plus one. This may appear to be a defect, but if so, it is one that can be readily overcome. A premium would be placed on nominating a person whose accomplishments, constitutional philosophy, and professional stature is so beyond cavil that even groups politically opposed to the nominee would fail to arouse senatorial opposition. Not every Justice will be Benjamin Cardozo, but the possibility of special interest checks will increase the odds that a larger proportion of nominees will look more like Cardozo than Thomas.

Historically, the existence of a two-thirds rule would only have reversed eight confirmations:

<u>NOMINEE</u>	<u>VOTE</u>	<u>PRESIDENT AND YEAR</u>
Clarence Thomas	52:48	Bush, 1991
William Rehnquist (for CJ)	65:33	Reagan, 1986
Mahlon Pitney	50:26	Taft, 1912
Lucius Lamar	33:28	Cleveland, 1888
Stanley Matthews	24:23	Garfield, 1881
Nathan Clifford	26:23	Buchanan, 1858
John Catron	28:15	Jackson, 1837
Roger Taney (for CJ)	29:15	Jackson, 1836

The loss of the services of this group would have been no great tragedy for the nation. Of these, it should be noted that Nathan Clifford is one of Professor David Currie's finalists for "Most Insignificant Justice," and that Lucius Lamar and John Catron each received honorable mention from Currie.<sup>44</sup> I might add Mahlon Pitney to Currie's list. I take no position on sitting Justices.

Of course, a two-thirds vote would have altered the dynamics of confirmation, so it is only fair to disclose the close calls, confirmations which would have barely survived by a two-thirds requirement:

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44. See, Currie, *supra* note 27.

<u>NOMINEE</u>	<u>VOTE</u>	<u>PRESIDENT AND YEAR</u>
Charles Evans Hughes (for CJ)	52:26	Hoover, 1930
Louis Brandeis	47:22	Wilson, 1916
Melville Fuller (for CJ)	41:20	Cleveland, 1888

The loss of these Justices, especially Brandeis and Hughes, would have been a much larger loss to our nation. It may be that a two-thirds rule would extinguish some dim flames but at the cost of snuffing out some bright candles. On this point, all is speculation. The thrust of this suggestion is not to claim that it will produce better justices in every instance of its application, but to suggest that the addition of another *structural* check might lessen the institutional costs that the current process seems to impose.

History tells us that politics are at the heart of the confirmation process. There is no way to drain the politics from this swamp. Some salutary changes are voluntary, and necessarily policed voluntarily. But it might also be an opportune moment to consider altering the structure of the process in a way that, *over time*, would likely be politically neutral in its impact.