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The Political Process of Appointment to the Supreme Court: A Study of Rejected Nominees

Curtis C. Ridling

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THE POLITICAL PROCESS OF APPOINTMENT TO THE
SUPREME COURT: A STUDY OF REJECTED NOMINEES

by

Curtis C. Ridling

B.A., University of California, 1958

A thesis submitted to the Faculty of the Graduate School of the University of Colorado in partial fulfillment of the requirements for the degree of

Master of Arts

Department of Political Science

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This Thesis for the Master of Arts Degree by

Curtis C. Ridling

has been approved for the

Department of

Political Science

by

Curtis W. Martin

Dayton D. McKean

Date July 22, 1970
Ridling, Curtis C. (M.A., Political Science)
The Political Process of Appointment to the Supreme Court: A Study of Rejected Nominees
Thesis directed by Professor Curtis W. Martin

The Supreme Court and prominent individuals who have served on the court have been the subject of extensive study by political scientists. In the past, study of the Supreme Court has emphasized careful analysis of important court decisions and the method of their formulation. Supreme Court Justices have generally been viewed as existing outside the normal political process, making decisions without political influence. Such a view is no longer held by knowledgeable political scientists; nevertheless, systematic study of how the political nature of the Supreme Court affects the selection process for Supreme Court Justices has been limited.

The Constitution has not given clear criteria for selection of members of the Supreme Court, and Congress has not been successful in laying down a legal pattern in regard to the selection system; the system has thus been without prescription or pattern other than that which has evolved through the nation's history. Several studies have described Supreme Court Justices in terms of their general preparation and professional background; however, very little has been done in
seeking to explain why twenty-six court nominees were rejected by the Senate between 1789 and 1970.

It is the purpose of this paper to examine the written and unwritten political structure which guides the President and the Senate in selecting members of the Supreme Court and, by looking at the men who have been rejected, to determine what patterns, if any, have existed. In addition, such exploration may be useful in determining the success of the selection system and thus providing some basis for curbing undesirable nominees and aiding those who are well qualified.

To place the problem in its proper perspective, it is important to review briefly the function of the Supreme Court, both as it was originally expounded in the Constitution and as it has evolved in actual practice. In addition, the function of the President and Senate in the appointing process must be understood; the "advice and consent" section of the Constitution is the key to such understanding, and is explored in some detail.

Study of the political process involved in Supreme Court appointments was accomplished through a detailed examination of the instances in which nominees to the Supreme Court have been rejected by the Senate. From such an examination, certain generalizations about the working relationship between the President and Senate are made. The study also examines the question
of whether or not those nominees who were rejected were truly unqualified to serve on the Supreme Court. As one further check on the latter question, several studies of the unwritten qualifications for service on the Supreme Court are examined.

Finally, the question is raised as to whether or not the present system of making Supreme Court appointments is successful and whether or not proposals which have been made from time to time might offer a better way of selecting Supreme Court Justices. The system as it now operates relies heavily on political factors in the selection process, and not on judicial qualifications; rejected nominees have one common quality: they were typically as qualified to serve on the court as those men who have actually served. The final issue is one of determining whether or not it is possible or desirable to remove all political considerations from the appointing process.

This abstract is approved as to form and content.

Signed

[Signature]

Faculty member in charge of thesis.
INTRODUCTION

The United States Supreme Court has been the subject of extensive study by historians and political scientists. Charles Warren wrote an extremely comprehensive history of the Supreme Court in 1926. In his three volume work Warren explored the major cases which had come before the court and the important personalities who had served as justices on the Supreme Court. Study of the Supreme Court has generally concentrated on either a review of the important cases or important individual members of the court. The trend has been to overlook the political and human side of the Supreme Court.

The powers of the President and the Senate have been carefully examined by many political scientists. Joseph Harris has done an excellent job of describing the interplay between the President and Senate in his book titled The Advice and Consent of the Senate.

The purpose of this paper is to examine the political aspects of appointment to the Supreme Court through a study of the men who have been rejected as nominees to the Supreme Court. This also involves examination of
the "advice and consent" section of the Constitution as it pertains to appointments.

In examining instances of rejection, the question of qualification for service on the Supreme Court will be explored. Cortez Ewing, John Schmidhauser, Walter Murphey, and Herman Pritchett have contributed to knowledge in this field by studying some of the qualifications of those who were successful Supreme Court nominees. Little has been done, however, to discover whether court nominees who were rejected were actually poorly qualified. This paper attempts to answer that question.

Some research has been done regarding the circumstances surrounding the rejection of particular Supreme Court nominees but general discussion of the rejections has been overlooked. One of the primary purposes of this paper is to analyze the general patterns involved in the rejection process. Finally, there is an attempt to determine whether the appointing system has been successful, and whether or not alternative methods which have been proposed should be adopted.
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Judging from the brevity of the third article of the Constitution, it may seem that the courts were meant to play the least significant role of the three branches of government; whatever the original intention, this has not been the case; much of the history of the nation has been written in the chambers of the United States Supreme Court. With this in mind, an attempt will be made to explore the role of the federal courts briefly, both as it was formulated by the founding fathers and as it has been practiced throughout the history of the nation.

Among the key principles discussed during the writing of the Constitution were those of balance and separation of powers among the branches of government. The authors of the Constitution adopted some of the principles found in the works of Montesquieu and other political philosophers; they felt a government composed of three branches, one balanced against another, was of initial importance. Recognition of the weaknesses of the Articles of Confederation prompted an effort to build a stronger national government; this was partially accomplished by the second clause of Article VI of the
Constitution, which declared that the laws and Constitution of the United States would be "...the supreme law of the land...". In this setting, the enforcement of this clause has come to be one of the more important responsibilities of the federal court system, which was established by Article III of the Constitution.

The provisions of Article III are probably less explicit than those of the articles describing the legislative and executive branches. The indefinite nature of Article III was in part responsible for its being "...the subject of more severe criticism and of greater apprehensions than any other portion of the instrument."1

Basically it provided for a supreme court and such inferior courts as should be established by Congress. Judges were given life tenure during good behavior and were guaranteed no reduction of salary while in office.

Federal court jurisdiction extended to law and equity cases in the following situations:

United States shall be a party; - to controversies between two or more states; - between a state and citizens of another state; - between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects. 2

The Supreme Court had original jurisdiction over cases in which a state was a party, or where ambassadors or other public ministers were involved. Appellate jurisdiction of the Supreme Court was controlled by Congress through the exception clause, which states that the Supreme Court has appellate jurisdiction over all of the above cases "...with such exceptions and under such regulations as the Congress shall make." 3

This open provision of Article III prompted early consideration by Congress, and resulted in the passage of the Judiciary Act of September 24, 1789. Madison had argued for specific provisions of the Constitution to subordinate the state legislatures to Congress, but he failed to win approval. He argued that "...in default of this procedure, the judiciary alone would have the opportunity and obligation to defend national power against subversion by the parochial excesses of one or

2 United States Constitution, Article III, Section 2a.

3 Ibid., Article III, Section 2b.
more of the states."⁴ This power was provided by the Twenty-fifth section of the Judiciary Act which gave the Supreme Court the power to pass judgment on the constitutional validity of state legislation. According to Charles Warren, "...it is unquestionably true that the existence of the United States as a nation would have been endangered had the Court possessed no power of determining whether State statutes conflicted with the Federal Constitution."⁵ Power gained through this act and later court decisions enabled the court to grow into the position it now occupies.

As a functioning part of the government, the Supreme Court has taken a more active role than the one expounded in the Constitution and Judiciary Act. Initially, Hamilton argued that the court would always be the weakest of the three branches:

> The judiciary, on the contrary, has no influence over either the sword or the purse...it may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁶


⁵Warren, Supreme Court, p. 17.

While this is true in theory, the impact of the court on the nation has been much more significant than this would imply. DeTocqueville pointed out that American courts had the same general characteristics as courts elsewhere in that decisions are only rendered where litigation has arisen, and deal with specific cases which must be brought to the court. "...and yet he [the judge] is invested with immense political power... the cause of this difference lies in the simple fact, that the Americans have acknowledged the right of the judges to found their decisions on the Constitution rather than on the laws."7

Alexander Hamilton and other early political thinkers implied that Supreme Court would handle only clearly stated factual cases arising out of the federal statutes and the Constitution. The role of the court as a policy maker was either overlooked or underplayed; today it is this power which gives the Supreme Court much of its importance. Policy is indirectly created by the court through the interpretation of portions of the laws or Constitution which are vaguely written.

In addition, Robert Dahl pointed out that court decisions involve uncertainty because of inadequate information in


regard to (1) alternatives available, (2) the consequences of choosing given alternatives, (3) the level of probability that certain consequences will actually be realized, and (4) the relative value of different alternatives. Thus, uncertainty exists both in terms of what the law is in a given situation, and what the effect of a particular decision will be.

Legal criteria are often inadequate to clearly indicate the proper course of action for the court. Thus the Supreme Court's position is special "...for it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task." Many of these cases are ones which deal with "hot" political issues in the social or economic field, this tends to draw praise and criticism by the public.

If the Supreme Court were considered a political body this might partially solve the problem, but a large measure of the court's legitimacy is derived from "...the fiction that it is not a political institution but exclusively a legal one..." To preserve the myth that

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9 Ibid., p. 280.
10 Ibid.
the Supreme Court is non-political invites criticism in some instances, and certainly confuses the public. There seems to be little question that one major function of the Supreme Court is involvement in policy making.

A second major role of the Supreme Court is the support it gives to the other branches in conferring legitimacy on their work through its decisions. Partly because of the myth of a non-political court this role has generally been carried out very successfully. The Supreme Court gives legitimacy to interpretations of the Constitution by the President and Congress, and sets the boundaries for governmental agencies and state governments to some degree. Except in periods of national political transition, the court generally tends to be strongly supportative of the dominant alliance in the other branches. At its best, the court goes further and gives legitimacy to the entire pattern of behavior required in a democracy. In discussing the nature of law, Benjamin Cardozo touched upon the same point.

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly, or in combination shape the progress of the law. 11

An extension or combination of the above mentioned roles is sometimes found in situations where the Supreme Court makes policy which is supported by a major political coalition, but not with sufficient strength to carry it into practice. Civil rights decisions of recent decades are examples of such a situation. The court can set such policy only if the coalition leadership is strong enough to ward off serious attacks on it.

The court must not venture too far afield from the majority coalition. Even before Franklin D. Roosevelt was able to make any appointments to the Supreme Court, there was evidence of a shift toward the position of the administration and Congress by the court. At the same time new coalitions recognize the importance of the court to the success of their program. "A political revolution in the United States is not a 'fait accompli' until the incoming party secures sufficient judicial appointments, and especially upon the Supreme Court, to protect its program from the limbo of unconstitutional statutes." ¹²

To a large extent, the ability of the court to play the roles previously discussed is dependent upon

the judicial review power of the Supreme Court. While this provision of the court's power is not stated in the Constitution, there is a great deal of evidence to support the argument that the founding fathers accepted the idea. Hamilton attempted to dispel any fears of such power being held by the Court in The Federalist.

A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body...Nor does this conclusion by any means support a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both...13

In the course of the discussions at the Philadelphia Convention the idea of judicial review was expressed. Madison argued strongly for a council of revision composed of the President and court members which would have veto power over illegal legislation. One position held by some who opposed this proposal was that it "...would vastly complicate the Court's subsequent and independent review of the laws assented to, as those laws were sought to be applied in actual 'cases and controversies.'"14

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14 Friedman and Israel, The Justices of the Supreme Court, p. viii.
This argument seems to indicate that the founding fathers understood and accepted the idea of judicial review; it is unlikely that they realized the broad powers the Supreme Court would come to have as a result of the use of judicial review. The importance of this power is hard to overemphasize; Charles Warren argued that without this power the United States might have remained a nation, but "...the Nation could never have remained a Federal Republic. Its government would have become a consolidated and centralized autocracy. Congress would have attained supreme, final and unlimited power over the Executive and Judiciary."

In the nation's history, the use of judicial review powers has been relatively limited, starting with Marbury versus Madison. By 1957, eighty-six provisions of federal law had been declared unconstitutional. A study by Robert Dahl indicated that in cases involving major goals, lawmakers eventually gain the victory, either through revision of the statutes or changes in court personnel. The power of the Supreme Court to

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15 Warren, Supreme Court, p. 16.

16 Of the 86 court reversals, about one-half were rendered more than four years after passage. Of 24 acts held unconstitutional within two years, 11 were New Deal legislation. One-third of the total number which were held unconstitutional within four years were New Deal proposals. See Dahl, Journal of Public Law, VI, (Fall, 1957), for more information.
reverse legislation is not measured by actual occurrences alone however; recognition of the possibility of such action by Congress gives the court added significance.

In order to appreciate fully the Supreme Court's role, it must be remembered that the court has evolved during the nation's history. Growth of the Supreme Court has come through landmark decisions and the presence of eminent men on the court. The early years of the Supreme Court's existence were marked by relatively little activity and a low level of prestige. Several early appointees either declined court positions or resigned when something better was offered to them. The years under John Marshall and Roger Taney were, however, years of growth in importance for the Supreme Court. The major exception in the Taney period was the Dred Scott decision which was extremely harmful to the court's reputation. Though the court may be faulted for its decision and failure to deal with the real problem in this case, the blame must be shared by other members of the power structure. As far back as 1848 Senator Clayton had introduced a compromise bill in regard to slavery in the territories which would have given the court a responsibility that should have been taken by the Congress. In speaking for the compromise, Clayton argued that with the plan "...the whole question as to the power of Congress over slavery in the Territories would be
referred to the Supreme Court for its decision. 1117 Clayton was willing to let the court make policy; what he failed to see was that this was a situation where there might not be sufficient support by the remaining branches of government to make the decision acceptable; the Dred Scott decision showed Clayton to be wrong.

More recent examples of Congress allowing the Supreme Court to initiate policy can be seen in the civil rights cases of the past two decades. Here there seems to be sufficient support from the majority coalition to prevent the court from losing its legitimacy, though at times the line seems to be a thin one. Passage of the voting rights bill on June 17, 1970, by Congress was done with the understanding that there would be an early test of the constitutionality of parts of the act (eighteen year old vote provision) when signed by the President; this is a striking example of how the Supreme Court role has evolved since the decision on Marbury versus Madison established the power of judicial review.

17 Warren, Supreme Court, p. 208. The compromise proposed by Clayton would have admitted Oregon with its anti-slavery provision, admitted California and New Mexico provided they make no laws denying or supporting slavery, and given the right to appeal cases from Territorial courts to the Supreme Court. The bill passed the Senate but failed in the House.
Extension of the power of the Supreme Court has not come without struggle; there have been several attempts to limit the court's jurisdiction. One of the critical issues has been the power of the Supreme Court to hear appeals from state courts; attempts to remove section twenty-five of the Judiciary Act, however, have not succeeded. Calhoun argued against the validity of the same section, basing his argument on the idea that the section was not based on the Constitution and was therefore illegal. Supreme Court jurisdiction limits are clearly a prerogative of Congress; the case of "Ex parte McCardle" in 1868 established the legality of such limitations by Congress. The use of this power by Congress, however, has been generally limited. In more recent times, the "Southern Manifesto" and the "Alabama Nullification Act" (1956) have attempted to curb the power of the federal courts in relation to school desegregation. The Supreme Court which Hamilton envisioned has grown far beyond his dreams. The political and policy
making aspects of the court have made it unique and have focused significant attention on the court's powers. This is perhaps best summed up by Felix Frankfurter.

The Court sits in judgment, that is, on the views of the direct representatives of the people in meeting the needs of the society...the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.19

This importance is reflected in the significance which is attached to Supreme Court appointments.

The normal technique used in studying the Supreme Court emphasizes a review of the landmark cases and the reasoning involved in the decision. While no one would deny the importance of this type of study, it sometimes overshadows the human side of the Supreme Court. People often speak of the government of the United States as one of laws, not men; this fails to take into account the fact that "Laws are made, enforced and interpreted by men."20 Long ago Oliver Wendell Holmes pointed out the dangers of considering the law a system which "...can be worked out like mathematics for some general axioms of

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conduct." For, Holmes said, "...certainty generally is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds..."\(^{21}\) With this in mind, the importance of the men who are appointed to the court is obvious, and the method of their selection becomes important, since this to some extent determines the quality of men and thought. Full understanding of the court can come only by understanding the dynamics involved in the decision making process.

Debate concerning the selection of Supreme Court judges was initiated on May 29, 1787, and not concluded until the closing days of the Constitutional Convention; it was a decision to be made carefully, for the operation on the court would depend in part on the judicial selection method. The compromise solution which became part of the Constitution had received relatively little discussion in the convention; it is therefore difficult to determine what was meant by the words "advice and consent" which are crucial to understand the division of appointive power between the President and Senate. Actual practice has not clarified this phrase; historically appointive power has varied from almost total executive dominance to heavy dominance by the Senate. An attempt is made in this chapter to trace the thinking of the found fathers and subsequent practice as it relates to the roles of the President and Senate in making appointments to the court.

The use of advisory councils was a common practice among the colonies, and was growing steadily prior to the revolution. In general, they performed three functions
in the colonial government; these were (1) an advising body to the governor, including advice on appointments (in some instances the "advice" called for compulsory acceptance by the governor), (2) serving as the highest court of appeals in the colony, and (3) serving as the upper house of the colonial legislature.

Under the Articles of Confederation, the power to appoint judges fell upon the legislative body. With this background, it would have been illogical for the founding fathers to suggest that total appointive power be given to the President.

Once the founding fathers had tentatively decided to write a new constitution, Edmund Randolph of Virginia introduced the first complete plan for a new government on May 29, 1787. The ninth resolution of that proposal called for a national court system to be established in the following manner:

Resolved that a National Judiciary be established to consist of one or more supreme tribunals to be chosen by the National Legislature to hold their offices during good behavior.¹

On June 5, 1787, this particular resolution was discussed by members of the convention. An objection by James Wilson to appointment by the legislature established one for giving the executive total power over the War.

of the most common criticisms to be heard. Wilson feared that the opportunity for intrigue would make selection by the legislature a poor method; he preferred placing the responsibility squarely on one man, the chief executive. Others, such as John Rutledge, feared placing so much power in one man's hands. "The people will think we are leaning too much towards Monarchy." Madison favored election by the Senate alone, and moved to leave the question unresolved until later in the convention; his motion carried. The solution suggested by Hamilton on this same day, June 5, was to allow the President to appoint with Senate approval; this was the solution which became the compromise plan.

A second plan was introduced on June 15, 1787, by William Patterson of New Jersey. This plan called for appointment of court members by the executive; however, the executive was to be selected by the legislative branch and the power was therefore not quite so clearly in the executive hands as it might at first appear.

On June 18, Hamilton introduced the last of the original plans of government; in his proposal he called for giving the executive total power over the War,

\[^{2}Ibid., p. 119.\]

\[^{3}Ibid., V. II, p. 81.\]
Finance, and State appointments, and shared power with
the Senate on the remaining appointments.

This matter of appointments was reviewed from time
to time throughout the convention, with the arguments
falling into a pattern as was earlier suggested. Those
favoring appointment by one or both branches felt this
would diffuse the power and avoid the creation of a
President with too much power. In debate on July 21,
Madison reversed his earlier position; his argument
makes it clear that the geographical question had been
raised. He argued that if the Senate were given complete
power, the equal representation there would mean that
representatives of a minority of the population and a
majority of the states could control appointments
"...it would moreover throw the appointments entirely
into the hands of ye Northern States, a perpetual ground
of jealousy and discontent would be furnished to the
Southern States."\(^3\)

While the argument regarding appointment of higher
members of the executive department and the court dragged
on throughout the convention, the question of appointing
lesser officials was settled early (June 1), when a
resolution was passed to give the President power to
appoint all officers not otherwise provided for. This

\(^3\)Ibid., V. II, p. 81.
appointive power was not typical of state governments, and therefore, "...this broad grant of an independent power to the President was truly remarkable."^4 While this was never questioned in later sessions, the question of giving the legislature appointing power was a subject of continuing debate; this may have forecast to some extent the final compromise.

At various times during the convention, there was considerable support for the advisory council idea, similar to that which existed to some extent at the colonial level. The New Jersey plan favored this policy, and Randolph's Virginia Plan called for a council of revision with veto power over legislation. Most support for the council "...was based on the conviction that giving to the President alone all the executive power - particularly the power to make treaties and appointments - would lead to tyranny."^5 Davie of North Carolina argued that a special council to advise the President would not be necessary, since the Senate could perform in this


role; it was primarily due to recognition of this fact that proposals for an advisory council were finally dropped. On June 13, Madison introduced a resolution calling for appointment of court members by the Senate; that resolution passed and remained the official position until near the end of the convention. On September 4, as a part of a revision report by a committee of eleven, the clause regarding the appointment of court members and ambassadors was revised to wording which is similar to the final form. As finally adopted by the convention, the crucial wording is as follows:

He [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; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law...

It should be noted that the power to appoint is more clearly initiated by the President than is the power to make treaties. While the arguments opposing giving total appointment power to either the Senate or President are clearly stated in the writings of Madison and others, The Federalist Papers, (New York: The New American Library, 1961), p. 465.
there is little clarification of the real meaning of the "advice and consent" clause as finally adopted.

Efforts to clarify this section of the Constitution started in the ratification conventions, and has continued until today. Clearly the initial phase of action belongs to the President; the problem relates to how much advice he should seek, and the extent of the power that was intended for the Senate in its consent role. Hamilton clearly viewed the role of the President as the primary one, as the following quotation indicates.

In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. Hamilton saw the Senate role as primarily a "silent one"; the threat of a Senate veto would prevent the President from exercising favoritism or appointing persons of unfit character.

Some of the framers returned to their home states critical of this portion of the Constitution. Luther Martin told Marylanders that such power would make the President king in all but name. In other states, "The

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'blending' of legislative and executive powers was decried as contrary to the principle of separation of powers, and it was feared that the Senate would become too powerful." 8 This argument was based partially on the belief that the Senate would use the appointing power to entrench its members in the government, especially since there was no provision prohibiting the appointment of their own members.

John Adams was possibly the man with the most insight into the future, for he almost predicted the spoils system. "He foresaw the use of appointments as political spoils, and that individual Senators would exert pressure to secure patronage for personal advantage." 9 Since he was a supporter of a strong executive, he feared that this power would dilute the power of the President.

The proper criteria for rejection of a nominee by the Senate has been a continuing question. George Cabot, U. S. Senator from Massachusetts (1791-1796) felt that the Senate power was quite limited.

The power of the Senate was in no sense initiative or even active, but negative and censorial and was never to be exercised but in cases where the persons proposed for office were unfit. 10

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8 Harris, Advice and Consent of the Senate, p. 25.
9 Ibid., p. 29.
Judge Story saw the role of the President and Senate as separate and distinct. He shared Hamilton's opinion that the Senate check would make the President act carefully in selecting his nominees. Not as optimistic as Cabot, Story recognized that the Senate might on occasion reject qualified men for party reasons or private motives, "...but such occasions will be rare." ¹¹

The arguments presented by the founding fathers and those who followed them indicate that careful consideration was given to the appointing process. A compromise is an attempt to please all concerned and in the end often pleases no one; this case was no exception. It was a complex compromise, including consideration of the large and small states, the Northern versus Southern interests, and popular versus aristocratic government. Those involved in the writing wanted high quality and decentralized power, but they

...also expressed with candor and realism opinions which indicated a keen awareness of the geographical and interest group considerations which have, in fact, influenced the federal judicial appointing process down to the present day. ¹²

Joseph Harris argued that from the compromise wording it would appear that those who favored a stronger executive


with little legislative interference won, "...but subsequent history indicates that, on the whole, victory rested with the other side." With the Constitution written, it remained for men like Washington and those who followed to test the validity of the theory through actual practice.

Through the total history of the Supreme Court (1789-1970) there were 135 nominations to the court; of these 109 were confirmed and, including Blackmun (1970), 98 have been sworn in as members of the court. Several Presidents have had the opportunity to appoint a majority of the court. Of these, Washington appointed the largest number; he named the original men plus half of their replacements. The precedents set by Washington and those who served under him influenced the course of the court in large measure.

In practice, the appointment process is broken into three distinct steps: nomination, assent of the Senate, and appointment or commissioning of the appointee. Most conflict arises in the first two steps, though there have been instances of conflict which arose when the

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13 Harris, Advice and Consent of the Senate, p. 20.

14 John Adams appointed 3; Jackson, 6; Lincoln, 5; Taft, 5; and Franklin Roosevelt, 9. Grant did not appoint a majority but sent 8 names in nomination; only 4 of these served.
Senate wished to reconsider a nomination it earlier confirmed, but such cases are rare. It is also possible for the President to refuse to commission an appointee who has been confirmed by the Senate.

The actions of President Washington and the first Congress established precedents in all areas of government. In the case of the Supreme Court, these have been particularly lasting. One of the most important acts of the first Congress was the passage of the Judiciary Act in September, 1789. Congress established a six-man Supreme Court, which was also related to the inferior court system in terms of both size and geography. The power to set the size of the Supreme Court was assumed by Congress, and later proved to be important as attempts to manipulate the Court were made by Congress. Also, the assignment of justices to supervise circuits was used to imply a geographic distribution, and at times the rearrangement of these districts removed available seats on the Supreme Court. The Constitution is unclear as to the appointment of inferior judges, but the assumption has always been that these were "other officers," and they have been appointed in the same way as judges of the Supreme Court.

Washington fully appreciated the importance of his role in setting precedents; the procedure which he followed in making appointments is ample proof of this.
James Hart summarized the criteria which Washington used in making appointments:

1. to enter office without any engagements.
2. not to be influenced by motives of amity or blood.
3. to take into account three principal factors:
   a. fitness.
   b. comparative claims "from the former merits and sufferings in service."
   c. equal distribution among the states.  

In writing to a nephew who had requested an appointment as a district attorney, Washington indicated his need to be careful in making appointments; he "...realized he had to be 'exceedingly circumspect' in this matter, 'no slip will pass unnoticed.'"  

Washington, as did the men who followed him, believed it was important that appointees be men whose ideology was similar to his own. He "...added a desire that they should be sound supporters of the new system; that is, political orthodoxy was considered as one of the elements of fitness for office." He realized that the Constitution was still new and untested, and therefore wanted men who were respected in their own area; this would lend confidence to the people. He tried to combine geography and fitness in making appointments. His success

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16 Ibid., p. 114.
in distribution based on geography is clearly shown. "He chose the members of his Cabinet from five states and justices of the Supreme Court from seven." 18

First steps are often awkward; this proved to be true with Washington's first appointment. Careful in his selection, he nominated William Short on June 15, 1789, to take charge of American affairs in France. He sent Jay in person to the Senate to present Short's qualifications and to answer any questions. In the Senate there was debate as to the method of voting; the decision favored the use of a secret ballot. Those who favored a voice vote passed a motion on August 5, to give future decisions in the presence of the President. Short had been approved, but this motion led to further discussion between Washington and the Senate.

Two meetings were held between the President and a committee of the Senate to determine future procedures for presenting treaties and appointments. (The first treaty presentation was equally awkward.) Washington indicated that he favored an opportunity to present treaties in person but preferred to make nominations in writing. Washington reasoned that appointments could easily be communicated in writing; the Senate would be left on clear and responsible ground, and it would avoid

18 Haynes, The United States Senate, p. 725.
the embarrassment to both the Senate and President in instances where the Senate objected to a nomination. The committee reported to the Senate and on August 21, 1789, the Senate passed a resolution supporting Washington's approach, and calling for a voice vote on future appointments. Almost without exception this procedure has been followed to the present day.

Some of the founding fathers had envisioned an advisory council role for the Senate, based on the "advice and consent" clause. In practice, Washington turned to others in his executive family for this service. He relied heavily on Madison, and "...even made Madison a one-man council of advice in his dealings with the Senate itself." In addition, E. W. Binkley argued that Washington, by asking Senate approval to submit nominations in writing, curtailed any opportunity for the Senate to act as a council. Thus the precedents established by Washington destroyed any real possibilities for an executive advisory council, at least one staffed by the Senate.

19 Swanstrom, The United States Senate, p. 94.

Three months into the first session of Congress, Washington suffered his first rejection of an appointment. He had sent the name of Benjamin Fishbourn to the Senate for appointment as naval officer of the Port of Savannah. The Senate rejected Fishbourn, though, according to reports at the time, he was highly qualified. Supposedly the reason for the rejection was the fact that the Senators from Georgia had already picked a man for the position. The following day Washington withdrew the name and submitted one which pleased the Georgia delegation. At the time Washington wrote a rather cynical letter to the Senate, indicating that he would accept their judgment, and he assumed that they had valid reasons for rejection; however he also indicated that the man was highly recommended, and if there were questions about future appointments he would be glad to discuss his reasons for nomination with the Senate. It would appear that in this case, the President was disturbed because the Senate did not seek his counsel.

This case is often referred to as the first instance of the use of "senatorial courtesy," but proof seems insufficient. James Hart has researched this question and finds that all references lead back to the writings of Thomas H. Benton, who was not a contemporary of the situation. Hart argued that there were specific charges against Fishbourn. "It would appear that
Fishbourn thought charges of which Washington was unaware had been brought against him in the Senate.\textsuperscript{21} Whether this was the case or not, it was one more incident which sealed the fate of using the Senate in an advisory capacity.

The separation of the executive and judicial branches of government has long been debated, especially in the sense of the judicial branch offering advice. The question came before the Supreme Court under Washington in August 1793, when the President sent a list of twenty-nine questions on international law to the court, asking for clarification of the fine points of law. Hamilton had argued against this course of action while Jefferson supported it. Washington recognized the possible conflict and placed the decision in the hands of the Supreme Court, which took a firm stand in opposition to giving such advice, fearing a mixing of the two branches. "By declining to express an opinion except in a case duly litigated before it, the Court established itself as a purely judicial body..."\textsuperscript{22}

In general, Washington was very successful in his appointments. Five nominations were refused during his

\textsuperscript{21}Hart, \textit{The American Presidency}, p. 124.

two terms; one of those was to the Supreme Court and will be discussed later. The number of men who declined to accept appointments seems high, but it must be remembered that Washington had many appointments to make, and nominations were often made without first asking the nominee. In addition, the prestige of the federal government, in its infant stage, was low. It seems likely that if the men who followed him had always been as careful in making nominations as Washington appeared to be, there would have been fewer rejections. In addition, he "...had the political astuteness to make it a definite policy not to nominate men to whom strong opposition could be expected." Underlying the entire process was the fact that Washington's character was highly regarded in the country; his reputation and prestige surely placed him in a position of strength in his relations with the Senate.

Other early Presidents were important in cementing the procedure established by Washington and adding their own modifications. John Adams kept many of the Washington appointments; the thought of a complete turnover did not enter the pattern until later. Adams extended the concept of choosing men of his own ideology to even the minor offices, but he did not truly become a "party

—Ibid., p. 109.
leader." In terms of success, he suffered more defeats than Washington, losing eight by outright rejection and nine others by the tactic of postponement which became a common tool used by the Senate. The role of members of Congress in suggesting men to fill appointments became much more noticeable. "...Adams himself explicitly admitted that this was the situation." Adams almost revived the role of the Senate as an advisory board when he met unofficially with the Senate in regard to the appointment of a minister to France. Attempts to further this practice under Madison were rebuffed, and the practice was dropped.

Jefferson was more successful in appointments, probably because he appeared to be a stronger President. His attitude toward rejections was similar to that of Senator Cabot; he felt the only valid ground for objection was the unfit nature of a candidate. This position is much more restricted than one in which the Senate is expected to reject all but the best candidate. Jefferson also allowed a minor role to members of Congress in selection, and in some situations considered geography as a factor. In one circuit court opening he requested that each member of Congress from the area submit a first and second choice for the nomination, and then he chose from the list.

Ibid., p. 109.
As an administrator, Madison did not present a strong personal image. This "...gave hostile factions an opportunity, and they attempted to control, through the Senate, the distribution of the patronage." 25 As an example, opposition forces in the Senate managed to persuade him to drop efforts to appoint Albert Gallatin as Secretary of State.

The pattern established by these early Presidents has been continued. Rejections have been relatively few; the role of the Senate has vacillated in a loose relationship with the strength of the President.

An early addition to the appointing process was the concept of "senatorial courtesy," which possibly started during the Washington years. It has been less effective in Supreme Court appointments than in other appointive positions, but nevertheless, it has occasionally had minor, and in at least two cases, major impact on Supreme Court appointments. One early practice was that of consulting Senators from the home state of the nominee, simply because they were the ones most likely to be knowledgeable about the candidate's qualifications. Over the years the requirement that candidates have the approval of members of Senate from their home state became more and more entrenched. It has varied, however,

25 Refer to earlier section of paper regarding Washington's appointments, p. 31.
depending on the strength of the President and, to some extent, according to the nature of the appointment. Some appointments have come to be considered the "personal property" of members of Congress and others are strictly relegated to the President. For example, except in rare cases, the appointment of Cabinet members has been regarded as within the province of the President. The most notable exception to this rule came under Tyler when he suffered four Cabinet rejections, one nominee being rejected three times!\(^{26}\) Appointments to the courts are not viewed in the same way as Cabinet appointments.

In such cases, the nominees are not merely members of the "President's family," but are lifetime appointments to a separate branch of the government.

In situations where "senatorial courtesy" will probably be honored, the power can be an apparent contradiction to the meaning of the Constitution. "...usage has literally reversed the Constitutional provision, so that it is the Senate that actually nominates and the President that gives consent."\(^{27}\) In some instances the

\(^{26}\) President Tyler's four rejections to Cabinet posts included Caleb Cushing, Secretary of Treasury; David Henshaw, Secretary of Navy; James Porter, Secretary of War; James Green, Secretary of Treasury. Cushing's nomination was rejected three times in the closing day of a hectic Senate session. 

\(^{27}\) Binkley, The Man in the White House, p. 11.
abuse of this power has been quite flagrant. In cases where the only objection is that an appointee is "personally obnoxious" to a particular Senator, the practice is shorn of all defenses. John Wigmore argued that this reversal has taken place "...by silent usurpation achieved by selfish intrigue." He argued that it is possible only because individual Senators respect each other's veto power.

There is no denying that the institution of "senatorial courtesy" exists, and yet it does not have to be fatal. There are certainly good men in both parties, and probably in sufficient numbers to fill all appointments. In the final analysis, the President has the initial responsibility and can use it in such a way so as to secure qualified nominees.

A reverse kind of courtesy also exists, though there are fewer opportunities for its practice; this practice consists of immediate confirmation of members of the Senate who are appointed to office. It was used effectively by Cleveland in the appointment of Edward White to the Supreme Court after two earlier rejections for the post. However, this reverse courtesy is not always effective; George Badger, John Crittendon, and George

Williams, who were rejected as appointees to the Supreme Court offer ample proof.

Analysis of the "senatorial courtesy" institution shows that it is fairly effective in securing appointments to local offices, but its power diminishes as it affects the higher office partly because the Senate's power begins to be diffused. In the end, "Senatorial courtesy waxes and wanes depending on the interests of the Senate and the occupant of the White House."

If the clause "advice and consent" is to be fully understood, a brief review of the general usage, both by Congress and the President, from the past to the present is necessary. Each branch has found ways to use its power to the fullest extent in given situations, and in some cases to abuse that power.

Many Presidents have recognized the value of court appointments as a means of extending their own philosophy beyond their presidential term. John Adams named John Marshall to defend federalism, Roger Taney was named by Jackson to continue "Jacksonian Democracy," and President Wilson named Justice Brandeis to extend his liberal views; these are only some of the more obvious examples. Early abuse of this power came in the

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administration of John Adams, when, acting with the assistance of Congress, he managed to appoint twenty-three new circuit and inferior judges. The haste of the legislation and appointments "...all indicate that the whole matter was a political intrigue rather than an effort to supply the legitimate demand of litigants." In addition to the appointment of these "midnight judges," the legislation called for reduction of the size of the Supreme Court by one member to thwart Jefferson's first appointment; however, the new Congress reversed the legislation.

In the "Legal Tender Cases," Grant supposedly used his appointive power to bring about a reversal of a crucial decision by the Supreme Court. The cases questioned the power of the government to make paper money legal tender during the Civil War; the original decision of the court found it illegal for the government to make paper money legal tender, but with the addition of two Grant appointees, the court later reversed the decision. Added suspicion was created by the fact that Grant announced his two nominees on the day that the court delivered the first decision. The question of whether or not Grant truly packed the court remains a subject of debate. Walter D. Coles, "Politics and the Supreme Court of the United States," American Law Review, XXVII, No. 2, (March-April, 1893), p. 195.
Murphey and Herman C. Pritchett argued that Grant "...had advance warning of the decision from Chief Justice Chase," while Walter Coles stated that "No evidence has been adduced to make such a charge good, and we believe it to be unfounded." In the pragmatic sense the answer to this question is unimportant; the end result was reversal of a decision which was very important to the administration.

Among the powers of the President is that of making recess appointments. The Constitution states that "The President shall have power to fill up all vacancies that may happen during the recess of the Senate..." The question of the meaning of the wording, "may happen" has been widely disputed; through evolution it has come to mean vacancies which were in existence at the time the Senate adjourned, or vacancies which came to exist during the recess. George Haynes, writing about this confusion, clearly describes the struggle and confusion.


33 United States Constitution, Article II, Section 3c.
It may be doubted if it [the Constitution] contains any other phrase, the ambiguity of which might so easily have been removed, that has given rise to such long winded controversy.\textsuperscript{34}

*Recess appointments have the effect of presenting the Senate with a "fait accompli," and it is often much more difficult to refuse confirmation.*

Recess appointments have been rare in the history of the Supreme Court. Washington made the first one when he appointed John Rutledge as Chief Justice, but the Senate later rejected the nomination. The next such appointment of Benjamin Curtis in 1851 was successful. No more such appointments were made until during the Eisenhower administration when three such appointments were made successfully.\textsuperscript{34} At times Congress has fought such appointments. In 1883 a bill was passed to withhold payment of salary to recess appointments until they were confirmed. Later revision modified this so that vacancies which occur while the Senate is not in session are not affected. In 1960, as a reaction to the Eisenhower appointments, the Senate passed a resolution designed to discourage recess appointments. The resolution stated that such appointments made fair review of nominees difficult and was not in the interest of the court or public, and "...such appointments therefore,

\textsuperscript{34}Eisenhower's recess appointments included Chief Justice Warren, 1953; Justice Brennan, 1956; Justice Stewart, 1958.
should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business."  35

At times a President, as another way of exerting his power to appoint, has refused to name a nominee, though this again is rare. In more modern times it has become easier for the President to use his own prestige to press the Senate on his nominations; obviously the effectiveness depends on the public image of the President in office.

The ultimate power which may enable the President to maintain supremacy in the appointing field is his position in the sequence of events. Hamilton argued in The Federalist that the power to nominate in most cases would mean the power to appoint. No matter how much the Senate may object, its power is limited to the negative, and a strong President can maintain the initiative in appointments. Marshall's appointment provides a good example. So strong was the feeling in the Senate against the nomination of Marshall that the Federalists were actually prepared to refuse to confirm him, if by such actions they could have induced the President to appoint Patterson.  36

35 Murphey and Pritchett, Courts, Judges and Politics, p. 105.

36 Warren, The Supreme Court, p. 176.
Voting on the nomination was postponed for a week, but when it became evident that Adams would remain firm, the Senate gave its approval on January 27, 1801.

If the initiative belongs to the President, then a strong President should be able to make acceptable appointments to office in most situations. Moreover, a President who is aware of the importance of the Supreme Court will emphasize careful selection to this branch of government; indeed, "The President's power to appoint the judges in the federal court system has been identified as his most potent check on judicial behavior." 37

Available evidence would seem to indicate that the founding fathers did not expect the Senate to exercise a great deal of strength in regard to appointments; whatever the original intention of the founding fathers, the Senate has come to assume a stronger role over the years. In the Senate battle over the nomination of Abe by the President. Such a view was held by Hamilton; however, one student is critical:

Hamilton was wrong. The Senate was interested in considerations other than "appearances of merit" or "proofs for the want of it," and almost at once began to interpose vetoes. 38

Pressures were felt almost immediately after the government was formed by all who were near the appointing


process; the political faithful and candidates for every conceivable office pressured members of Congress and the President. In some cases the President gave a portion of the appointive power to Congress for the simple reason that the burden was too much for one man.

William Mitchell stated that the original purposes of giving the Senate a voice in appointments was twofold: (1) to insure a fair distribution of appointments, and, (2) to provide a check on quality by the Senate.\(^3\)

Hamilton, writing in *The Federalist* saw the Senate power as strictly negative.

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 he may have made.\(^4\)

Whatever the original intention of the founding fathers, the Senate has come to exercise a stronger role over the years. In the Senate battle over the nomination of Abe Fortas to the Chief Justiceship (1969), Senator Robert Griffin argued that the role of the Senate was much more than to determine if a candidate met some set of minimum qualifications in terms of education and experience. According to Griffin, such a view is

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\(^3\) For additional information, see William Mitchell, "Appointment of Federal Judges, Minnesota Law Review, XVI, No. 1, pp. 105-117.

...wrong and simply does not square with the precedents or with the intention of those who conferred the "advice and consent" power upon the Senate...this power of the Senate with respect to the judiciary is not only real, but is at least as important as the power of the President to nominate.41

It is important to realize that such statements must be judged in context; Senator Griffin's position might have been more moderate if the nominee had been of his own party.

Congress, like the President, has found ways to increase its power, both over appointments and the courts. The methods employed have taken the form of attacks both on the courts as institutions, and the judges as members of the institutions. In the most extreme form this has meant impeachment for judges and attempts to abolish the Supreme Court, such as the proposal offered by the Radical Republicans during the Civil War period. Chief Justice Chase is the only member of the Supreme Court to be impeached, and he was found not guilty; thus the most extreme measures by Congress have not proved successful other than in the sense of possible coercion of the court.

Most attempts by Congress to influence the courts have not had such a dramatic flair. By setting the Supreme Court size in 1789, the first Congress discovered

an implied power which was later used successfully to thwart incoming Presidents and to support their own point of view. For example, the Supreme Court was reduced by one member through an act of Congress prior to Jefferson's first term in an attempt to block his appointive power, and under President Andrew Johnson the court was reduced from ten to seven members, with the same intention. In Jefferson's case, the next Congress reversed the act, but Johnson made no appointments to the Supreme Court. The court was stabilized at nine members after varying from six to ten members during the period from 1789-1866, but the opportunity for change still exists. In 1953, Senator Butler, of Maryland, introduced a constitutional amendment which would have removed the power of determining the Supreme Court size from Congress; the bill passed the Senate but died in the House of Representatives.

A second avenue of control by Congress has been through attempts to place qualification restrictions on men selected for federal courts or on the manner in which they are selected. Most attempts to add qualifications have been based on the question of experience. Recent efforts, in part sponsored by the American Bar Association, have recommended periods of either five or ten years of prior judicial experience for judges.
In the first ninety years of American history, four constitutional amendments changing the method of selection were offered, but all failed. In general, these efforts would have given the power to Congress alone. Since 1889 almost forty other proposals have been made; in many instances, especially since 1900, these have provided for popular election of the Supreme Court or all federal judges. All but a dozen of these set limited terms for court members.\(^4\) Despite the proliferation of proposals, none of them has become law.

Other efforts have been directed toward limitations on the power of the Supreme Court to hear certain types of appellate cases. Opposition to section twenty-five of the Judiciary Act existed from the earliest days of the nation, and over the years there have been many attempts to amend it or remove it entirely. In 1821, Senator Richard Johnson offered an interesting abridgment regarding section twenty-five. He proposed that the Senate be made an appellate court for all cases where a state was involved, and also in cases involving state laws or the state constitutions. Other efforts would have made decisions affecting states require a majority of five of seven judges. Seven such proposals were made.

\(^{42}\) For further information, see Evan Haynes, *The Selection and Tenure of Judges*, (Berkeley: The National Conference of Judicial Councils, 1944.)
between 1823 and 1830; only two of these included application to acts of Congress. 43

Contemporary legislative attempts include the effort of Senator William Jenner, Indiana, who offered a bill in 1957 which would have curbed Supreme Court jurisdiction in five areas; the primary effect would have been to limit appellate jurisdiction in cases which involved employees and government officials who were removed for political reasons (subversion primarily). 44

More subtle forms of pressure from the Senate are visible in the hearing process. Delays in holding hearings or reporting the results are common. In 1959 President Eisenhower had thirteen lower court appointments delayed until Senator Lyndon Johnson was able to substitute a candidate he favored; at that point the appointments were quickly approved. In general attacks on the Supreme Court, the Senate often uses the procedure of a hearing for a court nominee. The 1958 hearings on Justice Potter Stewart turned largely on the merits of school desegregation. In the Abe Fortas case involving appointment to the Chief Justice position, a major question was the supreme court rulings on obscenity.

43 Warren, The Supreme Court, p. 685.

Attacks of this nature are indirect but sometimes achieve the desired effect.

Clearly there have been several cases of abuse by both the President and Senate in the appointing procedure. Such a list might include the "midnight judges" of John Adams, the "court packing" attempt by Franklin Roosevelt, the obvious attempts to block appointments by changing the court size, and the appointment of twenty-five Republicans by Harding to fill new judicial seats in 1922. In the continuing struggle for a proper division of the appointing power between the President and Senate, such situations will probably continue to occur.

Though there have been many attempts by both the Senate and President to reform the system, all major portions of the original system remain intact. Charles Warren attributed this to faith in the courts by the people.

Warren, The Supreme Court, p. 671.
To complete a review of the "advice and consent" phrase, a brief explanation of the system as it now operates may be useful. Nominations by the President have become more sophisticated over the years. Much of the responsibility rests with the Deputy Attorney General, who often takes the initiative in discovering candidates and pointing them out to his superiors. The American Bar Association and White House staff also contribute names on occasion. Once a candidate is under serious consideration, the Federal Bureau of Investigation is asked to make an investigation, seeking any information which might discredit the nominee. Based on information gathered by these sources, the President submits a nomination to the Senate.

By 1868 the Senate Judiciary Committee had become a permanent part of the appointing process; sessions to consider nominations were held in secret, but this practice changed in 1929, though such sessions may still be held on occasion. Nominations received by the Senate are referred to this committee, which may in turn, refer it to a subcommittee. Information about the candidate is gathered from personal testimony and written information; the F.B.I. report is made available, but only to the committee chairman. After the second term of Franklin Roosevelt it became common practice for the candidates themselves to appear before the committee. At the informal
level there is often some discussion between the President and Senate leaders prior to a formal nomination. Samuel Krislov believed that this "...goes a long way toward explaining the dramatic reduction of refusal to confirm in this century."46

Opposition to a particular appointment may enter the procedure in several ways. One of the first steps in processing a nomination is to send a "blue slip" to Senate members from the state involved in the particular nomination; failure to return the slip within one week is an indication of approval. Committee members tend to bear the burden of pressure when there is opposition to a nominee. Within the committee, delaying tactics are used at times; the appointment of Louis Brandeis to the Supreme Court took more than four months. Hearings may also be slanted by arranging witnesses in a particular order, and the tone of questioning may be such that it proves embarrassing to either the candidate or the President.

Once a nomination is reported favorably by the Senate Judiciary Committee, it is rarely defeated on the Senate floor. Senate rules call for an open hearing, with voting prohibited on the day that the report is issued. Nominations may be returned to committee, and

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are handled in this manner as one tactic of those wishing to reject a nominee. The Senate may also fail to take action of any kind on the nomination. In such cases, the nomination expires either at the end of a session or when there is a recess of more than thirty days; if the President wishes further consideration of a nomination, he must resubmit the name at the next session. "Lame duck" Presidents have often watched their nominations expire in this manner. The procedure for nomination and appointment appears fairly simple, but it provides several possibilities for blocking a nomination.

In tracing the history of the "advice and consent" phrase, it becomes obvious that the lack of clarity in the original wording of the Constitution has led to a never ending power struggle. The arguments first offered by the founding fathers are still being used, though in modified form. President Wilson once called the power of the Senate to confirm "...the weakest and the most tried and strained joint of our federal system." Prof. Charles Hyneman defended the role of the Senate; in his opinion, no one is better qualified to pass judgment on appointments than members of the Senate.  

47 Harris, Advice and Consent, p. 9.  
48 Ibid., p. 11.
No matter what the intended roles were, the power of the President to initiate seems to loom most importantly, for "...the Senator in the moment of truth has only defensive weapons." As the system has evolved, the appointive power seems to have divided according to the type of appointment. The President typically has more influence over the higher appointments while the Senate has more control over local and regional ones. Not to be forgotten is the relative strength of the President and Senate in each situation.

CHAPTER III

THE SUPREME COURT: INDIVIDUAL ROLE AND QUALIFICATION

The nature of the cases which come before the Supreme Court make it unique among courts in the American system; this has produced an unusual breed of men to staff the court and has given them a particularly powerful role in the national system. If the rejection of nominees to this court is to be fully understood, then a review of the Supreme Court Justice's role is required. In this analysis, the theoretical role of court members will be examined first. Next, the qualifications required for service will be discussed, as seen through several studies of the various factors which may be entered under the topic of qualifications. Finally, an attempt is made to determine which qualities really affect the thinking of those men who nominate and appoint members of the court.

When Alexander Hamilton wrote part of The Federalist he either did not appreciate the role the court would come to play, or made a deliberate effort to de-emphasize it; he argued that the court would be the weakest branch of the government with no power other than that of making judgments. While this is true in a strict sense, it does not do justice to the power of the Supreme Court. The Supreme Court has become powerful primarily because it has assumed a political role, though some would dispute this even today.
sense, it does not do justice to the power of the Supreme Court. The Supreme Court has become powerful primarily because it has often assumed a political role, though some would dispute this even today. Kenneth Cole points out the fact that the court becomes political when three things exist. "These are, first, the doctrine of judicial review; second a 'liberal' theory of the function; and third, a period of political transition."¹

Much of this political nature of the Supreme Court arises from the kind of cases which come before it. They are not generally the kind of questions which are free of political impact, and therefore a different kind of judge is required. Justice Frankfurter wrote that:

"...the nature of the controversies that they adjudicate inevitably leaves more scope for insight, imagination, and prophetic responsibilities than the type of litigation that comes before other courts."²

The importance of the Supreme Court becomes apparent when it is viewed as a maker of political policy, "...rather than the impersonal vehicle of revealed truth."³


making choices for the court, controversy often hinges on the political philosophy of the candidate, and more basically, the question of whether or not this should be a factor considered by the President or Senate.

Ideally, perhaps the Supreme Court should be able to avoid any political bias among its members or in the decision making process. Realistically, it seems that this is simply not possible in a system which is staffed by humans, and perhaps it is not even desirable.

Benjamin Cardozo pointed out the weakness:

> There is in each of us a stream or tendency... which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals... We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

Not only is the Supreme Court an important body because it makes policy, but also because, in large part, that policy is based on the Constitution rather than statute law; it is this power which gives the court and its members their special independence. Recognizing this, Richard Nixon stated that the Chief Justices have probably had more influence on the direction of the

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nation than have Presidents. This is certainly true if numbers alone are considered. Including Warren Burger, there have been fifteen Chief Justices, while there have been thirty-seven Presidents (including Nixon). Certainly the length of terms for Chief Justices has given them ample opportunity for influence; in the last century the average length of term was in excess of twenty years.

Members of the court often come from "politically rich" backgrounds; this has led to a continuing problem regarding the separation of the Supreme Court from the world of politics. In some instances politically ambitious men have refused appointment to the Supreme Court rather than give up their political life. In the early history of the nation it was not uncommon for members of the Supreme Court to hold two positions; this was in part possible because of the relatively light load and short term of the court. For six months John Jay held both the position of Chief Justice and Secretary of State; he conducted two campaigns for governor and resigned from the Supreme Court when his second campaign was


6Tyler, seeking the presidential nomination, attempted to eliminate his main rival, Van Buren, by placing him on the court, but friends discouraged him, and no formal nomination was made. See Charles Warren,
successful. John McLean, who served on the bench from 1829-1861, attempted to capture the presidential nomination in five of the eight elections during his term of office. Others were active in campaigning for particular men; Chief Justice Chase angered the Republicans by his active role in supporting John Q. Adams in his presidential bid, and by his delivery of political charges to federal grand juries. This criticism was partly responsible for the unsuccessful impeachment of Chase. There were other underlying motives, but it was also evident that the mood of tolerance for heavy political activity by members of the Supreme Court was coming to a close.

Open political activity and judicial service have been much more clearly separated since the Civil War. The separation of the executive and judicial branches has not been as explicit. Several Presidents, starting with Washington, have sought advice from members of the Supreme Court. Washington made the mistake of making a formal request; others since him have relied on more informal methods. It seems quite normal that when a President appoints personal friends or political supporters to the bench, he should continue to seek their...
advice on occasion. Jackson certainly used Chief Justice Taney in this manner, as was also the case with Justice Taft and President Coolidge, Justice Brandeis and President Wilson. The recent rejection of Abe Fortas for the position of Chief Justice was to a large extent influenced by charges of violation of the separation of power concept by Mr. Johnson and Mr. Fortas. Examples of cross influence are not limited to relations between the executive and judicial branches, though these are more common. Chief Justice Hughes wrote to the Senate Judiciary Committee offering advice on how the "court packing" bill sponsored by Franklin Roosevelt could be defeated!

Dualism as it was once practiced is obviously not acceptable today, but the question remains as to how rigid must the line of separation be to preserve the integrity of all concerned? To close the door tightly is to force those on the Supreme Court to cut all ties with the forces which probably brought them to the court. Senator Philip Hart, writing about the rejection of Fortas, felt that the decision was at best an uncertain guide, which could be dangerous and subject to abuse by opposing a nominee.  

Criticism of other justices, such

as Justice Douglas, regarding his writing indicates that there should be an attempt at clarification of this matter. Once the Supreme Court role is defined, the task of discovering what qualifications are necessary for judicial service may be examined. A collective review of members of the court may be the best method of discovering the kinds of qualities which have led to appointment. By 1970 there had been a total of 135 men nominated to the court; of these 109 were confirmed by the Senate, and 98 actually served, including Justice Harry Blackmun (1970). The discrepancy in the figures is explained by several factors. Of the total number nominated, seven men declined, eleven were rejected by the Senate, and several others were withdrawn by the President after opposition appeared, or were not acted on by the Senate. In choosing men for Chief Justice, the President has typically not elevated a member of the court. Only four associate justices have been so honored. These statistics point out the relatively limited opportunity for appointment to the court. 8

8 The four justices who were elevated to the Chief Justice position were John Rutledge, Edward White, Charles E. Hughes, and Harlan Stone. For a complete listing of nominations from 1789-1962, see Thomas Schroth, ed., Congress and the Nation, 1945-64, (Washington, Congressional Quarterly Service, 1965), pp. 1452-1453.
At times appointments seemed to come very slowly, and the Supreme Court appeared to be politically "out of step" with the other branches of government; this was most noticeable in the early years of President Roosevelt's first term. In a study of the turnover rate of Supreme Court appointments, Samuel Krislov estimated that, on the average, there are openings about every eighteen months.\(^9\) Roosevelt's situation indicates how the average may tend to "catch up." In his early years he made no appointments, but before his death he had made nine appointments. Recent retirement plans have tended to promote more retirements; in earlier years openings occurred most often upon the death of a justice.

Seemingly, most students of government and politics have, at least to their own satisfaction, determined the qualities which should be present in a good nominee to the court. One place where a list of qualifications is conspicuous by its absence is in the Constitution itself. The only limitation indirectly applies to the court in prohibiting members of Congress from being appointed to offices which they have created in the  

same session of Congress; this caused Washington to withdraw the name of William Paterson from consideration for appointment to the Supreme Court until the session following passage of the Judiciary Act.

The criteria which Washington set down for his appointments were discussed earlier; he wanted fit men and men of reputation, whose ideology was similar to his own. 10 Erwin Griswold, writing in The Atlantic Monthly, expressed the desire that Supreme Court members be men who had experience both in the law and in dealing with people, men with "...wisdom to see things in terms of their substance and character—courage to see the right and act accordingly..." 11

The desire for strong, independent men is evident in much of the writing on the subject. An underlying fear of a justice who cannot rise above politics is always visible.

The mere fact that to be on the bench is, at least ultimately, to be in politics, brings into play every factor which is ruinous to judicial independence. And since judicial independence is the first requisite of judicial purity, it is the primary consideration to be satisfied in the making of selective criteria. 12

10 For a more complete listing and detailed study of Washington's criteria, see chapter 1.


Others in the field of political science make essentially the same plea, and probably realize the near impossible nature of realizing its fulfillment.

In a survey conducted by U.S. News and World Report a cross section of federal judges were asked to comment on the qualities they felt desirable in members of the Supreme Court. They agreed that broad experience was necessary, and partisan positions must be cast aside. Scholarship, integrity, and sound judgment were emphasized. Prior judicial experience was felt to be valuable but not crucial.

President Eisenhower was one of the few recent Presidents who spelled out the criteria which he felt were important. He felt judicial experience was extremely important and, except for the appointment of Chief Justice Warren, held very closely to this rule. Age was an important factor, and older men were out of favor by Eisenhower's standards. The American Bar Association approval was also considered vital. Anthony Lewis wrote critically of the Eisenhower viewpoint; the criteria are too limiting and do not emphasize the "higher qualities"; the best men should be appointed.

regardless of their background. Most Presidents have not attempted to spell out their appointive philosophy, and Lewis has probably hit upon the answer—to do so is to restrict choice.

Several studies have been made regarding the common qualities of men who have served on the Supreme Court. Included in this listing are family background, age, education, political party, relation to the President, and past professional experience. A review of these studies should help to determine the characteristics which have been important in the past.

The family background of members of the court has been surprisingly similar; it would almost appear that the court has been drawn from a narrow elite. John Schmidhauser, in a study of ninety-one justices who served between 1789 and 1957, found that only nine were of humble origin; the remainder were from the professional and gentry classes. Roughly two-thirds of the justices came from politically active families. In a similar study by Samuel Krislov, the family background

16 Krislov, The Supreme Court in the Political Process.
showed that over one-third of the justices were related in some way to persons in judicial service. Several were sons of judges, while others had married into judicial families. It is difficult to know how important the atmosphere of the home was in setting this pattern, but it certainly seems to be a factor which influenced future judges.

Educationally, the vast majority of justices have had opportunities far above the average person. Many early appointees trained for the law in apprenticeship situations rather than in a formal school of law. One-third of Schmidhauser's sample attended Ivy League schools; the opportunities afforded in such a situation were great. Leadership abilities were developed, and probably equally important, friendships were formed which later opened doors to the political and judicial world.

Age does not seem to have been a crucial factor, though it was evidently important in the rejection of Caleb Cushing, who was seventy-four at the time of his nomination. In general the recent trend has been to appoint older men as compared with those selected in the first years of the nation. In a study of appointments from 1789-1937, Cortez Ewing discovered that

twelve of the first twenty judges were below fifty at the time of their appointment; all were under sixty. Of the twenty justices appointed from 1897-1937, only one was less than fifty; eight were under fifty-five, and seven were over sixty. There are obvious reasons why older nominees may have become more acceptable; the lifespan has increased markedly, and there have been several examples on the court of successful judges being appointed late in life. Oliver W. Holmes is one of the more striking examples; he was appointed at the age of sixty-one and contributed significantly to the Supreme Court in his thirty years of service.

Membership in the same political party as the President has been an important factor, though there have been exceptions. By 1960, there had been thirteen Federalists, one Whig, forty-four Democrats, thirty-five Republicans, and one independent appointed to the Supreme Court. Only eight Presidents made appointments of men not of their own party; President Taft was probably the man who most consciously tried to avoid partisanship in his appointments; he appointed three

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Democrats and three Republicans. Some authorities believe Taft's motives were not completely altruistic, but were part of a plan to open the door to a court nomination for himself by a Democratic administration. Probably the important thing to be remembered is that:

All six of Taft's appointees in large measure shared his "real politics," though only half of them shared his "nominal politics" in the sense of party affiliation. In general, it is evident that in excess of 90 per cent of presidential nominations have come from a President's own party and there is little reason to expect this pattern to change significantly.

Geography was an important consideration in the early days of the nation; Washington indicated that an equal distribution among the states would be one of his criteria, and he was quite successful in distributing appointments on this basis. Because members of the early Supreme Court were responsible for supervision of the circuit court system, appointees normally came from the circuit which was unrepresented at the time. When Supreme Court justices were relieved of this responsibility, less emphasis was placed on area representation.

19 Other Presidents who made one appointment from the opposition include Tyler, Lincoln, Harrison, Harding, Franklin Roosevelt (also one independent), Truman, and Eisenhower.

20 Murphy and Pritchett, Courts, Judges and Politics, p. 93.
but it has retained some importance even today; a balanced court is often thought to include geographical balance. President Hoover hesitated to nominate Justice Cardozo because he would be the third representative from the New York area. Felix Frankfurter argued that geographic consideration is no longer important; men for a modern Supreme Court should not be those "...who have professionally a merely parochial significance."\(^{21}\)

Politically, such idealism may not always be the best course of action, and this factor is recognized by those charged with making court appointments.

Many of the qualifications for Supreme Court membership are subtle and exist only in the minds of the President and the Senate members. Religion and ethnic background have never been openly considered, but, to some degree, have become an unwritten part of the process through evolution. In the eyes of many people, there are Supreme Court seats reserved for a Catholic and Jewish court member. The latter came to exist after 1916, and the appointment of Justice Brandeis; in 1969 part of the problem in filling the vacancy left by Abe Fortas revolved around the question of whether or not the nominee should be Jewish. These seats are not always filled on a religious basis, but there is

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constant pressure to retain the tradition. It is possible that similar traditions may be established with reference to ethnic groups; this may already be the case with the Negro.

Of all the qualities sought in members of the Supreme Court, professional background or experience is probably viewed as most important. As might be expected, the practice of law has been common in the background of all justices; Schmidhauser found that 96 percent of the court members had practiced law at some point in their careers. Those whose major profession was not the practice of law were involved in law schools as deans or professors. 22 Samuel Krislov wrote that much of the modern Supreme Court's business does not require such legal skill, but he admitted that it is unlikely that any President would seriously consider someone without a law background. More important, he pointed out that this common background influences court decisions in the sense that it determines the form of court discussion. 23

Experience in politics is probably the next most common characteristic of justices. Schmidhauser argued that all but one of the men in his study had participated

23 Krislov, The Supreme Court in the Political Process.
in practical politics in some form; other writers have found Schmidhauser's definition of politics to be too flexible, but they still recognize that politics has proved to be an important stepping stone to judicial appointment. Congressional service, and especially experience in the Senate, has been useful to those desiring court appointments; for example, nominees who are members of the Senate are usually approved quickly and with little debate. The founding fathers feared that appointment opportunities would cause members of Congress to resign, and thus weaken the legislature; their fears were not totally unfounded. Jefferson appointed twenty members of Congress to positions in the government and Madison appointed twenty-nine. The increased prestige of Congress in later years curtailed this practice, but it still occurs.

Cortez Ewing did extensive research in an attempt to determine whether or not there has been a change of emphasis on kinds of experience common to justices. While there are few clear patterns from the nation's early history, some trends do emerge. Cortez divided history into four periods, covering the years from

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24 Ewing, Supreme Court Judges.

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Krislov, The Supreme Court in the Political Process.
1789-1937, and explored the background of justices in each of the periods. From 1789-1937, there has never been less than 57 percent of the justices who had prior judicial experience. Such experience was most prominent in the first period (1789-1829), and has generally diminished slightly in modern times.

The most obvious pattern to emerge from Ewing's study is the trend toward greater emphasis on experience at the national level of government rather than state experience. This finding is supported by the work of Krislov. According to Krislov, increased emphasis on experience at the national level may reflect the increase in stature of the federal government as contrasted to the state and local government. At the national level, the Cabinet, and particularly the post of Attorney General, has become an important stepping stone to Supreme Court appointment. By 1964 a total of fifteen nominees had come from the office of Attorney General. Service in lower federal courts has not generally led to a Supreme Court nomination, and in cases where this has happened, it has usually been a Republican President who

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25 Ewing breaks the time periods as follows: 1789-1829; 1829-1861; 1861-1897; 1897-1937.

26 Krislov, The Supreme Court in the Political Process.
made the nomination. These studies seem to point out the importance of political experience in receiving an appointment to the Supreme Court.

Related to the experience issue is the general question of the effect experience has on performance. This divides into two areas of concern: how necessary is prior judicial experience, and does the nature of that prior experience affect the decision making process? Some administrations have taken strong stands favoring prior judicial experience, while others have given it only minor consideration. Members of Congress and the Supreme Court also divide on this issue. In recent years there have been several attempts by Congress to pass legislation which would require prior judicial experience of five to ten years for members of the Supreme Court, but all such efforts have failed. Both Justice Cardozo and Justice Frankfurter strongly opposed any plan to place such restrictions on court membership. Frankfurter argued that the business of the Supreme Court is so unique a combination of law and politics that previous experience on either state or lower federal courts is not of particular advantage. Other than offering proof that one has served on a court, "... judicial service tells nothing that is relevant about the qualification for the functions exercised by the
Cardozo made essentially the same argument.

Certainly the history of the Supreme Court would support such a position. Frankfurter pointed out that in 1957, twenty-eight of the non-contemporary justices out of a total of seventy-five had not had previous judicial experience. Others also question the need for prior experience and point to the excellent record made by men such as John Marshall, Joseph Story, Roger Taney and Louis Brandeis as proof that prior experience in the judicial realm is not necessarily important for service on the Supreme Court.

Another aspect of the experience issue is the question of how prior experience affects judgment. Political scientists who support the requirement of prior judicial experience argue that men with this background will exercise more restraint in their decision making process. Schmidhauser believed that there is little evidence to support such a position; on the contrary, he argued that those men with prior judicial service may be more political, and received their initial appointment partly because of this background; thus the circle becomes whole.28

28 Schmidhauser, "A Collective Portrait,"
A study by Stuart Nagel attempted to show a relationship between judicial decision making and political party affiliation. Basing his study on all 1955 cases heard before state and federal supreme courts, he examined individual judicial decisions made on fifteen categories of cases which came before the courts, (i.e., criminal, administrative agency versus business regulation, and tax cases). First determining what the liberal and conservative position would be in each type of case, he attempted to score judges on how many liberal and conservative decisions they made in each category; he further assumed that the liberal position would tend to be the Democratic one and the conservative one would match the general Republican position. Judges were then scored on how well their decisions matched their party affiliation. In the fifteen types of cases, the Democratic Judges were above the average decision score of their respective courts (in what might be considered the liberal direction) to a greater extent than the Republican Judges. 29

Nagel admitted that voting pattern which appeared to reflect the individual judge's party affiliation did not prove that the voting was a "party line" process; that past performance is not a valid means of prediction.

the same internal factors which caused the judges to select a given political party may have also influenced their decision making process. Nevertheless, the study does imply that party affiliation is not a factor to be totally ignored.

Arguing that party affiliation is not a factor, Charles Warren showed that in the eighteen years from 1892-1920, only one constitutional case which came before the Supreme Court was decided strictly along party lines; he argued that individual attitudes are much more crucial. This is no doubt true, but the lack of unanimity among justices of a particular party on specific decisions does not rule out the possibility that party membership may affect the decision making process.

Many of the battles over court appointments have been focused on the ideology of the individual in question. Decisions about the nomination of Clement Haynsworth (1969), and George Carswell (1970) clearly involved this issue. It may be of some value to look at some of the earlier appointments to determine how well one can predict future behavior on the Supreme Court. There are some rather striking examples which seem to indicate that past performance is not a valid means of prediction.

Benjamin Cardozo's father was a Tammany Hall judge, but Justice Cardozo "...became one of the saintliest figures in Anglo-American law."\(^\text{31}\) Many Presidents have lived to be disappointed by their nominees. The "Legal Tender Acts" were held unconstitutional by Supreme Court members who were appointed by Lincoln, including Chief Justice Chase, who was Secretary of the Treasury when the "Legal Tender Acts" were passed, and had supported them at the time.

Knowledge of a nominee's previous actions does not necessarily enable the President or Senate to predict behavior once the nominee becomes a member of the Supreme Court. There may be several explanations for this; certainly the life tenure of the position removes the justice from any need to be concerned with outside pressures. In addition, once on the Supreme Court, a new member is exposed to the "...interaction of intelligent and frequently forceful personalities"\(^\text{32}\).

Jefferson was constantly frustrated by nominees who seemed to come "under the spell" of John Marshall; court membership means being subjected to the influence of other justices and the office itself. Even though a nominee's past record will not necessarily predict his


pattern of decision making on the court, it has remained
an important part of the criteria which is considered by
the President and Senate.

A question which continues to plague politicians
and the public is that of the appointment of men to office
for political reasons. Political motivation has often
influenced the selection of court members; at times the
charge of appointing a political friend is roundly criti-
cized, to the extent that it would appear this was an
outright violation of political ethics, if not the law.
Yet there is no denying the importance of political
ideology in the selection of court members.

The choice of men ideologically committed or
thought to be committed to the values of the President
making the selection has been the policy most rigidly
adhered to throughout American history.33

Senator Robert Griffin, writing about the Fortas rejection,
indicated that there has never been any hesitation by the
Senate to take a nominee's political views, his writing,
and attitudes on particular issues into account.34

Krislov pointed out that one of the more valid means of
knowing the political philosophy of a President is to
review his appointments to the Supreme Court.35

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33 Ibid., p. 37.
35 Krislov, The Supreme Court in the Political Process, p. 7.
If this is true, then one must determine whether it is wrong or not. There seems to be no doubt that in the world of reality members of the Supreme Court do make political decisions as a part of their work; it is also evident that, try as they may, members of the court are unable completely to divorce themselves from beliefs and traditions which have shaped their thought and personalities. This being so, it would seem rather foolish for those involved in the appointing process to ignore this factor in selecting justices.

Qualities which are important to one President or during one period of history may not remain so; geography was once an important consideration; it plays only a minor role today. Professional background has changed from a focus on state office and judicial experience to federal office experience and particularly Cabinet posts. The success of men in the latter category may in part be due to their exposure to Congress and the President; close association with the President has often led to court appointment.

Senatorial courtesy must not be totally dismissed from the picture; a good record in the home state and rapport with members of Congress may smooth the way to a court appointment.

Though there are no written qualifications for membership on the court, there are certain unwritten ones
which are considered by the President and Senate in selecting court members. Those are flexible and the emphasis may shift, depending on the philosophy of the President and the Senate. The importance of high standards cannot be over-emphasized.

It is a truism that the quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer.36

Justice is in the hands of mortal men; those men should be the best available.

CHAPTER IV

SUPREME COURT NOMINEE REJECTIONS—WHO AND WHY

The procedures which are involved in selecting members of the Supreme Court have been examined, and the qualifications considered by those making selections have been reviewed. It is the purpose of this chapter to place these concepts into a practical setting through examination of Supreme Court history. More specifically, the examination will consist of a study of those men who were nominated to the Supreme Court and were not confirmed by the Senate. Individual cases of rejection will be studied with the hope of discovering what led to the rejection and whether or not the nominee was actually qualified, based on criteria found in Chapter III. The working relationship of the Senate and President on appointments should also emerge; in each instance there is basically a conflict situation between the Senate and the President. Thus the negative features of the relationship will be most obvious. There have actually been few rejections during the course of American history, but even so, certain patterns of conflict and rejection may be observable. Lastly, the question of whether the present system, based on the presidential nomination and
consent of the Senate, has functioned satisfactorily
will be examined.

As discussed earlier, the Supreme Court history
to date shows that a total of 135 men have been nominated
as justices; 26 of these have been denied confirmation
by the Senate. Rejections thus represent only 20 per
cent of the total number of men nominated by Presidents,
an indication that the Senate's use of consent power
has not been overbearing.

The Senate has hesitated to openly reject nominees;
of the twenty-six men not confirmed, only eleven suffered
clear rejection by a vote of the Senate; some Presidents
have had more than one rejection, so that only eight
Presidents have suffered rejections. In other instances,
the Senate has avoided the question by taking no action
until the session ended; in such situations the President
is forced to renominate the candidate if he wishes to
have the nomination receive further consideration.
Senate motions to postpone action have had the same
effect. At other times, the President, either at the
request of the candidate or of his own initiative, has
withdrawn the nominee's name. It is evident that these
evasive actions by the Senate and President should,

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1 Edwin M. Stanton, of Pennsylvania, appointed by
Grant, died four days after he was confirmed by the
Senate.
in general, be considered rejections even though there was no formal action.

A total of seven men have declined the post after having been appointed; the most recent instance occurred in 1882 when Roscoe Conkling was appointed by President Arthur; prior to that there were six other declinations, but all in the early history of the nation. Some nominees declined because of poor communication, for example Washington did not always consult nominees prior to submitting their names. In other instances, the President hoped that once confirmed the candidate would change his mind and accept the position. The low level of prestige of the early Supreme Court made the position unattractive to many men, and especially those with political ambitions such as John Q. Adams.

If there is a pattern of rejections, it seems to be that most of them occurred in a relatively brief time period, and under a limited number of Presidents. From 1828 to 1894, a span of sixty-six years, there were twenty-two instances when the candidate who was nominated did not take the office. 3 Tyler failed to obtain Senate

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2 Others who declined court appointments and the Presidents who appointed them include Robert Harrison, Washington; William Cushing, (Chief Justice) Washington; John Jay (Chief Justice) Adams; Levi Lincoln, Madison; John Q. Adams, Madison; William Smith, Jackson.

3 This includes two who declined and Stanton who died before taking office.
confirmation for four Supreme Court nominees, while Grant and Fillmore met the same fate with three failures each. In more recent years, rejections by the Senate have been rare. From 1894 to 1930, there were no rejections, though the nomination of Justice Brandeis received confirmation only after five months of bitter fighting. From 1930 to 1968, when Abe Fortas' name was withdrawn, there were no Supreme Court rejections. Such long periods of calm may have caused some political observers to lose perspective. Rona Mendelsohn, writing in 1968, stated that the likelihood of open confrontation between the Senate and the President was at a minimum.

...so long as our Presidents continue to select nominees wisely and well, the chances of a serious confirmation dispute seem negligible at best.

The 1968-1970 battles over confirmation of Fortas, Haynsworth, and Carswell seem to indicate that the Senate has not given up its role of "devil's advocate," despite a long dormant period.

In considering the men who were not confirmed by the Senate, it would simplify the situation to study only those who were openly rejected by the Senate, because in some cases of postponement or withdrawal, there

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was in truth no negative reflection on the President or the nominee. However, in most instances, such action (or inaction) has been indicative of strong Senate opposition and their inclusion gives a more truthful historical picture.

The first nomination which failed to receive confirmation clearly shows the problem. William Paterson, a member of the Senate, was nominated to serve on the first Supreme Court by Washington. When Washington realized that such an appointment would be in violation of the Constitution, which prohibits members of Congress from being appointed to offices of their own creation, he quickly withdrew the nomination; he renominated Paterson on March 4, 1793, and he was confirmed the same day. The quick response of the Senate on the second nomination attempt indicates that the Paterson appointment was unopposed in the chamber.

The rejection of John Rutledge (1795) was in some ways unique and in other ways typical of the ideological battles which developed with later rejections. Professionally, Rutledge was extremely well qualified. Kenneth Umbriet argued that:

...to top his [Rutledge's] other formal qualifications there have been few Chief Justices whose previous judicial experience equaled his.5

A brief summary of his other qualifications is sufficient to show that Umbriet was correct. Rutledge's professional political career probably dated back farther than most of the members of Washington's administration. He was a member of the Stamp Act Congress, and of both Continental Congresses. He was a member of a well-known South Carolina family, had studied and practiced law in England, and then returned to South Carolina where he became the leader of the state; he was first president and later governor of the state. One of his flaws may have been ties so close to his own state; this may have limited his national vision. He was an Associate Justice of the first Supreme Court but resigned in 1791 to accept the position of Chief Justice in his own state.

There had been some reluctance by Rutledge to accept the first nomination to the Supreme Court; it was probably only because of a personal letter from Washington that he accepted. Rutledge and his friends had thought he should have the Chief Justice position rather than only an associate position.

When John Jay was elected governor of New York, the Chief Justice position opened, and Washington began searching for a candidate. On June 12, 1795, Rutledge

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6 Washington wrote only two personal letters to men he asked to sit on the first court; this is a further indication of the prestige of Rutledge.

wrote Washington a very interesting letter, indicating that he was "available" for the position. Washington responded on July 1, appointing him to be Chief Justice during the recess period. In overlooking the sitting justices, Washington established a precedent, and it has been rare for any justice on the court to be elevated to Chief Justice.

The Jay Treaty with England was signed on June 24, 1795. It had been bitterly contested, and Federalists were particularly defensive about it. In many areas of the country there were attacks on it by the newspapers and in public debate. Supporters of the treaty regarded it as "...the touchstone of true Federalism." South Carolina had been harshly dealt with by the British during the Revolution, and the treaty was unpopular in the state. At a public meeting to protest the treaty, Rutledge was a featured speaker; his words were extremely critical of the treaty, and even of the President, should he sign it.

Before Rutledge reached Philadelphia to begin serving his recess appointment as Chief Justice, newspapers were attacking him for making the speech. When Congress met in December, 1795, the question of Rutledge's confirmation had gained wide attention. Further speculation centered around charges that Rutledge suffered from

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spells of insanity. In 1792 his wife died and shortly afterward his mother. "Subsequent events undoubtedly show that his mind was losing its balance." However, there is evidence to show that he had recovered by the time of the appointment and at first "...the appointment was generally received throughout the nation with satisfaction." Some of Rutledge's friends tried to defend his speech in Charleston by arguing that he was not truly responsible for what he said, but such arguments only served to strengthen the opposition. When the matter came to a vote in late December, he was rejected by the Senate on a vote of ten to fourteen.

News of his rejection caused Rutledge to attempt to commit suicide. He lived until 1800, but suffered lapses in his mental condition several times. It was the most important appointment rejection suffered by Washington and indicates that even strong Presidents are not immune from such actions.

Richard Barry, Rutledge's biographer, argued that he was not insane; he claimed that "...the rumor was based on political jealousy and the speech against the treaty." The question of Rutledge's sanity is still

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8 Umbreit, Chief Justices, p. 75.
9 Ibid.
debated but evidence seems to indicate that the Senate acted wisely; however, the Senate may well have been reacting as much to Rutledge's position on the treaty as to the charges of insanity.

Several precedents were established in the Rutledge nomination. It was, first of all, a recess appointment; the Senate's rejection showed that such appointments were not assured of approval. It was also an indication that the Senate would question presidential appointments, and use its power of rejection. Possibly the most important precedent was the following one.

The Senate thus established a precedent of inquiring into the political views and ideas of persons nominated for public office and of rejecting a nominee whose views do not correspond with the majority of the Senate.11

The ideological questions raised in the Rutledge nomination have proved to be stumbling blocks for several other nominees.

Madison was the next President to suffer a Supreme Court rejection. Filling the vacancy created by William Cushing was difficult from the start; Madison was successful in doing so only after two men had declined and one had been rejected by the Senate.12


12 Lincoln Levi and John Q. Adams declined.
The difficulty is also shown by the delay in time between the occurrence of the vacancy and Madison's first attempt to fill it. Justice Cushing died on September 10, 1810, but Madison did not attempt to fill the opening until January, 1811, and was not successful until November 18, 1811, when Justice Story was confirmed.

One of the difficulties was in a sense positive; interest in the Supreme Court was rising. Charles Warren wrote that "...the Federal Judiciary had become a live issue in connection with problems of the day." There were disputes regarding claims to Western lands, the status of the United States Bank, and other issues with wide ranging effects; many of these issues were likely to be settled in the Supreme Court.

When Levi Lincoln declined to accept an appointment to the Supreme Court, Madison offered the position to Alexander Wolcott on February 4, 1881. There had been strong support in his home state, Connecticut, for Gideon Granger, who had been Postmaster General under Jefferson. Wolcott, sometimes known as the manager of Connecticut, was well known and served as a U. S. Collector of Customs. It was his enthusiastic performance of this work which in part defeated him. His enforcement was strict and affected many men of business and influence. His nomination brought heavy criticism by the press.

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13 Warren, The Supreme Court, p. 400.
The Connecticut Courant, on February 20, 1811, expressed this editorial opinion:

We hope that even in the ranks of democrats, a man might have been found, whose appointment would have been less disgusting to the moral sense of the community... 14

Others spoke of his lack of experience, and even Levi Lincoln could only say that with study Wolcott could become the equal of his associates. Members of the opposition party were strongly opposed to the nomination while friends of the President were unenthusiastic in their support of Wolcott; the nomination was rejected by a one-sided vote on February 4, 1811.

Failure of the Wolcott nomination probably resulted from several factors. It may have been a case of the wrong time to appoint a weak candidate; it was a critical period for the Supreme Court and attention was focused on the nomination; at another time the nomination might have been approved, for many candidates who were no stronger have been approved. Undoubtedly, part of the blame lay in Madison's relations with the Senate; in an earlier test of strength, informal pressure from the Senate had caused Madison to stop short of appointing Albert Gallatin to be his Secretary of State, and the nomination of John Adams as minister to St. Petersburg had been rejected on the first attempt. For the legal

14 Ibid., 411.
history of the nation, Wolcott's rejection may have been a blessing; later he took the position that any member of the Supreme Court who determined that the court should have the power to declare a law unconstitutional should be expelled!

The appointment of John Crittendon (1828) by John Q. Adams had the appearance of perfection. It would be difficult to conceive of a man more highly qualified. From Kentucky, his family was well established, and related to Thomas Jefferson. He practiced law in that state and served most of his life in some form of public service, both in the state legislature and in the United States Senate; he was twice appointed Attorney General, under Harrison and Fillmore. He was a Whig and held rather strong opinions, but it is doubtful that his ideology caused his defeat.

Adams first offered the office to Clay, his Secretary of State, who refused it and suggested Crittendon's name; on December 17, 1828, Adams made the nomination to the Senate; which was controlled by the Democrats. Timing and the fact that the opposition controlled the Senate were probably the crucial factors in the defeat; the Senate took no action for two months and then on February 12, 1829, postponed action. Charges of partisanship were carried in the press; the Democrats saw another attempt at appointing a "midnight judge," while the
Whigs felt it was a clear move by the Democrats to block any appointment until Jackson was inaugurated. The latter was certainly the case, though no one would deny that Adams would also have liked to maintain Whig control of the Supreme Court. Henry Scott pointed out that:

His [Crittendon's] ability as a lawyer did not enter into the problem as a factor; that he was able and competent was never questioned. 15

Earlier nominations had been disputed because of the candidate's ideology; Crittendon's defeat seemed to be almost totally based on partisanship issues.

The Jackson administration was not noted for a lack of controversy, and the nomination of Roger B. Taney to the Supreme Court was no exception. Taney, born of an aristocratic family in Maryland, was well qualified. His father was a member of the state legislature, in which Taney later served. Taney became the leading member of the Maryland bar, and through the attention that this position brought him, was made Attorney General by Jackson. His previous work with private banks had convinced him of the evils of the United States Bank; from his vantage point, he worked with Jackson to curtail the bank's activities. When Jackson's Secretary of the Treasury refused to withdraw monies from the United States Bank, Jackson looked for a man who would accept

this responsibility; he appointed Taney to the treasury position as a recess appointment, and Taney promptly withdrew the money. When confirmation of the appointment came before the Senate (June 24, 1884) it was rejected; this marked the first rejection of a Cabinet nominee.

In January, 1835, Jackson appointed Taney to replace Justice Duval, who had retired when he was told that Taney would be appointed. Taney had made many enemies as Treasurer, and Jackson hoped to offer him safety; unfortunately his appointment involved confronting a hostile Senate. Though Taney was not a strong Democrat, despite his actions toward the bank, he was feared by the Whigs; in addition, the opposition could count on the support of such strong Senate members as Clay, Calhoun, Webster, and Crittendon. One of the early moves by the Senate was an attempt to legislate the position away. Geography was still a critical factor, and appointments came from the circuit where the vacancy existed; as part of a circuit reorganization plan, the Maryland circuit was to be combined with another, thus eliminating the Maryland vacancy. "Webster favored this type of strategy..." 16 However the attempt failed when the bill was defeated in the House.

Action on the nomination was postponed until the last day of the session. Jackson felt that at least he had not faced an outright rejection and gained some consolation from this thought. However, the Senate "stopped the clock" and acted on the nomination after midnight, voting for an indefinite postponement. When word was brought to Jackson, he supposedly reacted strongly and refused to hear any messages from the Senate, since it was after midnight.

The real climax of the Taney struggle came when Jackson was successful in having him appointed Chief Justice when John Marshall died. Jackson may have lost the battle, but he won the war. Appointments often caused battles in the Jackson administration; in his first term, ten nominations were rejected, but eventually all but four were accepted.

No other President ever had as many contests with the Senate over appointments as Andrew Jackson, a former member of the Senate, and no other President ever came off so well.\(^\text{17}\)

Jackson's own ability to create a strong image in the office of President was in part responsible for this success.

During the years between the beginning of the Tyler administration (1841) and the ending of the Grant years (1877), fourteen candidates for Supreme Court

\(^{17}\) Harris, Advice and Consent, p. 53.
appointment failed to receive confirmation by the Senate. Joseph Harris called these years the period when the Senate tried to control appointment: "...the spoils system was at its height."\(^{18}\) It is difficult to avoid concluding that those men who were rejected in this era were in part victims of the times, and especially the five men who failed to be confirmed by the Senate while Tyler was President.\(^{19}\)

Several elements worked to defeat the candidates whom Tyler nominated. He was the first man to assume the presidency from the office of Vice-President, and thus appeared on the scene without a true mandate from the people. Secondly, he had vacillated so much in his party affiliation that neither party accepted him; he had changed from the Whig to Democratic party shortly after entering office, and earned the hatred of the Whigs without gaining favor with the Democrats. His own political ambition was to obtain the 1844 nomination for President on the Democratic ticket, and members of both parties were interested in blocking this effort. As a result, both parties sought to embarrass him and did so partly by contesting his nominations.

\(^{18}\) Ibid., p. 65.

\(^{19}\) Tyler was successful in appointing only one court member, Samuel Nelson, a man so highly regarded, that the Senate could hardly afford to reject him.
The record of Tyler's rejections is in some ways the worst of any President; during the last two years of his term, he suffered the rejection of four Cabinet members. (He was the second man to have a Cabinet nomination rejected.) In that same period, four nominees were rejected for Supreme Court positions, and nominees for the posts of minister to France and Brazil were rejected. In addition, one other Supreme Court nomination failed when the Senate took no action during the session. In the years from January 1844, to February 1845, Tyler lost five of six Supreme Court nomination battles.

John Spencer, nominated January 9, 1844, was the first Supreme Court nominee of Tyler's to suffer rejection, and in some ways was typical of what was to come in regard to the others. He was a Whig, but not a supporter of Clay and had opposed him as a presidential candidate. His qualifications were perhaps the best of any of Tyler's rejected nominees. He was the son of a judge and had entered the law practice early; he had been assistant attorney general in his state, and was later a member of Congress and the state legislature and Senate. An editorial at the time indicated that "...all acknowledge his legal ability to fill with honor the office." 20

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His break with Clay endeared him to Tyler, who appointed him Secretary of War, and later, Secretary of Treasury; however, his acceptance of these appointments alienated Whigs in Congress, who accused him of being a turncoat who accepted rewards from the Tyler administration. In addition, he was noted for his great ability, but also for a curt manner and bad temper: "...he was never an attractive man, because his ambition was kiln dried."  

He was rejected by the Senate on January 31, 1844, by a vote of twenty-one to twenty-six; this gave him the distinction of being the only Tyler rejection, since the others were withdrawn or postponed. He was a strong candidate, but was disliked because he supported Tyler, though his own personality probably did not help.

Tyler was attempting to regain favor within the Democratic party, and next offered the position to two lawyers from Philadelphia, but both refused; he then turned to Silas Wright, the Democratic leader in the Senate, but he also declined. At this point he finally offered the position to Reuben H. Walworth of New York who accepted the nomination.

Walworth came from a prominent Connecticut family; his great-grandfather had immigrated from

England with Fitzjohn Winthrop and settled in the state; his father was an officer in the Revolutionary War.

Walworth served in the War of 1812 as an adjutant general; he was a member of Congress, and in 1828 became Chancellor of New York, a post he held for twenty years.

The general attitude toward Tyler's administration had not improved. Justice Story, writing a friend, expressed his fear of Tyler's appointments.

What can we hope for from such a head of an Administration as we have now but a total disregard of all elevated principles and objects?\textsuperscript{22}

Some of the same attitudes which had defeated Spencer worked against Walworth; as a supporter of Tyler, he was automatically opposed by Clay and his Whig faction. In addition, there was a lack of rapport between Walworth and the Senators from New York; thus "senatorial courtesy" became a factor. Some argued that the post of chancellor was abolished in New York as a gesture of the attitude toward Walworth in that state. The Clay forces were already looking ahead to the possibility that he would receive the presidential nomination that year (1844), and there was talk of leaving the Supreme Court post vacant until he took office, so that John Crittendon, who had earlier been rejected under similar circumstances,

\textsuperscript{22}Warren, The Supreme Court, p. 116, citing letter dated April 25, 1844, Massachusetts Historical Society Proceedings, 2d Series, XIV.
might be appointed to the court. It was thus a combination of several issues which caused the Senate to refuse to take action; the nomination was finally postponed, and then withdrawn in June, 1844, by Tyler, when he realized there was no chance for confirmation.

While the Walworth decision was still pending, another vacancy occurred on the Supreme Court when Justice Baldwin died. Tyler first offered the post to James Buchanan, who declined; Tyler then nominated Edward King of Pennsylvania on June 5, 1844. King was a well-established lawyer in Philadelphia, but the mood of the Senate was not favorable to any appointment, regardless of qualification. In the eyes of most Senate members, Tyler was now a "lame duck," and King, as with the earlier nominees, suffered from the reaction to Tyler rather than from criticism of his ability. Editorials openly advocated leaving the posts on the Supreme Court open until the next President should take office. Only ten days after the King nomination, the Senate voted for postponement. Tyler resubmitted his name during the next session of Congress, but there was still no response from the Senate; King's name was finally withdrawn in February, 1845.

In a last bid to make Supreme Court appointments, Tyler submitted two nominees in February, 1845, Samuel Nelson and John Read. Nelson was extremely popular and became the only successful appointment by Tyler. Read
was qualified in terms of background; he was the grandson of George Read, who had signed the Declaration of Independence as a representative from Delaware. He had served in the legislature and was the attorney general of Pennsylvania.

The hostility of the Senate toward Tyler is clearly shown by its failure to act on this appointment. Polk had been elected President and would take office shortly; it was obvious that the vacancy would be filled by a Democratic President eventually, but the Senate allowed Read's nomination to die at the session's end.

There was some question as to whether Read was an outstanding candidate, but there seems to be little doubt that he would have been confirmed if nominated by another President. It was probably a mixed blessing to receive a nomination from Tyler; this may partially explain why so many candidates refused to have their names placed in nomination by him.

Soon after entering office, President Polk was faced with the task of filling two seats on the Supreme Court; Justice Story had died and the second seat was the one Tyler had been unable to fill. James Buchanan, a Cabinet member, was first offered a position but preferred to remain in the Cabinet. On December 23, 1845, the nomination of George Woodward was submitted to the Senate. Woodward came from a strong court background.
He was the president judge of the fourth district in Pennsylvania for ten years and served sixteen years of his career on the state supreme court. He also served two terms in Congress; "...no man can fail to perceive the lofty, legal and moral tone of his mind."\(^{23}\)

Opposition to his appointment came from several sources. He was somewhat radical in his thinking; he believed in election of justices of the peace, and limited terms of office for judges. More crucial, he held some of the beliefs which later became the foundation of the Know-Nothing party, and many people who were not native Americans, especially the Irish, opposed his appointment. The courtesy of the Senate was another element of discord; Senator Cameron of Pennsylvania opposed Woodward's candidacy. The general Whig attitude was very negative; with the retirement of Justice Story, they felt the Supreme Court was in poor hands, since it was controlled by the Democrats. Finally, the attempt of the Senate to control the appointing process was in full flower. Joseph Harris argued that one reason for the rejection was simply to show Polk "who was boss."\(^{24}\)

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Polk's record of appointment success indicates that minor rejections were a common occurrence. When the vote was taken, Woodward was rejected by a vote of twenty to twenty-nine. A further indication that the Senate was not willing to accept the President's judgment was the voting pattern. Senator Cameron was joined by five other Democrats in voting against the appointment.

Appointments made by Fillmore suffered a fate similar to those of Tyler, in part for the same reasons. Fillmore came to power without full support of the people; he moved from the office of Vice-President to President upon the death of Zachary Taylor and lacked the necessary prestige at a time when the strongest of men would have had difficulty in controlling Congress. With partisan feelings running high, he was faced with a Senate majority from the opposition party, whose members were unlikely to look favorably upon any Whig appointments. Of four possibilities to appoint Supreme Court members, he made only one successfully, and this required two attempts. The failures also came late in his term, giving them a "lame duck" appearance.

Before the 1852 Supreme Court term opened, Justice McKinley died, and Fillmore attempted to find a replacement. On August 16, 1852, he nominated Edward

25 Benjamin Curtis, nominated September 22, 1851, and again on December 11, 1851; appointed December 29, 1851.
Bradford to the post. Bradford was a leading member of the Louisiana bar; he was not well known nationally, but in some cases this seemed to be an asset. The Democratic attitude was to refuse any Whig appointment if at all possible, and since the session's end was near, the Senate refused to take any action, allowing the nomination to die. Fillmore did not renominate Bradford.

With the term coming to a close, Fillmore made two other attempts to fill the vacancy; in January, 1853, he nominated George E. Badger of North Carolina to the Supreme Court. Badger was the son of a lawyer, and had been a member of his state legislature and state supreme court. Under Harrison he accepted appointment to the Secretary of Navy post, and in 1846, he had been elected to the Senate. Fillmore undoubtedly expected an easy confirmation, since it was fairly common for the Senate to approve its own members without question, usually on the same day that the nomination was received. This could have happened in this instance, but Badger was not just a nominal Whig, but one of strong partisan sentiments.

The slavery question had placed Badger in a rather awkward position; he was a slaveholder but also supported the legality of the Wilmot Proviso. This stance caused him to be feared and mistrusted both in the South and by the anti-slavery interests in the North. According to Cortez Ewing, "The radical abolitionists of
the North looked upon Badger as a tool of the slavery interests." 26 Finally, he was not from the circuit which lacked representation on the Supreme Court. One month after Fillmore submitted the name, the Senate voted to postpone consideration and the nomination was not reopened.

Fillmore made one more desperate attempt in late February of the same year. He offered a Supreme Court appointment to Judah Benjamin, a lawyer from the vacant circuit, but he declined. At that time, the position was offered to William C. Micou, Benjamin's law firm partner. Micou, from Louisiana, was qualified in terms of legal experience but was not widely known. With the session nearing its end, the Democratic Senate had no intention of yielding, preferring to wait and allow Pierce to make the appointment. The Senate adjourned without acting on the nomination. A strong President, elected in his own right, might have been successful in appointing men to the Supreme Court in the face of a hostile Senate, but Fillmore was not that man.

President Buchanan suffered one defeat in attempting to make Supreme Court appointments; the timing, both in the session and in the nation's history, was poor and probably was an important factor in the rejection.

26 Cortez M. Ewing, The Judges of the Supreme Court, 1798-1937, (Minneapolis: The University of Minnesota Press, 1938), p. 34.
Buchanan nominated Jeremiah Black to the Supreme Court in February, 1861; the appointment was attempted while he was a "lame duck" President and immediately prior to the Civil War.

Black was serving as Secretary of State and had also been Attorney General under Buchanan. His earlier experience included service on the state supreme court of Pennsylvania, and a promising law practice where he had become "...master of the general principles of his chosen profession." 27

The Supreme Court was evenly divided with four members from the North and four from the South; thus all of the surrounding events gave the nomination added importance. By the time the nomination came before the Senate, many of the Southern members had left; it was an opportunity for the Whigs to return the favor of refusing to act on a nomination from the opposition party, preferring to wait for a change of Presidents. 28 In this case the Whigs would give Lincoln the opportunity to make the appointment. In addition, Black was opposed by Stephen Douglas and his forces and the anti-slavery press; supposedly he had advised the President as Attorney General that he had no power to stop the secession.

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28 Crittendon and Badger had been rejected by the Democrats in similar situations.
movement. In such an environment a successful appointment was unlikely. On February 21, 1861, the Senate rejected Black by a vote of twenty-six to twenty-five and ended any chance that Buchanan would fill the seat.

One of the most interesting methods of thwarting a President was used by Congress against Andrew Johnson. Not only was Johnson an elevated Vice-President, but he had to work with an extremely hostile and divided Congress; his own impeachment resulted when feelings became too strong. When Johnson was given the opportunity to make his first Supreme Court appointment, he nominated Henry Stanbery of Ohio, who was serving as Attorney General.

Stanbery had a good record of service and was well known. He had been the first attorney general of Ohio, and had been appointed to the federal post in 1866. When his nomination to the court was made known, it was well received by the public. A newspaper editorial indicated that it was: "A most excellent appointment, and it is to be hoped that he [Stanbery] will be promptly confirmed." However, this was not to be the case; support in the Senate for any of Johnson's actions was weak at best and this was to be no exception. There was little question of Stanbery's qualifications for the position, but the Senate did not wish to accept this or any other Johnson nomination.

\[29\] Warren, The Supreme Court, II, p. 422, citing the Philadelphia Inquirer, April 18, 1866.
Seeking a way to curb any and all Johnson appointments to the Supreme Court, on July 23, 1868, Congress passed a bill to reduce the size of the court from ten members to seven. It was clearly a move designed to frustrate Johnson, and he was unable to make any Supreme Court appointments during his tenure.

In the minds of some political thinkers, Grant had the worst record of any President for Supreme Court appointments; in strictly numerical terms this is not true, for Grant was successful in having five of eight nominations confirmed. If the question of his ability to select qualified men is added, then his record may be the worst, for the qualifications of two of his unsuccessful candidates were open to serious question.

It appears, however, that meeting minimum standards for office was not the issue with his first nominee, Ebenezer R. Hoar. In April, 1869, Congress passed a bill which increased the size of the Supreme Court to nine and reorganized the circuits, increasing the number of circuit judges by nine. Hoar was nominated by Grant in December, 1869, after he had aided Grant in selecting the nine new judges for the circuit court positions. This was one of the factors which led to his rejection.

Professionally, Hoar was well qualified to serve on the Supreme Court. His legal qualifications were said to be superior; previous experience included service on the
supreme court of Massachusetts, and at the time of his nomination he was serving as Grant's Attorney General. His nomination was "...commended on all sides by the public and the press." Unfortunately, this view was not shared by many members of the Senate. Cortez Ewing listed the reasons why the Senate was unhappy with the nomination. Hoar had supported Johnson at the time of his impeachment; this alienated some Senators. Probably the most important reasons for Senate displeasure were centered around the patronage issue. Hoar strongly supported civil service reform, a move that would remove much of the patronage from Senator's hands. In addition, his involvement in selecting the new circuit judges made enemies in each circuit, since his criteria were strict, and patronage was not always considered. Lastly, the Democrats saw Hoar "...as representative of a centralizationist system that...was, to them, inherently vicious." One other factor which contributed to his failure was that Southern Senators felt the appointee should come from their area. While the battle for approval was in progress, another opening on the Supreme Court occurred. In an unprecedented maneuver, petitions were circulated in both the Senate and House urging Grant to appoint Edwin

\[30\] Ibid., p. 502.

\[31\] Ewing, Supreme Court Judges, p. 36.
Stanton to the position. Partly in an effort to obtain approval for Hoar, Grant made the appointment, but Stanton died four days after Senate confirmation. Finally, on February 3, 1869, by a vote of thirty-three to twenty-four, the Senate rejected the Hoar nomination. "'What could you expect,' exclaimed Senator Cameron, 'for a man who has snubbed seventy senators!'"

The next failure for Grant involved a candidate who appears to have been one of the few rejections that was justified on the grounds of being unqualified, though there have probably been men of similar limited ability appointed to the Supreme Court. Upon the death of Chief Justice Chase in 1873, Grant began the search for a replacement. His first offer was to Senator Conkling, who declined; on December 1, 1873, Grant announced the nomination of George H. Williams of Oregon. There was general surprise and disappointment which soon surfaced in the press. Williams was an ex-Senator and had served as a territorial chief justice in Oregon. Prior to that he had been a district judge in Iowa. Possibly because of his Senate status, the nomination quickly cleared the judiciary committee, but when opposition began to mount, the committee requested the opportunity to review its report.

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32 Harris, Advice and Consent, p. 75.
Criticism came from various bar associations; the New York State Bar Association passed a resolution condemning the nomination on the basis that the candidate was a man of little experience and ability. Several of his decisions had been reversed by higher courts. Ewing wrote that he was "...little better than a second-rate politician from Oregon..." The Nation, taking a tactful position, indicated that "...Mr. Williams, if not able and learned, is laborious and painstaking, and respectable..." The American Law Review expressed disappointment that the President had not availed himself of the opportunity to appoint an eminent lawyer. In the several offices that Williams had held, he had never distinguished himself.

Opposition in the Senate grew, as the public outcry became serious. Senator Conkling supposedly considered sponsoring a bill to remove the power to appoint the Chief Justice from the President and allow members of the court to elect one of their members to the position. When it became obvious that the confirmation vote might fail, Williams asked Grant to withdraw his name; Grant complied on January 8, 1874, after five weeks of struggle. From information available, it appears that the Senate acted wisely and in response to public pressure.

33 Ewing, Supreme Court Judges, p. 36.
Immediately after the withdrawal of Williams' nomination, Grant nominated Caleb Cushing, a seventy-four year old jurist of exceptional ability. He had served on the state supreme court in Massachusetts; he had also served as United States Attorney General. Warren wrote that "...as a profound jurist, he probably excelled either Marshall or Taney or Chase..." However, there was a reaction against his age and his political habits, which left some doubt as to his party affiliation.

...the fact that he [Cushing] had been successively a Whig, a Tyler man, a Democrat, and finally a Republican did not commend his appointment to the Senate, which had rejected him as Secretary of the Treasury in Tyler's administration.

Even so, it is quite possible that the Cushing nomination would have succeeded had not other charges been brought against him.

The most damaging charge brought against him was that he was disloyal to the republic; this charge grew out of a letter which Cushing had written to Jefferson Davis in 1861 to introduce a young man to him. The Radical Republicans, who opposed Cushing because they felt he supported slavery, used the letter as justification for urging his defeat. C. M. Fuess, Cushing's...
biographer, argued that portions of the letter were altered to make it appear that Cushing's loyalty was questionable.37 In addition, Cushing's age and personality were criticized by the press, as the following editorial from The Nation indicates. Cushing was said to be:

...of a crafty nature and erratic temperament, and more renowned for shrewdness and learning than respected for talents or integrity.38

Heavy criticism caused Grant to withdraw Cushing's nomination only five days after it was first submitted. Most of the evidence indicates that Cushing was qualified, and probably loyal; however, his age and the inconsistencies which seemed to be developing in his personality, possibly due to his age, suggest that the wisdom of the nomination was doubtful.

The fate of Stanley Matthews, a nominee of President Hayes, may have foretold the kind of battle which would become commonplace in the next century.

37George H. Haynes, The Senate of the United States, II, (Boston: Houghton Mifflin Company, 1938), p. 92, citing C. M. Fuess, Life of Caleb Cushing, II, pp. 370-373. The wording had been changed to indicate a closer relationship between Davis and Cushing, and to show the young man as having had experience in ordinance work, which would have been useful to the South; actually he had worked as a clerk in the Attorney General's office.

38"Nomination of Mr. Cushing," The Nation, XVIII, No. 446 (January 15, 1874), p. 33.
Matthews was nominated in January, 1881, by a "lame-duck" President, which always tends to weaken the possibility of a positive decision in the Senate, especially if there is any significant opposition.

Matthews had held various positions in his home state of Ohio, including a county judgeship and service in the Ohio legislature. He had also served in the United States Senate, a factor which normally insured approval; however, his record had been mediocre and this may account for the lack of support.

He had been heavily committed to the anti-slavery movement and at one time edited a radical newspaper, but this does not appear to have affected his candidacy, since his nomination was supported in the South. It appears that the only major charge against him concerned his interest in big business.

The main objection to Mr. Matthews for Supreme Court Justice was the fact that he had for years been recognized as an attorney for railroads and other corporations. He was the first, but certainly not the last nominee, to be so charged. This opposition, coupled with the time factor and the weak status of the President enabled the opposition to avoid any action; the Senate session closed with the nomination still pending. Evidently the opposition was weak, for when Garfield became President, he

resubmitted the name of Matthews for the same appoint-
ment and it won approval in May, 1881. This is the
only instance in which a candidate was renominated by
another President and received confirmation.

President Cleveland suffered two Supreme Court
rejections in quick succession, evidently based on the
same issue. William B. Hornblower, of New York was
nominated September 19, 1893, to fill the seat left
vacant by Justice Blatchford; the nomination was made
without consulting the Senators from New York, and
especially Senator Hill. Hornblower was considered an
outstanding lawyer of his state. His record was
investigated; "...notwithstanding the fierce light
that was turned upon him, not a flaw was found in his
character as a lawyer or a citizen."40 The only possible
question seemed to be his age; at forty he was young to
be a member of the Supreme Court. The nomination re-
mained in committee for a month, and was then reported
unfavorably; the warning was clearly sounded for Cleve-
land when Senator Hill was chosen to make the report even
though he was not the committee chairman. One week
later, the nomination was rejected by the Senate.

40 "The Senate and the Recent Appointments to the
Supreme Bench," American Law Review, XXVIII, No. 2
(March-April, 1894), p. 274.
Waiting one week, Cleveland made a second nomination, again from New York; he nominated Wheeler H. Peckham to the Supreme Court. Peckham had excellent qualifications; his father had been a state circuit judge, and he had one brother practicing law. At the time of his nomination, Peckham was serving his third term as president of the New York State Bar Association. The only objection raised was that "...he was a natural advocate, and that his temperament was not judicial." Even so, when the nomination was reported from committee, it was without recommendation, and was rejected by the Senate on February 16, 1894, just one month after the rejection of Hornblower.

In both instances, the real reason for defeat appeared to be "Senate courtesy," the first rejections solely based on this issue. Haynes wrote that it was "The most notable contest in which a successful appeal was made to the courtesy of the Senate..." Both New York Senators, and particularly Senator Hill, were strongly opposed to the nominations. According to an editorial in the American Law Review, the real reason for their objection was:

41 Ibid., p. 275.

...that these eminent lawyers had been leaders in the movement which took place among the members of the bar of the state of New York to prevent the election of Mr. Maynard, the regular Democratic nominee, to the Court of Appeals of that state... 43

Maynard had supposedly been involved in the theft of some duplicate election returns and was exposed and condemned by the bar association. Hornblower and Peckham were prominent members of the bar association's investigating committee and helped make the exposure which later caused the defeat of Maynard in his bid for election to the court in New York. Hill and other Tammany Hall Democrats had vowed revenge, and the Hornblower and Peckham nominations provided the opportunity.

Cleveland refused to yield to Hill, and reversed the normal "Senate courtesy" by nominating Senator Edward D. White to the vacant Supreme Court seat; he was confirmed on the same day that his nomination was sent to the Senate. The situation thus provided examples of two types of Senate courtesy; Senator Hill was able to block two appointments which he opposed while the President was able to obtain quick Senate confirmation of a member of the Senate. It also illustrates the fact that the initiative remains in the hands of the President.

43 "The Senate and Recent Appointments," p. 275.
The period between Cleveland's rejections and the next such instance was the second longest period of harmony in the appointing procedure, though there were several bitter struggles prior to the rejection of John J. Parker in 1930. In some ways, the Parker rejection was typical of the kind of struggle which has gone on in the twentieth century when Supreme Court appointments have been questioned.

President Hoover nominated Parker to the Supreme Court on March 21, 1930, to replace Justice Sanford. Professionally, Parker had the proper background; he was a member of an important North Carolina family, with many relatives involved in politics. In 1923, he was appointed an assistant to the United States Attorney General to aid in prosecuting several war fraud cases. He ran for Congress, attorney general and governor, but was unsuccessful in each instance. He became a member of the fourth circuit court in 1925, a position he held until his death. In 1930, at the time of his nomination to the Supreme Court, he had had only two cases reversed by the Supreme Court.

Opposition seemed primarily directed toward his conservative philosophy, and focused on his position regarding organized labor and Negro civil rights. In a sense, the reaction to Parker may have been a reflection of animosity toward Hoover and the confirmation of
Charles Hughes, only one month earlier. Hughes had been widely criticized for his support of big business and his conservative views; the liberals felt that a man of their ideology should be appointed. "Democrats and 'Coalitionists' who had made common cause against the Hughes nomination seized this new opportunity with eagerness." 44 To support their philosophical arguments, the opposition forces made two concrete charges against Parker. He was accused of being against organized labor, and the "Red Jacket" case (1927) was cited as evidence. This case involved the United Mine Workers and a coal company in West Virginia. 45 The company had sought an injunction to prevent the miners' union from attempting organizational activities which violated the Sherman Act. The issue was based on "yellow dog" contracts, a means of preventing miners from joining unions by placing a prohibition in their work contract. The union criticized Parker for supporting this type of contract, but Parker had based his opinion on an earlier decision. Parker's decision was defended in a statement from Attorney General Mitchell's office, stating that Parker was correct. 46

44 Haynes, Senate of the United States, p. 757.
was simply abiding by Supreme Court precedents. William Green, the union president, said that the decision showed "...that he [Parker] places a greater value upon property rights than upon human rights." 46

The second charge against Parker involved a speech he made while campaigning for governor of North Carolina. Replying to a charge that the Republicans would give the Negro the vote if elected, Parker stated that:

We recognize the fact that he [the Negro] has not yet reached that stage in his development when he can share the burdens and responsibilities of government. 47

Additional charges were made indicating that Parker supported the application of the "grandfather clause."

In testimony before the Senate, Walter White, acting secretary of the NAACP, admitted that he knew of no instance when Parker had been unfriendly to Negroes, or of a case in which Parker had been unjust.

Parker wrote to the Senate Judiciary Committee, offering to appear, but the request was never made; he also attempted to explain by letter his position on the two charges, but the effort was unsuccessful. Early public reaction had been mild, and in some instances, favorable, as the following editorial shows.


Mr. Hoover has indicated his respect for the Court by nominating a political judge to whom there will apparently be no opposition for the good reason that there is nothing in particular to object to.\(^{48}\) Heavy pressure came from organized interest groups and the Parker defeat represents at least a partial victory for such groups. A minor charge which helped defeat Parker was that his nomination was a "political deal" to reward North Carolina, which had supported Hoover in the election. It was a combination of liberals and those who opposed Hoover that defeated the Parker nomination; seventeen Republicans voted against the nomination in a forty-four to thirty-nine rejection. After the defeat, Hoover nominated Owen Roberts, a conservative Republican who had been politically inactive; he was approved in eleven days, with only one minute of debate on the Senate floor.\(^{49}\) The lesson from such experience may be that political mutes are less likely to evoke serious dissent.

The Parker rejection seemed to be an isolated incident in a new era, one that would see little opposition by the Senate to presidential appointments. It was not until 1968, thirty-eight years later, that the


\(^{49}\)Haynes, Senate of the United States, p. 759.
Senate again asserted its rights, and in a unique and untried manner; the filibuster was used for the first time to block an appointment to the Supreme Court. The Fortas case was also unique in that it was the first time a sitting justice, other than a recess appointment, had appeared before the Senate Judiciary Committee.

One other feature which made the nomination unique was the fact that Chief Justice Warren had not retired from the court, but had informed President Johnson that he would retire when "a suitable replacement could be found." It was on this basis that Johnson nominated Fortas as Chief Justice and Homer Thornberry as a replacement for Fortas on June 26, 1968.

Both men were well equipped professionally for the positions; Fortas, a graduate of Yale, had served as an under Secretary of the Interior Department, and had been appointed to the Supreme Court in 1965 in an associate position. Thornberry had practiced law in Austin, Texas, had been a district attorney, member of the city council, and had served both in the state legislature and for several years in Congress. He had been named to the district court and later appointed to serve at the circuit court level in the federal system.

Attention was focused on the Fortas nomination for several reasons. While President Johnson was still very much in office, the fact that he had indicated he would
not run again had weakened his position; coupled with Warren's statement it appeared that an attempt was being made to insure the court of a liberal replacement for Warren. In a scathing editorial, The New Republic indicated that life tenure is essential for the court, but:

...life tenure with a right to influence confirmation of a successor is rather another [matter] ...resigning, as Chief Justice Warren did, effective upon the qualification of a successor is unprecedented in the Supreme Court.50

Other strong criticism on this point came from Senator Griffin, who argued that a "retractable retirement" was being used as pressure on the Senate.51 Others questioned the legality of the nomination Attorney-General Clark testified that there were precedents in which a nomination had been made prior to retirement.52 While this was true, Warren's statement had added a twist to the precedent.

A second charge involved the question of separation of the executive and judicial branches. Fortas admitted that he discussed matters of current concern with Johnson, but he denied that these were ever issues which

52The record shows six Supreme Court nominations made prior to resignation of the sitting justice. The first incident occurred under Washington; the most recent under Franklin Roosevelt. In the longest case,
were before the Supreme Court; this was disputed by some members of the Senate. There is no question that such counsel had been common between some Presidents and members of the court; Wilson and Brandeis is one example. In some ways, this charge was related to the question of whether or not Johnson was guilty of appointing cronies to the court. Both Thornberry and Fortas were close friends of Johnson; however, it has been common practice for Presidents to appoint friends to office, and the charge was of secondary importance.

The most damaging charge against Fortas concerned his financial affairs. He had been involved in financial dealings with Louis Wolfson, who was later convicted of violation of the Securities Exchange Act. In addition, he had accepted a $15,000 seminar fee for conducting a series of lectures at the American University in Washington, D.C. The money had been raised by an associate in Fortas' law office, and in part, was obtained from clients of that office.

The Fortas hearings were also used as a means of attacking the Supreme Court; decisions on obscenity and civil rights were brought under attack by conservative senators. A role of Advice and Consent to Judicial Nominations, in Judicial Nominations, (April, 1969), p. 305. Other not confirmed included John Rutledge, Caleb Cushing, and George Williams, though Rutledge did Sutherland was appointed thirteen days before Justice Clarke retired.
Senators toward the liberal Supreme Court may have, in truth, been the major reason for the Fortas defeat. Senator Hart wrote that the nomination came in unique circumstances, including:

...the erosion of the power of the President with the approach of a political campaign, the nearness of the end of a legislative session, and the opportunity afforded for political attacks on the court and the President. 53

Even with the strong opposition, there is serious doubt that the nomination could have been defeated without the use of the filibuster. On October 1, 1968, the Senate, by a vote of forty-five to forty-three, refused to invoke the cloture rule, and Fortas became the fourth man to be denied confirmation as Chief Justice. 54 President Johnson withdrew the nomination at the request of Fortas on October 4, 1968, and in June, 1969, Fortas announced his retirement from the court.

To fill the vacancy, President Nixon nominated Clement Haynsworth of South Carolina to the Supreme Court on August 18, 1969, as part of a general effort to give the court a "strict construction" orientation.


54 Others not confirmed included John Rutledge, Caleb Cushing, and George Williams, though Rutledge did sit briefly as a recess appointment.
Haynsworth was not a widely known figure but appeared to be qualified. There was some mention of the nomination being a political reward to Senator Thurmond of South Carolina, but Thurmond countered this by indicating that he had been supporting another candidate. An article in Newsweek gave Haynsworth the following evaluation:

"Courtwatchers consider Haynsworth neither an intellect nor an innovator but a careful, hard working professional."

He had served as a federal judge in South Carolina since 1957, rising to chief judge of the circuit in 1964. The American Bar Association gave him its highest rating, finding he was "...highly acceptable from the viewpoint of professional qualifications." The eight days of testimony, however, indicated that all was not well with the nomination. Charges centered around the financial interest of the nominee and possible conflicts of interest. With holdings in over fifty concerns and institutions, Haynsworth had assets of nearly one million dollars. Several court decisions were examined by the committee; one which concerned a textile company and another concerning the Brunswick Corporation.

were the subject of particular criticism. In the first instance, Haynsworth owned one-seventh of the Vend-A-Matic Company, which operated machines in textile plants; the Brunswick situation was one in which Haynsworth had purchased 1,000 shares of stock in the corporation while a decision Haynsworth shared in making had not been announced, though a decision had been reached by the court. An additional issue appeared regarding the Vend-A-Matic Company; in June, 1969, Haynsworth had testified before another committee of the Senate that he had resigned "...from all such business associations I had, directorships and things of that sort." Later in testimony before the judiciary committee, he admitted having remained a vice-president of Vend-A-Matic until 1963, six years after having resigned from other similar businesses.

In making its report, the Senate Judiciary Committee indicated that the ethics attacks against Haynsworth "...have not been substantiated, and that nothing in his judicial conduct...would in any way justify recommending against his confirmation." The committee stated that unless the attacks were substantiated, there


was no reason to withhold approval, even though such attacks might raise serious doubt in the public mind.

Other opposition came largely from interest group pressure and public pressure stirred by interest group leaders. The NAACP strongly opposed the nomination, and united with the labor unions to urge its defeat. In terms of a strict construction position, there was little to criticize about his civil rights decisions. However, Roy Wilkins stated that such a view meant giving Negroes "...their constitutional rights with an eye dropper one at a time when they should be flowing like a river in a thirsty land." 59 Both the NAACP and the union leaders cited Haynsworth's record of anti-Negro and anti-labor decisions. Tom Harris, associate counsel for the AFL-CIO, cited seven cases in which Haynsworth had ruled against labor and had been reversed in later decisions by higher courts. He agreed that labor had been wrong in opposing the Parker nomination, and that he had been a pro-labor judge in later years; "...if we can get both of the same two results here, we will be happy." 60

There was also opposition from the National Education Association, which feared that Haynsworth's confirmation would mean the end of efforts for equal education


60 Nomination of Clement F. Haynsworth, Jr., Senate Executive Report, p. 21.
opportunities. The Fortas seat had traditionally been the Jewish seat, and there was some effort to block the nomination on this account. Though the nomination was reported favorably from committee, it was defeated on the Senate floor by a vote of fifty-five to forty-five on November 21, 1969. The issues which were presented were real, and had added impact in light of the rejection of Fortas on similar charges only months before. Haynsworth's political ideology was undoubtedly a factor for many liberal members of the Senate; the charges were tools which were used to bring about the defeat.

When Haynsworth was rejected, Nixon turned to another nominee from the South; he placed George H. Carswell's name before the Senate on January 19, 1970. Carswell, from Florida, was a lower federal court judge. Upon graduation from law school he ran unsuccessfully for the state legislature, and then set up his law practice. In 1953 he became a federal attorney, and was made chief judge at the district level in 1958. He served in that capacity until his elevation to the fifth circuit in June, 1969. Investigation by the American Bar Association resulted in Carswell being rated as "qualified" for appointment to the court. In two earlier instances of ratings by the same group, he had been rated "well qualified."

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61 The American Bar Association rates candidates for judicial office in four classifications: extremely well qualified, well qualified, qualified and unqualified.
Opposition to Carswell was both similar to and very distinct from that seen in the Haynsworth nomination. The ideology of the two men was similar, and the liberals who opposed Haynsworth generally looked with disfavor upon the Carswell nomination for the same reasons. Senator Eastland wrote that the opposition operated from a weak position.

The substance of all of their testimony and proof is that Judge Carswell is a southerner, and a constitutional conservative. Interest group opposition was again present, though the labor forces took a much less active role. Charges of racism stemmed from several sources. One of the first issues to be brought to light was a speech made by Carswell while he was campaigning for office in 1948. Responding to liberal criticism, Carswell stated that he would not attempt to break down segregation policies.

I yield to no man, as a fellow candidate or as a fellow citizen, in the firm, vigorous belief in the principle of White Supremacy, and I shall always be so governed. Carswell indicated that this was no longer his position. It is quite unlikely that this statement alone would have been terribly harmful; others on the Supreme Court have


had similar background and have managed, by their ac­tions, to show a change of philosophy. Other events, however, seemed to raise the question as to whether there had indeed been such a change. Carswell had been involved in the incorporation of a Tallahassee country club which was segregated. In testimony, he first denied knowledge of the fact that the club was so organized; however, a conflicting story emerged from two members of the American Bar Association selection committee, who indicated that the night before testifying, Carswell had admitted that he was aware of the conditions of club membership at the time of his involvement. Other changes which were important in the decision included the question of judicial restraint. Testimony from several members of the bar implied that it was difficult for nor­thern lawyers and especially those involved in civil rights cases to obtain a fair hearing before Carswell.

Mounting opposition came from law schools and bar associations, questioning Carswell's professional qualifications. The Nation editorially stated that:

The Senate should ask itself what strength of character or attainment the candidate might bring

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64 Justice Black was once a member of the KKK, though this was not known at the time of his appointment.

to the United States Supreme Court. Thus evaluated, what chance would Judge Carswell have? In attempting to defend Carswell against such attacks, Senator Hruska, of Nebraska, probably aided in sealing his fate.

Hruska's startling argument that even "mediocrity" deserved representation on the high court... gave the judge's foes just the handle they needed to dramatize the case against the Florida conservative.

The case became one against mediocrity on the Supreme Court and coupled with the other charges led to the defeat of the nomination by a vote of fifty-one to forty-five on April 8, 1970. Nixon thus became the first President other than Cleveland to have two Supreme Court nominees clearly rejected by the Senate. It is possible that the criteria established by Nixon were too confining to allow for a proper choice; by looking outside the South he was able to nominate and receive quick confirmation of Justice Harry Blackmun.

Each instance throughout history in which a nominee for the Supreme Court was rejected involved certain unique aspects, but careful study also shows some general patterns. While these patterns are not common to every rejection, they occur often enough to suggest the features

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68 Nixon wanted a nominee from the South, a conservative in ideology, not over 60 years old, and with
which are likely to exist when there is a failure to appoint. A vote to reject has been the most common action taken by the Senate; eleven men have been refused appointments to the Supreme Court in this manner. Withdrawals by the President have occurred in seven cases, making this the second most frequent method. In addition, there have been four instances of indefinite postponement and four in which no action was taken. 69 In some ways, this is an incomplete picture; it fails to illustrate fully the psychological battle which occurred in connection with some successful appointments. In several instances the confirmation was delayed for excessive periods of time, thereby placing the President under pressure to withdraw the nomination. The most famous case of this sort occurred during the presidency of Woodrow Wilson when the appointment of Justice Brandeis was delayed for five months. In several cases the nomination has been allowed to expire as the session's end; often the President has not renominated the candidate, though there have been several instances where such renominations have been successful.

69In the case of Stanbery, no action was taken because the seat was abolished when Congress reduced the court from ten to seven members.
No attempt is made here to explain court rejections by single factor analysis; there may have been an especially significant issue which was primarily responsible in some cases, but in most instances rejections were based on several reasons. An underlying condition which was present in almost every case was the struggle between the Senate and the President for power; appointments are an important expression of that power. During the peak of the "spoils period," the Senate was probably most aggressive, and this was partly reflected in the number of rejections during that period. This factor was heightened by the lack of strong men in the executive office during that period. It also seems likely that there was a diffusion effect over time. With precedent being such an important process in the American system, rejections were quite likely to inspire others. This is even more clearly shown when instances of more than one rejection of candidates for a particular vacancy are examined. In seven cases where one nomination to the Supreme Court failed, there was a second failure before the seat was filled.70

70 Instances in which multiple nominations were required to fill vacancies were the vacant seats of Cushing, Thompson, Baldwin, Chase, McKinley, Blatchford, and Fortas.

While it would seem that party differences between the President and Congress might be a primary cause of failure, the evidence is inconclusive; only seven rejections occurred when the party in power in the Senate was in opposition to the President. This explanation, however, should not be ruled out, for party affiliation in the nominal sense is not necessarily a true indication of alignment. In many instances, there was open hostility between the President and the Senate, even though they were of the same party. Haynes argued that during much of the nation's history, "...the President has had to deal with a hostile majority in the Senate."\(^{71}\) Probably more significant than party consideration is the question of the relative strength of the Senate and the President and their level of rapport. Using the Schlesinger study\(^ {72}\) as a guide to presidential strength, the following correlations emerge. Of the total number of rejections, sixteen occurred under Presidents who were rated as "average" or below. The "near great" and "great" Presidents accounted for seven rejections; one of these was William Paterson whose failure was only a technical one. The "below average" and "failure"

\(^{71}\) Haynes, Senate of the United States, p. 738.

Presidents accounted for twelve failures. The Schlesinger scale is admittedly subjective but may be of some value. Applying the scale to the Supreme Court rejection data, the trend indicates that Presidents who were rated as less successful were also the ones who had more Supreme Court rejections.

Other factors which may be tied to presidential strength include "Senate courtesy" and "lame duck" appointments. The strength of these factors are probably related to the power of the executive. Excluding President Johnson's rejections, there have been six nominees rejected under "lame duck" Presidents. Again using Schlesinger's scale, of the six, four were nominees of "below average" Presidents, one by an "average" President, and one by a "near-great" President. There is little doubt that a President who is nearing the end of his tenure suffers a loss of power, but it seems quite likely that his loss is relative; strong Presidents have made late appointments successfully, but a President who has had poor relations with the Senate in earlier times is usually more likely to experience difficulty near the end.

"Senate courtesy" has not been a major factor in blocking appointments to the Supreme Court; it has been much more effective as the lower court level. Cleveland's two rejections were the only cases in which the courtesy of the Senate was the major factor; it has been of minor
importance in some other instances. Part of the explanation regarding Cleveland's failures may be the strong hostility which existed between the Senate and the President during most of Cleveland's tenure.

Probably the most significant factor to emerge from a review of the rejected nominations is that, in general, the nominees were qualified by any objective set of professional standards. Comparing them to those men who have served on the Supreme Court, there appears to be little if any significant difference. They were lawyers with experience in the judicial, political and appointive areas of government; in general, their achievements were satisfactory. The full record of the nominee was rarely considered; attention was focused on weak points, which often seemed to give justification for rejection, while the real reasons remained buried. Haynes argued that the Rutledge, Wolcott, Williams, and Cushing rejections were creditable exercises of the Senate's negative and, regarding these four cases, "...the Senate showed better discrimination than did the President who made the nomination." 73 This may be true, but even so, the right decision may have been made for the wrong reason; for example, in the Rutledge case, if he had not questioned the Jay Treaty, there is little doubt that he

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73 Haynes, Senate of the United States, p. 754.
would have been confirmed. The Senate may have served a valuable function in many instances, but no less than a dozen of the nominees who were rejected were outstanding men whose service to the Supreme Court was lost.

The ideology of the President or the nominee (sometimes both) has often been a crucial factor in the confirmation process. Usually other issues have been more visible and may have drawn the primary focus of attention, but ideology has been an underlying concern. Neither the President nor the Senate has always been successful in determining a nominee's ideology; in general, however, the system tends to be a successful method of bringing the Supreme Court into line with the prevailing philosophy of the administration.

Ideology at first appears to be a questionable criterion for selection court members, but close examination may show that it is very relevant. In Chapter III the political nature of the Supreme Court was examined; experienced justices admitted that members of the Supreme Court, to some extent, carry their ideology into the courtroom. If this is true, then choosing court members with some concern for their ideology may be a means of maintaining a certain sense of harmony between the various branches of government.

The evidence based on instances where Supreme Court nominees were rejected indicates that the selection system,
based largely on unwritten rules, functions in a satisfactory manner, though there are occasional errors. One question remains; is there a better method which would reduce the opportunity for error?

Earlier discussion has been directed toward an examination of the selection process used to choose members of the Supreme Court. The process has evolved through an ever-shifting balance of power, with both the executive and Senate recognizing the importance of the power to appoint members of the third branch of government. The process has generally worked fairly well, at least in the strictly pragmatic sense. Considering only those men who were rejected, it has worked to deny more "qualified" men than "unqualified" ones a seat on the court. This is not a complete picture, for it fails to consider how many unqualified men were discouraged from attempting to obtain a seat, knowing the pressures of the testing situation. How many men have Presidents declined to nominate for similar reasons?

As a side issue, it may be wise to consider other possible selection methods, if for no other reason than to gain perspective regarding the method to use.

Before considering alternatives, other questions should be raised; the crucial issue is actually the question of what the goals of the selection system are.
CHAPTER V

ALTERNATIVE METHODS OF JUDICIAL SELECTION

Earlier discussion has been directed toward an examination of the selection process used to choose members of the Supreme Court. The process has evolved through an ever shifting balance of power, with both the executive and Senate recognizing the importance of the power to appoint members of the third branch of government. The process has generally worked fairly well, at least in the strictly pragmatic sense. Considering only those men who were rejected, it has worked to deny more "qualified" men than "unqualified" ones a seat on the court. This is not a complete picture, for it fails to consider how many unqualified men were discouraged from attempting to obtain a seat, knowing the pressure of the testing situation. How many men have Presidents declined to nominate for similar reasons?

As a side issue, it may be wise to consider other possible selection methods, if for no other reason than to gain perspective regarding the method in use.

Before considering alternatives, other questions should be raised; the crucial issue is actually the question of what the goals of the selection system are.
What kind of man is selected by the process? The power of the Supreme Court is immense when the impact of a court decision is viewed as reflecting the collective action of nine men who may effectively oppose the combined executive and legislative branches of government. It is true that an unwise decision of the Supreme Court may be reversed by appropriate legislation, but such instances are the exception rather than the rule. Further, the effect of a poor Supreme Court decision has wider implications than the immediate consequences of the ruling; Hamilton\(^1\) indicated that the court had no power other than making judgments, but that power must be reinforced by public and governmental confidence if the court is to retain its strength. At the same time, the judicial branch must remain independent, for much of the public confidence rests on this assumption. A. T. Vanderbuilt expressed his concern over the men who serve in the courts.

We need judges—beholden to no man, independent and honest and equally important—believed by all men to be independent and honest.\(^2\)

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Such independence is achieved through a proper selection system and allowance for judicial independence once court membership is obtained. Life tenure enables court members to make judgments free from the threat of removal; the selection process is not so clearly free from conditions which threaten judicial independence.

Possibly the key is not independence but responsibility; those who appoint men to the courts must be made responsible to the people for their actions. This was one of the critical arguments in the minds of those who wrote the Constitution. Life tenure in itself may make full responsibility an impossible goal for court members while elected officials who are not eligible for reelection are in a similar position. In considering the tenure of justices, the loss of responsibility may be offset by the advantages gained in the area of judicial independence. Dividing responsibility between the President and Senate has tended to weaken the responsibility of each branch, and was one fear expressed by the founding fathers. Giving the President full responsibility to make life appointments, however, was more than the founding fathers could accept.

Several aspects of the problem are linked by the term responsiveness; should the system of selection be responsive, and if so, to what kind of pressures and interests? This question again focuses attention on the
political nature of the Supreme Court and the attitudes of the men who staff the court. Should appointment be entirely divorced from ideology and be based strictly on judicial merit, and is this, in truth, possible? At various times interest groups have exerted strong pressure on the selection process; the rejection of John Parker was partially a result of such pressure. If such influence is to be allowed, should it be systematic rather than haphazard and open to usurpation or intrigue by well organized factions? These are questions and problems which must be considered when examining the present system and any alternatives which may be proposed.

Basically, there are four possible ways to select man for the courts: (1) inheritance, (2) appointment by a man or group of men competent in that field, (3) a separate professional system with appointment from within the system, and (4) some method based on election. Most systems which have been suggested through the years are a variation or combination of these methods. Each method has its advantages and weaknesses.

Early efforts to reform the selection system were aimed at reducing the power of the President and increasing legislative power. There were proposals to allow both houses of Congress to select the court members, without presidential participation, and others which would have given the Senate full appointive power. The only
apparent advantage of such a change would have been to strengthen Congress at the expense of the President; it is difficult to know if this would produce a more responsive system. Sharing power with the lower house would have the effect of reducing the influence of the small states. To place full responsibility on the Senate or Congress would reduce the level of responsibility and give additional opportunity for intrigue and pressure tactics. Dividing the responsibility between the President and the Senate gives the heavier load to the President under the existing system, since he initiates the appointment. The uncertain nature of any advantage offered by increasing the role of Congress, and the possible harmful effects included in such a change are evident; there have been no recent efforts to implement such a system.

The most widely accepted reform of the court appointing process has been some variation of judicial election; in 1964, 19 states used some form of partisan election, while 16 used non-partisan election systems, 10 used some form of the "Missouri plan," and 9 operated under the same system used by the federal government. In 1846 all but one of the states used an appointive system.3 Much of the

reform came during the Progressive Era, when efforts to fully involve the public in government were at their height. The philosophical question raised by elected judicial officials is sometimes overlooked: should court members be strictly a reflection of the popular will of the day? There have been many instances when a court took an unpopular stand in support of a minority group or view. The question turns on one of the basic aspects of American democracy: majority will versus minority rights. There is little question that the founding fathers would not approve of an elective system for members of the courts, for minority rights were important in their thinking.

Pragmatic questions are also raised by election systems. Whether partisan or non-partisan, elections tend to bring the candidate into alliance with various interest groups. In the partisan election, the potential judge may be dealing with a county or state political machine; the non-partisan election attempts to circumvent this problem but non-partisan elections usually live in the shadow of partisan politics. Both systems fail to recognize that many men who might make excellent judges are reluctant to enter an election situation. Regarding the advantage of non-partisan election, the question must return to the kinds of issues a judge faces.
If the judiciary administers a supernatural code to which it has infallible access, its work is in no way partisan and the judges should not be chosen through partisan channels. Divine appointment would then be the proper method of recruitment. 4

As in other elective situations, the question of financing a campaign must be considered. All men who enter politics must face this question, but it seems especially unfortunate that the staffing of courts might be affected by financial considerations.

Finally, there is the question of whether or not voters can be sufficiently informed about court nominees to make valid choices. Voters would need to know not only the potential judge's political philosophy, but the nature of earlier decisions made by the candidate. This would seem to require a knowledge of the law which is beyond the average voter, either because of lack of interest or intelligence. Further, the voter must take an active interest in this campaign in addition to those he normally follows. The same arguments which apply to use of the "long ballot" may apply here; will voter interest justify using an elective system for filling judicial positions?

The "Missouri plan" is an attempt at compromise between the advocates of appointive and elective systems. While there are variations within this plan, basically it calls for three steps in the making of court appointments. First, a non-partisan board or panel nominates a slate of candidates to be submitted to the executive. Secondly, the executive makes an appointment from the list of approved candidates. Finally, the decision is reviewed by the citizenry through some type of referendum process in which the voters are asked to approve or reject the appointments made by the executive. Murphey and Pritchett argued that to vote in such a situation where the alternative is unnamed is the "...most famous window dressing of despotism." The voter choice is no longer between men, but simply whether to accept a given candidate or to reject him. As in the normal election system, a major problem is whether the voting public will have sufficient information to make an intelligent decision. If the voters do not accept this responsibility, then the effect of the system is to shift responsibility to the executive and the selection committee, for it is here that the real decision will be made. Responsibility thus falls into the hands of a committee which is not responsible to the voters and which may be dominated by interest groups. Experience with the "Missouri plan" indicates that

5Ibid., 109.
voters have allowed the executive and selection committee to dominate the process; the number of rejections by the public at an election has been infinitesimal. The potential check on power by the voters is available, but there is no real leadership to encourage acceptance of this responsibility.

All American judicial election experience has been on the state level; it is conceivable that some of the problems might not appear if judicial elections were attempted at the federal level, and in particular with the Supreme Court. Stuart Nagel argued that judges who are going to hold value positions should be elected "...since presumably a judge elected at large will tend to have more representative values than a judge chosen in any other manner." The question which must still be answered involves what is expected of judges. Even recognizing the political nature of the task, there is some doubt as to the wisdom of making the appointment a strictly political one. Would outright election strengthen or weaken public confidence in the impartiality of the Supreme Court? It seems quite likely that the latter would be the case.

Most recent efforts to reform the system have been directed toward solutions which involve the use of an impartial committee. The American Bar Association has taken the lead in this effort, working through its own committee system and exerting pressure on governments for reforms. In 1945, a special committee within the Association was formed to lend its assistance to the administration in performing the selection function. First efforts were directed toward providing the President with a slate of candidates, but this was unsuccessful, and the committee has since confined itself to passing judgment on names submitted by the President:

...representing every segment of the bar of the nation, the Committee provides the Attorney-General with a ready source of information... 7

The committee submits a report to both the Attorney General's office and the Senate Judiciary Committee; among other things, the report rates candidates from "extremely well qualified" to "not qualified." These reports reached their high water mark of influence under Eisenhower, who insisted on knowing the position of the American Bar Association before acting. Other Presidents before and after him have used the information, but to a lesser extent.

Criticism of the American Bar Association selection committee and its attempt to gain power has been severe. While the selection committee represents all of the circuits, neither it nor the Association represent all of the nation's lawyers; only about one-third of the total lawyer population belongs to the American Bar Association. This limited membership tends to be conservative. Robert Drinan has shown alarm at the Association's potential role.

The prior approval of the bar association for all judicial appointments would indeed be a treacherous idea to introduce.8

The conservative nature of the Association is best illustrated by the Brandeis nomination; in that situation, seven men who had served as presidents of the Association signed a statement questioning the professional qualifications of Brandeis. An earlier question is raised by this case: can the legal competence of a man be separated from his ideology? John Schmidhauser indicated that opposition to Brandeis was not based on his fitness, "...but his lack of sympathy for the values which they [bar presidents] cherished."9 Recent efforts by the Association have been more in the direction of an independent selection committee


which would have representation from the Association, but would not be controlled by it. Senator Hugh Scott has long pushed for such a process, to be called the Judicial Service Commission plan. This would consist of a seven-member commission, to include three men from the highest state and federal courts, three from positions outside this category, and one retired federal judge. No more than four members of the commission would be allowed to come from one political party. Their duty would be to make recommendations to the President, which he could refuse but not without good reasons, which he would have to explain to the Senate; the Senate would still have the power of confirmation, but the commission pressure would supposedly reduce the likelihood of a rejection.

A solution of this nature would certainly reduce the power of both the President and the Senate; it might also reduce the patronage and partisan aspects of the selection process. To eliminate partisanship is a questionable value if the harmony of the Supreme Court and other branches is desirable. Sheldon Goldman suggests that the Attorney General be included on the panel as chairman. A similar committee system was suggested...
by Harold Laski, incorporating four members of the Supreme Court, two federal judges, the Attorney General, and the president of the American Bar Association.\footnote{Harold J. Laski, "The Technique of Judicial Appointment," Michigan Law Review, XXIV, No. 6 (April, 1926), pp. 529-543.}

Plans such as these are significant in that they would have important effects on the distribution of power; it is conceivable that there would be an important shift of power to the non-partisan committee, which in itself is not necessarily bad. The difficulty appears when the question of responsibility is raised, for there would be none, at least as far as the committee is concerned.

Determination of policy is politics and when men are being selected to make policy there will always be some who want to influence the choice; therefore a non-political committee is really an irresponsible committee.\footnote{Murphey and Pritchett, Courts, Judges and Politics, p. 111.}

Hamilton was among the first to recognize the weakness of such a system; he saw in it "...an unbounded field for cabal and intrigue..."\footnote{Hamilton, Madison, and Jay, The Federalist Papers, No. 77, p. 461.} and a lack of responsibility. No matter how eminent the men on such a committee, the pressure of interest groups is present.
Other suggestions which have been made to improve the selection process involve various kinds of curbs of the power of the Senate or President or both. Kenneth Cole suggested that reports from the justice department and representatives of the federal judges should be channeled to the Senate. The purpose of such reports would be to make expert opinions readily available. Historically, however, this has not been the problem; nominees were qualified and in many rejection cases extremely well known. Indeed, being well known may have contributed to the rejection of several candidates; it was rare for an unknown nominee to be seriously challenged. It is easy to understand how Senator Hart arrived at the following conclusion:

I have little faith in any of these mechanical solutions, nor does history give me any cause for optimism... If anything history teaches that no door should be closed and that diversity is the goal. Clearly, each of the alternatives considered might bring positive reform and yet open the door to new weaknesses.

Returning to the present selection system, it may be worthwhile to examine it on the basis of some of the goals mentioned early in this chapter, such as that of judicial independence. The independence of the Supreme Court is important to the United States. As Justice H. L. Duvall said in a 1945 case, it is the duty of the Senate to see that the President's nominees are confirmed. It is the duty of the Senate to see that the President's nominees are confirmed. Justice H. L. Duvall, "The Fortas Controversy: The Senate's Role of Advice and Consent to Judicial Nominations, the Discriminating Role," Prospectus, II, No. 2 (April, 1969), p. 306.
Court is established more by the system of tenure than by the method of selection. Once appointed to the court, a justice need answer only to his own conscience and concept of justice, no matter what the circumstances of his appointment may have been. In some ways, the system as now established may be prone to produce more diversity on the court than would another approach; since vacancies occur on the average of about every twenty months, this means that each President appoints an average of two Supreme Court members during one presidential term. Assuming that ideology is a prime criterion, the court should thus normally be representative of a cross section of ideologies.

The division of responsibility between the President and the Senate has probably produced the most friction and criticism of the selection system. The ideal system would not allow for the rejection of well qualified candidates; in this sense the system has failed to operate in at least one-half of the rejections, and much of this failure has been due to extreme friction between the Senate and the President. However, if viewed from another perspective, this failure may not be quite as serious as it first appears. Of 128 nominations, 26 were refused confirmation. If, as Haynes suggested,

four of these were poor choices, then the percentage of qualified men who were rejected is about 18 per cent. Such a percentage may not be too high. The very nature of the entire structure places emphasis on the power of those who would restrain action, or reject nominations. Much of the criticism of the present selection method is centered on the question of public confidence in the Supreme Court and yet most of the alternatives fail to provide a better solution to this problem. Historically, confidence in the Supreme Court has rarely been focused on the appointing process and it has only been indirectly involved when particular Supreme Court decisions were being attacked. In addition, attacks on the court often are not isolated events, but part of a general loss of faith in the government or nation.

These arguments are not meant to suggest that the present appointment system is ideal; the fact that it has been the subject of numerous legislative bills to alter the process suggests that there is room for improvement. However, it seems that much of the criticism has been a result of a failure to understand that the Supreme Court has a political nature; often those who would change the court feel it is not impartial when their own values are threatened by its decisions. Learned Hand once wrote:

> "..."
The words a judge must construe are empty vessels into which he can pour nearly anything he will.\textsuperscript{17} If the Supreme Court fails to function properly, it may well be the responsibility of the entire governmental process and not the fault of the court alone. The strength of the vessels which Hand mentioned is dependent upon the support of the other branches of government and the public, for without this support, the court truly has "...neither force nor will but merely judgment..."\textsuperscript{18}

\textsuperscript{17}Murphey and Pritchett, \textit{Courts, Judges and Politics}, p. 107.

\textsuperscript{18}Hamilton, Madison, and Jay, \textit{The Federalist Papers}, p. 465.
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<thead>
<tr>
<th>Nominee</th>
<th>Date of Nomination</th>
<th>Senate Action</th>
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<tbody>
<tr>
<td>William Paterson</td>
<td>February 27, 1793</td>
<td>Withdrawn</td>
<td>(Later renominated and confirmed 3/4/1793)</td>
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<tr>
<td>John Rutledge (CJ)*</td>
<td>July 1, 1795</td>
<td>Rejected</td>
<td>December 15, 1795</td>
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<td>Alexander Wolcott</td>
<td>February 4, 1811</td>
<td>Rejected</td>
<td>February 13, 1811</td>
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<td>John J. Crittenden</td>
<td>December 17, 1828</td>
<td>Postponed</td>
<td>February 12, 1829</td>
</tr>
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<td>Roger B. Taney</td>
<td>January 15, 1835</td>
<td>Postponed</td>
<td>March 3, 1835 later renominated for Chief Justice and confirmed 1/31/1844.</td>
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<td>John C. Spencer</td>
<td>January 9, 1844</td>
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<td>January 31, 1844</td>
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<td>Reuben H. Walworth</td>
<td>March 13, 1844</td>
<td>Postponed</td>
<td>June 17, 1844</td>
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<td>Edward King</td>
<td>June 5, 1844</td>
<td>Postponed</td>
<td>June 15, 1844</td>
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<td>December 4, 1844</td>
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<td>February 7, 1845</td>
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<td>John Read</td>
<td>February 7, 1845</td>
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<td>George W. Woodward</td>
<td>December 23, 1845</td>
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<td>January 22, 1846</td>
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<td>Edward A. Bradford</td>
<td>August 16, 1852</td>
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<td>George E. Badger</td>
<td>January 10, 1853</td>
<td>Postponed</td>
<td>February 11, 1853</td>
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<tr>
<td>William C. Micou</td>
<td>February 24, 1853</td>
<td>Not Acted Upon</td>
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<td>Jeremiah S. Black</td>
<td>February 5, 1861</td>
<td>Rejected</td>
<td>February 21, 1861</td>
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<td>Henry Stanberry</td>
<td>April 16, 1866</td>
<td>Not Acted Upon</td>
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### APPENDIX (Continued)

**SUPREME COURT NOMINEES WHO FAILED TO RECEIVE CONFIRMATION 1789-1970**

<table>
<thead>
<tr>
<th>Nominee</th>
<th>Date of Nomination</th>
<th>Senate Action</th>
<th>Date of Senate Action</th>
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<tbody>
<tr>
<td>Ebenezer L. Hoar</td>
<td>December 15, 1869</td>
<td>Rejected</td>
<td>February 3, 1870</td>
</tr>
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<td>George H. Williams (CJ)*</td>
<td>December 1, 1873</td>
<td>Withdrawn</td>
<td>January 8, 1874</td>
</tr>
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<td>Caleb Cushing (CJ)*</td>
<td>January 9, 1874</td>
<td>Withdrawn</td>
<td>January 13, 1874</td>
</tr>
<tr>
<td>Stanley Matthews</td>
<td>January 26, 1881</td>
<td>Not Acted Upon</td>
<td>(Later renominated and confirmed)</td>
</tr>
<tr>
<td>William B. Hornblower</td>
<td>September 19, 1893</td>
<td>Rejected</td>
<td>January 15, 1894</td>
</tr>
<tr>
<td>Wheeler H. Peckham</td>
<td>January 22, 1894</td>
<td>Rejected</td>
<td>February 16, 1894</td>
</tr>
<tr>
<td>John J. Parker</td>
<td>March 21, 1930</td>
<td>Rejected</td>
<td>May 7, 1930</td>
</tr>
<tr>
<td>Abe Fortas (CJ)*</td>
<td>June 26, 1968</td>
<td>Withdrawn</td>
<td>October 4, 1968</td>
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<td>Homer Thornberry</td>
<td>June 26, 1968</td>
<td>Not Acted upon</td>
<td></td>
</tr>
<tr>
<td>Clement F. Haynsworth</td>
<td>August 18, 1969</td>
<td>Rejected</td>
<td>November 21, 1969</td>
</tr>
<tr>
<td>Harrold Carswell</td>
<td>January 19, 1970</td>
<td>Rejected</td>
<td>April 8, 1970</td>
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*(CJ -- indicates Chief Justice nominee)*