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The Politics of Early Justice, Federal Judicial Selection, 1789-1861

Michael J. Gerhardt

University of North Carolina School of Law, gerhardt@email.unc.edu

Michael Ashley Stein

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The Politics of Early Justice: Federal Judicial Selection, 1789–1861

Michael J. Gerhardt & Michael Ashley Stein***

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* Samuel Ashe Distinguished Professor of Constitutional Law and Director of the Center on Law and Government, University of North Carolina School of Law.

** Visiting Professor, Harvard Law School, and Professor, William & Mary Law School.

I. INTRODUCTION

Almost every commentary on the history of the selection of federal judges presumes that there was some prior “golden era” in which Senators deferred reflexively to judicial nominations and national political leaders focused primarily on the merit of individual nominees and were not unduly swayed by partisan politics or ideology.¹ Particularly since the Senate’s rejection of Robert Bork’s nomination to the Supreme Court in 1987, commentators across the political spectrum have criticized the Senate for deviating from general deference to the President’s judicial nominations that they have asserted or assumed to have been the hallmark of judicial selection from its inception. Numerous constitutional scholars—and national leaders—have therefore roundly criticized the modern day judicial selection process, citing unprecedented delays and a low percentage of approval of federal court nominees as evidence that the system has broken down.² They have argued that the ways in which Senators, as well as Presidents, have handled lower court nominations in the modern era have deviated from how the nation’s first chief executives and the first few Senates handled such nominations.

Yet, there is one glaring error in almost all commentaries on disputes over judicial selection over the past few decades—the absence of any substantiation of an earlier, so-called “golden era” in which there actually was general deference within the Senate to Presidents’ nominations to federal district and appellate judgeships. Even the classic work on federal judicial selection by the late Kermit Hall begins its analysis of federal judicial selection in 1829, disregarding over 40 years of prior practices in the field and

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1. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 3–22 (1994); RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 3–13 (2005); Theodore B. Olson, *The Senate Confirmation Process: Advise and Consent, or Search and Destroy?*, in 15 GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY 9–23 (Tim O’Brien ed., 2005).

2. See, e.g., CHARLES PICKERING, SR., *SUPREME CHAOS: THE POLITICS OF JUDICIAL CONFIRMATION & THE CULTURE WAR* (2005); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL’Y 1035, 1038–39 (2009); Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2234–35 (2013); Laurel Bellows, *Judicial Emergencies Worsen as Partisanship Stalls Nominations in the Senate*, A.B.A.J. (July 1, 2013, 9:40 AM), http://www.abajournal.com/magazine/article/judicial_emergencies_worsen_as_partisanship_stalls_nominations_in_the_senate/; Editorial, *Filibustering Nominees Must End*, N.Y. TIMES (Jan. 28, 2012), <http://www.nytimes.com/2012/01/29/opinion/sunday/filibustering-nominees-must-end.html>; Edmund H. Mahony, *Shortage of Federal Judges Stressing the System*, HARTFORD COURANT (Dec. 2, 2012, 6:14 PM), <http://www.courant.com/news/politics/hcp-federal-judges-shortage-20121203,0,184099.story>.

reinforcing the received, but unsubstantiated, assumptions about how judicial nominations to lower courts fared beforehand.³

It is tempting to oversimplify, discount, mythologize, or simply ignore the early history of federal judicial selection. Because the Senate confirmed the vast majority of judicial nominations prior to the Civil War, one might be inclined to think that the system must have been working ideally, or at least as it was intended, with paramount importance attached to a nominee's integrity and qualifications. Such a conclusion is especially alluring when considering, as we do here for the first time in the literature, the relative success rate of judges nominated during the last six months of a presidential term. However, the real story is much more nuanced and contextually dependent. The fact that the Senate confirmed most judicial nominations during the first seven decades of the Republic period does not recount the full story of antebellum federal judicial selection. It was neither a "golden era" nor perfectly analogous to our modern one. In fact, the means by which Presidents could communicate with their nominees was quite limited, resulting sometimes in the nomination of the wrong people, the nominations of the right people but to the wrong courts, and the confirmations of nominees who subsequently withdrew for personal or financial reasons. These miscues have little or no salience in the modern era in which the White House, the Federal Bureau of Investigation ("FBI"), the American Bar Association ("ABA"), round-the-clock media coverage, and numerous interest groups all help or join with the well-staffed Senate Judiciary Committee to vet judicial nominees. Hence, there is more emphasis today on processes filtering out potentially problematic nominees, including the significant time lapse in reaching Senate consideration. Nor was the antebellum Senate uniformly or reflexively deferential, occasioning the forced withdrawals of some nominees, rejections based on concerns about the nominees' integrity, or their positions on the hot-button issues of the day—most importantly, slavery. There was deference, but it was not automatic. Further, there was no systematic or sustained consensus on "merit." Judicial nominations were often made to reward political allies, and opposition fomented to punish political foes. Political and ideological concerns were almost always a backdrop, if not expressly important factors, in the dynamics of the judicial nomination and confirmation process during the pre-Civil War period. Strikingly, despite the existence of a greater absolute number of judicial seats (and allegedly more bitter politics), the ultimate percentage of confirmed nominees between the antebellum period and the modern one is comparable. Moreover, the confirmation process in each of these eras largely functioned as it was designed by the Framers and paid special attention to nominees who lacked integrity or were obviously unqualified or unsuited for the bench.

3. See generally KERMIT L. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM*, 1829–61 (1979).

To be sure, few scholars actually make the unqualified claim that there was a specific “golden era” of apolitical federal judicial appointments. However, the overwhelming majority of scholarship that addresses the nomination and confirmation process waxes nostalgically on some elusive era wherein the process functioned more perfectly. For example, Benjamin Wittes, in his widely-cited book *Confirmation Wars*, states that “[t]he general trend at the lower-court level . . . is that the ability of presidents to win confirmation for their judicial nominees has eroded steadily since the mid-1980s.”⁴ Critics of the current system often point to the increased politicization of the process as the cause of departure from some prior “golden era.” The ideal approach to federal judicial selection would presumably focus primarily, if not exclusively, on personal qualifications, integrity, and strength of character in place of the apparent current preoccupation with political party affiliation. In fact, the process has never had that kind of focus, and a closer look at the early years of judicial selection reveals an era of controversial nominations that was by no means halcyon.

This Article is the first to make a serious comprehensive historiography of federal judicial selection from 1789 to 1861 in the United States. We identified each of the lower court nominations made by Presidents, from George Washington through James Buchanan, and then tracked the Senate’s actions on each of their nominations through both archival and secondary sources. Further, we identified the criteria employed in the first seven decades of judicial nominations, as well as the outcomes of, and grounds for, the Senate’s proceedings for all of these nominations. We believe that the results of this unprecedented study are significant because they provide a window into an era of early federal judicial selection that has been virtually ignored by both commentators and national political leaders. While we identified some antiquated practices, such as several of the earliest Presidents’ judicial nominees actually declining judgeships *after* the Senate had confirmed their nominations, we found other patterns of practice that are similar to contemporary developments. Among the most significant of these latter patterns are the facts that: every antebellum President took political considerations into account in making nominations; all antebellum Presidents, with the exception of William Henry Harrison, had most of their judicial nominations confirmed by the Senate; and three antebellum Presidents—George Washington, Martin Van Buren, and James Polk—enjoyed Senate confirmation of 100% of their judicial nominations. Yet, political parties, particularly in times of divided government, often split along party lines in judicial confirmation proceedings, and several judicial nominations in the antebellum period failed because of opposition based on the particular nominees’ ideologies or past political decisions.

4. BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 41 (2006).

The Article proceeds as follows. In Part II, we provide an overview of federal judicial selection from 1789 to 1861. We describe the basic allocation of power and patterns relating to early federal judicial selection and provide a table setting forth a complete list of the failed judicial nominations during this period and the likely reasons for their failures. Part III, the heart of the Article, examines in detail the judicial nominations made by every President from Washington through Buchanan. For each President, we include a table setting forth each of his failed nominations, including information on the composition of the Senate at the time. In Part IV, we analyze how the data in the previous Part illuminate our understanding of federal judicial selection. Perhaps most importantly, the data indicate how Presidents and Senators in this early era used judicial nominations to advance their political agendas and, particularly, how the Senate approved them when those agendas aligned with those of a majority of Senators and rejected them when they did not. Consequently, the early history of federal judicial selection provides a glimpse not only into how the selection process used to be, but also how it was likely to evolve. We conclude our analysis by comparing and contrasting the processes of the antebellum period and those of the contemporary period. The extent to which the process is different now is the product or culmination of many different forces. Not the least of these are: technological developments, which have improved the dissemination of information about nominees; the increased workload of the Senate and capacity to process it; the expansion of judicial review over time and corresponding consensus on the importance of judicial appointments; and the inevitable extent to which nominees have become proxies or substitutes for differences or fights over other issues. In short, there was neither a “golden era” of Senate deference to judicial nominations nor a focus strictly on merit separated from ideology and partisan concerns, but rather, different eras in which politics, in different ways, shaped federal judicial selection.

II. AN OVERVIEW OF EARLY FEDERAL JUDICIAL SELECTION

The basic process for making judicial appointments during the Republic’s first seven decades was, of course, the same as it is today. Pursuant to Article II, the President makes judicial nominations, which are subject to the Senate’s “Advice and Consent.” By virtue of its Article I powers, Congress created and sometimes abolished the inferior judicial tribunals to which the President made judicial nominations.

Virtually all the criteria that Presidents used in making judicial nominations served some political purpose. For example, many judicial nominees had close ties not only to the Presidents who nominated them, but also to certain Senators. From George Washington’s administration on, many Senators believed that, by virtue of their power to give “Advice” on nominations, the Constitution required Presidents to consult with them prior to formally making nominations, including ones to Article III courts.

Presidents pushed back, and the give-and-take between them and the Senate gave rise to the norm of senatorial courtesy, which entailed the President deferring to Senators' suggested nominations to posts of critical concern to them, including judgeships located in their respective states.⁵ Because of this norm, which first developed during George Washington's presidency, a number of early judicial nominations included people who had close ties to or were likely to curry favor with key Senators. Moreover, during this period, the Senate had no Judiciary Committee and sat as a committee of the whole to consider judicial nominations. The absence of a Judiciary Committee meant there was one less veto-gate that judicial nominations had to maneuver and thus, were more likely to be debated and voted on the floor of the Senate during this period.

A second critical factor common to almost all the nominations made to lower courts from 1789 to 1861 had to do with the nominees' political background. Oftentimes, this entailed service to the President(s) or Administration(s) nominating them. Consistent with judicial nominations made after 1861, judicial nominees largely came from the same political parties as the Presidents who nominated them.⁶ But, at the same time, the political affiliation of a nominee was a necessary but not a sufficient condition for a nomination. There usually had to be some personal connections to Presidents, including but not limited to service in their administrations or close ties to cabinet officers or Senators with keen interests in the judgeships being filled.

From 1789 to 1861, America's Presidents made a total of 254 judicial nominations, of which 37 failed for some reason. The tables⁷ below list all the judicial nominations that failed during this period:

5. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 143-52 (2003).

6. From 1789 to 1861, the main political parties in the United States were the Federalists (which ceased to exist around 1816), the Democratic-Republicans (which later split between the Democratic Party and the National Republican Party, which in turn became the Whigs), the Whigs (which existed from 1833 to 1860 and eventually was folded into and became a part of the Republican Party), and the Democrats.

7. The tables are compiled from historical data on file with the authors. The nominee's political party is abbreviated as follows: D for Democrat, DR for Democratic-Republican, F for Federalist, FS for Free Soiler, NR for National Republicans, R for Republican, and W for Whig. Abbreviations have also been made for the nominee's "Experience" as follows: Att'y for Attorney, CC for Continental Congress, Const'l Convent'n for Constitutional Convention, Ct. for Court, Gov. for Governor, Lt. for Lieutenant, Sup. for Supreme, and USSC for United States Supreme Court.

George Washington								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Thomas Johnson, 1732-1819	D.C. Md.; C.J. D.C. Circuit	F	Declined: Preferred state, vowed to decline appointments	N/A	1789	CC, Gov. of MD, Justice on USSC	Lawyer	Informal
Edmund Pendleton, 1721-1803	D.C. Va.	F	Declined: Wanted to remain on state bench	Poor	1789	CC, VA House of Burgesses	Lawyer	Informal
Thomas Pinckney, 1750-1828	D.C.S.C.	F	Declined: Domestic affairs took priority after he had returned from overseas	Aristocrat	1789	Gov. of SC, soldier	Lawyer	Middle Temple
William Davie, 1756-1820	D.C.N.C.	F	Declined: Salary too low, not worth it	Modest	1790	CC, Gov. of NC, NC House, soldier	Lawyer	Queen's Museum College
Richard Harrison, N/A	D.C.N.Y.	F	Declined: Poor health	N/A	1794	U.S. Att'y	Lawyer	N/A

John Adams								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Richard Bassett, 1745-1815	3d Circuit	F	Other: Midnight appt., lost seat when court abolished, never again held public office; farmer in MD 1802-1815	Poor, father owned a tavern; inherited wealth from mother's family	1801	Delegate to Const'l Convent'n, Gov. of DE, soldier, state judge, U.S. Senator	Lawyer	Informal
Thomas Bee, 1739-1812	5th Circuit	F	Declined: Already Chief Judge of the district court	N/A	1801	CC, district ct. judge, Lt. Gov. of SC	Lawyer	Oxford
Egbert Benson, 1746-1833	2d Circuit	F	Other: Midnight appt., lost seat - left politics, founded U.S. Historical Society	N/A	1801	Congress, NY Att'y General, NY Const'l Convent'n, NY Sup. Ct. justice	Lawyer	King's College
Benjamin Bourne, 1755-1808	1st Circuit	F	Other: Midnight appt., lost seat - afterwards, he left public life uneventfully, returned to private practice	Wealthy, influential	1801	Congress, General Assembly, R.I. U.S. District Ct. judge,	Lawyer	Harvard
Thomas Gibbons, 1757-1826	D.C. Ga.	F	Technicality: Didn't receive valid commission, Jefferson did not correct it even though it had been promised, Clay didn't vacate	Wealthy plantation owner	1801	Campaign manager, mayor	Lawyer	Informal

John Adams, continued								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Ray Greene, 1765-1849	D.C.R.I.	F	Technicality: Misabeled commission assigned him to circuit court, Jefferson did not correct the commission	N/A	1801	R.I. Att'y General, U.S. Senator	Lawyer	Yale
William Griffith, 1766-1826	3d Circuit	F	Other: Midnight appt., lost seat when court abolished	N/A	1801	State assemblyman	Lawyer	Informal
William Hill, 1767-1809	D.C.N.C.	F	Technicality: Commission for an unvacated office, Sigreaves did not accept his promotion, Jefferson withdrew it	Wealthy plantation owner	1801	Congress, U.S. Att'y	Lawyer	N/A
Samuel Hitchcock, 1757-1826	2d Circuit	F	Other: Midnight appt., lost seat - spent most of 1803 in debtors' prison	N/A	1801	State Rep., VT Att'y General	Lawyer	Harvard
Jared Ingersoll, 1749-1822	3d Circuit	F	Declined: Unknown, but postulated that he foresaw the impending repeal of the Judiciary Act	Prominent	1801	CC, U.S. Att'y	Lawyer	Yale; LLD, Middle Temple
Philip Key, 1757-1815	4th Circuit	F	Other: Midnight appt., lost seat when court abolished, served three Congresses, beginning in 1807	N/A	1801	British soldier in Revolution, Congress, state delegate	Lawyer	Middle Temple
Charles Lee, 1758-1815	C.J. of 4th Circuit	F	Declined: Possibly disagreed with midnight appt./ anticipated repeal of Judiciary Act	Prominent	1801	Customs collector, soldier, U.S. Att'y General	Lawyer	Princeton
John Lowell, 1743-1802	1st Circuit	F	Other: Midnight appt.; died 1802	Prominent: First Family of Boston	1801	CC, MA Const'l Convent'n, militia major, State Senator	Lawyer	Harvard
Charles Magill, 1759-1827	4th Circuit	F	Other: Midnight appt., lost seat when court abolished, served in VA State Senate and worked in private practice	Prominent	1801	Army colonel, planter, State Senator	Lawyer	Informal

John Adams, continued								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
William McClung, 1758-1811	6th Circuit	F	Other: Midnight appt., lost seat when court abolished, judge for KY Circuit	N/A	1801	Rep., State Senator	Lawyer	Washington College
Jacob Read, 1752-1816	D.C. S.C.	F	Technicality: No vacant office for Read to fill after Bee declined a promotion	Wealthy	1801	CC, soldier, U.S. Senator	Lawyer	England
John Sitgreaves, 1757-1802	5th Circuit	F	Declined: Threats to repeal Judiciary Act, already district court judge	N/A	1801	CC, NC House, U.S. Att'y	Lawyer	Eton
Jeremiah Smith, 1759-1842	1st Circuit	F	Other: Midnight appt., lost seat; became MA Supreme Court justice 1802	N/A	1801	Congress, Gov. of NH, soldier, U.S. Att'y	Lawyer	Harvard, Queens College
George Keith Taylor, 1769-1815	4th Circuit	F	Other: Midnight appt., lost seat when court abolished, returned to private practice	Modest estate	1801	VA state delegate	Lawyer	William and Mary
William Tilghman, 1756-1827	3d Circuit	F	Other: Midnight appt., lost seat when court abolished, returned to private practice	Father was plantation owner	1801	Chief Justice of PA Sup. Ct., delegate, State Senator, University of PA trustee	Lawyer	College of Philadelphia
Oliver Wolcott, Jr., 1760-1833	2d Circuit	F / DR	Other: Midnight appt., lost seat when court abolished, began negotiating new employment before the Repeal Act had passed	Modest	1801	Farmer, Gov. of CT, Secretary of Treasury, soldier	Lawyer	Yale

Thomas Jefferson								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Theodore Gaillard, 1805-1893	5th Circuit	DR / W	Declined: "Imperious circumstances of a private nature"	Prominent Influential	1801	Presidential elector, Speaker of State House	Lawyer	Middle Temple; Columbia
Henry Brockholst Livingston, 1757-1823	D.N.Y.	DR	Declined: Reason unknown. He was confirmed but did not take the bench. In 1806, he was confirmed for a seat on the USSC	Large wealthy NY family	1805	Gov. of NJ, NY Sup. Ct., soldier	Lawyer	Princeton

Thomas Jefferson, continued								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Daniel Tompkins, 1774-1825	D.N.Y.	DR	Declined: Preferred his job on NY Sup. Ct. because it paid better, was better for his health, same tenure	Farmer	1805	Const'l Convent'n, Gov. of NY, Vice President	Lawyer	Columbia

James Madison								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Thomas Parker, 1760-1820	D.S.C.	DR	Declined: Cited duty to introduce his sons to the legal profession	Prominent	1812	Soldier, U.S. Att'y	Lawyer	N/A
Theodore Gaillard, 1805-1893	D. La.	DR / W	Declined: Reasons unknown	Prominent Influential	1813	Presidential elector, Speaker of State House	Lawyer	Middle Temple, Columbia

James Monroe								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Thomas U.P. Charlton, 1779-1835	D. Ga.	D	Declined: Reasons unknown	Son of a surgeon	1821	Author, GA Att'y, General, State Legislature, state judge	Lawyer	N/A

John Quincy Adams								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Philip Clayton Pendleton, 1779-1863	W.D. Va.	D	Accepted recess appointment; declined permanent appointment after resigning from recess appointment: Tried serving on a court during a recess appointment, didn't have strength or health to serve, resigned	Farmer	1825	Board of commissioners for UVA, Lawyer	Lawyer	Princeton
Daniel Smith, N/A	W.D. Va.	D	Declined: Declines after considering nomination for two months	N/A	1825	Judge of VA's 11th Circuit	N/A	N/A
Israel Pickens, 1780-1827	D. Al.	D	Declined: Declines in favor of serving as a Senator	Family of farmers, modest	1826	Gov. of AL, U.S. Senator	Lawyer	Washington and Jefferson College

John Quincy Adams, continued								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
William Creighton, Jr. , 1778-1851	D. Oh.	DR / W	Rejected: Held court briefly before rejected for partisan reasons; saving vacancies for Jackson, declined to confirm	N/A	1828	Congress	Lawyer	Dickinson College
Henry Gurley , N/A	D. La.	NR	Rejected: ⁸ Senate (closed doors) decided not to decide on it during present session, in effect rejecting it. Likely reason is that Jacksonian Senators wanted to keep vacancy open for Jackson	N/A	1829	N/A	N/A	N/A

Andrew Jackson								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Benjamin Tappan , 1773-1857	D. Oh.	D	Rejected: ⁹ Held court briefly, opposed by Whigs and southerners due to sympathy with slaves, might not enforce Fugitive Slave Act, partisan	Father was a pastor, goldsmith, and later merchant	1833	President Judge of OH's 5th Circuit, soldier, State Senator	Lawyer	Public school education and apprentice

John Tyler								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Abner Nash Ogden , 1809-1875	D. La.	W	Declined: Preferred serving on state Sup. Ct.	N/A	1841	LA Sup. Ct.	N/A	N/A

8. See S. EXEC. JOURNAL, 20th Cong., 2d Sess. 645 (1829); see also *infra* notes 145-48 and accompanying text.

9. See S. EXEC. JOURNAL, 23d Cong., 1st Sess. 412 (1834). The Senate rejected Tappan's nomination on a largely party-line vote, 28 to 11. Of the 11 ayes, 10 were Jacksonian and 1 was Anti-Jacksonian (White of Tennessee). Of the 28 nays, there were 23 Anti-Jacksonians, 2 non-affiliated Senators (Calhoun and Preston of South Carolina), and 3 Jacksonians (King of Georgia, Bibb of Kentucky, and Linn of Missouri). See *id.* (additional information on file with authors).

John Tyler, continued								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Horace Binney, 1780–1875	E.D. Pa.	NR	Declined: Inferior judicial station, heart not in it, cured of all ambition when Gibson was appointed over him, didn't like Tyler	Elite, esteemed, prestigious	1842	Congress, declined offer to PA Sup. Ct., USSC	Lawyer	Harvard
Thomas Bradford, 1745–1838	E.D. Pa.	W	Rejected: ¹⁰ He was a Whig but didn't act in the best interest of the party, Whigs didn't want anyone aligned with Tyler, too politically involved	Respected: Father was a publisher, grandson of an infamous Revolution- ary War hero	1842	Lawyer, soldier	Lawyer	College of Philadel- phia
Charles Dewey, 1793–N/A	D. Ind.	D	Declined: Pay was better working state Supreme Court	Father an eminent lawyer and judge	1842	District Att'y, MA House and Senate, MA Sup. Ct.	Lawyer	Williams College
John Beverly Christian, 1796–1856	E.D. Va.	W	Rejected: ¹¹ Party vote, didn't like family ties, Whigs wanted to spite Tyler, felt he was too involved in politics	Prominent, influential	1844	Judge of Williams- burg Circuit, Senator	Lawyer	William and Mary
Robert R. Collier, 1805–1870	E.D. Va.	R	Rejected: ¹² Rejected along party lines, lots of enemies, support of annexation for TX and states' rights not popular, questionable character	Prosperous	1844	Lawyer, VA Legislature	N/A	UVA

10. See S. EXEC. JOURNAL, 27th Cong., 2d Sess. 32 (1842). Bradford's nomination failed 22 to 17. Of the 22 nays, 21 were Whigs and 1 was a Democrat. Of the 17 ayes, 11 were Democrats and 6 were Whigs. See *id.* (additional information on file with authors).

11. See S. EXEC. JOURNAL, 28th Cong., 1st Sess. 342 (1844). The Senate rejected Christian's nomination 24 to 20. Of the 24 nays, all were Whigs, while of the 20 ayes, 18 were Democrats, 1 was a Law and Order Senator, and 1 was a Whig—Daniel Tallmadge, who resigned two days later to become the Governor of Wisconsin. The Senate proceeded to reconsider the vote of Christian's nomination immediately after its initial failure, failing 23 to 16 on a party-line vote, with 23 Whigs voting nay, against 15 Democrats and 1 Law and Order Senator voting aye. See *id.* (additional information on file with authors).

12. See S. EXEC. JOURNAL, 28th Cong., 1st Sess. 349 (1844). The vote on Collier's nomination was not up or down on the nomination, but rather, to "lie [the nomination] on the table." The vote passed 24 to 15. In the ayes were 16 Whigs, 7 Democrats, and 1 Law and Order Senator. Of the nays, 9 were Democrats, and 6 were Whigs. See *id.* (additional information on file with authors).

Zachary Taylor								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
James G. Campbell , N/A	D. La.	W	Declined: Salary was not enough to justify all the travel	N/A	1849	Helped win election, state circuit ct. judge	Lawyer	N/A
John Kingsbury Elgee , N/A	W.D. La.	W	Declined: Preferred lucrative law practice and plantations	First generation Irish immigrant	1849	State circuit ct. judge, wealthy because of sugar	Lawyer	N/A

Millard Fillmore								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
Judah Philip Benjamin , 1811-1884	N.D. Cal.	W / D	Declined: Preferred state politics, his plantation, and potential opportunity in the Senate, CA unattractive	Wealthy	1850	Lawyer, State House	Lawyer	Yale
John P. Healey , 1810-1882	S.D. Cal., N.D. Cal.	D	Declined: Private and domestic reasons, didn't want to be separated from his father	Father a prominent lawyer	1850	City solicitor, corporation counselor	Lawyer	Dartmouth
John Currey , N/A	N.D. Cal.	FS / R	Rejected: Accusations of immorality, abolitionism, theft, opposition was strong, seen as a scoundrel. Nominated a second time. Senate voted to table the nomination, effectively rejecting it	N/A	1850, 1851	Lawyer	Lawyer	Middle-town College

Franklin Pierce								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
George Washington Hopkins , 1804-1861	Chief Judge of D.C. Circuit	D	Declined: Declined to be considered after a recess appointment	Modest, school teacher	1855	Congress, State Legislature	Lawyer	Common schools

James Buchanan								
Appointee	District	Party	Outcome & Reason	Origin	Year	Experience	Career	Education
John Pettit , 1807-1877	D. Kan.	D	Rejected: Too involved in slavery issues, no vote was taken, Senate did not send it to Judiciary Committee	School teacher	1861	Congress, KS Sup. Ct., State House, U.S. District Att'y	Lawyer	Indiana

As these tables illustrate, there were three prevailing explanations for failed nominations. The most commonly cited justification for a failure was something personally problematic to the nominee that does not appear to involve anything political. Indeed, 16 of the failed nominations—nearly half of all those during the period from 1789 to 1861—failed for personal reasons, including insufficient pay to entice the person to leave his current position, the person’s family needed them, or the person found his current position to be more interesting. For example, John Davis, the District Attorney for Massachusetts during Adams’s presidency, refused to be considered for a judgeship after “discover[ing] the diminished duties and lower salary of the district judges.”¹³ The second-most common reason for the failure of nominations during this period was political. Ten of the failed nominations failed for political reasons, including the nominee’s position on, or support for, unpopular or controversial policies. One other nomination appears to have failed for ethical reasons; for example, Senators considered the nominee to lack the integrity required for judicial service. The third-most common explanation for failure was a mistake. At least three nominations failed because the judgeship was already filled or did not exist. Obviously, this specific basis for failure is the least likely to recur in modern times because records are likely to be better maintained or nominees or national leaders are likely to be better informed. Otherwise, nominations failed for reasons that cannot be documented. Indeed, we know of two nominees who declined judgeships, but there are no records indicating why they declined them.

III. JUDICIAL NOMINATIONS FROM 1789 TO 1861

From 1789 to 1861, there were 15 different Presidents. Of these, William Henry Harrison and Zachary Taylor died in office, and thus, their Vice Presidents, John Tyler and Millard Fillmore, completed their respective terms. While the Senate confirmed five of Taylor’s six judicial nominations before he died, Harrison served barely a month in office and did not have the opportunity to make a full slate of judicial nominations, much less have the Senate act on them while he was President. For the 14 other Presidents, we have detailed records of their judicial nominations, which we discuss in the following Subparts.

A. *GEORGE WASHINGTON AND JOHN ADAMS, 1789–1801*

The nation’s first two Presidents, George Washington and John Adams, were both Federalists, who appointed the country’s first Article III judges. President Washington deliberately and purposely chose well-known, popular nominees who could be trusted with the duties of the judiciary, making

13. Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 500 (1961).

“extensive inquiries about the candidates for posts in the judicial system.”¹⁴ In a letter to William Cushing, one of the Supreme Court’s original members, Washington called “the Judicial System . . . the chief-Pillar upon which our national Government must rest.”¹⁵ Washington wanted “to choose judges ‘from among the most eminent and distinguished characters in America.’”¹⁶ Washington made 43 judicial nominations, of which five failed.¹⁷ That Washington’s party controlled the Senate during each of his two terms—holding an 18 to 8 advantage in the first¹⁸ and a 16 to 14 advantage in the second¹⁹—undoubtedly helped their confirmations. Of course, President Washington occupied the unique position of filling every judicial vacancy at the time. As the first President, he received the initial opportunity to appoint people to the Supreme Court and every other Article III court. Nonetheless, his record was not perfect. Although he appointed 11 people to the Supreme Court, the Senate rejected his nomination of John Rutledge as the second Chief Justice based on his controversial defense of the Jay Treaty and doubts about his sanity.²⁰

All of President Washington’s judicial nominees were ardent Federalists, who were committed to the Constitution’s ratification and implementation. Many of them had served in leadership positions during the Revolution, represented their respective states at the Constitutional Convention, and served as judges in the higher-level state courts. For instance, David Brearley, who had served as a judge in the District Court of New Jersey, previously held the position of Chief Justice of the New Jersey Supreme Court, and he had been a delegate to the 1787 Constitutional Convention after serving in the Continental Army.²¹ John Stokes, who served as a judge in the District of North Carolina, had previously served as a captain in the Continental Army and was later a member of the North Carolina State Senate, the North Carolina House of Commons, and a member of the North Carolina

14. 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 79 (W.W. Abbot et al. eds., 1993).

15. *Id.* at 78.

16. PETER GRAHAM FISH, FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789–1835, at 15 (1977) (citation omitted).

17. *History of the Federal Judiciary, Biographical Directory of Federal Judges, 1789–Present*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 17, 2014) (follow “Select research categories” hyperlink; select “Nominating President”; click “Continue”; select “George Washington” from the drop-down menu; then click “Search”).

18. *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/page/layout/history/one_item_and_teasers/partydiv.htm (last visited Nov. 17, 2014).

19. *Id.*

20. GERHARDT, *supra* note 5, at 51–52.

21. *History of the Federal Judiciary, Biographical Directory of Federal Judges: David Brearley*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=246&cid=999&ctype=na&instat=na> (last visited Nov. 17, 2014).

Convention to ratify the Constitution.²² William Lewis, who received a recess appointment to serve as a judge in the U.S. District Court in the District of Pennsylvania, previously worked as a Representative in the Pennsylvania State Legislature, and was the U.S. Attorney for the District of Pennsylvania.²³

Each of Washington's five failed nominations failed for the same reason—the personal desire to remain in a current position, rather than undertake a position in the newly formed federal judiciary. For example, Edmund Pendleton, nominated to the newly formed Virginia District Court, preferred to continue serving on the state court.²⁴ Similarly, Thomas Johnson declined his appointment to the District Court of Maryland to continue working in state politics.²⁵ Thomas Pinckney refused to join the District Court in South Carolina on the grounds that he had a “numerous family & that [his] affairs [were] so situated as to require . . . immediate & unremitted exertions.”²⁶ Richard Harrison declined his appointment to the Maryland District Court due to poor health.²⁷ William Davie declined to work as a judge in the newly created District of North Carolina, partly because “of its ‘paltry salary.’”²⁸ Although each failure resulted from a different set of circumstances and each nominee gave different reasons for declining the federal judgeship, each nomination implicitly reflected the reputation, or lack thereof, of the federal judiciary. Political posturing played less of a role than personal preference. Johnson and Washington were close friends—Johnson delivered a eulogy at Washington's funeral²⁹—and Davie later became a U.S. Senator from North Carolina. The decisions of Pendleton and Johnson to remain on the state courts, and even of Davie to forego a federal judgeship, reflect the

22. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Stokes*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2298&cid=999&ctype=na&instate=na> (last visited Nov. 17, 2014).

23. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Lewis*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1395&cid=999&ctype=na&instate=na> (last visited Nov. 17, 2014).

24. Richard S. Arnold, Isaac Marks Memorial Lecture, *Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473, 486–87 (1996).

25. FISH, *supra* note 16, at 10. Johnson and the President knew one another quite well. *Id.* (“Johnson, as a delegate to the second Continental Congress, had nominated Washington for commander-in-chief of the army and . . . led the Maryland militia as part of Washington's Continental Line in New Jersey.”).

26. 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 14, at 79.

27. *Id.* at 79–80.

28. FISH, *supra* note 16, at 14 (citation omitted). Davie had previously served in the cavalry during the Revolution before representing North Carolina at the Constitutional Convention. *Id.* at 13. He later was elected nine times to the North Carolina House of Commons before being elected Governor of North Carolina.

29. EDWARD S. DELAPLAINE, THE LIFE OF THOMAS JOHNSON: MEMBER OF THE CONTINENTAL CONGRESS, FIRST GOVERNOR OF THE STATE OF MARYLAND, AND ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 507 (1927).

more elevated stature that state governments and elected public offices played at the time.

The lack of appeal of occupying a federal judgeship bothered Washington. Knowing that the legitimacy of the federal judiciary was at stake, President Washington wrote:

[I]n appointing persons to office, & more especially in the Judicial Department, my views have been much guided to those Characters who have been conspicuous in their Country; not only from an impression of their services, but upon a consideration that they had been tried, & that a readier confidence would be placed in them by the public than in others, perhaps of equal merit, who had never been proved.³⁰

Edmund Pendleton's decision to remain at the head of the Virginia judiciary "embarrassed Washington Moreover, Washington could not afford to let a federal judgeship be declined a second time. That would tend to lower the position in the eyes of the people."³¹ After Pendleton declined his appointment, Washington wanted to nominate George Wythe. However, his fear that Wythe would decline an appointment led Washington to abandon his strategy of nominating the man he believed best fit the job in favor of the less prominent, more certain appointment of Cyrus Griffin.³² After Johnson declined his appointment as district judge, Washington wrote to James McHenry:

I am unwilling to make a new appointment of Judge for that District until I can have an assurance, or at least a strong presumption, that the person appointed will accept; for it is to me an unpleasant thing to have Commissions of so important a nature returned; and it will in fact have a tendency to bring the Government into discredit.³³

Compared to Washington, John Adams was more overtly partisan in nominating judges, particularly in the closing weeks of his term in early 1801. Immediately before Adams's term expired, "Congress passed the Judiciary Act of 1801, [which created] sixteen new federal circuit judgeships" and was engineered to allow Adams to fill the new vacancies with Federalist-supporters before he left office.³⁴ At least 13 of these judges were left without judgeships following the repeal of the Judiciary Act in March of 1802. While not officially categorized as "failed nominations," the "midnight" judges demonstrate the

30. 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, *supra* note 14, at 79 (letter to William Fitzhugh, Dec. 24, 1789).

31. ROBERT LEROY HILLDRUP, THE LIFE AND TIMES OF EDMUND PENDLETON 307 (1939).

32. *Id.*

33. H.H. WALKER LEWIS, THE UNITED STATES DISTRICT COURT OF MARYLAND 5 (1977) (quoting a letter written to James McHenry from George Washington).

34. Jed Glickstein, Note, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 544 (2012).

profound impact of political partisanship on judicial selection at a very early point in our nation's history.

Even with the help of Chief Justice and Secretary of State John Marshall, President Adams struggled to appoint the 13 "midnight" district judges who were subsequently confirmed by the Senate.³⁵ Charles Pinckney told Jefferson that the prevailing sentiment in South Carolina was that the Judiciary Act would be repealed or greatly altered, and this "produce[d] a [g]eneral indisposition on the part of qualified men to accept."³⁶ Despite nominees' reservations, Benjamin Bourne, John Lowell, and Jeremiah Smith were confirmed to the First Circuit; Egbert Benson, Samuel Hitchcock, and Oliver Wolcott, Jr. to the Second Circuit; Richard Bassett, William Griffith, and William Tilghman to the Third Circuit; Philip Key, Charles Magill and George Keith Taylor to the Fourth Circuit; and William McClung to the Sixth Circuit.³⁷ All of these judges lost their positions following the repeal of the Judiciary Act during Jefferson's presidency; however, these men are also notable for the ways in which they achieved their nominations.

President Adams continued his predecessor's practice of nominating well-known, well-respected public servants to serve in the federal judiciary. For example, Benjamin Bourne, whom Adams had nominated to the newly created First Circuit,³⁸ had studied at Harvard before working at the Rhode Island General Assembly.³⁹ Bourne then served as a U.S. Representative from Rhode Island.⁴⁰ Immediately before his nomination, Bourne had served as a judge on the U.S. District Court in Rhode Island.⁴¹ Unfortunately, Bourne lost his position as a district judge less than a year after his confirmation due to the repeal of the Judiciary Act. After initially supporting a plan to recover his judgeship, he "left public life more or less uneventfully."⁴² Similarly, George Keith Taylor, whom Adams had nominated to the Fourth Circuit,⁴³ had been a member of the Virginia House of Delegates prior to his judicial appointment.⁴⁴

35. Turner, *supra* note 13, at 495–96.

36. Glickstein, *supra* note 34, at 549 (alteration in original) (quoting Letter from Charles Pinckney to Thomas Jefferson (May 26, 1801), in 34 THE PAPERS OF THOMAS JEFFERSON 186, 186 (Barbara B. Oberg ed., 2007)) (internal quotation marks omitted).

37. Glickstein, *supra* note 34, at 547.

38. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Benjamin Bourne*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=219&cid=999&ctype=na&instate=na> (last visited Nov. 18, 2014).

39. *Id.*

40. *Id.*

41. *Id.*

42. Glickstein, *supra* note 34, at 576.

43. *History of the Federal Judiciary, Biographical Directory of Federal Judges: George Keith Taylor*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2348&cid=999&ctype=na&instate=na> (last visited Nov. 18, 2014).

44. *Id.*

In addition to allowing political bias to affect his nominations, President Adams was also swayed by personal connections; he and his advisors often had personal or family ties to nominees, and often, the recommendations of a state's senators or representatives were influential on Adams's decisions. In the case of Jeremiah Smith's nomination to the First Circuit, Smith himself vigorously campaigned for office, and his efforts were supplemented by the support of five New Hampshire Senators who recommended him for a judgeship.⁴⁵ Following his confirmation, Smith wrote a letter to John Marshall stating that he was "particularly grateful" to Marshall for the role that Smith believed he had played in his appointment.⁴⁶ John Lowell, the final "midnight" judge appointed to the First Circuit, was nominated because of his distinguished Federalist political career and "assured acceptance" of the post.⁴⁷

Backed by a Senate in which his Federalist Party controlled 22 of the 32 seats, Adams made a total of 31 judicial nominations, of which eight failed.⁴⁸ All eight of the failed nominations had been made as part of his effort to stack the federal judiciary with loyal Federalists on the eve of Thomas Jefferson's inauguration. Although Adams gave all eight nominees recess appointments, three declined their appointments. The latter nominees likely decided to stay in their current positions because they expected Jefferson and his fellow Republicans to repeal or abolish the judgeships to which they had been appointed. For instance, prior to being nominated to the Fifth Circuit, John Sitgreaves served as a district court judge in North Carolina, having also spent time as the U.S. Attorney for the District of North Carolina.⁴⁹ Sitgreaves also served in the Continental Army as a lieutenant and was a North Carolina delegate to the Constitutional Convention.⁵⁰ Sitgreaves declined his promotion to the appellate court amid Republican threats to repeal the Judiciary Act that had created the seat to which he had been nominated.⁵¹

Similarly, Jared Ingersoll rejected his appointment to the Third Circuit.⁵² "When notified of the nomination, Ingersoll rejected Adams's offer without

45. Turner, *supra* note 13, at 497–98.

46. Letter from Jeremiah Smith to John Marshall (Feb. 20, 1801) (on file with authors); see also Turner, *supra* note 13, at 498.

47. See Turner, *supra* note 13, at 499–500.

48. *History of the Federal Judiciary, Biographical Directory of Federal Judges, 1789–Present*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 18, 2014) (follow "Select research categories" hyperlink; select "Nominating President"; click "Continue"; select "John Adams" from the drop-down menu; then click "Search").

49. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Sitgreaves*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2201&cid=999&ctype=na&inststate=na> (last visited Nov. 18, 2014).

50. *Id.*

51. FISH, *supra* note 16, at 110.

52. Robert J. Lukens, Note, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 206 (1997).

articulating his precise reasons for doing so.”⁵³ It has been postulated that “Ingersoll recognized the possibility that the second Judiciary Act would be constitutionally challenged and perhaps found deficient.”⁵⁴ An ardent Federalist who later served as the Federalist nominee for Vice President,⁵⁵ “Ingersoll’s reasons for rejecting John Adams’s appointment appear to have been as much personal as political.”⁵⁶ Lukens contends that Ingersoll recognized the growing divide between Republicans and Federalists, as well as the growing unpopularity among Federalists with the electorate, particularly after Jeffersonian Republicans swept the 1800 elections.⁵⁷

On the other hand, the final Adams nominee that declined his appointment, Thomas Bee, turned down the position of circuit court judge on the Fifth Circuit to avoid having to ride circuit. He explained to James Madison that he was “unable to undergo the fatigue of the long Journeys [sic] necessary.”⁵⁸ Bee was already Chief Judge of the District Court of South Carolina,⁵⁹ and felt that he could “render as Essential service to [his] Country by continuing in the Station of District Judge which [he then held].”⁶⁰

The other Adams nominees who failed had all intended to claim their positions on their respective courts, but technicalities found in their commissions prevented them from ever taking office. President Adams had nominated all these men—Jacob Read, Ray Greene, William Hill, and Thomas Gibbons to the district courts in South Carolina, Rhode Island, North Carolina, and Georgia, respectively—as part of his court-packing plan. Consequently, the appointments of Read and Greene “were bitterly attacked as sinecures given in deliberate violation of the Constitution.”⁶¹ Read, a former Senator from South Carolina, had been appointed to fill Thomas Bee’s position on the district court.⁶² However, as noted above, Bee refused his appointment to the circuit court, thereby leaving Read without a seat to fill on the district court. Hill’s fate was similar to Read’s. A Federalist Congressman, Hill received a commission for the seat held by John Sitgreaves.⁶³ When Sitgreaves decided to maintain his position on the district

53. *Id.*

54. *Id.*

55. *Id.* at 204.

56. *Id.* at 207.

57. *See id.* at 207–08.

58. Letter from Thomas Bee to James Madison (March 19, 1801), in 1 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 28 (Robert J. Brugger et al. eds., 1986).

59. Turner, *supra* note 13, at 514.

60. Letter from Thomas Bee to James Madison, *supra* note 58.

61. Turner, *supra* note 13, at 520.

62. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377, 392 (2005).

63. FISH, *supra* note 16, at 110.

court rather than accept a promotion to the newly created circuit court, no open seat existed for Hill to fill.

Perhaps the most apt example that highlights the political hostility driving these failed nominations is the case of Senator Ray Greene of Rhode Island. Greene had been nominated and confirmed and accepted his place as a judge on the District Court of Rhode Island, replacing the aforementioned Bourne who had moved on to the newly created First Circuit Court. However, Greene's "commission erroneously appointed him as a circuit [court] judge. President Jefferson refused to [correct the error], and instead [gave] David Barnes a recess appointment to the [seat] to which Greene had been confirmed."⁶⁴

Georgia Republicans despised Thomas Gibbons, a fervent Federalist. The most prominent Republican from Georgia, James Jackson, "informed Secretary of State James Madison that although Adams' 'midnight appointments' had occasioned 'disgust' in Georgia, none had 'created such disapprobation as that of Mr. Thomas Gibbons to the district Judgeship of [Georgia].'"⁶⁵ It is unclear whether the Adams Administration failed to create a commission for Gibbons, or if the Jefferson Administration failed to deliver the commission.⁶⁶

Another of Adams's failed appointments was Charles Lee, whom Adams had nominated to an appellate court. Prior to that nomination, Lee had served as Attorney General of the United States.⁶⁷ Lee was a long-time friend of George Washington and shared his strong Federalist views, which the Adams presidency also embodied.⁶⁸ Based on his personal political views, one might assume that Lee would have gone along with Adams's attempt to stack the federal courts with Federalists. In fact, sources indicate that Lee did serve as Chief Judge of the Fourth Circuit.⁶⁹ Oddly, the Senate Executive Journal and biographical directory of federal judges at the Federal Judicial Center do not indicate that Lee ever served on the court.

The animosity between Adams's Federalists and Jefferson's Republicans tied all of Adams's failed nominees to a similar fate. Although some declined their positions, some accepted positions that could not be filled, and others failed on mere technical grounds—a common theme between all of Adams's failed nominees is the political hostility existing at the time between the Federalists, whose power waned, and the Jeffersonian Republicans, who came into office with a sweeping mandate from the electorate.

64. Hartnett, *supra* note 62, at 393.

65. GEORGE R. LAMPLUGH, *POLITICS ON THE PERIPHERY: FACTIONS AND PARTIES IN GEORGIA, 1783-1806*, at 168 (1986).

66. See Hartnett, *supra* note 62, at 393.

67. Turner, *supra* note 13, at 513.

68. THE VIRGINIA LAW REPORTERS BEFORE 1880, at 85 (W. Hamilton Bryson ed., 1977).

69. See *id.*

B. THOMAS JEFFERSON, JAMES MADISON, AND JAMES MONROE, 1801–1825

The three American Presidents who served over the next 24 years were founders of the Democratic–Republican Party (“Republican Party”) and shared similar constitutional commitments and judicial selection criteria. They also enjoyed extremely high confirmation rates for their nominations because of the Republican Party’s increasing dominance in the Senate and the Federalist Party’s demise in this period.

After coming into office vowing to repeal the Judiciary Act of 1801 that led to the controversial “midnight” appointments, President Jefferson made 20 judicial nominations, of which three failed. Unlike Washington’s and Adams’s judicial nominees, Jefferson’s judicial nominees had little or no previous experience or service in the federal government prior to their appointments. For instance, Charles Willing Byrd, whom Jefferson nominated to the U.S. District Court in the District of Ohio, had previously served as Secretary and acting Governor of the Northwest Territory.⁷⁰ Prior to that, Byrd had no record of public service.⁷¹ Nicholas Battalle Fitzhugh, nominated to the D.C. Circuit Court, had served only three years in the Virginia House of Delegates prior to becoming a federal judge.⁷²

Out of the three judicial nominations Jefferson made that failed, not much is known. For instance, there are no records explaining why Henry Brockholst Livingston’s nomination in 1805 to the District Court in New York failed, but in 1806, Livingston accepted Jefferson’s nomination to the U.S. Supreme Court.⁷³ Although the Senate, with Republicans controlling 27 of the 34 seats, confirmed the popular Republican politician Daniel Tompkins to the District Court in New York, he declined the appointment so that he could remain on the New York Supreme Court.⁷⁴ Tompkins also resigned his position in Congress after being elected in 1804 because he preferred to serve on the Supreme Court in New York.⁷⁵ Jefferson offered to give a recess appointment to Theodore Gaillard to the Fifth Circuit to fill the seat that Thomas Bee, nominated by Adams, had declined to fill. With Republicans barely controlling the Senate with 17 of the 34 seats, Gaillard refused to take

70. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Charles Willing Byrd*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=339&cid=999&ctype=na&instate=na> (last visited Nov. 18, 2014).

71. *Id.*

72. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Nicholas Battalle Fitzhugh*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2815&cid=999&ctype=na&instate=na> (last visited Nov. 18, 2014).

73. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Henry Brockholst Livingston*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1408&cid=999&ctype=na&instate=na> (last visited Nov. 18, 2014).

74. RAY W. IRWIN, DANIEL D. TOMPKINS: GOVERNOR OF NEW YORK AND VICE PRESIDENT OF THE UNITED STATES 50 (1968).

75. *Id.*

the judgeship, citing “imperious Circumstances of a private Nature.”⁷⁶ There is no record of what these “Circumstances” were or whether Gaillard might have wanted something else, such as a permanent appointment to an Article III court, that was not possible because of significant opposition.

Less than a year into Jefferson’s presidency on March 3, 1802, the Repeal Act passed the House.⁷⁷ The Republicans argued that although they were constitutionally forbidden from altering a sitting judge’s salary or tenure, Congress could abolish a judge’s position entirely.⁷⁸ A local Federalist newspaper in Philadelphia wrote: “The fatal Bill has passed: Our Constitution is no more.”⁷⁹ With the passage of the repeal, the Judiciary Act of 1801 ceased to be effective; the seats of 13 judges who had been serving for over a year were abolished. Following the repeal, the displaced judges contemplated acting independently to challenge the repeal but elected to wait for the Supreme Court’s ruling on the matter.⁸⁰ Unfortunately for the Federalists, the Republicans cancelled the Supreme Court’s June term, effectively pushing back the Supreme Court’s next meeting to the following February, almost a year away.⁸¹ The Republicans offered the excuse that the June term was unnecessary because of the Court’s small caseload, but it seems more likely that they acted with blatant partisanship; the cancellation required that the judges ride circuit under the Judiciary Act of 1789, which appeared as “a tacit acceptance of the repeal’s validity.”⁸²

In the wake of inaction by the Supreme Court, many of the ousted judges joined together in an attempt to address the possible violation of their constitutional rights. William Tilghman first wrote to the other judges urging a meeting in Philadelphia.⁸³ Their responses were enthusiastic,⁸⁴ and following the meeting in July, they planned to meet again in November to draft a memorandum to Congress in the hope of recovering their salaries, at the very least.⁸⁵ As November approached, it became clear that few judges would attend. In fact, Egbert Benson from the Second Circuit was the only judge outside of those in the Third Circuit who actually attended the meeting in November of 1802.⁸⁶ Many of those who could not attend promised to

76. Letter from Theodore Gaillard to James Madison, Sec’y of State (June 16, 1801) (on file with authors).

77. Glickstein, *supra* note 34, at 550.

78. *Id.* at 549.

79. *Farewell, a Long Farewell to All Our Greatness*, WASH. FEDERALIST, Mar. 3, 1802, at 2.

80. Glickstein, *supra* note 34, at 550.

81. *Id.*

82. *Id.* at 551.

83. *Id.* at 558.

84. *Id.* at 559.

85. *See id.* at 566–67.

86. *Id.* at 566.

support whatever remedy the attendees decided upon,⁸⁷ but several judges had abandoned hope of a congressional remedy. Charles Magill had returned to private practice in Virginia, Samuel Hitchcock was headed for a debtors' prison, and Oliver Wolcott had written to a friend that he would "probably attend [the November meeting], but [had] no expectation" of personal advantage or public success, and hoped to quickly "get into a situation in which [he could] earn bread for [his] family."⁸⁸

In spite of personal and financial challenges, the November meeting did give rise to a written memorial authored primarily by Oliver Wolcott.⁸⁹ The judges argued that although Congress "had stripped the judges of their powers, they remained vested in the office, which meant they could perform judicial duties and had a right to their salaries."⁹⁰ They requested that Congress assign them duties "consistent with the [C]onstitution and the convenient administration of justice."⁹¹ The Republican majority in the House and Senate made the prospect of victory for the judges very bleak. The House rejected two motions based on the judges' memorandum after just a few hours of debate,⁹² and the Senate rejected the measure 15 to 13.⁹³ Many assumed that the judges would then turn to the Supreme Court for a remedy, but the enthusiasm the judges had initially shared was spent. Some took up judgeships by other appointments or became more involved in politics and government, and some even spent a portion of their lives in poverty or prison.⁹⁴

President Madison's appointees to the federal bench had more judicial and political experience than those of Jefferson. For example, William Sanford Pennington had previously served as an associate justice on the New Jersey Supreme Court, as well as Governor of New Jersey prior to his appointment on the District Court of New Jersey.⁹⁵ St. George Tucker served as a judge on the General Court of Virginia, as well as on the Supreme Court of Appeals of Virginia prior to his appointment on the Virginia District Court,

87. *Id.* at 559.

88. *Id.* at 569 (alteration in original) (quoting Letter from Oliver Wolcott to James Watson (Oct. 18, 1802) (on file with Connecticut Historical Society)).

89. Glickstein, *supra* note 34, at 569.

90. *Id.*

91. *Judges Removed from Office by Legislation (Jan. 28, 1803)*, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 340 (1834).

92. See 12 ANNALS OF CONG. 427-40 (1803).

93. Glickstein, *supra* note 34, at 574.

94. *Id.* at 575-76.

95. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Sanford Pennington*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1866&cid=999&ctype=na&instat=na> (last visited Nov. 19, 2014).

and was one of the most prominent legal commentators of the era.⁹⁶ Madison also appointed to the District Court John Tyler, Sr., who had been a delegate to the Constitutional and Virginia Ratification Conventions, served as a Virginia Court of Appeals judge and Governor of Virginia, and was the father of the tenth President of the United States.⁹⁷

Under Madison, only two of the 15 nominations failed, while Monroe had only one of 23 people nominated to judgeships decline to take his post. The failed nominations included Thomas Parker, who declined a confirmed position to the federal bench in 1812, when the Republicans held a 30 to 6 advantage over the Federalists in the Senate, and Gaillard, who again declined a recess appointment in 1813, when Republicans held a 28 to 8 advantage over the Federalists.

Of President Madison's 15 judicial nominations to the lower federal courts, two nominees did not accept their commissions. Although the Senate confirmed Madison's nomination of Thomas Parker just four days after he had been nominated to serve on the District Court in South Carolina,⁹⁸ Parker turned down the opportunity in order to mentor his two sons who were beginning their legal careers.⁹⁹ President Madison also offered a recess appointment to Theodore Gaillard to fill a vacancy on the District Court of Louisiana,¹⁰⁰ but he declined the offer just as he had turned down Jefferson's offer of a recess appointment a few years before.¹⁰¹

Besides his successful appointment of Smith Thompson to the Supreme Court, President Monroe made 23 judicial nominations, all to district courts because there were no vacancies on the one circuit court during his time in office. The sizeable advantages that Republicans held over Federalists in the Senate—ranging from 37 to 9 in his first two years to 31 to 17 in his last two years in office—undoubtedly increased their odds for confirmation.¹⁰² His nominees reflected a wide variety of judicial and political experience prior to their nominations. For instance, William Wilkins had served as a U.S. Senator, U.S. Representative, Minister to Russia, and U.S. Secretary of War prior to his appointment on the U.S. District Court in the Western District of

96. *History of the Federal Judiciary, Biographical Directory of Federal Judges: St. George Tucker*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2420&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014).

97. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Tyler*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2429&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014).

98. FISH, *supra* note 16, at 117.

99. *Id.*

100. Hartnett, *supra* note 62, at 401.

101. Letter from Theodore Gaillard to James Madison, *supra* note 76.

102. *Party Division in the Senate, 1789–Present*, *supra* note 18.

Pennsylvania.¹⁰³ But, Monroe also appointed James Hawkins Peck (who was later impeached but not found guilty by the Senate), who had served in the U.S. Army and worked as a lawyer in private practice until his appointment to the U.S. District Court in Missouri.¹⁰⁴

In 1821, President Monroe offered a recess appointment to Thomas U.P. Charlton to the District Court of Georgia.¹⁰⁵ Although Charlton declined the appointment, no records exist that illuminate why Charlton, who had previously served as a state court judge and as the mayor of Savannah for six terms, declined the opportunity.¹⁰⁶

C. JOHN QUINCY ADAMS, 1825–1829

The Era of Good Feelings gave way to a sharp increase in partisan squabbling over judicial appointments. There was no better sign of the things to come or of the impending conflict than the election of 1824, which produced no winner in the Electoral College. Eventually, John Quincy Adams prevailed in a close contest in the House that Andrew Jackson, the man who had won a plurality in the election, stridently challenged over the next four years.

As President from 1825 to 1829, John Quincy Adams made one Supreme Court appointment and 13 nominations to lower-court posts. Adams's criteria for these appointments were loose. He deferred to the suggestions of Henry Clay, his Secretary of State, and tried, but without much success, to use these appointments to curry favor with congressional leaders. The same dynamic was apparent in his other appointments, in which he did not emphasize party or personal loyalty or constitutional outlook. Of his 13 judicial nominations, the Senate confirmed nine and rejected two, while two others declined their nominations. Adams also made one recess appointment of a federal judge, who resigned before the end of his recess appointment.

Adams's judicial nominations did not begin well. Barely two months into his presidency, Adams gave a recess appointment to Philip Clayton Pendleton to the Western District of Virginia on May 6, 1825; however, Pendleton lasted less than three months.¹⁰⁷ That time allowed Pendleton "to estimate with some accuracy, the labours, the fatigue, and the privation incident to a faithful

103. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Wilkins*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2585&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014).

104. *History of the Federal Judiciary, Biographical Directory of Federal Judges: James Hawkins Peck*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1856&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014).

105. *Hon. T. U. P. Charlton*, BOS. COM. GAZETTE, June 11, 1821, at 4.

106. 4 DICTIONARY OF AMERICAN BIOGRAPHY 24 (Allen Johnson et al. eds., 1930).

107. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Philip Clayton Pendleton*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1864&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014) [hereinafter *Biographical Directory: Philip Clayton Pendleton*].

discharge of the duties of this office.”¹⁰⁸ The job included traveling between four separate seats of court in the district, which were some distance apart.¹⁰⁹ The experience convinced Pendleton that he lacked the health and the strength necessary for the role, which led to his resignation on July 29, 1825.¹¹⁰ As a result, Pendleton left the bench for good and was never nominated or considered for another judgeship. Instead, Adams nominated Daniel Smith to fill the vacancy.¹¹¹ Smith, a state court judge on Virginia’s Eleventh Circuit, considered the nomination for two months before eventually declining it.¹¹² He gave scant insight into his reasons for declining the nomination; in a letter to President Adams, Smith wrote only that he had “deliberated” before deciding to decline.¹¹³

The other three nominations that year—Alfred Conkling, Alexander Caldwell, and George Hay—were made on the same day, December 13, 1825.¹¹⁴ Conkling had been serving on the District Court for the Northern District of New York as a recess appointment since August 27 of that year. After his nomination on December 13, he was confirmed the very next day.¹¹⁵ Twenty-seven years later, in 1852, Conkling would resign from the bench in order to accept an appointment by President Millard Fillmore to serve as U.S. Minister to Mexico. Caldwell, like Conkling, had been serving as a recess appointment in his district, the Western District of Virginia, since October 28, 1825.¹¹⁶ The Senate confirmed his nomination on January 3, 1826.¹¹⁷ Hay, already also serving as a recess appointment, had been presiding in the

108. Letter from Philip Clayton Pendleton to Henry Clay, Sec’y of State (July 29, 1825) (on file with the State Department Records, National Archives); *see also* FISH, *supra* note 16, at 231.

109. *See* FISH, *supra* note 16, at 231.

110. *Id.*; *Biographical Directory: Philip Clayton Pendleton*, *supra* note 107.

111. *Appointment by the President*, SALEM GAZETTE, Sept. 6, 1825, at 2.

112. FISH, *supra* note 16, at 231–32; 4 THE PAPERS OF HENRY CLAY 606, 753 (James F. Hopkins ed., 1972).

113. Letter from Daniel Smith to Henry Clay, Sec’y of State (Oct. 21, 1825) (on file with the State Department Records, National Archives).

114. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Alexander Caldwell*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=353&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014) [hereinafter *Biographical Directory: Alexander Caldwell*]; *History of the Federal Judiciary, Biographical Directory of Federal Judges: Alfred Conkling*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=490&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014) [hereinafter *Biographical Directory: Alfred Conkling*]; *History of the Federal Judiciary, Biographical Directory of Federal Judges: George Hay*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1006&cid=999&ctype=na&instate=na> (last visited Nov. 19, 2014) [hereinafter *Biographical Directory: George Hay*].

115. *Biographical Directory: Alfred Conkling*, *supra* note 114.

116. *Biographical Directory: Alexander Caldwell*, *supra* note 114.

117. *Id.*

Eastern District of Virginia since July 5, 1825.¹¹⁸ The Senate did not confirm him until March 31, 1826.¹¹⁹

President Adams made six nominations in 1826. In the spring of that year, he nominated Israel Pickens, former Governor of Alabama, to a seat on the district court for Alabama.¹²⁰ Although he was confirmed and received commission, Pickens did not learn of his nomination until he arrived in Washington in March 1826.¹²¹ By that time, the new Governor of Alabama, John Murphy, had already appointed Pickens to a seat on the U.S. Senate.¹²² Preferring to serve in the Senate, Pickens declined the judgeship.¹²³ According to one account, Pickens was then “embittered by Adams’s decision then to give the judicial appointment to Pickens’s nemesis, [William] Crawford.”¹²⁴

Adams nominated Crawford on May 5, 1826, to both the Northern and Southern Districts of Alabama, and he was confirmed on May 22, 1826.¹²⁵ Also on May 22, the Senate confirmed William Bristol, who had been nominated on May 15.¹²⁶ On December 13, 1826, Adams nominated both William Rossell, who the Senate confirmed on December 19, 1826, for a seat on the District of New Jersey, and John Boyle, who was confirmed on February 12, 1827, for a seat on the District of Kentucky.¹²⁷ On December 19, 1826, Adams

118. *Biographical Directory: George Hay*, *supra* note 114.

119. *Id.*

120. W. BREWER, ALABAMA: HER HISTORY, RESOURCES, WAR RECORD, AND PUBLIC MEN: FROM 1540 TO 1872, at 272 (1872); THOMAS MCADORY OWEN, 4 HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 1360 (1921); Hugh C. Bailey, *Israel Pickens, Peoples’ Politician*, 17 ALA. REV. 83, 95 (1964). Although the accounts do not specify the federal district to which Pickens was appointed, the District of Alabama had been divided into the Northern and Southern Districts of Alabama in 1824. *History of the Federal Judiciary, U.S. District Courts for the Districts of Alabama*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_district_al.html (last visited Nov. 19, 2014). William Crawford, who was nominated after Pickens declined the seat, was nominated to both the Northern and Southern districts.

121. Bailey, *supra* note 120, at 96.

122. BREWER, *supra* note 120, at 95.

123. *See generally id.*

124. J. Mills Thornton, *Israel Pickens*, AM. NAT’L BIOGRAPHY ONLINE (Feb. 2000), <http://www.anb.org/articles/03/03-00379.html?a=1&n=israel%20pickens&ia=at&ib=bib&d=10&ss=0&q=1>.

125. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Crawford*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=534&cid=999&ctype=na&inststate=na> (last visited Nov. 19, 2014).

126. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Bristol*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=264&cid=999&ctype=na&inststate=na> (last visited Nov. 19, 2014).

127. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Boyle*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=230&cid=999&ctype=na&inststate=na> (last visited Nov. 19, 2014); *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Rossell*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2061&cid=999&ctype=na&inststate=na> (last visited Nov. 19, 2014).

nominated Samuel Rossiter Betts to a seat on the Southern District of New York; Betts was confirmed just two days later.¹²⁸

President Adams did not make his next lower court nominations until December 11, 1828. He nominated Joseph Hopkinson, who had been serving on the Eastern District of Pennsylvania as a recess appointment since October 23, 1828.¹²⁹ The Senate confirmed Hopkinson on February 23, 1829.¹³⁰ Also on December 11, 1828, Adams nominated William Creighton, Jr. to the District of Ohio, the same court on which Creighton had served through a recess appointment since November 1, 1828.¹³¹ Creighton had previously been a member of the “Chillicothe Junto,” a group that had helped Ohio gain statehood, before becoming Ohio’s first Secretary of State and then becoming a U.S. Attorney.¹³² Starting in 1813, he served two terms as a U.S. Congressman for Ohio, before returning to private law practice.¹³³ “In the 1820s, Creighton associated himself with the conservative wing of the Jeffersonian Republican Party, and voters in his district again elected him to Congress in 1826 and 1828, despite the Jackson landslide.”¹³⁴ Creighton had just begun this second term in the House of Representatives when he received his nomination to the District of Ohio.¹³⁵

The Senate effectively rejected Creighton’s nomination to the District of Ohio by approving a resolution on February 16, 1829, not to act on the nomination.¹³⁶ The resolution, which stated that it was “not expedient to act upon the nomination . . . [d]uring the present session of Congress,” was carried by a vote of 22 to 19.¹³⁷ All but one of the 22 voting in favor were Jacksonians—the other supported Adams (Nathan Sanford of New York); all 19 against the resolution were Adams-supporters.¹³⁸ The reasons for the rejection were not made public; the Senate sat behind closed doors for much

128. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Samuel Rossiter Betts*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=164&cid=999&ctype=na&instat=na> (last visited Nov. 19, 2014).

129. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Joseph Hopkinson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1094&cid=999&ctype=na&instat=na> (last visited Nov. 19, 2014).

130. *Id.*

131. *History of the Federal Judiciary, Biographical Directory of Federal Judges: William Creighton, Jr.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2706&cid=999&ctype=na&instat=na> (last visited Nov. 19, 2014) [hereinafter *Biographical Directory: William Creighton*].

132. ROBERTA SUE ALEXANDER, *A PLACE OF RECOURSE: A HISTORY OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, 1803–2003*, at 216 (2005).

133. *Id.*

134. *Id.*

135. ALEXANDER, *supra* note 132, at 216; *William Creighton*, AM. MERCURY, Nov. 25, 1828, at 3.

136. S. EXEC. JOURNAL, 20th Cong., 2d Sess. 645 (1829); *Biographical Directory: William Creighton*, *supra* note 131.

137. S. EXEC. JOURNAL, 20th Cong., 2d Sess. 645.

138. *Id.*

of the day on February 16,¹³⁹ and in March 1829, the Senate decided not to lift an “injunction of secrecy” on its discussions on Creighton’s nomination.¹⁴⁰ However, Creighton has been described as a “victim of the strong partisan feuds of the time” in a discussion of the Senate’s inaction on his nomination.¹⁴¹ Another author further elaborated that the Senate, dominated by Jacksonians, was “[o]bviously determined to keep all the vacant judicial positions open for Jackson appointees”¹⁴² The Senate was strongly criticized for its failure to fulfill its purported constitutional duty to give good-faith consideration to judicial nominees.¹⁴³

John Quincy Adams’s next judicial nomination met a similar fate. Henry Gurley was nominated to the District of Louisiana on January 6, 1829.¹⁴⁴ On February 17, 1829, the Senate reached the same resolution on Gurley’s nomination as it had on Creighton’s, rejecting it for all practical purposes by saying that it was “not expedient to act upon the nomination . . . during the present session.”¹⁴⁵ Again the debate on the nomination was conducted behind closed doors,¹⁴⁶ and again, the Senate refused to lift an “injunction of secrecy” on the proceedings.¹⁴⁷ The Senate voted largely along party lines: 23 Jacksonians and 1 Adams-supporter—Nathan Sanford from New York—voted “[t]hat it is not expedient to act upon the nomination of Henry H. Gurley,” while no Jacksonians and 18 Adams-supporters voted against the resolution.¹⁴⁸

Though the debates over these nominations were private, the evidence suggests that the Senate did not even consider the nominees’ backgrounds, qualifications, and judicial philosophies. The rejections of both Gurley and Creighton left the seats open for the next President, Andrew Jackson, to fill. These two rejections thus might be the first in what has become a long line of rejections designed to keep the vacancies open for the next or incoming President to fill.

139. 5 REG. DEB. 60 (1829).

140. S. EXEC. JOURNAL, 21st Cong., Spec. Sess. 23 (1829).

141. NELSON W. EVANS, A HISTORY OF SCIOTO COUNTY, OHIO 167 (1903); Irwin S. Rhodes, *With the Courts: The History of the United States District Court for the Southern District of Ohio*, 24 U. CIN. L. REV. 338, 343 (1955) (citing 3 A HISTORY OF THE COURTS AND LAWYERS OF OHIO 709, 865 (Carrington T. Marshall ed., 1934)); see also ALFRED E. LEE, HISTORY OF THE CITY OF COLUMBUS 596 (1892).

142. ALEXANDER, *supra* note 132, at 216.

143. *Id.* at 216–17 (citation omitted).

144. S. EXEC. JOURNAL, 20th Cong., 2d Sess. 630–31 (1829).

145. *Id.* at 645.

146. 5 REG. DEB. 60 (1829).

147. S. EXEC. JOURNAL, 20th Cong., 2d Sess. 631.

148. *Id.* at 645–46.

D. ANDREW JACKSON AND MARTIN VAN BUREN, 1829–1841

Partisan conflict over judicial nominations remained intense throughout the presidency of Adams's successor, Andrew Jackson.¹⁴⁹ Although Jackson transformed the Supreme Court with six appointments, they were often contentious.¹⁵⁰ In 1834, the Senate, with Jackson's Democrats holding only 20 of its 48 seats, tabled his nomination of Roger Taney as an Associate Justice because the majority Whig Senators had wanted to punish Taney for the actions he had taken as acting Secretary of the Treasury to weaken the national bank.¹⁵¹ Two years later, Democrats gained a two-seat majority in the Senate, which then narrowly confirmed Taney as Chief Justice.¹⁵²

President Jackson made 18 nominations to seats on lower courts. The Senate confirmed 17 and rejected one, Benjamin Tappan, in 1834. All of Jackson's judicial nominees, including those to the Supreme Court, were loyal Democrats who shared Jackson's narrow construction of federal powers and correspondingly broad construction of state sovereignty.

President Jackson made his first two lower court nominations on March 6, 1829.¹⁵³ He nominated John Wilson Campbell to a seat on the U.S. District Court for the District of Ohio and Samuel Hadden Harper to the Eastern and Western Districts of Louisiana.¹⁵⁴ Jackson nominated Campbell as a replacement for William Creighton, Jr. after the Senate had failed to act on Creighton's nomination.¹⁵⁵ The Senate confirmed both Campbell and Harper on March 7, the day after they were nominated.¹⁵⁶ Jackson's next two lower court nominees, both made on December 14, 1830, were also confirmed quickly.¹⁵⁷ Matthew Harvey was nominated for the District of New Hampshire, and Philip Pendelton Barbour for the Eastern District of

149. GERHARDT, *supra* note 5, at 10, 105–06.

150. *Id.* at 105–06.

151. *Id.*

152. *Id.*

153. *History of the Federal Judiciary, Biographical Directory of Federal Judges, 1789–Present*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 20, 2014) (follow “Select research categories” hyperlink; select “Nominating President”; click “Continue”; select “Andrew Jackson” from the drop-down menu; then click “Search”).

154. *Id.*

155. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Wilson Campbell*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=362&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

156. *Id.*; *History of the Federal Judiciary, Biographical Directory of Federal Judges: Samuel Hadden Harper*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=981&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

157. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Philip Pendelton Barbour*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=91&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014) [hereinafter *Biographical Directory: Philip Pendelton Barbour*]; *History of the Federal Judiciary, Biographical Directory of Federal Judges: Matthew Harvey*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=994&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014) [hereinafter *Biographical Directory: Matthew Harvey*].

Virginia.¹⁵⁸ The Senate confirmed both of them on December 16.¹⁵⁹ Pendelton later became a U.S. Supreme Court Justice.¹⁶⁰

In each of the next three years, Jackson made only one lower court nomination. Thomas Irwin received a nomination in 1831.¹⁶¹ He served on the Western District of Pennsylvania as a recess appointment starting on April 14, 1831, and was nominated on December 7, 1831, to a seat on the same court.¹⁶² The Senate confirmed his appointment on March 21, 1832.¹⁶³ Jackson nominated Powhatan Ellis on July 13, 1832, and the Senate confirmed him to the District of Mississippi the following day.¹⁶⁴ Morgan Welles Brown was nominated to the Eastern and Western Districts of Tennessee on December 18, 1833, and confirmed on December 31, 1833.¹⁶⁵

President Jackson's next nomination was unsuccessful. On January 20, 1834, he nominated Benjamin Tappan to a seat on the U.S. District Court for the District of Ohio.¹⁶⁶ Tappan had been given a recess appointment on October 12, 1833.¹⁶⁷ Tappan had previously served as a state court judge in Ohio.¹⁶⁸ He had supported Jackson's run for the presidency in 1828, "became a Democratic partisan," and played an active role in Jackson's reelection in 1832.¹⁶⁹ The district court nomination was seen as a reward for his political service.¹⁷⁰ However, Tappan's support for Nat Turner's slave rebellion "was enough to sink [his] nomination in the Senate by a vote of 28 to 11."¹⁷¹ Tappan had also "vowed his support for other slaves who would rise and slit

158. *Biographical Directory: Philip Pendelton Barbour*, *supra* note 157; *Biographical Directory: Matthew Harvey*, *supra* note 157.

159. *Biographical Directory: Philip Pendelton Barbour*, *supra* note 157; *Biographical Directory: Matthew Harvey*, *supra* note 157.

160. *Biographical Directory: Philip Pendelton Barbour*, *supra* note 157.

161. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Thomas Irwin*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1152&cid=999&ctype=na&inststate=na> (last visited Nov. 20, 2014).

162. *Id.*

163. *Id.*

164. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Powhatan Ellis*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=702&cid=999&ctype=na&inststate=na> (last visited Nov. 20, 2014).

165. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Morgan Welles Brown*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=286&cid=999&ctype=na&inststate=na> (last visited Nov. 20, 2014).

166. S. EXEC. JOURNAL, 23d Cong., 1st Sess. 344 (1834).

167. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Benjamin Tappan*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2712&cid=999&ctype=na&inststate=na> (last visited Nov. 20, 2014).

168. Daniel Feller, *Benjamin Tappan*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), <http://www.anb.org/articles/15/15-00682.html?a=1&n=benjamin%20tappan&ed=10&ss=0&q=1>.

169. *Id.*

170. Daniel Feller, *Benjamin Tappan: Democrat, Scientist, Iconoclast, in THE HUMAN TRADITION IN ANTEBELLUM AMERICA* 213, 223 (Michael A. Morrison ed., 2000).

171. *Id.*

their masters' throats."¹⁷² Senators were not convinced that, as a federal judge, he would enforce the terms of the Fugitive Slave Act of 1793.¹⁷³ In addition, opponents objected to "his irreligion, extreme partisanship, and injudicious temperament."¹⁷⁴ His "nomination had to pass through a hostile Senate in the highly partisan session of 1833–34,"¹⁷⁵ which was "one of the most rancorous in Senate history."¹⁷⁶ Furthermore, "[o]ver the previous few years, Tappan's Democratic politicking had alienated one member after another of his old circle," almost all of which "had followed Henry Clay and John Quincy Adams into the National Republicans and Whigs."¹⁷⁷ Eventually, "all of Tappan's enemies joined to defeat him."¹⁷⁸ The Senate rejected the nomination on May 29, 1834,¹⁷⁹ by a vote of 28 to 11.¹⁸⁰ The vote on Tappan's nomination did not follow strictly along party lines: voting in favor of the nomination were 10 Jacksonians and 1 Anti-Jacksonian; voting against were 23 Anti-Jacksonians, 2 non-affiliated Senators, and 3 Jacksonians.¹⁸¹ The rejection apparently worked to Tappan's advantage in 1838 when he was elected to the Senate by a Democratic legislature in Ohio.¹⁸² The rejection of his judicial nomination had "cemented Tappan's claim to party favor,"¹⁸³ or as one author even states, "[i]t clothed him with political martyrdom and thus, paved his way to the Senate itself."¹⁸⁴ On June 28, 1834, President Jackson nominated Humphrey Howe Leavitt to fill the void left on the District of Ohio by Tappan's rejection.¹⁸⁵ Leavitt's confirmation process went more smoothly: he was confirmed on the very same day he was nominated.¹⁸⁶

Although President Jackson made no lower court nominations in 1835, he made eight in the first seven months of 1836. On January 12, 1836, he

172. *Id.*

173. PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 315 (1997).

174. Feller, *supra* note 170, at 223.

175. *Id.*

176. Daniel Feller, *Benjamin Tappan: The Making of a Democrat, in THE PURSUIT OF PUBLIC POWER: POLITICAL CULTURE IN OHIO, 1787–1861*, at 77 (Jeffrey P. Brown et al. eds., 1994).

177. *Id.*

178. Feller, *supra* note 170, at 223.

179. S. EXEC. JOURNAL, 23d Cong., 1st Sess. 412 (1834).

180. Feller, *supra* note 170, at 223.

181. *See supra* note 9.

182. Feller, *supra* note 170, at 223.

183. *Id.*

184. *Id.*

185. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Humphrey Howe Leavitt*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1360&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

186. *Id.*

nominated George Adams to a seat on the District of Mississippi.¹⁸⁷ The Senate confirmed Adams on January 20.¹⁸⁸ On March 21, Jackson nominated Jesse Holman Lynch to the District of Indiana.¹⁸⁹ Lynch, who had been serving on the court pursuant to a recess appointment since September 16, 1835, was confirmed on March 29, 1836.¹⁹⁰ Upton Scott Heath, nominated to the District of Maryland on April 1, 1836, was confirmed on April 4.¹⁹¹ On April 6, Jackson nominated Peter Vivian Daniel to the Eastern District of Virginia.¹⁹² The Senate confirmed Daniel on April 19,¹⁹³ and he later became a U.S. Supreme Court Justice.¹⁹⁴

Next, on June 16, 1836, President Jackson nominated Robert William Wells to the District of Missouri, who was confirmed on June 27.¹⁹⁵ Also on June 27, Jackson made his next nomination: Benjamin Johnson, to the District of Arkansas.¹⁹⁶ The Senate confirmed Johnson on June 29.¹⁹⁷ Andrew Thompson Judson was nominated on June 28 and confirmed on July 4 to the District of Connecticut.¹⁹⁸ Ross Wilkins was nominated on July 2 to a seat on the District of Michigan.¹⁹⁹ The Senate confirmed him on the very same day.²⁰⁰

187. *History of the Federal Judiciary, Biographical Directory of Federal Judges: George Adams*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=10&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

188. *Id.*

189. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Jesse Lynch Holman*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1080&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

190. *Id.*

191. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Upton Scott Heath*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1017&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

192. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Peter Vivian Daniel*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=558&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

193. *Id.*

194. *Id.*

195. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Robert William Wells*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2545&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

196. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Benjamin Johnson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1178&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

197. *Id.*

198. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Andrew Thompson Judson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1214&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

199. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Ross Wilkins*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2584&cid=999&ctype=na&instate=na> (last visited Nov. 20, 2014).

200. *Id.*

Interestingly, the Senate's rejection of Tappan's nomination and its failure to act on two of John Quincy Adams's nominations of Creighton and Gurley were based largely on partisan political grounds. A Senate loyal to Jackson blocked Adams's nominees,²⁰¹ while a coalition of Whigs and Republicans successfully came together to defeat Tappan.²⁰² However, unlike the Senate's apparently willful failure to consider the merits of Creighton and Gurley in order to keep vacancies open for Jackson to fill, Jackson's political foes in the Senate appeared to focus on the actual merits of individual nominees. The vast majority of Jackson's nominees were confirmed, including several who were nominated after the Senate became more hostile to Jackson following the 1832 elections. Even though Tappan had opponents in the Senate, his rejection seemed to depend on his philosophy, as well as his affiliation. For example, commentators have contrasted Tappan's confirmation process with that of Holman.²⁰³ Both were Democrats, and both were openly anti-slavery.²⁰⁴ However, while Holman convinced others that he would enforce the Fugitive Slave Act when on the federal bench, Tappan did not.²⁰⁵ Overall, it appears that Senators in this period were influenced by political alliances, but not controlled by them.

Martin Van Buren was Jackson's handpicked successor, whose election to the presidency in 1836 was widely viewed as effectively giving Jackson a third term. While Van Buren provoked the same kind of animosity from Whigs as Jackson had and used similar criteria for choosing his judicial nominees, he enjoyed much greater success than Jackson in securing confirmations for his judicial nominations. In fact, Van Buren made two nominations to the Supreme Court and eight nominations to lower courts, all of which the Senate confirmed. In all likelihood, a key factor that might explain the differences in the Senate's treatments of Jackson's and Van Buren's judicial nominations is that Democrats were firmly in control of the Senate during Van Buren's presidency, holding 30 of the Senate's 52 seats during the first two years of his presidency and 28 in his final two years.

President Van Buren made his first lower court nomination, Philip Kissick Lawrence, to the Eastern and Western Districts of Louisiana on September 6, 1837.²⁰⁶ The Senate confirmed Lawrence on September 12, 1837.²⁰⁷ No further lower court appointments were made until February 9, 1839, when Van Buren nominated Samuel Jameson Gholson to the Northern

201. See *supra* text accompanying notes 131–43.

202. See *supra* text accompanying notes 166–81.

203. KARSTEN, *supra* note 173, at 315.

204. See *id.*

205. *Id.*

206. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Philip Kissick Lawrence*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1353&cid=999&ctype=na&instat=na> (last visited Nov. 20, 2014).

207. *Id.*

and Southern Districts of Mississippi.²⁰⁸ Gholson was confirmed four days later on February 13, 1839.²⁰⁹

On January 23, 1840, Van Buren nominated John Cochran Nicoll for the District of Georgia, after serving on that court as a recess appointment since May 11, 1839.²¹⁰ The Senate confirmed Nicoll on February 17, 1840.²¹¹ On January 23, 1840, Isaac Samuels Pennybacker was nominated to the Western District of Virginia after serving in that seat as a recess appointment since April 23, 1839.²¹² Also on January 23, 1840, Van Buren nominated Robert Budd Gilchrist for the District of South Carolina.²¹³ The Senate confirmed both Pennybacker and Gilchrist on February 17, 1840.²¹⁴

President Van Buren nominated Mahlon Dickerson for the District of New Jersey on July 14, 1840.²¹⁵ Dickerson received confirmation one week later on July 21.²¹⁶ However, Dickerson lasted less than a year, resigning on February 16, 1841.²¹⁷ He was replaced by his brother, Philemon Dickerson,²¹⁸ who was nominated on February 22, 1841, and confirmed on February 27, 1841.²¹⁹

Van Buren made his final lower court nomination, John Young Mason, in the closing days of his presidency, on February 26, 1841.²²⁰ The Senate

208. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Samuel Jameson Gholson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=843&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

209. *Id.*

210. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Cochran Nicoll*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1762&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

211. *Id.*

212. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Isaac Samuels Pennybacker*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1867&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014) [hereinafter *Biographical Directory: Isaac Samuels Pennybacker*].

213. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Robert Budd Gilchrist*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=856&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

214. *Id.*; *Biographical Directory: Isaac Samuels Pennybacker*, *supra* note 212.

215. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Mahlon Dickerson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=614&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

216. *Id.*

217. *Id.*

218. *Manuscript Group 13, Mahlon Dickerson (1770–1853) and Philemon Dickerson (1788–1862)*, THE N.J. HISTORICAL SOC'Y, <http://www.jerseyhistory.org/findingaid.php?aid=0013> (last visited Nov. 21, 2014).

219. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Philemon Dickerson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=615&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

220. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Young Mason*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1499&cid=999&ctype=na&inststate=na> (last visited Nov. 21, 2014).

confirmed Mason as a U.S. District Judge for the Eastern District of Virginia on March 2, 1841.²²¹ This confirmation stands in marked contrast to what the Senate had done in the closing days of John Quincy Adams, perhaps underscoring the extent to which Democrats during Van Buren's presidency were determined to fill whatever judicial vacancies they could.

E. WILLIAM HENRY HARRISON AND JOHN TYLER, 1841-1845

After three straight terms, or 12 years, of Democratic Presidents bent on appointing party loyalists to the bench, the Whigs achieved their first opportunity to turn the tables when their nominee, William Henry Harrison, defeated Van Buren in the 1840 presidential election. Unfortunately, Harrison had the briefest tenure of any President in American history. He died 31 days after his inauguration. While he had the opportunity during that time to appoint his cabinet and many other sub-cabinet offices within the executive branch, he made no judicial nominations at all. There were vacancies, but Harrison did not prioritize them. So, the opportunity to fill them fell to Harrison's Vice President and successor, John Tyler. Democrats held Tyler in contempt for leaving the party shortly before becoming Harrison's running mate, and Whigs did not trust Tyler because he had been a Democrat for most of his political life. As a result, Tyler had few allies in Congress. In response to the disdain that both Whig and Democratic Party leaders had for him, Tyler used his judicial appointments, much like his other appointments, to reward his personal friends and to build an independent political base for himself and a possible run for the presidency in 1844. The strategy failed, and his judicial nominations met considerable, unprecedented resistance. Indeed, the Senate rejected eight of his nine nominations made to fill a single vacancy on the Supreme Court.²²² Tyler made 12 other judicial nominations, three of which the Senate rejected. While the Senate confirmed the remaining nine, three of his confirmed nominees turned down their commissions.

President Tyler made his first two lower court nominations on July 15, 1841. The Senate confirmed Peleg Sprague, a nominee for the District of Massachusetts, a day later.²²³ Abner Nash Ogden, nominated for the District of Louisiana,²²⁴ was confirmed on July 15, the same day as his nomination.

221. *Id.*

222. MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* 58-60 (2013).

223. S. EXEC. JOURNAL, 27th Cong., 1st Sess. 404 (1841).

224. *Id.* While references in this document are to the District of Louisiana, that District had been divided into the Eastern District of Louisiana and the Western District of Louisiana by that point. Following the practice of other nominations to district court seats in that state around that time, it is likely that Ogden was nominated to both the Eastern and Western Districts of Louisiana.

However, Ogden declined the appointment.²²⁵ At the time of his nomination, Ogden was serving on the Louisiana Supreme Court and “considered service on the state supreme court of greater significance than duty on the federal district bench.”²²⁶ On September 1, 1841, Tyler nominated Theodore Howard McCaleb to fill the seats on the Eastern and Western District of Louisiana that Ogden had declined.²²⁷ “With support from the major factions in the Whig Party, McCaleb’s nomination sailed through the upper house,”²²⁸ resulting in confirmation on September 3, 1841.²²⁹

The year 1842 was busy for lower court nominations, starting with Horace Binney on January 13.²³⁰ Although Binney was confirmed on January 25 for service on the Eastern District of Pennsylvania,²³¹ he later declined the nomination.²³² By the time of the nomination, Binney had already twice declined a position on the Supreme Court of Pennsylvania.²³³ Although he served one term in the U.S. House of Representatives,²³⁴ he generally showed little desire to serve in public office,²³⁵ preferring instead to continue practicing law.²³⁶ He recognized that legal practice was more lucrative than being a judge, and also felt that a judgeship would not make the most of his talents.²³⁷ Binney felt that “public life would be a perfectly useless martyrdom.”²³⁸

President Tyler’s attempt to fill the still-vacant seat on the Eastern District of Pennsylvania was likewise unsuccessful. On February 5, 1842, he nominated Thomas Bradford,²³⁹ and the Senate rejected the nomination on

225. DAILY MO. REPUBLICAN, Aug. 28, 1841, at 2 (on file with authors); Letter from Abner Nash Ogden to Daniel Webster, Sec’y of State (Aug. 26, 1841) (on file with authors).

226. HALL, *supra* note 3, at 48.

227. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Theodore Howard McCaleb*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1519&cid=999&ctype=na&instate=na> (last visited Nov. 21, 2014) [hereinafter *Biographical Directory: Theodore Howard McCaleb*].

228. HALL, *supra* note 3, at 48.

229. *Biographical Directory: Theodore Howard McCaleb*, *supra* note 227.

230. S. EXEC. JOURNAL, 27th Cong., 2d Sess. 12 (1842).

231. *Id.* at 22.

232. *Id.* at 24.

233. HAMPTON L. CARSON, A SKETCH OF HORACE BINNEY 28 (1907).

234. *Id.* at 29.

235. *Id.*; ROBERT R. BELL, THE PHILADELPHIA LAWYER: A HISTORY, 1735–1945, at 149 (1992) (reporting that Binney stated the experience in the House of Representatives “was a mistake and from that time on he emphatically rejected any suggestion that he return to public office”).

236. *Id.* at 147.

237. *See id.* at 149.

238. *Id.*

239. S. EXEC. JOURNAL, 27th Cong., 2d Sess. 24 (1842).

February 21.²⁴⁰ Bradford was “one of the oldest and most respected members of the Philadelphia bar.”²⁴¹ However,

[Bradford’s] alliance with President John Tyler was the main blemish in [Bradford’s] career. President Tyler was affiliated with the Whig political party, but many perceived that he did not act in the best interests of the party. The Whigs were determined he not be re-elected and they did not want anyone who aligned themselves with him in a position of power.²⁴²

One contemporary newspaper reported that “[f]rom the time of [the Whigs’] induction to office . . . they have been wholly and solely engaged in quarreling among themselves for the spoils of office; opposing, as they come up, first one measure and then another of their leaders.”²⁴³ Another newspaper speculated that there may have been a more specific reason:

It is intimated in Washington that the reason of Mr. Bradford’s rejection was the fact that immediately after making application for the place, he returned from Washington to Philadelphia, and . . . organized a meeting in favor of the President and denounced the course of Mr. Clay and his friends. This may be true or not.²⁴⁴

Whatever the eventual reason for the Senate’s rejection of Bradford, it appears that political alliances played a major role. The Senate voted 22 to 17 against Bradford’s confirmation.²⁴⁵ The 22 opposing confirmation included only 1 Democrat.²⁴⁶ The remaining 21 in opposition were Whigs; of the 17 in favor of Bradford’s confirmation, 11 were Democrats while 6 were Whigs.²⁴⁷ The vacancy on the Eastern District of Pennsylvania was finally filled on March 8, 1842, when the Senate confirmed Archibald Randall.²⁴⁸ Tyler had nominated Randall on March 3.²⁴⁹

However, President Tyler again had trouble filling an empty seat on a lower court after nominating Charles Dewey to the District of Indiana on April

240. *Id.* at 32.

241. *Summary*, N.Y. EVANGELIST, Feb. 24, 1842, at 31.

242. THE HISTORICAL SOC’Y OF PA., BRADFORD FAMILY PAPERS, 1620–1906, at 5 (2006), available at http://hsp.org/sites/default/files/legacy_files/migrated/findingaid1676bradford.pdf.

243. *A Modern Babel Illustrated; Or, the Tyler’s Not Tyled*, MACON TELEGRAPH, Feb. 8, 1842, at 3 (on file with authors).

244. 1 WILSON & CO., BROTHER JONATHAN: A WEEKLY COMPEND OF BELLES LETTRES AND FINE ARTS, STANDARD LITERATURE, AND GENERAL INTELLIGENCE 238 (1842) (on file with authors).

245. *Rejection of Mr. Bradford*, PITTSFIELD SUN, Mar. 3, 1842, at 2 (on file with authors).

246. *Id.*

247. *See supra* note 10.

248. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Archibald Randall*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1962&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

249. *Id.*

4, 1842.²⁵⁰ The Senate confirmed him two days later,²⁵¹ but Dewey declined the position shortly thereafter.²⁵² Since 1830, Dewey had served as a justice on the Indiana Supreme Court, as his father had done.²⁵³ After declining the seat on the federal district court, Dewey continued on the Indiana Supreme Court until his death.²⁵⁴ It is possible that he remained in that position because “he preferred the higher \$1,500 salary he earned as a justice of the Indiana Supreme Court to the mere \$1,000 salary of a federal district judge.”²⁵⁵ Another account indicates that the state court position offered was as much as \$1,500 *more* than the federal job.²⁵⁶ The greater prestige of the state court judgeship was an additional factor.²⁵⁷ Elisha Mills Huntington, a former Indiana Circuit Court judge,²⁵⁸ had originally suggested that Tyler nominate Charles Dewey for the District of Indiana.²⁵⁹ After Dewey declined the nomination, Huntington was himself called upon to do the job.²⁶⁰ Tyler nominated him on April 26, 1842, and the Senate confirmed him on May 2, 1842.²⁶¹ Tyler had less difficulty in finding a judge for the District of Vermont. Samuel Prentiss was nominated on April 8, 1842, and confirmed later the same day.²⁶²

It took almost two years for President Tyler to make his next lower court nomination, selecting John Beverly Christian for the Eastern District of Virginia on April 2, 1844.²⁶³ Christian’s nomination was eventually rejected

250. S. EXEC. JOURNAL, 27th Cong., 2d Sess. 48 (1842).

251. *Id.* at 49–50.

252. *Id.* at 48.

253. Zachary Eddy, Pastor, First Church in Northampton, Discourse Delivered at the Funeral of Charles Augustus Dewey 8–15 (Aug. 25, 1866).

254. *Id.*

255. GEORGE W. GEIB & DONALD B. KITE SR., FEDERAL JUSTICE IN INDIANA: THE HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA 42 (2007) (citing COURTS AND LAWYERS OF INDIANA 1, 199 (Esarey et al. eds., 1916)); *see also* EMILY FIELD VAN TASSEL ET AL., WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992, at 13 (1993); Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—And Disservice—1789–1992*, 142 U. PA. L. REV. 333, 359 (1993) [hereinafter *Resignations and Removals*] (internal citations omitted).

256. HALL, *supra* note 3, at 52.

257. *Id.*

258. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Elisha Mills Huntington*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1131&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014) [hereinafter *Biographical Directory: Elisha Mills Huntington*].

259. *See* GEIB & KITE, *supra* note 255, at 42. *But see* HALL, *supra* note 3, at 52 (suggesting that Secretary of State Daniel Webster was responsible for suggesting Dewey to Tyler).

260. GEIB & KITE, *supra* note 255, at 42.

261. *Biographical Directory: Elisha Mills Huntington*, *supra* note 258.

262. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Samuel Prentiss*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1935&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

263. S. EXEC. JOURNAL, 28th Cong., 1st Sess. 252 (1844).

by the Senate.²⁶⁴ He served as a circuit court judge in Virginia before his nomination to the federal bench.²⁶⁵ He came from a long line of judges and politicians: he was the son of a Virginia politician, who had also been a colonel in the Revolutionary War, “a devoted friend of Washington [and] an ardent federalist in politics.”²⁶⁶ Christian’s family had “for quite two hundred years been honorably and usefully represented in the judiciary, and varied local trusts in Virginia.”²⁶⁷ However, Christian’s most high-profile family connection proved to be his undoing in the district court confirmation process: “[u]nfortunately, the bitter contest between Mr. Tyler and the Senate, led by [Henry] Clay, was then going on, and because Christian was Tyler’s brother-in-law, and only for that reason, and to spite Mr. Tyler, the Senate refused to confirm that nomination.”²⁶⁸ A contrary view is that:

Even if he had not been the president’s kinsman, Christian would have been a controversial nominee. Since the beginning of the administration, he had served Tyler as a confidential personal and political advisor. In 1843 and 1844, while ostensibly conducting judicial business, Christian had organized Tyler rallies in his judicial district, frequently taking to the stump to cajole wavering Democrats to support the president.²⁶⁹

Christian was criticized “for clamoring after the federal post on the basis of his family ties and for meddling in politics while holding a judgeship.”²⁷⁰ The Senate Judiciary Committee, made up mostly of Whigs, did not endorse Christian.²⁷¹ In the full Senate vote, all 20 Democrats voted for Christian’s confirmation, but all 24 Whigs voted against it.²⁷² According to the Senate Executive Journal, the count was 18 Democrats, 1 Law and Order member, and 1 Whig voting for Christian, with 24 Whigs voting against him.²⁷³

President Tyler failed in his next attempt to fill the seat on the Eastern District of Virginia. On June 15, 1844, he nominated Robert R. Collier,²⁷⁴ “a former delegate to the Virginia legislature, a prosperous lawyer, and a member of the Calhoun faction of the Virginia Democracy.”²⁷⁵ Collier was an advocate of states’ rights, and on this issue “had a small but influential

264. *Id.* at 341–42.

265. *Id.* at 207.

266. George L. Christian, *Judge John Beverly Christian*, 6 VA. L. REG. 205, 206 (1900), available at <http://www.jstor.org/stable/1098355>.

267. *Id.* at 207.

268. *Id.* at 208.

269. HALL, *supra* note 3, at 57.

270. *Id.*

271. *Id.*

272. *Id.*

273. S. EXEC. JOURNAL, 28th Cong., 1st Sess. 341–42 (1844); *see also supra* note 11.

274. S. EXEC. JOURNAL, 28th Cong., 1st Sess. 348.

275. HALL, *supra* note 3, at 57.

following in Virginia that included the president.”²⁷⁶ He was also vocally in favor of immediately annexing Texas.²⁷⁷ William S. Archer, a Whig from Virginia and an influential U.S. Senator at the time, was opposed to any federal judge who held this view on Texas.²⁷⁸ Collier’s nomination was rejected along party lines: 15 Senators wanted to confirm Collier, and 24 Senators, 16 of them Whigs, voted to oppose him.²⁷⁹ According to the Senate Executive Journal, 16 of those opposed were Whigs, 7 Democrats, and 1 Law and Order Party member; those in favor of Collier’s nomination consisted of 9 Democrats and 6 Whigs.²⁸⁰ The seat on the Eastern District of Virginia was finally filled by James Dandridge Halyburton, who was nominated on June 15, 1844. The Senate confirmed him that same day.²⁸¹

It appears that the Senate treated Tyler’s nominations in a similar way to how it had treated Andrew Jackson’s nominations several years earlier. The nominees’ political affiliations were an important factor, but not the deciding factor, in the Senate’s decisions. The Senate was not rejecting nominees purely because Tyler had put them forward, as is evident from the nine confirmations during the presidency. However, the Senate seemed most disposed to resist or oppose nominees who had particularly close ties to Tyler (just as it had attempted to do with nominees with particularly close ties to Jackson). Christian was related to the President, and Collier expounded political views that were not widely shared. Bradford was not only personally aligned with Tyler, but he also actively supported Tyler. Thus, both Christian and Bradford made easy targets for Senators bent on dealing personal blows to Tyler, whom many of them resented as an “accidental” or “acting” President rather than a legitimately elected one.

F. JAMES POLK, 1845–1849

Partisan strife continued throughout the presidency of James K. Polk from 1845 to 1849. Whereas Tyler found party government to be impossible because of the antipathy of the leadership of both major parties, Polk was, like his mentor Andrew Jackson, an ardent Democrat. Pledging to serve for only a single term, he wanted a cabinet filled with Democrats who were loyal to him. To ensure their loyalty, he demanded that his cabinet members eschew any presidential aspirations. He demanded the same fealty from every other subcabinet official as well. He closely scrutinized all possible judicial

276. *Id.*

277. *Id.* at 57–58.

278. *Id.* at 58.

279. *Id.*

280. S. EXEC. JOURNAL, 28th Cong., 1st Sess. 349 (1844); *see also supra* note 12.

281. *History of the Federal Judiciary, Biographical Directory of Federal Judges: James Dandridge Halyburton*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=955&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

candidates to ensure their prior commitment to the Democratic Party and to protecting state sovereignty and ensuring limited federal power.

Although President Polk made two Supreme Court appointments, they did not come easily. When Polk became President, he already had a Supreme Court vacancy to fill—the seat of Henry Baldwin from Pennsylvania. The challenge was to find someone who was acceptable not only to Democratic leaders from Pennsylvania, but also to the Senate, of which Democrats controlled only 31 of its 63 seats at the time. He first turned to James Buchanan, a former Pennsylvania Senator, whom Polk was eager to remove from his cabinet. Polk had appointed Buchanan as his Secretary of State but found him nearly impossible to manage. Although the Senate confirmed Buchanan, he declined the appointment. When his next nominee to the Court, George Woodward, was found unacceptable to Democratic leaders in Pennsylvania, it was not hard for a powerful coalition opposed to the nomination to develop in the Senate, which rejected the nomination. The Senate found more agreeable his second nominee for the same vacancy, Robert Grier. Polk made his other Supreme Court nomination, Levi Woodbury, after Democrats had secured control of the Senate. As a Senator from New Hampshire, Woodbury not only enjoyed strong support from his home state but also benefitted from the emerging tendency of the Senate to defer to nominations of their colleagues to confirmable offices. A little more than a month after Woodbury's nomination, the Senate easily confirmed him by a voice vote.

Polk made eight appointments to lower federal courts, one to the circuit court and the others to district courts. The Senate confirmed them all. There is no record of any significant resistance to his nominees, perhaps reflecting how quickly (and ably) Polk learned how to clear their nominations with the Senators from the states in which their judicial offices were located.

G. ZACHARY TAYLOR AND MILLARD FILLMORE, 1849–1853

Although the Whigs regained the presidency in 1848, they were unsure of whether the new President, Zachary Taylor, was committed to the fundamental principles of their party, including congressional supremacy on policymaking. Though Taylor would disappoint the party faithful on most issues, his judicial nominations did not. During Taylor's short tenure as President, from March 1849 until his death in July 1850, he made six nominations to lower courts. The Senate confirmed five, one declined his judgeship after having been confirmed, and another declined the seat before the Senate considered his nomination. But, when it became apparent that the Senate, incensed over Taylor's stubbornness in sticking with his plan for Congress to consider adding two new free states to the Union (and thus disrupt the balance between free and slave states in the Senate), was likely to stifle other judicial nominations, Taylor filled six vacancies with recess appointments.

In filling judgeships, Taylor did not routinely follow the preferred Whig policy of deferring to congressional leadership. Instead, he developed the ad hoc practice of deferring to an assortment of advisors, including friends and family, but rarely Senators. For example, in seeking a candidate for the Western District of Louisiana, Taylor “trusted his knowledge and that of personal friends,” while he “ignor[ed] altogether the heavily Democratic Louisiana congressional delegation.”²⁸² He chose to nominate James G. Campbell, who had campaigned for Taylor during the election.²⁸³ Campbell had previously been a state circuit court judge in the state and was in private practice at the time of the nomination.²⁸⁴ Taylor nominated him on March 16, 1849,²⁸⁵ and the Senate confirmed him on March 19.²⁸⁶ However, Campbell was unaware of the nomination, and he declined it on April 9 because “he preferred his lucrative private law practice and planting to the inadequate federal judicial salary” of \$2,000.²⁸⁷

Campbell instead suggested another nominee, John Kingsbury Elgee, a Louisiana state circuit judge.²⁸⁸ Campbell explained that Elgee was not only “one of the very best jurists in Louisiana,” but also, through sugar planting and private law practice, had “an ample fortune which will enable him to accept the appointment, for with the salary attached to it, the Judge will have to support the office and not the office the Judge.”²⁸⁹ However, even the fortune was not enough to convince Elgee to take the position: he was better paid as a state court judge, and the federal role would have required him to travel more.²⁹⁰ Taylor issued a recess commission to Elgee on April 24, 1849, but Elgee declined.²⁹¹

Taylor eventually found a willing nominee, Henry Boyce, for the Western District of Louisiana. He gave Boyce a recess appointment on May 9, 1849, and he nominated Boyce on December 21, 1849.²⁹² It took the Senate several months to confirm Boyce, but it eventually did on August 2, 1850.²⁹³ Taylor

282. HALL, *supra* note 3, at 87.

283. *Id.*

284. *Id.*

285. S. EXEC. JOURNAL, 31st Cong., Spec. Sess. 88 (1849).

286. *Id.* at 89.

287. HALL, *supra* note 3, at 87 (citations omitted); *see also Resignations and Remarks, supra* note 255, at 358.

288. HALL, *supra* note 3, at 87.

289. *Id.* (quoting Letter from James G. Campbell to John M. Clayton (Apr. 12, 1849)) (internal quotation marks omitted).

290. *Id.*

291. *Id.*

292. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Henry Boyce*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=225&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

293. *Id.*

nominated Daniel Ringo to the District of Arkansas on December 21, 1849.²⁹⁴ Ringo had served pursuant to a recess appointment since November 5, 1849.²⁹⁵ The Senate confirmed his appointment on June 10, 1850.²⁹⁶ Taylor's final lower court nominee was Thomas Drummond, who was nominated for the District of Illinois on January 31, 1850, and confirmed on February 19, 1850.²⁹⁷

Taylor's relative success in securing Senate confirmation for all his lower court nominations is not easy to explain. The Senate had slowed down, nearly to a halt, the confirmation process for his executive branch nominations in retaliation against his taking the initiative to push Congress to add two new states to the Union; and Taylor had not given the level of deference to the Whig leadership in Congress that its orthodoxy demanded. It is all the more mystifying since the Democrats held a 35 to 25 advantage in seats in the Senate. It is, however, possible that his judicial nominees had powerful friends or allies in the Senate, as northern Whigs supported Taylor and his initiatives; and many Senators might have either not cared much about lower courts or believed that a battle over them would not necessarily work to their political advantage with the next election almost three years away.

Taking over as President after Taylor's death, Millard Fillmore served from 1850 to 1853. Whigs rejoiced over Fillmore's elevation to the presidency since he was a very close friend to Whig Party founder Henry Clay and had been a loyal party member from its inception. Whigs' hopes that Fillmore would fill federal offices with loyal Whigs was high, particularly since Taylor had tried to demonstrate his independence from party pressure by not consulting Fillmore on appointments while Fillmore served as his Vice President.

Unlike Taylor, Fillmore developed criteria for judicial selection. He looked for people who had loyally served him, whom he knew personally, and who shared his reading of the Constitution as vesting the federal government with broad powers, including the authority to establish a national bank, which Democrats had long opposed. Fillmore also suggested reforming the federal judiciary, including raising salaries to draw more competent people to judicial service. Because Whigs controlled a majority of seats in the Senate at the time Fillmore became President, he hoped that his long service to the Whig Party would work to the advantage of his nominees in the Senate, where he also had

294. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Daniel Ringo*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2013&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

295. *Id.*

296. *Id.*

297. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Thomas Drummond*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=650&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

many friends from his days as powerful Chair of the Ways and Means Committee in the House.

But Fillmore's judicial nominations faced considerably more resistance than did Taylor's. Although Taylor died without having had the opportunity to make a Supreme Court nomination, Fillmore had two vacancies to fill. Although the Senate easily confirmed his nomination of Benjamin Curtis to the Court shortly after Fillmore became President, the Senate tabled two others and rejected a third nomination to another vacancy. While the Senate eventually confirmed his choice of Judah Benjamin to take the seat, Benjamin declined the appointment so that he could serve as one of Louisiana's two Senators. Fillmore had only a handful of lower court vacancies to fill, but they proved difficult. The Senate rejected one of his nominees, John Currey, on two separate occasions, while two of his other nominees turned down their appointments after having been confirmed by the Senate.

On September 28, 1850, the day California became a state, President Fillmore nominated Judah Philip Benjamin for the Northern District of California, and John P. Healey (sometimes spelled Healy) for the Southern District.²⁹⁸ "Both men were the administration's first choices, though neither nominee had sought the post."²⁹⁹ The Senate confirmed both Benjamin and Healey the same day they were nominated,³⁰⁰ but both eventually turned down the opportunities.

Benjamin, a Whig from New Orleans, had been counsel to the California Land Commission in 1847.³⁰¹ Daniel Webster, who was Fillmore's Secretary of State and had recommended Healey, believed that his qualifications were sufficient to secure Healey's confirmation.³⁰² "Benjamin preferred the lure of politics in Louisiana, his plantation, and a potential seat in the United States Senate to the low-paying Northern District judgeship."³⁰³ At that time, the salary was \$3,500 a year.³⁰⁴

Healey was a lawyer from Boston and had managed the law office of Daniel Webster while Webster was in Washington.³⁰⁵ He was also fluent in Spanish, which made him useful in Southern California.³⁰⁶ However, Healey

298. S. EXEC. JOURNAL, 31st Cong., 1st Sess. 266 (1850).

299. Kermit L. Hall, *Mere Party and the Magic Mirror: California's First Lower Federal Judicial Appointments*, 32 HASTINGS L.J. 819, 828 (1981) (citations omitted).

300. S. EXEC. JOURNAL, 31st Cong., 1st Sess. 266.

301. Hall, *supra* note 299, at 828.

302. *Id.* (citing Letter from Daniel Webster to Millard Fillmore (Oct. 29, 1850) (on file with authors)).

303. Hall, *supra* note 299, at 829 (citing Letters from Daniel Webster to Millard Fillmore (Oct. 19, 1850; Oct. 23, 1850; and Oct. 29, 1850) (on file with authors)).

304. Edgar M. Kahn, *Judah Philip Benjamin in California*, 47 CAL. HIST. SOC'Y Q. 157, 162 (1968), available at <http://www.jstor.org/stable/25154286>.

305. CHRISTIAN G. FRITZ, *FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1891*, at 18 (1991).

306. *Id.*

declined the judgeship. A number of reasons have been given for this. Several reports agree that the low salary and the forced distances from his family were both deterrents.³⁰⁷ Another possibility is that Healey “thought the post too lacking in prestige in comparison to the Northern District [and] the area around Los Angeles too unsettled.”³⁰⁸ However, after Benjamin’s refusal to accept the post in the Northern District, Healey was offered that position, and again declined.³⁰⁹

Next, President Fillmore offered the seat in the Northern District to Charles B. Goodrich, another lawyer from Boston.³¹⁰ However, once again, the low salary was an obstacle, preventing Goodrich from taking the position.³¹¹ It is not clear whether or not Goodrich received Senate confirmation before declining.

Fillmore was finally able to fill the seat in the Southern District with James McHall Jones, whom he nominated on December 23, 1850, and whom the Senate confirmed only three days later.³¹² However, the task of filling the seat in the Northern District was far less straightforward. Fillmore turned to John Currey (occasionally spelled Curry), nominating him on December 28, 1850.³¹³ The Senate rejected the nomination on January 25, 1851, by a vote of 34 to 9.³¹⁴

Currey was from San Francisco and a member of the California bar, an attribute for which California politicians had been advocating following several out-of-state nominees.³¹⁵ However, in general, “Currey’s support came from Washington, D.C., and not California.”³¹⁶ In particular, he had strong support from William Nelson, a Congressman from New York, and a lawyer with whom Currey had previously studied law.³¹⁷ Nelson “was able to mediate the selection process because he retained significant political contacts with

307. *Id.* at 18–19; *see also* GEORGE COSGRAVE, *EARLY CALIFORNIA JUSTICE: THE HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, 1849–1944*, at 21 (1948); GODFREY MORSE, *MEMOIR OF JOHN PLUMMER HEALY LL.D., LATE CITY SOLICITOR AND CORPORATION COUNSEL OF THE CITY OF BOSTON* 6 (1882) (noting that, in particular, Healey wanted to stay close to his aging father); Hall, *supra* note 299, at 829 (citing Letters from Daniel Webster to Millard Fillmore (Oct. 19, 1850; Oct. 23, 1850; and Oct. 29, 1850) (on file with authors)).

308. Hall, *supra* note 299, at 829 (citing Letters from John P. Healy to Daniel Webster (Oct. 23, 1850 and Oct. 24, 1850) (on file with authors)).

309. *Id.*

310. FRITZ, *supra* note 305, at 19.

311. *Id.*

312. *History of the Federal Judiciary, Biographical Directory of Federal Judges: James McHall Jones*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1195&cid=999&ctype=na&inststate=na> (last visited Nov. 22, 2014) [hereinafter *Biographical Directory: James McHall Jones*].

313. S. EXEC. JOURNAL, 31st Cong., 2d Sess. 280 (1850).

314. *Id.* at 286.

315. FRITZ, *supra* note 305, at 19.

316. Hall, *supra* note 299, at 832.

317. *Id.*

President Fillmore's most powerful opponents in the New York Whig party."³¹⁸ For Fillmore, the nomination provided an opportunity to strengthen his standing among New York Whigs. "Nelson was a maverick," and "[b]y rewarding Nelson's position on the Compromise, Fillmore hoped to draw the representative closer to the administration."³¹⁹

Despite Nelson's backing, "[o]pposition to the nomination was immediate and strong."³²⁰ The southern contingent of the Democratic Party, led by Senators Andrew Pickens Butler and William McKendree Gwin, attacked Currey, especially for his alleged abolitionist views.³²¹ The Senate Judiciary Committee, which Butler controlled, discovered that Currey was a former New York Free-Soiler.³²² "Southern Democratic senators, already wary of President Fillmore's position on the slavery issue, seized upon Currey's nomination to embarrass the administration."³²³ Nelson insisted that Currey was not an abolitionist. However, the slavery issue was not the only sticking point. There were accusations against him of "ethical and moral turpitude,"³²⁴ including "immorality, abolitionism, and theft."³²⁵ He was alleged, on one occasion, to have "fled to California to avoid a scandal stemming from misuse of clients' funds."³²⁶ According to one commentator, most of these accusations were without foundation, but "Gwin made no attempt to join with Nelson in rebutting them."³²⁷ Fillmore knew that the nomination would not succeed, but refused to act, "equating withdrawal with an admission of guilt."³²⁸ According to the Senate Executive Journal, the Senate voted on January 25, 1851, rejecting the nomination by 34 votes to 9: the 9 consisted of 8 Whigs and 1 Democrat, while the 34 were composed of 23 Democrats, 9 Whigs, and 2 Free-Soilers.³²⁹

President Fillmore eventually filled the seat on the Northern District after nominating Ogden Hoffman, Jr. on February 1, 1851.³³⁰ Less than a month later, the Senate confirmed Hoffman on February 27.³³¹ However, any relief

318. *Id.*

319. HALL, *supra* note 3, at 96 (citation omitted).

320. Hall, *supra* note 299, at 833.

321. *Id.*

322. HALL, *supra* note 3, at 96 (citation omitted).

323. Hall, *supra* note 299, at 833.

324. *Id.*

325. FRITZ, *supra* note 305, at 20.

326. HALL, *supra* note 3, at 96.

327. Hall, *supra* note 299, at 833.

328. *Id.*

329. S. EXEC. JOURNAL, 31st Cong., 2d Sess. 286 (1851) (noting that the Senate voted 34 to 9 on the question: "Will the Senate advise and consent to the appointment of John Currey?").

330. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Ogden Hoffman, Jr.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1065&cid=999&ctype=na&instat=na> (last visited Nov. 22, 2014).

331. *Id.*

at having filled the problematic seats on California's federal district courts was short-lived. James McHall Jones, who had served less than one year on the Southern District, died on December 15, 1851.³³² Fillmore turned again to Currey, who had been rejected for the Northern District earlier in the same year.³³³ Once again, Currey's nomination was unsuccessful. In contrast to the nomination for the Northern District, there are few details about Currey's bid for the Southern District. On August 30, 1852, the Senate voted to table the nomination.³³⁴ After this, there was no further mention of Currey's nomination. In effect, the nomination failed.

On March 18, 1852, Fillmore nominated John Glenn for the District of Maryland.³³⁵ Glenn was confirmed the following day.³³⁶ There were no further lower court nominations until August 13, 1852, when the President nominated Nathan Kelsey Hall for the Northern District of New York.³³⁷ The Senate confirmed Hall on August 31, 1852.³³⁸

Fillmore's last judicial nominations were made as part of his failed efforts to fill a seat on the Supreme Court that had been vacated when John McKinley, whom Van Buren had appointed, died on July 19, 1852. The Senate's persistent refusal to confirm Fillmore's nominees, coupled with Judah Benjamin's decision to decline the seat, ensured that the vacancy would be available for the next President to fill. In fact, it remained vacant for more than two years, the longest lasting vacancy in the Court's history. It entrenched further the norm of the opposing party's efforts to keep vacancies on the Court available for the next President to fill.

H. FRANKLIN PIERCE AND JAMES BUCHANAN, 1853–1861

After receiving slightly more than half of the popular vote in the 1852 presidential election, Franklin Pierce, a former Senator from New Hampshire, entered the presidency with his fellow Democrats gaining control of both the House and the Senate. With Democrats holding 38 of the Senate's 62 seats, Pierce's nominees had excellent prospects for favorable treatment in the confirmation process. Indeed, the Senate confirmed his entire cabinet in nearly record time and all but one of his judicial nominations, including John Campbell, to the Supreme Court.

332. *Biographical Directory: James McHall Jones, supra* note 312.

333. S. EXEC. JOURNAL, 32nd Cong., 1st Sess. 370 (1852) (misspelling Currey's name).

334. *Id.* at 449–50.

335. *History of the Federal Judiciary, Biographical Directory of Federal Judges: John Glenn*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=869&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

336. *Id.*

337. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Nathan Kelsey Hall*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=947&cid=999&ctype=na&instate=na> (last visited Nov. 22, 2014).

338. *Id.*

Although Pierce was the first President to place his Attorney General in charge of assessing possible judicial nominees, Pierce retained the authority to veto his decisions and made clear his selection criteria. Hence, Pierce appointed only Democrats who had significant experience as judges or lawyers and had proven commitment to a strict construction of the Constitution that prioritized protecting state sovereignty and limiting federal power.

Pierce is one of the few Presidents who entered the presidency with a vacancy already available for him to fill. He chose John Campbell of Alabama, who had substantial experience arguing cases in the Alabama appellate courts and the Supreme Court, and whose nomination a delegation from the Supreme Court had urged Pierce to make. Though Campbell's strong constitutional views were well known, the Senate easily confirmed him the same day that it received his nomination.

The Senate also confirmed 18 of Pierce's 19 nominations to the lower federal courts. One nomination, that of George Washington Hopkins, never made it to the Senate because after serving on a recess appointment, Hopkins decided not to serve. Pierce consequently withdrew the nomination.

One of Pierce's more interesting nominees was West Hughes Humphreys, whom he nominated to the Eastern, Middle, and Western Districts of Tennessee on March 24, 1853.³³⁹ The Senate acted quickly, confirming Humphreys just two days later on March 26.³⁴⁰ In 1861, Humphreys shocked many of his previous supporters by leaving the bench to serve as a judge for the Confederacy. Two years later, Congress impeached and removed him from office for treason, and in the first instance in which it ever did so, sanctioned him further by disqualifying him from ever serving in another federal office and receiving any benefits or pensions from his prior service as an Article III judge.

Although the Senate quickly confirmed 17 of his other judicial nominations, Pierce made his one unsuccessful nomination in 1855 when he nominated George Washington Hopkins to be Chief Judge of the Circuit Court of the District of Columbia. The precise date of the nomination is unclear. Hopkins was a lawyer from Virginia and had previously served on both the Virginia House of Delegates and the U.S. Congress.³⁴¹ He had also been a member of the Virginia Constitutional Convention and a state court judge.³⁴² Hopkins declined the nomination. He had been given a recess

339. *History of the Federal Judiciary, Biographical Directory of Federal Judges: West Hughes Humphreys*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1123&cid=999&ctype=na&instat=na> (last visited Nov. 22, 2014).

340. *Id.*

341. *Biographical Directory of the United States Congress: George Washington Hopkins (1804-1861)*, OFFICE OF ART & ARCHIVES, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000774> (last visited Nov. 22, 2014).

342. *Id.*

appointment for the Circuit Court of the District of Columbia, but it is not clear whether or not he actually served on the federal bench before declining.³⁴³ His nomination was withdrawn on December 7, 1855.³⁴⁴ There are few details available about Hopkins's reasons for declining.

Instead, Pierce turned to James Dunlop to fulfill the role of Chief Judge on the Circuit Court of the District of Columbia.³⁴⁵ Dunlop originally received a recess appointment for a regular position on that court on October 3, 1845, and once Hopkins was out of contention for the Chief's seat, Pierce placed Dunlop in that position through a recess appointment on November 27, 1855.³⁴⁶ Pierce officially nominated Dunlop as Chief Judge on December 3, 1855, and the Senate confirmed him on December 7, 1855.³⁴⁷

Pierce also had success in persuading Congress to create the Court of Claims. On January 22, 1856, Pierce made the first nomination ever to that court, George Parker Scarborough.³⁴⁸ Pursuant to a recess appointment, Scarborough had already served on that court since May 8, 1855, and the Senate confirmed him as the nation's first judge on the Court of Claims on February 11, 1856.³⁴⁹

The relative ease with which the Senate confirmed Pierce's judicial nominees is testimony to the Democrats' dominance in the Senate. While there was little debate or evident furor over these nominations, members of Congress—and the nation—had, in the meantime, sharply divided over Pierce's proposed Kansas–Nebraska Act, which vested the people of each of those territories to decide for themselves on whether to become slave or free states. Pierce expected the new law to work to the advantage of slaveholders, and his aggressive enforcement of the law (coupled with the appointment of staunch, pro-slavery advocates to positions of power within the Kansas territory) helped to provoke a civil war in Kansas. The ensuing bloodshed and political fallout destroyed the remainder of Pierce's presidency, even though they do not seem to have taken any tolls on his judicial nominations.

343. Hopkins does not appear in the *Biographical Directory of Federal Judges*. However, a table in a brief recently submitted to the U.S. Supreme Court suggests that Hopkins actually served on the D.C. Circuit pursuant to the recess appointment. Brief for the United States in Opposition at 21a, *Miller v. United States*, 544 U.S. 919 (2005) (No. 04-38). As described in the following paragraph, James Dunlop was assigned to the position as a recess appointment beginning in November 1855, so it appears likely that Hopkins did not serve, or only served extremely briefly, in the seat.

344. S. EXEC. JOURNAL, 34th Cong., 1st Sess. 1 (1855).

345. *History of the Federal Judiciary, Biographical Directory of Federal Judges: James Dunlop*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2818&cid=999&ctype=na&instat=na> (last visited Nov. 22, 2014).

346. *Id.*

347. *Id.*

348. *History of the Federal Judiciary, Biographical Directory of Federal Judges: George Parker Scarborough*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3258&cid=999&ctype=na&instat=na> (last visited Nov. 22, 2014).

349. *Id.*

Pierce's weakened status within his own party is evident from the fact that the next President was none other than James Buchanan, who had been Pierce's Ambassador to Great Britain. Buchanan entered the presidency with Democrats holding a sizeable advantage over Republicans in the Senate. Bent on shoring up support from his fellow Democrats, Buchanan largely deferred to their recommendations on lower appointments, though Buchanan wanted to appoint lawyers who had previous judicial experience, were relatively young so they could serve for a long time, and who were strongly committed to construing the Constitution in favor of state sovereignty.

President Buchanan made 11 judicial appointments, including one to the Supreme Court. His Supreme Court nominee, Nathan Clifford, had served as his Attorney General, was a staunch defender of slaveholders' rights, and was confirmed by the Senate in one of the closest, most bitterly contested confirmation votes in American history.

The Senate confirmed nine of Buchanan's 10 lower court nominations. None of his lower court nominees faced any significant resistance until his last: John Pettit, whom he nominated to the District Court in Kansas when he was a lame duck and nearing the end of his term.³⁵⁰ Congress' session ended before a vote was taken on the nomination.³⁵¹ On February 14, 1861, the Senate voted not to refer Pettit's nomination to the Judiciary Committee.³⁵² Motions were made on February 21, 27, and 28, but none passed.³⁵³ This result does not seem to have been a surprise: a report from February 16 predicted that Pettit's confirmation was "not probable."³⁵⁴ On March 1, 1861, it was reported that Pettit's nominations was "rejected by three or four majority."³⁵⁵

Pettit was a Democratic politician, who had previously served in the Indiana House of Representatives and had been appointed U.S. District Attorney by President Van Buren in 1843.³⁵⁶ He was elected to the U.S. Congress in 1843 and served three terms.³⁵⁷ In 1850, he chaired the Judiciary Committee of the Indiana Constitutional Convention.³⁵⁸ He served another term in the U.S. Congress before returning to Indiana and serving as a circuit judge.³⁵⁹ He later became Chief Justice of the Kansas Territory, and later

350. S. EXEC. JOURNAL, 36th Cong., 2d Sess. 262 (1861). This nominee should not be confused with John W. Pettit, a Congressman who served from 1855 to 1861.

351. *Id.* at 273.

352. *Id.*

353. *Id.* at 278, 283, 288.

354. *From Washington*, SATURDAY EVENING POST, Feb. 16, 1861, at 6 (on file with authors).

355. *Washington*, Feb. 21, FARMER'S CABINET, Mar. 1, 1861, at 3 (on file with authors).

356. George Anastaplo, *Abraham Lincoln and the American Regime: Explorations*, 35 VAL. U. L. REV. 39, 42 (2000).

357. *Id.* at 42-43.

358. *Id.* at 43.

359. *Id.*

served on the Indiana Supreme Court.³⁶⁰ Pettit was described by another influential Kansas attorney as “a lawyer of considerable learning, of great native talent, and of unquestioned integrity.”³⁶¹ An account of the Indiana Supreme Court, published in the late 19th century, stated: “Pettit was a man of pronounced character. His opinions are characterized by the forcible language used in them His opinions are not noted for their learning or even accuracy of expression, but for the good common-sense often displayed in them.”³⁶²

Pettit was known for opposing ideas of racial equality. In an 1854 speech, he declared the phrase “all men are created equal,” as written in the Declaration of Independence, to be a “self-evident lie.”³⁶³ In professing such views while in the Senate, Pettit earned himself “an inglorious reputation.”³⁶⁴

Indeed, Abraham Lincoln had singled Pettit out for criticism on many occasions.³⁶⁵ However, “[t]here are indications here and there that John Pettit . . . was both personally and politically dubious about slavery.”³⁶⁶ Although there is no evidence of Pettit’s direct response to the Court’s decision in *Dred Scott v. Sandford*,

[H]e had made it quite clear in 1854 that the kind of controversy addressed three years later in *Dred Scott* should be decided (both by a United States Court and by tribunals such as the Missouri Supreme Court) in favor of emancipation of any slave taken (as Dred Scott and his wife had been taken) into any State that had once been part of the territory governed by the anti-slavery provision of the Northwest Ordinance.³⁶⁷

As stated, Pettit’s nomination was rejected, for all practical purposes, on February 28, 1861.³⁶⁸ On February 21, 1861, the Senate voted primarily along party lines to reject Pettit’s nomination by a 27 to 24 margin.³⁶⁹

Clifford’s narrow confirmation in 1858 and Pettit’s rejection nearly three years later reflected the growing antipathy against slavery, the fracturing of

360. *Id.*

361. Letter from Thomas Ewing, Jr. to John Sherman (Jan. 22, 1861), available at <http://www.kansasmemory.org/item/963>.

362. W.W. Thornton, *The Supreme Court of Indiana*, 4 GREEN BAG 249, 263 (1892).

363. CONG. GLOBE APP’X, 33d Cong., 1st Sess. 214 (1854).

364. *The Campaign in Indiana: The Breckinridge State Ratification Convention Speeches of Messrs. Bright and Fitch Ex-Senator Pettit, Etc.*, N.Y. TIMES, Aug. 13, 1860, at 2, available at <http://www.nytimes.com/1860/08/13/news/political-campaign-indiana-breckinridge-state-ratification-convention-speeches.html?module=Search&mabReward=relbias%3Aw>.

365. Anastaplo, *supra* note 356, at 58–61.

366. *Id.* at 62.

367. *Id.* at 64–65.

368. S. EXEC. JOURNAL, 36th Cong., 2d Sess. 288 (1861). Of the 27 nay votes, there were 26 Republicans and 1 Democrat (Stephen Douglas of Illinois). Of the 24 aye votes, there were 23 Democrats and 1 American Party member. See *id.* (additional information on file with authors).

369. *Id.* at 278.

the Democratic Party, and the impending rise of the Republican Party, which was committed to the preservation of the Union. The fates of these nominees reflect, in other words, the inextricable link between judicial nominations and the most intense political divisions of the era. As such, they signaled the emerging (and perhaps now) permanent trend in assessing judicial nominations through a political prism.

IV. HOW GOLDEN WAS THE “GOLDEN ERA”?

Some superficial and nostalgically appealing evidence can be used to infer a golden antebellum era of judicial appointments. Yet, the modern day Senate is so procedurally divergent from those preceding the Civil War that the halcyon haze disappears when viewing the earlier period in context. Quantitative and qualitative analyses further demonstrate surprisingly relative equivalence between the antebellum and contemporary periods.³⁷⁰

A. EVIDENCE SUPPORTING THE NOTION OF A “GOLDEN ERA”

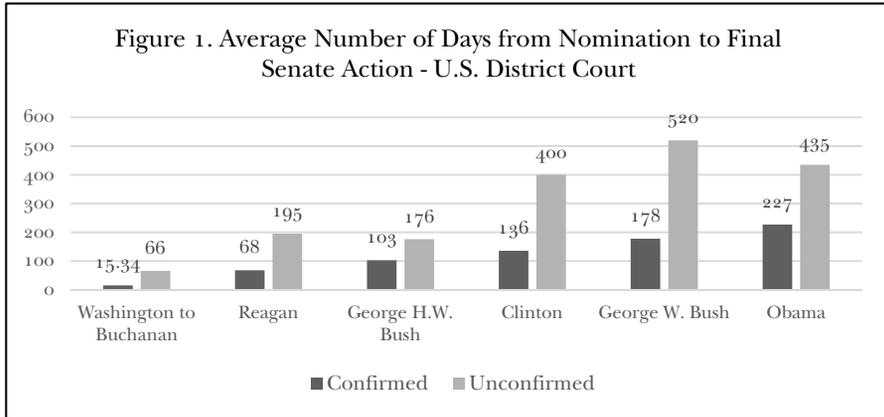
Modern scholars and politicians presume the early years of this nation’s history reflect a “golden era” of judicial confirmations—a time when the Senate was presumably much more deferential to the President’s discretion in selecting judicial nominees and not allowing judicial confirmation decisions to become bogged down by ideologies or party politics.³⁷¹

Selective evidence might even create a sketchy impression that this era lives up to that high standard. For instance, as shown above in Part III, the Senate confirmed 100% of Presidents Washington’s, Van Buren’s, and Polk’s

370. The evidence showing that people who yearn for a lost “golden age” are mistaken on their own terms suggests as well the possibility that senatorial deference to presidential picks might not be the appropriate way to describe the dynamics of federal judicial selection. As Professor Chafetz has argued, levels of deference and considerations of ideology are themselves factors that, in his view, are quite properly subject to political conflict. Hence, any age in which such considerations are thought to be off-limits for political debate or conflict would not be “golden” at all. In other words, politics determines the norm of any given era, and if the politics of judicial selection are by nature contentious, it is inappropriate to accept as a norm some conception of judicial selection itself at odds with that norm. See Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1116–20 (2011) (reviewing ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)).

371. See, e.g., Olson, *supra* note 1, at 18–19 (“[T]he occasional rejection of nominees is not new.”). However, confirmations did not historically extend for long periods of time without good reason. For example, “John Jay . . . was confirmed in two days[] [and] John Marshall was confirmed in a week.” *Id.*; see also David Greenberg, Editorial, *History Betrays GOP Claims in Judicial Battle*, COLUMBUS DISPATCH, May 7, 2005, at 6A (“[U]nlike in the 19th century, when senators often admitted to political motives when they opposed a nominee, senators since 1968 typically alight on a kind of cover story, such as Fortas’ outside income, William Rehnquist’s alleged voter intimidation in the 1960s[,] or Clarence Thomas’ reported sexual harassment.”); Russ Pulliam, *Not What the Founding Fathers Intended*, INDIANAPOLIS STAR, June 5, 2005, at 2E (“Judicial nominations have become intensely political. The filibuster against Bush judicial nominees is one example of how the court system has been drawn into the political disputes that should be settled by the other two branches of government. That’s not what the Founding Fathers intended.”).

judicial nominees. In addition, as set forth in Figure 1 below, our own research³⁷² demonstrates that the average number of days from nomination to final Senate action for district court nominees was substantially lower throughout the antebellum period than that of contemporary circumstances.³⁷³

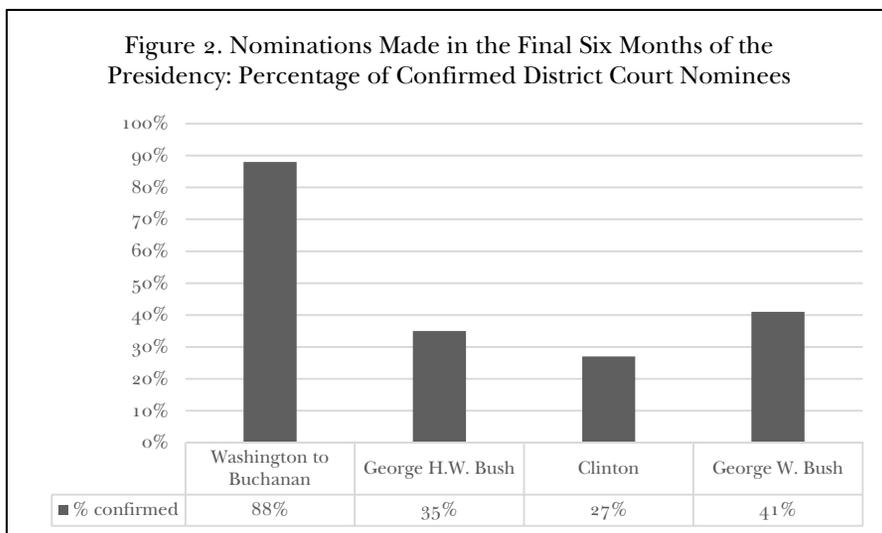


Our research further reveals, as set forth in Figure 2 below, that nearly 90% of those individuals nominated in the final six months of a pre-Civil War presidency were confirmed prior to the end of the congressional session.³⁷⁴ This success rate is in stark contrast to the comparatively lower success rates for modern-era Presidents.

372. See DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL 33953, NOMINATIONS TO ARTICLE III LOWER COURTS BY PRESIDENT GEORGE W. BUSH DURING THE 110TH CONGRESS (2008); *Judicial Nominations*, U.S. SENATE COMM. ON THE JUDICIARY, <http://www.judiciary.senate.gov/nominations/judicial> (last visited Nov. 22, 2014).

373. We limited our comparative scope to district court nominees because the antebellum period contained very few circuit court nominees. The “midnight” appointments were excluded from the analysis due to their ability to skew the data. Not including the “midnight” appointments, only ten judges were nominated to the circuit courts during the antebellum period, a number that does not produce a sufficient sample size for viable comparison.

374. See also RUTKUS & BEARDEN, *supra* note 372.



Finally, as demonstrated by our research in Part III, the majority of judicial nominees who did not ultimately assume office during the antebellum era did so at their own election *after* confirmation. Further, those individuals who *were* rejected by the Senate were disagreeably outspoken, intolerably incestuous political cronies, or knowingly corrupt—radical outliers from a normally acquiescent process.

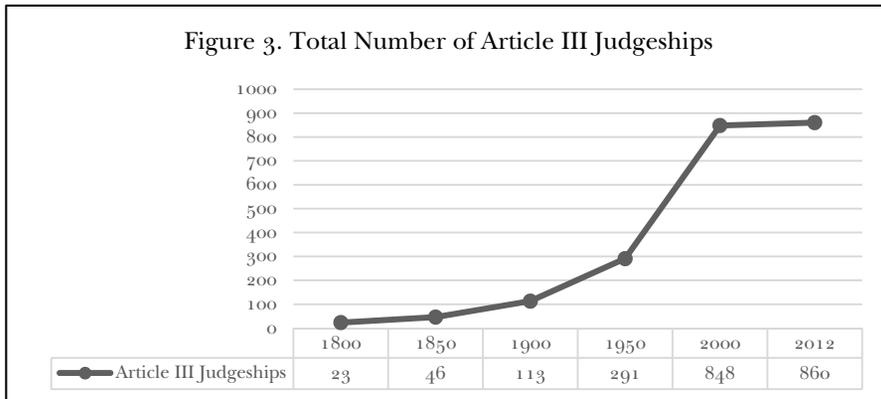
B. EVIDENCE UNDERMINING THE NOTION OF A “GOLDEN ERA”

The above evidence could seemingly support the popular notion of a “golden era” during the Republic’s first seven iterations—until the facts are examined in context. When subjected to situational analyses that frame the comparison in terms of governing procedures, at least a few patterns seem to be relics of the past and highly unlikely, if not impossible, to recur. This is because the vetting of judicial nominees has become an extensive process involving institutionalized mechanisms that did not exist in the antebellum era and which are unlikely to disappear any time soon.

To begin with, judicial nominees no longer decline appointments after their confirmations. As noted above in Part III, the vast majority of failed nominations in the antebellum period were actually a result of such voluntary declinations. At least since the Civil War, the communications between prospective candidates and presidential administrations have improved, such that Presidents, or their advisors, know beforehand which of the people they would like to nominate as judgeships will actually accept the appointments if confirmed. No one remembers the last time a judicial nominee declined the post after his or her confirmation. Further, contemporary nominees, unlike some of those during the antebellum period, are clearly aware of compensation potential. If anything, to the extent that remuneration remains

a concern for modern candidates, the issue is confronted long before a person is even nominated.³⁷⁵

Three developments plainly influenced the Senate's handling of judicial nominations after 1861. The first was the Senate's increased workload. Before the Civil War, the Senate faced difficult political and constitutional questions—none bigger than the future of slavery. While everyone within the Senate was sensitive to how other concerns might affect the slavery issue, Senators did not have such a busy workload that they would have lacked the opportunity to spend significant time and energy considering judicial nominations. There was, in short, more of an opportunity prior to 1861 for Senators to carefully consider the judicial nominations made by the President. By the end of the 19th century and beyond, it appears Senate business increased to such an extent, along with a rise in the number of lower court nominations, that it became difficult, if not practically impossible, for Senators to debate each and every judicial nomination on its merits. Among other factors, the number of judgeships had increased exponentially since 1861, as Figure 3 reveals below.³⁷⁶



To assist the Senate in its ever-increasing workload, essentially every modern judicial nominee goes through a lengthy vetting period before they reach the Senate Judiciary Committee. Notably, the ABA has been heavily involved in the process, formally rating prospective nominees since the early 1950s.³⁷⁷ The ABA conducts confidential interviews of at least 40 peers of a

375. See AM. BAR ASS'N & FED. BAR ASS'N, *FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION* 22–23 (2003); Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 83–84 (2008).

376. See *Judgeship Appointments by President*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/appointments-by-president.pdf> (last visited Nov. 22, 2014).

377. See *Frequently Asked Questions About the ABA Standing Committee on the Federal Judiciary*, AM. BAR ASS'N (Mar. 2009), <http://www.americanbar.org/content/dam/aba/migrated/scfedjud/fjfaq.authcheckdam.pdf>.

prospective nominee to assess their professional competence, integrity, and judicial temperament.³⁷⁸ The nominee is finally rated as either “well qualified,” “qualified,” or “unqualified.”³⁷⁹ Similarly, the FBI is also heavily involved in evaluating candidates by preparing thorough background checks as an added filter towards ensuring that suitable people are nominated as judges.³⁸⁰ These files are open to public scrutiny and include information ranging from tax returns, to movie rentals, to marital status (including discord).³⁸¹ In a related vein, today’s media investigates, reports, and scrutinizes nominees—often relying on the above information, as well as what it culls independently—to shine light on the virtues, or lack thereof, of candidates for the judiciary.³⁸²

In analyzing the judicial selection and confirmation process at the time, Kermit Hall emphasized the political developments of the era. He identified the characteristics marking the shift from a traditional to a modern political environment: “the surge in voter turnout, the acceptance of party as a legitimate means of organizing as well as opposing government, and the emergence of well-articulated local party organizations.”³⁸³ These changes had an impact on the way the judicial selection process was carried out. Gradually, over time, the process became more institutionalized. There were, for example, changes in the supervisory role of the Attorney General and in the developing “systematic involvement of senators of a president’s party in the selection of district judges in their home states.”³⁸⁴ Similarly, the practice of nominating relatives to judicial offices has died; norms against nepotism and concerns about conflicts of interest have influenced Presidents not to nominate family members to lifetime judicial appointments. But, Presidents occasionally appoint them to executive offices, such as John F. Kennedy’s appointment of his brother Bobby as Attorney General. Even an appointment like the latter is likely to offend modern sensibilities and ethics.

Just as there were changes in the processes by which the presidential administration selected nominees, there were changes in the mechanisms the Senate used to discharge its responsibility of reviewing nominees during the confirmation process. For instance, the Senate approved a resolution in 1816 creating the Judiciary Committee as one of its standing committees, and the

378. *Id.*

379. *Id.*

380. DAN G. BLAIR, NAT’L ACAD. PUB. ADMIN., A SURVIVOR’S GUIDE FOR PRESIDENTIAL NOMINEES 27 (2013), available at <http://www.napawash.org/wp-content/uploads/2013/05/SurvivorsGuide2013.pdf>.

381. *Id.*

382. See, e.g., Will Evans, *Bush Withdraws Nominee*, SALON (Mar. 8, 2006, 7:00 AM), <http://www.salon.com/2006/03/08/payne3/>. See generally Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287 (2012) (describing the Senate’s consideration of politics instead of qualifications for judicial nominees).

383. HALL, *supra* note 3, at 171.

384. *Id.*

resolution listed judicial administration (and thus judicial nominations) among its initial responsibilities. By the Civil War, it had become routine for the Judiciary Committee to consider nominees prior to being referred to the Senate as a whole. Moreover, it was not unusual, prior to the ratification of the 17th Amendment in 1917, for Senate debates on judicial nominations to take place behind closed doors. As a result, there are no official records of many of the most hotly disputed judicial nominations in the 19th and early 20th centuries.

The second development that shaped federal judicial selection was the growth in prestige of serving in the federal judiciary. Prior to the 1860s, prominent lawyers tapped to serve in the federal judiciary might have viewed judicial service as less prestigious, or requiring more of a professional sacrifice, such as serving in a President's cabinet or elected office.³⁸⁵ The growth in federal courts' dockets coincided with an increase in perception of the prestige—and power—of serving as a federal judge. Perhaps even the conception of public service or duty itself might have changed, as reflected in John Jay's decision to leave the chief justiceship in the late 18th century, compared with Salmon Chase's decision to forego a presidential run and a powerful cabinet post to take the same position in 1864. Similarly, while Judah Benjamin turned down appointments to both the lower federal courts and the Supreme Court in the 1850s, it became far less common an occurrence for someone to turn down the same professional opportunities by the end of the 19th and early 20th centuries.

The third development that undoubtedly shaped the Senate's judicial selection process is the two-party system. Prior to 1861, the major political parties were often in flux, and Senators who were chosen by state legislatures paid greater heed to what the people who sent them to Washington wanted than to the desires of party leaders in Washington. Whigs, for example, were united on some issues, such as the creation of the National Bank, but not on others, such as the scope of the federal government's authority to regulate slavery in the territories. But since the 17th Amendment, political parties have appeared to occupy the vacuum left by the removal of state legislatures from the electoral process. Parties have simply consolidated their influence over senatorial actions since then. The result is an increased probability for adhesion, or unanimity, among party members in today's world than prior to 1861. So, for example, it has become possible for Republicans on the Judiciary Committee to unify in opposition to a judicial candidate, regardless of their backgrounds and ideological differences.

Put slightly differently, it might appear that there is a better chance today that one party's members will unify against a candidate based on their dislike for a President and their hope to preserve the vacancy for the next President,

385. See generally JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012).

whom they hope will be from their own party. Of course, this circumstance is not new to American politics. It is no different than how Democrats had obstructed some of Tyler's judicial nominations, particularly his last efforts to fill a Supreme Court vacancy, because of their dislike for Tyler and hope to preserve the vacancy for the next President, whom they expected to be from their party. Similarly, Democrats blocked Fillmore's efforts to fill a Supreme Court vacancy because they did not want Fillmore to make it. When Republicans obstructed or successfully blocked confirmation proceedings in anticipation of the 2012 presidential election because they disliked President Obama or simply did not want him to fill vacancies, their actions were not unprecedented. They were doing what partisan Senators had done since the early 1800s.

Nonetheless, the two-party system has taken the process one step further. Perhaps no better example of party solidarity has been the use of the filibuster—endless debate that precludes floor action in the absence of a supermajority vote—by Senate minorities to block judicial confirmations. The Senate rules allow only cloture votes to break filibusters, consisting of a supermajority vote.³⁸⁶ When the minority party controls the minimal number of votes required for a filibuster, the likelihood of a successful cloture vote is very small.³⁸⁷ Accordingly, until the beginning of the 21st century, minorities within the Senate were rarely able to muster the requisite votes to reach cloture on lower court nominations. Instead, throughout most of American history, the opposing party was most likely able to defeat or frustrate judicial nominations if they held a majority of seats in the Senate.³⁸⁸ Although the filibuster did exist in the 19th century, it succeeded in blocking floor votes only when it was made near the end of a legislative session and was therefore used, in effect, to run out the clock. Otherwise, filibusters could be used to delay floor votes, but the relative sparseness of other business and the difficulty of maintaining complete unity among the opposing party's Senators rarely made them fatal, even to legislation.³⁸⁹ However, things changed dramatically in 1975 when the Senate created a two-track system that allowed the majority leader to move onto other business once a filibuster of a nomination (or any other business) had been threatened.³⁹⁰ Particularly during President George W. Bush's administration and Barack Obama's presidency from 2008 through 2013, Senators from the opposing party had sufficient numbers to derail dozens of lower court nominations by merely

386. Brian Naylor & Ron Elving, *Primer: Judicial Nominees and the Senate Filibuster*, NAT'L PUB. RADIO (Apr. 5, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4575047>.

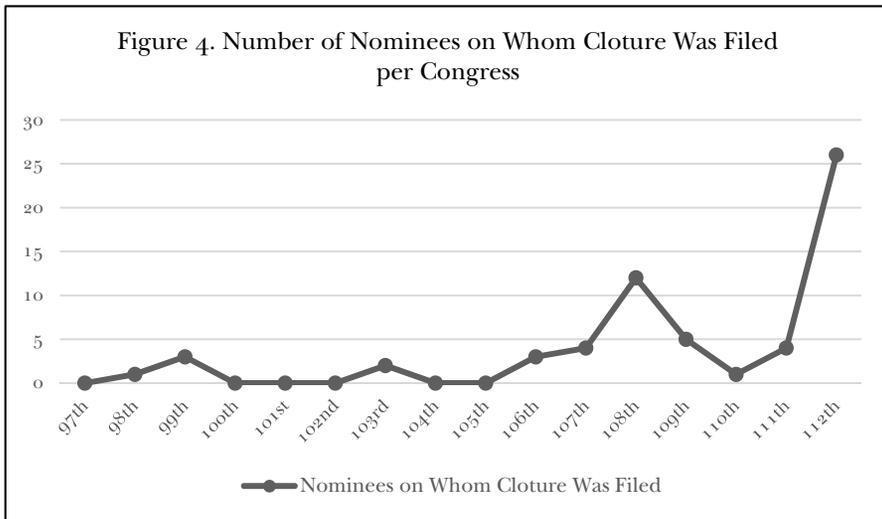
387. *Id.*

388. See generally GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006).

389. *Id.*

390. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT 120–23* (2008).

threatening filibusters.³⁹¹ The use of filibusters to block judicial nominations and attendant cloture votes during recent sessions of Congress is shown below in Figure 4.³⁹²



The obstructing practice of the filibuster suffered a fatal blow on November 20, 2013, when the Senate used an unprecedented parliamentary move to disallow any further blockage of executive or judicial nominations through filibusters.³⁹³ The dismantlement of the filibuster is so recent that there is yet no meaningful data on the extent to which it has translated into, or produced, significantly higher rates for judicial confirmations. Nevertheless, the point remains that nothing quite comparable to the post-1975 filibuster existed during the antebellum period.³⁹⁴

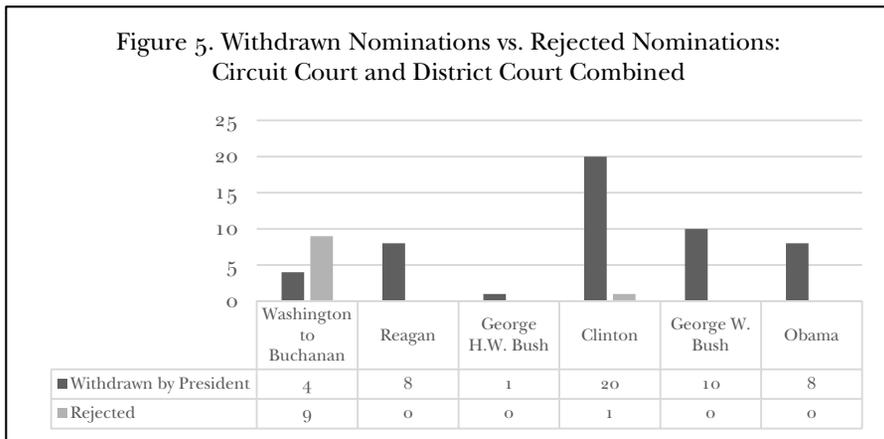
391. See Rebecca Ballhaus, *Do Obama Nominees Face Stiffer Senate Opposition?*, WALL ST. J. (Nov. 21, 2013, 12:43 PM), <http://blogs.wsj.com/washwire/2013/11/21/do-obama-nominees-face-stiffer-senate-opposition/>; Matt Corley, *After Trying to Abolish Filibusters of Judicial Nominees in '05, GOP Threatens to Filibuster Obama's Nominees*, THINK PROGRESS (Mar. 3, 2009, 7:00 PM), <http://thinkprogress.org/politics/2009/03/03/36538/gop-filibuster-letter/>. Senator John Cornyn of Texas was critical of the modern judicial confirmation process's use of the filibuster. See generally John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003). Cornyn argued that the process was broken because of excessive delays, with the filibuster adding additional and unnecessary delays. *Id.*

392. Ellie Sandmeyer, *The Senate Filibuster the Media Ignored*, MEDIA MATTERS FOR AM. (Mar. 7, 2013, 4:46 PM), <http://mediamatters.org/blog/2013/03/07/the-senate-filibuster-the-media-ignored/192957>.

393. Ryan Grim & Michael McAuliff, *Senate Votes for Nuclear Option*, HUFFINGTON POST (Nov. 22, 2013, 3:48 PM), http://www.huffingtonpost.com/2013/11/21/senate-filibuster-reform_n_4316325.html.

394. WAWRO & SCHICKLER, *supra* note 388, at 159–79.

Until the Senate's fateful vote to dismantle judicial filibusters, the full-Senate rejection of a judicial nominee had largely become a thing of the past. Significantly, from 2001 to 2013, it was not needed to defeat a nomination. Instead, the Judiciary Committee and stall tactics, like the filibuster, had resulted in many nominations simply being returned to the President at the end of a session of Congress. Both Presidents Clinton and George W. Bush, as well as President Obama, had become more likely to withdraw nominations because of the prospect of deadlock over those judicial candidates. In the antebellum period, on the other hand, a full-Senate rejection was the more common method. A comparison of this phenomenon between eras is provided in Figure 5 below.³⁹⁵



In addition, as set forth in Part III, a deeper analysis of the antebellum period nomination evidence reveals many of the same patterns and practices that exist in the contemporary period. Clear examples of politics and ideology entering the decision-making process suggest that the earlier period does not live up to the high standards placed upon it by scholars and national leaders. Moreover, it remains to be seen whether the dismantlement of judicial nominations will end up resulting in similar or analogous patterns in the Senate's handling of lower court nominations.

As an initial matter, our in-depth survey of judicial nominations during the Republic's first seven iterations reveals a number of patterns of political or partisan activity. It is plainly evident that nominees' outlooks or ideologies played a central role in the selection and confirmation process, just as they do today. Broadly, this occurred in three ways. First, there were occasions in

395. See RUTKUS & BEARDEN, *supra* note 372, at 17; DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL31635, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977-2003 (2004); *Judicial Nominations*, *supra* note 372; *Resources: Rating Judicial Nominees*, AM. BAR ASS'N, http://www.americanbar.org/groups/committees/federal_judiciary/resources.html (last visited Nov. 22, 2014).

which the Senate rejected nominees purely because of party affiliations. Reports from behind the closed doors in the Creighton and Gurley debates suggest that the Senate rejected the two nominees purely to keep seats on the lower courts vacant for the next President, Andrew Jackson, to fill. Second, some nominees were rejected not merely based on their affiliation, but because they were especially active politically. This was the case, for example, when the Senate rejected Thomas Bradford in 1842. Third, on numerous occasions, the Senate looked not just at party affiliation, but also at nominees' personal views on particular issues. These views sometimes aligned with a nominee's party affiliation. However, nominees that were rejected based on a particular position were usually more extreme or vocal in their viewpoint than the party's official position. In that respect, both the antebellum era and the modern one have shown fidelity to the Framers' desire that nominees be disqualified when they evidently lacked the integrity to merit judicial confirmation.³⁹⁶

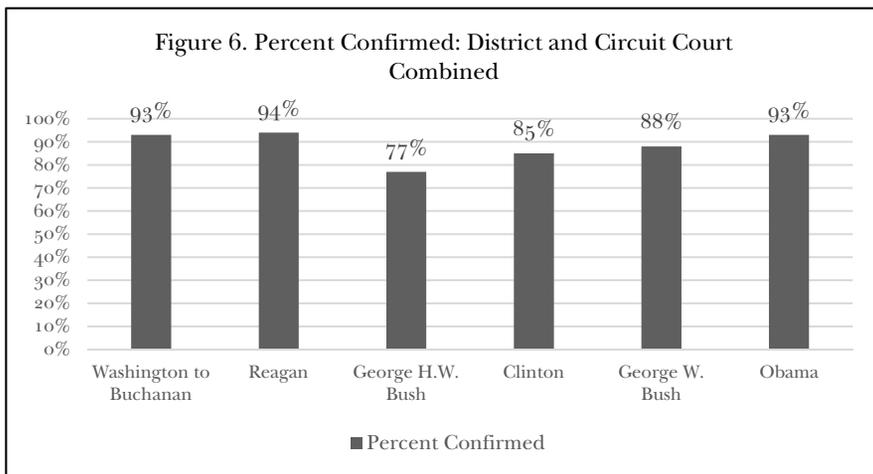
Unsurprisingly, slavery was the particular issue that received the most attention throughout the period. In 1834, Benjamin Tappan's rejection related to his support for the recent slave rebellion and his perceived unwillingness to support the Fugitive Slave Act. At the same time, Jesse Lynch Holman's confirmation depended on his convincing the Senate that he would enforce the same Act. Fourteen years later, John Currey's alleged abolitionist views were a central reason for his rejection. A decade after, the same type of controversy surrounded John Pettit, who vocally opposed notions of racial equality. However, slavery was not the only issue in which the Senate was interested. For example, Robert R. Collier's views on the annexation of Texas were fatal to his chances of confirmation. Overall, as set out in detail in Part III, ideologies were extremely important in the Senate's decision-making.

The Senate's focus on ideology was further mirrored by Presidents and their administrations in deciding who to nominate. To be sure, ideological alignment was not the only criterion. Party or personal loyalty was another important criterion. Hence, it was no accident that all of Washington's and John Adams's judicial nominees were people who had been active Federalists; Jefferson's judicial nominees had no prior experience working for the federal government, which would have been dominated by Federalists, rather than Republicans loyal to him or his constitutional vision. Occasionally, Presidents made nominations as political favors, such as Fillmore's 1850 nomination of John Currey to try to draw Senator Nelson closer to the Administration.

396. See GERHARDT, *supra* note 5, at 36 (citation omitted) (citing James Iredell at the North Carolina Ratifying Convention who expressed agreement with Alexander Hamilton that "the Senate should reject a presidential nominee only if that person was 'positively unfit' for the post to which he had been nominated"). The Framers in the Constitutional Convention and the ratifiers in their respective conventions made various references that the Senate had the confirmation authority primarily to check presidential nominations of unfit or unqualified people to office. *Id.* at 35.

Another central criterion was a potential nominee's willingness to serve. Many candidates during the period declined their nominations because of the demands of service on the federal bench, or most often, the lack of prestige and compensation attached to the role. Fillmore's difficulty in filling seats on the federal district courts in California is just one example. Ideology, therefore, was just one factor in judicial selections, but it was clearly an important factor. Although Hall notes that "no president ever entirely succeeded in molding the federal judiciary to his will,"³⁹⁷ Presidents certainly tried to do so. During the period, "[t]he selection process increasingly reflected the underlying ideological imperatives that eventually destroyed the artificial second party system."³⁹⁸

Ultimately, however, the rate of success of nominations remains comparable between the two periods. Despite notions that the antebellum period represents some "golden era" of judicial nominations, the percentage of confirmed nominations is not significantly different from current circumstances, as seen below in Figure 6.³⁹⁹



397. HALL, *supra* note 3, at 174.

398. *Id.* at 173.

399. See also RUTKUS & SOLLENBERGER, *supra* note 395, at 19.

V. CONCLUSION

The early history of federal judicial selection in this country was largely a different era than our own but not a golden one. From 1789 to 1861, the Senate approved the vast majority of judicial nominations, though the Senate was not, as many contemporary commentators might assume, uniformly deferential. Both Presidents and Senators based their decisions largely on political considerations, including the nominees' past service to the President's party or administration and positions on important constitutional issues of the day, such as slavery. When the President's party controlled the Senate, it was much more likely to confirm his judicial nominations.

Nonetheless, it is a mistake to overstate the relevance, or similarity, of this early era to modern disputes over judicial nominations. The differences between then and now are significant, and these differences obviously affected federal judicial selection. In this early era, communication between the President and his nominees or with the Senate was far from perfect, so that mistakes were made, including occasionally nominating someone uninterested in the job. Moving up from the federal district did not necessarily correspond to any increase in pay. Travel then was much harder, and the higher up one moved in the judiciary, the more one had to travel. Hence, it was not unusual to find some early judicial nominees uninterested in remaining in the job or uninterested in promotion. In this early era, some Senators were able to exercise inordinate influence over judicial nominations and confirmations. Senators then traveled home at least as much as they do now, though their workload was different. Throughout this era, the Senate dealt with judicial nominations as a committee of the whole, and thus, Senators were likely to be relatively well-acquainted with the nominations before them.

Yet, Presidents and Senators then largely made decisions based on political considerations, though there were no formal mechanisms (including the filibuster) that gave Senate minorities substantial influence over early federal judicial selection. Indeed, there is ample evidence indicating both Presidents and Senators took political connections, ties to themselves and/or their parties, and even ideological considerations into account in assessing judicial nominees. Moreover, there is no evidence to suggest that any consensus or even express preoccupation with merit existed. Merit was, and still is, a contested concept within this process. The nature of the considerations influencing judicial selection have changed because the issues, technology, the courts' dockets, the prestige of serving in the federal judiciary, and the times themselves have changed. But, to no surprise, when all is said and done, politics or political considerations have played a significant role in a process that the Constitution explicitly placed under the control of the nation's political leaders. Politics, in other words, has always, in one form or another, influenced the selection of lower court judges in this country.