THE APPOINTMENT OF SUPREME COURT JUSTICES: PRESTIGE, PRINCIPLES AND POLITICS*

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Hidden in musty obscurity behind the forbidding covers of three hundred and more volumes of court reports, the Justices of the United States Supreme Court seldom emerge into public view. Deaths and retirements, new appointments, and occasional opinions attract fleeting attention; all else is unnoticed. But to the political scientist, to the historian, and, above all, to the lawyer, the Supreme Court is an object of vital concern. To the political scientist, the Court matters because it is the chief juggler in maintaining the Balance of Powers. To the historian, the Court matters because of its tremendous influence on the policies of federal and state governments. To the lawyer, the Court is important because it determines the litigation through which he earns his living.

Both student and lawyer know that the Court is only the sum of its parts, that nine individuals compose The Court. Hence to study the court is to study men. The purpose of this article is to discuss these men, who they are, where they came from, how they got there. A better knowledge of each Justice will mean a better understanding of that mass personality, the Supreme Court of the United States.

The source materials used here are the records of the Department of Justice on applications and recommendations for appointment to

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Certain general principles of citation are followed in this article. All statements or quotations from documents found in secondary sources have been credited to the proper author. Letters and records not so identified come either from Justice Department or Judiciary Committee files. These sources can be distinguished by the fact that all Justice documents bear on suggested appointments while Judiciary papers deal with appointments already made. Citations are given for all quotations from any source, but to avoid over-footnoting, statements made about Court aspirants are not given citations as often as those bearing on actual appointees.

No attempt has been made to correlate all the secondary materials on appointments; nor is the story of an appointment restated when nothing can be added to accepted accounts.

the Supreme Court, and the records of the Senate Judiciary Committee on confirmations. The papers of both the Department and the Committee for the years prior to 1900 are in the National Archives. Justice documents extending as far back as 1853 have been found while the Senate papers begin a few years later; after 1870, the records gather in volume and reveal a more detailed picture of nomination controversies. The Justice files since 1900 are kept in the Department and the Senate records since that date are in the basement vault of the Judiciary Committee.

The Justice Department files are kept, not under the name of the position in question, but under the name of the applicant. Thus the researcher can find the supporting papers for candidates who are known to have been considered, but recommendations of others are completely inaccessible until, as the papers become fifty years old, they are taken to the Archives, and filed by position. The Judiciary Committee files for the post-1900 period are in great confusion. The papers covering the 1900-1922 period are almost entirely lost, and those of more recent date are mixed with every other record of the Committee, and stacked indiscriminately in the Committee vault.

THE COURT IN 1853

The Supreme Court Justices of 1853 were bound by the traditions and experience with the earliest days of the Republic. With Taney as Chief Justice, the Court included in order of seniority, McLean, Wayne, Catron, McKinley, Daniel, Nelson, Grier, and Curtis. Only Curtis was born in the Nineteenth Century. Taney was only a year younger than the Declaration of Independence and four other Justices were older than the Constitution which they expounded. All of them could remember when there was not a state west of the Mississippi and few west of the Alleghanies. They had known invasion of the United States by a foreign power. Their thinking was conditioned by their intellectual development at a time when slavery was thought of only casually as an evil, and they could remember when Garrison and the abolitionists were considered troublemakers and radicals.

Within the lifetime of these Justices the Supreme Court had played its important part in establishing a strong central government and an economic system which served the commercial interests of

the country. It had survived the attacks of the Jeffersonian Republicans and had gained a fair amount of national prestige.

Within ten years of 1853 the Court was to lose its prestige almost entirely by running counter to a powerful drift of popular opinion in the *Dred Scott* case; within the same period it was almost entirely reconstituted. After 1853, and more particularly after 1860, the men who came to the Court faced two major problems: first, how to meet the political conditions which arose from the war, and second, how to adapt the Constitution to the needs of post-war capitalist expansion.

The Pre-Civil War Appointments (1853-1860)

In the wake of the Compromise of 1850 there came a comparative calm in sectional strife. The question of slavery in the territories was settled "forever." After the election of 1852 the Democratic party was virtually the only national political party and the Whig disintegration which provided the basis for the Know Nothing and Republican parties was well under way. Not until 1854, and then over the issue of organization of the Kansas and Nebraska territories, was that peace broken and the relentless march toward civil war begun again.

A cessation of political passion, however, did not mean a lapse in the normal turbulence of politics. A Supreme Court justiceship is a position of great honor and majestic dignity, and a Justice is supposed, by popular legend, to be above the petty conflicts of politicians. But a Supreme Court Justice is also a job holder, and he has power. The attempt by rival politicians to control the job and the power was particularly in evidence after the death of John McKinley. President Fillmore, the last Whig President, made three attempts between August, 1852, and the end of his term to fill the vacancy and all three were ignored or rejected by the Senate Democratic majority.[1] The new position was left to be filled by Democratic President Franklin Pierce.

Pierce might look for inspiration to the recommendations presented to his predecessor but some of these he skimmed hurriedly.

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[1] For a discussion of the Fillmore appointments of Edward A. Bradford, George E. Badger, and William C. Micou, see 2 Warren, *The Supreme Court in United States History* (2d ed. 1928) 242-245.

Solomon W. Downs of Louisiana,[2] a Whig Senator from that state who had been defeated along with Fillmore in the Democratic triumph, sought the post. He had the support of several members of the Louisiana legislature and ten members of the United States Senate who joined in petition for their fallen friend. But if Fillmore had been unable to get a Whig confirmed there was little reason to expect Pierce to do more and Downs died a year later, a minor federal officeholder. A more likely suggestion was Thomas Ruffin,[3] for 20 years Chief Justice of the North Carolina Supreme Court. His name was presented by North Carolina's Governor, David Reid,[4] in what are for a politician words of great urgency: "I would be much gratified. . . ." But even Reid knew that Ruffin was not of the same circuit as the deceased McKinley, and that this was at least some objection to his appointment; perhaps this was why Pierce did not choose Ruffin.[5]

Ruffin was not the only applicant with political backing. John A. Campbell[6] of Alabama, Pierce's ultimate choice, had important friends. Governor Henry Collier[7] of Alabama strongly advocated the appointment of Campbell, whom he had known for twenty years. Collier had been Chief Justice of the Supreme Court of Alabama for ten years and was adequately able to form an opinion of Campbell's legal ability. In Collier's estimation, Campbell's fluent French and his

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[2] Solomon W. Downs (1801-1854) was United States Senator from Louisiana, 1847-53. He became Collector of the Port of New Orleans in 1853 and served for one year.

[3] Thomas Ruffin (1787-1870) was a Justice of the Supreme Court of North Carolina from 1829 to 1833 and was Chief Justice from 1833 to 1852. He returned to the North Carolina bench for part of the year 1858.

[4] David Reid (1813-91), North Carolina Democrat, was a Member of Congress, 1843-47; Governor, 1850-53; and United States Senator, 1853-59.

[5] The geographical factor in Supreme Court appointments has diminished in importance since the Justices no longer serve as circuit judges. There is no member of the present Court who was appointed from a residence west of the Mississippi river although Mr. Justice Douglas has associations with the State of Washington. The Court has recently had three members at one time (Hughes, Stone, and Cardozo) from New York City. This, however, is not to say that it is a factor which may be ignored as it is of practical importance still in weighing candidacies. For a modern acceptance of the value of this factor, see Hughes, *The Supreme Court of the United States* (1928) 44.

[6] John Archibald Campbell (1811-1889) was a practicing lawyer in Alabama at the time of his appointment.

[7] Henry W. Collier (1801-55) was Chief Justice of the Supreme Court of Alabama, 1839-49, and was Governor, 1849-53. Campbell was also endorsed by Ben Fitzpatrick (1802-69), a former Governor of Alabama and, at the time of Campbell's appointment, United States Senator. According to Carl B. Swisher, Catron and Curtis, as representatives of the Court, asked Pierce to appoint Campbell. Swisher, *Roger B. Taney* (1935) 446.

wide knowledge of the civil law suited him particularly to act as judge for a circuit which included Louisiana.

Campbell had not been active as a practical politician—Collier claimed that "his severe habits of study are not calculated to make him an adept . . . "; but Pierce need have no fears: "His politics class him with the truest sect of Democrats. He is a Republican upon the model of 1798-99." This estimate proved sound, for in 1861 Campbell left the Supreme Court to join his state in secession.

Recommendations of politicians all over the South buttressed the words of Collier. Five Congressmen from Mississippi, six from Alabama, thirteen from Virginia, six from Tennessee, five from Georgia, six from South Carolina, three from North Carolina, and one each from Arkansas and Florida, as well as the members of the Alabama Supreme Court, petitioned for the appointment. On March 21, 1853, the appointment was made and four days later the Senate concurred.

The next vacancy came when Benjamin R. Curtis resigned to take up a lucrative practice in abolitionist Boston where his slashing dissent in the *Dred Scott* case had reversed the low opinion in which he was held by the anti-slavery faction and insured him a profitable practice.[8] The problem of Curtis' successor must have cost the timid Buchanan many unhappy moments for passion over the issue of slavery had risen to a crescendo; in the circumstances, any appointment would have been attacked. However, Buchanan was not sorry to see Curtis go. The closest to any expression of a pleasantry in the letter acknowledging the resignation was a cool: "The President gives you his thanks for postponing the time of your retirement to a period when no one will be inconvenienced by it."[9]

The three men mentioned most prominently for the post were John J. Gilchrist,[10] Associate and Chief Justice of the New Hamp-

[8] The Curtis dissent "entirely revolutionized the former adverse views held regarding him by the anti-slavery men." 2 Warren, *op. cit. supra* note 1, at 321. Curtis resigned because of the inadequacy of his salary (1 Curtis, *A Memoir of Benjamin Robbins Curtis* (1879) 243), and his son estimates that he earned $650,000 in professional fees in the seventeen years after his resignation. 1 Curtis *op. cit.* 268.

[9] Curtis had informed Buchanan that he had chosen the date of his retirement so that no litigants would be inconvenienced. Curtis also wrote to ex-President Fillmore who had appointed him that financial considerations and the fact the Court had sunk so low that his voice would not improve it were his reasons for resigning. The Curtis-Fillmore letters are very cordial. For the complete correspondence, see 1 Curtis, *op. cit. supra* note 8, at 249.

[10] John J. Gilchrist was Associate Justice of the New Hampshire Supreme Court from 1840 to 1848, and Chief Justice, 1848-55.

shire Supreme Court for fifteen years and at the time of the Curtis vacancy a judge of the Court of Claims; Charles B. Goodrich[11] of the Boston bar; and Nathan Clifford[12] of Maine. Gilchrist boosted himself for the office by having letters of recommendation sent to Attorney General Black. George Ticknor Curtis, brother of the resigning Justice and a noted authority on constitutional law in his own right, supported Gilchrist.

Rufus Choate signed a Gilchrist petition but later thought better of it and wrote President Buchanan in Goodrich's behalf. He and other supporters of Goodrich considered their candidate to be an excellent lawyer as well as a thoroughly deserving Democrat; and if big names were thought significant in guiding the presidental choice, Gilchrist could have rejoiced, for Reverdy Johnson of Maryland, one of the country's leading Democrats, supported him.

Buchanan's choice was Nathan Clifford, whom he had known well since their service together in Polk's Cabinet.[13] Clifford was known, in those days when being a Maine Democrat was not a mark of distinction in itself, as one of the leaders of his party in that state. Naturally the appointment was bitterly fought by all the critics of the Democracy but, on January 12, 1858, Clifford was confirmed with a narrow margin of three votes.

Civil War Appointments (1860-66)

As the Civil War drew closer, moderates in the country saw in the Supreme Court vacancies an opportunity to propitiate factions and thus avert the crisis. When Justices Daniel, McLean, and Campbell vacated their seats through death or resignation in 1860 and 1861, "A humble citizen of the United States"[14] asked President Lincoln to appoint the aged Senator Crittenden of Kentucky, a prominent advocate of sectional compromise. As late as 1862, a far less humble citizen, who was later to become a Cabinet member and United States Senator, William Evarts,[15] clung to the conciliation

[11] Charles B. Goodrich was a Boston lawyer of no political prominence.

[12] Nathan Clifford (1803-81) had been attorney general of Maine and Attorney General of the United States under Polk.

[13] Clifford left his active campaigning largely to close friends who approached Buchanan personally. One of these friends, Congressman John Appleton of Maine, wrote Clifford confidentially two weeks before the nomination was sent to the Senate that Clifford would definitely get the appointment, and that he should begin preparations to move to Washington. Philip Clifford, *Nathan Clifford, Democrat* (1922) 268.

[14] Thomas S. Malcolm of Kentucky to President Lincoln, March 13, 1861.

[15] Evarts to Lincoln, November 22, 1862.

approach and proposed the appointment of James L. Pettigru,[16] a loyal Whig South Carolinian. Evarts stressed the wise politics of recognizing "The most steadfast example of faithfulness which this great rebellion has brought out" and indicated that many other members of the bar shared his sentiments.

This means of defeating the rebellious found little support among the politicians of Washington. Buchanan, after considering the merits of suggested Southerners, including William L. Harris[17] of the Mississippi Supreme Court, sent the name of his Attorney General, Jeremiah Black, to the Senate as a Lame Duck appointment. Black had been a member of the Pennsylvania Supreme Court and thus could claim some judicial experience, but the Republicans of the Senate felt that so important an appointment should fall to one of their number and rejected Black, 25-26.[18]

No sooner had Lincoln taken office than he began to receive suggestions of possible appointees. Among those who were put forward by their friends were James Speed, brother of Lincoln's good friend Joshua Speed and later Attorney General, and George Robertson of Kentucky.[19] William T. Otto,[20] later Supreme Court reporter, had his supporters. But retiring Justice McLean wanted Noah Swayne,[21] a member of the Ohio bar, as his own successor and politicians and businessmen joined in boosting the Ohioan. Governor

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[16] James L. Pettigru (1789-1863) was a South Carolina Whig and Unionist who never held public office.

[17] William L. Harris (1807-68) was a Mississippi lower court judge, 1853-58, and was on the Mississippi Supreme Court, 1858-67. Others suggested to Buchanan were George H. Lee of Virginia, S. S. Boyd of Mississippi, and Samuel Hampstead, Arkansas.

[18] Daniel, whom Black was to succeed, died in May, 1860. The reason for the delay was that Taney had been expected to resign in time for Buchanan to name his successor and Black was scheduled to become the new Chief Justice. When it became clear that Taney had no intention of resigning, Black's name was sent in as an Associate, but too late. By that time twelve Democratic Senators had resigned to join the South.

The Republicans would have refused any Democrat. As Horace Greeley put it, he would oppose Black even if Buchanan's choice had possessed all the virtues of Marshall and Story together. See William N. Brigance, *Jeremiah Sullivan Black* (1934) 113.

[19] George Robertson (1790-1874) had been a Whig Member of Congress (1817-21) and Associate and Chief Justice of the Kentucky Supreme Court (1828-42). He later became an Associate again from 1864 to 1871.

[20] William T. Otto (1816-1905) was an Indiana lower court judge from 1844 to 1852 and was professor of law at Indiana University from 1847 to 1852. He was later Assistant Secretary of the Interior for eight years.

[21] Noah Swayne (1804-84) held only one public office prior to his Supreme Court appointment. As a young man he had been United States District Attorney from 1830 to 1839.

Dennison[22] of Ohio pointed out to President Lincoln that "the appointment would give great satisfaction to our friends" and this frankly practical argument outweighed the deficiency in Swayne's judicial experience. Dennison went to Washington to press the claims of his candidate and friends of Swayne flooded the President with letters. William B. Ogden, former mayor of Chicago and later president of the Chicago and Northwestern as well as the Union Pacific Railroad[23] had known Swayne for twenty-five years and pronounced him to be not only personally, morally, socially, literarily, and legally "exceptional" but also to be possessor of sufficient "means to live handsomely independent of his salary."

Whether Lincoln was convinced of the intellectual and political merits of the appointment or whether he sought to test what sort of man had earned so large a collection of laudatory adjectives is not clear, but he appointed Swayne. Confirmation was readily granted. With no Southerners to choose from, Lincoln was reluctant to fill the vacancies in the Southern circuits; but it soon became imperative to have a Supreme Court that would decide important war issues favorably and in 1862 Lincoln appointed Samuel F. Miller, a former doctor and at the time of his appointment a Keokuk Republican leader, important in Iowa politics, but then unknown elsewhere.[24] A

[22] William Dennison (1815-82) was Governor of Ohio, 1859-61. He later became Lincoln's Postmaster General. Warren lists Senators Sherman and Wade of Ohio as Swayne Backers. 2 Warren, *op. cit. supra* note 1, at 378.

[23] William Butler Ogden was mayor of Chicago in 1837. His endorsement of Swayne marks the period of the beginning of railroad influence in the appointment of Supreme Court Justices. After 1860 the railroads were the biggest business interest in the country and their influence was felt by the high and low. Occasionally their domination of Court choices became so patent as to cause revolt, as in the instance of Stanley Matthews.

Swayne himself organized the campaign for his appointment. In April, 1861. he wrote Secretary of the Treasury Chase, a fellow Ohioan, that if Chase could "deem it proper to give me your friendly support you will lay me under a lasting obligation." Fairman, *Mr. Justice Miller and the Supreme Court* (1939) 43.

[24] Miller (1816-90) was born in Kentucky. He was a doctor for many years before his admission to the bar in 1847. In 1850 he moved to Iowa and in 1862 he was chairman of the Keokuk Republican district committee.

Miller's effort to win appointment involved two steps: First, to mold the impending reorganization of circuits so that Illinois and Ohio would not be in the same circuit as Iowa for these states had likely candidates for the Court; second, to get the appointment from Lincoln. (Fairman, *op. cit. supra* note 23, at 44.) It took six months to get the required legislation. Had it not been for the presence of Iowa Congressmen in key positions a different scheme might have been adopted.

Iowa's Congressional delegation as well as Governor Kirkwood appealed to Lincoln in Miller's behalf. Miller had so little reputation outside his own state that even a neighbor like Lincoln had never heard of him. Senators Grimes and Harlan of Iowa drew up a petition on which they secured the signatures of 28

second appointment went to David Davis of Illinois. Davis had been Lincoln's floor manager at the Chicago nominating convention of 1860 and had earned his appointment.[25]

Lincoln later appointed Stephen J. Field, California Democrat.[26] The post of Chief Justice went to Salmon P. Chase,[27] Lincoln's

Senators and 120 or more Representatives, few of whom knew anything of Miller. That support won the nomination. Miller was so little known at the time of his appointment that he was widely confused with Daniel F. Miller, a former Whig Congressman from Iowa.

[25] David Davis (1815-86) was an Illinois judge at the time of his appointment. Lincoln wavered between the choice of Davis and Orville H. Browning of Illinois and it was largely through the efforts of Leonard Swett, a friend of both Lincoln and Davis, that Davis was chosen. As Swett set it down, he went to Lincoln and appealed to the President to remember his obligation to Davis. As a clinching argument he assured Lincoln that the appointment of Davis would also pay any political debts owed to Swett (Fairman, *op. cit. supra* note 23, at 55). Lincoln thereupon appointed Davis.

[26] Stephen J. Field (1816-99) was a member of the California Supreme Court at the time of his confirmation for the Court post, March 10, 1863. Field was chosen at the instance of the California delegation, and because Governor Leland Stanford, California railroad magnate, asked Lincoln to make the appointment. Myers, *History of the Supreme Court* (1912) 502. Myers gives as his authority the assurance of a man "who was Stanford's private secretary at this time." David Dudley Field, Stephen's brother, was a prominent Republican, and this influenced Lincoln in making the appointment. Swisher, *Stephen J. Field* (1930) 116.

[27] Salmon P. Chase (1808-73), United States Senator from Ohio, Governor, and war-time Secretary of the Treasury, made an attempt to supplant Lincoln as the party's choice in 1864. His effort came to nothing, and was abandoned before the Republican convention, after which he supported Lincoln.

Immediately upon Taney's death friends of Chase began to importune Lincoln to appoint his former Secretary. Senator Sumner argued that Chase could be relied on for his sincere anti-slavery convictions. Fessenden and Stanton within the Cabinet made the same appeal. Opponents of Chase, as well as advocates of other candidates, repeated to the President every criticism made by Chase of his former superior, but to no effect. It is the opinion of Nicolay, Lincoln's secretary, that he was determined to appoint Chase from the moment of Taney's death, but that he was determined to remain "very 'shut pan' about this matter." The policy of secrecy was continued until the very moment that the appointment was announced to the Senate, for Lincoln made out the necessary papers with his own hand.

Such doubts as Lincoln held must have arisen from Chase's disloyalty to the President, but the only fear he expressed openly was that Chase could never forget his presidential aspirations even when on the Supreme Court. He almost wrote to Chase to ask him to declare himself publicly against ever attempting again to win higher honors, but considerations of the barter and sale tone of such correspondence, as well perhaps as a realization of its futility, dissuaded him. In the end, a respect for Chase's ability, a reliance on him to support the war measures in the Court, and a feeling that judicial duties would keep Chase out of politics caused the President to make the nomination. At least in the last two respects Lincoln judged poorly; Chase upset the very methods of war finance which had been initiated during his term in the Treasury Department and remained a frustrated politician to the end. (For a discussion of the Chase appointment, see 9 Nicolay and Hay, *Abraham Lincoln* (1890) c. 17.)

Others considered were Swayne, William M. Evarts, and former Postmaster General Blair (2 Warren, *op. cit. supra* note 1, at 402).

chief rival for the Republican nomination in 1864. Thomas Drummond, federal district judge for Illinois, was mentioned frequently to Lincoln but was never appointed. Drummond later served fifteen years as a circuit judge in the Seventh Circuit.[28]

Andrew Johnson sent only one name, that of Henry Stanbery,[29] his Attorney General, to the Senate for a Supreme Court position. The Senate had no objection to Stanbery, but it had the greatest objection to Johnson and all his works. Congress passed a law reducing the size of the Court so that there could be no new appointments to fill such vacancies as might arise, the sole purpose of the maneuver being to prevent Johnson appointments, and Stanbery was never even considered by the Senate.

Before Johnson lost all control of Congress there were diligent efforts by many to win appointments. Horace Maynard[30] of Tennessee is best known to history among those recommended. Maynard was a Congressman, first as a representative of the American party and later as a Republican, for nearly twenty years. He was attorney general of his state during the Civil War; after his retirement from Congress he was Minister to Turkey and, later, Postmaster General. Maynard's case rested principally upon endorsements by Tennessee officials and judges. William L. Sharkey[31] of Mississippi, a former judge of the Supreme Court of that state and in 1865 the Johnson-appointed provisional governor, was also recommended. His friends saw in him the perfect combination of virtues for "the spotless purity of his private life united with his extensive and profound judicial knowledge."

As is apparent from the cases already discussed, most seekers after the judicial office pretended some lack of interest. They hoped to make it appear that their friends pushed them for the office, or that "the office seeks the man rather than the man the office" as enthusiasts of the Nineteenth Century customarily expressed it. This

[28] Thomas Drummond (1809-90) was mentioned as a possible candidate again in 1877 when Davis resigned and Harlan was appointed.

[29] Henry Stanbery (1803-81) was described by Miller in 1866 as "one of the feeblest men who has addressed the Court this term." The expression did not refer to Stanbery's physical condition (Fairman, *op. cit. supra* note 23, at 118). This may very well have been a partisan criticism for the *Philadelphia Inquirer*, a Republican paper, recommended confirmation of "a most excellent appointment" (2 Warren, *op. cit. supra* note 1, at 457).

[30] 1814-82. Maynard was endorsed by several federal officeholders in Tennessee and by state officials and judges.

[31] 1798-1873. Sharkey had the backing of his former associates on the Mississippi Supreme Court.

polite usage was easily penetrated by common knowledge, and the filing clerks in the Department of Justice displayed little sympathy with the fiction by collecting the papers for each aspirant under the title "Applicant. . . ." Nonetheless, it was comparatively rare for aspirants to confess ambition. One who had no such diffidence was George W. Paschal[32] of Texas. Prior to his moving to Texas in 1848, Paschal had been a judge of the Supreme Court of Arkansas for eight years. During the War he stood firm as a Unionist. In 1865 he wrote to Johnson stating, "I am lawyer enough to fill the station with at least average ability. I was born poor and worked my way to the bar. . . . I therefore feel neither arrogance nor humiliation to solicit the appointment of a President whose sympathies and attachments have always been in the direction of my own." Paschal would sacrifice himself for his country: "No man would more willingly undergo the great labors and responsibilities at this time,"[33] but he and the many politicians and lawyers who endorsed him wrote in vain.

Another Texan not inhibited by modesty was Lorenzo Sherwood, who had moved to New York at the outbreak of the War because of his Unionist sympathies. He caused to be printed a collection of testimonials, and the printed booklet was then presented to the President. Sherwood exhibited endorsements from Governor Fenton of New York, Peter Cooper, various Congressmen and judges, and the members of the Union League Club. No "endorsement" was too remote for Sherwood to present in his own behalf. The second letter in his booklet was from Governor Yates of Illinois, who wrote that he could not endorse Sherwood, for he had already evidenced his support of Charles Drake of St. Louis, a prominent Missouri Republican.[34]

Many other names were sent to Johnson during the early period of his administration, but the man who had so much difficulty keeping himself in office was unable to meet the requests of others.

[32] 1812-78. After Paschal's attempt to obtain a Court position had failed he became a practicing lawyer in Washington and often appeared before the Bench he had hoped to join.

[33] Paschal to Johnson, June 16, 1865.

[34] Drake (1811-92) was more successful in the pursuit of office than Sherwood. He went to the Senate in 1867 and was a member of the Court of Claims from 1870 to 1885.

At least fifteen other hopefuls caused papers to be filed with the Attorney General in 1865 and 1866, showing why Johnson should choose them for the Court. Almost all of them were Southerners who hoped that the South was to be represented on the post-war Court.

GRANT: THE EARLIER APPOINTMENTS

The Grant administrations may well be termed The Shabby Era in American political history. In the beginning, the Reconstruction frenzy was at its height. Senators and Representatives from the Southern states, if not from others, won their seats by the process of barter and sale. Corruption was brazen and the first obedience of the Congress was to the rising forces of Capitalism. With the exposé of the worst of the scandals in Grant's second administration, the lowest depth of American public morality was reached. These factors cannot be ignored in studying the politics of the Grant appointments.

In 1869, President Grant had two vacancies to fill. One was the vacancy which Congress re-opened to appointment as soon as Andrew Johnson left the White House. The other was that caused by the announcement by Justice Grier of his resignation as of February, 1870. Grier had long been senile and he was retiring to reap the benefits of the pension law of 1869.

The misfortunes that dogged Grant in almost every attempt he made to fill a Supreme Court vacancy began with these first efforts. His first choice was Ebenezer Rockwood Hoar, at the time of his appointment, Grant's Attorney General. Hoar had ten years of experience as a Justice of the Massachusetts Supreme Judicial Court.[35]

[35] Hoar (1819-95) was a Justice of the Massachusetts Supreme Judicial Court during the Civil War. He had been Grant's Attorney General for one year at the time of his appointment. At the next election he became a member of Congress.

The popular explanation of the Hoar rejection is that he was an honest man among thieves—that the Senate would have taken any man had he been "one of the boys" but that Hoar's honesty in filling the circuit judgeships brought him the enmity of that body. (Such is the explanation given by George F. Hoar, 1 *Autobiography of Seventy Years* (1903) 306.) This may have been the explanation but as yet it must be set down as not entirely proved. Senator Simon Cameron of Pennsylvania, the perfect and complete example of a machine politician, was quoted by his good friend Hoar as having said of the rejection, "What could you expect for a man who had snubbed seventy Senators!" (*Proceedings of the Massachussetts Historical Society, Second Series* (1895) vol. 9, p. 304). But the fact that Hoar had Cameron's support may mean that he leaned to one Republican faction instead of another. A certificate of good character from a man like Cameron, who had been forced out of the Lincoln Cabinet for corruption, is not a guarantee of respectability.

It may have been Hoar's manner, his clinging to virtue as though it was a peculiar possession which alienated the Senate. Hoar was described after his death by Charles Francis Adams, a distant relative and one who knew him well, as "essentially a Puritan." Said Adams:

> "A slight difference in his composition—in the balance, so to speak, of his make-up—would have wholly changed the result, bringing to the front the more repellant as well as familiar attributes of those of whom he was a type. A man of intense, deep-rooted convictions—religious, political, social; of strong family

In his general outlook he was thoroughly sympathetic to the radical Reconstruction program. But his manner was brusque and in advising Grant on nine circuit judgeships in 1869 he had been less than cooperative with the Senate spoilsmen. It soon became clear that anti-Reconstruction Democrats and aggrieved Republicans would prevent his confirmation. In the hope of appeasing the anti-Hoar faction, Grant bowed to the will of Senate leaders and appointed Edwin M. Stanton[86] to the other vacancy. Stanton was at the pinnacle of his popularity. His role as a saboteur of the Johnson Cabinet and his efforts to undermine his chief in the tenure of office struggle had won him a reputation since dimmed. The Senate immediately confirmed.

Only four days after his confirmation, and before he took office as a Justice, Stanton died. The country was treated to the macabre spectacle of seeing Grier attend the funeral of his own successor, and general opinion demanded that no further appointment be made for that "vacancy" until the expiration of the lengthy period between Grier's announcement of resignation and his actual departure from the bench. At the same time it became apparent that Hoar would not be confirmed, and while formal rejection did not come until February, Grant had to begin all over again in his search for two Supreme Court Justices.

There were many volunteers to help him. Foremost among these was Justice Samuel Miller, who endorsed Henry Clay Caldwell for one vacancy. Like Miller, Caldwell was originally an Iowan. While an officer in the Union army during the War, Caldwell had been appointed by Lincoln as a federal judge for Arkansas and so, in that quasi-carpet bagger fashion he came to the post which he held from

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and local, almost clan, feelings; seeing things most clearly from his own point of view, and not devoid of prejudices, conscious of strength and consequently fearless of contact with opponents; honest himself and intuitively sensitive to dishonesty in others, with an instinct like the scent of a hunting-dog for cant, pretence, and sham, and a wit which as with flashes of lightning revealed and not infrequently scathed what he instinctively saw,—Judge Hoar was saved from that Puritan sourness of disposition so often noticed, by a sense of humor and a spirit of kindliness. . . . " (*Massachusetts Historical Society Proceedings, supra.*)

In other words, even Hoar's friends thought he was a crusty old man saved from complete "sourness" only by a sense of humor. On occasions when this sense of humor failed to function smoothly, there was no saving grace at all—and when patronage was being dispensed, Adams reluctantly admitted, Hoar's "sense of humor . . . did not always have time to come to his rescue."

[86] Stanton (1814-69) had a good reputation as a lawyer. He was Buchanan's Attorney General in 1860 as well as Secretary of War from 1862 to 1868.

1863 to 1890. From 1890 to his retirement in 1903 he was a judge of the Eighth Circuit.

Miller told Grant that, as one of the few members of the Supreme Court who was thoroughly in accord with the Republican party, he felt some responsibility and right to suggest an appointment. He felt that it would be politic to appoint a Southerner, but:[37]

> I must confess my fears that so thoroughly were all the best lawyers of that region, whether whigs or democrats before the rebellion, indoctrinated with the rancor and strict construction of the federal constitution, which enfeebles the federal powers and enlarges those of the states, that no one of sufficient ability can be found among the old resident lawyers there who would not, when his conscience was appealed to on the bench, bring to this great Court the very doctrines which have caused so much trouble and which may yet be appealed to, and are now everyday, to overthrow the legislation of the last eight years.

To avoid that difficulty, Miller recommended Caldwell as "a thoroughly unadulterated Republican."[38] Senator James Harlan of Iowa added his word of recommendation and O. P. Morton, Senator from Indiana, "without making any recommendation" spoke of Caldwell's high character.[39] The appointment, however, was never made.

A notorious, rather than distinguished, advocate was Ben Butler, one of the foremost demagogues and near geniuses in American political history. As a Civil War general and as a Congressman and radical leader from Massachusetts, his voice must have carried great weight when purely political considerations were debated, although

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[37] Miller to Grant, April 14, 1869.

[38] Caldwell and Miller were close friends. In 1873 Caldwell returned the favor attempted by Miller by endorsing his friend for the chief justiceship.

Caldwell was (according to Fairman, *op. cit. supra* note 23, c. 15, from which this footnote account is taken) a fair and humane man—as good a liberal as the Nineteenth Century bench afforded. He was not overly sympathetic to railroad demands and, to keep himself above suspicion, refused to accept the railroad pass which most of his fellow politicians prized. Temperamentally, he and Miller had much in common and their mutual admiration was inevitable.

Miller felt that a Southerner should be appointed but he was afraid that no Southerner who was not of pre-war Northern background could be trusted with Reconstruction legislation. The good Southern lawyers had all joined the rebellion. Miller lined up support for Caldwell in Iowa and Arkansas and attempted to do likewise in Texas. The Justice had a feeling that the appointment would redound to his own glory on the Bench by giving him greater influence: "If appointed, Caldwell will feel that he owes it mainly to me, and he will be very pleasant to me on the bench. . . ." (Miller to Ballinger, in Fairman, *op. cit. supra* note 23, at 343).

[39] Undated memorandum.

not when virtue was in issue. Butler wrote Attorney General Hoar, the late-rejected, in behalf of David Kellogg Cartter, Chief Justice of the Supreme Court of the District of Columbia. Butler hastened to discredit rumors that Cartter had been guilty of certain improprieties in his judicial determinations, and went on to assure Hoar that Cartter was thoroughly "loyal." He was, thought Butler, "peculiarly fitted for the Southern Circuit from his fearlessness, his energy, and his determination for the right."[40] Translated into the realities of post-war America, this meant that Cartter could be trusted to carry out Reconstruction policies with Butlerian ferocity.

Another federal judge with supporters both in the North and the South was John Erskine, United States District Judge for Georgia. Charles Butler, a partner of William Evarts, and the Governors of Alabama, Georgia, and Florida endorsed him. William Marvin, Florida federal judge, had the most orthodox capitalist support. He was recommended by the officials of at least eleven insurance companies and the New Orleans Chamber of Commerce. Marvin had heard many salvage cases, and while underwriters felt frequently that he was too free with their funds, "a further intimacy with the case served but to increase our confidence in his stern justice."[40a]

President Grant passed over the possessors of all these qualifications[41] to choose for the posts William Strong[42] of the Pennsylvania Supreme Court and Joseph P. Bradley[43] of New Jersey. Strong had been on the Pennsylvania bench for thirteen years and during the latter portion of his term he had joined with Judge John M. Read, and Judge Daniel Agnew of that court to give the court a substantial Republican majority on all important issues. Both Agnew and Read wrote to urge the appointment. The words of Read gain special interest from the fact that he had been nominated for the Supreme Court by President Tyler in 1841, when his appointment had been ignored by the dominant politicians. Had he been confirmed, it is unlikely that Strong would ever have been nominated, since such an appointment would have meant two judges from the

[40] Butler to Hoar, February 6, 1870.

[40a] Thos. A. Adams, president of the Board of Underwriters, New Orleans, to Grant, July 8 1869.

[41] Other aspirants in 1870 were Richmond M. Pearson of the North Carolina Supreme Court, W. W. Howe of the Louisiana Supreme Court, and Alexander Rives who got a judgeship in Virginia a year later as a consolation prize.

[42] William Strong (1808-95) held his position on the Court for only ten years.

[43] 1813-92. Bradley had been a practicing lawyer.

same state. Pennsylvania's Governor and other major state officials also advocated Strong's appointment. In addition there was the inevitable Nineteenth Century certificate of good character from a railroad magnate—this time the president of the Cumberland Valley road.[44]

Bradley too had his official supporters in the members of the High Court of Errors and Appeals of New Jersey and the Chancellor of that state. The Hudson County bar strongly recommended their neighbor and urged New Jersey Congressmen to do their bit. Their bit must have been effective enough, because on February 7, 1870, the names of both Bradley and Strong were sent to the Senate.

February 7th was also, perhaps by odd coincidence, the date of the handing down of the important decision holding unconstitutional the Legal Tender Act,[45] a decision which Strong and Bradley were shortly to reverse, by their votes in addition to the original minority.[46] It is not proposed here to re-examine the old controversy as to whether Grant "packed" the Court to achieve the desired end, but it is widely accepted that Grant was advised a month or more beforehand what the decision would be; everyone knew that Bradley and Strong were good Republicans and good railway men who could be expected to follow the party line, particularly where the method of paying off railroad bonds was at stake.[47]

Both nominations, and particularly that of Bradley, were fought by carpet-bag Senators who desired an appointment from their own section. With the help of the Democrats this opposition was defeated, although the Bradley appointment was stalled for over a month and there were nine votes recorded in opposition to his con-

[44] Both Bradley and Strong had wide experience representing railroads and there were presumably more recommendations of a similar sort. Among Strong's clients, when he had been in practice, were the Philadelphia and Reading Railroad and the Lebanon Valley Railroad (Myers, *History of the Supreme Court* (1912) 517). Bradley represented the New Jersey Railroad and the United Railways of New Jersey (Myers, *op. cit.* 518). They were more completely identified with railroad interests than any other appointees between Field and Matthews. Of the members of the Court with Bradley and Strong, Miller, Chase, and Harlan had the least experience as a railroad counsel. For evidence of Miller's disgust at what he considered the pro-railroad biases of his colleagues, see examples from his private correspondence quoted in Fairman, *op. cit. supra* note 23, at 231, 232, 233, 240.

[45] Hepburn v. Griswold, 8 Wall. 603 (U.S. 1870).

[46] Knox v. Lee, 12 Wall. 457 (U.S. 1871).

[47] For a typical statement of this view, see Swisher, *op. cit. supra* note 26, at 181. For adequate proof that Grant knew in advance that Strong and Bradley supported the constitutionality of the legal tender acts see Ratner, *Was the Supreme Court Packed by President Grant?* (1935) 50 Am. Pol. Sci. Q. 343, 350.

firmation. It may be supposed from the bitterness of Democratic attacks on Bradley in 1877 for his vote in favor of Hayes on the Electoral Commission that the Democrats came to regret their former support.

The next vacancy on the Court came in 1872 with the resignation of Justice Nelson, a New York Democrat who had been on the Court for twenty-seven years. Grant immediately received a telegram from John Harlan of Kentucky.[48] Harlan, who was himself appointed five years later, in recognition of his services as a Louisiana Commissioner and because his law partner, Benjamin H. Bristow, was *persona non grata* with too many Senators to be likely of confirmation, urged the nomination of Bristow as "fit recognition of his talents" and "gratifying to Southern Union Men." Bristow had been the first Solicitor General of the United States, holding the office under Grant from 1870 to 1872, and he was later to become the Secretary of the Treasury and gain his lasting place in history because of his work in breaking up the Whiskey Ring.

A New Yorker had been planning for a long time to succeed Nelson. He was Ward Hunt,[49] formerly mayor of Utica, New York, and from 1865 a member of the New York Court of Appeals. His record of Republicanism extended back to 1856. As early as 1870 his supporters began to write Grant in anticipation of Nelson's resignation. While some who were asked to commit themselves in favor of Hunt before Nelson left the Bench felt that there was some impropriety in expressing themselves prematurely, others showed no such reluctance. Judge John M. Parker of the New York Supreme Court emphasized to the President, Hunt's character, his ability, and his marked courtesy.[50] The quality of charm and gentlemanliness implicit in the last reference was Hunt's chief claim to fame and has not saved him from being one of the most obscure Justices. He is remembered for the fact that, although paralyzed, he held his seat for four years (1878-82) while waiting for an adequate retirement pension. He was appointed and confirmed without marked controversy.

Grant and the Chief Justiceship

President Grant may have thought that he had had trouble over Supreme Court Justice appointments, after the problems pre-

[48] Harlan to Grant, December 3, 1872.
[49] 1810-86.
[50] John M. Parker to Grant, January 31, 1870.

sented by the Senate in handling Hoar, Bradley, and Strong; but all that had gone before was but a mild prelude to the storm that broke over his head when he attempted in 1873 to fill the vacancy caused by the death of Chief Justice Chase. There is no parallel in American judicial and political history to the difficulties that beset Grant before he filled the seat of the Chief Justice.

There were aspirants galore. Bradley, Swayne, and Miller of the Court all had advocates in the Cabinet.[51] Indeed it may well be that the desire not to offend those who would be rejected caused Grant to exclude the members of the Court from his several selections.

A leading organizer for Miller sentiment was Henry Clay Caldwell, the Arkansas district judge whose apointment Miller had backed at the time of the 1869 vacancies. Caldwell was selected by the bar of Little Rock to lay before the Attorney General their petition for the elevation of Miller. The petition was signed by the judges of the Arkansas Supreme Court, the state attorney general, the Chancellor, and by many leading lawyers. One of those who signed the petition was August H. Garland, against whom Miller had spoken in a strong dissenting opinion in the test oath for lawyers case, Ex parte *Garland*.[52] Garland was among the first to support Miller at the Bar Association meeting and he drafted the pro-Miller petition. Caldwell concluded his description of Little Rock sentiment with words that express his own admiration:[53]

> All concur that his strong and vigorous intellect enables him to take a clear and comprehensive view of the great questions going before that court and to fortify his conclusions by a plain, clear, and forcible method of reasoning that carries information and conviction to the mind, alike, of lawyers and laymen.

Senator Wilson of Iowa also strongly endorsed Miller as the choice of the Northwest.

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[51] Secretary of War Belknap supported Miller; Secretary of Interior Delano supported Swayne; and Secretary of Navy Robeson supported Bradley.

[52] 4 Wall. 333 (1867).

[53] Caldwell to Attorney General Williams, June 7, 1873. For a lengthy discussion of the Miller-for-Chief-Justice campaign see Fairman, *op. cit. supra* note 23, c. XI. Upon the death of Chase papers throughout the country began to suggest the Iowan. Within the Cabinet, Secretary of War Belknap (who was, to Miller's horror, later revealed as one of the rankest corruptionists) gave his support. The Iowa papers and the bar of Miller's circuit were especially vehement. George Wright, United States Senator from Iowa in 1873 and many years later president of the American Bar Association, was a Miller advocate.

Without expressing a preference as to which Justice should be elevated to the chief position, John Harlan expressed his conviction to President Grant that some one of them should. Since no President had ever advanced an Associate Justice there was something of a tradition that no Associate should ever be considered for the chief justiceship.[54] Harlan argued that the contrary should be the rule and that experience should give a man preference. He thought it would be "fraught with danger to the administration of justice to announce that an Associate Justice, however faithful he may have been in the discharge of his duties and however eminent may be his ability—could never proceed to the office of Chief Justice."[55]

Harlan did not write as an amateur political scientist fearful that denial of opportunity for advancement would impair Court morale. His more practical objective emerged at the end of his discussion. He explained that the advancement of one of the Associates would make possible the appointment of a Southerner, of whom there were none on the Court, to fill the vacancy left by the advancement. And then, inevitably, came the suggestion that Benjamin Bristow was the right man for the post.

Choosing a Chief Justice for Grant was everybody's pastime. S. B. H., writing on the stationery of the Internal Revenue Office, urged Grant to advance Swayne.[56] The only S. B. H. listed in the Federal Register as an employee of the Department of Internal Revenue for 1873 was S. B. Hannum, a clerk at a $1400 a year salary. Since Hannum was an Ohioan, as was Swayne, it is not improbable that he was the advocate. Hannum, if Hannum it was, had no difficulty in speaking as an expert on the qualifications of several candidates and pointed out that Senators Howe of Wisconsin and Conkling of New York were infinitely inferior to Swayne. The fact that everyone, down to the lowest clerk, had his own theories as to the right man for the vacancy may account for the fact that Grant had such difficulty in getting a confirmation. Widespread support of so many candidates made it difficult to agree on any one.

Stanley Matthews, another Ohioan later to be appointed as Associate Justice had a creditable number of supporters. The Western Methodist Book Congress saw in him a suitable Christian gentle-

[54] Associate Justice White was made Chief Justice by Taft in 1910 and is still the only Justice to have been elevated to the first position.

[55] Harlan to Grant, August 28, 1873.

[56] Memorandum of July 16, 1873, signed S. B. H.

man,[57] and Manning Ferguson Force, a Civil War Union general and later a Cincinnati municipal judge, felt that if former Justice Curtis or Judge Advocate General Holt could not be appointed, Matthews was a good second choice.[58] Matthews, however, had to wait until he had made a greater name for himself as a loyal Republican, and by that time the tide of agrarian unrest had reached such force that his railroad connections almost cost him confirmation.

Grant's first choice for the chief justiceship was Senator Roscoe Conkling of New York. To the relief of a large share of the public, Conkling refused the appointment.[59] After Secretary of State Hamilton Fish also declined,[60] Grant chose George H. Williams of Oregon.[61] Williams had some judicial experience, having been a judge of an Iowa court for five years as well as Chief Justice of the Oregon Territorial Court from 1853 to 1857. He had been a Republican

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[57] Letter signed by five representatives of the Congress to Grant, August 26, 1873.

[58] Force to Grant, September 4, 1873.

[59] On November 8, 1873, Grant wrote Conkling as follows:

"When the Chief Justiceship became vacant I necessarily looked with anxiety to someone whose appointment would be recognized as entirely fitting and acceptable to the country at large. My own preference went to you at once. But I determined and announced that the appointment would not be made until the meeting of Congress—that I thought a Chief Justice should never be subjected to the mortification of a rejection. The possibility of your rejection of course was not dreamed of. But I think the conclusion of waiting for confirmation was right in principal.

"I now wish to state to you that my first convictions on the subject of who should be Judge Chase's successor have received confirmation by time; and I tender the nomination to you, to be made at the meeting of Congress, in the hope that you will accept and in the full belief that no more acceptable appointment could be made." (Alfred R. Conkling, *Life and Letters of Roscoe Conkling* (1889) 460).

Two weeks later Conkling informed Grant of his unwillingness to accept, without stating any reason. He clung to his determination. After the Williams nomination had been withdrawn Senators Howe and Hamlin sought to induce a change of mind, but without result. In 1882 after Conkling had been driven from his position of power after his war with President Garfield over patronage, and when he had no other position to hold, President Arthur, in a surprise move, sent Conkling's name to the Senate for a position as Associate Justice. The Senate confirmed before Conkling had an opportunity to refuse, but he immediately resigned.

Conkling was the foremost machine politician of his age and typified complete opposition to all reform. These details show Grant's frame of reference in selecting a Chief Justice. As a matter of first choice it never occurred to Grant to appoint anyone to the Court but a Stalwart—Hoar, Stanton, Conkling, and, later, Williams. Hunt was a rare exception and he had been a Republican since the origin of the party. There is no more obvious case of a presidential concept of the Supreme Court posts as havens for worthy politicians.

[60] Fairman, *op. cit. supra* note 23, at 259.

[61] 1823-1910.

United States Senator from Oregon from 1865 to 1871 and he was Attorney General at the time of his appointment to the Court.

At the time of Williams' appointment[62] the chairman of the Committee on the Judiciary was George F. Edmunds of Vermont. Edmunds, a Republican, was a member of the Senate from 1866 to 1891 and was chairman of the Committee for all but eight years of that period. Hence he was closely associated with every Supreme Court appointment for a quarter of a century.[63]

A person named Wright, otherwise unknown to history, was a sufficiently vigorous opponent of Williams to have a pamphlet printed charging him with corruption. Wright had been some sort of representative of certain Indian tribes (obscurity befogs the details of the entire incident) and had been indicted by the Department of Justice for fraud for his activities in that connection. Williams personally ordered the United States district attorney at St. Louis to proceed vigorously with the criminal action and offered to provide him with full assistance—all this in April, 1873, and before the death of Chase. It is not clear from the records whether Wright was convicted or not, but he harbored a deep grudge against Williams. In some manner he came into possession of copies of much of the correspondence of the Department of Justice, stolen with the aid of a clerk in the Department. The originals, of which Wright claimed to have copies, remained with the Department, so that the authenticity of any individual document might be challenged by point-

[62] December 4, 1873.

[63] George F. Hoar's description of Edmunds catches the essence of most of the estimates of the man:

"He was an excellent debater. He was very fond of criticising and objecting to what was proposed by other men. He seemed never so happy as when in opposition to the majority of his associates. But he possessed what persons of that temper commonly lack, great capacity for constructive statesmanship.

"David Davis, who was President pro tempore of the Senate, used to say that he could always compel Edmunds to vote in the negative on any question by putting the question in the old New England fashion, "Contrary-minded will say no," for Edmunds was always contrary-minded. I once told him, borrowing a saying of an Englishman, that if George Edmunds were the only man in the world, George would object to everything Edmunds proposed. . . .

"Edmunds was nominated for the Presidency by the Massachusetts nominating convention of 1880 which also chose Hoar as the head of its Edmunds slate of delegates to the national Republican convention. Edmunds told Hoar that he did not care to be nominated. Said Hoar:

"'But, Edmunds, just think of the fun you would have vetoing bills.' He smiled, and his countenance beamed all over with satisfaction at the idea and he replied, with great feeling: 'Well, that would be good fun.'" Hoar, *Autobiography of Seventy Years*, 387, 388.

ing to the fact that the Department had no record of a letter from which the paper in question was allegedly copied.

Wright published this correspondence in his pamphlet. Most of the letters were innocent enough, but one, from an assistant in the Department named Williamson, addressed to Williams, implied that some sort of dishonest offer to sell justice had been made, with Williams' sanction, to Wright. Upon the publication of the pamphlet, Williamson claimed vigorously that the letter was a forgery and a fraud. But it at least provided sufficient material to warrant Senate investigation especially since Wright had retained a respectable Washington lawyer to press the matter before the Judiciary Committee.

December 8th when the Committee met to consider the nomination, the Wright charges were formally laid before it.[64] Feeling that charges of such questionable authenticity should not be graced by a formal procedure until there had been some preliminary investigation of their merits, the Committee delegated Edmunds to look into the question. Edmunds went to Williams the next day and learned that Williams had no intention of being put on trial by the Committee but that the Senators would be welcome to look through the office records. Edmunds then spent several hours looking through the Department files with the assistance of Chief Clerk Falls, primarily to determine whether the Williamson letter was recorded. Falls, according to the later report of the Senate Committee, convinced Edmunds that he alone was in charge of opening the mail and registering letters. Since there was no evidence of the receipt of the letter in question, Edmunds concluded that it probably was a forgery. The Committee later concluded that it was not true that Falls was the sole opener of the mail and that there was a possibility that unrecorded documents might have been received. Since the Williams nomination was withdrawn before the Committee had the opportunity to probe the matter exhaustively, no opinion was expressed finally on the merits of the charge.

Senator Edmunds, probably enjoying himself immensely in his role of sleuth, then decided to go a bit beyond his instructions, and interviewed Wright's counsel to study his evidence. The evidence

[64] The following account is taken largely from Edmund's report to the Committee, Williams' letter to the Committee, and the final Committee report. The original reports are in the Senate Judiciary Committee files. No printed copies have been found.

displayed to the Senator there did not convince him in the light of his own study of the Department records. On December 10th Edmunds laid his account before the Committee which decided that there was no need to hear further testimony. The nomination was then reported favorably to the Senate.

One other preliminary charge was made, involving the alleged ownership by Williams of an interest in an Alexandria stone quarry from which stone was purchased for Government buildings. The inference was that Williams used his official influence to benefit his pocket by throwing Government business to his own company. In a communication to the Committee, Williams forcefully asserted that he had never had more than a $250 interest in the concern, that he had taken this as a legal fee, and that he had given it up before it ever made any profits. The matter seems never to have been formally considered by the Senate Committee; it is said that Edmunds was too good a Republican to allow public discussion to be directed to a matter of this sort when, it is rumored, Grant had stock in the same quarrying concern.

December 14th the question of confirmation came up in the Senate. By that time other charges against Williams were being industriously circulated and the nomination was held over until the 20th when it was referred back to the Committee for more detailed investigation.[65] One Charles H. Winder made the principal accusation

[65] The account of the procedure and formal statements of the Judiciary Committee and the Senate must not disguise the fact that there were probably fundamental biases at work, certain prejudices and dislikes that caused the Senators to react as they did. The foremost of these biases arose from a dislike for Williams' wife. Justice Miller reported to a correspondent: "Williams' nomination is received with universal disgust. It is attributed to the personal influence of his wife, and remarks are made publicly as to the nature of that influence, which are of the most discreditable or rather disgraceful character." (Fairman, *op. cit. supra* note 23, at 260).

Legend has it that Mrs. Williams attempted to assert her social position as a Cabinet lady in a manner which alienated Senate wives; and another rumor tells of anonymous letters she was supposed to have written. (Trimble, *Chief Justice Waite* (1938) 124).

This factor had an influence which is vague and immeasurable. Subsequent accounts of the nomination have ascribed great weight to it, perhaps because of its mysterious nature. A writer commenting on the death of Williams in 1910 thought that "the real opposition of the Senate was not to the Judge himself and related to social matters which he could not remedy or publicly explain." T. W. Davenport, *The Late George H. Williams* (1910) 11 Ore. His. Soc. Q. 279, 284. Williams' own comment on the nomination adds to the mystery element. Writing on "Reminiscences of the Supreme Court" in 1899, long after he had dropped out of national politics, Williams said: ". . . I was surprised, and so was the President, at the opposition of some of the Republican Senators. I had twice been confirmed by the Senate, once for High Joint Commissioner to

which led to the recommital. Winder's allegations grew out of a case[66] involving baled cotton seized by the Union army in its march through the South. This was one of the numerous post-war conflicts over whether particular cotton was properly subject to seizure or whether it belonged to loyal citizens. A large number of the gentlemen who live on honesty's margin put up dubious claims to cotton and frequently by dint of corruption won some damages from the Government. At least three such cases were cited in the course of the Williams contest. In this particular instance Winder asserted that, in some manner not now clear, Williams had been guilty of illicit procedure in handling the appeal.

Winder came before the Committee and told his story but the Senators found that it fell apart at the touch and was completely inconclusive. Williams stated that he had never before heard of Winder, nor did he remember ever having seen the go-between who was supposed to have approached him with offers of bribery. He pointed out that Senator Matt Carpenter, noted attorney and Republican stalwart from Wisconsin, had approached him in an effort to have the appeal in this case dismissed. It is conceivable that the connection of a member of the Judiciary Committee with the case in question may have diminished the enthusiasm of the Senators for investigation, but there is no evidence that the conclusion was not reached on more straightforward grounds.

Thus far none of the charges against Williams had been made to stick. But the delay gave Williams' Oregon enemies an opportunity to gather their weapons. Oregon politics had long been stormy, and Williams had enemies not only in Democratic, but in Republican ranks. The differences on the Republican side were unusually bitter because the state had recently undergone an exhausting wrangle over the election of a United States Senator. An outline of Oregon politics from 1860 to the Williams nomination is necessary to an understanding of the bearing of these conflicts on the Williams appointment.

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make the treaty of Washington, and again for Attorney-General, without the usual reference of my name to committee. I shall not go into that matter at this time; suffice it to say that the reasons for the Republican opposition to me in the Senate were not such as were given to the public by the newspapers." (1899) 8 Yale Law Journal 296, 299.

Another handicap for Williams was the fact that articulate elements of the bar considered him incompetent. The Bar Association of the City of New York, for example, passed a resolution dubbing the nomination of Williams a disappointment. (Fairman, *op. cit. supra* note 23, at 259).

[66] Hill v. United States, 8 Ct. Cl. 361 (1873).

In 1860 the Democratic party of Oregon was divided between the Breckenridge faction and the Douglas faction. A leader of the Douglas wing was James W. Nesmith[67] who had come to Oregon in 1843 and almost immediately became a leader in the affairs of the territory. Williams was a Republican leader. In 1860 Williams and Nesmith were rivals for senatorial positions. Nesmith won, to quote Williams, because "some of my supporters, under the pressure of the Salem clique, went over to Nesmith."[68] From that date Nesmith and Williams were rivals; they soon became bitter enemies.

In 1865 Williams went to the Senate where he served with Nesmith as his colleague for two years. During the War, Nesmith had been a loyal Unionist and a supporter of Lincoln. But with the death of Lincoln, Nesmith became a Johnson supporter while Williams stood with the radicals. The two men were opponents for the length of their service together. Williams defeated all appointments given to Nesmith's friends by Johnson; the patronage aspect of the feud culminated with Williams' successful attempt to block confirmation of Johnson's appointment of Nesmith as Minister to Austria.

In 1866 Nesmith was a candidate to succeed himself but lost because of his support of Johnson. The two chief contestants were John J. Mitchell and Addison C. Gibbs. Gibbs, Republican Governor during the War, was the regular party nominee but Mitchell won enough of his supporters to prevent any agreement by the legislature. As was often the case in the days of legislative election of Senators, the deadlock was broken by the selection of a dark horse, in this case Henry W. Corbett.[69]

In 1872, Corbett was defeated for re-election by Mitchell. Williams' support of Mitchell was a decisive factor. The Corbett-Mitchell battle was hard fought and lasted for almost the entire legislative session. Mitchell was freely charged with corruption.[70]

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[67] Nesmith (1820-85) was a Senator, 1861-67, and a Member of Congress, 1873-75.

[68] George H. Williams, *Political History of Oregon, 1853-65* (1901) 2 Ore. Hist. Soc. Q. 1, 24.

[69] Henry Winslow Corbett (1827-1903) was a Republican Senator, 1867-73.

[70] John H. Mitchell (1835-1905) was a United States Senator, 1873-79, 1885-97, 1901-05. He was charged frequently with a varied collection of public and private misdeeds. Many of the charges were well founded and in 1905 he was convicted for receiving fees for using his influence as a Senator to win favors from Government bureaus for his clients. He died during the appeal of the conviction and the Senate omitted its usual practice of adjourning upon the death of a member. (13 Dictionary of American Biography 53).

Thus in 1873 when his name was sent to the Senate for the chief justiceship, Williams had many powerful political enemies in his own state. Nesmith of the Democrats, Corbett, whom he had just defeated, and Gibbs whose enemy of 1866 had just been boosted into office by Williams—they and their friends had every reason to oppose Williams.

In 1873 Nesmith successfully ran for the House of Representatives to fill a vacancy, and hence was in Washington at the time of Williams' nomination. Gibbs, who had become United States Attorney for Oregon, prosecuted several of Nesmith's opponents for participation in vote frauds in that election. Williams finally removed Gibbs from his position as United States Attorney for what Williams considered was excessive zeal in the prosecutions.

Nesmith personally and representatives of the Corbett faction in Oregon charged that Gibbs was removed for prosecuting Williams' friends. When the Winder matter was disposed of, Nesmith, whom Williams characterized as "the most malignant political and personal enemy I have in the world," was invited by the Judiciary Committee to appear before it. He gave his account of the Gibbs incident and, incidentally, related all the other charges he could think of against Williams. There is nothing which an active imagination could produce that Mr. Nesmith omitted.

As Williams saw the Gibbs case, the removal was thoroughly justified. Williams stated that the alleged frauds had been investigated first by a state grand jury and then by a federal grand jury. Because no one was indicted by either, Gibbs called a special and irregular grand jury in what Williams considered an illegal manner and at this point he, as Gibbs' superior, ordered the proceedings stopped. Gibbs nonetheless indicted several people, one of whom was "a man of character and wealth, . . . an officer in the Union army . . . an active Republican."[71] In 1873 that frequently was excuse enough for robbing the Treasury. When the accused were acquitted, Gibbs was removed.

There was difference of opinion as to the accuracy of Williams' account of the failure of the Gibbs efforts. The Senate Committee found that, Williams to the contrary notwithstanding, Gibbs did have "more than one of the defendants convicted." At this point the matter was dropped by the Committee on the strength of Williams'

[71] Williams' statement of January 17, 1874, to the Judiciary Committee.

statement. No official and final conclusions were reached as to the possible culpability of either Williams or Gibbs. The possible effect on fellow-Senator Mitchell may have been a reason for not probing the matter too carefully.

The effect of Nesmith's opposition is hard to ascertain or understand. The quarrel was obviously a political battle between a Democrat and a Republican and the Republican Senators should have had no difficulty in siding with their own. The Corbett phase may account for Republican opposition since Corbett probably left many friends in the Senate. The coalition under Nesmith had enough effect for Williams to remember it for many years. In 1901 he described his patronage battles with Nesmith during the Johnson administration and stated that in return Nesmith "as a representative in Congress did what he could with the help of some prominent republicans of Oregon to prevent my confirmation by the Senate when I was nominated for Chief Justice. . . . "[72]

The Committee did not need to resort to these charges which might have cast reflections beyond the immediate problem for at last they struck pay dirt in a field which was exclusively confined to Williams. It was charged that he had bought a carriage and horses out of the public monies, that he was using the messengers of the Department of Justice in his personal service, and that he had in other ways used the funds of his Department for his own benefit. In the beginning the Committee was not sure what it had in mind by these "other ways," but it eventually established enough of a case on that score to lead to the withdrawal of the nomination.

December 16th and 17th, Clerk A. J. Falls of the Department of Justice was examined by the Committee. Falls had cooperated with Williams in a questionable bookkeeping technique. As chief clerk of the Department, he was in charge of official disbursements. Williams also made him his private financial secretary and put him in complete charge of the Attorney General's private funds. Thus Fall made the expenditures for both the Department and for Williams

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[72] Williams, *loc. cit. supra* note 68, at 25.

The Nesmith-Williams feud lapsed with the retirement of both men from active politics. As Williams described their relationship, "I am happy to say that before his last illness our friendly relations were re-established, and while he was sick he wrote me a pathetic letter begging me to help him out of his imaginary troubles." Williams, *ibid.*

personally, fairly inviting the suggestion that he had mingled public and private funds as readily as he had mingled public and private duties.

Falls was examined first of all as to expenditures of Departmental funds for a carriage and horses to be used by Mr. Williams. In respect to this matter it was not suggested that Williams had stolen the public monies, but rather that he had abused his discretion for his personal benefit. The inference was extravagance with public money rather than corruption.

There were other charges of similar extravagance and abuse of discretion relating to the use of messengers and their livery. These criticisms stung Williams, and after the Committee had adjourned on December 17th for the Christmas holiday he deluged it with correspondence to sustain the propriety of his practices. In good lawyer-like fashion, he proved the need for the carriage and then cited authorities as precedents. The Department of Justice, claimed Williams, needed a carriage more than any other department.[73] People were constantly being carried from the Department to the Capitol, and great numbers of the staff went regularly to the Supreme Court. Williams had ordered the carriage purchased by Falls with no directions as to the kind or price and he did, at the late date of the confirmation controversy, claim to have had some doubts about its propriety when he first saw it. It was a beautiful carriage. Its horses were old and decrepit so new ones were purchased. True, the driver had brass-buttoned livery, but Mrs. Williams had paid for this herself.

As for precedent, both Henry Stanbery and William M. Evarts had purchased horses and carriages while in office as Attorneys General, and Williams claimed that this was accepted Government practice. Chief Justice Chase when Secretary of the Treasury, was reputed to have done likewise, and to have used the official livery freely for social purposes. The harassed Williams pulled evidence from every crevice. George Wilkinson, a driver for the Department, was cited as authority for the proposition that similar coats were worn by servants in previous administrations, and Henry Coleman, a messenger in the Department, admitted that he was absent from Washington for eighteen weeks in the private service of Mr. Stanbery while on the Government payroll. If these were sins, Williams

[73] No statistics were furnished.

could at least prove that they were common ones. In addition, said Williams with consummate faith in the kindliness of Washington's second-hand dealers, the carriage was as good as new and could be sold for its original price.

There was something patently farcical about this entire proceeding. Williams had at worst gratified his taste for luxury at some public expense, but Senators with a favorable mileage budget and the countless perquisites of their office should have been the last to protest. Unhappily for Williams, there is, and was particularly in the Nineteenth Century, something un-American about the appearance of well-being in the lives of politicians. Hence, while the carriage and related expenditures were probably not the main cause for the withdrawal of the appointment, they must have contributed to the result.

Williams complained sadly that he saw no reason why "an effort should be made to censure or condemn me for a practice which has notoriously obtained" generally. To which the Committee suavely replied: "The Committee think it due to the truth to say that they have made no effort to 'censure or condemn' such a practice. It would not have required any effort to do so. . . . "

The blow which actually ruined Williams' chances for confirmation came when Falls admitted, after an examination of several hours, that the funds of Williams and the Department had actually been mingled and that on occasion Williams was in debt to the Department. Upon returning to his office and facing his angry superior, Falls immediately recanted: "I should state that I am unable to say how I was led into the error of saying that I paid the amount of these checks out of government funds."[74] The complicated story told by Falls and Williams involved certain checks which had been deposited in the Williams account and which had been delayed in payment. There was no suggestion, and there was not the slightest evidence to show that Williams actually profited from these transactions. He persisted in arguing that, if there was any fault, it was merely that he was paid in advance.

On January 8th, the day before his nomination was withdrawn, Williams sent his private accounts to the Judiciary Committee. From these and from the original Falls testimony, the Committee concluded that "In more than one instance and beside that of the car-

[74] Falls to Williams, January 15, 1874.

riage, the public moneys of the United States were used for the private benefit of Mr. Williams." To the Senators, the evidence showed "that prior to the entry of the receipt and disbursement of $500 from Williamson and to Henderson there had been used for Mr. Williams' private purposes more than $2000 of the public moneys unreturned, and that, after this entry, the same deficiency in the contingent fund still existed although it was made up a short time thereafterward."[75]

On January 8th, Grant withdrew the nomination of Williams. The Attorney General felt keenly that he had been disgraced in the eyes of the public, as indeed he had, and that the Judiciary Committee had treated him unfairly. On January 17th, after Cushing had been nominated and withdrawn and two days before the appointment of Waite, Williams sent a lengthy statement of his position to the Committee through Edmunds. Whether he hoped to clear himself sufficiently to be re-offered the post or whether he merely wanted to restore his reputation is not clear. He evidenced his deep distrust of Edmunds personally, by asking that his statement be read to the "*full*" Committee, and he hoped that the Committee would agree, upon completing its perusal of his statement, that an injustice had been done.

Williams' statement was the product of much labor and clearly set forth his position. He claimed that he had been mistreated both substantively and procedurally—*i.e.*, that faulty judgments had been made on the evidence, and that the rules of fair play had not been followed in not permitting him to state his case to the Senate. He stressed the procedural feature particularly, claiming a right to confront and cross-examine the witnesses before he could fairly be condemned. He listed the charges against him and discounted them either as the result of political bias, or as trivial. He charged that the Committee had frightened Falls by citing the statute which makes it a penal offense for disbursing officers to mingle public and private funds and suggested that some of Falls' statements might be laid to his resultant confusion. He denied that he had ever abused his trust and put all blame for transactions "which are open to criticism" upon the chief clerk, Falls. With an eye to the long judgment of history, Williams asked that his statement be preserved with the testimony against him.

[75] Senate Committee Report.

Stirred by the Williams' statement, the Judiciary Committee determined to make a formal report[76] to the Senate, presenting its side of the case although, since the nomination was withdrawn, this practice would not ordinarily be followed. The Committee report, much larger and even more vigorous in its tone than was the Williams' statement, chronicled the entire course of the proceedings. Most of the charges were kept open, since the Committee was not compelled to complete its hearing on them, but were left on a note most injurious to the Attorney General. Thus it was left to appear that Falls had lied as to the checking of the incoming mails and that, inferentially, the Wright-Williamson letter might be authentic. Reference was made, mysteriously, to other unexamined charges.

On the procedural side, the Committee asserted that Williams had at first declined to attend the Committee proceedings, and on the major issue claimed that the Senate was entirely free to advise the President on appointments in whatsoever manner it chose. At a time when a President had recently been nearly impeached and when both houses of Congress were particularly sensitive to their rights and prestige, this argument was more than a mere form of words. The Senators pointed out that unless he were a member of the Senate, Williams could not possibly have the right to cross-examine witnesses and participate in Committee hearings as an equal.

On the merits, the Committee concluded that since the nomination was withdrawn, they were not "at liberty to make any comment upon the plainly appearing fact of the somewhat considerable use of public moneys of the United States for the private benefit of Mr. Williams as from time to time there seemed to be occasion." They regretted, politely and bitingly, that Williams' statement "should have been so erroneous in statements of fact and complaint as to compel the Committee to make any special reference whatever to it."

So ended the aspirations of George H. Williams to become Chief Justice of the United States Supreme Court.

A few days after the Williams withdrawal Grant offered to the Senate the name of Caleb Cushing[77] of Massachusetts. Cushing was 74 years old at the time of his appointment—an age when many Justices retire. He had been a Member of Congress from 1835 to

[76] These are the statements and reports referred to as the basis of the account of Williams.

[77] 1800-79. Cushing was a member of the Massachusetts Supreme Judicial Court in 1852.

1843 and was Attorney General in Pierce's Cabinet. He had been a Republican from 1861. Although his nomination was greeted by no special enthusiasm he would have probably been confirmed easily had it not been for the opposition of the *Washington Chronicle* edited by George B. Corkhill, Justice Miller's son-in-law,[78] and Senator Sargent of California. Sargent led the attack on Cushing, for personal reasons of some mysterious origin, and the *Chronicle* dressed up what slanders it could and disseminated them. At the last minute a clerk discovered a letter which had been written to Jefferson Davis by Cushing in 1861 recommending for his acquaintance the bearer, a former employee of the Justice Department. This was treated as an "astonishing development" and led to the withdrawal of the appointment. After writing a letter of deep feeling expressing his early and everlasting devotion to the principles of the Union, Cushing retired from the scene of judicial consideration.[79]

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[78] Miller refused to participate in the attack on Williams (although he blamed Williams for the failure of his own attempt at the nomination) because Williams was an old Keokuk friend and because Miller thought he could dominate Williams more completely than any other likely Grant appointee. (Fairman, *op. cit. supra* note 23, at 264). There were no extenuating circumstances in the nomination of Cushing, whom Miller considered an antique and a bad Republican, and the Iowan made every effort to block confirmation through his friends in the Senate and in his son-in-law's paper.

Fairman shows perturbation over the possibility of moral responsibility in Miller for the excesses of the *Chronicle* (Fairman, *op. cit.* 265-275). The worst of these excesses was the publication of a forged copy of the Jefferson Davis letter which gave it a much worse tone than the innocuous original. It quoted Cushing as writing his "dear friend" Davis and made the bearer of the letter an ordnance expert instead of a harmless young man. Fairman partially evades his own problem by showing that withdrawal had already been agreed upon as a result of the real letter before the forged copy appeared, but of course the moral obloquy, if any, would remain the same regardless of the effect of the forgery. However, the *Chronicle* may actually have been misled and there is no evidence that Miller personally sanctioned any impropriety.

The Davis letter was found in War Department files and was immediately shown to Secretary Belknap. There is no evidence as to how the letter got from the Department files to Senator Sargent; Claude Fuess, Cushing's sympathetic biographer, refers to a rumor of an anonymous letter. 2 Fuess, *Caleb Cushing* (1923) 370. Since Belknap was Miller's chief supporter in the Cabinet it is unlikely that Sargent was compelled to make a great effort to obtain the incriminating document.

Miller's opposition to Cushing must have been based on grounds other than distrust of the nominee's Republicanism alone for such radicals as Senators Sumner and Boutwell and Congressman Ben Butler of Massachusetts strongly backed Cushing. (2 Fuess, *op. cit.* 369).

[79] On January 14, 1874, Grant sent a message to the Senate that "information has reached me which induces me to withdraw his nomination. . . ." After signing the withdrawal Grant received from Cushing the letter referred to accompanied by the request that the nomination be withdrawn, for Cushing did not know that Grant had already deserted him. Grant sent the Cushing

A trifle weary after his repeated rebuffs, Grant determined to try again. On this, his third attempt, he chose Morrison Remick Waite,[80] an able, but obscure Ohio lawyer. Waite's sole experience as a figure of national importance was as counsel in the Geneva Arbitration. He was confirmed without difficulty and although he earned a position of high rank among American jurists, at the time of his appointment the words of Judge Hoar were thoroughly justified: "Waite is that luckiest of all individuals known to the law, an innocent third party without notice."[81]

HARLAN AND WOODS APPOINTMENTS

In 1877 Rutherford B. Hayes, a man who may have been declared elected as the result of fraud but who won for himself the reputation of a scrupulous man, was inaugurated President. Hayes' election and administration marked the end of the formal Reconstruction program. In 1877 the last of the Southern states were freed of military rule and in form at least the nation's wounds had been bound up. The Republican party was still the party of patriotism and the Bloody Shirt, but there was a South to be propitiated and represented on the Supreme Court. The result was that in 1877 there was, for the first time since the Civil War, an actual contest between a Southerner and a border man for a Supreme Court seat. In the course of Hayes' administration both sides won.

The man who lost the first round but who ultimately shared the title was William B. Woods[82] of Alabama. Like Caldwell, he may be described as a carpet bagger. Orginally an Ohioan, he was a Union officer in the Civil War and after the War he moved to Alabama

letter to Congress with his own message. This correspondence is printed in 2 Fuess, *op. cit. supra* note 78, at 373-375.

[80] 1816-88. Waite had been a member of the Ohio legislature. At the time of his appointment he was serving as chairman of the Ohio constitutional convention.

It is impossible to give a detailed account of Waite's appointment and confirmation even from secondary sources. All that can be said is that Waite's Ohio friends, Congressmen, and administrative officials recommended him to Grant. It is probable that a dozen other groups of similar political strength made similar attempts to win favor for other candidates and there is no apparent reason why the choice should have fallen on Waite instead of one of the others. Waite's biographer gives no explanation. (Trimble, *op. cit. supra* note 65, at 127 *ed seq.*). Waite himself could give no account of why the lightning struck where it did and supposed that perhaps Grant had liked a speech of welcome Waite had made at a Grand Army of the Republic reunion during Grant's first administration. Trimble, *op. cit.* 129.

[81] 2 Warren, *op. cit. supra* note 1, at 561

[82] 1824-87.

where he became an active Republican. His foresight and political virtue were recognized and rewarded in 1869 when he became a judge for the Fifth Circuit.

Woods, fortunately for him, had friends on both sides of the political battleground. James A. Garfield, who was to succeed Hayes as President, felt that he had never seen as many sincere recommendations as those which supported Woods. In a frank general letter to his fellow Ohioan, Secretary of the Treasury John Sherman, Garfield pointed out that the Woods appointment would be pleasing to Southerners and that Woods' Ohio origin should not lessen his chances.[83] Democrats also rallied to his support. Senator John Morgan of Alabama felt that Woods had done excellent work and by his great industry had gained the confidence of the people. Morgan would have preferred a Democrat, but he had confidence that Woods would proceed with a real sense of justice.[84]

Other Democrats including Members of Congress, joined in the recommendation. John A. Campbell, who had resigned from the Court in 1861, felt that Woods was the best man in the circuit for the post—although he felt that there were men in other circuits who would do as well.[85] Senator L. Q. C. Lamar of Mississippi, appointed Woods' successor in 1887, pledged himself to tell Hayes that Southerners would prefer Woods to "any of those more likely to get the position." Whether Hayes appreciated the frankness is not known.

Southern Republicans, of course, were overjoyed that one of their number was considered for so high a post. The executive committee of the party in Georgia endorsed Woods strongly. So did the business interests. Presidents of a half dozen New Orleans banks declared Woods satisfactory, and the self-styled representatives of the bankers and commercial interests of Montgomery, Alabama, saw in him a man who would be a desirable addition to the bench.[86]

Despite the fervor and bulk of his endorsements, Woods lost the post to a man who had done more for the party. Three years later his chance came again, and in 1880 he was appointed to succeed Justice Strong.

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[83] Garfield to Sherman, August 8, 1877.

[84] Morgan to Sherman, March 10, 1877.

[85] Campbell to E. C. Billings, March 2, 1877. Billings was federal district judge for Louisiana, 1876-93.

[86] Commercial leaders in Mobile and Atlanta also endorsed Woods. Justice Department files contain more than one hundred letters and petitions for Woods, including petitions of the bars of several southern cities, letters from six federal judges, and endorsements from at least fifteen members of Congress.

Woods and the eventual appointee, John Harlan, were not the only contenders for the Supreme Court post which Davis had vacated. There were twenty-four more, who are known to history in their capacity as seekers after the post solely because the Department of Justice made a list of them. Samuel Rice, a former Associate and Chief Justice of the Alabama court, filed a brief in his own behalf.[87] John Baxter,[88] Tennessee federal circuit judge, had the Church in the form of two bishops, and the Supreme Court of his state behind him. William P. Ballinger of Texas, Justice Miller's brother-in-law, had several recommendations. Indeed, Miller's loyalty must have been sorely tried since the constant Henry C. Caldwell had returned to the fight, supported this time by most of the state officials of Iowa and a United States Senator.[89] Robert Hughes,[90] a strong Virginia Secessionist and Richmond publicist who turned Republican as the adverse winds of the Civil War chilled his cause, sought the position; he had been made a district court judge in 1874 and stayed there. Thomas Drummond, a judge of the Seventh Circuit who had often been mentioned was disappointed again. He was the only

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[87] Samuel Rice was Associate Justice of the Alabama Supreme Court in 1855 and Chief Justice from 1856-59.

[88] 1819-96.

[89] Ballinger had two chief supporters, Miller and another brother-in-law, Guy M. Bryan of Texas. Bryan and Hayes were college classmates and remained intimate friends throughout life. In 1848 Hayes had met Ballinger's future wife while visiting in Texas and thus Ballinger was not a total stranger to Hayes when he was suggested. Ballinger at first demurred to attempts in his behalf, suggesting John A. Campbell and Woods. Miller overwhelmed this objection by emphasizing Campbell's age and the fact that Woods was not a legitimate Southerner. Bryan came to visit Hayes and thought he made some progress and Miller lined up support wherever he could. The Texas delegation in Congress and the Texas Supreme Court joined in the effort. Miller reported to Ballinger that Hayes was considering him, Harlan, Bristow, Woods, and William Hunt of Louisiana.

Miller pulled every string he could reach. He obtained from Justice Bradley the assurance that if Woods were not to be nominated, Bradley would support Ballinger, and he won a qualified approval from Waite. Secretary of War McCrary supported Caldwell but Miller hoped that Ballinger would be his second choice.

Although Ballinger lost, Miller never made any criticism of Harlan, even though an attack on the Kentuckian might have thrown the position to Miller's choice. After Harlan's nomination, Miller supported him. (For the full account of Miller's activities in behalf of Ballinger, from which this synopsis is drawn, see Fairman, *op. cit. supra* note 23, at 348-370.)

In view of the fact that Harlan, who had been a radical Republican from 1866 and a Union officer in the Civil War, was almost defeated in the Senate because of the recency of his conversion to Republicanism, it is very unlikely that Ballinger, a Democrat and a rebel, would have come close to confirmation.

[90] Hughes (1821-1901), a Scalawag, was district judge from 1874-98.

Northerner on the list of twenty-four. John F. Dillon,[91] who had been elevated to a judgeship for the Eighth Circuit from his post on the Iowa Supreme Court, claimed Missouri as his residence for the purpose of this application and was thus brought within the circle of Southern and Border states.

John Marshall Harlan[92] had been a frequent correspondent of the Attorney General's office, writing regularly to express his ardor in behalf of his law partner's aspirations to the Court. While Benjamin Bristow was never to win the post, his partner became one of the strong Justices of Supreme Court history and served longer (1877-1911) than almost any other Justice. Harlan was a native Kentuckian and his only public office before the Civil War was a one year term as judge of the Frankfort County court. In 1860 he was, unhappily for bis later peace of mind, a Bell-Everetts Elector, and in 1864 he supported McClellan for President. He also opposed the adoption of the Tbirteenth Amendment. But after the War, in which he served for three years as a colonel, his Republicanism was exemplary. He became aligned with the radicals of the party and was gubernatorial candidate in 1871 and 1875, most unsucessfully. In 1876 he took a block of Bristow delegates to the Republican convention, and at a critical instant was instrumental in nominating Hayes instead of Blaine by throwing his delegates to Hayes. In 1877 he was a member of the Louisiana Commission, a group sent to Louisiana by Hayes to iron out the civil war condition existing there as the result of the presence of two contending legislatures and governors. He, as well as the whole Commission, was the target of the normal amount of epithets which would be flung at a mediator in such a situation.

Why he was appointed to the Court is not fully clear. Perhaps the President desired to appoint a bona fide resident of a comparatively Southern state, which would exclude Woods, and still did not care to choose a Democrat. Bristow may not have been chosen because of possible presidential aspirations.[93]

Harlan's name was before the Judiciary Committee for six weeks. Some of the opposition was directed to the merits of the appointment. Melville W. Fuller, Chief Justice from 1888 to 1910 and hence

[91] 1831-1914.

[92] 1833-1911.

[93] In a conversation between Hayes and Miller prior to the nomination, Hayes expressed the fear that Bristow might use the Supreme Court as a political stepping-stone. Fairman, *op. cit. supra* note 23, at 357.

Harlan's colleague for that time, wrote Senator Hannibal Hamlin to express his opposition. Fuller may have felt particular interest in the appointment because, as a Chicago lawyer, he was of a circuit left unrepresented by the appointment of a Kentuckian to succeed Davis.[94] Fuller found the nomination "a disagreeable surprise." If a representative of the South had to be appointed, he thought that it should be one acquainted with civil law, but "we should have thought it wiser and more in accordance with the necessities of the situation if Judge Drummond had been selected or some other lawyer in this circuit." Fuller was almost extreme in his denunciation: "There seems positively no reason for this circuit justice. It accomplished nothing except to reward a Louisiana Commissioner, a personal and secondary consideration. I hope the nomination will fail of confirmation."[95]

As a Democrat, Fuller would not of course attack the appointment on the basis of the insufficiency of Harlan's Republicanism. The sturdy Republicans of the Judiciary Committee had no such hesitation. Since 1866 Harlan had been a radical Republican but that was not enough for his critics. Senator Edmunds, still enjoying his role of sniffing out iniquity, wrote to James Speed, brother of Lincoln's close friend and a former Attorney General himself, to inquire about the political faith of Speed's fellow Kentuckian. Speed was forced to admit that Harlan had opposed the Emancipation Proclamation "on constitutional grounds" as well as the Thirteenth Amendment. He also confessed that Harlan had opposed the election of Lincoln in 1864 and that he was uninformed as to Harlan's stand on the Fourtennth Amendment and the Civil Rights Bill. Speed contended that these sins were washed away in Harlan's new faith:[96]

> It is due to Gen'l Harlan to say that eight or ten years ago, he sloughed his old pro-slavery skin and has since been an earnest open and able advocate of what he had thought wrong or inexpedient. This I know from intimate intercourse with him since his removal to Louisville.

[94] The geographical objection was frequently urged against Harlan, for his appointment gave his circuit three representatives (Swayne, Waite, and Harlan) on the Bench. Senator Timothy Howe of Wisconsin may have been especially voluble on this score because Wisconsin was, then as now, part of the Seventh Circuit and Howe wanted to succeed Davis. (Hayes' Diary as quoted, 2 Warren *op. cit. supra* note 1, at 566). For evidences of Howe's opposition (in appearance on the high plane of geography rather than on the level of self-seeking) see Fairman, *op. cit. supra* note 1, at 369.

[95] Fuller to Hamlin, October 29, 1877.

[96] Speed to Edmunds, November 10, 1877.

> From the beginning of our civil troubles till General Harlan became anti-slavery the idea that had led his course was the integrity of the country. For that he was ready to sacrifice everything.

Edmunds collected whatever he could find critical of Harlan. This caused the delay in confirmation.

Senator James B. Beck[97] of Kentucky had as a Democrat long been a political opponent of Harlan. Nevertheless he was sympathetic to the nomination and he informed Harlan of the various charges being made against him in Louisville. Harlan replied at length giving his answers to the charges and asking Beck to use the information and letter in such manner as he thought best.[98] Beck turned it over to the Judiciary Committee.

Harlan began with the charge as to the recency of his Republicanism. He could not claim to have been a Republican since 1856, but he pointed out that there was not even an organized Republican party in Kentucky until 1868. He admitted voting for Scott in 1852, Fillmore in 1856, Bell and Everett in 1860, and McClellan in 1864. Harlan had supported McClellan because he thought him most likely to bring about the end of the War, but in many public speeches after 1868 he admitted his error. He claimed to have supported McClellan as a Union man. In 1868 Harlan supported a Unionist for governor, and in 1877 campaigned in Kentucky and Indiana for Grant and in support of the War amendments. He cited his candidacies for governor and sent lengthy quotations from speeches of years past to prove that he was violently opposed to the Klan. Harlan wrote to Beck in much the fashion of a college student applying for a fellowship, and enclosed every supporting document he could find including a letter from Senator Morton thanking him for his part in the campaign of 1872.[99] This record, thought the nominee, should satisfy the most critical.

He indignantly repudiated the story that he had been guilty of improprieties as a member of the Louisiana Commission and then turned to one last charge, that he had resigned his commission in the army because of opposition to emancipation. Harlan did resign in 1863, but, he said, because the death of his father left his business

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[97] James B. Beck (1822-90) was a Member of Congress from 1867 to 1875 and was Senator from 1877 to 1890.

[98] Harlan to Beck, October 31, 1877.

[99] Morton to Harlan, December 8, 1872.

affairs in such shape that attention was essential. To prove the point he quoted his letter of resignation which not only put his bereavement as his reason but expressed his complete faith in the justice and eventual triumph of the cause of the North.

Harlan indicated a willingness to go to Washington if need be to answer the questions of the Committee but this was unnecessary. He was confirmed November 29, 1877.

As has been stated, Hayes' next vacancy occurred in 1880 when Strong retired, and Woods was awarded the seat. For a time that seat overcame the Court tradition of longevity for Strong had held it for only ten years, Woods kept it for seven, his successor L. Q. C. Lamar held it for five years, and Lamar's successor, Howell Jackson, held it for only two years. In 1895 Rufus Wheeler Peckham began a tenure of more normal length.*

* This is the first of a series of articles by Mr. Frank. The second will appear in the May issue. Ed. note.