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Advice and Consent: A Four Era Model Exploring the Evolution of the Appointments Clause...

Abstract

This paper details the evolution of the Advice and Consent Clause of Article Two of the United States Constitution from the Constitutional Convention to the present. It also covers the history of failed Supreme Court nominations from John Rutledge in 1795 to present times. Finally, it analyzes the debate over whether or not it is appropriate for senators to consider a nominee's ideological bent when performing their advice and consent function. More broadly the paper tracks the ever-changing role of the Senate in the Advice and Consent process, and offers a new era-based model to organize the history of failed Supreme Court nominees.

Keywords

Advice and Consent Clause, Constitution, Failed Supreme Court Nominations, Supreme Court, Abe Fortas, John Rutledge, Senate, Robert Bork, Clarence Thomas, Constitutional Convention, Dilulio, John, John Dilulio, Political Science

Advice and Consent:

**A Four Era Model Exploring the Evolution of the
Appointments Clause...**

**Brian Rosenwald
March 25th, 2006**

Chapter 1- Advice and Consent: Where Did it Come From, and What Did It Mean to the Framers?

Article Two Section Two of the United States Constitution states “... and he (the President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law...” This clause is known as the Advice and Consent Clause or the Appointments Clause, and it represents one of the frustratingly vague phrases used by the Framers of the Constitution, which can mean many different things to many different people. Neither the debates from the Constitutional Convention, nor the implementation of the advice and consent process over the last two hundred and eighteen years do much to clarify this incredibly important, yet highly oblique phrase. About the most that can be concluded from the debates, both historical and modern interpretations of the clause, and the history of the advice and consent process is that the Framers intended for the Senate to have a major role in the appointment of Supreme Court justices, and it has definitely played such a part. Indeed, the Senate has prevented more than one-fifth of the men and women nominated to the High Court from reaching it. To get more specific than that is quite difficult because the Senate has used an ever-evolving process to apply constantly changing criteria to evaluate each Supreme Court nominee. What one can say is that if the Framers of the Constitution did in fact intend for the Senate to play a robust role in the appointment of Supreme Court justices then they have once

again been proven quite wise. For it was only during the one era in which the Senate adopted an extremely deferential pose that the eight truly awful justices in the nation's history made it onto the Court.

The Convention

To discern the intent of the men at the Constitutional Convention with regard to the Advice and Consent Clause of Article Two is almost impossible. The Committee of Eleven, whose job it was to deal with postponed matters, slipped it into Article Two when making its report to the Committee of the Whole on September 4th.¹ Debate over the wording was almost non-existent, and what little debate did occur focused mostly on the appointment of executive officers.² Gouverneur Morris did speak in favor of the new construction of the appointment power, saying, “as the President was to nominate and the Senate was to concur there would be security. As Congress now makes appointments there is no responsibility.”³

The Virginia Plan proposed by Edmund Randolph at the beginning of the Convention provided for the establishment of a National Judiciary to consist of “one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature...”⁴ This clause was first debated on Tuesday, June 5th, 1787, and was immediately opposed by James Wilson of Pennsylvania. He claimed that experience showed that intrigue, partiality, and concealment were the results of appointments by legislatures. Wilson wanted to lodge the appointment power with the Executive. John Rutledge of South Carolina responded that he opposed a grant of so great a power to any single person, lest the people think the Framers were leaning too much towards monarchy. Benjamin Franklin gave a speech requesting that other options be laid upon the table, and then talked about how lawyers nominated judges in Scotland. More seriously, James

¹ James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton and Company, 1987), 569 & 575.

² *Ibid.*, 597-599.

³ Madison, 598.

⁴ *Ibid.*, 32.

Madison discussed his dislike for letting the Legislature select judges, because legislative talents were very different from those of a judge, and many of the members of the legislature would not be adequate adjudicators of the requisite qualifications; however, he was not satisfied with the Executive making appointments either. He was inclined instead to give the appointment power to the Senate, which would be numerous enough to confide in, but also sufficiently stable and independent to follow deliberate judgments. Madison moved to strike the language giving the appointment power to the legislature, and to leave the section blank to allow for reflection. This motion passed by a nine to two vote.⁵

On Wednesday June 13th, Roger Sherman of Connecticut and Charles Cotesworth Pinckney of South Carolina moved to return the power to appoint judges to the National Legislature. Madison promptly objected on the grounds that many members of the legislature would be incompetent judges of the necessary qualifications, who would also be influenced too much by their partialities. He then moved that the Senate, a smaller and more select body, have the appointment power, which was agreed to *nem. Con.*⁶ Two days later, William Patterson of New Jersey proposed his alternative to the Virginia Plan, and it gave the Executive, not the Senate, the appointment power.⁷ Similarly when Alexander Hamilton presented his alternative plan the following Monday, he failed to discuss the power of making judicial appointments, but he reserved the power to make cabinet appointments, and the power to nominate all other officers, including ambassadors, to the Executive, subject to the approbation or rejection of the Senate.⁸

This might ordinarily make it appear as if the Advice and Consent Clause is simply another of the Convention's trademark compromises, which to a certain extent it is. However, it

⁵ *Ibid.*, 67-68.

⁶ *Ibid.*, 112-113.

⁷ *Ibid.*, 120.

⁸ *Ibid.*, 138.

failed the only time it was actually proposed and voted upon as a stand-alone measure. On July 18th, Nathaniel Ghorum of Massachusetts proposed that Judges be appointed by the Executive with the advice and consent of the 2nd branch, as was done in Massachusetts. He claimed that this system had worked “perfectly well” for 140 years in his state. Luther Martin of Maryland, Roger Sherman of Connecticut, and Gunning Bedford of Delaware argued against the proposal. Primary among their arguments was the idea that the Senate, being composed of members from each state, would be best informed of characters and therefore, as Martin put it, most capable of making a good choice. Bedford also worried that giving the Executive the appointment power would allow him to win over the larger states by granting preference to their citizens. Ghorum countered that the Senate would have no better information than the Executive as individual senators would, like the Executive, have to trust information about potential judges from the members of the candidates’ states.⁹ Gouverneur Morris and James Wilson believed Ghorum’s proposal to be better than allowing the Senate to appoint judges, but they also made their own motion to allow the Executive to make appointments without any consultation with the Senate. That motion failed six states to two, and Ghorum’s motion also failed after a tied vote of four states to four.¹⁰

Three days later, James Madison tried to revive Gorham’s proposal, but his twist on the concept, which featured the Executive nominating judges, who would be appointed unless opposed by two-thirds of the Senate, failed by a vote of six states to two. Among the arguments Madison made in favor of his proposal was that in the case of a flagrant error by the Executive, two-thirds of the Senate would surely join in utilizing its negative over the nomination. Additionally, he believed that the recent compromise providing for equal representation in the Senate meant that judges might be appointed by a minority of the people, though by a majority of

⁹ Ibid., 315-316.

¹⁰ Ibid., 315-317.

the States, which could not be justified on any principle, as their proceedings would relate to the people rather than the states. Edmund Randolph stated his preference for Ghorum's version of the plan, and reminded his fellow delegates that appointments by the Legislature have generally occurred because of personal considerations, a cabal, or some other non-merit based reason. Gouverneur Morris added his belief that rather than the Executive, it would be the Senate that would be uninformed as to characters. He thought that senators would have to accept the description of the character of candidates as friends of the potential nominees portrayed it to them.¹¹

Charles Pinkney and Oliver Ellsworth responded with the traditional argument that the Executive would have neither the requisite knowledge of potential nominees, nor the confidence of the people for such a responsibility. George Mason went a step further, arguing that lodging the appointment power with the Executive would create a dangerous prerogative, which could perhaps lead to the Executive having an influence over the Judiciary department itself. In an attempt to obviate an objection from Elbridge Gerry, Madison, who had only used the two-thirds number to clearly differentiate his proposal from that of Ghorum, changed the motion so that a simple majority of the Senate could reject a nomination. Even so, Madison's motion was rejected, and the Convention agreed by a six to three vote to leave the appointment power in the hands of the Senate as it had stood before the debate of July 18th began.¹² This was where it would stay until the change made by the Committee of Eleven on September 4, which was strangely agreed to without much argument from the men who had opposed it in July.¹³ Of course it is possible that they did not know that the change had been made. In his book on the topic, the

¹¹ Ibid., 343-346.

¹² Ibid., 343-346.

¹³ Of the men who led the opposition to the advice and consent formulation in July, Ellsworth, Bedford, Martin, and Mason said nothing during what little debate there was on September 6th and September 7th. Most of the comments that were made dealt either with the treaty making power, executive appointments, and the question of whether or not to add a Council with whom the President would share various powers (Madison, 597-602).

late Senator Paul Simon contends that the change was so little noticed that at least two of the delegates continued to speak and write about the Senate naming federal judges.¹⁴

What did Advice and Consent Mean to the Framers?

Nowhere in the debates of the Convention does Ghorum or anyone else try to describe what advice and consent means. It is also problematic to attempt to make an originalist style assessment as to what the term means. The phrase advice and consent first appeared in America in the 1663 declaration and proposals of the Carolina Proprietors, which empowered the major part of freeholders or their deputies to make their own laws by and with the advice and consent of the Governor and council. The phrase also appeared in other concessions and governing documents between 1663 and 1784, including as contended by Ghorum in the Convention, the 1691 Charter of Massachusetts Bay. It says, ““it shall and may be lawfull for the said Governour with the advice and consent of the Councill or Assistant from time to time to nominate and appoint Judges ...””

In addition, the phrase is included in the Constitutions of South Carolina, Delaware, Maryland, New York, New Hampshire, and Massachusetts. In each, the phrase discusses powers delegated to the Governor, which are to be performed with the advice and consent of the council, including the power to appoint officers, fill vacancies, etc. The Constitutions of Massachusetts and Maryland actually give the Governor, with the advice and consent of council, the power to appoint judges. The problem is that none of these documents, dating from 1663 forward, describe what is meant by advice and consent. It would almost seem guaranteed that the concept of offering advice and consent was applied differently in each state, especially since each State

¹⁴ Senator Paul Simon, *Advice and Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles* (Washington: National Press Books, 1992), 157.

Constitution differed as to the tasks which required advice and consent. Thus, these historical precedents are not much help in discerning what the Framers believed the term to mean.¹⁵

Nor do the *Federalist Papers* provide much clarity about the meaning of advice and consent as it regards judicial nominations. Hamilton discusses the appointment power in Federalist 76 and Federalist 77, but he never really delves beneath the surface of the meaning of advice and consent. He talks about the value of the Senate having a negative over the choice of the Executive, as well as about the unlikelihood of the Senate actually utilizing it for fear of a worse second nomination. Thus he feels they will only use this power when they have ““special and strong reasons for the refusal.”” Hamilton believed that the concurrence of the Senate would have a powerful, though, in general, silent operation.”¹⁶ He also replied to criticism of the scheme by noting that the Framers intended for the Senate to be able to restrain the President in his exercise of the nominating power.¹⁷ While these descriptions may help explain the overall goal of the Framers in adding the Advice and Consent Clause, they do little to shed light on the mechanism by which it is to be applied, or the standards the Framers expected the Senate to use when giving advice and consent. Hamilton does discuss how obtaining the advice and consent of the Senate will be, “an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”¹⁸

As discussed later, Senator Orrin Hatch (R-UT), interprets this passage to mean that Framers intended for the Senate’s only job in the advice and consent process to be ensuring that the President does not appoint incompetent judges. This reading of Hamilton’s words is very

¹⁵ Thurston Greene, *The Language of the Constitution* (New York: Greenwood Press, 1991), 9-17.

¹⁶ Alexander Hamilton, “Federalist 76,” in *The Federalist Papers*, edited by Clinton Rossiter (New York: Penguin Books Ltd, 1961), 425.

¹⁷ Alexander Hamilton, “Federalist 77,” in *The Federalist Papers*, edited by Clinton Rossiter (New York: Penguin Books Ltd, 1961), 428.

¹⁸ Alexander Hamilton, “Federalist 76,” in *The Federalist Papers*, 425.

debatable, especially in light of the fact that Hamilton led the fight against the confirmation of John Rutledge for mostly ideological and partisan reasons.¹⁹ Even if one assumes it to be true, one cannot assume that Hamilton spoke for all of the Framers in interpreting the clause in that way.

This is especially the case because Hamilton was perhaps the convention's only monarchist, who favored as strong an executive as possible. As Professor Michael Garhardt writes, "it is also not surprising, given Hamilton's preference for a strong executive, that he took the position that the constitutional procedure for making federal appointments did not envision a dominant or significant role for the Senate."²⁰ Additionally, as Adam White notes in a recent article, Hamilton was absent from the convention during July when the Appointments Clause was discussed, and the language he used in *The Federalist* appears to be a reliable indicator more of Hamilton's perception of advice and consent than what the delegates actually endorsed. More precisely, White believes that Hamilton's writings in the *Federalist* equate the language in his proposal of June 18th - "approbation or rejection"- with the mechanics of the final advice and consent proposal. Thus he concludes that the view in the *Federalist* most plausibly represents the appointments framework proposed by Hamilton on June 18th, and not the one accepted by the convention on September 4th.²¹ This conclusion is definitely supported by the short part of *Federalist* 66 in which Hamilton discusses the basic setup of the appointments process. "It will be the office of the President to *nominate*, and with the advice and consent of the Senate, to *appoint*. There will of course, be no exertion of *choice* on the part of the Senate. They may

¹⁹ See pages 31-35 which discuss the Rutledge nomination in detail.

²⁰ Michael J. Garhardt, *The Federal Appointments Process* (Durham: Duke University Press, 2000), 25.

²¹ Adam J. White, "Toward the Framers' Understanding of 'Advice and Consent': A Historical and Textual Inquiry," *Harvard Journal of Law and Public Policy* 29, no. 1 (2005):127-129.

defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*- they can only **ratify or reject the choice he may have made.**”²²

Indeed, one would be mistaken in attempting to portray the Framers as united in almost anything, and one of them, George Mason, provided support for an alternative interpretation of the Advice and Consent Clause in 1792. Mason’s interpretation seems to provide the Senate with great latitude as to what standards it applies in the exercise of this power.

I am decidedly of opinion, that the Words of the Constitution... give the Senate the Power of interfering in every part of the Subject, except the Right of nominating.... The Word ‘*Advice*’ here clearly relates in the Judgment of the Senate on the Expediency, or the Inexpediency of the Measure, or Appointment; and the Word ‘*Consent*’ to their Approbation or Disapprobation of the Person nominated; otherwise the word *Advice* has no Meaning at all- and it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous or nugatory, which is capable of a fair and rational Meaning. The Nomination, of Course, brings the Subject fully under the Consideration of the Senate; who have then a Right to decide upon its Propriety or Impropropriety. The peculiar Character or Predicament of the Senate in the Constitution of the General Government, is a strong Confirmation of this Construction.²³

Chapter 2 -What does Advice and Consent mean Today?

Modern day interpretations of the meaning of the Advice and Consent Clause also vary widely. One of the more interesting, and unique approaches is that announced by Senate

²² Alexander Hamilton, “Federalist 66,” in *The Federalist Papers*, edited by Clinton Rossiter (New York: Penguin Books Ltd, 1961), 373.

²³ David A. Strauss and Cass R. Sunstein, “The Senate, The Constitution, and The Confirmation Process,” *The Yale Law Journal* 101, 7 (1992):1495.

Judiciary Committee Chairman Joseph R. Biden Jr. (D-DE) on the eve of the contentious hearings into the nomination of Robert Bork to be Associate Justice of the Supreme Court. Eminent conservative legal professor Philip Kurland, and liberal luminaries Laurence Tribe and Walter Dellinger advised Biden as he formulated his position.²⁴ Biden's belief is that the Framers intended for the Senate to play a broad role in the appointment of judges, a contention, which certainly seems true based upon the evidence. He then cited evidence of how the Senate has exercised, what in his opinion is their undisputed right, to question a nominee's judicial philosophy. He cited a famous quote from Judiciary Chairman Norris of Nebraska during the debate over the 1930 nomination of John J. Parker to the Supreme Court. "When we are passing on a judge *** we ought not only to know whether he is a good lawyer, not only whether he is honest -- and I admit that this nominee possesses both of those qualifications -- but we ought to know how he approaches these great questions of human liberty."

Yet, Biden continued by cautioning that just because the Senate has the right to consider the judicial philosophy of Supreme Court nominees does not mean that a nominee's philosophy ought to always play a role in senators' determinations about whether the nominee should be confirmed, because utilizing this criterion comes with costs. The Chairman then laid out conditions under which he believed that senators in fact should be willing to approve nominees with whose judicial philosophies they disagree. He believed those conditions to include a spirit of bipartisanship between the President and the Senate, the President's having enlisted and heeded the advice of the Senate, or making an honest effort to choose a nominee from the

²⁴ Mark Gittenstein, *Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* (New York: Simon and Schuster, 1992), 45.

mainstream of American legal thought, and above all that the President had sought two qualities in his nominees: detachment and statesmanship.²⁵

Finally, Biden laid out the three conditions under which in his opinion the Senate not only had the right, but also the duty to carefully consider a nominee's judicial philosophy. When either the President attempts to remake the Court in his own image by selecting nominees for their judicial philosophy, or when the President and the Senate are deeply divided, demonstrating a lack of consensus on the great issues of the day, the Senate ought to consider a nominee's judicial philosophy. Lastly Biden believed that philosophy also must matter when the balance of the Court itself is at stake. This two-tiered system is certainly an interesting conception of the Senate's duty to provide advice and consent, and one which must be taken seriously as Biden chaired the pivotal Judiciary Committee during hearings on five Supreme Court nominations.²⁶ Biden is not alone in his support for this type of circumstance and condition-based criteria for evaluating judicial nominees. Respected law professors Laurence Tribe and Cass Sunstein both endorse similar situation based approaches.²⁷ Political Scientist Michael Comiskey goes a step further writing that conflict over agenda-driven Supreme Court nominations at times of broken Constitutional consensus is a critical part of the Constitutional dialogue. He believes that this conflict tends to produce justices who are more widely acceptable to the polity, less activist, more likely to afford the democratic branches the space to work out their differences, and less likely to perpetuate the Court itself as an issue.²⁸ Comiskey concludes that these periods of Constitutional schism definitively call for an especially robust dialogue over who should receive

²⁵ Joseph R Biden (DE), "Advice and Consent: The Right and Duty of the Senate to Protect the Integrity of the Supreme Court," *Congressional Record* 133: 122 (July 23rd, 1987) p. S10522. Available from LexisNexis Congressional; Accessed: 11/14/05.

²⁶ Ibid.

²⁷ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process: Hearings before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary*, 107 Cong., 1st sess., June 26 and September 4, 2001. Washington: Government Printing Office, 2002, 41-42, 57, & 59-60.

²⁸ Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominations* (Lawrence: University of Kansas Press, 2004), 184.

life tenure to sit on the Supreme Court, and accordingly be able to issue nearly uncheckable rulings on the fundamental Constitutional questions that divide Americans.²⁹

A week after Biden delivered his speech in the Senate, Senator Hatch, a future chairman of the committee, rose to rebut it. His interpretation of the intent of the Framers differed greatly from that of Biden:

In the first place, the "broadest role" for both the President and the Senate was rejected by the Convention. The Convention arrived at a compromise that Madison, the framer of the compromise, designed to achieve the result just discussed. This is hardly the "broadest role" for the Senate. Furthermore, the Senate was given no nominating authority whatsoever. Indeed the Senate's appointment authority was rejected by the Convention. This hardly argues for the broadest Senate role "in choosing the Court."³⁰

Hatch continued on to cite the aforementioned passage from Hamilton that he interpreted to mean that the Framers only intended for the Senate to serve as a check on unqualified nominees. Hatch stated that none of the Framers, even those such as Luther Martin who most strongly favored Senate appointment of judges, argued for a system of, "ideological inquisitions and inquiries." Instead Hatch opined that they supported Senate appointment, because they believed that the Senate would be most able to produce judges with the requisite qualifications. Hatch then discussed the history of rejected Supreme Court nominees, and came to the conclusion that political and philosophical factors played little role in most of the Senate's rejections of nominees. This conclusion is only possible because Hatch essentially deemed all nominations postponed or rejected because senators were saving the vacancy for a new President from their party as uninfluenced by partisan or philosophical considerations. To him, these cases were just examples of the Senate refusing to allow lame duck presidents to make appointments. This

²⁹ Ibid., 193.

³⁰ Orrin Hatch (UT), "The Dangers of Politicizing Supreme Court Selections: A Response to Senator Biden," *Congressional Record* 133: 127 (July 30th, 1987) p. S10878. Available from LexisNexis Congressional; Accessed: 12/21/05.

distinction seems somewhat dubious in light of the facts of many of the individual cases, and Hatch's overall conclusion is contrary to that of, among others, distinguished scholar Joseph Harris.³¹

Finally, Hatch discussed the potential dangers of considering nominees' philosophical beliefs in rejecting them, and attacked Biden's criteria for ever doing so. This is not necessarily important from the standpoint of interpreting Hatch's belief about the meaning of advice and consent, but he seems to fundamentally distort Biden's concept of when the Court's balance is at stake. Over all, Hatch's point is that in his view, advice and consent only involves considering the professional qualifications/abilities of a nominee, and that the Senate should otherwise defer to the judgment of the President.

Two other people whose opinions on the meaning of the Advice and Consent Clause ought to be significant, the late Chief Justice William H. Rehnquist, who went through two difficult confirmation processes, and Supreme Court Justice Ruth Bader Ginsberg, whose nomination passed the Senate with near unanimous support, disagree with Hatch. Rehnquist made his opinion on the subject known several times. As a young lawyer in 1959, Rehnquist wrote in the Harvard Law Review that the Senate ought to resume its practice, "'of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him.'"³² Then while Chief Justice he reaffirmed this belief in a speech at Columbia University in 1987 saying, "'it is appropriate for the Senate to inquire into the Judicial philosophy of a Supreme Court nominee. Such an inquiry has always seemed entirely consistent with our Constitution and

³¹ Ibid.; See Chapters 4 & 5 for a discussion of many of these cases, and an explanation of why they involved much more than just the Senate rejecting nominations from lame duck Presidents. Hatch's conclusion is also unreasonable because it ignores cases such as that of Justice Samuel Nelson, who was successfully appointed by President Tyler after the 1884 Presidential Election.; Harris, who is one of the two pre-eminent scholars in this area of history, has written that, "the Senate thus established a precedent of inquiring into the political views and ideas of the persons nominated for public office and of rejecting a nominee whose views do not correspond to those of a majority of the Senate" (Joseph Harris, *Advice and Consent of the Senate* (Berkeley and Los Angeles: University of California Press, 1953), 43).

³² Ibid.

serves as a way of reconciling judicial independence with majority rule.”³³ This from a man whose initial nomination to the Supreme Court in 1971 was filibustered by Senator Birch Bayh for a several weeks because of his conservative judicial philosophy.³⁴

Ginsberg’s opinion has evolved over time, but by 1988, she agreed with her late colleague. She summarized her opinion with a quote from Louis Henkin, a former colleague at Columbia Law School. “In the appointment to the United States Supreme Court, the Senate comes second, but is not secondary. The standards the Senate should apply are the same as those that should govern the President: what would serve the national interest (not simply for today’s cases but for the long term).” She does not believe that nominees have to answer all of the Senate’s questions about their philosophy, citing Felix Frankfurter’s famous statement on the matter, but she does feel it is a legitimate area for the Senate to probe.³⁵

What do contemporary academics believe about the meaning of the Advice and Consent Clause? Like many senators, they are largely split, often depending on which party controls the White House. Perhaps the most objective view of the meaning of the Appointments Clause comes from Professor Michael Garhardt who has written a book on the federal appointment process. He believes that through its silence on the matter, the Advice and Consent Clause allows the President and the Senate to base their decisions or actions regarding appointments on whatever grounds they deem appropriate. Additionally, although Garhardt believes there to be plausible evidence that the Framers intended for senators to reject nominations only for compelling reasons, he thinks that they left largely unexplored the question of what would

³³ Ruth Bader Ginsberg, “Confirming Supreme Court Justices; Thoughts on the Second Opinion Rendered by the Senate,” *University of Illinois Law Review* 101 (1988) Available from LexisNexis Academic. Accessed 11/9/05.

³⁴ Henry Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham: Rowman and Littlefield Publishers, 1999), 269-270.; According to Abraham, Rehnquist’s nomination only passed because Christmas and an election year were approaching, causing Bayh and his supporters to relent. However, other evidence exists to lead to the conclusion that a filibuster failed simply because of the lack of support for one (See page 92, and footnote 280 for a more elaborate discussion of this).

³⁵ Ginsberg, “Confirming Supreme Court Justices.”

qualify as a very good or compelling reason for rejecting a nomination.³⁶ If one agrees with this view, there is an especially important reason that the Senate not only can, but also ought to, consider a nominee's ideology when judging an appointment.

Over 40 years ago, noted scholar Walter F. Murphy wrote that with regard to Supreme Court appointments, the President may take as his principal concerns the general position of the nominee and the way he can be expected to vote once on the Court.³⁷ If both Garhardt and Murphy are correct, then the Senate has a duty to consider a nominee's ideology for a simple, if not immediately evident reason. As David Strauss and Cass Sunstein explain, one party to a conflict should not have the dominant role in choosing the mediator, and the Court is often called upon to mediate between Congress and the President.³⁸ In the same vein, as part of his argument in favor of the Senate considering a nominee's ideology, the late scholar Charles Black Jr. wrote, "The judges are *not* the President's people. God Forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less."³⁹ If the President considers a nominee's ideology and the Senate does not, then the scale is tipped in favor of the President, who gains a dominant role in choosing the justices of the Court.

As Marsha Greenberger pointed out during Congressional subcommittee hearings on the role of ideology in the confirmation process, "there is widespread agreement among scholars and commentators that it is absolutely appropriate and indeed necessary for Senators to inquire into, and base their confirmation votes on judicial nominees' positions and views on these and other substantive areas of the law."⁴⁰ Although this is a bit of an overstatement, both liberal and conservative scholars do believe the consideration of ideology to be at the very least permitted by the text of the Constitution. Conservative scholar Douglas Kmiec told the Senate

³⁶ Garhardt, *Federal Appointments Process*, 36-38.

³⁷ Walter F. Murphy & C. Herman Pritchett, *Courts Judges, and Politics* (New York: Random House, 1961), 69.

³⁸ Strauss, and Sunstein, *Senate, Constitution, and Confirmation Process*, 1493.

³⁹ Charles Black Jr., "A Note on Senatorial Courtesy," *The Yale Law Journal* 79, no. 4 (1970): 660.

⁴⁰ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process*, 79.

Subcommittee on the Constitution, Civil Rights, and Property Rights that there was no textual restraint to preclude the Senate from considering a nominee's ideology. Two other conservative witnesses, Professor Stephen Calabresi, and Constitutional Law specialist Bruce Fein went further, agreeing that it is legitimate for the Senate to inquire as to a nominee's ideology.⁴¹ Liberal professors Cass Sunstein and Laurence Tribe go another step further, with Sunstein believing that a nominee's ideology should matter, and Tribe opining that it has a substantial role to play in the advice and consent process.⁴² Even former Carter White House Council Lloyd Cutler, who believes that it is wrong for senators to make ideology a part of the advice and consent process, stated that senators have an "absolute right" to deny consent on whatever grounds they think is important.⁴³ Professors Catherine Fisk and Erwin Chemerinsky perhaps best summarize the case that the Senate ought to consider a nominee's ideology writing:

the Senate should use ideology precisely because the President uses ideology.... Republicans, who today argue for the Senate to approve nominations without regard to their views, are utterly disingenuous to assert that ideology should be irrelevant when the President also bases his picks primarily on ideology. Under the Constitution, the Senate should not be a rubber-stamp and should not treat judicial selection as a presidential prerogative.⁴⁴

Professor Stephen Presser disagrees with this position, but even he, who uses Hamilton's writings in the *Federalist* to conclude that the Senate should not use partisan political ideology to select judges, believes that the Senate should "insist upon proper judicial philosophy for

⁴¹ U.S. Senate. Committee on the Judiciary. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary*, 108th Cong., 1st sess., May 6, 2003. Washington: Government Printing Office, 2003,

⁴² U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process*, 48 & 61.

⁴³ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process*, 27, 29, & 41.

⁴⁴ Catherine Fisk, and Erwin Chemerinsky, "In Defense of Filibustering Judicial Nominations," in *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointment Process* (The Floersheimer Center for Constitutional Democracy and The Cardozo Law Review, 2005), 17.

nominees.”⁴⁵ Under questioning from Senator Charles Schumer (D-NY), Professor Presser even declared that whatever questions a senator feels are necessary to ascertain a nominee’s philosophy are fair game.⁴⁶ Indeed, there seems to be almost universal agreement that a nominee’s judicial philosophy ought to be an important piece of the Senate’s criteria when giving advice and consent. This widespread agreement only extends so far however, and might actually be a case of semantic agreement papering over a seismic divide. The chasm exists mainly over what constitutes judicial philosophy, and what ought to be considered political ideology. On this both scholars and politicians are split.

Liberal politicians and scholars seem to refer to ideology and judicial philosophy almost interchangeably. In asking a question to former Bush White House Council C. Boyden Gray, Senator Schumer equated ideology with judicial philosophy. “Now let’s just assume... that the White House... insists on ideology, that the nominees they send for the Supreme Court and for the bench by and large seem to have one consistent judicial philosophy which would be regarded by a Senator as clearly out of the mainstream.”⁴⁷ Similarly, Professor Tribe described to the Senate subcommittee how he believed asking a nominee to share his or her “thought process,” about hallmark Supreme Court decisions to be part of an inquiry, not into a nominee’s political ideology, but into his or her “legal thought.” Professor Sunstein is even clearer, believing ideology in this context to mean the expected approach, and general patterns of votes, of a potential judge.⁴⁸

By contrast, Schumer’s counterpart on the subcommittee, Senator Jeff Sessions (R-AL), himself once rejected by the Senate for a federal judgeship, sums up the opposing viewpoint, which is fundamentally dichotomous to that of Schumer, Tribe, and Sunstein.

⁴⁵ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process*, 51.

⁴⁶ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process*, 109.

⁴⁷ U.S. Senate. Committee on the Judiciary. *The Judicial Nomination and Confirmation Process Hearings*, 44.

⁴⁸ *Ibid.*, 40 & 61.

In my view, the Senate may appropriately examine a nominee's judicial philosophy, and should do so, but should not assess a nominee on some results-oriented ideological or political basis to demand that they produce rulings that we might politically agree with.

Does the nominee understand that his or her role as a judge is to follow the law, regardless of personal political opinion? Does he or she understand the role of precedent in interpreting the law? Can the nominee put aside political views, which may be appropriate as a legislator, executive or advocate, and interpret the law as it is written? Will the nominee keep his or her oath to uphold the Constitution, first and foremost? The Senate needs to know the answers to these important questions. Questions that would implicate a nominee's view on what the result of a particular case should be, however, should not be asked, in my view.⁴⁹

There is truly no way to reconcile the two opposing positions, other than to say that what one side believes to be part of a permissible inquiry into a nominee's judicial philosophy, the other side views as an impermissible effort to use a results-oriented political approach in an attempt to produce Supreme Court rulings, with which that side agrees. Regardless of which view is correct, history supports an inquiry into *both* a nominee's political beliefs and judicial philosophy.

As will be discussed in great detail later in this paper, a nominee's political stances have always been reason enough for the Senate to reject him, going back to John Rutledge in 1795. It is however somewhat difficult to ascertain when judicial philosophy became important, simply because of the definitional difficulty surrounding the term. What it is safe to say is that judicial philosophy has become an increasingly important area of inquiry in what will later be defined as the Fourth Era of Advice and Consent. As Senator Biden pointed out in his speech, judicial philosophy played a role in the withdrawal of the nomination of Abe Fortas to be Chief Justice; it also factored into the opposition against Rehnquist's nomination, and it certainly accounts almost

⁴⁹ Ibid., 5-6.

entirely for Judge Bork's rejection.⁵⁰ In fact, Stephen J. Wermeil contends that beginning with the Bork hearings senators have felt at liberty to engage in a constitutional discourse with perspective nominees.⁵¹ He believes Bork's nomination to be the first time the Senate rejected a nominee because his confirmation might move constitutional interpretation in a direction different than that desired by the majority of the senators.⁵² The case study in Chapter Six of John J. Parker's 1930 rejection would argue against this point, but it cannot be denied that such considerations have become increasingly important in the last half century. Wermeil also believes that since the Bork nomination, senators on the Judiciary Committee have actually attempted to use hearings to influence nominees' constitutional philosophy.⁵³

Wermeil's contention is somewhat contradicted by the findings of Frank Guliuzza III, Daniel Reagan, and David Barrett. After coding all of the questions put towards Supreme Court nominees since 1954, they have found that there has been no obvious shift in the percentage of questions about a nominee's constitutional philosophy from the pre-Bork era to the post-Bork era.⁵⁴ They found that Thurgood Marshall in 1967 received a greater percentage of questions about his constitutional philosophy than did Judge Bork. Senators also asked Rehnquist the same percentage of questions (92.6% of all questions put towards him) about his constitutional philosophy in his 1971 confirmation hearing as they did Judge Bork. More broadly, the researchers found that about 58% of the nominees between 1954 and Judge Bork's nomination in 1987 received 75% or more constitutional questions, while 32% of them received at least 80%

⁵⁰ Biden, "Advice and Consent."; Chapters four through seven of this paper will discuss these cases in much greater detail.

⁵¹ Stephen J Wermeil, "Confirming the Constitution: The Role of the Senate Judiciary Committee," *Law and Contemporary Problems* 56, 4 (1993), 128-130.

⁵² *Ibid.*, 131.

⁵³ *Ibid.*, 133-142.

⁵⁴ Frank Guliuzza III, et al., "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria," *The Journal of Politics* 56, no. 3, (1994), 785.

constitutional questions.⁵⁵ Additionally the three researchers found that senators engaged in a higher proportion of constitutional commentary in four other confirmation hearings than they did during the Bork hearings. Of those four, three occurred during the pre-Bork period. They also found that 42% of the pre-Bork nominees elicited higher percentages of constitutional commentary than did either Justices Kennedy or Thomas.⁵⁶ One way or another, it would seem that a nominee's constitutional philosophy has joined his or her political views and professional credentials as major factors in the Senate's deliberations when giving advice and consent.

Chapter 3- The Rules of the Game Change: Procedural Changes since 1795

One thing about which there can be no debate is that the Senate's process for offering advice and consent on Supreme Court nominees has varied vastly over the years. This could not be made more clear than by comparing the week long publicly televised hearings this past September for now Chief Justice John Roberts with the official Senate Record of the debate for

⁵⁵ Ibid., 776.

⁵⁶ Ibid., 782-783.

the first rejected Supreme Court Nominee, John Rutledge, in 1795: “On motion, The Senate resumed the consideration of the message of the President of the United States, of the 10th instant, containing the nomination of John Rutledge, to be Chief Justice of the United States; and on motion to advise and consent to the appointment, agreeable to the nomination, * It passed in the negative, * Yeas ... 10, * Nays ... 14.”⁵⁷ Why is the record so sparse? The explanation is simple- the Senate met in closed executive session when acting upon nominations until 1929. The only way for a nomination to be considered in open session before 1929 was if during a closed session, two-thirds of the senators agreed that the debate be opened. After 1844, any senator who leaked the proceedings of the secret debate on a nomination risked expulsion. Efforts were made in 1841, 1853, 1886, and 1915 to change the Senate rules, but each went down to defeat. In 1886, Senator Platt, who spearheaded the effort to change the rules, contended that open sessions would lead to better appointments, and would reduce the evils of political patronage.⁵⁸

The Senate only finally changed its procedure in 1929, because it had been embarrassed by leaks of the proceedings on two controversial nominations, which had been published by a receptive press. The ensuing controversy eventually led the Senate Rules Committee to propose an amendment, whereby open sessions would be permitted when ordered by a majority of the members. The proposed rules change also provided that the vote on nominations in closed session should be published in the record. Not satisfied, Senator Joseph Robinson of Arkansas offered a substitute amendment providing that sessions be open unless ordered closed by a majority vote. Robinson’s Amendment did not contain the provision ordering publication in the

⁵⁷ U.S. Congress. *Senate Exec. Journal*. 4th Cong., 1st Sess., December 15 1795, 195-196.
<http://memory.loc.gov/ammem/amlaw/lwejlink.html#anchor4>.

⁵⁸ Joseph P Harris, *Advice and Consent of the Senate* (Berkeley and Los Angeles: University of California Press, 1953), 249-251.

record of votes on nominations taken in closed session.⁵⁹ Even at this point, there was a strong debate over whether to open the sessions to the public. Some senators feared that approving the Robinson amendment would lead to legitimate criticism of nominees being withheld. They also worried that a fear of meretricious public charges would deter qualified individuals from consenting to nomination. Proponents of the rule change actually felt that meretricious public charges would be more readily refuted and legitimate charges would be made more effectively.⁶⁰ After an effort by Senator Norris to affix the provision providing for the publication of the vote on nominations taken in executive session was narrowly defeated, the Robinson Amendment was adopted by a vote of 69-5.⁶¹

This change fit with the times in which it occurred. During the early portion of the twentieth century many of the Senate procedures regarding the advice and consent process underwent significant alterations. The cause for many of these procedural changes was probably the passage of the Seventeenth Amendment to the Constitution in 1913, which provided for the direct election of senators.⁶² In addition to the opening of the debate sessions, there were changes to the committee process for considering nominations. In its earliest days, the Senate often acted on nominations without referring them to committees for consideration. Only in cases in which the person nominated was either unknown or had charges lodged against him was the nomination referred to the Judiciary Committee. Only in 1868 did the Senate change its rules to require the referral of all nominations to the appropriate committee, unless otherwise ordered. The Senate also changed its rules to prohibit the floor consideration of a nomination on the same day it was reported by committee, except by unanimous consent. However, perhaps because of their

⁵⁹ Ibid., 254-255.

⁶⁰ Paul Freund, "Appointment of Justices: Some Historical Perspective," *Harvard Law Review* 101, 6 (1988), 1157-1158.

⁶¹ Harris, *Advice and Consent*, 255.

⁶² Garhardt, *Federal Appointment Process*, 65-67.; John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: The John Hopkins University Press, 1995), 52-53.

importance, only the nomination of Associate Justice White to be Chief Justice in 1910 has escaped the Judiciary Committee entirely.⁶³

It was not until around 1900 that the Senate Judiciary Committee started routinely holding hearings on Supreme Court nominees.⁶⁴ Before that time, the committee more informally accepted charges and comments relating to nominations, as will be discussed later with regard to the nominations of George H. Williams, William Hornblower and Wheeler Peckham between 1870-1894. The hearings are held in one of two forms: either the Chairman of the Judiciary Committee appoints a subcommittee, which holds either public or closed hearings, or the committee as a whole conducts them. The former practice seems to have been utilized mostly in the first half of the twentieth century, whereas nowadays the full committee usually conducts robust public hearings. Not until the controversial nomination of Louis D. Brandeis in 1916 did a Senate Judiciary subcommittee hearing into a Supreme Court nomination occur in public.⁶⁵

An even bigger change in the hearings into Supreme Court nominations has occurred gradually over the last eighty years. Although it might stun people whose major memory of the advice and consent process is the picture of now Justice Clarence Thomas staring into the camera and declaring a Judiciary Committee inquiry into charges that he sexually harassed a former subordinate, ““ a high-tech lynching,”” no Supreme Court nominee appeared before the Senate Judiciary Committee until 1925.⁶⁶ Harlan Fiske Stone became the first nominee to appear before the Committee to refute charges against him by Senator Burton K. Wheeler (D-MT).⁶⁷ In 1930, almost unbelievably, a motion to allow John Parker to testify before the committee to refute

⁶³ Kenneth C. Cole, “Judicial Affairs: The Role of the Senate in the Confirmation of Judicial Nominees,” *The American Political Science Review* 28, 5 (1934), 877.; One would assume that Cole’s contention excludes nominations to the Court prior to the creation of the Judiciary Committee in 1816.

⁶⁴ Lee Epstein and Jeffery A Segal, *Advice and Consent: The Politics of Judicial Appointments* (Oxford and New York: Oxford University Press, 2005), 88.

⁶⁵ Cole, “Judicial Affairs, 877.

⁶⁶ Simon, *Advice and Consent*, 114-115.

⁶⁷ Abraham, *Justices, Presidents, and Senators*, 147.

charges against him was rejected.⁶⁸ Subsequently, the next nominee to appear before a subcommittee was Solicitor General Stanley Reed in 1938. However, Reed's appearance amounted to little more than answering questions from one friendly witness, before the chairman blocked an attempt by a hostile witness to question him.

FDR's next appointment to the Supreme Court, Felix Frankfurter, also appeared before a subcommittee of the Judiciary Committee, but he did so very reluctantly. Frankfurter initially respectfully declined the invitation to appear before Senator Neely's subcommittee, citing his teaching duties at Harvard as an excuse. However, after the advice of friends, and a first day of hearings that produced a series of adverse witnesses whose opposition was often motivated by racial or religious prejudice, Frankfurter reversed ground and appeared before the subcommittee.⁶⁹ However, he made it clear that he did not wish to testify in support of his own nomination. Frankfurter also set a precedent that is still invoked today as an explanation for why nominees should not discuss controversial issues that might come before the Court:

While I believe a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee, no less than for a member of the Court to express his personal views on controversial political issues affecting the Court.⁷⁰

The next two Supreme Court nominees, William O. Douglas and Frank Murphy appeared voluntarily at hearings, but Douglas did not testify, and Murphy spoke only briefly. Robert H. Jackson, FDR's sixth nominee to the Court also appeared at hearings, and answered questions from Senator Millard Tydings of Maryland about his failure to prosecute two columnists for allegedly libelous statements against Tydings.

⁶⁸ Freund, *Appointment of Justices*, 1158 & 1161.

⁶⁹ Harris, *Advice and Consent*, 247; Freund, *Appointment of Justices*, 1159.

⁷⁰ Freund, *Appointment of Justices*, 1159.

Although this meant that five straight nominees had appeared at hearings, it did not yet signal that an appearance before the committee was routine protocol. In 1949 when President Truman nominated former Indiana Senator Sherman Minton, the Judiciary Committee voted five to four to invite Minton to appear. Senator Ferguson prompted this effort, as he wished to question Minton about his robust support for President Roosevelt's Court "packing" plan. Minton replied by declining the invitation to appear, questioning the propriety of such an appearance, but also responding to the questions about his support for the court-packing plan. The committee then voted to reverse its action, and voted nine to two to send the nomination to the Senate favorably.⁷¹

The Senate however was only reluctantly willing to accept Minton's refusal to testify, signaling a sea change in the nineteen years since the committee had refused to allow Judge Parker to appear. Subsequent to Minton's refusal, it has become commonplace for all Supreme Court nominees to appear before the Senate Judiciary Committee for some sort of questioning, with only the odd exception, such as Earl Warren, who was not asked to appear in 1954, and then Associate Justice Abe Fortas in 1967, who refused to return before the Committee a second time.⁷² One of the primary reasons that hearings have become institutionalized is the landmark decision of *Brown v. Board of Education*, 347 U.S. 483, handed down by the Supreme Court in 1954. After that decision, southern senators, who dominated the Judiciary Committee, insisted that nominees come before the Committee to declare their feelings about desegregation.⁷³

The discontinuation of applying senatorial courtesy to Supreme Court nominations represents yet another procedural change in the advice and consent process since the beginning of the twentieth century. The idea of senatorial courtesy has varied slightly throughout history,

⁷¹ Harris, *Advice and Consent*, 246.

⁷² Freund, *Appointment of Justices*, 1161-1162.; As is discussed later, Fortas appeared before the Judiciary Committee once in 1967, but refused to reappear after new questions arose about his conduct.

⁷³ Garhardt, *The Federal Appointment Process*, 68.; Comiskey, *Seeking Justices*, 89.

but its basic gist is that nominees must have the support of their home state senators to progress beyond at the very most a committee hearing.⁷⁴ Due to the peculiarities of the Senate, the term senatorial courtesy also applies to the unrelated practice of senators who are nominated to an executive or judicial post usually receiving only token scrutiny from their colleagues.⁷⁵ During the nineteenth century this concept was at least somewhat responsible for five Supreme Court nominations failing. The opposition of New York's Democratic senators, Silas Wright Jr. and Nathaniel P. Tallmadge, and that of Pennsylvania Independent Senator Simon Cameron helped to doom President Tyler's nomination of Rueben Walworth of New York and President Polk's nomination of George Woodward of Pennsylvania, who Cameron called, "personally objectionable."⁷⁶ Polk's nomination of Woodward was an incredible affront to Senator Cameron, as the President not only failed to consult him, but also appointed Woodward, over whom Cameron had won a controversial victory in the most recent Senate election.⁷⁷ There is also little doubt that the vociferous opposition of New York Democratic Senator David B Hill, a Judiciary Committee member no less, helped to harpoon President Cleveland's nominations of William Hornblower and Wheeler Peckham in 1894. However, as will subsequently be discussed in more detail in Chapter Five, Abraham's contention that senatorial courtesy was the sole factor in these rejections seems to have been disproved by the excellent scholarship of Carl Pierce.⁷⁸

The successful use of senatorial courtesy to block Supreme Court appointments ended in 1925 when Senator Burton Wheeler, a powerful Montana Democrat, attempted to invoke it against the nomination of Harlan Fiske Stone. Wheeler was angry that Stone had refused to drop a case brought by Attorney General Dougherty against him, and his objection did create choppy

⁷⁴ Some versions of this idea have included only applying it if the nominee's home state senators are from the majority party, or disregarding it if the President has consulted with the nominee's home state senators before making the nomination. Epstein and Segal, *Advice and Consent*, 75-82 & 88-92.

⁷⁵ Harris, *Advice and Consent*, 306-307.

⁷⁶ Abraham, *Justices, Presidents, and Senators*, 20.

⁷⁷ Garhardt, *Federal Appointments Process*, 146.; Maltese, *Selling of Supreme Court Nominations*, 35.

⁷⁸ *Ibid.*, 19-20.

waters for the Stone nomination to traverse.⁷⁹ Although the Judiciary Committee had previously approved it unanimously, the full Senate moved to recommit Stone's nomination to the committee. This of course caused Stone to become the first Supreme Court nominee in history to appear before the Judiciary Committee, and he was articulate, dignified, and generally outstanding under hostile cross-examination by allies of Senator Wheeler. This caused the committee to re-recommend Stone's nomination by voice vote without dissent, and the full Senate then confirmed him seventy-one to six.⁸⁰

The other strand of senatorial courtesy should have guaranteed Senator Hugo Black (D-AL) almost unanimous and immediate approval after President Roosevelt nominated him to the Court in 1937. However, for the first time in almost fifty years, the Senate refused immediate confirmation of one its members. When Senator Ashurst, chairman of the Judiciary Committee, moved that the Senate take up the nomination in executive session without referral to committee, Senators Burke and Johnson of California objected, and the nomination was referred to the Judiciary Committee. Within less than an hour, Senator Ashurst had announced to the press the membership of the subcommittee he had named to consider the appointment. All the Democrats on the subcommittee had supported the President's Court "packing" plan, assuring favorable action on Black's nomination, though it did have to go through the committee process.⁸¹

A final major change in the application of advice and consent in the twentieth century regards the length of time between the nomination and confirmation of generally non-controversial nominees. Throughout history, controversial nominees have consistently faced lengthy delays during this process, but the amount of time non-controversial nominees have waited to be confirmed has grown drastically. This is probably due to the advent of Judiciary

⁷⁹ Dougherty was Stone's predecessor as Attorney General.

⁸⁰ *Ibid.*, 147.

⁸¹ Harris, *Advice and Consent*, 306-307.

Committee hearings, and later, in the late 1970s, the introduction of Judiciary Committee investigative staff.⁸² For instance, in the first part of the twentieth century, Justice Oliver Wendell Holmes was approved unanimously only two days after being nominated by President Roosevelt, while the confirmation of Charles Evans Hughes with “nary a dissent,” also occurred only a few days after being sent to the Senate. Similarly, the nomination of former President William Howard Taft to the job he treasured most, that of Chief Justice, sailed through the Senate with only four no votes on the same day the nomination was transmitted from President Harding, and in a speed record still standing, Justice George Sutherland, formerly a senator from Utah, received Senate approval not only within hours after Harding nominated him, but only one day after Harding received the retirement letter of Justice John Clarke.⁸³ By contrast, President Reagan’s nomination of Sandra Day O’Connor, and President Clinton’s nominations of Ruth Bader Ginsberg and Stephen G. Breyer, all relatively non-controversial, took thirty-two, fifty, and seventy-two days respectively to be confirmed by the Senate, which in all three cases was controlled by the President’s party.⁸⁴ As will be demonstrated by the case studies in Chapters Four through Seven, the longer a nomination is dragged out, the better the chances of it being defeated. This finding is supported by a statistical study done by Charles R. Shipan and Megan L. Shannon who found that the longer the duration of the nomination process, the better the chance of the Senate rejecting the nominee.⁸⁵ Hence, this procedural change is not as minor as it might otherwise seem.

One part of the Senate process of advice and consent has remained very consistent throughout history, if only because it has been inconsistent from day one. That piece of the

⁸² Epstein and Segal, *Advice and Consent*, 88.

⁸³ Abraham, *Justices, Presidents, and Senators*, 119, 127, & 140-141.

⁸⁴ U.S. Senate. Supreme Court Nominations, Available:

<http://senate.gov/pagelayout/reference/nominations/Nominations.htm>. Accessed 12/16/05; O’Conner was confirmed 99-0, Ginsberg by a 96-3 count, and Breyer’s margin of confirmation was 87-8.

⁸⁵ Charles R. Shipan and Megan L. Shannon, “Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations,” *American Journal of Political Science* 47, no. 4 (2003):656-657.

process is the important, if often overlooked idea of the Senate providing the President with advice BEFORE he nominates someone to a Supreme Court vacancy. President Washington maintained that the right to nominate someone to the Supreme Court lies solely with the President, and every subsequent President has echoed this contention. However, this has not prevented many of them from consulting with senators before choosing whom to nominate. Washington himself consulted not only members of the Senate, but also members of the House of Representatives, and other prominent citizens.⁸⁶ Before nominating Thomas Todd of Kentucky to a newly created seat on the Court, President Jefferson officially requested that each member of Congress suggest to him two individuals for the vacancy. While Jefferson ultimately did not appoint the candidate requested by Congress, Representative George E. Campbell, because of doubts about the constitutionality of doing so, Todd had been listed as either a first or second choice of each of the ten members of Congress from the new judicial circuit.⁸⁷

Presidents Theodore Roosevelt and Woodrow Wilson practiced a different method of seeking advice from the Senate. Before nominating Oliver Wendell Holmes, Roosevelt only consulted with Holmes' home state senator, Henry Cabot Lodge, through a lengthy personal letter of inquiry about Holmes' views on the key issues of the day.⁸⁸ Similarly, out of concern of early disclosure, Wilson consulted with only one senator, the influential Wisconsin progressive, Robert M. La Follette, before he sent the highly controversial nomination of Louis D. Brandeis to the Senate in 1916. Wilson knew that the support of La Follette and his small band of supporters in the Senate was imperative for the confirmation of Brandeis, and only after

⁸⁶ Joseph Harris, "The Courtesy of the Senate," *Political Science Quarterly* (1958):38 & 59.

⁸⁷ Jefferson doubted the Constitutionality of appointing a sitting member of Congress to an office created during his incumbency. Garhardt, *Federal Appointments Process*, 75-76)

⁸⁸ Murphy, *Courts, Judges, and Politics*, 81-82.; Abraham, *Justices, Presidents, and Senators*, 66-67.

receiving La Follette's enthusiastic support did the President forward Brandeis's name to the Senate.⁸⁹

Only once has the Senate basically demanded that the President make a nomination. In 1870 large majorities of both houses of Congress signed petitions supporting the nomination of Edwin M. Stanton to the vacancy left by retiring Justice Robert Grier. President Grant complied in an effort to smooth passage for a controversial and already pending nomination to the Court, and the Senate confirmed Stanton one day later. Sadly, he never got the chance to serve on the Court, as he succumbed to a coronary thrombosis only four days later.⁹⁰ The next closest the Senate has come to demanding that a specific person be named to the Court came after the death of Justice Holmes in 1932. Chastened by the defeat of Judge Parker in 1930, weakened because of the Depression, and looking to avoid a fight due to his party's tenuous one-seat margin in the Senate, President Hoover eventually acquiesced to the Senate in selecting Benjamin Cardozo to fill the Holmes' vacancy. Hoover had been told in no uncertain terms by Judiciary Chairman Norris that the members of his committee, mostly progressives, preferred the selection of Cardozo to that of any non-controversial western Republican. Further pressure from business leaders, academics, and Senator William Borah (R-ID), a westerner and the powerful Chairman of the Senate Foreign Relations Committee, whose support he needed on other matters, convinced Hoover to nominate Cardozo.⁹¹

Of course, some Presidents decide on a nominee without consulting senators at all. Doing so can often put nominations in peril, and lead to their failure at the hands of a vengeful Senate. This was the case with all but one of President Tyler's nominees, and with President Cleveland's

⁸⁹ Abraham, *Justices, Presidents, and Senators*, 119, & 126.

⁹⁰ *Ibid.*, 96.

⁹¹ Garhardt, *Federal Appointments Process*, 173-174.; Abraham, *Justices, Presidents, and Senators*, 153-154.

nominations of William Hornblower and Wheeler Peckham.⁹² Perhaps the best example of how meaningful consultation with the Senate can smooth the path for a nomination, President Reagan summoned Judiciary Chairman Biden to the White House in 1987, and showed him a list of prospective nominees. One name on the list, Robert Bork, caused Biden to tell the President, ““ If you nominate him, you’ll have trouble on your hands.”” Biden left the White House, and flew to Houston for a campaign appearance. Upon touching down he was mobbed by reporters asking him what he thought about the nomination of Judge Bork.⁹³ Evidently, President Reagan’s decision was already made before meeting with Biden, and he ignored the Chairman’s advice. The President subsequently watched not only Bork’s nomination go down in flames, but also that of his second choice, Douglas Ginsberg. Perhaps chastised, Reagan again consulted Biden, showing him a list, which included among others, Ninth Circuit Court of Appeals Judge Anthony Kennedy. Without committing himself, Biden told the President that he believed the Senate would confirm Kennedy, and it did.⁹⁴

⁹² Simon, *Advice and Consent*, 183.; Carl A. Pierce, “A Vacancy on the Supreme Court: The Politics of Judicial Appointment: The Politics of Judicial Appointment 1893-94,” *Tennessee Law Review* 39, 555, (1972). In LexisNexis, <http://hdl.library.upenn.edu/1017/6973> (accessed through the University of Pennsylvania Library homepage March 25, 2006).

⁹³ In their books, Senator Paul Simon and former Judiciary Committee Chief Council Mark Gittenstein disagree over how this warning was expressed to the President. In contrast to the Simon account, Gittenstein writes of a meeting in which Biden conveyed it to Attorney General Edwin Meese and Chief of Staff Howard Baker. The meeting also included Senate Majority Leader Robert Byrd. However, the two sources agree on the basic substance of the message sent from Biden to President Reagan. Gittenstein, *Matters of Principle*, 36.

⁹⁴ Simon, *Advice and Consent*, 68. Again Gittenstein’s account of the consultation regarding Kennedy differs from that of Senator Simon. Gittenstein instead describes a second meeting between Chief of Staff Howard Baker and Chairman Biden, during which Biden told Baker, that of the candidates presented to him, Kennedy and Second Circuit Court of Appeals Judge Ralph Winter would be the least objectionable. Gittenstein, *Matters of Principle*, 313 & 317.

Chapter 4- The First Era of Advice and Consent: The Most Qualified Nominee Rejected in the History of Advice and Consent

The history of rejected Supreme Court nominees is truly best considered as a tale of four separate eras of advice and consent. During each of these eras, the Senate has applied different standards for providing advice and consent, and the number of rejected nominees has reflected the different attitude of the Senate during each time period. Some might persuasively argue that a new era began either with the 1987 rejection of Robert Bork, or with the narrow confirmation of now Justice Clarence Thomas in 1991. However, the factors that played a role in the difficult confirmation process for both of these nominees were not necessarily part of a new phenomena, and it is very difficult to judge whether or not a new era has begun, simply because there have only been five nominations since the Thomas hearings, three of which have come in the last eight months. Only time will truly tell if the period after 1987 or 1991 ought to be designated as the Fifth Era of Advice and Consent. The first era ran from 1789 until the Presidency of John Tyler, and the rejection of John C. Spencer by the Senate in 1844. However, its most important and interesting case comes from 1795.

On December 15th, 1795, the Senate voted 14-10 to reject the nomination of John Rutledge to be the second Chief Justice of the Supreme Court. It would not be an overstatement

to say that Rutledge is perhaps the most qualified man ever to be rejected under the Advice and Consent Clause. Rutledge was a pivotal member of the Constitutional Convention, and in fact he was the Chairman of the five man drafting committee/Committee on Detail, which his biographer Richard Barry, gives credit for most of the final content of the Constitution.⁹⁵ Bolstering his qualifications further, Rutledge was almost solely responsible for the Judiciary Clause of the Constitution, having changed James Wilson's original draft to make the clause more oblique, and the judiciary more powerful.⁹⁶ After the Convention, Rutledge was one of the finalists to be the first Chief Justice of the United States, but like his convention colleague Wilson, he was bypassed in favor of Governor John Jay of New York, and instead appointed associate justice. He would resign that position in 1791 to become chief justice of the South Carolina Supreme Court.⁹⁷ How could the Senate reject someone so eminently qualified, and previously confirmed as an associate justice? It all stems from what was either the biggest political blunder of Rutledge's long and distinguished career, or from a temporary loss of his mental faculties due in part to the death of his wife in 1792. The sources greatly differ on which

⁹⁵ James Haw, *John and Edward Rutledge of South Carolina* (Athens: The University of Georgia Press, 1997), 210.

⁹⁶ Richard Barry, *Mr. Rutledge of South Carolina* (New York: J.J. Little & Ives Company, 1942), 338-350.; The American National Biography makes the following claim, "The only full-scale biography, Richard Barry, *Mr. Rutledge of South Carolina* (1942), suffers from the author's fascination with dictators and is totally unreliable." *American National Biography*, s.v. "John Rutledge," <http://www.anb.org> (accessed March 20, 2006). However, a contemporary review states that while Barry's claims are extreme, they are matters of interpretation about which historians have differed and will continue to differ. While the reviewer criticizes the completeness, uniformity and exactness of the bibliography, he believes the extensive discussion of source material at the back of the book to be somewhat mitigating. W. Neil Franklin, review of *Mr. Rutledge of South Carolina*, by Richard Barry, *The Journal of Southern History* 9, no. 2 (1943): 263-264. Similarly another review notes, "The evidence in the appendix supporting these and other novel deductions, though often thin, is neither manufactured nor irrelevant." This review acknowledges that Barry cites authority only for what he considers disputable points, and that his citations give no page references. It also mentions that the book is encrusted in minor errors, and that Barry inserts imaginary conversations, while frankly admitting that other details rest on conjecture. However the review concludes that none of this invalidates the major contentions made by Barry. St. Julien Ravenel Childs, review of *Mr. Rutledge of South Carolina*, by Richard Barry, *The American Historical Review* 48, no. 4. (1943): 801-802. Finally, Senate Historian Richard Baker found Barry's book worthy enough to use in preparing a one-minute historical essay on Rutledge's nomination for Senate Democrats (Richard Baker, "Chief Justice Nomination Rejected," http://www.senate.gov/artandhistory/history/minute/A_Chief_Justice_Rejected.htm (accessed March 20, 2006).

⁹⁷ *Ibid.*, 351-353.

of the two caused the Senate to reject Rutledge's nomination, but they were certainly very much intertwined.

Rutledge sent President Washington a letter offering his services upon hearing of the resignation of Chief Justice Jay, and Washington actually sent word back with the slave who delivered the letter that he had made Rutledge chief justice by recess appointment.⁹⁸ Rutledge's commission was dated July 1st, 1795, and the next day the terms of the treaty that Jay had negotiated with the British became public and set off a firestorm of protest. The treaty was so unpopular in Charlestown that Jay was hung in effigy. At a protest meeting on July 16th - at which point Rutledge may have, but did not definitely, know of his appointment as chief justice- Rutledge gave a fiery oration blasting the treaty.⁹⁹ Barry quotes someone from the crowd that day as saying it was, "the first time in years he (Rutledge) had let himself go." Rutledge spoke for more than an hour that night at St. Michael's Church, and took the treaty apart line-by-line. The speech became a bible for the campaign being waged against the treaty by among others, no less than Thomas Jefferson. Most sources seem to agree that Rutledge did not expect his words to reach any sort of national audience, but in this he was sorely mistaken. It received widespread coverage, and caused the Federalist press in the north to advocate the rejection of Rutledge as Chief Justice.

⁹⁸ Ibid., 353.

⁹⁹ Ibid., 355; Simon, *Advice and Consent*, 165.; The sources are truly divided over whether Rutledge did or did not know of his appointment as chief justice at the time of the speech. Senator Simon believes that Rutledge almost certainly had received his official commission as Chief Justice, because the speech occurred the same day as news of his nomination made it into the *South Carolina State-Gazette*. By contrast, John Anthony Maltese contradicts Simon, writing that the meeting at Saint Michael's Church took place, "before newspapers in Charlestown had announced his appointment, probably before Rutledge himself knew of the appointment, and certainly before Rutledge had formally received his commission." Maltese contends that news of Rutledge's appointment did not make it into Charlestown newspapers until July twentieth, and that he did not receive his official commission until August 12th, after he had arrived in Philadelphia to assume the chief justiceship. Maltese, *Selling of Supreme Court Nominees*, 27, 164. James Haw provides a useful footnote that lists evidence supporting both sides of the argument, but he concludes that Rutledge apparently did not know of his appointment at the time he gave the speech. Haw, *John and Edward Rutledge*, 248 & 339-340.

News of Rutledge's appointment was known in the Capitol City of Philadelphia before word of his speech arrived. Initially, the reaction was positive, focusing on Rutledge's patriotism, but there were detailed rumors circulating about Rutledge's mental health. The publication of the anti-Jay Treaty speech aroused shock and outrage among Federalists. At the very least, most, like Vice-President John Adams, believed that the speech did not reflect the sort of restraint that one might hope for from a judge.¹⁰⁰ Apparently the odd timing of the fire and brimstone speech from the newly appointed Chief Justice raised questions about whether or not Rutledge had lost his mental faculties. A July 29th letter from Secretary of State Randolph to President Washington mentioned that Secretary of the Treasury Wolcott and Secretary of War Pickering "conceived it to be proof of insanity." A letter from Vice President Adams to his wife Abigail also questioned whether Rutledge had lost his mind.¹⁰¹ Apparently, Aaron Burr of New York and Jefferson, the leading opponents to the Jay Treaty, did everything they could to secure Rutledge's confirmation when it came before the Senate in December of 1795. Indeed, in spite of his opposition to the Jay Treaty, Rutledge maintained some level of support from President Washington who refused to withdraw his nomination. He also had the support of most of the southern senators, who did not want to see New York dominate the Supreme Court. On December 10th, 1795, the Senate postponed consideration of the Rutledge nomination for five days.¹⁰²

According to Barry, it was during those five days that Secretary of the Treasury Alexander Hamilton lobbied members of the Senate, using three pieces of evidence to allege Rutledge's insanity. The first was a letter from a bystander in Charlestown who had heard the speech denouncing the Treaty and said that "Rutledge talked like a crazy man." Barry provides

¹⁰⁰ Barry, *Mr. Rutledge*, 355-356; Simon, *Advice and Consent*, 165-166.; Haw, *John and Edward Rutledge*, 250 & 252.

¹⁰¹ Simon, *Advice and Consent*, 165-167.

¹⁰² Simon, *Advice and Consent*, 167; Barry, *Mr. Rutledge*, 357.; Haw, *John and Edward Rutledge*, 252.

compelling evidence that this was in fact just a byproduct of Rutledge's rapid speech, which may have made him hard to understand. The second piece of evidence was a newspaper clipping from Norfolk, where Rutledge had recently held Court as part of his circuit riding duties, saying that the Court had adjourned for the day because Rutledge was unable to attend due to illness. The final piece of evidence was a clipping from a Rhode Island newspaper with an anonymous letter from an alleged contributor in Charlestown, which used much of the same language as the first letter. It was later learned that Hamilton himself was part owner of this newspaper.¹⁰³

No senator talked to Rutledge before the vote took place on December 15th, nor were any medical records sought. Ironically, Oliver Ellsworth, a fellow member of the drafting committee at the Constitutional Convention, now a senator from Connecticut, led the successful opposition to Rutledge's nomination.¹⁰⁴ Adding a bit of irony, it was Ellsworth who on July 21st, 1787 had fretted during debate over where to lodge the power to appoint Supreme Court justices that, "He (the President) will be more open to caresses and intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment."¹⁰⁵ His own successful fight against the Rutledge nomination proved that Ellsworth had nothing about which to worry. Adding further irony, it was Rutledge himself who had opposed granting the President alone the power to nominate judges, as he was

¹⁰³ Barry, *Mr. Rutledge*, 357.; The veracity of this account of Hamilton's role in lobbying against the Rutledge nomination is somewhat called into question by a statement that Hamilton made to Senator Rufus King of New York. Hamilton told King that he would be inclined to vote for Rutledge if his Jay Treaty speech was the only objection to him, "but if it be really true- that he is sottish or that his mind is otherwise deranged, or that he has exposed himself by improper conduct in pecuniary transactions, the byass of my judgment would be to negative." Hamilton advised King to carefully inquire into these charges. Haw, *John and Edward Rutledge*, 253. It is certainly conceivable that Hamilton was deviously attempting to use King to start rumors about Rutledge within the Senate, but this statement might also show Hamilton to be much more objective about the nomination than Barry portrays him to be.

¹⁰⁴ Ginsberg, "Confirming Supreme Court Justices."

¹⁰⁵ Madison, *Notes of Debates*, 345.

“by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy.”¹⁰⁶

Three questions remain: was Rutledge insane, was his nomination rejected because of insanity or opposition to the Jay Treaty, and what were the ramifications of the Senate’s rejection? The first question is the hardest to answer, and also the least important. Rutledge was certainly not of the soundest mind at the time of his rejection, because twelve days after the Senate rejected him, he attempted to commit suicide.¹⁰⁷ Either way the answer to this question is not very important simply because to many Federalist opponents of the nomination, Rutledge’s supposed derangement explained the Jay Treaty speech, and the speech in turn proved the derangement.¹⁰⁸ Discerning the reasoning behind the Senate’s action might also seem somewhat difficult, but not for Thomas Jefferson. After the Senate vote, he wrote to William B Giles that, “the rejection of Mr. Rutledge by the Senate is a bold thing, because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but Tories hereafter into any Department of Government.”¹⁰⁹ This assessment seems quite accurate, because all fourteen senators who voted against the Rutledge nomination had also supported ratification of the Jay Treaty. Similarly, of the ten senators who supported the nomination, only Rutledge’s home state senator, James Read, had voted for the ratification of the treaty. Read’s reasons for crossing-over were practical, as he believed that the rejection of Rutledge would severely damage the Federalist Party in South Carolina. His post-mortem on the nomination associated its failure with the content of the Jay Treaty speech, but also discontent among Federalists because of the forum in which it was delivered.¹¹⁰ Joseph Harris, one of the

¹⁰⁶ Ibid., 67.

¹⁰⁷ Simon, *Advice and Consent*, 167.; Of course one might argue that Rutledge was simply depressed about having his nomination rejected and his sanity called into question.

¹⁰⁸ Haw, *John and Edward Rutledge*, 256.

¹⁰⁹ Harris, *Advice and Consent*, 43.

¹¹⁰ Haw, *John and Edward Rutledge*, 255-256.

two pre-eminent scholars in this area of history, also believes the third question to be easy to answer. He wrote that, “the Senate thus established a precedent of inquiring into the political views and ideas of persons nominated for public office and of rejecting a nominee whose views do not correspond to those of a majority of the Senate.”¹¹¹ This interpretation has been proven correct many times over.

It was true of the second Court nominee to be rejected, Alexander Wolcott in 1811. Wolcott was rejected in part because Federalist senators opposed his vigorous enforcement of the embargo and nonintercourse acts when he was U.S. Collector of Customs in Connecticut.¹¹² The case of the third nominee who failed to make it onto the Court also represents the beginning of a common occurrence in the history of the advice and consent process. John Quincy Adams was a lame-duck President when he forwarded the name of former Kentucky Senator John J. Crittenden to the Senate in late December 1828. Andrew Jackson’s supporters in the body were not about to let a Clay Whig onto the Supreme Court, and without even discussing his qualifications they postponed the nomination in February 1829, effectively killing it.¹¹³ This pattern would be repeated many times between 1828 and 1893, as lame duck Presidents found their nominations postponed by the Senate, which, for political reasons, was inclined to save the empty Supreme Court seat for the incoming President.

The final nominee during the First Era of Advice and Consent who failed to make it onto the Supreme Court was perhaps the most worthy of postponement. Future Chief Justice Roger B. Taney had drawn the anger of the Senate by in essence performing Robert Bork’s role in the Watergate Scandal 140 years before Bork would have the chance to do so.¹¹⁴ The major

¹¹¹ Ibid., 43.

¹¹² Abraham, *Justices, Presidents, and Senators*, 30 & 66.

¹¹³ Ibid., 70.

¹¹⁴ Biden, “Advice and Consent.”; During the infamous “Saturday Night Massacre,” Bork was the Solicitor General who fired Special Prosecutor Archibald Cox on the orders of President Nixon after both the Attorney General, and Deputy Attorney General had refused and resigned. Simon, *Advice and Consent*, 59-60.

controversy of the time regarded the Bank of the United States, and President Jackson wanted all of the government's money withdrawn from the bank. By law, only Treasury Secretary Louis McLane was authorized to withdraw the funds. Jackson commanded McLane to act, McLane understanding the law, refused, so Jackson fired him. Next up came William Duane, who agreed to withdraw the funds as a condition of his appointment. But once in office, his conscience got the better of him. He told Jackson, "Congress confers a discretionary power and requires reasons if I exercise it." According to Senator Biden who would tell this story before Bork's confirmation hearing, Duane was right, because the law clearly stated that Duane had to report any decision regarding the deposit, and Congress was in recess. Jackson then fired Duane, and finally found his man in Attorney General Roger B. Taney. Without even being confirmed as Treasury Secretary, Taney ordered the funds removed from the bank. The furious Senate refused to confirm Taney as Treasury Secretary, and many of the giants of the body successfully worked to postpone his 1835 nomination to the Supreme Court out of concern over his lack of detachment and statesmanship as displayed during the Bank controversy.¹¹⁵

Taney would be the final nominee not allowed onto the Court by the Senate during the First Era of Advice and Consent. However, the second era would prove much less kind to nominees. It began with the Presidency of John Tyler, who would set a record for futility when it came to getting his nominees onto the Court. However, Presidents Fillmore, Grant and Cleveland would join him in seeing multiple Supreme Court nominees fail to make into on the bench at the hands of the cantankerous Senate between 1844-1894. In all, as shown in Table 1, a whopping seventeen of the thirty men and women whose nominations to the Court have been rejected,

¹¹⁵ Biden, *Advice and Consent*.

postponed, not acted upon, or otherwise scuttled by the Senate came from this time period.¹¹⁶

One, Edward King, would see his nomination go down twice in the course of two years.

Chapter 5- The Second Era of Advice and Consent: Would Samuel Have Satisfied the Senate?

John Tyler was an accidental President, the first in the nation's history, assuming power after the death of President William Henry Harrison only thirty-one days into his Presidency. Tyler was even weaker than he might have been, because he was a Democrat, who had crossed party lines to be the running mate of the Whig Harrison. After ascending to the Presidency, Tyler angered the Whigs by opposing their key legislative proposals. Essentially, both parties disliked Tyler, and he had no powerbase whatsoever.¹¹⁷ His ignominious record of five out of six Supreme Court nominees rejected or otherwise kept off the bench shows this. Justices Smith Thompson and Henry Baldwin died within four months of each other relatively late in Tyler's Presidency. The Whigs in the Senate were convinced that their party would be victorious in the 1844 Presidential Election, and thus resolved to make it hard for Tyler to appoint anyone to the two vacant seats on the Court.¹¹⁸ Tyler's first nominee, John C. Spencer, the able Treasury Secretary, was eminently qualified, but he fell into the same political problem that plagued his benefactor. Spencer actually was a Whig, but he infuriated the party by accepting a cabinet nomination from the Democrat Tyler.¹¹⁹ Spencer was also an avowed enemy of the powerful Whig Senator Henry Clay, and he was rejected by a 26-21 vote.

¹¹⁶ Table 1 is located at the back of this paper.

¹¹⁷ Simon, *Advice and Consent*, 182.; Garhardt, *Federal Appointments Process*, 56.

¹¹⁸ Abraham, *Justices, Presidents, and Senators*, 79-80.

¹¹⁹ Simon, *Advice and Consent*, 182.; Garhardt, *Federal Appointments Process*, 56.

Tyler's next two nominees, Chancellor of the Bar Rueben H. Walworth of New York, whom the Senate Whigs disliked and the New York state political machine opposed, and distinguished Philadelphia lawyer and legal scholar, Judge Edward King, saw their nominations postponed in an effort by the Whigs to save the vacancies for what they were sure would be an incoming Whig President. An angry and frustrated Tyler re-nominated King in December 1844, but the Senate refused to act, and Tyler finally withdrew both nominations in January of 1845. However, he was not about to give up his quest to replace Justices Thompson and Baldwin, especially after a Jacksonian Democrat, James K. Polk, defeated the Whigs in the 1844 Presidential Election. He would finally succeed in nominating Samuel Nelson, who was confirmed, mercifully filling Thompson's seat on the Supreme Court after a fourteen-month delay. Tyler still had more one vacant seat to fill, and he nominated Philadelphia lawyer John Meredith Read. It was mid-February, however, the Senate was weary and simply adjourned without acting on Read's nomination. This gave President Tyler the dubious record for most failed Supreme Court nominations, but he should have been at least somewhat consoled by the Senate's treatment of the next two Presidents who had the chance to appoint justices to the bench.¹²⁰

James K. Polk succeeded Tyler, and his first attempt at filling the still vacant Baldwin seat, was the aforementioned failed nomination of George Woodward. Woodward was rejected, not only because of senatorial courtesy, but also because he had acquired a strong reputation as an extreme American nativist, which helped compel five Democratic senators to join with the Whigs to reject Woodward. Polk would succeed in finally filling the Baldwin seat with his appointment of Robert Grier of Pennsylvania, but Grier would only ascend to the bench a

¹²⁰ Abraham, *Justices, Presidents, and Senators*, 79-80.; Tyler's problems with the Senate were not limited to the Supreme Court nominations. Before his Presidency, the Senate had only rejected one cabinet nomination, but it rejected four of Tyler's cabinet nominees as well. Harris, *Advice and Consent*, 66-68.

whopping twenty-eight months after Justice Baldwin had died! Polk's record of seeing two out of his three Supreme Court nominees make it onto the bench was not only better than Tyler's, but would prove to be better than that of President Millard Fillmore, the next President faced with Supreme Court vacancies.¹²¹

Fillmore was responsible for the excellent appointment of Justice Benjamin Curtis, but he also made three unsuccessful attempts to fill another vacancy on the Court at the end of his term. In a situation similar to that of Crittenden's rejection in 1828, Fillmore's three attempts to fill the seat of Justice John McKinley came after Democrat Franklin Pierce had already been elected to succeed him in 1852. Of note, the Democratic senators felt so strongly about preserving the vacancy for Pierce to fill that they postponed consideration of Fillmore's nomination of Whig Senator George E. Badger by the razor thin margin of one-vote. This was as close to sacrilege as the Senate could come, as it almost never rejects the nomination of one of its members to an executive or judicial post.¹²² All in all, to say that Presidents Tyler, Polk and Fillmore had a rough time with the Senate would be an understatement. They saw a whopping nine of thirteen nominees to the Supreme Court shot down by a less than accommodating Senate, and yet none of them was the most roughly treated President during the Second Era of Advice and Consent.

That distinction goes to President Andrew Johnson, a Democrat, in a very similar position to that of John Tyler. He ascended to the Presidency upon the assassination of Republican President Lincoln, and his relations with the Senate while President would make the relationship between Bill Clinton and Newt Gingrich seem almost loving. Shortly after he became President, Justice John Catron died. Johnson waited almost a year, but then chose a well-qualified nominee in his Republican Attorney General Henry Stanbery. However, as Henry Abraham so aptly puts it, "it is doubtful that the Senate would have approved God himself had he

¹²¹ Abraham, *Justices, Presidents, and Senators*, 80-81.

¹²² *Ibid.*, 82-83.

been nominated by Andrew Johnson.” The radical Republicans who controlled the Senate reviled Johnson, and decided that failing to act on Stanbery’s nomination was not close to sufficient mistreatment of him. They also passed a bill that simply abolished the vacant seat of the deceased Justice Catron, as well as the next one that occurred, thereby reducing the Court’s membership from ten to nine, and eventually eight, and depriving Johnson of another shot to fill the seat. Thus, when Justice James M. Wayne died two years later, the vacancy was abolished by statute.¹²³ As Senator Paul Simon points out, Johnson stunningly signed the bill abolishing the two seats into law.¹²⁴

Johnson’s successor, Ulysses S. Grant actually saw a fair number of his appointments to the Supreme Court make it onto the bench, but he still had nothing close to smooth sailing. His first nomination, that of his Attorney General Ebenezer Hoar went down to defeat, more due to Senate pettiness than anything else. Hoar was outstandingly qualified, and his nomination was commended on all sides by the press and the public. *Harper’s Weekly* called Hoar’s nomination ““one of the best that could have been made.””¹²⁵ However, Hoar had committed the unpardonable sin of daring to ignore senators’ recommendations for lower court nominees, instead choosing to recommend to the President the most highly qualified possible candidates. Ignoring the tradition of senatorial courtesy, although it is nowhere found in the Constitution, does not typically endear oneself to the Senate. Hoar also ran into trouble with the Senate because he had opposed the impeachment of their nemesis, President Johnson, and because many senators did not want to see another New Englander on the Court while it was devoid of southern representation.¹²⁶

¹²³ Ibid., 93.

¹²⁴ Simon, *Advice and Consent*, 201-202.

¹²⁵ Harris, *Advice and Consent*, 74-75.

¹²⁶ Ibid; Simon, *Advice and Consent*, 202-203.; Abraham, *Justices, Presidents, and Senators*, 96.

Although Grant had much better luck with his next three nominations, he had maybe the second toughest time in history replacing a Supreme Court justice after Chief Justice Salmon Chase died in 1873. Grant offered the nomination to no fewer than seven men before the Senate finally confirmed Morrison Waite in 1874. The Senate would play a role, refusing two nominees for the seat. The first, Grant's Attorney General George H. Williams, may be one of the most legitimate Senate rejections in the history of the advice and consent process. Williams was by all accounts a mediocre lawyer, and there were also accusations of corruption, probably founded, surrounding his nomination. The nomination was immediately condemned from all sides- the bar, the press, and the public- for lacking in stature. However, Grant persisted in pushing it, and at that point accusations about Williams' character surfaced. The Senate Judiciary Committee received these accusations and tried to handle them delicately.

The chairman of the committee, George Edmunds of Vermont presented the charges to Williams in a private meeting, in an effort to give him a chance to respond. His response was indignant, as he stated that he “declined to be put on trial before the Committee or the Senate; that he did not propose to submit himself to any such jurisdiction in any form; and that of course, the Senate had the right to make any inquiries it saw fit... but he must decline to be party in any form.”¹²⁷ The ensuing investigation would uncover that in more than one instance Attorney General Williams used the funds of the United States for his private benefit. After he wisely asked the President to withdraw his nomination, Williams sent a bitter letter to the Judiciary Committee almost laughably accusing it of trying and practically condemning him without the opportunity to confront and cross-examine witnesses, or to otherwise refute the charges. Mr. Williams evidently had a short memory, conveniently forgetting his meeting with Chairman Edmunds. In an article in the Yale Law Journal, Williams wrote that opposition to his

¹²⁷ Simon, *Advice and Consent*, 204-206.

nomination from Republican senators surprised him, especially considering that the Senate had twice confirmed him to different positions without referring either nomination to committee. He then wrote that while he would not get into it, the reasons the Republican senators opposed him were not those stated in the newspapers. One can only assume that this is a veiled reference to the charges of corruption lodged against him, which the Senate Judiciary Committee must have handled very quietly indeed, if they did not make it into the news.¹²⁸

An angry Grant would next send up the nomination of seventy-four year old Caleb Cushing. Cushing was a lawyer of superb intellect, but the Senate distrusted him because he had been a political chameleon, who had been a part of no less than five political factions and parties.¹²⁹ Additionally, the contents of a letter that Cushing had written to Jefferson Davis on the eve of the Civil War became public, causing an uproar that prompted Cushing to withdraw his name from consideration. All things being equal, it was a rather innocuous letter, as Cushing asked Davis to give a job to one of his young clerks who felt an obligation to work for the Confederacy because of his home state roots. However, the wounds of the Civil War were still fresh, and Cushing understood that his nomination was doomed in light of the letter.¹³⁰

The final two nominations of note from the Second Era of Advice and Consent were those previously discussed cases of William Hornblower and Wheeler Peckham. What makes them so important is that they are frequently overlooked, and written off as simply cases of senatorial courtesy toppling two nominations. This is certainly partially correct, as President Cleveland was engaged in a nasty blood feud with Senator David B. Hill of New York, who did

¹²⁸ George H Williams, "Reminiscences of the United States Supreme Court," *Yale Law Journal* 8, no. 7 (1899):299.; There is some confusion on the happenings surrounding the nominations of Williams and Cushing. In his *Yale Law Journal* article, Williams placed his nomination after that of Cushing, which contradicts all other sources. 298-299. Additionally, Senator Simon writes that the Senate Judiciary Committee decided to reject the nomination of Williams, but Abraham contradicts that, claiming that Grant pushed forward until the committee approved the nomination, which then received no floor action. Simon, *Advice and Consent*, 207.; Abraham, *Justices Presidents, and Senators*, 98.

¹²⁹ Abraham, *Justices, Presidents, and Senators*, 98.

¹³⁰ Simon, *Advice and Consent*, 208-209.

invoke senatorial courtesy against both nominations. However, these two cases are also prime examples of how nominations fall prey to larger dynamics that really have nothing to do with the fitness of the nominees. In the case of 1894, President Cleveland had effectively split his party by demanding a full and unconditional repeal of the Sherman Silver Purchase Act. He refused to compromise with southern and western Democrats whose constituents regarded free silver coinage as the only hope for economic recovery. Additionally, Cleveland did not fully support the Democratic machine in his home state of New York, and found ward politics, conciliation, and compromise, all necessary to hold the party together, distasteful. This would play a larger role in the defeat of Peckham, because he himself was viewed as a Mugwump, or someone who reneged on party loyalties to follow his individual preferences. Such a person was anathema to people in both parties.¹³¹

Senator Hill set out not thinking that he could actually defeat the nomination of Hornblower, but instead hoping to postpone it in order to help his friend, Issac Maynard, win election to the New York Court of Appeals. Maynard had allegedly tampered with election results in 1891 in order to ensure a Democratic victory, and a Bar Association committee, which included William Hornblower, condemned Maynard, and recommended proceedings to remove him from office. After successfully stalling the nomination for several months by appealing to senatorial courtesy, Hill, decided that he needed to rebuke President Cleveland for warring against the Democratic organization, and that the nomination of William Hornblower was just the vehicle to do so. Hill decided to both invoke senatorial courtesy against the nominee, and also to call his qualifications into question. After the Senate Judiciary Committee, of which Hill was a member, received testimonials and letters from many leading lawyers, some of whom claimed Hornblower to be highly qualified, others who called his qualifications into question, it

¹³¹ Pierce, "Vacancy on the Supreme Court."; The reason there are not more specific citations for this article is that I was unable to find a version of it with the page numbers included.

voted six to five to reject the nomination. Two Republicans and four Democrats voted against the nomination. Three Republicans, and only two Democrats voted in favor of Hornblower. Three of the four Democrats who voted against Hornblower's nomination in committee vigorously opposed the President's handling of the currency question, and the fourth was of course Senator Hill.

Hill led the opposition on the Senate floor, and argued that if legislators did not defend their right to be consulted about appointments from their respective states, the executive would soon possess unbridled power in matters of federal offices. However, he also discussed the behavior of Grover Cleveland since he had taken office, and how he had ignored the party organization, and indeed had only nominated someone whose choice was obnoxious to the New York Democratic organization. Senator William Villas conceded that Cleveland should have consulted the New York senators, but claimed that they had no more right to consultation than any of the other fifty-four senators because the case involved a Supreme Court nominee. Several other senators sparred over Hornblower's qualifications, and after five hours of debate, the Senate voted thirty to twenty-four to reject the nomination. Several senators, including Republican George F. Hoar of Massachusetts, who had supported the nomination, steadfastly denied that senatorial courtesy had anything to do with the rejection. The vote against Hornblower closely paralleled the vote on unconditional repeal of the Sherman Silver Purchase Act, and provided Democratic senators angry with the President over his unwillingness to compromise a chance to express their disenchantment.¹³²

Instead of trying to make peace, President Cleveland vengefully proceeded to nominate Wheeler Peckham, another New York lawyer, who while a Democrat, was an avowed enemy of Senator Hill, whose candidacy he had opposed in the 1888 Gubernatorial Election. Many

¹³² Ibid.

senators were angry at the President's purely spiteful nomination, and Senator Hill again invoked senatorial courtesy. Questions were also raised about Peckham's judicial temperament, as he had allegedly accused the Senate Judiciary Committee of taking petty revenge when it reported Hornblower's nomination unfavorably. Peckham denied these charges, and testimony from supporters as to his legal fitness impressed wavering members of the committee. However, his nomination got caught in a vice, as Democratic organizations opposed it because of his supposed mugwumpery, and Republicans became alarmed upon hearing that he had apparently stated that protective tariff legislation would be unconstitutional. Although Peckham tried to deny the latter charge through an intermediary to Senator Hoar, Hoar felt the need to absent himself on the day the committee voted, leaving it deadlocked five to five on the nomination.

President Cleveland then essentially tried to bribe senators of both parties with patronage appointments of their friends and allies, but to no avail. In fact, his blatant attempts to bribe senators caused a backlash, and in spite of arguments that only the fitness of Peckham was relevant, senators could not separate him from his patron. They voted forty-two to thirty-two to reject Peckham's nomination. Although senatorial courtesy was invoked against both Hornblower and Peckham, their rejections clearly involved more than just the Senate honoring the wishes of one of its own.¹³³

Chapter 6- The Third Era Of Advice and Consent A Quiet Change: Hello Judicial Philosophy, Goodbye Rejected Nominees

The Third Era of Advice and Consent was as docile as the second was stormy. From 1894-1967, only one single nominee, Judge John J. Parker in 1930 saw his nomination to the

¹³³ Ibid.

Supreme Court felled by the Senate. The nomination of Louis Brandeis was highly turbulent and very significant, while other nominees faced serious opposition from political opponents, but many undistinguished jurists sailed through the Senate, as it suddenly lost its backbone. Indeed, perhaps the eight worst justices in the history of the Court passed through the Senate without so much as a major fuss during this era.¹³⁴

Maybe the appointment most emblematic of this period was the already mentioned case of Justice Sutherland. Although most nominees took a bit more than two hours to receive the consent of the Senate, many did so in short time periods without so much as a recorded roll call vote.¹³⁵ However, the Third Era of Advice and Consent is still critically important because it probably marked the entrance of what is known as judicial philosophy into the Senate's evaluation of nominees. This change may not have been immediately evident, because the Senate only refused to consent to one nomination, but there is a simple explanation for that. A judge's overall judicial philosophy became an important criteria for senators to consider when they were offering advice and consent somewhere in the beginning of the twentieth century. The reason for this change is unclear, it could be related to a realization of the power of the Court to stymie legislators through decisions like *Lochner v. New York*, 198 U.S. 45 (1905), or it could somehow be related to the vast procedural changes in the advice and consent process, which also occurred during the Third Era of Advice and Consent. Regardless of the reason behind it, two factors somewhat masked this change, and may have prevented more nominees from being defeated.

The first is that unlike the Fourth Era of Advice and Consent, during which divided government has mostly prevailed, and nominees have struggled to be confirmed, one party controlled Congress and the White House for all but five nominations during the Third Era of

¹³⁴ Abraham, *Justices, President, and Senators*, 369-370.

¹³⁵ See Note 83.

Advice and Consent.¹³⁶ Four of those nominations came during the Presidency of Dwight Eisenhower, and one of them, William Brennan, was a Democrat.¹³⁷ Throughout the history of the advice and consent process, nominations have had a much greater chance of success when the President's party controls Congress. Through 1994, 87.9% of nominees appointed during periods of unified government have been confirmed, as opposed to only 54.5% of nominees during divided government.¹³⁸ Additionally, the Third Era featured ten nominees who had or were serving in Congress at the time of their nominations, and one nominee who was a former President of the United States. Thus, almost twenty-five percent of the nominees during the Third Era may have benefited to some degree from the previously discussed practice of senatorial courtesy.¹³⁹ The result of one party government and senatorial courtesy was to largely obscure the increasingly important role of judicial philosophy in the advice and consent process until the Fourth Era of Advice and Consent. Yet, there is little doubt that it played a major role in the two key cases from the Third Era of Advice and Consent, those of Louis D. Brandeis and John J. Parker.

The first important case from the Third Era of Advice and Consent is that of maybe the greatest justice in the country's history. Louis D. Brandeis waited four agonizing months between when Woodrow Wilson nominated him to the Court, and the Senate finally confirmed him. They were four bloody months of battle, during which one of the first highly organized

¹³⁶ Strauss and Sunstein, "The Senate, The Constitution, and The Confirmation Process," 1522-1523.

¹³⁷ Garhardt, *Federal Appointments Process*, 111.

¹³⁸ Maltese, *The Selling of Supreme Court*, 5.; This statistic should not have changed much in the last twelve years, as there has been only three nominations, two of which were successful, and all of which occurred under unified government. Divided government seems to be a valid factor in spite of statistical evidence showing that since 1866, the condition of divided government has not had a statistically significant impact on whether or not nominees are confirmed. Shipan, and Shannon, "Delaying Justice(s)," 657-658. There are many factors that might account for this statistical finding, including cases in which there is unified government, but the party in power is badly split, such as the 1930 nomination of John Parker, and the 1968 nomination of Abe Fortas.

¹³⁹ I calculated this statistic using Abraham, *Justices, Presidents, and Senators*, 109-218.

campaigns against a nomination took place.¹⁴⁰ Anti-Semitism drove much of the fight against Brandeis' nomination, but many titans of business, finance, and law, angry about his longtime effective work in favor of consumers, also vociferously opposed the nomination. Seven former Presidents of the American Bar Association (ABA), including former President and future Chief Justice Taft even opposed the nomination on the grounds that Brandeis was, “not a fit person to be a member of the Supreme Court.”¹⁴¹ The opposition screamed about Brandeis' supposed radicalism and unethical behavior, and many business luminaries spoke against him during the Senate judiciary subcommittee's hearings. During the four months of the Brandeis struggle, the Senate Judiciary Committee or its investigative subcommittee held twenty-eight public hearings, and the outcome was very much in doubt. The fact that the hearings happened in public was crucial to Brandeis' eventual confirmation, as his opponents toned down their accusations in a way they would not have in closed hearings.¹⁴²

On the day that President Wilson announced the nomination, five of the Democratic members of the Judiciary Committee would probably have voted against Brandeis. However, after it finished holding hearings, the investigate subcommittee decided by a three to two margin to recommend the nomination favorably. Even Senator Cummins of Iowa, who wrote the minority report for the committee, praised Brandeis' abilities. The nomination then remained stalled until a campaign by President Wilson and a personal meeting of Brandeis and two wavering Democratic senators enabled the Judiciary Committee to vote by a ten to eight margin, strictly on party-lines, to send the nomination to the floor favorably. There it ran into less opposition, and Brandeis was finally confirmed.¹⁴³

¹⁴⁰ The first nominee to face the opposition of organized interests was Stanley Matthews in 1881. Maltese, *Selling of Supreme Court Nominees*, 36-37.

¹⁴¹ Harris, *Advice and Consent of the Senate*, 99-100.

¹⁴² Harris, *Advice and Consent*, 99-114.; Simon, *Advice and Consent*, 234-241

¹⁴³ Ibid.

The man with the dubious distinction of being the only nominee rejected by the Senate during this period, was actually a quite capable jurist, who would probably have been an excellent addition to the Court. Judge John J. Parker of the Fourth Circuit Court of Appeals fell prey to some of the same type of organized opposition that took Brandeis' nomination to the brink of failure. In fact, Parker's nomination would represent the first time that an organized group would testify before a Senate committee about a Supreme Court nominee.¹⁴⁴ Although young, Judge Parker was qualified for the position as he had spent five years on the Fourth Circuit, had practiced law for twenty-two years, and had previously served as a special assistant to the U.S. Attorney General.¹⁴⁵ Initially, Judge Parker's nomination, for which North Carolina Republicans had heavily lobbied, seemed relatively uncontroversial. President Hoover thought the nomination to be a safe one, with the potential for political benefits down the road. The nomination had the support of both Democratic North Carolina senators, while Judiciary Committee Chairman Norris was also reportedly favorably inclined.¹⁴⁶ There were almost no dissenting voices when President Hoover announced the nomination, and initially there were not even hearings planned.¹⁴⁷ Even when opposition arose, causing hearings, the nomination sailed through the judiciary subcommittee by a two to one vote after only one four-hour hearing.¹⁴⁸

However, trouble was brewing for Parker from two directions. As a member of the Fourth Circuit, Parker had upheld an injunction granted by the district court against the United Mineworkers, enjoining them from interfering with the business of the West Virginia non-union mines. This decision, while probably consistent with Supreme Court precedent, brought the full-

¹⁴⁴ Maltese, *Selling of Supreme Court Nominees*, 59.

¹⁴⁵ Kenneth Goings, *The NAACP Comes of Age: The Defeat of Judge John J. Parker* (Indianapolis: Indiana University Press, 1990), 21-23.

¹⁴⁶ Richard L. Watson, Jr. "The Defeat of Judge Parker," *The Mississippi Valley Historical Review* 50, 2 (1963), 214-216.

¹⁴⁷ William C. Burris, *Duty and the Law: Judge John J. Parker and the Constitution* (Bessemer: Colonial Press, 1987), 73-74.

¹⁴⁸ Watson, "The Defeat of Judge Parker," 220-221.; Simon, *Advice and Consent*, 247.

fledged opposition of the American Federation of Labor (AFL) to bear against the Parker nomination. The AFL believed that even if Parker felt bound by Supreme Court precedent, he should have expressed his personal disagreement with that precedent in his opinion.¹⁴⁹

At the same time, the National Association for the Advancement of Colored People (NAACP) waged what was one of its first major campaigns against the nomination. Parker earned their wrath because of the contents of the speech he gave to accept the 1920 Republican nomination for governor. He had declared that, “the Negro as a class does not desire to enter politics. The Republican Party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government.”¹⁵⁰ Walter White, the executive secretary of the NAACP, telegraphed Judge Parker to inquire if he still held these views, but Parker did not respond, so the NAACP went all out to defeat his nomination.¹⁵¹ Parker did not respond to White’s telegraph, but not necessarily because he believed the content of his 1920 speech. Rather, he generally felt that it was inappropriate for him to become engaged in a public debate about his appointment before either the Judiciary Committee or the Senate as a whole began their deliberations.¹⁵² In fact, other than the one speech, the NAACP had no other evidence that Parker had any prejudice towards African-Americans. White admitted as much under cross-examination from Senator Borah (R-ID). “Frankly, we never heard of him until he was nominated by President Hoover.”¹⁵³

In fact the context of Parker’s comments, the support for his nomination from several African-Americans who knew him, and his rulings on the Fourth Circuit after 1930 indicate that he harbored no prejudices whatsoever. Before 1920, Parker had run two progressive campaigns

¹⁴⁹ Burris, *Duty and the Law*, 77.

¹⁵⁰ This quote was taken from Richard Watson’s article. Kenneth Goings’ book provides a different quote that apparently came from the same speech as both authors cite the Greensboro *Daily News* from April 19th, 1920 as the source for their quotation.

¹⁵¹ Watson, “The Defeat of Judge Parker,” 216-220.

¹⁵² Burris, *Duty and the Law*, 96.

¹⁵³ Goings, *The NAACP Comes of Age*, 27.

for office and had lost both elections due to race baiting. In 1920, Parker wanted his progressive campaign platform to succeed or fail on its own merits. Therefore, he made several seemingly prejudiced statements during the course of the campaign in an effort to neutralize the issue of race.¹⁵⁴

The NAACP campaign against Judge Parker, which was both more significant and more effective than the effort by the AFL, consisted mostly of lobbying and pressuring senators to oppose the nomination, while simultaneously threatening electoral retribution against senators who had the temerity to ignore this pressure.¹⁵⁵ The campaign was aided by the 1929 change in the Senate rules, which opened the debate over Parker's nomination to the public. This allowed the NAACP to better monitor the debate, and to more credibly threaten retribution against wavering senators.¹⁵⁶ Due to this campaign, Republicans all over the country were becoming increasingly concerned that if Republican senators voted to confirm Parker, they would lose the African-American vote for election cycles to come. Hoover however refused to withdraw the nomination, and at the behest of Parker's supporters, Senator Overman (D-NC), the Ranking Member of the Judiciary Committee, made a motion to invite the nominee to appear before the committee. Almost inexplicably, the committee refused by a ten to four margin after a vigorous debate. Then, in an abrupt and unexpected move, the committee adversely reported the nomination to the Senate by a ten to six margin.

Understanding that he would lose substantial Republican support due to the lobbying of the NAACP, Parker and his supporters began a ferocious campaign to gain the support of southern Democratic senators, many of whom had no problem with a nominee charged with being a racist. Parker also issued a statement saying that he had no prejudice whatsoever against

¹⁵⁴ Ibid., 23- 24 & 28.

¹⁵⁵ Ibid., 26.

¹⁵⁶ Burris, *Duty and the Law*, 93.; Maltese, *Selling of Supreme Court Nominations*, 52-53.

the “‘colored people.’” This statement was careful however not to oppose a North Carolina Constitutional Amendment that had restricted Negro suffrage for fear of losing crucial support from southern senators.¹⁵⁷ Again this statement may not have reflected the true tenor of Parker’s feelings, but rather was designed to have the maximum positive impact on his struggle to be confirmed.

The ensuing heated floor debate over the nomination occurred in front of packed galleries, including Oscar DePriest (Ill), Congress’s only African-American member. Some of the northern opponents of Parker, such as Senator Robert Wagner (NY), may have lost support for their cause during the floor fight by making statements that put down the South and its racism. However, the crushing blow against the nomination came when Senator Kenneth McKellar of Tennessee found a letter from the First Assistant Secretary of the Interior, who happened to be a North Carolina Republican, to one of Hoover’s secretaries. The letter urged Parker’s nomination on the grounds of political expediency, and expressed the hope that it would deliver North Carolina permanently to the Republican Party. This letter cost Parker some absolutely critical votes from southern Democratic senators, such as Senator Heflin (D-AL), who may have hated African-Americans, but hated the idea of helping Republicans more. The Parker nomination went down to defeat forty-one to thirty-nine.¹⁵⁸

Evidence shows that all of these factors combined to defeat the nomination of Judge Parker. The NAACP campaign was especially effective, probably costing Parker somewhere between ten and sixteen votes.¹⁵⁹ At least three senators afraid of electoral repercussions turned down direct entreaties from President Hoover to support Parker due to the NAACP pressure.¹⁶⁰ The AFL campaign had considerably less impact, although labor opposition did surprisingly

¹⁵⁷ Watson, “The Defeat of Judge Parker,” 221-224.

¹⁵⁸ *Ibid.*, 222-232.

¹⁵⁹ Goings, *The NAACP Comes of Age*, 48.

¹⁶⁰ Burris, *Duty and the Law*, 96.

influence the votes of several southern senators.¹⁶¹ The issue of party politics proved more significant, possibly costing Parker the votes of up to ten southern Democrats. However, Parker also lost because of his perceived judicial philosophy. Somewhere around eighteen senators, thirteen Republicans, and four or five Democrats, felt that the appointee should have liberal leanings. Judiciary Chairman George Norris best summarized what these Senators wanted in a nominee. ““Everyone who ascends to that holy bench should have in his heart and mind the intention of looking after the liberties of his fellow citizens... of discarding if necessary old precedents of barbarous days and construing the Constitution and the laws in light of a modern day.”” Consequently, several senators including Norris voted against Parker because of his incorrectly perceived philosophy.¹⁶²

Chapter 7- The Fourth Era of Advice and Consent: A Whole Different (and Nastier) Ballgame

The Fourth Era of Advice and Consent could rightly be described in either of two ways: as the period during which the Senate rediscovered its backbone, or as the culmination of the process through which judicial philosophy became a crucial factor for the Senate in providing advice and consent. The increasingly important role of judicial philosophy can probably be directly linked to two factors. First, senators realized as a result of the Warren Court’s

¹⁶¹ *Ibid.*, 95.

¹⁶² Watson, “The Defeat of Judge Parker,” 231.; The proof that they incorrectly perceived his philosophy comes from his record on the Fourth Circuit after 1930, as well as by the fact that Democratic Presidents Roosevelt and Truman were sufficiently impressed by this progressive record to consider appointing him to the Supreme Court. Burris, *Duty and the Law*, 101-110.

groundbreaking decisions just how powerful the Court could be in nullifying the judgments of the other two branches if it so chose. This discovery is best embodied by Senator Howard Baker (R-TN), who said in 1969 that the Supreme Court had, “demonstrated a spirit of activism and has at times competed for the role of the legislative branch of our government.” Hence, Baker felt that a “non-philosophy” test would no longer be sufficient, as justices had to be evaluated as “quasi-legislators.”¹⁶³

The second piece of the explanation is that after a seventy-three year era in which all but five nominations to the Supreme Court came in times of unified, one-party government the Fourth Era of Advice and Consent has been marked by long periods of divided government. Indeed, only ten of twenty-two Supreme Court nominations during the last thirty-eight years have occurred when the President’s party also controlled the Senate. These two factors probably account for the greatly increased scrutiny with which the Senate has evaluated Supreme Court nominees during the Fourth Era of Advice and Consent. After only rejecting one nominee in the seventy-three years of the previous era, the Senate has failed to confirm seven nominees in the last thirty-eight years. One of the two key cases from this era, the rejection of Robert Bork, occurred ostensibly because of his style of interpreting the Constitution, which represented at least somewhat of a departure from previous Senate practice. Judicial philosophy also played the major role in the era’s other key case. This case is genuinely unique in American history, and it signaled the rather abrupt change from the Third Era to the Fourth Era of Advice and Consent.

When Chief Justice Earl Warren decided to retire, President Lyndon Johnson, with the support of Warren moved to elevate his close friend and advisor, Associate Justice Abe Fortas,

¹⁶³ John Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (Charlottesville: University Press of Virginia, 1991), 126.

into the Court's center chair.¹⁶⁴ Simultaneously, he nominated another old friend, Homer Thornberry to Fortas's seat on the Court. Ironically, for a man whose most famous biography is entitled, *Master of the Senate*, and who is regarded as one of the sharpest political minds of his time, Johnson severally botched the replacement of Warren from the very first moment. Before even selecting a nominee, Johnson made the first in a series of critical errors. Upon receiving Warren's one sentence retirement letter, in which the Chief Justice declared that he was retiring "effective at your (Johnson's) pleasure," Johnson replied that he would accept Warren's retirement "effective at such time as a successor is qualified." This language wound up providing significant fodder for opponents of the Fortas nomination, such as Senator Sam Ervin (D-NC), who used the question of whether a vacancy actually existed to waste critical time heading towards the Senate's adjournment for the party conventions.¹⁶⁵

President Johnson was smart enough to realize that he needed the support of certain critical senators to even have a chance of seeing his nominees confirmed. Thus he did actually consult with Republican Minority Leader Everett Dirksen (R-IL), Judiciary Committee Chairman James Eastland (D-MS), and Richard Russell (D-GA), the venerable leader of the Senate's conservative Dixiecrats, before sending Fortas' nomination to the Senate. In a phone conversation and then a private meeting, Johnson secured the support of Dirksen for Fortas' nomination, but in doing so, he foolishly foreclosed the possibility of appointing former Justice Arthur Goldberg to Fortas' soon to be vacant seat on the Court. During his phone conversation with Dirksen, the President had argued against a candidate whom Dirksen suggested for the

¹⁶⁴ Although Warren indicated to President Johnson that he believed Fortas would make a good Chief Justice, he probably would have preferred either former Justice Arthur Goldberg or Justice William Brennan.; Bruce Allen Murphy, *Fortas* (New York: William Morrow and Company, 1988), 270-271.

¹⁶⁵ *Ibid.*, 372-374.; The issue was more that conservative senators felt that Johnson had added the language to force them to choose between Warren's continued stewardship of the Court, and confirming Fortas. Had Chief Justice Warren himself used the language there might have been less of an issue, as is demonstrated by the case of Justice Sandra Day O'Connor. O'Connor used the retirement upon the qualification of her successor language in her 2005 retirement letter, without any problem. "O'Connor to Resign from Supreme Court," *CNN.com*, July 1, 2005, <http://www.cnn.com/2005/LAW/07/01/resignation.supreme/>.

Court, by saying that he did not want to, “disturb the religious balance on the Court.” This argument precluded the appointment of the easily confirmable, but Jewish, Goldberg, who even Senator Robert Griffin (R-MI), one of the leaders of the Senate opposition to the Fortas nomination, would not have opposed.¹⁶⁶ Johnson essentially bought Dirksen’s vigorous support for his nominees by agreeing to compel Attorney General Ramsey Clark to refer cases to the Subversive Activities Control Board, in order to keep the SACB, one of Dirksen’s pet projects, from being abolished.¹⁶⁷

However, Johnson undoubtedly misjudged Dirksen’s power to control his Republican caucus, especially in light of the campaign by Senator Griffin and seventeen of his colleagues to leave the vacancy for the next President to fill. This campaign, begun before Johnson even announced nominees, was probably spurred by a belief that the Republican nominee was likely to win that fall’s Presidential election.¹⁶⁸ Many of these Republican rebels did not quarrel with Johnson’s right to appoint nominees to the Supreme Court, even as a lame duck. Rather, they opposed the idea that a lame duck President who had led the country into unpopular turmoil ought to be making an appointment to Supreme Court before the country could decide if it wanted to make a change in course.¹⁶⁹ Indeed, Dirksen was not even sufficiently fearsome or persuasive to get the support of his son-in-law, Senator Howard Baker, who told him, “Mr. D., I can’t go along with you. I’ll fight confirmation until we convene a new Congress, and install a new administration.”¹⁷⁰ President Johnson was however aware from previous dealings with

¹⁶⁶ Murphy, *Fortas*, 280-283.

¹⁶⁷ *Ibid.*, 290-298.

¹⁶⁸ Simon, *Advice and Consent*, 281.282.

¹⁶⁹ John R. Schmidhauser and Larry L. Berg, *The Supreme Court and Congress: Conflict and Interaction, 1945-1968* (New York: The Free Press, 1972), 105-110.

¹⁷⁰ Murphy, *Fortas*, 298.

Dirksen that if the process got dragged out too long, he would jump ship, almost certainly dooming the nominations.¹⁷¹

Gaining the support of the racist and anti-Semitic Judiciary Committee chairman, James O. Eastland of Mississippi, proved to be an impossible task even for Johnson. Eastland had already warned the Attorney General that the southern Dixiecrats, who opposed Fortas' philosophy, and some of whom disliked him personally, were organizing a filibuster against his nomination, and Eastland did not believe there was any chance of success for the nomination. The best concession Johnson could gain from Eastland was a promise to allow the nomination to proceed from his committee to the Senate floor at his "own time."¹⁷² Johnson ignored Eastland's initial warning that the nomination had no chance for success, as he would several later such predictions from the Judiciary Committee chairman, even one which came in August, when Johnson knew Eastland to be correct.¹⁷³

Thus, after failing to secure the support of Eastland, LBJ knew the support of his mentor and close friend, Senator Richard Russell, was critical to the success of the nomination. Johnson had learned through a mutual friend that although Russell would vote for Fortas for Chief Justice, he could enthusiastically support Homer Thornberry, an old duck hunting buddy, for the appointment to Fortas' seat on the Court. Thornberry had probably topped Johnson's short-list for the second nomination before the President heard this, but it sealed the deal in his mind. He then confirmed this information in a meeting with his old friend and mentor. With Russell in his study, Johnson called Thornberry to proffer the nomination, after which Russell talked to Thornberry, and told him he was, "with him all the way."¹⁷⁴

¹⁷¹ Murphy, *Fortas*, 367.

¹⁷² *Ibid.*, 299 & 301.

¹⁷³ *Ibid.*, 367 & 462.; Laura Kalman, *Abe Fortas* (New Haven: Yale University Press, 1990), 350.

¹⁷⁴ Murphy, *Fortas*, 292 & 299-300.

By nominating Thornberry, President Johnson opened himself up to charges of cronyism, as both nominees were old friends of his, and indeed Thornberry had even held Johnson's old Congressional seat for eight-terms.¹⁷⁵ Moreover, the selection of Thornberry precluded the nomination of someone who might appeal to Senate Republicans, thus nipping some of the nascent opposition in the bud. Confidant Clark Clifford sagaciously begged Johnson to consider the strategy of appointing a respected non-political Republican lawyer for Fortas' seat. He and Johnson argued about the wisdom of the strategy, and Fortas himself was left to break the tie. He sided with the President, leaving Clifford to regret the timing of the argument. Clifford believed that Fortas would have taken his side had they been able to talk alone when agreeing did not mean Fortas telling the man offering him the chief justiceship of the United States that he was wrong.¹⁷⁶ Johnson also would have been wise to consider appointing a senator, such as Edmund Muskie (D-ME), as suggested by Attorney General Ramsey Clark, in order to use senatorial courtesy to grease the skids for the much more controversial nomination of Justice Fortas. Even appointing Thornberry as Chief Justice, and not subjecting Fortas to the confirmation process probably would have worked, as Senator Russell later would tell people that he would have spoken in favor of that nomination on the floor of the Senate.¹⁷⁷

Indeed, perhaps the worst mistake Johnson made in the entire process was the decision to nominate Fortas. As Fortas biographer Laura Kalman has written, the associate justice was perhaps the only candidate who could be tarred both by the controversial decisions of the Warren Court, and also because of his role as a close advisor to President Johnson, the unpopular decisions Johnson had made about the Vietnam War. Kalman associates the implosion of the Fortas nomination with the justice being forced to answer for both the executive and judiciary

¹⁷⁵ Ibid., 285.

¹⁷⁶ Kalman, *Abe Fortas*, 328.

¹⁷⁷ Ibid., 284 & 300.

branches, or in other words, for the domestic reforms spurred both by the White House and the Court, and Johnson's globalism.¹⁷⁸

If LBJ was determined to make these two particular appointments, he would have been wise to consult with more senators before sending the nominations up to the Senate. Indeed, he did not even consult with Majority Leader Mike Mansfield (D-MT), nor Senator John McClellan of Arkansas, the second most senior member of the Judiciary Committee, before announcing the nominations.¹⁷⁹ Although someone as conservative as McClellan probably would not have supported the Fortas nomination under any circumstances, consultation just might have made him, and other senior southern senators less willing to stall the nomination through the use of procedural tactics.¹⁸⁰ While Johnson could have probably gotten away with this type of cavalier behavior just after his landslide election in 1964, his administration had expended a lot of energy in ramming a tax surcharge and a new civil rights bill through Congress in 1968, and following his March 31st announcement that he would not run for re-election, Johnson's once mighty influence had been significantly reduced.¹⁸¹ Indeed, his strategy left little room for error, and LBJ would soon allow his Attorney General to make a massive error.

For a man known for his fearsome "treatment," one would assume that President Johnson would rule over members of his cabinet with an iron fist. That was just not the case with regards to Attorney General Clark. White House Aide Larry Temple recalled that "as a practical matter I never saw him (LBJ) order ... Ramsey to do anything. He strongly expressed his views, and the independent guy that Ramsey was and is came to the fore. Ramsey ultimately did, in every instance I saw, just what Ramsey thought the right result was."¹⁸² This unwillingness to

¹⁷⁸ Kalman, *Abe Fortas*, 357-358.

¹⁷⁹ Murphy, *Fortas*, 284 & 303.

¹⁸⁰ Massaro, *Supremely Political*, 56-58.

¹⁸¹ *Ibid.*, 287.

¹⁸² *Ibid.*, 296.

decisively overrule Clark would cost the Fortas nomination the crucial support of Senator Russell, shatter Johnson's friendship with Russell, and probably doom the nomination to failure.

In February of 1968, as was his prerogative through senatorial courtesy, Russell had forwarded the name of Alexander Lawrence Jr. to the Justice Department for a vacancy on the federal district court in southern Georgia. Lawrence, a respected legal historian and former President of the Georgia Bar Association, was eminently qualified for the position. This may have led a confident Senator Russell to diverge from his usual practice by only sending Lawrence's name to the White House, as opposed to a short list of candidates, while also publicly confirming to the press that Lawrence was his choice for the judgeship. Thus, he put his waning power and prestige on the line on behalf of Lawrence. Although an initial informal report by the ABA indicated that Lawrence was well qualified, the nomination soon drew the opposition of civil rights groups. Their primary reason for opposing Lawrence was a speech he had given in 1958 attacking the Warren Court and its desegregation decisions. The *Atlanta Journal Constitution* confirmed that Lawrence stood by these remarks, and this drew the attention of Attorney General Clark. During his time in the Kennedy Administration, Clark had seen the danger of acquiescing to the appointment of racists to the district and appeals courts in the hopes that they would change their stripes once on the bench. Based upon this speech, Clark believed that Lawrence could not be counted upon to enforce a policy of integration, and thus the Attorney General would actively oppose nominating him.¹⁸³

By mid-April Senator Russell was beginning to wonder about his appointment, and he called Attorney General Clark, who promised him a decision, ““ in a few days.”” In reality, Clark had already made up his mind, and he explained his opposition to the President. Johnson was in a bind, because philosophically he agreed with Clark, but Russell was a dear friend whose support

¹⁸³ Ibid., 336-340.

he needed. So he agreed to Clark's recommendation that he wait for the official report from the ABA before deciding what to do.¹⁸⁴ Johnson did make it clear to Clark that, "If there's any way at all that we can posture this man in a way that he can be appointed without hampering the judiciary, without doing anything to undermine the judiciary, I want to do it. I want to appoint this man." By May 4th, Russell had waited long enough and took the issue directly to Johnson during a seventy-five minute lunch meeting. Johnson argued that Clark would resign if he overruled him, and he asked Russell to check with Lawrence, and then to send him a letter that he could use to persuade Clark, who he also promised to send to meet with Russell.

Russell sent Johnson a letter in which Lawrence promised to abide by the decisions of the Supreme Court, but it was not enough to convince the intransigent Attorney General. Furthermore, it came out that Lawrence was a member of an exclusive intellectual discussion group that had once said that the "only way to solve the race problem was to get rid of the Negroes." This sealed the deal for the Attorney General, who informed Senator Russell on May 11th, that he would not recommend Lawrence's appointment. This reflected badly on Russell who had personally vouched for Lawrence, and he conveyed that he would be deeply hurt and would "never feel the same about the President" if the appointment was not made. Johnson himself was not ready to pick a side in the battle so he stalled further, actually consulting with Justice Fortas, who recommended that he make the nomination. Meanwhile, the agitated Russell sent the President a letter in which he essentially put their long and deep friendship on the line. Johnson knew from the letter that he had to make the appointment. He decided to ask the chairman of the ABA Standing Committee on the Federal Judiciary to go to Georgia to investigate the matter himself, in the hopes that a positive report would change the mind of Attorney General Clark.¹⁸⁵

¹⁸⁴ Clark believed the ABA would not approve of Lawrence because of his advanced age.; Ibid., 340-341.

¹⁸⁵ Ibid., 343-345.

As time progressed, the White House received more and more positive reports on Lawrence. By the time the President met with Russell to solidify their deal on the Fortas-Thornberry ticket on June 25th, he promised the senator that it would only be a matter of time before he appointed Lawrence to either the district court or the court of appeals, if Russell would prefer that. In reality, the President still could not convince Clark to expedite the matter, and inexplicably refused to overrule him. He came as close as he would go to ordering Clark to do it, but even so he included the same caveats as he had during their earlier conversation. As this was happening, Russell was hearing the deep anger of his southern brethren, and he began having misgivings about his support for the Supreme Court ticket. He probably realized that he no longer had the power to compel his southern colleagues to vote contrary to their interests, and when that was combined with his personal struggle over the Lawrence nomination, Russell felt compelled to make a difficult decision.

After one more meeting with Johnson's emissaries about the Supreme Court nominations during which he again asked about the Lawrence nomination, Russell sent a letter to Johnson that devastated the effort to put Fortas on the Supreme Court. In the letter he accused LBJ of holding up the Lawrence nomination to ensure his support for the Fortas-Thornberry ticket. Essentially, he accused the President of acting in bad faith, and he wrote that he considered himself released from any statements he may have made to Johnson regarding the two Supreme Court candidates. He also declared that LBJ was at liberty to do whatever he wished with the recommendation of Lawrence for the district court. Johnson went ballistic on Clark, finally ordering him to appoint Lawrence. He then spent a whole day working on a response to Russell's letter, before proceeding to send numerous emissaries to the senator in an effort to regain his support for the nominations. Finally, Johnson spent two hours meeting with Russell in the Oval Office on July 13th, during which he was able to tell the senator that the Lawrence nomination would be made,

and indeed that the final ABA report had come back concluding that Lawrence was well-qualified. The damage had however already been done, and shortly thereafter, unbeknownst to the administration, Russell invited Senator Griffin into his office. He asked Griffin about the resolve of his rebellious group of eighteen senators, and upon hearing that it was firm, Russell agreed to support the rebels behind the scenes in their opposition of the nominations.¹⁸⁶

While the loss of Russell's support may have marked the death knell of the Fortas nomination, it might not have been immediately evident to the President.¹⁸⁷ His initial vote counts showed between sixty-seven and sixty-nine votes in favor of Fortas, and Johnson understood that time was the biggest threat to the success of his nominations.¹⁸⁸ Consequently, the Administration did everything it could to ensure a vote on them before the Senate recessed for the party conventions at the beginning of August. That proved to be impossible because of the behavior of the conservative southern senators on the Judiciary Committee, as well as the numerous blunders committed by the administration. Senators Eastland, McClellan, Ervin, and Strom Thurmond (R-SC) battered Fortas for four days in mid July. They also used every single procedural tactic and line of questioning they could to slow the process down. Even when the pro-Fortas side would win a skirmish or two, they would lose the most crucial commodity, time.

For instance, even before Fortas testified, Attorney General Clark was forced to appear before the committee to neutralize the question of whether or not there actually was a vacancy to the Court. Then Senator Dirksen savaged Senator Griffin, and his charges that Johnson had no legitimate right to make the nomination, successfully reducing Griffin to the fodder of jokes on Capitol Hill. But these two efforts wasted a day of Judiciary Committee time, which helped to

¹⁸⁶ Ibid., 345-359.; Russell promised behind the scenes support, because public support from the Dixiecrats would have actually hurt the effort to stop the nominations more than it would have helped.

¹⁸⁷ The Russell defection was devastating because President Johnson had counted on Russell to help prevent his southern colleagues from stalling the nomination using procedural tactics. These tactics would in the end be what actually defeated the nomination.

¹⁸⁸ Ibid., 313.; Kalman, *Abe Fortas*, 332.

push back Fortas' appearance before the committee.¹⁸⁹ Griffin, relying on anonymous news articles, also was able to charge that Fortas had violated the separation of powers by frequently advising his friend, President Johnson. This charge would prove to be one of the most significant accusations against the nomination.¹⁹⁰ Later in the confirmation hearings, Senator Phil Hart (D-MI), Fortas' top Senate defender, would admit to having introduced a memo written by the Justice Department into the committee record, which allowed the southern senators to waste yet another day of hearing time inquiring as to why the Justice Department was trying, to “propagandize” the Senate.¹⁹¹

The race against time placed the Fortas nomination in some trouble even before the justice appeared in front of Senate Judiciary Committee on day three of its hearings. In even appearing before the committee, Fortas was breaking precedent, as no other candidate for chief justice had ever been invited to testify. Nor had any already sitting justice ever testified before the Senate, save for those who had received recess appointments.¹⁹² Fortas's performance before the Committee probably aided his cause, as he accounted himself quite well. His methods were not exactly scrupulous, as he obfuscated, and indeed resorted to blatantly lying about the extent of his controversial role as a presidential advisor in the three years he had been on the Court.¹⁹³ Although his lies and blurring of the facts largely succeeded because the senators lacked proof to support their accusations, Fortas still was forced to acknowledge having advised Johnson on “a few critical matters”.¹⁹⁴ Included among these matters, Fortas conceded to Senator McClellan, were the Vietnam War, and the Detroit riots.¹⁹⁵ “He implausibly claimed to only sit in on

¹⁸⁹ Murphy, *Fortas*, 373-377

¹⁹⁰ *Ibid.*, 376-377.

¹⁹¹ *Ibid.*, 445-446.

¹⁹² Robert L. Shogun, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* (Indianapolis and New York: The Bobbs-Merrill Company, 1972), 164.

¹⁹³ *Ibid.*, 378-404.

¹⁹⁴ *Ibid.*, 385.

¹⁹⁵ *Ibid.*, 404-405.

meetings in which other advisors gave their opinions, which he then summarized for the President. Fortas denied ever making any recommendations to the President, but the damage had been done.¹⁹⁶ This admission stole the next day's newspaper headlines, after what had otherwise been a solid first day of testimony for the justice.¹⁹⁷

The conservative senators would spend most of the justice's four days testifying hammering him about the Warren Court's criminal justice and desegregation decisions. Maybe the most vicious of these assaults came at the hands of Senator Thurmond. His opportunity to question Fortas came after his southern colleagues had by and large failed to do any serious damage to the justice's prospects for confirmation. Perhaps the most famous moment of the hearings came when Thurmond angry about Fortas' unwillingness to answer questions regarding the case of *Mallory v. United States*, 354 U.S. 449 (1957), which had been handed down a full eight years before the justice joined the Supreme Court, bellowed, ““ Mallory, Mallory, Mallory, I want that word to ring in your ears- Mallory.’ ... ‘A man who raped a woman, admitted guilt, and the Supreme Court turned him loose on a technicality.’”¹⁹⁸ Fortas squirmed in his seat, but refused to take Thurmond's bait. As a result, in so much as Thurmond's multi-day attack had any impact, it brought sympathy to Fortas and his cause.¹⁹⁹

Undaunted, the wily senator had one more card up his sleeve. After the conclusion of Fortas' testimony, Thurmond convinced the sympathetic Chairman Eastland to allow James J. Clancy, an attorney representing Citizens for Decent Literature, to testify. He testified that his group had analyzed fifty-two obscenity cases over the previous two Court terms, and that Fortas had provided the ““ deciding”” fifth vote for reversing the lower court's finding that the material was obscene in forty-nine of them. This charge conveniently ignored reality and the truth, but

¹⁹⁶ Simon, *Advice and Consent*, 282-283.

¹⁹⁷ Murphy, *Fortas*, 404-405.

¹⁹⁸ *Ibid.*, 423-429.

¹⁹⁹ *Ibid.*, 431.

Senator Thurmond gave it teeth by arranging screenings of lewd films for senators.²⁰⁰ The negative impact of these screenings proved to be surprisingly great, and was magnified because Senator Dirksen, for whatever reason, neglected to get a memo that effectively portrayed Fortas as a moderate on obscenity into the record. This was yet another of the many mistakes made by Fortas supporters over the summer of 1968, which allowed the opponents of the nomination to gain an upper hand.²⁰¹

Some of these mistakes helped allow the Dixiecrats to keep the nomination bottled in the committee before the Senate recessed for the party conventions. After the conclusion of the hearings, Senator McClellan exercised his right to request a one week delay in considering the nomination, and the following week, not enough senators showed up at the committee meeting for there to be a quorum.²⁰² This delayed a final vote on the nomination for over a month, and for practical purposes cost Fortas his chance of ever becoming chief justice. It gave his opponents another month to find something to deal the nomination a final blow. Even a victory by Everett Dirksen, who prevented Senator Griffin from inserting language into the Republican platform that questioned Johnson's right to make the appointment, while also criticizing his cronyism, could not stem the tide of negative momentum. In a late July letter to Justice William O. Douglas, Fortas himself acknowledged that he did not believe the administration forces could break a filibuster.²⁰³ The only man left who could save the nomination was Republican standard-bearer Richard Nixon, and by the time his opponent Hubert Humphrey goaded him into giving a clear signal that he opposed filibustering the nomination in mid-September, it was too late to

²⁰⁰ The claim could not have possibly been true, because the justices' conferences are private, and Clancy had no way of knowing anything about their deliberations.

²⁰¹ *Ibid.*, 441-444 & 448-449.

²⁰² *Ibid.*, 447-452.

²⁰³ Kalman, *Abe Fortas*, 348.

have an effect.²⁰⁴ Nixon's half-hearted gesture came too late, because one of the seeds planted by Senator Griffin would blossom, and kill the nomination once and for all.

Back in July, an anonymous and disembodied voice had called Senator Griffin's office to report that American University had established a tax-exempt foundation to pay Justice Fortas to teach a seminar at its law school.²⁰⁵ In August, realizing that the alliance between the conservative southerners and the Republican rebels was shaky, Fortas' opponents leaked this and other rumors to the press, which was long considered to be a senator's "extended staff."²⁰⁶ This move paid off immensely when the *New York Times*' Fred Graham reported that Fortas had been paid the then gigantic sum of \$15,000 to teach the seminar.²⁰⁷ Around the time of this revelation, several other charges were lobbed at Fortas, including one by Senator Gordon Allott (R-CO). Simultaneously, President Johnson, and Majority Leader Mansfield began applying significant pressure on the Judiciary Committee to discharge the nomination, after a majority of the committee again failed to provide a quorum at a meeting on September 4th. As a result of the combination of new charges and pressure being applied to the committee, a deal was struck under which the hearings would be reopened, but the committee would also take a final vote on the nomination the following Tuesday. Fortas' supporters made one seemingly harmless concession in securing this deal- they granted Chairman Eastland the power to subpoena any witness unsupervised by the rest of the committee.

This proved to be much more important than the Fortas supporters could have realized thanks to Strom Thurmond. After Senator Griffin's staff had been unable to confirm the rumors about Fortas' law seminar at American University all summer, Griffin turned the information over to Thurmond's staff. While his political instincts would not allow him to press the

²⁰⁴ Murphy, *Fortas*, 462 & 475.

²⁰⁵ *Ibid.*, 440.

²⁰⁶ *Ibid.*, 468.

²⁰⁷ *Ibid.*, 478.

unsubstantiated charge, he knew that Thurmond would be a good deal less scrupulous. Indeed, a Thurmond aid called the Dean of American Law School, who refused to testify before the Judiciary Committee. Hearing this, Senator Thurmond himself called the dean and intimated that he knew all about the seminar fund. Thurmond also told the dean that he could appear before the committee either by choice, or under subpoena, thanks to the helpful subpoena power granted to Thurmond's southern ally, Chairman Eastland. After much debate, the White House believing there to be no benefit, decided that neither Fortas nor any White House witnesses would appear before the committee to dispute any of the new charges against Fortas.²⁰⁸ This decision was made in spite of having evidence to rebut several of the charges.

When the hearings reopened, the testimony of Dean A.B. Tennery proved devastating. Tennery stretched the truth to be paint the justice in the best possible light, but he had to testify that Fortas' former law partner Paul Porter had arranged for five businessmen- none of whom had any connection to American University- to provide the \$15,000 to pay Justice Fortas for giving the seminar. Fortas in fact did not know the source of the funding for the seminar, and it is quite possible that had Fortas and Porter revealed the truth about the seminar earlier they could have diffused the issue. By remaining silent, they allowed their opponents to raise the issue in the worst possible light, at the absolute worst time. This revelation may well have cost Fortas at least three, and maybe even five votes either on cloture or confirmation.²⁰⁹

To make matters even worse, Thurmond used the reopened hearings to again use smut to do serious damage to Fortas's hopes of confirmation. He called a Los Angeles Police Sergeant to testify, and the sergeant helpfully brought with him an entirely new film for Thurmond to show in his infamous peep shows. Although unfairly, as Fortas' obscenity rulings had nothing

²⁰⁸ Rebutting Senator Allot's charges was impossible, because his colleagues were much more likely to believe him than anyone the administration sent to testify. Murphy, *Fortas*, 491-496.

²⁰⁹ Murphy, *Fortas*, 497-504.; Kalman, *Abe Fortas*, 352.

whatsoever to do with whether or not he supported graphic pornography, this issue cost the justice at least three more crucial votes on confirmation.²¹⁰ For all practical purposes the re-opened hearings ended any possibility that a last gasp effort would get Fortas confirmed as chief justice. Senator Dirksen basically informed the President of as much during a private meeting on September 16th. In spite of everything, the Judiciary Committee finally referred the nomination to the floor of the Senate positively, by a bipartisan eleven to six margin. The majority report called Fortas, “‘extraordinarily well qualified for the post to which he has been nominated.’” However, Chairman Eastland noted his belief that Fortas should not be confirmed.²¹¹

As late as September 25th, President Johnson’s head counts showed fifty-seven senators in favor of cloture. Perhaps it is possible that somehow, someway, LBJ could have coaxed the Senate into invoking cloture had Senators Dirksen and Mansfield gone to the hilt for the nomination, but in a final blow, Dirksen would announce on September 27th that he was now officially neutral in the fight. He gave several specious reasons for this change, but in essence, he was jumping off of a sinking ship.²¹² Although Majority Leader Mansfield used an ingenious tactic to attempt to ward off a filibuster- he called for a vote on the right of the Senate to have the issue debated- his devotion to the cause can also be questioned. Unlike LBJ had done in his days as Majority Leader, Mansfield would not force the filibustering senators to exhaustion by keeping the Senate in session around the clock.²¹³ Perhaps had Johnson at least consulted with the majority leader before selecting nominees, he might have felt a greater sense of ownership for the nominations, and gone all out to get them confirmed.

The nomination would probably have been approved had it been voted upon, but the conservative southern Democrats, the rebel Republicans, and even a few moderate and

²¹⁰ Murphy, *Fortas*, 507-509.

²¹¹ Simon, *Advice and Consent*, 283-285.

²¹² Murphy, *Fortas*, 521-522.

²¹³ *Ibid.*, 519-520.

progressive senators joined hands to stage the first filibuster of a Supreme Court nominee. A vote to cut off debate on Fortas' nomination, which would have required a two-thirds majority, only garnered forty-five votes, and at his request LBJ withdrew the nomination.²¹⁴ Even at this final moment of the nomination fight, the President may have been making a mistake. Evidence presented by John Massaro indicates that had Mansfield waited a reasonable amount of time, and scheduled another cloture vote, he could have gotten close to sixty votes. This might not have been the two-thirds necessary to cut off the filibuster, but it could have created a climate in which that would have been possible on a successive vote.²¹⁵ The unprecedented and ideologically motivated filibuster of a clearly qualified sitting Supreme Court who had been recommended favorably by the Judiciary Committee, by a Senate with sixty-three members of the President's party no less, signaled a sea change in the advice and consent process, and left liberals angry and brooding.

A year later, Fortas would be forced to resign from the Court by yet another scandal, and President Nixon's first two attempts to replace him would be rejected by the Senate. The second nomination, that of G. Harold Carswell, does not warrant significant discussion, because Carswell, nominated most likely in an effort to spite the Senate, was probably doomed by his lack of competence for the position and his history of overt racism.²¹⁶ The best defense of him, offered by Senator Roman Hruska (R-NE) acknowledged as much. "Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation,

²¹⁴ Ibid., 523-525.

²¹⁵ John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany: State University of New York Press, 1990), 27-31.; This evidence seems to be somewhat thin, in that Murphy's account describes a fluid climate in which some of the senators cited by Massaro may have changed their minds about the nomination at the last minute. When asked about Massaro's contention, Murphy replied that he does not like to deal with hypotheticals in his work, and that as far as he is concerned the issue of additional cloture votes is rendered moot by LBJ's withdrawal of the nomination. Bruce Allen Murphy, e-mail message to Brian Rosenwald, February twentieth, 2006.

²¹⁶ As the efforts of President Grant, President Cleveland, and President Nixon have shown, nominations made to spite the Senate after it rejected one of the President's nominees, usually end in yet another rejection.

aren't they, and a little chance? We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that."²¹⁷

The nomination of Clement F. Haynsworth Jr. is more significant, because it demonstrates several key elements of how the advice and consent process has worked during the Fourth Era of Advice and Consent. The cliff notes version of the case is that Haynsworth fell prey as much to Fortas' crimes as his own. Fortas was forced to resign because he had accepted a \$20,000 a year contract with the foundation of Louis Wolfson, who was in prison for stock manipulation. Fortas had signed the contract, which made him a lifetime advisor to the foundation, before Wolfson's indictment.²¹⁸ He did absolutely nothing illegal, and neither did Haynsworth, who was just less than careful with regard to conflict-of-interest laws. He had failed to recuse himself from two cases indirectly affecting two corporations in which he owned stock.²¹⁹ More seriously, Judge Haynsworth had bought stock in a corporation after a three-judge panel on which he had sat, decided a case in the company's favor, but before the decision was publicly announced.²²⁰ What might not otherwise have proved fatal for the nomination, had to, because the Senate had played a role in essentially forcing Fortas to resign for being similarly indiscreet. Although the Judiciary Committee favorably recommended the nomination by a ten to seven margin, seventeen Republican senators, including both of the party's leaders, joined thirty-eight Democrats in voting the nomination down.²²¹

However, this sort of perfunctory and superficial explanation of the Haynsworth case ignores several important details that begin to show an emergence of a pattern. Not unlike the Fortas and Parker nominations, Haynsworth initially seemed headed for quick confirmation. He

²¹⁷ Abraham, *Justices, Senators, and Presidents*, 11.; John Frank, *Clement Haynsworth*, 101-117.

²¹⁸ *Ibid.*, 218.; Simon, *Advice and Consent*, 284-285.

²¹⁹ During the Senate Judiciary Committee hearings, it was pretty much established that poorly written rules of disqualification actually required Haynsworth to sit in these cases (Frank, *Clement Haynsworth*, 68).

²²⁰ Simon, *Advice and Consent*, 290.

²²¹ *Ibid.*; Abraham, *Justices, Senators, and Presidents*, 10.

had several benefactors in the Senate who had pledged to do whatever they could to help pave his way onto the Court, and the ABA rated Haynsworth well-qualified to serve on the bench.²²² However, as with the Fortas nomination, time was a major ally of the opposition forces. One of the first blows to the nomination, and one that Professor John Frank believes eventually proved to be fatal, was the death of Senator Dirksen in early September. Senator Hugh Scott (R-PA) replaced Dirksen as Senate Republican Leader, and he would eventually oppose Haynsworth's confirmation.²²³ Additionally, the death of Dirksen delayed the Judiciary Committee hearings on the nomination by a week, providing the opposition with an extra week to get itself organized, and to further investigate Haynsworth and the charges against him.²²⁴

Indeed, as late as September 24th, before his opponents testified before the Judiciary Committee, both Senate supporters and opponents of Haynsworth believed he would be confirmed.²²⁵ The ethical charges against Haynsworth were rather complicated, and it is not necessary to go into any further detail about them, except to say that at least one set of charges was mostly debunked during the Judiciary Committee hearings.²²⁶ With the exception of the ethical charges, the opposition to Haynsworth eerily shadowed the opposition to his friend and mentor, Judge Parker, in 1930. Both labor and civil rights leaders attacked Haynsworth and his record, and most of the opposition against Haynsworth was ideological. Things turned against the nomination in a matter of two weeks, and by the week of October 10th a UPI poll showed more senators opposed to the nomination than in favor.²²⁷ The opposition of the Republican leaders, Senators Scott and Griffin, especially hurt Haynsworth's chances of success. Both

²²² Frank, *Clement Haynsworth*, 24, 26, and 29.

²²³ Dirksen's death may not have had the effect Frank believes it did, simply because it is quite possible that had he lived, Dirksen would have repeated his performance during the Fortas nomination and withdrawn his support from Haynsworth once the charges against the judge eroded the Senate's support for him.

²²⁴ Frank, *Clement Haynsworth*, 26, 31, & 90.

²²⁵ *Ibid.* 35.

²²⁶ *Ibid.*, 36-44.

²²⁷ *Ibid.*, 65.

senators were locked in tight re-election races, and in the face of a one-sided campaign against Haynsworth's nomination, they had nothing to gain, and everything to lose from supporting him.²²⁸

One of the reasons for the quick swing against the Haynsworth nomination is the poor management exhibited by the Nixon White House. The perfunctory background check the FBI performed on Haynsworth left hidden the second and more damaging conflict of interest charge. Further, although President Nixon himself had assured Judge Haynsworth that the conflict of interest charges would be dealt with successfully during the confirmation process, his White House was initially unwilling to respond to queries from any senator other than Senators Eastland and Hruska.²²⁹ This prevented them from sharing critical information with senators, such as Senator Marlow Cook (R-KY), valiantly trying to defend the nomination. Inexplicably the White House itself was also much too slow in rebutting the ethical charges lodged against Judge Haynsworth, which might have been neutralized had they been responded to more immediately.²³⁰ As Haynsworth's cousin Harry, an aide during the confirmation fight, said, "the offense was always moving more quickly than the defense and somehow the truth never caught up."²³¹ Finally, when the Nixon team did decide to go all out to secure Haynsworth's confirmation, they ended up going too far in the other direction, and applying too much pressure on the wrong senators, who were needlessly antagonized by White House tactics.²³² President Nixon basically agreed with this assessment, for which he blamed Attorney General John Mitchell. Nixon faulted Mitchell for not having all of the facts about Haynsworth, for coasting on the assurances of Senators Eastland and Ernest Hollings (D-SC) instead of really working for

²²⁸ Ibid., 73.

²²⁹ John W. Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court* (New York: The Free Press, 2001), 17.; Massaro, *Supremely Political*, 94-96.

²³⁰ Massaro, *Supremely Political*, 94-96.

²³¹ Frank, *Clement Haynsworth*, 94.

²³² Massaro, *Supremely Political*, 96-104.

the nomination, and then for keeping the White House Congressional liaisons out of the fight until it was too late. Finally, the President concluded that at the end Mitchell had overplayed his hand by putting excess pressure on some, which backfired.²³³

Although, fifteen senators publicly associated their opposition to Haynsworth with the ethical charges raised against him, these charges probably served as subterfuge, allowing many of them to oppose Haynsworth for ideological reasons. Several of President Nixon's advisors drew this exact conclusion, and there is only specific evidence that five conservative Republican senators actually voted against the nomination because of the ethical issues. Moreover, an analysis of the roll call vote on the nomination by John Massaro indicates that at the very least senators assessed the seriousness of the ethical charges against Haynsworth with an ideological bias.²³⁴ A critical additional piece of evidence is the revelation that Justice Harry Blackmun, who was eventually confirmed instead of Haynsworth, had an almost identical record when it came to recusing himself from cases in which he might have had some sort of financial interest. Similar to Judge Haynsworth, Judge Blackmun had sat in four cases in which he had minute stock interests in one of the parties. The two differences between the judges were that before he sat in the first of these cases, Blackmun had conferred with the Chief Judge of the Eighth Circuit Court of Appeals, who told him that it was appropriate to sit, while Blackmun also recused himself in a fifth case which occurred *after* the criticism of Haynsworth by the Senate.²³⁵ However, Blackmun was considered more liberal than Haynsworth on key issues, and the Senate was exhausted after two long confirmation fights. Southern senators bemoaned the double standard applied by the Senate, but it clearly demonstrates the increasing importance of a nominee's perceived judicial philosophy, especially when the opposition party controls the Senate.²³⁶

²³³ Dean, *The Rehnquist Choice*, 18.

²³⁴ *Ibid.*, 80-93.

²³⁵ Frank, *Clement Haynsworth.*, 120-122.

²³⁶ *Ibid.*, 124-126.

The next rejection of a Supreme Court nomination would not occur for eighteen years, but when it did come, it was perhaps the culmination of all of the nasty and protracted fights previously discussed. The battle was especially intense because it was moderate Justice Lewis Powell, who often cast the decisive vote in five to four decisions, who was retiring. As mentioned earlier, Judiciary Committee Chairman Biden, who was running for President and truly not interested in a fight over a Supreme Court nominee, had warned President Reagan that Robert Bork would encounter stern resistance from the Senate, and this warning proved to be right on the money.²³⁷ Only forty-five minutes after Reagan announced the nomination, Senator Ted Kennedy (D-MA) took to the Senate floor and attacked it. “Robert Bork’s America is a land in which women be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue policemen could break down citizens’ doors in midnight raids, school children could not be taught about evolution, writers and artists could be censured at the whim of the government.”²³⁸

Although this speech helped to frame the public’s view of Bork, while signaling the ferocity with which liberal Democrats would battle the nomination, it may have hindered the effort to build opposition to Bork *within* the Senate. The speech angered conservative Democratic Senator Dennis DeConcini (D- AZ), who felt that the speech made it impossible for him, or any other moderate Democrat to oppose Bork before the Judiciary Committee hearings. They would have to wait for an intervening reason to oppose Bork, or risk being branded as puppets of the liberal Kennedy. Senator Richard Shelby (D-AL), explained this perfectly saying, “with Senator Kennedy against him, that puts a lot of Southern Democrats in bed with Bork.”

²³⁷ Gittenstein, *Matters of Principle*, 36.

²³⁸ Abraham, *Justices, Presidents, and Senators*, 298.

Shortly after the Kennedy speech, DeConcini sent a letter to his colleagues urging them to take caution in announcing an early position on the nomination.²³⁹

Outside interest groups waged a fierce campaign against Bork, but as Senator Paul Simon, a member of the Judiciary Committee during the Bork hearings, wrote, the campaign was not what defeated Judge Bork. ““What defeated Robert Bork in the Judiciary Committee hearings was Robert Bork.””²⁴⁰ Simon believed that when the hearings began, Bork would have made it through the committee favorably by a margin of nine to five or eight to six. Additional evidence that the campaign by outside groups is not what defeated Bork— which flies in the face of conservative rhetoric - comes from former Judiciary Committee Chief Council Mark Gittenstein’s account of the Bork nomination.²⁴¹ He writes of several occasions in which the civil rights community or other liberal interest groups were dissatisfied with Chairman Biden’s strategy for opposing the Bork nomination.²⁴² More significantly, Gittenstein notes the results from a Democratic poll after the nomination had failed, and only 20% of respondents had seen a negative print ad- on which most opposition group money had been spent. Ninety-four percent of the respondents said that they had based their decision to oppose the nominee on information from television news coverage, 76% from information from other media news coverage, and 61% from following Bork’s own testimony in the hearings. Although some of the ads run against Bork were unfair, the less than \$1 million spent on paid media against the nomination did not defeat it.²⁴³

Judge Bork was indisputably brilliant, but he had written volumes of controversial opinions, articles, and speeches against almost every single important “liberal” decision that the

²³⁹ Gittenstein, *Matters of Principle*, 56 & 139-140.

²⁴⁰ Simon, *Advise and Consent*, 52.

²⁴¹ Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Carbondale and Edwardsville: Southern Illinois University Press, 1998), 155-159.

²⁴² Gittenstein, *Matters of Principle*, 84 & 100.

²⁴³ *Ibid.*, 274.

Supreme Court had ever authored. He criticized the one-man, one-vote decision, the decision finding a right to privacy in the Bill of Rights, the decision striking down Virginia's poll tax in 1966, etc.²⁴⁴ In spite of this record, White House Chief of Staff Howard Baker and his aides decided to employ the internally controversial strategy of re-branding Bork in the model of the moderate Justice Powell. This strategy opened the door to criticism that the Bork being portrayed by the White House was not the real Robert Bork. It would backfire when, perhaps because of his voluminous writings, Bork chose to disregard the Frankfurter principle, and to engage the Judiciary Committee on the major issues of the day. He would pay the price for both this decision, and his tendency to lecture the committee members. One other issue that played a minor role in Bork's confirmation hearings was previously discussed with regard to the actions of Roger Taney during the fight over the National Bank. Bork had been the Solicitor General who fired Special Prosecutor Archibald Cox during the "Saturday Night Massacre," after President Nixon told both the Attorney General and the Deputy Attorney General to do so, and instead, they refused and resigned. Many felt that Bork's actions that night had been illegal, but this too did not cost him a seat on the Supreme Court.²⁴⁵ In the end, Robert Bork is not on the Supreme Court almost entirely because of his conservative, some might say extreme, views and judicial philosophy.

The Judiciary Committee reported his nomination unfavorably by a nine to five margin with all committee Democrats and Senator Arlen Specter (R-PA) voting against the nomination. In its report, the committee cited an exchange between Senator Simon, and Bork, in which Bork affirmed his belief that when a Court adds to one person's constitutional rights it subtracts from the rights of others, calling it "a matter of arithmetic."²⁴⁶ The report also cited the opinion of

²⁴⁴ Ibid., 83-88. Simon, *Advice and Consent*, 51.

²⁴⁵ Vieira and Gross, *Supreme Court Appointments*, 107-115.

²⁴⁶ Ibid., 61.

conservative Democratic Senator Howell Heflin (D-AL) that a lifetime appointment to the Supreme Court was too important to risk on a person who continued to exhibit a “proclivity for extremism in spite of the confirmation process.”

Besides Heflin, Senator DeConcini was the committee Democrat most likely to support Bork, but he was a strong supporter of equal rights for women, and Bork’s answers to his questions on the topic probably cost him DeConcini’s vote. These answers were indicative of Bork’s answers to many questions from both friend and foe on the Judiciary Committee. They were technically correct, at least from Bork’s philosophical vantage point, but they were not “plain talk” that the average American could understand. Time and again senators would ask Bork a question on a broad policy level, and he would respond with an answer on a technical level. In fact, Bork would frustrate Senator Hatch to no end, because the senator was intentionally lobbing soft ball questions with which Bork could hit home runs, but the overly defensive nominee repeatedly failed to do so.²⁴⁷

Indeed Mark Gittenstein credits an exchange during the last day of the Judiciary Committee hearings in which Bork missed or chose to ignore a broader point from the moderate Senator Specter as the moment the nomination died. Bork had issued a ruling while on the Court of Appeals for the District of Columbia Circuit that was technically/legally correct, but whose effect was to present women with the choice of being sterilized or losing their jobs. Specter understood the technical grounds on which Bork had ruled, but he told the judge a story from his days as a district attorney in Philadelphia. The moral of the story was that judges have a broader responsibility to do justice in spite of procedural or technical realities. The aloof Bork responded

²⁴⁷ Gittenstein, *Matters of Principle*, 231-232 & 243-244.

that the idea was an “interesting concept.” This exchange cemented Specter’s opposition to the nomination, and he announced his decision the following day.²⁴⁸

Although five other Republicans joined Specter in voting against Bork, what killed the nomination was the opposition from southern Democrats. After Bork’s nomination, law professors and other legal experts had spent several weeks briefing Chairman Biden as he tried to both understand the nominee’s views, and to construct the best strategy to fight the nomination. He concluded from the briefings that the best way to do so was to highlight Bork’s belief that the Constitution did not include a generalized right to privacy.²⁴⁹ His aides wanted to confirm that their boss was right before Biden employed this strategy in the Judiciary Committee hearings. The anti-Bork interest groups happened to be funding a poll on the issues raised by the nomination, and Biden’s aides asked pollster Tom Kiley to oversample Specter’s home state of Pennsylvania and Heflin’s state of Alabama. Kiley believed his results to show that the privacy argument was not effective. Wanting to be sure that Kiley was correct, Biden’s strategists took the cross tabulations from the poll to Biden media consultant Pat Caddell, who explained that to the contrary, the privacy issue was the issue that connected best with the white southern voters whose opinions influenced conservative southern Democratic senators. Caddell prepared a memo to Democratic senators, which displayed that 71% of white southerners were less inclined to support the Bork nomination after hearing that he did not believe that the Constitution recognizes a generalized right to privacy.²⁵⁰

In 1987, the southern Democratic senators were not the entrenched and ferocious conservatives who helped to defeat the nomination of Abe Fortas to be Chief Justice. Instead, most of them were more moderately conservative, and five of them were freshman senators.

²⁴⁸ Ibid., 289-290.

²⁴⁹ Ibid., 102-112.

²⁵⁰ Ibid., 113-116.

President Reagan had campaigned against these freshmen specifically on the issue of judicial nominations, and the strategy had failed. Although four of them had received a minority of the white votes cast, all five were elected thanks to huge amounts of black support. From the beginning, these new senators remembered the tactics employed by President Reagan against them, and according to a cloakroom ballot early in the struggle, opposed the nomination. Yet, they wanted a more senior southern Democrat to take the lead.²⁵¹ That senator would end up being Louisiana's conservative J. Bennett Johnston. After a post – Judiciary Committee hearings poll showed that a majority of both southerners and southern whites opposed Bork's nomination, Johnston would announce his opposition to Bork, and his more junior southern colleagues would soon follow suit. Johnston succinctly summarized the reason that Bork would fail to be confirmed by a fifty-eight to forty-two vote. ““What comes through is a brilliant professor, a fine lawyer, I think I would hire him as my Solicitor General, if given a chance. And I think he is honest, I have no quarrel with his honesty. But what it (the hearings) shows is a scholarship devoid of moral content. He misses the spirit of human rights in the Constitution.””²⁵²

Bork's defeat would have much in common with the final crucial case study from the Fourth Era of Advice and Consent- Democrats controlled the Senate, Joe Biden chaired largely the same Judiciary Committee as reported Bork's nomination unfavorably, the nominee was an extreme conservative, and southern Democrats controlled the fate of the nomination. However, two crucial differences explain why that nominee made it onto the Court and Bork failed. Although much less qualified than Bork, Clarence Thomas was African-American, which helped him to win the support of many of the same southern Democrats who opposed Bork, and as John Massaro argues, President George H.W. Bush was willing to, and did use any means necessary

²⁵¹ Ibid., 277-286.; Vieira and Gross, *Supreme Court Appointments*, 154.

²⁵² Ibid., 287,290, & 310.

to get his nominee onto the Court.²⁵³ By contrast, in 1987, President Reagan had spent the entire month of August ignoring the Supreme Court fight while vacationing, did very little personal lobbying of senators, and waited a full three weeks after Bork personally requested to his advisors that he give a speech supporting the nomination before doing so.²⁵⁴

It is quite tempting to exclude the case of Justice Thomas from this discussion of the advice and consent process, because it is in many ways anomalous. In spite of his conservative ideology, Thomas was headed for confirmation by a safe margin when his nomination was rocked by lurid accusations of sexual harassment that came quite close to derailing Thomas' ascension. However it is an important case, if only because it shows that even in the Fourth Era of Advice and Consent, a carefully chosen nominee backed by excellent strategic management from the White House can be confirmed in spite of an extreme judicial philosophy, non-ideological charges, and a Senate controlled by the other party. Thomas was almost the perfect nominee because he was a black conservative who truly personified the American Dream.

The Bush administration wisely decided to employ what would come to be known as the Pin Point strategy, named after the poor Georgia town in which Thomas grew up. The idea was to focus attention on his rags to riches background, thus deflecting attention from his reactionary philosophy.²⁵⁵ The other benefit to Thomas's nomination was his race. Thomas' race split the civil rights community, preventing the sort of immediate and unified opposition that had hurt the Bork nomination. It was only after almost a month of positive momentum for the nomination that the NAACP finally announced its opposition to Thomas. Many of the organization's liberal allies

²⁵³ John Massaro, "Pyrrhic Politics? President Bush and the Nomination of Clarence Thomas," in *Honor and Glory: Inside the Politics of the George H.W. Bush White House*, edited by Leslie D. Feldman and Rosanna Perotti (Westport: Greenwood Press, 2002), 277-329.; Massaro actually contends that President Bush would have been in a stronger position when he stood for reelection in 1992 had it not been for the tactics he used to ensure the confirmation of Justice Thomas. 293.

²⁵⁴ Gittensstein, *Matters of Principle*, 180, 270-271, & 305-308.

²⁵⁵ Timothy M. Phelps and Helen Winternitz, *Capitol Games: The Inside Story of Clarence Thomas, Anita Hill, and a Supreme Court Nomination* (New York: HarperPerennial, 1993), 25.

were paralyzed during this month, waiting for the NAACP to make a decision.²⁵⁶ Furthermore, the National Urban League chose to remain neutral, and the Southern Christian Leadership Conference ended up endorsing the nomination, believing it to be the best it could get from the conservative Bush administration.²⁵⁷

Before President Bush nominated Thomas, he had gotten covert back-channel assurances from NAACP executive director Benjamin Hooks that he would personally remain neutral in the confirmation battle, and that he would help if he could.²⁵⁸ Strong evidence also exists that Thomas' race helped to get him confirmed. After meeting with Thomas, black Alabama political kingpin Joe Reed, who was close to Senator Heflin, and had helped elect Senator Shelby, did not take a position on the nomination.²⁵⁹ This was very significant, as Reed had personally met with both senators in 1987 to urge them to vote against the Bork nomination.²⁶⁰ Even more importantly, statistical work done by Marvin Overby et al. shows a positive and statistically significant relationship between the African-American population in a senator's state, and whether or not the senator voted for Thomas' confirmation. The statistical analysis also shows a similar, but stronger relationship between a senator's vote in favor of confirmation, and a variable that included both African-American population and whether or not a senator was up for re-election in 1992. Interestingly, as a whole, the senators up for re-election were less likely to support Thomas' confirmation. When these variables were added into logistic regression models, the percentage of senators whose votes were correctly predicted improved significantly, and the overall model fit also improved over models that only included senators' Americans for

²⁵⁶ Comiskey, *Seeking Justices*, 126-128.

²⁵⁷ Vieira and Gross, *Supreme Court Appointments*, 203.

²⁵⁸ *Ibid.*, 12, & 74.

²⁵⁹ Phelps and Winternitz, *Capitol Games*, 144-146.

²⁶⁰ Vieira and Gross, *Supreme Court Appointments*, 164.

Democratic Action voting scores from 1990, their parties, and a constant.²⁶¹ This leads Michael Comiskey to conclude that the electoral pressures on several southern Democrats facing reelection provided Thomas with his three-vote margin of victory.²⁶²

Thomas was also the beneficiary of a great deal of good luck during the confirmation process. First and perhaps foremost, the logical leader of the Senate opposition to Thomas and his conservative philosophy, Senator Kennedy, was unable to fulfill the role he had played during the Bork hearings. Earlier in 1991, Kennedy had made headlines during a drunken night of cavorting around a family estate in Palm Beach, during which his nephew was accused of raping a woman. This incident prompted the senator to attempt to maintain a low profile, which kept him from giving anything like the fire and brimstone speech he had delivered against Judge Bork. Indeed, it was his staff that first received a tip about the possibility of charges of sexual harassment against Judge Thomas, but Kennedy wanted no part of publicizing such charges because of his personal situation.²⁶³

Kennedy was not the only senator whose personal peccadilloes impacted his conduct during the Thomas confirmation process. Senator Charles Robb (D-VA), ended up voting in favor of Thomas because he had been accused of having an extra-marital affair, which “gave him an understanding of allegations that were untrue, and unprovable.”²⁶⁴ Senator DeConcini (D- AZ) supported Thomas both in the Judiciary Committee and on the Senate floor, in part because he hailed from a conservative state, had been severely tarred by the Keating Five Scandal, and did not want to further damage his chances of being reelected in 1994.²⁶⁵ Similarly, Senators Biden, Metzenbaum, and Cranston had recently been involved in some sort of scandal

²⁶¹ L Marvin Overby et al., “Courting Constituents? An Analysis of Senate Confirmation Vote on Justice Clarence Thomas,” *American Political Science Review* 86, no. 4 (1992): 999-1001.

²⁶² Comiskey, *Seeking Justices*, 53.

²⁶³ *Ibid.*, 28 & 124.

²⁶⁴ *Ibid.*, 400.

²⁶⁵ *Ibid.*, . 214-215.

and were thus reluctant to raise ethical questions about a nominee, especially after a conservative group ran a television ad criticizing Biden, Kennedy, and Cranston for their ethical improprieties.²⁶⁶

Further, Thomas benefited from the general reluctance of Judiciary Chairman Biden to raise ethical questions of any sort. In spite of the urging of the other Democratic members of the committee, Biden refused to delve into questions about whether Thomas had billed the government for personal travel during his days as Chairman of the EEOC.²⁶⁷ Had these charges been investigated, they might well have caused Thomas to join Haynsworth and Fortas as Supreme Court nominees defeated by ethical questions that provided cover for ideological opposition. Additionally, Biden bent over backwards in an attempt to be fair towards Thomas during the hearings into Anita Hill's allegations of sexual harassment. He made the controversial decision to prohibit questioning either Hill or Thomas about their personal lives, which prevented senators from questioning Thomas about his use of pornography. The chairman also allowed Thomas and his supporters to testify during times when the national TV audience was highest. This may have impacted public opinion polls, which in turn Senator Simon believed influenced the votes of some of his colleagues.²⁶⁸

Thomas also benefited from weak leadership from Senate Majority Leader George Mitchell (D-ME). Mitchell refused to whip his colleagues to vote against Thomas, which may have contributed to nine Democratic senators providing Thomas with his narrow margin of victory. Mitchell's predecessor as Majority Leader, Robert Byrd (D-WV), who had initially planned to support Thomas, gave an impassioned speech against the nomination after the second round of hearings. It was a speech so powerful that Senator Simon believed it would have

²⁶⁶ Ibid., 124-126 & 266.

²⁶⁷ Ibid., 188-189.

²⁶⁸ Ibid., 394-395.; Simon, *Advice and Consent*, 122 & 125.

switched votes had more of his colleagues heard it, and Thomas probably would have been defeated had Byrd still been the leader of his caucus.²⁶⁹

In a final bit of luck for Thomas, who was chosen for his ideology and not his qualifications, the Democratic members of the Judiciary Committee were unwilling to raise the issue of whether or not an African-American nominee was qualified for the position.²⁷⁰ He had only been on the Court of Appeals for a short time, and had only practiced law for five years. In addition, Thomas had only been rated qualified by a less than unanimous panel of the ABA. This was lower than even the rating bestowed upon the mediocre Judge Carswell, who had at least received a unanimous qualified rating. A brilliant strategic ploy by the White House neutralized this poor rating from the ABA. The reaction of the pro-Bork forces in 1987 when the ABA had rated Bork well-qualified, but with five dissenting votes, had allowed the split vote to have a major negative impact on Bork's nomination. In 1991, White House Spokesman Marlin Fitzwater simply responded to Thomas' much lower rating by saying, "We are very pleased that the ABA's Standing Committee has found Judge Thomas qualified to be an associate justice of the United States Supreme Court." This reaction helped neutralize any potential negative effects from the low ABA rating. To the average American, a rating of qualified sounded good, and without outrage from Thomas's supporters, the news value of the low rating was lost.²⁷¹ Not just the ABA had questions about Thomas's competency, well-respected former Solicitor General Erwin Griswold testified during Thomas' confirmation hearings that he was unqualified to sit on the Supreme Court. Thomas' lack of understanding for the intricacies of Constitutional law also was evident during the hearings, but Democrats felt they would appear racist and elitist if they ridiculed a black nominee for his lack of learning.²⁷²

²⁶⁹ Phelps, and Winternitz, *Capitol Games*, 402 & 403.; Simon, *Advice and Consent*, 128.

²⁷⁰ Simon, *Advice and Consent*, 77-78.

²⁷¹ Gittenstein, *Matters of Principle*, 203-205.; Vieira and Gross, 116-130 & 136-137.

²⁷² Phelps, and Winternitz, *Capitol Games*, 140-141, 184, & 199-201.

The majority of Thomas's first set of hearings dealt primarily with his judicial philosophy and the nominee did not handle himself well. In an effort to distance himself from previous controversial statements, and his rather radical judicial philosophy, Thomas disavowed many of those statements, and made a number of implausible claims before the committee. The most outlandish of these claims came in response to a question from Senator Patrick Leahy of Vermont. Thomas stated that he had not discussed the landmark decision of *Roe v. Wade*, 410 U.S. 113 (1973), in spite of it having been handed down while he was in law school.²⁷³ He went even further, claiming not only that he had never discussed the case, but that he also held no personal opinion about it.²⁷⁴ Thomas's confirmation conversions on every issue from his stance on natural law as it relates to property rights, to his feelings about legendary Justice Oliver Wendell Holmes, created doubt in the minds of many senators as to the nominee's veracity. Thomas also admitted to not having fully read articles he praised in speeches, nor a report he had signed as Chairman of the EEOC.²⁷⁵ After his confirmation, Thomas would acknowledge that he had hidden his beliefs under oath in order to win confirmation. "In the hearing, I played by the rules. And playing by those rules, the country has never seen the real person."²⁷⁶ His implausible answers and confirmation conversions ended up costing Thomas the votes of Senators Biden, Kohl and Heflin. This caused the committee to deadlock seven to seven on the nomination, which sent it to the Senate floor without a recommendation.²⁷⁷

The Anita Hill story has been told many times, and its details are not relevant to the topic of this paper. What is important is that, because of the reticence of Professor Hill, and the actions taken by Senator Biden and his Judiciary Committee staff, the charges of sexual harassment against Judge Thomas came too late in the confirmation process to defeat the nomination. Before

²⁷³ Ibid., 192-194.

²⁷⁴ Simon, *Advice and Consent*, 90.

²⁷⁵ Simon, *Advice and Consent*, 87-92.; Phelps, and Winternitz, *Capitol Games*, 174-193.

²⁷⁶ Comiskey, *Seeking Justices*, 112 & 138.

²⁷⁷ Phelps, and Winternitz, *Capitol Games*, 219-224.; Vieira and Gross, *Supreme Court Appointments*, 208.

the charges became public, many centrist senators had decided to support Thomas' confirmation. As a result, when the hearings dealing with Professor Hill's charges were not sufficiently conclusive to convince these senators that Thomas had definitely harassed Hill, they stuck with their initial decisions to support the nomination.²⁷⁸ As has been noted several times with regard to the failed nominations of Justice Fortas and Judge Haynsworth, the longer the confirmation process is drawn out, the better chance of a nomination failing to secure the advice and consent of the Senate. In the Thomas case, the Senate had agreed to vote on Thomas' nomination before the sexual harassment charges publicly broke. Thus, it would have required the unanimous consent of all senators to postpone the vote. As a result, Senator Jack Danforth (R-MO), Thomas' former boss and Senate patron, and Minority Leader Robert Dole (R-KN), were able to hold the delay for additional hearings to one week. Once a delay became inevitable, Senator Biden had pushed for a two-week delay, but he and Majority Leader Mitchell agreed to the one-week delay. The short length of the delay prevented a full-scale investigation into the charges, left the hearings rushed, and almost definitely impacted critical strategic decisions. This in essence helped lead to the confirmation of Thomas, whose nomination might well have been defeated had the delay lasted an additional two weeks or a month.²⁷⁹

Further, Thomas benefited from the fact that Democrats and Republicans on the Judiciary Committee were operating under vastly different sets of rules during the reopened hearings. President Bush had authorized, ““ a deliberate attack on the character, motives, mental condition and veracity of ... Anita Hill.””²⁸⁰ Senate Republicans, following those orders faithfully, were playing hardball, and were determined to win at any cost. They viewed the process as adversarial, and Senators Hatch and Specter savaged Anita Hill. Chairman Biden even allowed

²⁷⁸ Ibid., 402-411.

²⁷⁹ Ibid., 271-275.

²⁸⁰ John Massaro, “Pyrrhic Politics? President Bush and the Nomination of Clarence Thomas,” 280.

them to accuse Hill of perjury without having any sort of factual evidence to back up their claims.²⁸¹ Senator Danforth, an ordained minister no less, was willing to make such gutter level charges that his legislative director considered resigning. He gave information to the press that Biden had ruled unusable in the hearings, including testimony as to Hill's mental health by psychiatrists who had never met her.²⁸² By contrast, in a scrupulous effort to be fair to Judge Thomas, and to dare to seek the truth, the Democrats on the Judiciary Committee lost sight of the big picture. Judge Thomas also easily intimidated Democratic senators when he accused the committee of lynching him, thus subtly invoking his race and atrocities of the past. This helped flummox Senators Heflin, Biden, and Leahy, and prevented them from asking Thomas truly tough questions.²⁸³ This tactical difference is important, because it demonstrates that if the two parties are operating by different sets of rules, the side willing to use any tactic necessary usually wins the battle over a nomination.

Although Thomas' nomination is eerily reminiscent of the defeated nominations of Bork, Haynsworth and Fortas, it was saved by the impact the nominee's race had on the votes of Democratic senators from states with large African-American populations, the disparity in tactics employed by the two sides, and because Thomas' supporters were able to keep the length of the debate to a minimum. The duration of the confirmation process is perhaps the major difference between the controversial but successful nominations of William Rehnquist and Thomas, and the unsuccessful nominations of Fortas, Haynsworth, and Carswell. In the latter three cases opponents of the nomination were able to drag the confirmation process out long enough to explore ethical charges against the nominee to a degree sufficient to prevent confirmation. In the Thomas and Rehnquist cases, supporters of the nomination successfully truncated the process

²⁸¹ *Ibid.*, 275, 340-346.

²⁸² Comiskey, *Seeking Justice*, 125-126.

²⁸³ Simon, *Advice and Consent*, 111-112.; Phelps and Winternitz, *Capitol Games*, 331-377.

before enough senators could change their minds to deny confirmation. This fits with statistical analysis showing that the longer the duration of the nomination process, the better the chance of a nominee being defeated.²⁸⁴ Thomas' narrow confirmation is to date the last important case study from the Fourth Era of Advice and Consent. There is the potential for the confirmation of Justice Samuel Alito to become an important case study, but it occurred too recently for its effects to fairly analyzed in the appropriate context. The intricacies involved in all of the case studies detailed in the last four chapters help to diffuse potential criticisms of the model of Four Eras of Advice and Consent.

Chapter 8- Answering the Potential Critics

One potential criticism that could be lodged against the model of Four Eras of Advice and Consent is that it ignores or understates the importance of structural and circumstantial factors that have impacted the advice and consent process throughout U.S. history. For those with whom this criticism might resonate, a more reasonable model might be that offered by John Massaro. Massaro's explanation of the defeated nominations of Justice Abe Fortas, Clement Haynsworth, and Harold Carswell begins with the acknowledgement that the perceived ideology of the three nominees was the major factor in all three unsuccessful nominations. However, Massaro cautions that ideology alone would not have been sufficient to bring about the Senate's unfavorable action in any of the three cases. He then explains the role played by conditional as well as uncontrollable factors in determining the success of Supreme Court nominations. Since 1789, Supreme Court nominations made when either the Senate is controlled by the opposition

²⁸⁴ Shipan and Shannon, "Delaying Justice(s)," 656-657.

party, or forwarded to the Senate during the last full year of a President's term, have failed at a higher rate than those sent up when neither condition is present. Eighteen percent of those nominations occurring when one of the two conditions are present have failed, as opposed to only ten percent of nominations when neither condition is present. More significantly, of the fourteen nominations that have occurred when both conditions were present, a whopping ten, or seventy-one percent have failed.²⁸⁵

As Massaro accurately observes, these structural conditions along with ideology alone do not account for defeated Supreme Court nominations, as prior to 1968 only two of twenty-five nominations occurring when just one of the two adverse conditions was present ended in failure. According to Massaro, presidential management is the element, which makes or breaks Supreme Court nominations. Simply choosing to nominate a candidate who is vulnerable to non-ideological, non-partisan charges needlessly increases the opposition. Michael Comiskey would agree with this contention as he cites the results from several studies showing that senators who are ideologically opposed to a nominee will not, in most cases, vote against confirmation unless a good case can be made against a nominee's qualifications or unless the political setting is unfavorable to the President.²⁸⁶ Non-partisan, non-ideological charges can also cause senators who otherwise would support the nominee because of partisan and philosophical agreement to vote against him. More importantly, such charges provide a cover issue, which allows senators who ideologically oppose a nominee to couch their opposition in more noble terms.

Senators who oppose a nominee on ideological grounds risk alienating at least some constituents. However, since most Americans agree that Supreme Court justices ought to possess sufficient ethical sensitivity and competence, opposing a nomination on these sorts of grounds is much more acceptable to a senator's constituents. These sorts of non-ideological charges also

²⁸⁵ Massaro, *Supremely Political*, 135-136.

²⁸⁶ Comiskey, *Seeking Justices*, 63.

can cause senators to be reticent about publicly supporting a nominee, for fear of further revelations that might embarrass them. A nominee vulnerable to non-ideological, non-partisan charges is also indicative of a sloppiness in the White House vetting process, which provides even less incentive for senators to come to the aid of the President and his embattled nominee. Finally, as is exemplified by some of the case studies, poor post nomination strategic decisions or execution by the White House can also doom a controversial nomination.²⁸⁷

Hence, Massaro posits a sort of model, which explains that opposition to a Supreme Court nominee's judicial philosophy is latent, and can be activated and enhanced by either poor timing or greater natural partisan or ideological opposition to the President in the Senate. This leads to serious trouble for a nominee when it is coupled with a useful non-ideological, non-partisan cover issue that senators can use as a sort of rhetorical club to bludgeon the nomination to death.²⁸⁸ Although Massaro's model fits with much of the evidence in this paper, several recent cases raise questions as to whether it is any more accurate or insightful than the era based model. The previously discussed case of Justice Thomas certainly seems as though it should have been defeated according to the Massaro model. There was ample ideological opposition to the conservative Thomas, Democrats controlled the Senate 57-43, and the helpful charge of sexual harassment emerged to provide cover for senators who wanted to oppose Thomas because of his ideology without risking a backlash from their constituents. Indeed Professor Massaro himself acknowledges that Thomas' very narrow confirmation seems to have much more in common with the cases of defeated nominations, than with the cases of other successful nominations.²⁸⁹

However, it is not just the Thomas case that would call into question the validity of Massaro's model. The initial nomination of William H. Rehnquist to the Supreme Court also

²⁸⁷ Ibid., 140-142.

²⁸⁸ Ibid., 197.

²⁸⁹ John Massaro, E-mail message to Brian Rosenwald, February twentieth, 2006.

bears all of the hallmarks of a nomination that should have been defeated. There was substantial ideological opposition to the nomination of Rehnquist, indeed enough to trigger a filibuster led by Senator Birch Bayh of Indiana. Democrats controlled the Senate by a 54-44 margin, and the nomination of Rehnquist was forwarded to the Senate in October of 1971, just barely outside of the final year of President Nixon's term.²⁹⁰ Moreover, senators were given a perfect non-ideological, non-partisan charge to use to cover ideological opposition to Rehnquist's nomination when he was accused of harassing African-American voters at the polls in Arizona in 1964. Lastly, a memo written by Rehnquist during his days as clerk to Justice Robert H. Jackson was revealed to have supported upholding the doctrine of separate but equal.²⁹¹ Yet the Senate, probably because of his undeniable brilliance, approved the Rehnquist nomination by a 62-26 margin.²⁹² Massaro himself admits that his model is not intended to be deterministic, and that successful post nomination presidential management can pull out a nomination tottering on the brink of defeat.²⁹³ Thus, using structural and conditional factors to set out a model of defeated Supreme Court nominations may not be any more accurate than the model set out in this paper.

Two other examples from the academic literature that suggest a role for structural or conditional factors actually show the benefit of the model of Four Eras of Advice and Consent. As John Maltese correctly notes, only eleven of twenty men nominated by unelected Presidents have made it onto the Court. Maltese is however quick to point out that this phenomenon might in fact be more related to eras, as all nine nominations made by unelected Presidents since Chester A. Arthur in 1882 have been confirmed. A final example comes from the work of Charles S. Shipan and Megan L Shannon. Their findings show that between 1866-1994, divided

²⁹⁰ Abraham, *Justices, Presidents, and Senators*, 269-270.; Party Division in the Senate 1789-Present, accessible via http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm

²⁹¹ Fred P. Graham, "2 Negroes from Phoenix Arizona, say Rehnquist Harassed Blacks at Polls in 1964," *The New York Times*, November 16th, 1971.; Fred P Graham, Rehnquist Says '52 Memo Outlined Jackson's Views," *The New York Times*, December 9, 1971, 26.

²⁹² Fred P. Graham, "Rehnquist is Confirmed as Liberal Opposition Fails," *New York Times*, December 11th, 1971.

²⁹³ Massaro, E-mail Message.

government and the ideological distance between the President and the majority party in the Senate have increased the duration of confirmation battles at a statistically significant level. However, their model does not account for the fact that, as previously discussed, the confirmation process has gotten progressively longer in duration during the course of the twentieth century. Their model might even be skewed as the vast majority of nominations made during divided government have occurred since 1955, when the process was getting longer for reasons such as increasingly involved confirmation hearings, and the introduction of judiciary committee investigative staff.²⁹⁴

²⁹⁴ Shipan and Shannon, “Delaying Justice(s),” 660-666.

Chapter 9- So What About the Filibuster, and What Does This All Mean?

An appropriate place to end this paper is with the recent charge of Senate Majority Leader Bill Frist (R-TN) that it would have been against the intent of the Founding Fathers to have denied Supreme Court Justice Samuel Alito Jr. an up or down vote on the floor of the United States Senate.²⁹⁵ The only conclusion that can be reached from the history discussed in this paper, as well as modern scholarship on the topic is that Frist is at best deluding himself, or at worst lying to the American people. It is almost impossible to discern the intent of the Framers with regard to the Advice and Consent Clause, beyond saying that they intended for the Senate to play a robust role in the process of placing Supreme Court justices on the bench. Additionally, none of the history shows that the Senate has ever interpreted the Advice and Consent Clause to require an up or down vote for each nominee on the floor of the Senate. Indeed, the nomination of Stanley Matthews in 1881 never left the Judiciary Committee, while Abe Fortas failed to receive an up or down vote on his nomination to be Chief Justice in spite of being reported out of the Judiciary Committee favorably. Similarly, the late Chief Justice Rehnquist saw his

²⁹⁵ Ceci Connolly, "Frist Cautions Senators Against Stalling Alito Vote, *The Washington Post*, national edition, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/11/AR2005121100344.html> (accessed December 22, 2005).

nominations as both Associate Justice and Chief Justice filibustered, while John Meredith Read saw the Senate fail to act at all upon his nomination.²⁹⁶

To justify Frist's argument one must read the facts in a very slanted manner. First they must see a fundamental difference between blocking a nominee in committee and filibustering a nominee on the floor of the Senate. Professor John Eastman has concisely laid out the argument for this conception of Senate procedure. He views committee procedures that delay or deny a vote on a nomination to exist with the acquiescence of the majority of the Senate. By contrast, a filibuster is used to thwart the will of the majority of the Senate.²⁹⁷ Professor Michael Garhardt points out the flaw in this argument by noting that the unanimous consent of all senators is required for a successful petition to discharge a nomination from committee.²⁹⁸ Eastman's position also assumes that the Constitution requires confirmation of a nominee simply because the majority supports him. As Professor Garhardt rightly observes, the Appointments Clause makes no such contention. It says nothing about the specific procedures applicable in confirmation proceedings, or about how someone may be denied confirmation.²⁹⁹

Another argument against the Constitutionality of a filibuster against a nomination is that it essentially creates a requirement for supermajority support in order to confirm the nominee. The Framers clearly stated in the Constitution what things would require a supermajority to pass; nominations were not among the items included. This criticism is only valid if the filibuster is unconstitutional in all cases, because nowhere does the Constitution say that all legislation can be required to need supermajority support to be passed. As the Supreme Court has noted, "but

²⁹⁶ Abraham, *Justices, Presidents, and Senators*, 80, 102, 219 & 270.; Linda Greenhouse, "Senate 65-33, Votes to Confirm Rehnquist as 16th Chief Justice After Close of Bruising 5-Day Debate, the Senate Then Votes Unanimously for Judge Scalia," *The New York Times*, September 18th, 1986, A1.; Rehnquist's nomination as Chief Justice was not precisely filibustered. The opponents of the nomination refused to allow for a final vote, and had they defeated a cloture petition, they planned on launching an endless filibuster. However, they were unable to defeat the cloture motion, thus cutting off the debate.

²⁹⁷ U.S. Senate. Committee on the Judiciary. *Judicial Nominations, Filibusters, and the Constitution*, 72.

²⁹⁸ *Ibid.*, 88.

²⁹⁹ *Ibid.*, 27.

there is nothing in the language of our Constitution, our history, or our cases that requires that a majority vote always prevail on every issue.”³⁰⁰ Further, an analysis of discretionary completion and mandatory completion in the Constitution by Adam White concludes that with regards to interbranch interactions and otherwise, the Framers included the word shall when they intended for an action to be mandatory. That construction is not present with regard to the Senate role in the Appointments Clause, but rather only in regards to the behavior of the Executive. This makes the Senate’s role more akin to veto powers, and other matters of discretionary completion.³⁰¹

Frist’s contention also ignores all of the relevant history. This is clear both from the case studies described in this paper and also from scholarly literature. Professors Catherine Fisk and Erwin Chemerinsky, who have written extensively about the filibuster note that there is “no historical basis for the Republican claim that filibustering has not been used to block judicial nominations.”³⁰² The only way to twist the history into supporting the Frist position is to define a filibuster solely as one that successfully blocks a nomination. In that case, the filibuster launched against the nomination of William Rehnquist is not a filibuster, because opponents allowed the nomination to be confirmed due to a lack of support for their filibuster. However, that interpretation ignores the contemporary view of what was happening in the Senate. A December 8th, 1971 article from the *New York Times* quotes Minority Leader Hugh Scott (R-PA) as saying that Senator Birch Bayh was staging a one-man filibuster, and that he had a cloture petition ready for whenever he concluded that two-thirds of the senators would support cutting off debate.³⁰³ A similar effort to filibuster Rehnquist’s nomination to be chief justice failed in 1986, when the Senate invoked cloture allowing for a final vote on the nomination.³⁰⁴

³⁰⁰ Ibid., 95.

³⁰¹ White, “Toward the Framers’ Understanding of Advice and Consent,” 143-148.

³⁰² Fisk and Chemerinsky, “In Defense of Filibustering Judicial Nominations,” 3.

³⁰³ “Rehnquist Backers say Critics Have Begun a Senate Filibuster,” *New York Times*, December 7th, 1971.

³⁰⁴ Greenhouse, “Senate 65-33, Votes to Confirm Rehnquist as 16th Chief Justice, A1.

More fundamentally, for Frist's position to be valid, one must rely on a very convoluted view of history with regard to the nomination of Justice Fortas to be chief justice. This version of history is only even possible because of a letter from Robert Griffin to Senate Republicans in 2003. In this letter Griffin notes that the cloture vote on the Fortas nomination occurred only four days after debate had begun. He accurately recalls the final margin as being forty-five to forty-three in favor of cloture, and states that after reviewing the absentees, he was confident that the majority of the Senate opposed Fortas. Hence he concludes that even if four days of debate could be characterized as a filibuster, the minority certainly was not thwarting the will of the majority. Griffin quotes his own final remarks from the Fortas debate in which he did indeed question whether invoking cloture was appropriate as all of the speeches during the debate had been germane, while the debate over an investment tax credit the previous year had lasted five weeks.³⁰⁵

The backers of this convenient version of history also cite quotes from several senators during the Fortas floor debate claiming that what was occurring was not a filibuster. Regardless, this position is contrary to all non-self serving evidence. Both Fortas biographers, Bruce Allen Murphy and Laura Kalman, consider the nomination to have been toppled by a filibuster. Kalman writes, "Instead he (Senate Majority Leader Mike Mansfield) tried to head off a filibuster by moving that the Senate be allowed to debate the nomination... The majority leader's cleverness did not daunt his opponents, who still began a filibuster."³⁰⁶ Murphy's account is similar, and journalist Robert Shogun's tale of the nomination battle also concurs that the Fortas opponents staged a filibuster.³⁰⁷ Furthermore, even current Judiciary Committee Chairman Arlen Specter (R-PA) admitted during a Senate subcommittee hearing that, "the only occasion where

³⁰⁵ U.S. Senate. Committee on the Judiciary. *Judicial Nominations, Filibusters, and the Constitution*, 220.

³⁰⁶ Kalman, *Abe Fortas*, 355.

³⁰⁷ Murphy, *Fortas*, 519-526.; Shogun, *Question of Judgment*, 180-182.

there had been a filibuster was, as we all know, with Justice Abe Fortas and that was a bipartisan filibuster, and that was a filibuster which involved the issue of integrity.”³⁰⁸

Even if one might agree with Senator Griffin’s contention that four days does not make a filibuster, his contention that the majority of the Senate opposed confirming Fortas to be chief justice, also flies in the face of modern scholarship. John Massaro has concluded that there is an impressive amount of evidence indicating that had the Senate voted directly on the nomination, Fortas would have been confirmed. Massaro does concede the veracity of a statement made by Senator Griffin on the floor in 1968, that counting all senators who did not vote, but were paired in favor or against cloture, forty-seven senators would seem to have been in favor of cloture, and forty-eight opposed. However, he provides evidence that five other senators who did not vote were inclined to favor cloture, while five senators who either voted against or were initially opposed to cloture initially, might well have changed their votes after what they deemed to be a sufficient debate. Finally, Massaro cites primary sources to claim that an additional five senators who opposed cloture were inclined to favor the nomination on a direct vote.³⁰⁹ Massaro’s counts might even be considered conservative, because they fail to include Senators Dirksen or Thomas Dodd (D-CT) who supported the nomination in the Judiciary Committee, but opposed cloture.³¹⁰

All of this is to say that while modern scholars are conflicted over whether the filibuster of judges is Constitutional or unconstitutional, history, the text of the Appointments Clause, and a good deal of scholarship show that while filibustering judges may be unwise, it is certainly not unprecedented, nor against the intent of the Framers of the Constitution, who probably could not have even contemplated the matter.

³⁰⁸ U.S. Senate. Committee on the Judiciary. *Judicial Nominations, Filibusters, and the Constitution*, 17.

³⁰⁹ Massaro, *Supremely Political*, 27-31.

³¹⁰ Murphy, *Fortas*, 515 & 524.

In the end, what do all of these pages of analysis, history, and interpretation mean? The strongest and most reasonable conclusion is that with regard to the Appointments Clause, the intent of the Framers, in so much as they even had a unified purpose, is unknown. The language of the Advice and Consent Clause was left vague, whether purposely or not. This has provided each successive Senate with the ability to interpret its responsibility as it sees fit. Each Senate has clearly done so, neither employing a consistent process when giving advice and consent on Supreme Court nominations, nor applying any sort of steady standard to evaluate each nominee. In fact, within any single Senate, many senators use dichotomous standards when evaluating nominees. The Senate has kept nominees from the bench for a whole host of reasons, employing used a myriad of techniques to do so. The text of debates at the Constitutional Convention makes it clear that the Framers intended for the Senate to be very involved in the process of placing justices on the Supreme Court, which at the very least included serving as a check to prevent poor nominees from making it onto the bench. Indeed, the Senate has done so robustly, and during the one period of history when it was most deferential, the Third Era of Advice and Consent, all eight of the justices rated by academics in 1970 to be failures made it onto the bench.³¹¹ This proves the wisdom of those who interpret the Advice and Consent Clause to require vigorous participation from the Senate, as opposed to merely screening nominees for legal qualifications.

Finally, the model of Four Eras of Advice and Consent is not perfect, but it allows the history to illuminate patterns that explain how the Senate has gone about providing advice and consent. While structural models may seem to provide a clearer picture and more concrete rules that permit future prognostication, they allow nuance to be lost, and the evolution of the process

³¹¹ Abraham, *Justices, Presidents, and Senators*, 369-370.

to be obscured. Hopefully this paper has shown that the era model incorporates the great strengths of these structural models without the same drawbacks.

Table 1

Nominee	Rejected/Postponed/ Not Acted Upon/ Withdrawn	President who nominated (year)	Did President's Party Control Senate?
John Rutledge	Rejected	Washington (1795)	Yes
Alexander Wolcott	Rejected	Madison (1811)	Yes
John Crittenden	Postponed	John Quincy Adams (1829)	No
Roger Brooke Taney	Postponed	Jackson (1835)	No
John Spencer	Rejected	Tyler (1844)	Yes
Rueben Walworth	Postponed	Tyler (1844)	Yes
Edward King	Postponed/Withdrawn	Tyler (1844 & 1845)	Yes Yes
John Read	Postponed	Tyler (1845)	Yes
George Woodward	Rejected	Polk (1846)	Yes
Edward Bradford	Not Acted Upon	Fillmore (1852)	No
George Badger	Postponed	Fillmore (1852)	No
William Micou	Not Acted Upon	Fillmore (1853)	No
Jeremiah Black	Rejected	Buchanan (1861)	Yes*
Henry Stanbury	Not Acted Upon/Court Seat Eliminated	Andrew Johnson (1866)	No
Ebenezer Hoar	Rejected	Grant (1870)	Yes
George Williams	Withdrawn	Grant (1874)	Yes
Caleb Cushing	Withdrawn	Grant (1874)	Yes
Stanley Matthews	No Judiciary Committee Action	Hayes (1881)	No
William Hornblower	Rejected	Cleveland (1893)	Yes
Wheeler Peckham	Rejected	Cleveland (1893)	Yes
John J Parker	Rejected	Hoover (1930)	Yes
Abe Fortas	Withdrawn	Lyndon Johnson (1968)	Yes
Homer Thornberry	Withdrawn	Lyndon Johnson (1968)	Yes
Clement Haynsworth	Rejected	Nixon (1969)	No
G Harold Carswell	Rejected	Nixon (1970)	No
Robert Bork	Rejected	Reagan	No
Douglas Ginsberg	Withdrawn	Reagan	No
Harriet Miers	Withdrawn	G.W. Bush (2005)	Yes

Sources: Abraham, Justices, Senators, and Presidents & Party Division in the Senate 1789-Present, accessible via http://senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.