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The Appointment and Disappointment of Supreme Court Justices

Philip B. Kurland*

The recent controversy over President Nixon's appointments to the Supreme Court, and the institution of impeachment proceedings against Justice Douglas, have raised important questions concerning qualifications for, and behavior of, Supreme Court Justices. In this Article, Professor Kurland discusses the important qualities that a Supreme Court Justice should possess, the various competing pressures that often influence presidential selections, the Senate's proper role in the confirmation process, and, finally—with special emphasis upon the impeachment proceedings against Justice Douglas—the available means of removing incumbent Justices.

An invitation to deliver a series of talks under such distinguished auspices as the Oliver Wendell Holmes Devise—and in such an empyreal location as this Law School affords—may be reason enough for any academic to accept the opportunity. Nevertheless, it seems to me that to warrant the honor and to justify the imposition on the audience, it is incumbent on the speaker to have something to say. I hope that I do.

Perhaps the primary reason that I have for choosing to talk about the appointment and disappointment of Supreme Court Justices is that it is a subject that has not wanted for great attention in recent months. It may appear to some that the extensive coverage already afforded the subject is an even better reason for not addressing the questions involved. But I suggest that much of what has been said and written has been both less and more than the truth. And perhaps a little of my dull prose will afford an appropriate antidote to the colorful tales already recorded. I do not, of course, mean that recent talk about the Court and its Justices has taken the form of "the big lie" that has made us so distrustful of both our national government and our national press. I mean rather that most of the commentary—including some of my own, I must concede—has been in the romantic vein. Whether

*Lectures delivered at Arizona State University College of Law on March 28, 29 and 30, 1972, under the aegis of the Oliver Wendell Holmes Devise.
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it has been damning or praising, it has been shaped in terms of the mystique of an institution that means many things to many men. Unlike most contemporary fiction of note, however, the writing about the Court has featured a hero, even as it assumes the existence of the antihero.

Whether heroes or antiheroes, however, the men who have performed the functions of Supreme Court Justices have been mere men. No record, not Mrs. Bowen's picture of the magnificent Yankee¹ nor even Beveridge's idolatrous biography of John Marshall,² has revealed men of superhuman accomplishments. And, if Marshall does not qualify for the status of a human god or a human devil, as the case may be, certainly no other Justice does. Such is not the stuff of which judges are made.

The distortions of fact to which I have alluded are quite clearly a response to the Supreme Court rather than to the men who served it and to the symbol rather than the reality. For the Court is a symbol of the majesty of the law and of the never-ending but never-accomplished quest for justice. I certainly would not deny that the symbol may be more important than the reality. Professor Whitehead often reminded us that we live by symbols,³ and so too did the jurist whose name these lectures bear. I may then, in what I am about to say, only demonstrate once again the validity of Coleridge's proposition: "How mean a mere fact is, except in the light of some compulsive truth."⁴ I have, however, only facts and no "compulsive truth" to offer you.

I want to discuss who some of these judges were, how they came to be appointed, why some were rejected when they proved disappointing, and even how and why they were forced, cajoled, or convinced to surrender the great mantle that was theirs. Obviously I cannot here tell the tale in full. To do so would certainly be beyond my capacities and your patience. And, in any event, the volumes of the Supreme Court history sponsored by the same source as sponsors these lectures will perform the task more fully—and in proper perspective. My job is but to essay an essay on this subject. I had better get to it.

I. THE APPOINTMENT OF A JUSTICE

Perhaps I can best epitomize my subject by recounting some facts about an historic Supreme Court appointment, one that only infidels, cynics, or scoundrels would—even today—challenge as unworthy.

From 1882 until 1902, Mr. Justice Horace Gray occupied the place on the Supreme Court that was known—until Mr. Justice Frankfurter's retirement—as the “scholar's seat.” Gray's twenty years on the highest court of the land had

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¹ C. Bowen, Yankee from Olympus (1944).
² A. Beveridge, Life of John Marshall (1916–20, 4 vols.).
³ See, e.g., A. Whitehead, Symbolism 88 (1927).
been preceded by eighteen years as Associate Justice and Chief Justice of the Supreme Judicial Court of Massachusetts. By 1902 Gray had expended such energies as he could muster for the public service. His huge, once-strong body was twisted in paralysis. It was no longer possible for him to carry his share of the load. Even while McKinley was still President, Gray’s imminent retirement was rumored. If it had come before McKinley’s death, another would have sat in the seat that became Holmes’. In July 1902 Gray wrote a letter to President Theodore Roosevelt tendering his resignation from the Court to be effective at the pleasure of the President.

The evidence reveals that shortly after receiving Gray’s resignation, Roosevelt quite quickly thought of Oliver Wendell Holmes as his successor. Both Gray and Holmes were from Massachusetts; both had served long and ably on the Supreme Judicial Court and had become chief justice; both came from appropriately distinguished Boston families; both were cold, arrogant, intellectual. Holmes’ career was probably more to Roosevelt’s tastes, for however cerebral, Holmes had been a man of action. None was more likely to subscribe to Holmes’ sentiments as expressed in “The Soldier’s Faith” than “T.R. the Rough Rider” turned President.

In this event, perhaps uncharacteristically, Roosevelt did not act precipitously. In filling this vacancy on the Court, which he regarded as the swing vote, he knew what he wanted and he wanted to be sure that he got it. Thus, although he informed Holmes that he was prepared to nominate him on July 24, 1902, he did not make a public announcement until August 12. In fact, Holmes’ nomination was not sent to the Senate until December 2, where it was quickly processed and confirmed on December 4, so that Holmes could take his seat on December 8. Holmes was equally prudent. He did not resign from the Massachusetts court until after his Senate confirmation.

On July 10 Roosevelt had addressed a letter to Senator Henry Cabot Lodge of Massachusetts, expressing his expectations, his wishes, and his doubts about a Holmes appointment. He wrote that, on the one hand, he was in favor of a judge who could

preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy . . . for the men who most need that consideration.ª

Yet Roosevelt was not naive and he conceded that aloofness—even if it bent in the proper direction—was not all that he really had in mind. The letter

5. See Occasional Speeches of Oliver Wendell Holmes 73 (M. Howe ed. 1962); see also id. at 100, 109, 158.
6. 1 Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge 517 (H. Lodge ed. 1925).
continued with phrases that would not sound alien to any President charged with nominating a Supreme Court Justice:

In the ordinary and low sense which we attach to the words "partisan" and "politician," a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man . . . . Now I should like to know that Judge Holmes was in entire sympathy with our views, that is your views and mine . . . before I would feel free in appointing him.'

It appears that the necessary assurances were forthcoming from both Senator Lodge and his fellow Senator from Massachusetts. George Frisbie Hoar was one of the founders of the Republican Party, which meant that he was liberally inclined—of the camp of Abraham Lincoln and Theodore Roosevelt rather than of Mark Hanna and William McKinley. What is difficult to understand is the basis for such assurances as they were willing to afford that Holmes was a party man.

If the evidence did not differ from the data reported by the press, it was limited, indeed. True, Lodge was a long time friend of Holmes, and at one time they shared an interest in legal history. It was Lodge who conveyed Roosevelt's offer of appointment to Holmes, and Holmes later acknowledged, "[I] suppose I owe my appointment to him or Mrs. Lodge . . . ." But whether Lodge's recommendations were based on supposed knowledge of Holmes' attitudes or on a loyalty that went back to their long friendship, any assurance that Holmes was "a party man" seems attributable either to wishful thinking or to Dr. Samuel Johnson's favorite source of error: ignorance. Or it may be only that our hindsight is far superior to Lodge's foresight on this question.

The public and the press on the other hand quite clearly seemed to rest their approval or disapproval of Holmes' nomination almost entirely on his dissenting opinion in *Vegelahn v. Guntner*. In that case, Holmes first denied a temporary injunction and then dissented from the Massachusetts Supreme Court's grant of a final injunction to an employer against peaceful picketing by a labor union seeking to secure an increase in wages. Holmes' position on the question hardly seems startling today; it has long since been given constitutional sanction. But in 1896, when it was rendered, it was regarded as novel if not revolutionary. The point to be noted here is that for all his years of judicial effort, public opinion about his capacities to sit on the Supreme Court of the United States turned almost exclusively on a result-oriented reading of that single case. Holmes was riled, as he told his good friend Frederick Pollock:

There have been stacks of notices of me all over the country and

7. Id. at 518-19.
the immense majority of them seem to me hopelessly devoid of personal discrimination or courage. They are so favorable that they make my nomination a popular success but they have the flabbiness of... ignorance. ... [A]s to my judicial career they don't know much more than that I took the labor side in Vegelahn v. Gunter and as that frightened some money interests, and such interests count for a good deal as soon as one gets out of the cloister, it is easy to suggest that the Judge has partial views, is brilliant but not very sound, has talent but is not great, etc., etc. It makes one sick when he has broken his heart in trying to make every word living and real to see a lot of duffers, generally I think not lawyers, talking with the sanctity of print in a way that at once discloses to the knowing eye that literally they don't know anything about it."

Holmes was offered balm for his wound by Pollock, a fellow snob, who used language that may strike a note of recognition among our younger generation:

How should the lay gentry, or even the average lawyer, understand the development of the Common Law, or the work of men such as you and Bowen put into it? ... [Y]our work and his have both been thought, at times, by fairly competent persons to be a little too finely edged for cutting the blocks of common business. A crude lay version of this line of criticism seems to have found its way into your newspaper cuttings, though the notion that what is brilliant cannot be sound is dear to our friend the reasonable man, who in the flesh is a Philistine pig, on the general principles of pig-piety.

Wherefore, disquiet not thyself with what he saith, but leave him to worship his god Dagon and divers, to wit, thirty thousand cartloads of other devils, and if he ever gets a soul, the Lord have mercy on it."

Henry James, another of Holmes' friends, who perhaps had a better understanding of human character than did either Lodge or Roosevelt, also commented on Holmes' appointment. According to Leon Edel:

[James] continued to marvel at the Associate Justice's "faculty for uncritical enjoyment and seeing and imagining." What struck him as unusual about Holmes was that he remained himself, in all his integrity, unmodified by time. ... To the new Associate Justice Henry wrote, "You were born historic."

The key word is integrity, and for Holmes judicial integrity called for the exclusion of political bias. Roosevelt may have wanted a partisan, but there was almost nothing of the political partisan in Holmes because there was almost nothing political about him. Politics—nay, public events—made no call on him. Imagine a man, let alone a public man, who, in the days before radio or television, chose not to read newspapers. This Yankee from Olympus suffered none of the emotional hangups of the gods that once inhabited that place: he was more Yankee than Olympian. He served in the Union.

11. Id. at 107.
12. L. Edel, supra note 4, at 165.
army from a sense of duty not because of belief in the cause. His tempera-
ment was as cold and detached as that of any man who ever donned the
black robes of justice. Roosevelt had asked for aloofness. That he certainly
got. It is not strange that he didn't fully appreciate it.

It wasn't long into Holmes' tenure on the Supreme Court that he was
called upon to pass judgment on an important element of Roosevelt's trust-
busting campaign. The prosecution of J.P. Morgan's railroad consolidation,
which followed hard on the heels of that tycoon's successful merger of the
steel industry, culminated in the Northern Securities Case with a five-to-
four victory for the government. Lo and behold, Holmes wrote a dissenting
opinion. Even Holmes' most ardent admirers later found it necessary to
excuse his conclusion. Roosevelt and Lodge were allegedly outraged. Although
one Roosevelt biographer denied any resulting coolness on Roosevelt's part
toward Holmes, there is ample testimony from Holmes himself about the
reaction. Thus, while Pringle cited the absence of any documentary evi-
dence in Roosevelt's files expressing a distaste for Holmes' position in Northern
Securities, he advanced a documented anecdote apparently to support the
continued exchange of at least biting humor between them. Typical of the
Holmes reporting is a letter to Pollock of a much later date:

A good letter from you, just after reading Theodore Roosevelt &
His Time, a class of work that I eschew. Of course I pretty well made
up my package about him a good while ago, and I don't think I was
too much disturbed by what you admit to and what was formulated
by a Senator in his day, thus: "What the boys like about Roosevelt
is that he doesn't care a damn for the law." It broke up our incipient
friendship, however, as he looked upon my dissent to the Northern
Securities Case as a political departure (or, I suspect, more truly,
couldn't forgive anyone who stood in his way). We talked freely
later but it never was the same after that, and if he had not been
restrained by his friends, I am told that he would have made a
fool of himself and would have excluded me from the White House—
and as in his case about the law, so in mine about that, I never
care a damn whether I went there or not. He was very likeable,
a big figure, a rather ordinary intellect, with extraordinary gifts, a
shrewd and I think unscrupulous politician. He played all his cards—
if not more. R.i.p.16

II. THE SUPREME COURT FUNCTION

The facts about the Holmes nomination may be taken as typical of the
High Court appointment process, however atypical the appointee in the case
described. Some if not all of the factors that call for notice were present
here: Presidential predilections; the role of the Senate and of Senators (the

15. Id.
16. 1 HOLMES-POLLOCK LETTERS, supra note 10, at 63–64.
two are not the same); the absence of hard data on which judgments are in fact based; the part to be played by the press and the bar; the element of chance; and the existence or nonexistence of competing claims to the office.

At the outset, I would suggest that the prime difficulty in evaluating appropriate standards for such appointment—assuming the appointments are to rise above mere personal preferences—is the absence of consensus or understanding of what the proper duties of a Supreme Court Justice are. If we are to essay a description of what talents, capacities, and experience an appointee should have, surely we must do so in light of what we expect him to do.

It may be that, just as every private in Napoleon’s army was assumed to carry a marshal’s baton in his knapsack, so too every lawyer in the United States may be considered to hang the judicial robes of a Supreme Court Justice in his closet. Surely it is true that every time a vacancy on the Supreme Court occurs, the hearts of a very large number of American lawyers beat faster in anticipation of the impossible. But the fact is that neither the marshals of France nor the Justices of the Supreme Court—with notable exceptions in both cases—have risen from the ranks. Obviously not every member of the bar qualifies for the post; yet it is equally clear that only lawyers can qualify. Whatever its powers, the Court’s processes are those of judicial resolution of controversies between litigants. However diluted it may have become, the constitutional requirement for a case or controversy remains. If the controversies calling on the Court’s judgment must be resolved in a way that establishes doctrine for applications beyond the immediate case, the process for resolution is the time-honored method of appellate courts and not that of the legislative or executive branches of the government. Hence the need for lawyers, or so it has always been assumed.

In its broadest description, the work of the Court falls into two compartments. On the one hand, the Court is to be the voice of the majority in determining the meaning of legislative enactments. Certainly in matters of statutory construction, the Court has no mandate other than to effectuate the will of the legislature; it is not expected to substitute its own. To distort congressional purpose or to supplant congressional objectives with its own is clearly to usurp a power that does not belong to it.

On the other hand, the Court has the even more important role of restraining the majority will in accordance with the principles established by the Constitution. It is here that the Court is most likely to be involved in public controversy. The task of thwarting the expression of the majority—however temporarily—to protect individuals and minorities from what Tocqueville called the tyranny of the majority, is a vital task in a democratic society and one that is never likely to be popular.
Although public attention is likely to be focused on the constitutional problems that bedevil the Court, problems of statutory construction make demands on the jurists that are not easily met. I recall the description by the one judge above all whose judgment I respect in this regard, Judge Learned Hand:

[H]is task . . . is no less than to decide how those who have passed the "enactment" would have dealt with the "particulars" before him, about which they have said nothing whatever. Impalpable and insoluble as that inquiry may be, the method which he must pursue is toto coelo different from that open to him, were he free to enforce his own choices.

What then are the qualities, mental and moral, which best serve a judge to discharge his perilous but inescapable duty? First he must be aware of the difficulty and the hazard. He must hesitate long before imputing more to the "enactment" than he finds in the words, remembering that the "policy" of any law inheres as much in its limits as in its extent. He must hesitate long before cutting down their literal effect, remembering that the authors presumably said no more than they wanted. He must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower. Of the moral qualities necessary to this, before and beyond all he must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgments; he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment. There are those who insist that detachment is an illusion; that our conclusions, when their bases are sifted always reveal a passionate foundation. Even so; though they be throughout the creatures of past emotional experience, it does not follow that the experience can never predispose us to impartiality. A bias against bias may be as likely a result of some buried crisis, as any other bias. Be that as it may, we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered.

Hard as is the task of statutory construction, constitutional exegesis is far more difficult. It is more difficult because some words of constitutional command—due process of law, equal protection of the laws, privileges and immunities of citizenship, to suggest a few—are likely to be even more Delphic than those of the most abstruse statute. It is more difficult because a constitution often seeks to protect inconsistent purposes and conflicting values. It is more difficult because the constitutional language is usually a product of a society remote from the one in which the words are sought to be applied.

To apply a constitution drafted for a bucolic people to an urbanized one, to apply a constitution created for a society of artisans, mechanics, and merchants, all of whom were individuals, to a society where capital and labor are equally collectivized; to apply a constitution drafted when communications and transportation depended on the horse, the canal, the ship, or even the railroad, to one that receives messages from alien planets, certainly is an awesome task. It is no less so when the government that the constitution was intended to tether invades every nook and cranny of everyone’s life, often with, frequently without, his consent.

Mr. Justice Frankfurter described the demands of the office, long before he became a Justice:

Of course a Justice should be an outstanding lawyer in the ordinary professional acceptance of the term, but that is the merest beginning. Once recognize the true nature of the judicial process in these constitutional cases, and the determining factors in the qualifications of a Justice become his background, the range of his experience, and his ability to transcend his experience. For the part played by the familiar and the unconscious is tremendous. . . .

With the great men of the Court constitutional adjudication has always been statecraft. The deepest significance of Marshall’s magistracy is his recognition of the practical needs of government, to be realized by treating the Constitution as the living framework within which the nation and the States could freely move through the inevitable changes wrought by time and inventions. Those of his successors whose labors history has validated have been men who brought to their task insight into the problems of their generation. . . . Not anointed priests, removed from knowledge of the stress of life, but men with proved grasp of affairs who have developed resilience and vigor of mind through seasoned and diversified experience in a work-a-day world are the judges who have wrought abidingly on the Supreme Court.18

A capacity for disinterestedness and the statesmanship derived from the experience of dealing with important and basic issues in the real world are not alone sufficient for the work that is done daily by the Supreme Court of the United States. I should add qualities described by Cardozo when speaking about constitutional adjudication. The “chief worth” of the Court is “in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges.”19 It is, he said, a power to be “exercised with insight into social values, and with suppleness of adaptation to changing social needs.”20 Finally, I would add still another capacity that is perhaps the most difficult of attainment but nevertheless of utmost importance if the judiciary is to play its role in American constitutional government.

20. Id.
This time I use the words of Mr. Justice Brandeis, in a different context from that in which they were uttered, but proved even more by his practice than by his preachment. Speaking of the proper role of the judge, he said:

He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority.21

To some it might appear that once again I have been led—and seek to lead you—down the garden path by reliance on those who were adherents to the concept of judicial restraint. After all, Hand and Cardozo and Brandeis and Frankfurter had a different notion of the role of the highest court in the land than those who in more recent years have wielded the judicial sceptre and the academics who have applauded them. Perhaps the role of the Court and its Justices is better described in the tenets of "judicial activism" which demand that the Court undertake to provide a solution of its own making for each of the primary social and economic issues of our time. If we accept these more grandiose notions of the High Court’s judicial function, however, the standards to be met by judicial appointments will be even more difficult to achieve. It is true that under such guidance we may substitute “commitment” for the detachment and objectivity that is the essence of judicial restraint, but we must also substitute a requirement of wisdom even greater than that of those who wrote our Constitution, of those who wrote our laws, and of those who execute them. In any event, it is clear that the task calls for more talent even than that possessed by those who stamp themselves “pro bono publico” lawyers, although these, by self-definition, apparently know what the public good necessarily commands.

A commitment to judicial restraint, however, would not be inappropriate for the auspices of these lectures. For it was appropriately said of Holmes:

His profound analysis of the sources of our law before he became a judge left in Holmes an abiding awareness of the limited validity of legal principles. He never forgot that circumstances had shaped the law in the past, and that the shaping of future law is primarily the business of legislatures. He was therefore keenly sensitive to the subtle forces that are involved in the process of reviewing the judgment of others not as to its wisdom but as to the reasonableness of their belief in its wisdom. As society became more and more complicated and individual experience correspondingly narrower, tolerance and humility in passing judgment on the experience and beliefs expressed by those entrusted with the duty of legislating, emerge as the decisive factors in constitutional adjudication. No judge could be more aware than Holmes of these subtle aspects of the business of deciding constitutional cases. He read omnivorously to “multiply my scepticisms” (unpublished letter). His imagination and humility, rigorously cultivated, enabled him to transcend the narrowness of his immediate experience. Probably no man who ever sat on the Court was by temperament and discipline freer from emotional commit-

ments compelling him to translate his own economic or social views into constitutional commands. He did not read merely his own mind to discover the powers that may be exercised by a great nation. His personal views often ran counter to legislation which came before him for judgment. He privately distrusted attempts at improving society by what he deemed futile if not mischievous economic tinkering. But that was not his business. It was not for him to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of scepticism—by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest.22

At least since the time that John Jay rejected John Adams’ offer of a second appointment to the Chief Justiceship on the ground that the Supreme Court had no major role to play in the effectuation of the constitutional government of the Union, there has been debate over the proper role of the Court. But when Marshall accepted the post that Jay refused, he ended the dispute over whether that role of the Supreme Court was an important one.

III. LESSONS OF HISTORY

It will quickly be apparent that the standards for appointment of Supreme Court Justices to which I have adverted are difficult, if not impossible, to achieve. They are difficult both because they are so exalted and because they are so amorphous. I concede these defects. I submit, however, that this approach is, even so, more realistic than the myth, so frequently perpetrated, that there are objective standards—yardstick measures—for predicting great judicial competence at the High Court level. History belies the myth; nothing confirms it. History belies it, in part, because it reveals that great judicial performance is always dependent on the context in which it is evoked. Oliver Wendell Holmes’ competence was questioned by Theodore Roosevelt because Holmes was considered to have doubted Marshall’s greatness when he wrote:

A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of [Marshall’s] greatness consists in his being there. . . .

. . . [Y]ou cannot separate a man from his place, . . . there fell to Marshall perhaps the greatest place that ever was filled by a judge. . . .

Thus, a predictive approach would require not only foresight about the putative jurist’s individual capacities but also about the societal problems that he will be called upon to address.

History reveals more, however, for it demonstrates the absence of any pattern from which the cloth of a great Justice may be cut. But history does

23. OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES, supra note 5, at 132, 134.
not deny that from the beginning certain specifics were thought appropriate
guides to selection. Thus, in the very first volume of the *Oliver Wendell
Holmes Devise History of the Supreme Court of the United States,* the
distinguished author suggests the competence of the first Supreme Court, ap-
pointed by Washington, in terms that have continued to be used when dis-
cussion of a prospective appointee occurs:

The professional qualifications of the personages whom Washing-
ton on September 24, 1789, nominated for places on the Supreme
Court were, in the eighteenth century phrase, eminently respectable.
All but James Wilson had had judicial experience, although in the
case of John Jay it had been trifling. The most solid credentials were
those of William Cushing who had been appointed to the Superior
Court of the Province of Massachusetts Bay in 1772, had become
Chief Justice in 1777 and had been duly translated to the same
office after the Supreme Judicial Court was established by the con-
stitution of 1780. . . .

Other factors which obviously entered into the process of selection
were a proper geographic distribution of posts, experience in public
affairs, whether state or national, and a record of attachment to the
new federal Constitution. 24

With respect, I suggest that not only the phrase “eminently respectable,”
but also two of the suggested measures, were only eighteenth century stan-
dards. Until the power of judicial review was established and until the Court
was charged with its duties of legislative exegesis and with abstention from
common-law lawmaking, its work closely resembled that of other courts. At
the outset, judicial experience on other courts was evidence of potential
performance on the Supreme Court as well, particularly because of the
burdensome circuit-riding duties. These duties were ended first by noncon-
formance and then by statutory repeal.

About fifteen years ago, Mr. Justice Frankfurter unimpeachably docu-
mented the proposition that judicial experience is not a meaningful require-
ment for appointment to the Supreme Court. Examining the careers of
the first 75 Justices, he demonstrated his proposition:

Of the sixteen Justices whom I deem preeminent, only six came
to the Court with previous judicial experience, however limited. It
would require discernment more than daring, it would demand com-
plete indifference to the elusive and intractable factors in tracking
down causes, in short, it would be capricious, to attribute acknowl-
edged greatness in the Court’s history either to the fact that a Justice
had had judicial experience or that he had been without it. 25

If you would prefer to test your own judgment rather than rely on Frank-
furter, you can look at the latest 25 Justices whom Frankfurter did not

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25. Id. at 552–53.
26. F. FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER 81 (P.
Kurland ed. 1965).
consider in his roll call of great jurists—those appointed after Mr. Justice Cardozo. Among these more recent appointments, those with prior judicial experience include Wiley Rutledge, Fred Vinson, Sherman Minton, John Harlan, William Brennan, Charles Whittaker, Potter Stewart, Thurgood Marshall, Warren Burger, and Harry Blackmun. Those without prior judicial experience were Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, Frank Murphy, James Byrnes, Robert Jackson, Tom Clark, Harold Burton, Earl Warren, Byron White, Arthur Goldberg, Abe Fortas, Lewis Powell, and William Rehnquist. It should be obvious to even the most partisan that some of the best and some of the worst are to be found on each of the two lists.

Moreover, as Frankfurter also told us, the argument ad hominem is buttressed by reason:

To begin with, one must consider the differences in the staple business of different courts and . . . [the] different experience so generated in the demands of the business of the Supreme Court. . . . One would suppose that if prior judicial experience would especially commend itself for Supreme Court appointments, the Federal courts would furnish more materials for promotion.27

Yet, to bring Frankfurter's statistics up to date, of the 57 Justices with prior judicial experience, only 24 have come from the federal courts. We have more than ample testimony from Justices Holmes and Cardozo that the work of the Supreme Court of the United States was almost totally alien to the jobs that they were performing on the highest courts of Massachusetts and New York respectively.

More immediately relevant . . . is the fact that even Justices who have come to the Supreme Court fresh from a longish and conspicuously competent tenure on the lower federal courts do not find the demands of the new task familiar.28

In short, prior judicial experience is no basis for assuming capacity to do the extraordinary work of the Supreme Court.29 Prior judicial experience should be neither a qualification nor a disqualification:

The search should be made among those men, inevitably very few at any time, who gave the best promise of satisfying the intrinsic needs of the Court, no matter where they may be found, no matter in what professional way they have manifested the needed qualities. Of course, these needs do not exclude prior judicial experience, but, no less surely, they do not call for judicial experience. One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero. The significance of the greatest among the Justices who had such

27. Id. at 83.
28. Id. at 88.
29. If I may add a judgment based on personal experience, I can testify to the vast differences between the work that I witnessed and shared as a law clerk to Judge Jerome Frank of the Court of Appeals for the Second Circuit and that in which I participated as a law clerk at the Supreme Court.

experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly legal philosophers. The seminal ideas of Holmes, by which to so large an extent he changed the whole atmosphere of legal thinking were formulated by him before he was ever a judge in Massachusetts. And while the Court of Appeals gave Cardozo an opportunity to express his ideas in opinions, Cardozo was Cardozo before he became a judge. On the other side, Bradley and Brandeis had the preeminent qualities they had and brought to the Court, without any training that judicial experience could have given them.  

Although judges may well possess the elusive qualities that make great Justices, it is clearly idle to assume that only judges may have them.

The need for geographical distribution was once mandated by the Court's duties. So long as a Justice spent most of his time riding circuit and pronouncing on state law, it was appropriate that he be a lawyer familiar with the practices and variations of substantive law of the circuit in which he operated. Moreover, it must be remembered that, at the beginning, the Justices came from sovereign states, not yet molded into a nation. Local traditions and difficulties of transportation and of communication made for wider disparities among the interests of separate geographic communities. At least since the several states became a Union, not merely in legal terms but in sociological ones, the concept of geographic diversity has lost most of its function. In more recent times, it has been more of an excuse than a reason for selection of a Supreme Court Justice.

Historical evidence also suggests that geographical diversity ought to be an irrelevant factor. If the need for geographical dispersal had been determinative, it would have meant that, measured solely by identification by states, Cardozo would not have been appointed because there were already two New Yorkers on the bench when Hoover crossed party lines to nominate him. Other representative examples may be cited: John Marshall was appointed when there was already a Justice from his state on the Court; in more recent times Charles Evans Hughes, Robert Jackson, and Thurgood Marshall were each appointed when other New Yorkers were on the Court; Brandeis of Massachusetts was named while Holmes was still serving—the two sat together for 16 years. The fact is, too, that 20 of the 50 states—21 until this year—have never had one of their citizens on the Court, and geographical considerations would suggest that they are entitled to the next vacancies that occur.

To change the standard from states to geographic sections of the country would only exacerbate rather than diminish the problems created by geographical selection. The added irrelevance derives from the inadequacy of

30. F. FRANKFURTER, supra note 26, at 97.
the premise that Justices bring with them a regional attitude toward the solution of the problems that come before the Court. That premise, too, is belied by history, although there is an argument, based on facts too current to evaluate, that all Justices from Minnesota behave in the same way. But the Supreme Court has, through a large part of its history, been geographically unbalanced. Many examples, such as the affinity between the attitudes of Story of Massachusetts and Marshall of Virginia, on the one hand, and the disparity between the philosophies of Marshall and Johnson of South Carolina on the other, serve to demonstrate that judicial behavior on the Supreme Court is not often a factor of regional origin.

While we are on the subject of such irrelevant standards, it is perhaps not inappropriate to reject also the standard for appointment or nonappointment that is usually addressed only in hushed tones, that is, a suggestion of need for religious diversity. The relevance of religion to judicial performance is even less well established than the relevance of prior judicial experience to performance. Certainly the views of Chief Justices Taney and White and of Justices Murphy and Brennan are not Roman Catholic attitudes. No more were the positions of Brandeis, Cardozo, and Frankfurter ascribable to their religious beliefs or the absence of them. And, while we have only a very limited experience on the subject, it is already safe to say that Thurgood Marshall is a Justice whose views are not uniquely attributable to his race, since the proximity of voting patterns among Marshall, Brennan, and Douglas is as consistent as the identity of views of Burger and Blackmun.

The fact is that the standards, if they may be called such, of geographical origin, of race, of religion and, I venture, of sex, do not go to the qualities necessary for high judicial competence. They go rather to problems of partisan politics. A President will nominate with these factors in mind only to satisfy the parochial demands of an actual or potential constituency. These factors are among those that have frequently demeaned lower court appointments. They have no place there; they certainly should have no place in the selection of a Supreme Court Justice.

The sole determinant for choice of a High Court judge should be his breadth of capacity as tested in the crucible of his experience dealing with the hard problems that governance of society entails. The High Court requires tough-mindedness and statesmanship of a kind not developed in the cloistered study or by day-to-day experiences of the best of lawyers. And, if the line between the statesman and the politician is hard to draw, it is nevertheless the former and not the latter that should be sought.

A conglomerate portrait of the Court emphasizes that it is the experienced statesman that has most often been called upon. Almost all of the Justices have been public men, even those who had never held public office before
their appointment. For example, although Brandeis had never held a public post prior to his judicial appointment by Wilson, he nevertheless was, as the bitter fight against his confirmation documented, a man very much involved in public affairs. The facts are that the Justices of the Supreme Court have numbered in their midst, one ex-President, one who missed being President by a whisker, at least 13 cabinet officers, 21 sub-cabinet officers, 13 senators, 15 congressmen, 15 mayors, 45 state governors, legislators, prosecutors, and executives, 7 ambassadors and ministers, and 57 judges. The function of the Supreme Court Justice is governance and the best test of capacity for that office is experience in governance.

IV. PRESIDENTIAL PREROGATIVE

Of the four factors mentioned by Professor Goebel as relevant to the choice of Supreme Court Justices at the time of Washington, I have suggested that two have lost their substantive content and are appropriate only in terms of pleasing an actual or putative voting constituency. I refer to geography and judicial experience. The third, experience in public affairs in any and every guise should be and usually is regarded as vital. The fourth is one that has never lost its hold, and probably never will. I speak here of the question of the potential nominee’s attitudes toward the questions that are likely to come before him. Frankfurter thought it “noteworthy that Presidents so unlike as Lincoln and Roosevelt should have deemed relevant the general direction of mind of prospective members of the Court toward public issues.” I should have thought it noteworthy if a President did not so, as when Hoover did not in the appointment of Cardozo.

A distinction should be noted between concern about the individual’s expressed values and concern about his party label. The latter is not so important as the former. Again and again, even the most political of Presidents have appointed Supreme Court Justices from the opposing party. Suffice it to notice here Lincoln’s appointment of Field, Harrison’s appointment of Jackson, Hoover’s appointment of Cardozo, Roosevelt’s appointment of Stone, Truman’s appointment of Burton, and Eisenhower’s appointment of Brennan. Indeed, William Howard Taft divided his five appointments between two Democrats and three Republicans.

Of course, when I suggest that political party and race and geography and prior judicial experience and religion are not relevant factors in the selection of Supreme Court Justices, I mean that they do not go to the essence of measuring the candidate’s appropriateness for the Court. Certainly they are all relevant in terms of placating a voting bloc. But when we come to the

31. See p. 194 supra.
32. FELIX FRANKFURTER ON THE SUPREME COURT, supra note 18, at 227.
problem of selecting a Justice whose views are sound, in the way that both Theodore Roosevelt and Abraham Lincoln meant, we are dealing with a qualification of intrinsic importance even if it might also have external political ramifications.

Any President that has an understanding of the Supreme Court’s function—and there have been Presidents too ignorant or too disdainful to pay attention to it—recognizes that the Justices will be called on time and time again to make choices between contending rights and duties that will seriously affect the governance of the nation. Those choices are, whether you subscribe to the thesis of the activists or the passivists, not automatic. They call for the exercise of judgment. However determined to adhere to a duty of disinterestedness, every Justice is a child of his own past. Few jurists can attain the disinterestedness of a Holmes—not even a Frankfurter or a Learned Hand. A President wants that individual judgment to be exercised wisely. And for a President, no less than for lesser mortals, the wise choice is the one that he himself would make.

The President is faced with two problems here. The first is to determine what the nominee’s values really are. If he has had long personal contact with the future Justice, he may better be able to judge whether the man will perform as hoped, but not even then can he be certain. Otherwise he has to depend upon the advice and judgment of his own close advisers, be they the Attorney General, personal friends, or even an incumbent Justice or Chief Justice of the United States; their mistakes become his mistakes. This is a problem never certain of solution. Nor can there be any solution for the second problem. Since there are likely to be a multitude of issues before the Court during the tenure of the Justice to be appointed, no man is likely to afford a mirror image of the presidential preferences. Even if a President could conjure up all the future issues to be presented and the context in which they would arise, he can not be sure of finding a jurist who will perform perfectly. The choice, therefore, is usually made in the only way it can reasonably be made, in terms of the one or two dominant issues of the day likely to come to judicial attention. Lincoln’s concern was with the issues deriving from the Civil War; Theodore Roosevelt thought that antitrust battles and his war against plutocracy were at the forefront of the changing social scene; Franklin Roosevelt wanted judges who would remove the limits on the exercise of power by the legislative and executives branches of the national government; Nixon has seemed most concerned with removing the shackles on the police that were, he thought, inhibiting the war on crime. The price frequently paid to secure an appointee who will be safe on the major questions is a surrender of the potential for satisfaction on lesser issues.
The President's freedom of choice is, in fact, circumscribed in many ways. One pressing restraint may be political obligations often created prior to the President's election. Thus, when President Eisenhower was called on to fill the vacancy created by the death of Chief Justice Vinson, he was under obligation to offer the first vacancy at his disposal to Governor Earl Warren for services performed at the Republican convention. Although it is said Attorney General Brownell argued that the "first vacancy" was not intended to include the Chief Justiceship, Warren saw it otherwise and Eisenhower met the commitment as it was construed by the other party to the bargain. Taft, on the other hand, twice turned down offers of appointment to which Theodore Roosevelt had committed himself, because Taft felt that his task in governing the Philippines had not yet been completed.

Personal obligations as well as political commitments have often been the bases for such appointments, especially where they derive from services rendered in government posts, as was the case with most of Franklin Roosevelt's appointments. Sometimes the appointments have been by way of recompense for political services rendered more directly to the President. Lincoln's appointment of David Davis, Hayes' nomination of Stanley Matthews, and Grant's appointment of Bradley should suffice as examples. Occasionally, it has been rumored, the wife of the nominee was the one who secured the nomination for him by interceding with the President directly, as was said to have been the case with the appointment of Mr. Justice Catron, who spent 28 years on the Court in relative obscurity, and with the appointment of Mr. Justice Stanley Reed, whose tenure of 19 years could be similarly characterized. Finally, the President may be responsible to party obligations rather than personal political commitments. Lincoln's discretion in making Supreme Court appointments was so sharply confined by his need to placate party elements, that he appointed a Chief Justice, Salmon P. Chase, who was personally obnoxious to him. Some, however, argue that that appointment should be considered as a means of removing a political rival.33

33. The fortuities of the selection process often border on the haphazard, at least if advisers to Presidents are to be believed. On the Kennedy appointments of White and Goldberg, Arthur Schlesinger reported:

The first Supreme Court vacancy came in March 1962 with the resignation of Charles Whittaker. Kennedy, on the Attorney General's recommendation, appointed Byron White. The President later told me that it was one of the hardest decisions he had had to make and that he had hesitated a week over it. "I figure that I will have several more appointments before I am through, and I mean to appoint Paul Freund, Arthur Goldberg and Bill Hastie. But I didn't want to start off with a Harvard man and a professor [Freund was a professor at the Harvard Law School]; we've taken so many Harvard men that it's damned hard to appoint another. And we couldn't do Hastie [a Negro serving with distinction on the Third Circuit] this time; it was just too early." The President also disliked the thought of losing Goldberg from the cabinet; and when the next vacancy came with Felix Frankfurter's resignation in the summer of 1962, he inclined at first toward Freund. The Attorney General meanwhile urged the case of Archibald Cox, who had taken the job of
At times, the appointment power has in fact been delegated to powerful Senators. Mention has already been made of the role of Senators Lodge and Hoar in Holmes' case. Benjamin Curtis' appointment, however well deserved, was due to the influence wielded by Senator Webster, and Senator Stanford played no small role in McKinley's nomination of Mr. Justice McKenna. Nor has personal friendship—what Mr. Nixon has referred to as "cronyism"—been an unimportant force in shaping the Court. Johnson's relationship to Fortas was the instance that Nixon obviously had in mind, but it is not unique. To cite another example, Buchanan's friendship with Nathan Clifford did no damage to the latter's chance for an appointment.

Some Presidents had attitudes toward judicial appointments that precluded any expectations. "Without any fixed purpose [Grant] regarded appointments as essentially personal gifts to be bestowed on those who won his gratitude." What Professor McGrath says of Grant was equally true of other Presidents. The Supreme Court appointments of President Truman certainly reflected a similar attitude. Whereas one of Grant's appointments, Joseph Bradley was quite a distinguished jurist, none of Truman's rose above their qualities of mediocrity.

Most often, of course, it is a combination of factors rather than any single one that has resulted in the ultimate choice. Sometimes the result has been beneficial, even when only such theoretically improper grounds have been relied upon, as the appointments of Mr. Justice Bradley and Mr. Justice Miller attest.

Less often recently than in the past, a serious limitation on the President's freedom of choice has been the unwillingness of the person selected to assume the high office for which he was chosen. And here those who like to play the game of Cleopatra's nose can enjoy themselves to their heart's content. For certainly some of our greatest and most important Justices have not been first choices but have attained the post only because others turned it down. Strangely, this has been particularly true of the Chief Justiceship. Ellsworth would never have been Chief Justice if William Cushing had been willing to accept the post; Marshall turned down the seat that went to Bushrod Washington; Marshall, in turn, was appointed by Adams only after

Solicitor General, which Freund had declined. Unhappy at choosing between these two men of high ability and comparative background, the President eventually went ahead with Goldberg. Again he said philosophically, "I think we'll have appointments enough for everybody."

A. SCHLESINGER, A THOUSAND DAYS 698 (1965). Such is the philosophy of Presidents. Except for James Wilson who was delivering lectures on the law at the time of his appointment, only two Justices have been appointed directly from the academic chair to the High Court bench, and neither of them was a typical academic lawyer. The first was William Howard Taft and the second, Felix Frankfurter. On the other hand, many of the Justices had had academic posts before their ultimate appointments, including Douglas, Rutledge, Stone, Hughes, and Lurton.

Adams had nominated John Jay, who declined; Justice Schofield of the Illinois Supreme Court rejected the nomination that went to Fuller; Roscoe Conkling declined the post that was filled by Waite; Story was chosen only after refusals by three prior choices, Levi Lincoln, Alexander Wolcott, and John Quincy Adams; Smith Thompson also accepted a seat that was declined by John Quincy Adams. The list can be made much longer. Suffice it to say that a willingness to accept the job is a necessary if not sufficient qualification for any office, whether that of Vice-President or Supreme Court Justice.

V. Senatorial Prerogative

Certainly as a constitutional matter and probably as a matter of fact, the Senate’s refusal to advise and consent is more important than any other limitation on presidential appointments to the Court. This recalls, to those of you who have paid attention to recent events, that some Senators have sought to advance the proposition that the Senate has no right to exercise its power to reject presidential nominations, even for the Supreme Court, except for patent criminality or immorality of the nominee. History certainly contradicts any such construction.

There can be little doubt that the function committed to the Senate by the Constitution in this regard was intended to be a restraint on presidential discretion. What is true is that the words “advice and consent” should probably be construed to mean only “consent,” that there was no intention to give participation in the nomination as well as a veto power over its exercise. Hamilton was no friend of any role for the legislature in the appointment process. He undoubtedly spoke accurately in The Federalist, when he wrote, in No. 66:

> 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 defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose—they can only ratify or reject that choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency toward the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.35

In the selection of a Supreme Court Justice, the basic attributes of the candidate which the President is called on to consider when he makes his

choice have always been regarded as what Hamilton described as "the appearances of merit."

Seldom, indeed, have nominations for the Court been opposed on the score of personal disqualification. Fundamentally, the objections have been political. They have concerned the general outlook of nominees upon the public issues that in different periods of the country's history were likely to come before the Court.36

Reason as well as history supports this role of the Senate in the process of nomination for the High Court. The Senate as surely as the President is democratically elected and will, of necessity, be representative of an even greater number of segments of our society. It is the Senators' efforts as legislators as well as the President's as executive that will be subject to scrutiny by the Justices. Certainly the judicial censors should not be required to be acceptable to only one of the two branches of the national government that will be subject to their inhibitions. There is no reason why the political judgments that are accepted as appropriate for presidential exercise are not equally called for when the Senate is asked to approve the President's choice.

Obviously, when the President and the Senate are closely aligned in their views, there is not likely to be a conflict over appointees. When their views are essentially disparate, suggesting an absence of consensus in the nation—a situation more likely to occur at the time of greatest constitutional change—it will become the obligation of the contending forces to reach appropriate compromise. Certainly the nominees to the High Court, wielding political power that derives from the people, but never directly responsible to the people for their mandate, should receive the vigorous scrutiny of those who have received that mandate. It should not satisfy the Senate that the nominee is an able barrister with a record of unimpeachable ethical conduct. He who receives a Supreme Court appointment will engage in the governance of this country. The question for the Senate—no less than the President—is whether he is an appropriate person to wield that authority.

These views are by no means universally held. In 1931, Senator George Wharton Pepper, certainly a wise, knowledgeable, and experienced lawyer and legislator acknowledged this thinking and then rebutted it:

There are many wise men who hold that when a nomination to the Supreme Court is submitted by the President, the Senate has a duty to weigh not merely character, learning and ability but the nominee's economic opinions and social outlook. Professor Felix Frankfurter in one of his brilliant essays reminds us that five justices of the Supreme Court, a bare majority, are "molders of policy rather than impersonal vehicles of revealed truth." He points out that the Fifth and Fourteenth Amendments "do not embody technical conceptions nor specify guarantees based upon specific historical experience." When used to strike down legislation they may be mere instruments for frustrating the free life of the individual states in

36. Felix Frankfurter on the Supreme Court, supra note 18, at 211.
local affairs. He quotes Professor Roy A. Brown to the effect that since 1789 in nearly thirty cases has the Supreme Court by its decree invalidated social and economic legislation by the States or by the Congress. He is alarmed because the largest percentage of these decisions is found in the last ten years. The hope of the future lies in the quality of the Justices. “Once it is candidly recognized that their whole outlook on life, their freedom from fear, their experience and their capacity to transcend their experience, determine their decisions, it follows inevitably that these qualities will become pertinent matters of inquiry before a man is put on the Supreme Bench for life.”

These are wise words; but in my judgment they are more appropriately addressed to the Public and to the President than to the Senate. An informed and vigilant public opinion and a President who is responsive to it are the surest guarantees of wise selection. When the Senate takes to weighing imponderables it is very apt to tamper with the scales. If the President has vetoed your favorite measure you are apt to regard his next nominee as disqualified for a seat on the bench because of his limited social outlook. If the President has refused to appoint somebody whom you have earnestly pressed upon him and later he sends in a judicial nomination with which you have had nothing to do, your critical faculty becomes wonderfully keen. It is a subtle thing—this inter-play of human interests: and in the Senate you sense it all about you. The debate on the nomination of Chief Justice Hughes seemed to me to disclose the Senate at its worst. It was obvious from the outset that the President and the Public were too strong for the forces of opposition. Confirmation was inevitable. Nothing was said which justified resistance according to any generally accepted test. The net result of it all was that the Chief Justice waxed and the Senate waned. My thesis is that the Senate will best serve the country if, in the case of judicial nominations, it will limit its objections to cases in which the judgment of the executive has plainly slipped and has led him to name a lawyer who fails to command the esteem of the Bar.37

The first Supreme Court nomination to be rejected by the Senate came early in our history, when Washington nominated former Justice Rutledge to be Chief Justice of the United States. Rutledge had served as a member of the original Court for one year but had resigned to become Chief Justice of the South Carolina Supreme Court. On the resignation of John Jay, Rutledge solicited the appointment from Washington and received the nomination by way of a recess appointment. During the congressional recess, however, Rutledge launched an attack on the Jay Treaty which had been ratified by the Senate after a bitter battle. The attack was based largely on the allegedly inadequate protections afforded by the treaty to the Southern states. Rutledge was no more scornful of the treaty than were Alexander Hamilton and Thomas Jefferson. But Hamilton and Jefferson were not nominees for an office that required Senate affirmance. The Senate, by a vote of 14 to 10, rejected the nomination.

37. G. Pepper, Family Quarrels 91-94 (1931).
It has been argued that the rejection was based on doubts about Rutledge's mental stability. But the analysis afforded by Thomas Jefferson seems well buttressed by fact: "The rejection of Rutledge by the Senate is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty."

Madison was the next President to suffer senatorial rebuff in this area. And this time the Senate rejection paved the way for the appointment of Joseph Story. When William Cushing died in 1810, the Court was evenly divided between Federalist appointees and Republican appointees, and the Republicans hoped that they could capture a majority on the Court with the replacement for Cushing. Levi Lincoln, the first nominee, declined, however, in part on the ground that his failing eyesight disabled him for the job. Alexander Wolcott, the Republican leader of Connecticut, was Madison's second choice. It was a poor one. There is little doubt that Wolcott's small talents ill-fitted him for the post. But that was not the ground for the Senate's rejection. Charles Warren noted that the right result was brought about for the wrong reasons. He wrote of the Senate reaction:

"All this flood of objurgation, however, was in fact due to Wolcott's vigorous enforcement of the Embargo and Non-Intercourse laws, and any active supporter of those measures would have met with a similar denunciation from the Federalist opposition, who did not hesitate to resort to personal scurrility in their political attacks."

Wolcott was rejected by the largest majority ever recorded against a Supreme Court nomination.

Madison then nominated John Quincy Adams and Adams was confirmed by the Senate before he declined, preferring to remain at his post as ambassador to Russia and—perhaps—to keep open his options for a chance at the Presidency. Only then, to the great dismay of Jefferson, did Madison turn to Joseph Story, who at 32, was one of the two youngest men ever to be appointed to the Supreme Court. Although old-line Federalists like Timothy Pickering regarded Story as an ideological Republican, Jefferson noted that Story was only a "pseudo-Republican" and urged Madison not to appoint him. Madison, however, was caught up in what might now be termed his party's "northern strategy." He felt the need to appoint a New England Republican, however tenuous his political ties, to gain support in that part of the country as well as to provide a Justice to ride circuit in New England. Madison's fourth choice easily cleared the Senate.

The first example of senatorial veto by inaction as distinguished from

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38. 1 C. Warren, The Supreme Court in United States History 173 (1928).
39.  Id. at 412.
40. There is a liking for the fiction that Story changed his stripes after joining the Court essentially because of the strengths of Marshall. The record is clear that Madison should have expected nothing different from what he got.
outright rejection came when John Quincy Adams, a lame-duck President, proffered the name of ex-Senator John J. Crittenden of Kentucky to fill the vacancy created by the death of Mr. Justice Trimble. Crittenden’s sponsor was Henry Clay who, along with Charles Hammond, had himself refused the nomination. The Senate voted to postpone consideration of the nomination until after Jackson’s inauguration, thereby effectively killing it. Jackson, instead, sent in the name of John McLean. McLean filled the position with something less than distinction for over three decades.

The Crittenden nomination brings to mind the argument by the Republican leadership in the Senate at the time of President Johnson’s nomination of Abe Fortas for the Chief Justiceship. They argued that a lame-duck President is in fact disqualified from making a Supreme Court appointment. Obviously, as Adam’s last-minute nomination of John Marshall makes clear, the capacity of a lame-duck President to nominate successfully may depend not on the imminence of his own departure from office but upon the attitudes dominant in the Senate at the time of the nomination. The nomination hearings in the Fortas case also make this abundantly clear. Nevertheless, history does demonstrate that a President destined to depart his office in a short time has little leverage with a Senate that recognizes the political facts of life.

Even a President at the height of his popularity can find it impossible to move a hostile Senate to approval. In 1835, the Senate effectively rejected Jackson’s appointment of Roger Brooke Taney by the same means it had used to reject Crittenden. Taney had already experienced Senate refusal to confirm his recess appointment as Secretary of the Treasury. Both Senate actions are clearly attributable solely to Taney’s role in removing government deposits from the Bank of the United States. When an election changed the Senate balance to control by Jacksonian Democrats, Jackson’s nomination of Taney to succeed Marshall as Chief Justice was confirmed by a vote of 29 to 15. Approval was obtained despite the same attack on him maintained with all the rhetorical vigor that those two experts in rhetoric, Clay and Webster, could bring to bear.⁴²

Jackson’s problems with the Taney nominations were as nothing compared with Tyler’s difficulties in getting anything accomplished in the Senate. As the first Vice-President to succeed to the Presidency on the death of the President, he was met with a direct challenge from the Senate that the powers that had been voted to Harrison were now really in the keeping of the Whig leaders in the Senate. It was clear that Tyler, although elected

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41. Since all second-term Presidents are now “lame ducks,” the argument applies only to those close to the end of their terms, first or second.
42. Clay subsequently apologized to Taney for his opposition to the appointment, just as Stone and Hughes would later receive apologies from some Senators who had opposed them.
as a Whig, had no political future in that party, and his hopes of succeeding
to power in the Democratic party were mere chimeras of his own creation.
In fact he was a President without a party. When he nominated John C.
Spencer, a lawyer from New York with impeccable credentials, to succeed
Smith Thompson, Tyler found no new friends. The Whigs regarded Spencer
as a traitor to their party for his willingness to serve in the Tyler cabinet,
first as Secretary of War and then as Secretary of the Treasury. This time
the attack led by Clay, Calhoun, and Webster was joined by Senator Crit-
tenden, who had returned to the Senate but was still hoping for appointment
to the Supreme Court himself. Tyler was unable to get even his cabinet
officers and ambassadorial nominees confirmed, much less a Supreme Court
Justice. Three more of his nominations to the Supreme Court were frustrated
by Senate inaction. Tyler finally succeeded in filling one vacancy on the
Court with the nomination of Samuel Nelson, Chief Justice of the Supreme
Court of New York. Once again the result was a Justice with a long but color-
less career on the Supreme Court.

During this period of weak Presidents and strong Senates, the problem
of judicial appointments was made more difficult even for Presidents with
party majorities in the Senate. Polk with the opposing party in control of the
Senate had an even harder time. He was unfortunately persuaded by his
Secretary of the Treasury, George Dallas, to nominate George W. Wood-
ward, a comparatively unknown inferior court judge from Pennsylvania.
Woodward wasn't so unknown, however, that his "native-American" senti-
ments were not patent to many who found them most distasteful. But the
refusal of the Senate to accept this nomination was due largely to the oppo-
sition of Senator Cameron of Pennsylvania and Secretary of State Buchanan
of the same state, who asserted the rights of senatorial courtesy and political
obligation respectively. With every cabinet officer and Senator maintaining
his own duchy and principality, the royal prerogative of the President was
less than King John's at Runnymede. Justice Grier, who did receive the
appointment, also filled the position with less than extraordinary talents for
a period of about 30 years, during some of which he was totally incapacitated.

Another Vice-President who succeeded to the Presidency, Millard Fillmore
—a name not remarked for its importance in American history—twice nomi-
nated a Justice without securing confirmation from the Senate. Not even
the notion of senatorial courtesy came to his aid. Edward Bradford, a Demo-
crat from Louisiana, was not acted upon, and George Badger, a Whig from
North Carolina was "postponed," the latter probably because he was both a
Whig and an abolitionist, the former because he was neither. A third attempt
by Fillmore to fill the judicial vacancy with but two weeks of his own term
of office left to run, met with a predictable result. This time, however, the
ultimate appointee was a Justice of great capacity, Mr. Justice Campbell, but one whose loyalty to the Confederacy caused him to resign his post after the secession of his home state, Alabama.

President Buchanan first offered an apparently first-rate candidate in Jeremiah Black, who was Secretary of State at the time of his nomination and had been Chief Justice of Pennsylvania. But as Attorney General he had opposed Stephen Douglas' popular sovereignty proposal for solving the slavery question in the territories, and after Lincoln's election, he had advised Buchanan that he had no authority to use force to prevent secession. Considering the lateness of Buchanan's term—it had only one month to run—it is considerably to the credit of Black that he was rejected by only a single vote, 26 to 25. The antislavery forces in the Senate were already too strong to tolerate such an appointment.

Lincoln, who paid careful attention to his political obligations in making judicial nominations, did not once meet with rebuff from the Senate. But, it might be argued that the Senate took no exception because Lincoln heeded its wishes in making his nominations.

Andrew Johnson, like Tyler, however, was forsaken by his party and not befriended by the opposition. Ironically, Johnson was hoist by his own petard. As a Senator from Tennessee he had argued that the Senate had the right to reject presidential appointments for any reason or for none at all. His first nominee for the Court was again one with first-class credentials, Henry Stanbury, Attorney General of the United States, leader of the Supreme Court bar, former member of the House of Representatives and a person of some intellectual attainment. This time it was the entire Congress and not merely the Senate that foreclosed to Johnson the possibility of a Supreme Court appointment by reducing the number of Justices from ten to eight, eliminating not only the vacancy to which Stanbury would have been appointed but the next one as well.

The number of Supreme Court Justices was increased to nine after Grant's election. Even so, Grant—perhaps the most inept President of the United States before Warren Harding, although his vices appear to have been different ones—made at least one highly respectable appointment, but not without difficulty. After filling the nine newly-created circuit judge posts with men of some talent on the recommendation of Attorney General Ebenezer Hoar, Grant nominated Hoar for the Supreme Court. Whether because Hoar had insisted on talent rather than political affinity for the circuit judges, or because of his support of civil service reforms, or because of his opposition to the Johnson impeachment, or because of a desire by some Senators to restore a Southerner to the Court, or because of a combination of these, Hoar was rejected 33 to 24. Senator Cameron was brusquely expressive:
"What could you expect from a man who has snubbed seventy Senators?"44

Grant appointed Edward Stanton, the bane of Lincoln during his administration and the destroyer of Johnson. He was confirmed but died before he could take office. Grier, retired for senility, had the dubious pleasure of attending his successor's funeral.

Grant's nominations of Bradley and Strong were both confirmed, but he was compelled to withdraw the nomination of his Attorney General George H. Williams to succeed Chief Justice Chase. Fortunately for the country, Senator Roscoe Conkling had already declined the nomination. The New York bar violently opposed Williams, and there was some question—none of real merit—about Williams' personal and official finances. Grant was stubborn in his insistence on Williams, but Williams himself asked to have his name withdrawn because of the embarrassment to Grant and because he thought the objections would make it impossible for him to serve effectively in the post.

Grant then offered Caleb Cushing, a hardly believable choice; both a former Democrat and a former Whig, 74 years old, and having expressed a belief in the unconstitutionality of the reconstruction legislation, he was hardly the man most likely to succeed. His legal attainments were not questionable. But a fraudulent news story, based on an actual letter from Cushing to Jefferson Davis, permitted charges of disloyalty to be leveled. His name was withdrawn as a nominee to the Court and he was confirmed as ambassador to Spain, despite the evidence against him.

Perhaps the closest a Supreme Court appointment has come to being tainted with nepotism was the nomination of Stanley Matthews by President Hayes in 1881. Matthews had successfully represented Hayes in the election contest with Tilden. He was also Hayes' brother-in-law. He was attacked as a tool of the railroad interests, whom he represented as a lawyer and whom he protected as a legislator. Matthews' opponents managed to stall the nomination in committee until the end of Hayes' term. But Garfield again nominated Matthews who won a close Senate battle, 24 to 23, after a negative Judiciary Committee vote of 6 to 1.

That Matthews' name was resubmitted to the Senate by Garfield was something of a surprise. Hayes claimed the credit, but it was probably Jay Gould who deserved it. Whoever brought it about, he was probably disappointed in the result. As Professor McGrath has said:

Attorney Stanley Matthews was a loyal, many said notorious servant of the large corporations. Justice Stanley Matthews while sympathetic to property rights, did not—as the business elite had clearly expected—join Justice Field . . . again demonstrating the lack of causal relationship between a judge's pre-Court career and his judicial voting.44

43. M. Storey & E. Emerson, Ebenezer Rockwood Hoar 197 (1911).
44. C. McGrath, supra note 34, at 247.
In 1893, to fill the vacancy created by Mr. Justice Blatchford’s death, Cleveland nominated a prominent New York lawyer, William B. Hornblower, whose talents were highly regarded. While the nomination was pending, Senator Hill announced: “It is likely that every Democrat whose name has been sent to the Senate will be confirmed if he loyally supports the Democratic ticket this Fall. No others have any claim on the party.” A bolder public statement of the requirement of party loyalty has probably never been made. When the New York Democratic ticket went down to defeat, led in its nose-dive by Judge Maynard’s candidacy for the New York Court of Appeals, Hill was prepared to blame Hornblower for the event. Hornblower had been on some bar association committees that had condemned Maynard for political shenanigans as a judge of which only our current-day political bosses would have been proud.

Hill opposed the Hornblower nomination in the Senate on the ground that he had not been consulted. Despite the attempt by Senator Vilas to limit the right to senatorial courtesy to appointments within a state, not to include national offices, the rule of senatorial courtesy was invoked and was sufficient to defeat the nomination. When Cleveland then nominated Wheeler Peckham, Hill again killed the prospects, again essentially because Peckham had supported the elements of the party opposed to Hill and had participated in the exposure of Maynard’s election fraud. Cleveland solved the problem by going out of New York for the appointment. His final choice was Edward Douglas White, a Senator from Louisiana, whom the Senate could not so easily reject.

After the battle against Peckham, the Senate confirmed every Supreme Court nomination sent up Capitol Hill until 1930. This did not mean ready acquiescence on the part of the Senate. Three of the sharpest and most drawn-out controversies over nominations occurred when Wilson had the temerity to send Brandeis’ name to the Senate, when Coolidge kicked his college classmate Harlan Stone upstairs from the Attorney Generalship, and again when Hoover nominated Hughes to be Chief Justice. It is certainly fortunate that these battles resulted the way they did, for the very short roster of great Justices’s names would have been that much more limited if it could not include Brandeis, Stone, and Hughes.

45. N.Y. Times, Nov. 6, 1893, at 4, col. 1.
46. White chose the dubious course of remaining in the Senate for two weeks after his confirmation to participate in the resolution of the controversy over the continuation of the sugar bounty which was of no small importance to his old Louisiana constituents.
47. The 4-month Brandeis confirmation fight has been excellently detailed in A. L. Todd’s book, published in 1964 and titled Justice on Trial. The book is dedicated “[t]o the President who next appoints a Louis D. Brandeis.” One expects that the author will have a long wait.

In 1925, the same “liberal” forces that would oppose Hughes’ appointment sought to defeat Stone’s on the ground that he was too closely aligned with the New York
The record was broken in 1930, however, when Hoover nominated Judge Parker of the Court of Appeals for the Fourth Circuit. Parker's record as a judge was distinguished. And Hoover, like some of his Republican successors, had a "southern strategy." He noted that this appointment from the Fourth Circuit was the first in 70 years—the first since the American "troubles." As a matter of fact, except for the one-year service of Justice Byrnes of South Carolina, the Fourth Circuit would not supply a Justice for the Court until the appointment this year of Mr. Justice Lewis Powell.

Parker was, in effect, defeated by a combination of new political forces: organized labor and organized Blacks. His defeat resulted partly from his apparently unfortunate habit of following Supreme Court decisions. By upholding an injunction enforcing a yellow-dog contract, as he properly felt compelled to do by the Supreme Court's opinion in the Hitchman Coal Case, he aroused the opposition of labor. He was also condemned by the NAACP because, when running for Governor of North Carolina in 1920, he was reported to have said: "The participation of the Negro in politics is a source of evil and a danger to both races and is not desired by the wise men in either race. . . ." Despite an impeccable judicial record on this score, Parker was opposed by representatives of the newly emerging black political consciousness. After acrimonious debate, in which it was charged that the nomination was only made as part of Hoover's "southern strategy," the nomination was defeated 41 to 39. Parker remained on the Court of Appeals for the Fourth Circuit where he compiled an enviable judicial record.

From 1930 until 1968, there was another interlude in which noises were made but no action taken by the Senate to frustrate presidential choice of judicial nominations. In 1968, however, after Chief Justice Warren submitted his conditional retirement letter, Mr. Justice Fortas was denied appointment to the Chief Justiceship with the consequent rejection of Judge Thornberry who was named to fill the place that Fortas would have vacated. In 1969, President Nixon had two nominations defeated, largely by the same forces that caused the rejection of Judge Parker and essentially for the same reasons. The battles in the Senate were bitter and close. They are both of sufficiently recent vintage that the facts that appeared in the newspapers need not be reviewed and those that were not made public are still not available to aid in the analysis.

moneied interests. Stone received a battering from Senator Walsh at the committee hearings but emerged from the Senate with a vote of 71 to 6. No one has yet undertaken the study of the Hughes appointment battle. It, too, should be an interesting study in aberrant political behavior.

The story of the Senate's exercise of its prerogative of denying consent to Supreme Court nominations is not one that reflects honor on the Senate. It does demonstrate that the Senate very properly demands the right to judge the nominee's social, economic, and political values in passing on his capacity to assume the office. But it also reveals that Senate rejection has as often, if not more often, been based on petty political machinations, personal spite, conflict with the President over matters totally irrelevant to the nomination, the nominee's geographic origin, political party, and matters similarly immaterial to the performance of the judicial function. Only five times has the Senate rejected the nomination on the ground of incompetence. In short, like most Presidents, the Senate has not treated nominations to the High Court with the respect due the importance of their decision. This is demonstrable not only with regard to the nominations that have been rejected, but even more with the nominations that have been approved. But that is another story for another time.

The point to be made here is only that the appointment to the High Court is not an unrestricted presidential prerogative. A very high number of those who have taken their seats on the Supreme Court were not presidential first choices. Twenty-six times the Senate prevented the nominee from becoming a Justice; there were at least 22 occasions when the post was tendered to one who would not accept it. Sometimes when the President was forced to search out a second choice, the public was better served; sometimes the rejection of the presidential choice resulted in a mediocre appointment or worse.

There are two more institutional restraints on the power of appointment of a Supreme Court Justice that call for at least short mention here. The first is the bar and especially the organized bar. The second is the press. To the extent that either has power it is a negative power: it can inhibit appointment, it cannot compel it. And that, I submit, is as it should be. For I think that the bar and the press have seldom properly fulfilled the functions they are capable of performing and frequently have sought to exercise powers beyond their capacities.

With all due respect to my own profession, the submission of names for approval to any segment of that profession, national, state, local, or individual, is both inappropriate and undesirable where the Senate is charged with duties of advice and consent. Since the bar is anything but a representative political body, it affords no legitimating function in this regard. Since its expertise is limited to the question of the nominee's performance as a lawyer, it ought to be confined to answering that question. It should be remembered that professional competence is only one of the criteria to be satisfied. The bar can best answer that question by appearance before the Senate Judiciary Committee that is considering the presidential nomination. Furthermore, if
the bar is to have a role to play, it is insufficient that it say that the nominee is “extremely well qualified,” or “well qualified,” or “qualified,” or “unqualified.” The conclusions may be the correct ones, but in the absence of supporting data showing how these conclusions are reached, they are meaningless. A high standard of legal capacity is a necessary but not a sufficient condition for a Supreme Court appointment. The bar can perform its limited function by demonstrating the presence or absence of that capacity. It is not the bar’s function to determine, as the President and Senate must, whether the nominee has the proper attitudes on the public problems of the day.

I should say the same of the press. The news media have an extremely important part to play in the public scrutiny of judicial nominees. My reason for thinking so starts once again with a Frankfurterian premise:

In theory, judges wield the people’s power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted. The country’s well-being depends upon a far-sighted and statesmanlike Court. And the Court’s ultimate dependence is upon the confidence of the people.\[51\]

The importance of the press, then, lies in its capacity to inform the people of the facts about a nominee. The press may indeed be the only source for such data, particularly if the President and the Senate are in substantial agreement in their view. It is not the editorial writers and political columnists whose expressions are important; it is rather the reporters. The importance of the press does not lie in its judgment but in the facts upon which judgment may be based—the press has no more special competence to judge the desirability of an appointment than do its readers or viewers. The press is not representative of the people. It can serve them well by informing them; it cannot serve them properly by assuming to act as their surrogate.

In the past, neither the bar nor the press has regarded itself as so limited. In fact, they have destroyed appointments because of their prejudices rather than their knowledge. They have also permitted appointments to be made, by failing to uncover facts which they alone could reveal, and by regarding themselves as censors rather than disseminators of truth. It must even be recorded that each of them has, at times, manufactured falsehoods to achieve its own narrow objectives. No reader of the Todd book\[52\] on the Brandeis nomination can endorse the intrinsic good faith of the bar. No one with knowledge of the role the Washington Chronicle played in the rejection of the Cushing nomination—where that paper fabricated proof of disloyalty to the Union—could fail to recognize the danger in allowing the press a greater role than it can properly play. Similar acts have affected several if not all Supreme Court nominations. This is not meant to denigrate the importance

\[51\] Felix Frankfurter on the Supreme Court, supra note 18, at 217.

\[52\] A. Todd, Justice on Trial (1964).
of either the press or the bar, but to suggest that we be concerned about their abuse of power. Certainly the press was largely responsible for the rejection of Judges Haynesworth and Carswell. And the ABA can be given credit for the failure of the recent presidential choices of Judge Lillie of California and lawyer Friday of Little Rock. And some think that at least some of these vetoes were warranted.

VI. DISAPPOINTMENT OF GREAT EXPECTATIONS

It is frequently alleged that a mediocrity who dons the robes of a High Court Justice is transmogrified by that mystical act into a great man. Nonsense. Capacity for growth in stature by the age at which men reach the Supreme Court is certainly limited and, in any event, has already been revealed. Mediocre nominees remain mediocrities on the bench. Unfortunately, even men of great talents may find that the Supreme Court is not congenial to those talents, because the work is too different, too difficult, too demanding, or even too boring to evoke that commitment and effort which marks the better jurist.

As has already been indicated, there are no litmus paper tests for Supreme Court nominees. Nevertheless, it is true that some Justices have behaved in a different manner on the Court than was expected by those who appointed them, by those who confirmed them, and even by those who opposed them. Generally the reasons for this disparity between behavior and expectation can be explained. First, however, it should be noted that no President should and very few would assume that a Justice's vote on the Court will remain at the President's beck and call simply because the President appointed him. I suspect that a presidential choice of a person so deficient in character would meet with veto through one of the limiting devices already discussed. A Supreme Court Justice is beholden to no one and nothing except his office. That has probably been understood even by the meanest of the hundred men who have served their country in this capacity. If nothing else, persistent, informed public attention to the Court's efforts should preclude such misbehavior. For all the stories of recent Justices who have continued to offer advice to their Presidents after donning the robes, there are no stories of recent members of the Court who sought or took the advice of a President about any case pending before the Court. The one new ingredient in the man who has become a Justice is independence, and his is an independence that is limited only by a latent ambition for higher or different office. We have indeed had several Justices with their eyes on the possibility of a presidential nomination even as they write their opinions for or against the Court's position on a particular piece of litigation.

There have been instances, too, where judicial positions have been discussed with Presidents before the public is informed of them. And the possi-
bility for mischief here is certainly great. Grant, for example, was said to have been told of the outcome of the first Legal Tender Cases at least a month before the decision was rendered. The classic tale derives from the one case above all others in history that blotted the Court's scutcheon, Dred Scott.

The record is anything but clear, but it would seem that on February 3, 1857, President-elect Buchanan wrote to his good friend Justice Catron, asking whether the decision in that fateful case would be rendered prior to the March 4 inauguration. Catron responded one week later that the case would be decided the following Saturday and the opinion delivered at the end of the month. He added that the decision "would not help . . . with [Buchanan's] inaugural, since the question of the power of Congress over slavery in the territories would not be decided." At the second conference on the case on February 14, however, Justice Nelson indicated that he would make a majority for the proposition that the threshold jurisdictional question was not before the Court for resolution; the opinion was assigned to him to write. Thereupon, Justice Wayne brought pressure on Taney, Catron, and Grier to have Taney write the opinion settling the slavery question as a matter of constitutional law. Seeking to bring additional pressure on Grier, Catron wrote to Buchanan asking the President to write to Grier to tell him how desirable it would be for the Court to settle this omnibrooding question that so troubled the nation. Grier did receive a letter from Buchanan and did join the position of Taney, but the contents of the letter have never been revealed. Inferences have been drawn from the fact that at his inaugural, Buchanan declared:

[I]t is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever it may be.

Buchanan's anticipated cheerfulness was thought to belie his disclaimer of knowledge of the opinion's contents.

Taney, Grier, Catron, and Wayne did not vote differently from what would have been expected of them in this regard. Yet those who appointed them could not have anticipated that they would be called on to decide the case that helped sunder the nation. The question why a Justice behaves the way he is expected to behave is an interesting question; why he behaves or is thought to behave differently from what was expected is perhaps more interesting.

Probably the first and most frequent explanation of allegedly unanticipated

55. Letter from Justice Catron to President-elect Buchanan, Feb. 10, 1857, on file Buchanan MSS, Library of Congress.
56. Messages and Papers of the Presidents 431 (J. Richard ed. 1897).
judicial positions is that the expectations were based on fallacious data. As I have already suggested, the proposition that Story would act like a Jeffersonian Democrat, such as William Johnson, was based on misjudgment about the man. Jefferson, for one, knew it. Indeed, Story's respect for Marshall was no secret even before the appointment, and Story's participation in the revolt of the New England branch of the party on the question of the embargo was notorious. To have regarded him as a prospective judicial keeper of the Jeffersonian faith was to indulge in patent error. Roosevelt's disappointment over Holmes' position in the *Northern Securities* case was occasioned by a similar misconception. Neither Roosevelt, Lodge, nor Hoar had any good reason to expect that this most uncommitted of judges would interpret the Sherman Act to satisfy the predilections of his sponsors. If McReynolds was a surprise to Wilson, or Stone to Coolidge, or Frankfurter to Roosevelt, it could only have been because personal relations had blinded the appointing Presidents to the facts about these Justices' prior expressed opinions.

In several other cases a more likely explanation is that the appointment was not made with different expectations. As already indicated, many factors, besides adherence to presidential values, affect the choice of a Supreme Court nominee. Indeed, an Attorney General who is kicked upstairs, a party stalwart for whom this post seems the only proper reward, a politician with a pre-election commitment will of necessity advance views uncongenial to presidential preference.

Another major explanation for such disparities of points of view is to be found in the rapidly changing nature of American society. Problems dominant at the time of an appointment may be dissipated long before the end of a Justice's tenure. Roosevelt expected the New Deal Justices to remove the shackles that the "nine old men" had placed on social and economic legislation that violated the principal tenets of laissez-faire theology. With regard to this major concern the new Justices did, indeed, represent a cohesive group having but one point of view. The public shock at the tension between Black, Douglas, Murphy, and Rutledge on the one hand and Reed, Frankfurter, Byrnes, and Jackson, on the other, although all were Roosevelt appointees, was based on expectations of similar singlemindedness toward problems that were not in the minds of the President, the Senators, or the nominees at the time of the appointments.

The only appointing power who was completely successful in securing only Justices who would conform to his own attitudes was William Howard Taft who, as President, appointed Lurton, Hughes, Van Devanter, Lamar, and Pitney and who, as Chief Justice, manipulated the appointments of Sutherland, Butler and Sanford.

By contrast, Jefferson's efforts to restrain the judicial authority of the
Supreme Court, infected with the nationalism that he detested, were largely frustrated. Efforts to reorganize the court all failed. Therefore, as Professor Morgan put it:

Jefferson's last recourse in the transformation of the court was the slow process of replacement. . . .

It is no matter of surprise that Jefferson looked not merely for an honest man and a good lawyer [to replace Alfred Moore] but also a loyal Republican."

That he was wise in looking for all these qualities was attested by the career of his choice for that post, William Johnson of South Carolina, certainly—with the possible exception of Joseph Story who was also appointed at the age of thirty-two—the strongest Justice to share the bench with John Marshall. Of the 29 years that Johnson and Marshall were on the Court together, Johnson wrote 34 of the 74 dissenting opinions published, and 21 of the 35 concurring opinions. He wrote 112 majority opinions, to Marshall's 458. If Jefferson had done as well with his other choices, his effect on the Court would have come closer to his desires. Both Brookholst Livingston and Thomas Todd were loyal Republicans at the time of their appointments. But neither came up to the standard of talent that Jefferson found in Johnson. Moreover, despite Justice Livingston's enmity for his brother-in-law, he was instinctively a New York Livingston, and soon found himself back in the Federalist camp from which he had come. Todd fell prey to the Marshall charm—it was easier than working—and the two shared an interest in developing landed estates for their posterity.

It is also to be supposed that a Justice may and frequently does respond to institutional demands. Consciously or subconsciously, he may recognize that his role as a Supreme Court Justice is different not only from those he was called on to play as an active member of the bar, an executive, or a legislator but different even from that of a judge on another court. Samuel Miller and Joseph P. Bradley seem to have risen to their calling; Robert Jackson again and again was called on to disavow as a judge positions he had taken as an attorney general; Earl Warren’s judicial views were certainly at odds with those he espoused as a prosecutor and a governor.

Finally, the effect sometimes is brought about by personal rather than institutional pressures. Many a new Justice was swayed by Marshall's charisma. On the other hand, it has been suggested, not without foundation, that Frankfurter drove Justices away from his position. It would be naive to assume that the usual pettiness of human beings is foreign to the Court.

58. I am reminded that when I reported to Professor Warren Seavey that I was going to clerk for Mr. Justice Frankfurter, he leaned back in his chair and slowly said: “Felix is all right. The trouble with Felix is that he thinks he can convince somebody by calling him a son-of-a-bitch.”
Here, too, the exploitation of the possibility that a Justice will forsake his former commitments in favor of those more appropriate to a Justice may well depend on the continued surveillance of judicial behavior by the bar, the press, and even by academics.

VII. REMOVAL OF JUSTICES

The only constitutional means for compelling a Justice to leave the Court is impeachment by the House of Representatives and conviction by the Senate. I shall deal with this issue at some length, but first I would note some informal means for removal, which sometimes are as effective as the constitutionally sanctioned ones.

Of course, the prime reason for departure from the Court is the most effective of all means, death in office. Of the 92 Justices who have so far ended their service on the Court—Hughes, it will be recalled had the opportunity to leave twice—48 have died with their robes on. This includes Gray whose tendered resignation had not become effective at the time of his death. It does not include several whose resignations or retirements so closely preceded their deaths as, for all practical purposes, to have been simultaneous with them, as in the recent cases of Justices Black and Harlan. William Howard Taft, for another example, died one month after leaving office.

Ill health has caused the retirement, sooner or later, of at least a dozen members of the Court. The problem of mental or physical incapacity has, indeed, plagued the Court from its earliest days and is still a problem which lacks an appropriate solution. Although Justices have sometimes been pushed off the Court, the subtle or less than subtle pressures for retirement have not always been effective. Many Justices were incapacitated for months or years before their ultimate departures. Certainly Field overstayed his time by at least 4 years; Day for 2 or more; Hunt suffered a disabling paralytic stroke 4 years before retirement, and Frankfurter some months before his. Duvall’s resignation was anticipated for 10 years before it finally came. McLean and Samuel Chase, who died in office, were invalided long before the end and Baldwin was regarded as insane during his last terms. Lurton and Cardozo were sufficiently ill to preclude the performance of their duties for months. Chief Justices have been noteworthy in this regard. Certainly Taney, Chase, and Fuller continued to serve long after their capacities were overtaxed.

With President Wilson as the sole example of an incapacitated President, we have devised a means for removal of chief executives by a cumbersome constitutional device,* yet to be tested and hopefully never to be used. Yet, after many examples of judicial incapacity, we remain without a means for removing the physically or mentally disabled Justice. The exigencies are

59. U.S. Const. amend. XXV.
somewhat less serious, since the duties of the Supreme Court are shared by nine. But with issues of the magnitude that the Supreme Court is asked to pass on and with the frequency of close votes, it shocks the imagination to realize that the decisions might, in part, result from judgment exercised by one who should be regarded as incapable of judging. It will be recalled, for example, that two Justices on the Dred Scott Court were sufficiently incapacitated to keep them from active participation and Taney was, even then, not in the best of condition. In the 1878 Term, Waite presided over a Court with three members mentally incapacitated—Hunt, Clifford, and Swayne.

Without legal procedures, informal efforts toward securing resignations have been cumbersome, difficult, and often ineffective. The retirement of Mr. Justice Holmes is perhaps a rare example of successfully applied pressure.

The romantic version of Holmes' retirement may be seen in Catherine Drinker Bowen's description:

On the morning of January 11, 1932, Holmes had a majority opinion to deliver ....

When his time came, Holmes leaned forward, picked up the papers .... Spectators noticed how well he looked; the cheeks were pink against the white hair and mustache. But when he began to read, Holmes's [sic] voice faltered, thickened. He shook his head impatiently and went on. But what he said was barely audible beyond the front row of benches.

... When the Court rose at four-thirty, he got his hat and coat and walked over to the Clerk's desk. "I won't be down tomorrow," he said.60

There may be nothing untrue in this version of the tale, except perhaps by way of omission. Holmes' physical breakdown had become obvious by the beginning of the October 1931 Term. At the request of a majority of the Justices, who could not help but notice Holmes' frequently sleeping figure on the bench, the bent posture of the old soldier, and the lapses in his speech and memory, Chief Justice Hughes called on Holmes on the Sunday preceding the day on which he handed down his last opinion to urge his resignation. Holmes acquiesced in his brethren's suggestion. He composed the long dreaded letter to the President: "The time has come and I bow to the inevitable."

Perhaps Professor Paul Freund's paragraph on Holmes' departure would not be inappropriate at this point; it is no less kind than Mrs. Bowen's but adds a note of accuracy and one detail of peculiar relevance to this occasion:

On January 12, 1932, Holmes resigned from the bench. A visit from Chief Justice Hughes, with the approval of Justice Brandeis and other colleagues, was the occasion for suggesting that the time had come, and Holmes at once wrote out a letter to President [Hoover].

... He died at his house in Washington on March 6, 1935, two days

60. C. Bowen, supra note 1, at 410.
before his ninety-fourth birthday . . . . By his will, after some specific
bequests, he left the residue of his estate, about a quarter of a million
dollars, to the United States of America. A joint committee recom-
mended, and the Congress approved, the utilization of this fund to
memorialize him through the preparation of a history of the Supreme
Court, the publication of a selection of his opinions, and the support
of an annual lectureship.64

The process of securing resignations has not always been so serene. Some-
times legislative assistance has been necessary and helpful, as the retirement
of Mr. Justice Pitney demonstrates:

Pitney, having suffered what was described as a nervous breakdown,
had been ill through much of the 1921 Term. In September, 1922,
Mrs. Pitney wrote the Chief Justice that her husband’s illness was
such that she and the doctors thought he should not return to the
Court. There were, however, two complications. First, Pitney had
not yet reached the statutory retirement age of seventy. Second, Mrs.
Pitney did not want the exact nature of the Justice’s illness publicly
known. The diagnosis was arteriosclerosis affecting the cerebral arter-
ies, or in laymen’s language, senility. Taft was the soul of tact and
efficiency. He met and corresponded with Mrs. Pitney and arranged
with the President and chairmen of the House and Senate Judiciary
committees for special legislation authorizing Pitney’s resignation
with full retirement benefits.65

The practice was not original. Congress had earlier legislated to provide
retirement benefits that enabled Justice Hunt to retire, but the statute was
made conditional on the Justice’s immediate resignation. Taft also used his
persuasive talents to secure Mr. Justice Day’s retirement after obtaining
President Harding’s authorization to do so. Day’s resignation was ultimately
but not immediately forthcoming. Finally, the break-up of the “nine old
men” was certainly accelerated by the remnants of the Court-packing bill66
that made it possible once again to retire on full salary.

The classic story, of course, is that told of Mr. Justice Field by Chief Justice
Hughes in the book Hughes wrote in the interim between his judicial assign-
ments:

I heard Justice Harlan tell of the anxiety . . . the Court had felt
because of the condition of Justice Field. It occurred to the other
members of the Court that Justice Field had served on a committee
which waited upon Justice Grier to suggest his retirement, and it
was thought that recalling that to his memory might aid him to decide
to retire. Justice Harlan was deputized to make the suggestion. He
went over to Justice Field, who was sitting alone on a settee in the
robing room apparently oblivious of his surroundings, and after arous-

61. P. Freund, Oliver Wendell Holmes, in 3 L. Friedman & F. Israel, The Justices of
62. Murphy, In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments,
63. The one element of the Roosevelt court-packing plan that was effectuated was a
statutory provision for resignation or retirement on full pay. Mr. Justice Van Devanter
retired under this provision and thus created the vacancy filled by Hugo L. Black.
ing him gradually approached the question, asking if he did not recall how anxious the Court had become with respect to Justice Grier’s condition and the feeling of the other Justices that in his own interest and in that of the Court he should give up his work. Justice Harlan asked if Justice Field did not remember what had been said to Justice Grier on that occasion. The old man listened, gradually became alert and finally, with his eyes blazing with the old fire of youth, he burst out:

“Yes! And a dirtier day’s work I never did in my life.”

“That,” said Chief Justice Hughes, “was the end of the effort of the brethren of the Court to induce Justice Field’s retirement; he did resign not long after.” Later researches have revealed that the resignation was in fact pried out of Field by further efforts of Chief Justice Fuller; of Justice Brewer, who was Field’s nephew; and of Field’s brother, Henry. But apparently one’s perspective changes with advancing age. When Fuller’s time came, he, too, did not willingly recognize it. And Hughes, who advanced in his book, immediately after the description of the Field episode, a suggestion for compulsory retirement at the age of 75, was 79 at the time of his retirement.

Many Court-watchers have regarded an age limit on judicial service as unpalatable because of the sources from which the suggestions have sprung: conservatives in the era of liberal Courts and liberals in the times of conservative Courts, if those labels may be so loosely used. Franklin Roosevelt’s Court-packing plan and its Reconstruction precedent, and senatorial suggestions of a 70 year old retirement age, are looked upon as something less than good faith efforts to solve what has been a very real problem. With Holmes and Brandeis as shining examples of what can be done beyond the arbitrary limitation that any such provision would be, the likelihood of a change in this regard is not great.

Less depressing reasons than those I have discussed account for some departures from the Court. For example, Charles Evans Hughes resigned the first time because he was nominated for the Presidency of the United States. There is a long roster of Justices who would have liked to have had a similar reason including, but not limited to, Smith Thompson, John McLean, John Campbell, David Davis, and Salmon P. Chase, to speak only of the long departed. On the other hand, Morrison Waite specifically rejected the opportunity of a presidential nomination as inconsistent with the concept of independence he felt must attach to the High Court post. Fuller declined appointment as Secretary of State for the same reason.

Lesser positions have also attracted Justices. Oliver Ellsworth resigned in contemplation of becoming Chief Justice of Connecticut, and John Rutledge resigned to become Chief Justice of South Carolina. John Jay and Smith

64. C. Hughes, The Supreme Court of the United States 75–76 (1928).
65. Id.
Thompson were both candidates for the New York governorship during their Supreme Court tenure; and Jay's election to that office in 1795, ended his Supreme Court service. David Davis resigned to become Senator from Illinois; James Byrnes, to become assistant to President Roosevelt in managing domestic affairs during World War II; Arthur Goldberg, to become Ambassador to the United Nations. Justice Campbell left the Court when his home state left the Union, and Justice Tom Clark resigned so that there would be no barrier to his son's appointment as Attorney General. Two Justices left the Court because of their conflicts with and distaste for their brethren: Benjamin Curtis, who split so badly with Taney over Dred Scott, and John Clarke, whose treatment at the hands of Mr. Justice McReynolds made life on the Court impossible. McReynolds would have driven Brandeis from the Court, too, if he could, although all three, McReynolds, Clarke, and Brandeis were Wilson appointees.  

Informal methods of persuasion, temptation, even intimidation may be sufficient to induce resignation or retirement. In fact, the informality of such efforts is perhaps their most commendable characteristic since the man may be removed without embarrassing the institution. Nevertheless, the private approach has an inherent weakness: it can encourage, but it cannot compel. Thus, if the Justice refuses to step down "voluntarily," impeachment is the only remaining solution.

VIII. REMOVAL BY IMPEACHMENT

It was almost 350 years ago that Sir Francis Bacon was impeached as Lord Chancellor of the realm of James I and convicted by the House of Lords for taking bribes. Bacon was fined £40,000—a not inconsiderable sum when lords lived like lords on less than £2,000 a year—and sentenced to the Tower at the King's pleasure, as well as banished from public office, from Parliament, and from the Court.

Certainly Bacon was guilty of the acts charged. He confessed to them in 28 detailed pages, a confession that the legislature took pains to assure was voluntary. "Without figleaves," he wrote, "I do ingenuously confess and acknowledge . . . that I find matter sufficient and full, both to move me to desert the defence and to move your Lordships to condemn and censure me." It would seem, from today's perspective, that there is nothing to be said in defense of conduct so patently reprehensible.

There are other factors that, perhaps, speak in mitigation. It is admitted that the conduct indulged by Bacon was commonplace. Offices were bought for money or services and monetary rewards were to be reaped from the use

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66. It has been suggested that Curtis left to reap profits at the bar and Clarke to campaign for United States entry into the League of Nations. Certainly they both engaged in these enterprises, Curtis with more success than Clarke. But these were not the reasons for their departures.

of the power conferred. This was what Bacon himself called one of the “abuses of the times.” Bacon’s guilt was not singular; his punishment was. But Bacon was a friend of the King and, therefore, an enemy of Parliament. Moreover, Sir Edward Coke was, throughout his life, a rival and, consequently an antagonist of Bacon. Coke, who was several times the victim of Bacon’s power, meant to, and did, as a major figure in Parliament, exact retribution through punishment. If Lord Coke would never again hold high public office, neither would Bacon; and Bacon would be disgraced, whereas Coke had only been demoted.

I mention these events, not to revive the moribund contest between those who have sided with Bacon and those who championed Coke. (Judge Jerome Frank was prepared to do battle anywhere to show that Coke was a craven blowhard, while Bacon was both a strong mind and great man.) I offer them instead for the proposition that impeachment was then a political device concerned with partisan politics no less than with the guilt or innocence of government office holders. And I would suggest that the same may be true today. I do not mean to condemn the machinery of impeachment, but only to recognize how it functions and why.

Today impeachment is a word that has gained currency, to some degree, because of its widespread use by the John Birch Society in its attack on Chief Justice Warren. It is, moreover, usable at either end of the political spectrum. (Witness Representative McCloskey’s recent suggestion with reference to the President.) Usually, however, the word has been featured as a piece of empty rhetoric. Motions to impeach have not been a frequent occurrence in the House of Representatives, where such proceedings must originate. This infrequency is due, in part, to the fact that elected officials have relatively short terms of office and may be ousted at the ballot box. Furthermore, the legislature is subject to its own removal procedures, and officials appointed even for specific terms are readily removable. Only the judicial officers of the United States are by law entrenched in their posts for life, subject to removal only by impeachment.68

In the history of the United States, only nine judges of the national courts have actually been impeached. Four of these were convicted on trial in the Senate; four were acquitted by the upper house; one resigned before the trial of his impeachment took place. This is not, however, the whole story. Twelve judges have resigned or retired—13, if one includes Mr. Justice Fortas—after congressional proceedings had been initiated. One more entered an insane asylum. My tentative research discloses that Mr. Justice Douglas apparently

68. This may be gradually changing. A few years ago, for instance, the Supreme Court said that a majority of the appropriate courts of appeals can preclude a district judge from engaging in his appointed tasks. See Kurland, Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969, 1970 Sup. Cr. Rev. 1.
shares with Mr. Justice Samuel Chase the distinction of being the only members of the High Court against whom impeachment charges have been filed in the House of Representatives.

For the most part, the charges calling for impeachment processes have been directed to dishonesty. The tradition of Francis Bacon remains strong. Two of the successful impeachments however, those of Pickering and Humphreys, did not rest on such grounds. Pickering, the first target of Jeffersonians interested in ridding the federal courts of Federalist appointees, was a drunkard and probably out of his mind, but he was also accused of disregarding statutory commands. Humphreys joined the Confederacy during the Civil War and was convicted on that ground.

The Jeffersonians had looked hopefully to this remedy of removing political enemies until their efforts failed in the House of Representatives in the case of Judge Peters and in the Senate in the case of Supreme Court Justice Chase. That the Legislature is to invoke the processes of impeachment when judges, in the opinion of the Congress, have overstepped their bounds could be supported by no less a Federalist authority than Hamilton’s famous Federalist No. 81. After pointing specifically to the power to impeach federal judges, Hamilton wrote:

There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their station."

That John Marshall himself seems to have acceded to such a view is demonstrated both in his weak testimony offered at the impeachment trial of Justice Chase and in a letter suggesting that the National Legislature, rather than invoking their power of impeachment, should choose a system of directly revising the opinions of the Court. But, largely because of inept management of the impeachment trial by members of the House, Chase was not convicted, and from that day to this, it has been acknowledged that the substance of judicial opinions can themselves afford no basis for impeachment. Jefferson eventually acknowledged this deficiency of legislative power, however much he regretted it. In a letter to Thomas Ritchie in 1820, Jefferson wrote:

Having found from experience, that impeachment is an impracticable thing, a mere scare-crow, they [federal judges] consider themselves secure for life; they skulk from responsibility to public opinion, the only remaining hold on them. . . . A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government."  

Whatever their feelings, however, the Republicans of that day were unable

70. 9 Writings of Thomas Jefferson 46 (P. Ford ed. 1890-99, 10 vols.).
to agree upon a method of judicial removal other than impeachment. A constitutional amendment to provide for removal by petition of both houses of the legislature made no headway whatsoever. It should not be forgotten, however, that where an actual violation of criminal law occurs, as in the case of bribery, the ordinary criminal processes of indictment and conviction are available against judges no less than against other government officials.  

The most recent impeachment proceedings were against Justice Douglas, but before I turn to the facts of the Douglas impeachment move, there is a prelude to which I would advert, a prelude that is already all but forgotten. I refer, of course, to the Fortas affair, in which the resignation of a Justice of the Supreme Court was secured through the machinations of executive, legislative, and judicial officials, with the news media as the effective means of removal. So far as the public was ever informed, the facts were few and inexplicable. The inferences—however valid—were drawn by the press for those who could not themselves see the light. Mr. Justice Fortas, we are told, had taken and belatedly returned a large sum of money from a foundation, presumably for services to be performed for that foundation even while he served as a member of the Supreme Court; he had received large fees for speaking and teaching engagements; he had allegedly given friendly advice to a former client who was also the creator of the foundation and who was later convicted of violation of the securities laws—a conviction, incidentally, that was all but unique in the administration of those laws; he was accused of associating with criminals, namely the former client to whom he had given advice prior to his conviction; and was accused, and accused is the word, of giving advice to the President of the United States on matters unrelated to his judicial office.

The campaign against Fortas was a subtle blend of innuendo and public outcry. There were hints of influence peddling or even of bribery. Certainly if there were facts to support such charges, the public was entitled to have them rather than the surmises of those whom Mr. Justice Frankfurter used to call "newspaper calumnists." No such facts were publicly adduced. The Chief Justice of the United States was privately consulted by the Department of Justice, in the person of the Attorney General himself, but we shall probably never know what was said unless either Warren's or Mitchell's memoirs prove more open than we have any right to expect. Official "leaks" from the White House, the Department of Justice, and the Internal Revenue Service became the order of the day. And Senators and Congressmen were not to be outdone in their demands for ethical behavior by others.

71. The infamous case of Martin T. Manton, once presiding judge of the Court of Appeals for the Second Circuit, affords more example than one would wish to have on this score.

The result was that Fortas resigned, thereby lending credence to the innuendos, but with no further explication of the facts. The immediate consequences we know. There were two abortive attempts to appoint a Justice in place of Fortas. But neither Judge Haynsworth nor Judge Carswell were—to use recent presidential language—able to “hack it” in the Senate. The replacement of Mr. Justice Fortas by Mr. Justice Blackmun has already made a big difference in the jurisprudence of the Supreme Court.

There was no mention in the Fortas case of the distaste for Fortas’ opinions that so many of his detractors actually held, although evidence of this distaste is easily found in the hearings on his nomination for Chief Justice. The sole argument openly advanced was that this judge’s extrajudicial activities called for censure, not that his judicial activities left anything to be desired.

IX. Justice Douglas’ Impeachment

I point to the Fortas affair as prelude, because the same pattern of attack was later mounted against Justice Douglas. There was one major difference, however, Douglas did not yield and the problem became one of proof rather than assertion. The task fell to Gerald Ford, the Republican leader in the House of Representatives, who was the primary spokesman for Douglas’ traducers. Representatives Gross of Iowa, Hébert of Louisiana, and Wyman of New Hampshire played major supporting roles.

A special subcommittee of the House Committee on the Judiciary, led by its redoubtable chairman, Representative Emanuel Celler, conducted the investigation mandated by the impeachment resolutions. After collecting extensive data, three of the four committee members, Celler, Byron Rogers, and Jack Brooks, all Democrats, reported: “Intensive investigation of the Special Subcommittee has not disclosed creditable evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense.”

There was a dissent from Representative Edward Hutchinson, a Republican, who complained that the subcommittee had not called for any oral testimony to test the credibility of the parties whose evidence was involved. The other Republican committee member, William McCulloch, signed neither the majority or minority report.

Representative Ford had attempted to make clear that the charges related essentially to Douglas’ extrajudicial activities rather than to the judgments he rendered on the Court. Ford put this proposition in a way that calls for quotation rather than synopsis:

Let me say by way of preface that I am a lawyer, admitted to the bar of the U.S. Supreme Court. I have the most profound respect for the U.S. Supreme Court. I would never advocate action against

a member of that Court because of his political philosophy or the legal opinion which he contributes to the decisions of the Court. Mr. Justice Douglas has been criticized for his liberal opinions and because he granted stays of execution to the convicted spies, the Rosenbergs, who stole the atomic bomb for the Soviet Union. Probably I would disagree were I on the bench . . . with most of Mr. Justice Douglas' views, such as his defense of the filthy film, "I Am Curious (Yellow)." But a judge's right to his legal views, assuming they are not improperly influenced or corrupted, is fundamental to our system."

The subcommittee investigated a large number of matters. Some of them were rather detailed and complicated, such as the relationship between the Justice and Juan Bosch of the Dominican Republic. Theoretically, the question here was whether Douglas was in violation of the Logan Act. The same charge was levelled in connection with the Pacem in Terris Convocation, sponsored by the Center for the Study of Democratic Institutions with the financial assistance of the Parvin Foundation, two organizations with which Douglas was intimately involved. The Logan Act prohibits private citizens without the authority of the United States from contacting foreign governments with the intent to influence government relations. The answer found by the subcommittee in each instance was that the activities that were conducted had the approval of the State Department and that whatever role Douglas played, it thus did not involve a violation of the statute.

Douglas was also accused of practicing law while a Justice, a criminal offense. Title 28, section 454 makes it a high misdemeanor for "any justice or judge appointed under the authority of the United States" to "engage in the practice of law." The subcommittee found that Douglas had not given legal advice nor helped, as charged, to prepare incorporation papers for the Parvin Foundation and was, therefore, not in violation of the statute.

There were a series of other charges of which Douglas was exonerated by the subcommittee. Essentially, however, the major allegations concerned three things: Douglas' publications in two magazines that his accusers regarded as pornographic in nature; Douglas' publication of a book entitled Points of Rebellion, which his accusers thought to be seditious if not treasonous; and Douglas' association with what the accusers regarded as unsavory characters, from whom he received substantial payments for services rendered. It is on these that I will concentrate.

76. Id.
Because these "offenses" were the essence of the charges levelled against Douglas, an important constitutional question was raised but not answered in the ensuing proceedings. The question derives from the impeachment provision, in article II, section 4, which provides for removal from office "on impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." On the other hand, article III provides that a judge shall hold office during "good Behavior." No question was raised whether impeachment was the exclusive method for removal of federal judges. That proposition seems to have been accepted by all. Rather the question was whether "Treason, Bribery, or other high Crimes and Misdemeanors" could be defined as something other than statutory criminal offenses, and whether the standard of "good Behavior" could be interpreted by Congress to make noncriminal conduct a basis for removal. It was the contention of the attackers that Congress was free, in the fashion of the common-law courts, to decide what was a crime or misdemeanor for purposes of impeachment. The defense asserted that only statutory crimes could afford the basis for impeachment.

Both sides had some historical evidence to support their positions. Only Representative McCloskey, the new resident expert in Congress on impeachment, offered a rationale to satisfy both constitutional provisions. It is a rationale of much merit:

Conduct of a Judge, while it may be less than criminal in nature to constitute "less than good behavior," has never resulted in a successful impeachment unless the judge was acting in his judicial capacity or misusing his judicial power. In other words the precedents suggest that misconduct must either be "judicial misconduct" or conduct which constitutes a crime. There is no basis for impeachment on charges of non-judicial misconduct which occurs off the bench and does not constitute a crime."

This rationale has the advantage of not requiring for impeachment that the judge's behavior be criminal if it is improper judicial behavior. On the other hand, extrajudicial conduct would have to be criminal in order to justify impeachment. However, as I have already said, the subcommittee found it unnecessary to resolve the question on the ground that whatever standard was used the charges and their proof did not warrant impeachment.

The first of the publications in question in these proceedings was printed in a magazine called Avant Garde, published by Ralph Ginzburg, who had the distinction of being convicted for pandering erotic literature, a crime that was created by the Supreme Court in a five-to-four decision with Douglas a member of the minority. The same Ralph Ginzburg had the further distinction of being saddled with a judgment of $75,000 in a suit by Senator Gold-

78. Final Report, supra note 73, at 16.
79. Chase's and Pickering's impeachments would qualify on this rationale, since their behavior was not criminal.
water for libel.\textsuperscript{48} It is one of the few libel judgments that has withstood the test of the \textit{New York Times} case.\textsuperscript{81} When the judgment in the Goldwater case was brought to the Supreme Court for review, Justices Black and Douglas dissented from the denial of certiorari. And therein lies the charge. For just a year before that action was taken by the Supreme Court, Douglas had published his article in \textit{Avant Garde}. The article, as described by Congressman Ford, was not itself "pornographic, although it praises the lusty, lurid, and risque along with the social protest of leftwing folk singers."\textsuperscript{85} On this point, Ford argued: "Writing signed articles for notorious publications of a convicted pornographer is bad enough. Taking money from them is worse. Declining to disqualify one's self in this case is inexcusable."\textsuperscript{83}

The defense offered by Douglas was rather in the nature of confession and avoidance. He asserted, through his distinguished counsel, Judge Simon Rifkind:

\begin{quote}
When Justice Douglas permitted \textit{Avant-Garde} to publish his piece on folk singing, he had no personal knowledge, and no reason to believe, that the magazine was controversial, that it had any relationship to someone named Ginzburg, or that anyone else associated with the magazine was controversial or had been involved in litigation. When, nearly a year later, a petition came to the Court involving Ginzburg's \textit{Fact} magazine, the Justice did not relate that magazine to \textit{Avant-Garde} or his folk-singing article. In any event, prior publication of a single article does not require a Justice to disqualify himself subsequently in any case involving the publisher, where that case does not relate to the Justice's article and where no strong personal relationship exists between the Justice and the publisher.\textsuperscript{84}
\end{quote}

The subcommittee didn't entirely believe Justice Douglas. It found that Justice Douglas had known of Ginzburg's connection with \textit{Avant Garde} when the \textit{Goldwater} case was brought before the Court. But the subcommittee also held that the relationship between Douglas and Ginzburg, through \textit{Avant Garde}, did not require disqualification. Both the relationship and the money received for the article were found to be "\textit{de minimus}" [sic].

The second magazine publication to which the attacking Representatives took exception was an excerpt from the book \textit{Points of Rebellion} that appeared in the \textit{Evergreen Review}. Here the attack was levelled because of the nature of the publication in which the excerpt appeared. Part of the description of the magazine offered by Representative Ford is revealing both of the attitude of Mr. Ford and the magazine:

\begin{quote}
Alongside of Evergreen the old Avant Garde is a family publication....
\end{quote}

Next we come to a 7-page rotogravure section of 13 half-page

\textsuperscript{82} \textit{Final Report, supra} note 73, at 44.
\textsuperscript{83} \textit{Id.} at 45.
\textsuperscript{84} \textit{Id.}
photographs. It starts off with a relatively unobjectionable artsy nude. But the rest of the dozen poses are hard-core pornography of the kind that the U.S. Supreme Court's recent decisions now permit to be sold to your children and mine on almost every newsstand. There are nude models of both sexes in poses that are perhaps more shocking than the postcards that used to be sold only in back alleys of Paris and Panama City, Panama.45

Remember that Mr. Ford is not taking exception to what the Justices have done on the bench. (One should also note Mr. Ford's sophistication about the commerce that occurs in the back alleys of Paris and Panama City.) He continued:

Immediately following the most explicit of these photographs on pages 40 and 41, we find a fullpage caricature of the President of the United States, made to look like Britain's King George III and waiting, presumably, for the second American Revolution to begin on Boston Common, or is it Berkeley?46

Mr. Ford's point is clear, the magazine is not only pornographic, it is seditious. Again Mr. Justice Douglas' plea is confession and avoidance. His brief reported:

It is charged that Mr. Justice Douglas published an article consisting of a section from his book Points of Rebellion, in the April 1970 issue of Evergreen Review, where it immediately followed an artist's caricature of the President and a portfolio of allegedly obscene pictures. The fact is that Justice Douglas did not authorize the publication of the article in Evergreen Review, and had nothing to do with where it appeared and what materials accompanied it.

In short, Justice Douglas played no role in Random House's decision to permit a portion of his book to appear in Evergreen, he had no right under his contract to take any position on the matter, and he was not consulted.47

The plea of confession and avoidance was accepted by the subcommittee which, indeed, took a stronger stance than did the Justice. The subcommittee ruled:

The Special Subcommittee concludes that Justice Douglas had no knowledge or control over either the placement, or the manner of placing, the article "Redress and Revolution" in Evergreen Review. In the circumstances the Special Subcommittee does not believe that the juxtaposition of the article with other materials in the publication would have any bearing on the question of impeachment. Evergreen Review is a magazine that is lawfully distributed in the United States. It contains a wide spectrum of material, and its success shows its appeal to the public. The Special Subcommittee sees no reason why the process of making materials written by Justice Douglas available to the audience of the Evergreen Review should subject Justice Douglas to charges of impeachment. Any literary, social, ethical or other deficiencies of the Evergreen Review would not run

85. First Report, supra note 74, at 36, 37.
86. Id. at 37.
87. Final Report, supra note 73, at 397, 398.
The major charge against Douglas for his writing concerned the book *Points of Rebellion* itself. In this book, it was charged, Douglas “wilfully and deliberately fanned the fires of unrest, rebellion, and revolution in the United States.” The attackers took a series of quotations out of context to document the charge. The subcommittee, in its report, reprinted the same excerpts in context. The basic conflict was over the message that was conveyed. The attackers read the volume—as it could be read and has been read by those who liked it no less than those who disliked it—as an indorsement of a resort to violence. The defense had several responses: first, that even a Supreme Court Justice is protected by the first amendment and those who attack his right to speak his mind are the lawbreakers; second, that extrajudicial writings are commonplace, although the defense was hard put to find comparable literature written by members of the Court (they did invoke some writings of Felix Frankfurter, which to them had the same sound as some of *Points of Rebellion*, but those had been written in 1920, some two decades before Frankfurter ascended the bench); third, that the volume had been misread. One section of the Douglas brief stated the last defense as follows:

>Counsel . . . believes it might be a useful exercise to demonstrate that any fair reading of the book and of the Justice’s other writings makes nonsense of the charge that he advocates, incites or encourages violence or anarchy or the other evils alleged. The Justice’s view was well stated in a recent opinion where he wrote:


*Points of Rebellion* is concededly a provocative description of the danger signs which are so unhappily present in our society. If it is a call to action, it is for action to remedy social problems by legal and political means. By no fair reading does the book advocate the use of violence or resort to revolution. To accuse Justice Douglas of advocating violence is like charging a scientist who warns that air and water pollution may make our planet uninhabitable with advocating the destruction of human life.

Justice Douglas’ book . . . is, of course, profoundly anti-revolutionary. It is a call to Americans peacefully to make changes necessary to avoid a violent revolution. If such a call for peaceful change is a crime or grounds for impeachment, our Nation is in trouble, wisdom has become a punishable offense, and the Constitution is in tatters.*

The special subcommittee concurred with the reading given the book by Mr. Justice Douglas’ counsel. They ruled:

>To deny a judge the right to express his views on general social

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88. *Id.* at 175.
89. *Id.* at 393.
problems that are not the subject of particular cases or controversies would deprive the country of the benefits of advice, counsel and viewpoint of the third branch of our tripartite government. The accumulated wisdom and judgment of the judicial Branch of the Government, the Branch most detached from the hurly-burly of topical controversy, would be denied.

In summary, the Special Subcommittee believes that the theories of Points of Rebellion have been misconstrued. There is not a call to violence but it is a warning of rebellion, violent or otherwise, if divergent forces in society are not successfully assimilated under established order of law. Points of Rebellion may not be a well written book. It may not express viewpoints which are popular with all segments of society. These deficiencies, however, cannot become the basis for impeachment of its author. To premise impeachment on the writings of a judge would in large measure destroy the judicial independence which the Founding Fathers intended.\(^90\)

The subcommittee has a strange notion of the function of the judiciary in our society. I doubt that society needs “the advice, counsel or viewpoint of the third branch of government” on matters outside their special duties or competence. Indeed, our history shows that the third branch has from the beginning refused to offer such advice, at least on a public and official basis, even at the behest of the President, precisely to keep it out of the “hurly-burly of topical controversy.” Nevertheless, the subcommittee’s conclusions seem appropriate, if not in the construction of the book, in the construction of the applicability of the impeachment clause.

The second major category of charges related to extrajudicial activities by Mr. Justice Douglas in connection with two foundations, the Parvin Foundation and the Center for the Study of Democratic Institutions. Both of these efforts, it was charged, involved Douglas in close association with unsavory characters, in particular, Albert Parvin in the first instance, and Robert Maynard Hutchins in the second.

The words of the House Resolution related only to the Center for the Study of Democratic Institutions. Mr. Ford’s accusations concerned both. Ford’s words are, if cruder, more revealing of the tone of the charges against the Justice on this score. Necessarily, I quote only a small portion, a sort of summary, but I assure you that the remainder is equally as appealing:

On the basis of the facts available to me, and presented here, Mr. Justice Douglas appears to represent Mr. Albert Parvin and his silent partners of the international gambling fraternity, Mr. Ralph Ginzburg, and his friends of the pornographic publishing trade, Dr. Robert Hutchins and his intellectual incubators of the New Left and the SDS, and others of the same ilk. Mr. Justice Douglas does not find himself in this company suddenly or accidentally or unknowingly, he has been working at it for years, profiting from it for years, and flaunting it in the faces of decent Americans for years.\(^91\)

\(^90\) Id. at 165–66.

\(^91\) Id. at 225.
The facts were that Douglas had associated himself with Parvin and had received a salary of $12,000 per year as president of the Parvin Foundation—a total of $101,000 in 9 years. It was equally true that Douglas has associated himself with Hutchins’ Santa Barbara Center and had received from it $10,550 in honoraria and $13,770 in expenses in the period from October 1958 through February 1970. Further, it was true that Parvin certainly had associated with gamblers and Hutchins had associated with radical students. The hotel from which came the capital for the Parvin Foundation was located in Las Vegas, Nevada. One would find it difficult to do business in Las Vegas and not associate with gamblers. Hutchins was a university president, but before the days of the SDS.

The subcommittee, after an exhaustive examination of documentary sources, including those made available by the Department of Justice, the Internal Revenue Service, the Department of State, and even the CIA, could find no basis for condemnation of the goals of either foundation or the means used to achieve them. Nor was there anything in the behavior of the multitude of persons named by accusing Congressmen which would afford a basis for finding misconduct on the part of the Justice.

The subcommittee’s judgment of exoneration was, despite noises by Ford, Gross, Wyman and others of their persuasion, the last official word on the subject. It is not likely that the Congress will soon be troubling Mr. Justice Douglas again.

Nevertheless, the hearings have had their effects on Mr. Justice Douglas. His resignation from the Parvin Foundation presidency occurred, as Mr. Ford likes to point out, immediately after the revelations of Mr. Justice Fortas’ connections with the Wolfson Foundation. The Justice has disqualified himself from participation in numerous cases over the past two Terms on grounds for disqualification that were never apparent to him before. His judicial point of view, however, which one might appropriately think was the real subject of the attack upon him, seems unchanged. His comparative isolation in recent days is due more to the retirement of Mr. Chief Justice Warren and the resignation of Mr. Justice Fortas than to any withdrawal on his own part.

The essential question raised in the hearings about the propriety of impeachment for the conduct with which Mr. Justice Douglas was charged seems to have been appropriately answered in the negative. Questions remain, however, that were raised by Representative Whalen in his opposition to the impeachment, when he suggested that there was necessarily a difference
between conduct that was impeachable and conduct that was improper:

I would say that if Justice Douglas at this time were a member of the court of appeals and had been nominated for membership on the Supreme Court, his conduct probably would lead to the defeat of that nomination just as it did in the case of Mr. Carswell, Mr. Haynsworth, and Mr. Fortas. . . . [But] this is not a confirmation proceeding. For Justice Douglas, that decision was made 31 years ago. Rather we are talking about impeachment.9

The distinction between improper and impeachable conduct deserves further note. Although no exact standard for judicial conduct can be formulated, general guidelines should be developed. Prior to the impeachment hearings the Senate received expert testimony concerning the propriety of judicial conduct like that of Justice Douglas. The remarks of four commentators are worthy of reproduction at some length:

1. Arthur Goldberg emphasized the value of proper appearances:

Because our courts and especially the Supreme Court of the United States, inevitably deal with subjects of vast importance and great controversy, it is absolutely essential that regardless of one's views concerning the correctness or incorrectness of particular decisions, the institution itself be defended. This is not to say that judicial decisions are not properly subject to fair comment and criticism. . . . But the tumult, if there has to be one, should be about the decisions of the Court, and not the conduct of its members. In a very real sense we have staked our all on the probity of our judiciary and, as I have said, the test here must not be merely lack of corruption in office but avoidance of the appearance of impropriety. . . .

. . . . As men, and therefore cognizant of the public mood, judges cannot ignore the present public uneasiness concerning the whole matter of their outside activities and financial interests. . . .

Specifically, I would think that now the present is the time for judges to refrain from engaging in activities which, however proper in an abstract sense, have a potential to create doubt and confusion in the present public mind.44

2. Dean Acheson, certainly the most outspoken witness before the Senate subcommittee, suggested—in the fashion of the Supreme Court itself—specific prophylactic rules which included:

1. **Supplementing judicial salaries by outside earnings.**—This practice should be flatly forbidden. . . . The prohibition should extend to the receipt of earnings from the writing of books and articles. This activity and such compensation as may go with it may be saved for the often boring period following retirement from active work.

If for whatever reasons a judge's expenses increase so that he cannot meet them from his salary and private means, he should resign or retire and seek other work. Speeches and lectures by judges and justices should be restricted to legal subjects (including eulogies of

93. **Final Report**, supra note 73, at 382.

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deceased jurists) and to legal audiences. The judiciary will only invite trouble if it intrudes into other fields. I suppose that “World Peace Through World Law” falls within their field, but population control, the conflict of generations, and the iniquity of foreign undemocratic regimes surely do not.

A judicial robe is poor insulation from folly. As the Arab proverb wisely points out: “The ass that went to Mecca remained an ass.”

Even membership on civic, educational, and religious boards or committees can involve judges in unexpected controversies, which can detract from a proper reputation for impartiality.

3. The third witness, Judge Simon Rifkind, who later acted as counsel for Mr. Justice Douglas before the special House subcommittee that considered the question of impeachment, focused on the traditional virtue of moderation:

Because judges occupy a special place in our society, they necessarily undergo a degree of insulation. However, that insulation must not be so complete as to separate the judge from the community so that he no longer shares its joys and sorrows, its triumphs and defeats, its ambitions and anxieties. All that is necessary is that his behavior be such that he will not be suspected of having his decisions corrupted by passion, partisanship or partiality.

... The public expects its judges to visibly represent the elements of moderation and stability in the community. Judges who are wanting in this respect do not receive the respect they should evoke from the community. In order that judicial decisions may command respect, and this in my opinion is their primary sanction, judges must so order their lives as to earn that respect.

4. The most cogent commentary on the problem was offered by the Chairman of the Senate Subcommittee on the Separation of Powers, Senator Ervin. In opening the hearings he remarked:

There is much to be said for the idea of the “cloistered judge,” as it has recently been called. We place great reliance on our court system for the resolution of very controversial public as well as private disputes. The effectiveness of courts in performing their functions depends upon the public acceptance of them as impartial and objective bodies. Judges who lose the general respect of the public, for whatever the reason, weaken the entire structure of the judiciary, and consequently damage an important factor contributing to social stability and peace. This consideration is especially important today. Courts, and especially the Federal judiciary, are now called upon to resolve many social, economic, and political problems which in times past were more often left to other parts of the Government and society. Courts are not ideal institutions for the resolution of such issues, and it is perhaps unique to our country that they have come to serve this function. Nonetheless, the intrusion of courts into “political” controversies results in a heavy drain on the authority of the judiciary, and makes it doubly important that judges avoid

95. Id. at 116–17.
96. Id. at 47.
unnecessary excursions into controversial affairs outside the courtroom.

Offsetting these considerations, in practice if not persuasion, is the tradition that Federal judges, and particularly Supreme Court Justices, have continually engaged in outside activities of a wide variety. . . .

This is a delicate subject for discussion. The intangibles of judicial independence and integrity are involved. And difficult as this subject would be in normal times, we are now in the midst of a very controversial period in which almost anything said on the subject can be interpreted as criticism or praise for individual members of the judiciary. However difficult this subject, I think it imperative that it be discussed frankly and objectively. The severe tests to which the Supreme Court has been subjected in the past few months demonstrate exactly how fragile is the structure upon which its authority rests. Whatever one's views on the Court and its constitutional policy, there should be one thing upon which all will agree—that is, that the Court must be sustained as an institution. There could be no greater tragedy than to see the Court's moral standing and respect weakened to the point where it is considered a second-rate institution in our system of government. Democracy cannot afford it.97

There was a tension in the factors to be considered by the Subcommittee of the House Committee on the Judiciary when it considered the proposal to impeach Mr. Justice Douglas. It was patently evident to all who wished to see that the facts on which the attackers rested were a facade, that the real target at which they were aiming was the Supreme Court—or at least that part of it which shared with Justice Douglas certain views of the meaning of the Constitution. That the success of such an attack, after the earlier removal of Justice Fortas, would have been destructive of the independent role of the Supreme Court in American government was equally clear. On the other hand, that a Justice should treat the business of the Court as a part time occupation, and that he should enter the arena of politics and public controversy, was demeaning of the Court's function in our society.

In view of these conflicting arguments the resolution tendered by the subcommittee was clearly the proper one. The conduct of the Justice in question was clearly not an adequate basis for impeachment. But neither was it conduct becoming a High Court Justice. It could not be condoned on the ground that other Justices have behaved in the same way any more than Bacon should have been excused his trespasses because others indulged the same behavior. The Court is a delicate instrument for the protection of individuals and minorities against threatened imposition by a government that represents the majority. It cannot tolerate for long, either the kind of irresponsible attack mounted in the Douglas impeachment proceedings or the self-inflicted wounds of Justices who flout the conventions of society by unnecessary, unwise extra-judicial activities.

97. Id. at 31, 34.
The subcommittee's conclusions about the absence of a proper base for impeachment will remain correct only if the courts and the judges are committed to an aloofness from and an impartiality in the political arena. When, both on the bench and off, their actions are governed by the same kinds of partisanship that are displayed by our elected officials in the executive and legislative branches, their claim to immunity from impeachment rests on dubious grounds. If they constitute but another political branch, indistinguishable from the others in function and performance, it will be hard to argue that they should not be removable on the vote of a majority of the people's representatives in the lower House and two-thirds of those in the Senate, however partisan the votes may be. Immunity from impeachment for the performance of their work is the result of, no less than a means to, judicial independence.

I suggest that the attempts at the removal of Justices in recent times are not accidental. Neither in the post-Civil War judicial crisis nor in that of the Roosevelt era of the "nine old men" was there resort to or suggestion of impeachment. Not since the Republicans sought to oust the Federalists in the earliest days of our country have we had an analogous legislative attack on the judiciary. It failed the first time. It is to be hoped that it will fail again. But one should examine the causes rather than deny the danger which may be both past and future.
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