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Dear Members of the NYU Legal History Colloquium:

Thank you so much for agreeing to read my book manuscript! (And please do not copy, cite or circulate it without permission.) I have just submitted the manuscript (seconds ago) to Oxford for copy-editing, so I won't be able to add any new chapters, based on what you tell me. But I **will** be able to make changes when the manuscript comes back from the copy-editor and before I submit the final version. It would ideal if you could make your criticisms as targeted/specific as possible so I know what to fix, massage, rewrite, add, delete, etc. But whatever you say, I really look forward to being with all of you again.

Best wishes,

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The Long Reach of the Sixties: LBJ, Nixon and Supreme Court Nominations

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In Memory Of

Newton Kalman, 1920-2010

Celeste Garr, 1924-2010

John Morton Blum, 1921-2011

Lee Kalman, 1919-2014

Protectors, Promoters, Teachers, Friends

Preface

On February 13, 2016, friends found the body of the Supreme Court's preeminent conservative in his suite at a hunting resort in West Texas. Seventy-nine-year-old Antonin Scalia had unexpectedly died of natural causes just as the nation moved into an unusually fraught Presidential primary season. With the Court frequently divided on big issues 4-4 between "liberals" and "conservatives," and another 79-year-old justice, Anthony Kennedy, casting the swing vote, "Scalia's Death Offers Best Chance in a Generation to Reshape Supreme Court," the New York Times declared. Since President Obama had almost a year left in office and promised to fulfill his constitutional duty by naming a new justice, his fellow Democrats expected him to do so, though many doubted that the Republican Senate would confirm the nominee. After all, less than two hours before the public learned of Scalia's death, Senate Majority Leader Mitch McConnell of Kentucky had incensed Democrats by declaring that "it only makes sense that we defer to the American people who will elect a new president to select the next Supreme Court justice."¹

Five weeks later, Obama nevertheless nominated Merrick Garland, a white Harvard College and Law School alumnus. Like almost all justices since the mid-1970s, Garland was a federal judge with sterling credentials. He had been Articles Editor of the Harvard Law Review and had clerked for two legendary judges, Henry Friendly and William Brennan. He had also served as a partner in one of the capital's preeminent law firms, federal prosecutor in the Bush I Administration, and Deputy Assistant Attorney General in the Clinton Administration before Clinton successfully named him to the DC Circuit Court of Appeals. By some standards Garland was centrist; by others, a centrist

liberal slightly to the right of the Court's liberals. While he was the best the Republicans could hope for, a Justice Garland seemed likely to move the Court leftwards. Senate Republicans simply refused to hold hearings.²

Obviously, the Supreme Court nomination would play a critical role in the political season. By this time, Americans had grown accustomed to the eruption of periodic battles royal over Supreme Court vacancies, particularly when the President's party did not control the Senate. Some traced the origins of this state of affairs to Ronald Reagan's unsuccessful nomination of Robert Bork in 1987. In fact, it began over twenty years earlier when Lyndon Johnson and Richard Nixon created a new kind of Presidential politics around nominations to the Supreme Court.³

The Long Reach of the Sixties shows how, between 1965 and 1971, Supreme Court nominees and their confirmations became critical to Presidential politics. As Lyndon Johnson and Richard Nixon, the Senate, prospective justices, members of the Court, interest groups and the public mobilized, they created and politicized the modern nomination and confirmation process. The period saw two successful Supreme Court nominations and two failed ones by Johnson, and four successful Supreme Court nominations and two failed ones by Nixon. The quest to enlist the Court in consolidating Presidential power caused big battles that had lasting consequences for the Court's political significance and the selection and confirmation of Supreme Court justices that still resonate for the Garland nomination today.

Scholars have long focused on the turning point that Roosevelt's 1937 Court Packing Plan posed for President, Court and country. After the resolution of that crisis,

however, the Court and its membership consumed space in Presidents' partisan calculations only sporadically. FDR wasted little time worrying about the Senate's reaction to his prospective Supreme Court nominees or what they would do as justices--which may be one reason they fought with each other so much. That pattern continued under Truman, Eisenhower and Kennedy.⁴

Then, when LBJ and Nixon in rapid succession tried to enlist the Court in service of their Presidencies, the Senate asserted itself and nominations became more fraught. Just as we evaluate the impact of Presidential nominees on the Court, we need to examine prospective justices in the context of the Presidency. As Johnson and Nixon saw it, they needed a clearer idea of what potential candidates for Court vacancies would do because the Supreme Court under Earl Warren was making waves by transforming the meaning of the Constitution for civil rights, criminal procedure, internal security, reapportionment, religion and speech. With their expansive vision of the political chessboard and potential chess pieces, LBJ and Nixon modeled for their successors how the President should and should not factor the Court into the politics of the Presidency.

With his first nomination, Johnson sought to install a spy at the Supreme Court, to maintain the tradition of the "Jewish seat," and to continue keeping tabs on the Justice Department. With his second, Johnson created the "black seat" by naming the first African American to sit on the Court at a time when he worried that the civil rights consensus underlying Cold War liberalism was teetering. With his two failed nominations in 1968, LBJ hoped to reward devoted friends and to sustain the ideological momentum of the Warren Court, though he had some reservations about it. Like Chief Justice Warren, LBJ considered the Court part and parcel of his Great Society. For that

and other reasons, Republicans and southern Democrats derailed the nominations in a brawl about Johnson's attempt to name "cronies" to the Court; the Warren Court's civil rights, criminal law and obscenity decisions; and charges of financial impropriety.⁵

The Warren Court became Richard Nixon's quarry. He used it to win election in 1968 and to unify, shape and broaden the modern Republican Party. As President, he tried to create vacancies by getting rid of two of the Court's most liberal members, and he nominated six individuals to the Supreme Court whom he touted as "strict constructionists" or "constitutionalists." Now, liberal Democrats, often aided by moderate or progressive Republicans, mounted a counterattack.

The Long Reach of the Sixties turns the spotlight on Johnson and Nixon's attempts to populate the Court between 1965 and 1971. Using recordings of Presidential telephone conversations, along with archival sources, it grounds the efforts by LBJ and Nixon to shape the Court in the political history of their Presidencies. It places the ideological contest over the Court within the context of the struggle between the Executive, Judicial and Legislative branches of government and interest group mobilization. The fights that followed fixed the image of the Warren Court as "activist" and liberal" in one of the arenas where that image matters most, the contemporary Supreme Court appointments process.

The book also investigates the ways in which the sixties have haunted and scarred that process. Of course, Supreme Court nominees had faced attack before the late Warren era. But even by the standards of the nineteenth century, when confirmation struggles over Supreme Court justices routinely occurred, the fights about nominees from 1967-71 proved exceptionally contentious. If how we react to a Supreme Court nominee

depends on whose ox is gored, what makes this period special is that Warren Court partisans and antagonists alike had plenty of oxen at risk for slaughter.

We improve our understanding of the combination of political and constitutional developments that have made so many nominations since the mid-twentieth century so significant if we root the modern Supreme Court appointments process in “the sixties,” a period that lasted into the early seventies. But we should recognize, that just as contingency pervades history, it plays a large role in this story. Like other Presidents, LBJ and Nixon named people to the Supreme Court according to Holmes’s proverbial “felt necessities of the time,” and, as ever, all history “teaches” us is that history turns on a dime. If political science is too neat to instruct Americans on how to govern, history is too messy.

Nevertheless, in a real and often unfortunate way, Johnson’s and Nixon’s tussles over nominations have shaped how the Warren Court is remembered and how justices have been chosen and confirmed ever since. The struggles also led Republicans and Democrats to portray the Warren Court as too “activist” and “too liberal” in the contemporary appointments process. As a consequence, even when members of their own party controlled the Senate, two gun-shy Presidents in the late-twentieth and twenty-first centuries appointed moderate progressives to the Court who rejected judicial “liberalism” and “activism.” That pattern, I argue, reflects Democrats’ acceptance of the inaccurate portrayal of the Warren Court that its opponents promoted during “the sixties.”

Like stereotypes, adages exist for a reason. Trite as it is to point to Faulkner’s observation, “The past is never dead. It’s not even past,” I have the historian’s fondness

for doing so. This book had its origin in a prior one, a file and a policy. More than thirty years ago, I began work on a biography of Abe Fortas. In the Library of Congress, I discovered the notes of New York Times reporter Fred Graham on his conversations with Supreme Court members after Nixon had forced Fortas's resignation. Justice Potter Stewart had stressed that he and his colleagues "work hard, don't go out on nights when there are arguments" and that most had stopped lecturing for fees or serving on foundation boards. Justice William Rehnquist had informed Graham that "the justices are cut off to some extent by others' awe of them" and that "they have been cut off further by the [F]ortas scandal; thinks this is not a good thing." These documents started me wondering about a larger issue. How had the last days of the Warren Court affected the Supreme Court as an institution and shaped its impact on the Presidency?⁶

At the time, I put these questions aside to concentrate on learning about Fortas in the archives that housed his traces. As much as I loved my stints at the Johnson Library, one of its policies stymied scholars. Anyone who studied LBJ knew how important the telephone was to him. And ironically, the President who loathed wiretaps had secretly recorded more than 640 hours of his most important conversations, which he used instead of a stenographer's notes to ensure that promises made were kept. At Johnson's direction, the Library had closed the tapes until 2023, fifty years after his death, at which time LBJ had instructed the Archivist of the United States or the director of the Library to listen to them for the purpose of deciding whether the recordings should be "promptly resealed or examined by the appropriate security officials of the government for possible clearance."⁷

Although Johnson's Daily Diary revealed that the President recorded many conversations with Fortas, I reluctantly concluded that I could not wait for their release to finish my biography. If I lived until 2023, I would be 68. If the brittle tapes had not crumbled by then, and if officials decided against "promptly" resealing the recordings, government clearance would take years. I vowed to listen to the recordings if ever they became available and enjoyed comforting visions of spending my retirement in my favorite Presidential Library reading room hunched over recording equipment.

My biography of Fortas appeared in 1990. The following year, Oliver Stone's "JFK" excoriated the official, governmental explanation in the Warren Commission's report that Lee Harvey Oswald acted alone in assassinating President Kennedy. Far more likely, Stone suggested, that Kennedy planned to withdraw the United States from Vietnam after he won a second term in 1964 and that Vice President Lyndon Johnson and the military-industrial complex consequently staged a coup d'etat that included the President's assassination. The ludicrousness of its premise caused me to walk out of the theater in disgust three times when I first viewed "JFK," but the film proved good for something. In 1992, Congress reacted to the interest it stimulated by enacting legislation requiring the release of all data in government archives related to the President's murder. Among other things, the "JFK Series" conversations in the Johnson Library lay bare LBJ's antagonism towards Robert Kennedy. Perhaps in part because so many showed the President at his worst, LBJ Library Director Harry Middleton, after consultation with Lady Bird Johnson and the Archivist of the United States, promised to open all the tape recordings, not just those involving the assassination. Disregarding LBJ's wishes,

archivists began the arduous process of reviewing the recordings, which they made available in batches over the next sixteen years.⁸

When lightning struck the Library on the first day of the release, some may have wondered whether Johnson was angry. He need not have been. He had tried so hard to appear Presidential in public that he sometimes seemed dull, but the tapes allowed us to see him in his element: earthily persuasive, mercurial, sometimes manic, often paranoid. Unlike letters and memoranda, which he rarely drafted himself, the tapes provided a portrait of him at work. To be sure, it was incomplete, since LBJ did not record all his conversations. And as Bruce Schulman stresses, we must beware the delusion that by transforming “scholars into eavesdroppers,” audio creates “a direct, unmediated experience of history—sans bias, sans censorship, sans interpretation.” But given the frequent outrageousness of LBJ’s behavior on the tapes and the many instances on which he spoke of keeping them away from researchers, there seemed little possibility that the President crafted the performances to impress those who would write about him later. Of course, one can never be certain of anything with Johnson, and he always considered his historical reputation. Moreover, the recordings also testified to his anguish over the Vietnam War and his dedication to steering his civil rights and anti-poverty programs through Congress. At Lady Bird Johnson’s funeral, the Chairman of the LBJ Foundation imagined the words with which her husband welcomed his wife to the hereafter: “Even though you and Harry Middleton opened those sealed White House tapes about 40 years earlier than I had directed, it was another wise decision by you. It actually seemed to have helped my reputation.”⁹

At the same time that the Johnson tapes became available, the notorious Nixon recordings did too. Miraculously, the University of Virginia's Miller Center of Public Affairs made both sets of Presidential recordings available online, and Luke Nichter featured the Nixon recordings at Nixontapes.org. I listened to them in my study, office, classroom, car, hotel rooms, and on planes, and once played them for guests at Thanksgiving dinner. Because of Johnson's mistrust of the Department of Justice, under the leadership of, first, Robert Kennedy, and then, Kennedy's chosen successor, Nicholas Katzenbach, as well as LBJ's interest in courts and nominations, the Johnson recordings provided a particularly rich portrait of legal and judicial affairs. Like the Nixon tapes, they told a fascinating story about Presidents, Congress and the Court.

But this tale was more than technological. The vast quantity of documents related to the Supreme Court at the Presidential Libraries of Johnson and his successors, as compared to the Eisenhower and Kennedy Libraries, also suggested that as the Court became more politicized in the mid 1960s, Presidents became more conscious of its significance in American life and to their own survival. In this respect, too, the archives testified to the long shadow cast by the 1960s and the Warren Court over the contemporary Supreme Court, history and memory.

As Chapter One shows, when LBJ became President in 1963 he had to contend with Kennedy holdovers. Frustrated in particular by Attorneys General Robert Kennedy and Nicholas Katzenbach, the new President turned to his confidant--in Washington parlance, his "crony"--super-lawyer Abe Fortas to do the Attorney General's sensitive work satisfactorily and made Thurgood Marshall the nation's first African American Solicitor General. Chapter Two investigates the President's sense he needed an ear at the

Court, his installation of Fortas there, his continued reliance on Fortas to circumvent Katzenbach, and the impact of inner city rebellions and other issues on LBJ's political calculations for the Justice Department and the Court. Chapter Three roots LBJ's nomination of Marshall to the Court and his creation of "the black seat" in the President's problems at Justice and other political travails and demonstrates how the Warren Court became a bogeyman for the Supreme Court appointments process. As Chapter Four shows, the fight over the Court grew bipartisan and more furious when the President unsuccessfully tried to make Fortas Chief Justice and name Homer Thornberry as associate justice during an election year. Chapter Five delves into the last days of the Warren Court, Fortas's resignation under fire, and how those events affected Nixon's selection of Chief Justice Warren Burger. Chapter Six studies the President's "Southern Strategy" for the Republican Party and his failed attempts to apply it in 1969 and 1970 by nominating first Clement Haynsworth of South Carolina, then G. Harrold Carswell of Florida to the Court before Nixon was forced to settle on Harry Blackmun, a Midwesterner. Chapter Seven tells the strange story of the President's efforts to nominate successors to Justices Hugo Black and John Harlan in 1971 that resulted in the Court appointments of Lewis Powell and William Rehnquist. The Epilogue explores the shadow these struggles during the Johnson and Nixon years cast over the contemporary nomination and confirmation process and the Court itself.

Yet this story does not start at the Court. Instead, we turn to the Executive Branch in Chapter One. There LBJ's certainty that the lawyers he inherited from his predecessor did not represent his best interests led to a classic inside-the-beltway struggle between him and his Justice Department.

[Chapters 1-4 omitted]

The Last Days of the Warren Court, 1969-70

As President, Richard Nixon carefully toed the line between “demagoguing” the Court and disparaging its decisions, just as he had done in 1968. He knew that the liberal consensus had not evaporated. The Republican had won barely half a million more votes than his Democratic rival, and the Democrats still possessed healthy majorities in the House and Senate. Making hay with the Warren Court as symbolic target and selected civil rights and crime decisions might help the GOP woo white ethnics in the Northeast and Midwest and Southern whites away from the Democratic Party. If Republicans proved successful, they might become the majority party and destroy the Democratic coalition that dominated American politics from 1932-68 and would control Congress until 1980.¹

Nixon’s ambition meant the political spotlight shone ever more brightly on the Court. Just as the election of 1968 solidified many Republicans’ identification with conservatism and many Democrats’ with liberalism, so it became the moment when presidential candidates began playing up the importance of their elections for the Court’s membership. As soon as Nixon became President, the White House used threats of jurisdiction-stripping and impeachment, along with Warren’s retirement, to promote Nixon’s dream of melding together Republicans of all stripes, white Democrats in the South, and working-class ethnics elsewhere. During the first months of his Administration, it seemed clear that Nixon wanted to accomplish that goal by remaking the Court and breaking decisively with Kennedy and Johnson’s cronyism. It turned out, though, that like Johnson, the new President wanted an ally at the Court.

“The Opening Salvo”

Nothing came easy for Richard Nixon. What motivated him, he once said, were “the laughs and slights and snubs” he suffered growing up poor in Whittier, California. He had attended a small local college, and although he graduated third in his class from Duke Law School, he could not find a job in a prestigious firm. Only after he had become a senator, Eisenhower’s Vice President, and lost the Presidency to Kennedy in 1960, did Nixon finally become a Wall Street lawyer. But the work of an attorney in a small town or New York bored him to distraction, and politics became his refuge. Because of his intelligence, the depth and strength of his “anger,” and “personal gut performance,” he reflected, he achieved much while those who had it all lazed “on their fat butts.”²

Like Nixon’s ethos, his Washington was dark and gloomy. Unlike LBJ in 1963, the new President could turn his Justice Department over to someone he trusted. Nixon placed his pragmatic law partner and campaign manager, John Mitchell, at the helm of Justice. Attorney General Mitchell’s wife, Martha, a bibulous southern belle, would become a sensation for her candid, late-night telephone conversations with journalists. Beloved by friends for his warmth and loyalty, her husband cultivated a “[d]our, stern, taciturn, forbidding” demeanor for the public. Mitchell became the President’s point man in battling the antiwar movement, the left, and, sometimes, school desegregation advocates. Mitchell placed Jerris Leonard, a Wisconsin politician and team player, in charge of the Civil Rights Division. The Attorney General selected Richard Kleindienst, a blunt Goldwater conservative from Arizona, soon nicknamed “Mr. Tough,” as Deputy Attorney General. As the “president’s lawyer’s lawyer,” or Assistant Attorney General in

charge of the Office of Legal Counsel, Mitchell chose Kleindienst's brilliant and equally conservative Phoenix friend, William Rehnquist. Like the President, Rehnquist championed "strict constructionist" judges, those "not...favorably inclined towards claims of either criminal defendants or civil rights plaintiffs—the latter two groups having been the principal beneficiaries of the Supreme Court's 'broad constructionist' reading of the Constitution."³

In the White House, the President surrounded himself with "gut" fighters and reinforced their instincts. Chief of Staff H.R. Haldeman played the "President's son-of-a bitch." Nixon's first White House Counsel, Mitchell's antagonist, John Ehrlichman, known for his scowl and bushy eyebrows, spoke of leaving a Presidential patsy "twisting slowly, slowly in the wind." When Ehrlichman became the President's top domestic policy adviser and the "fireman" who extinguished embarrassments, John Dean took his place. Dean would entitle his White House memoir Blind Ambition. The third White House Counsel, Charles Colson, who proudly said that he would walk over his grandmother for Nixon, characterized himself as Presidential "hatchet man" and designed "dirty tricks" against political opponents.⁴

Despite his efforts to present himself as a man of the people, Nixon mistrusted the public and preferred secrecy to sunshine. Aspiring towards royalty, he went so far as to outfit White House security as elaborately as Buckingham Palace guards. Like LBJ, he saw the press, eastern elites and the "Georgetown crowd" as enemies. Like Johnson, too, he proved dogged in his persistence: Nixon was someone who courted his future wife by driving her to dates with other men. But in contrast to his predecessor, the new President was solitary. So uncomfortable did the Republican become at state dinners that he

pressed aides to cut them down to 58 minutes. (As part of his effort, he banished the soup course on the theory that “men don’t really like soup.”). In another contrast to LBJ, Nixon’s passion lay in foreign, not domestic policy. Even so, he could not ignore the Court.⁵

The new Administration’s first attempt to influence the Warren Court revealed more continuity than change and showed that JFK and LBJ were not the only ones to worry about government eavesdropping. On March 10, 1969, just over a month after Warren administered the oath of office to the President, the Court handed down Alderman v. U.S. The majority opinion declared that in all cases, even those involving national security, government must provide a defendant with transcripts of any conversations picked up by illegal wiretap or bug on the defendant’s premises or in which the defendant participated. In reporting that the Justice Department was expected to request a rehearing on March 13, Fred Graham wrote that its “stunned” officials had depended on Byron White and Thurgood Marshall, two Justice Department veterans, to inform their colleagues on the Court that the government was wiretapping and bugging many embassies in the nation’s capital, acts it did not want to admit officially and whose illegality it assumed. One alarmed official told Graham that “all a defendant in a routine tax case—or any other Federal case—has to do now is telephone a few foreign embassies, and we’ll have to drop the case against him” or show him the transcripts and embarrass the United States in the process.⁶

Justice Department leaders decided that they needed to do more than leak their distress to reporters. On March 12, Attorney General Mitchell dispatched Justice’s

director of public information, Jack Landau, to disclose to Justice Brennan, an acquaintance, the same information about the embassies that Graham would report in his front-page story the following day. Landau, who was excitable anyway, arrived in a high state of anxiety that became acute when Brennan took him in to repeat his message to the Chief Justice. In his memoirs, Warren described the encounter as his only “personal experience of a deliberate attempt to surreptitiously influence” a Court action. As the Chief Justice recounted it, he immediately realized “that this young man was only being used as a mouthpiece for others more sophisticated who would not dare to fulfill a mission of this kind” and sent Landau packing. But before he left, Landau twice affirmed that the Attorney General wanted the Chief Justice to know “that he would do anything in his power to head off any Constitutional Amendment or some legislation to curtail the Court’s jurisdiction.” At that, Warren smelled blackmail. The Chief Justice then reported on the encounter to the equally outraged justices.⁷

On March 19, the Justice Department filed a petition for rehearing urging the Court to exclude foreign intelligence surveillance from Alderman. Then, despite his no-blackmail pledge, Attorney General Mitchell virtually invited Congress to submit Court-curbing legislation by warning the Senate that Alderman might compromise national security. Five days later, the Court refused to rehear the case, and Potter Stewart berated the Justice Department. Solicitor General Erwin Griswold, the legendary former Harvard Law School dean and a Johnson holdover, had “mystifyingly” conceded in his Alderman oral argument that government surveillances of foreign embassies were “unconstitutional, although he was repeatedly invited to argue that they were not,” Stewart chided.

Moreover, any “careful reader” of the Alderman opinion should have discerned that the Court did not there determine the constitutionality of foreign intelligence surveillance.⁸

That was quite a rebuke. The Republican Stewart obviously viewed Nixon’s Justice Department as a nest of clowns who could neither argue a case nor understand an opinion. Others decided that the department harbored thugs. William O. Douglas saw Landau’s lobbying attempt as “the opening salvo of a long and intense barrage” by the Nixon Administration against the Warren Court. The Chief Justice himself debated making news of Landau’s visit public before deciding against doing so for the present. On the one hand, the Justice Department had been signaling that it wanted “to intrude into our decision-making process whenever it had a poor case on the merits,” Warren complained later. On the other, the Chief Justice feared that trumpeting Landau’s threat would seem vindictive since the new administration “had campaigned against the Court on the charge it was soft on crime.” Warren also charitably assumed that because Mitchell’s experience lay in bond law, the new Attorney General did not yet understand the importance of an independent judiciary. Consequently, the Chief Justice kept quiet, and the incident remained secret until Landau left Justice and sparked talk of his own and Mitchell’s disbarment by disclosing it to reporters in 1973.⁹

Pace Warren, it was not the first time on his watch that someone had deliberately attempted to “surreptitiously influence” the Court. Fortas had done it as LBJ’s agent, though he had capably hidden the Administration’s footprints. Douglas also got it wrong when he characterized Landau’s visit “as the first instance in the memory of anyone connected with the Court in which the executive branch has made actual threats to the Court.” He should have recalled FDR’s Court Packing plan, just for starters. He might

also have remembered World War II and the Nazi saboteurs' case, where, Douglas complained elsewhere in his autobiography, "[t]he Attorney General, Francis Biddle, told the Court that the claims of the saboteurs were so frivolous, the Army was going to go ahead and execute the men whatever the Court did; that the Executive would simply not tolerate any delay. That was a blatant affront to the Court."¹⁰

The Alderman incident may have helped underlined for the new President the need for friends at the Court. Like a number of his predecessors, Nixon honored the constitutional principle of separation of powers in the breach. Yet he seized on the chance to distinguish himself from LBJ by showcasing his refusal to name "cronies" as justices.

"The Most Thrilling Social Event"

Soon after he moved into the White House, Nixon shrewdly decided to substitute a party honoring the Chief Justice for the annual Presidential dinner for the Supreme Court. Nixon pulled out all the stops with a black-tie event on April 23 for 112, including Warren's six children, secretary, and closest friends. Guests dined on crabmeat imperial, filet mignon rossini with cocotte potatoes and asparagus hollandaise, Caesar salad, a cheese course, and mousse nesselrode. The toasts proved as luxuriant as the menu. Nixon and Warren appeared to bury the hatchet, with the President saluting the Chief Justice for having served his country well and his guest declaring that he was leaving public life with "no malice in my heart" towards anyone. Thanking Nixon, the Chief Justice sounded sincere too—and nostalgic. "To have had every one of our family there for such a gathering in the White House is something none of us can ever forget,"

Warren wrote. For me it was the most thrilling social event of my half century of public life.”¹¹

Several of Nixon’s rumored Chief Justice candidates attended the dinner. They included Eisenhower’s Attorney General, Herbert Brownell, a Wall Street lawyer and close adviser of Nixon’s; Brownell’s successor as Attorney General and Nixon’s Secretary of State, William Rogers; Attorney General John Mitchell; former New York Governor Tom Dewey; Justice Potter Stewart; and Vice President Spiro Agnew. “I’m not going to get it, but I think I know who it’s going to be,” Rogers told the press. Agnew joked that he wanted to become Chief Justice because “I’m interested in longevity,” while Dewey declared that “I decided a long time ago that I didn’t want to come to Washington.” One person who aspired to become an associate justice received an invitation too. DC Circuit Court of Appeals Judge Warren Burger, a protégé of Brownell’s, arrived at the White House early and asked for a glimpse at the guest list. To his surprise, it included just one other lower court judge, George MacKinnon, a former prosecutor, member of Congress, and friend of the President’s, whom Nixon had just put on the DC Circuit at Burger’s behest. “I turned to my wife,” Burger remembered, “and told her just to be natural if she got the feeling people were looking us over.”¹²

Burger had lobbied for the promotion to associate justice since before the election. Amid speculation that Nixon would nominate the distinguished Jewish critic of the Warren Court, Judge Henry Friendly, who was also seeking that spot, Burger had written Brownell during the final days of the Fortas-Thornberry battle that Friendly was “damned good—but is he quite the right guy unless Dick wants to negate the anti-Semitic business?” Burger maintained that in the “past, I have been content to let nature take its

course—which in high politics it rarely does, as you know.” If Fortas was “dead,” Warren might “hang on out of that sheer Scandinavian stubbornness.” That course would at least carry the advantages of showing the Chief Justice “in more nearly his true light” and providing time for “the heat on the Fortas business” to subside. Among other things, and despite Johnson and Warren’s “shady” attempt to arrange the next Chief Justice, “something must be done about the Senate handling of confirmations or nobody will want to take a judicial nomination.” Burger envisioned “‘a code of procedure’ for confirmation hearings” that the American Bar Association and others would promulgate. “I know you have many loyalties and demands on you and I shall never embarrass you with any request of mine,” he added to Brownell. “But the Midwest (from Ohio to the Rockies is a Hell of a lot of USA!) is not represented on the Topside and ought to be. Before RN gets too firmly fixed I hope that thought will be put to him.” Nixon had written Burger “spontaneously” in 1967 to extoll his criticism of the Warren Court for crippling police power to obtain confessions from suspected criminals, he volunteered. “Hence he is not unfriendly. Friendly to Friendly however!”¹³

Fortunately, for Burger, Friendly, whose appointment liberals and conservatives would have cheered, suffered from two negatives in Nixon’s eyes. He was Jewish, and at 65, elderly for a Supreme Court appointment. The American Bar Association generally made 64 its upper limit, though doubtless it would have made an exception for someone of Friendly’s stature.¹⁴

As his letter to Brownell about suggested, Warren Burger was ambitious, convivial, and partisan. “There is nothing stuffy about him, and he has a sense of humor he often turns on himself,” one reporter observed. Then 61, Burger was nearly six-feet-

tall, weighed in at 200 pounds, and sported a leonine white mane. He and his six siblings had grown up poor in Saint Paul, and he sold insurance to finance his way through the University of Minnesota and night school at Saint Paul College of Law, from which he graduated with high honors. In two years, Burger became a partner at a prominent Saint Paul law firm. Now he threw himself into civic and political life as a supporter of the “Grand Old Party’s grand old loser,” Harold Stassen of Minnesota, the liberal and ever-hopeful Republican Presidential candidate at whose campaign headquarters Burger first met Nixon in 1948. Burger came to Eisenhower and Brownell’s attention when he helped deny the nomination to Robert Taft by delivering the Minnesota delegation to Eisenhower at Stassen’s urging in 1952. After Eisenhower’s election, Burger joined the Justice Department as assistant attorney general, and the President named him to the DC Circuit Court of Appeals four years later.¹⁵

There he remained a “liberal Minnesota Republican” on civil rights even as he plunged zestfully into combat over criminal procedure and the insanity defense with “mine adversary”, liberal Judge David Bazelon. “[I]f I were to stand still for some of the idiocy that is put forth as legal and constitutional profundity I would, I am sure, want to shoot myself in later years,” Burger told his great friend since childhood and best man, Eighth Circuit Judge Harry Blackmun, whom he was forever importuning to join him on European getaways. “These guys just can’t be right. So there is nothing to do but resist,” though Burger picked his battles carefully. (Blackmun aptly characterized Burger as “a scrapper” with “many friends, in high places and in low, and some insistent enemies.”) Nor did Burger display any private patience for “the Bastards” in the Warren Court majority who “went to absurd length[s] in criminal law,” and it especially vexed him

“that the Eisenhower appointees are doing most of the damage.” Publicly, he became a vocal, though respectful, critic of the Warren Court’s criminal procedure decisions. “As a Court of Appeals Judge I am bound to follow the Supreme Court’s opinions, but not to praise them,” Burger would say.¹⁶

Just after the inauguration, Nixon asked Burger to swear in part of his economic team. The judge privately informed the President that day that the DC Circuit Court of Appeals was “the worst of all the Courts at this level in the country, in his opinion” and successfully urged the appointment of MacKinnon and another “strong” man to vacancies there. By now, the President was touting Burger to his Attorney General as “[o]ne of the ablest and most responsible Judges I know.” A few days later, Mitchell and his Deputy Attorney General had “a very fruitful meeting” with the judge. Burger followed up with a forceful memorandum for the President about the troubled federal courts. While Warren’s gubernatorial career had led many to anticipate that he “would become the outstanding administrative Chief Justice in our time,” he had not, perhaps because “he had to concentrate on learning the craft and techniques of the appellate judge,” Burger maintained. “For the dozen years or more in which the Supreme Court has been revamping criminal procedure and details of police function on a case-by-case basis, without adequate data and without adequate records or argument in many of the critical cases, it has neglected the crucial problems of court administration and management.” The new Chief Justice would face a difficult task. He would “come to office at a time when the Court’s prestige is perhaps at the lowest ebb in history, certainly in modern times; moreover the Court’s standing with Congress is lower than it is with the public.” Left unspoken but clear was the hint that one Warren Burger could mightily aid him.¹⁷

Burger sometimes pretended not to care about his campaign's chance of success. "I am glad that my mood and indeed my deep conviction on the SC business is rational and solid," he assured Blackmun in March 1969. "I can really take it or leave it and if RN doesn't do a lot better in picking his people there (than dear old Ike did), I would not want to be within shouting distance." What could "one man do to stop the nonsense," especially when he could not always count on Harlan and Stewart to side with him? The President could "only straighten that place out if he gets four appointments"--which given the ages of the justices, Nixon might well receive—"and draws on the State and Federal bench for the replacements," since "[f]ew lawyers" would understand the extent of the Warren Court's "subversion of the law." As of Warren's April retirement dinner, Burger could reasonably hope for an associate justiceship down the line. "We both know of the 'signs'" of favor from the Administration," he later confided to Blackmun, but he had "no inkling of the 'center seat' in anything which had come along. That was, and still is, a real bombshell." The events after Warren's dinner had helped move him to "the center seat."¹⁸

"A Question of Ethics"

"The toasts made me cry," Abe Fortas told reporters as he left the White House dinner. Less than a month later, he wept in sadness. Even as Nixon feted Warren, he and Administration officials knew that reporter William Lambert of Life Magazine, who had dug into Johnson's finances in 1963, was excavating Fortas's.¹⁹

As Fortas struggled to become Chief Justice in 1968, a government official tipped off Lambert that he should examine the relationship between Fortas and Louis Wolfson, who became perhaps the first modern corporate raider. The justice enjoyed the

financier and former client, who shared Fortas's immigrant Jewish roots and his interest in civil rights, juvenile delinquency and other social welfare issues. More prudent people who knew Wolfson, however, checked how many fingers they had left after they shook his hand, and the government had recently convicted him of illegal stock manipulation and conspiracy. By December, the reporter had learned that Fortas had visited Wolfson at his Florida horse farm in 1966 and that the financier had paid Fortas \$20,000 (over \$145,000 in 2016 dollars) to become a consultant to his family foundation. Lambert also heard that Fortas had concluded that he had no time for the job and returned the money—but only after the financier had twice been indicted. Moreover, Lambert was told, Wolfson had assured Elkin “Buddy” Gerbert and other associates that Fortas would protect them from the government. The reporter put the project aside until April of 1969, when he noticed that the Supreme Court, with Fortas recusing himself—as he routinely did in any case involving a former client—had refused to hear Wolfson's appeal from a Second Circuit decision affirming his conviction. (Oddly, after his release from prison, Wolfson would name his most famous colt, the winner of the 1978 Triple Crown, “Affirmed.”) At that point, Lambert resumed work on the story.²⁰

Since both Fortas and Wolfson refused to tell him anything, the reporter turned to Nixon's Justice Department for corroborating evidence. How much concrete, independent knowledge officials there possessed of the Fortas-Wolfson relationship remains murky. But Will Wilson, the head of Justice's criminal division, was an old enemy of Lyndon Johnson's and no fan of either Fortas's or the Warren Court. “I saw myself as ridding the Supreme Court of a man who never should have been on the Court,” he later said, and he confirmed Lambert's story. He also seized on the

journalist's visit to let John Mitchell and J. Edgar Hoover know that the criminal division would launch its own investigation of Fortas's activities.²¹

When Hoover and Nixon compared notes about the forthcoming Life story, the President declared Fortas should be "off" the Court. Ironically, the President ranked Fortas, along with Hugo Black, one of the ablest justices. Those two had proven most engaged when Nixon appeared before the Supreme Court in 1966 to argue that a publication invading its subject's privacy did not deserve First Amendment protection. "I judge them in terms of their questions, and I said, 'boy, I can tell the men in that Court that really had it,'" he remembered. Fortas had written the principal dissent coming down on Nixon's side. "I never thought he was radical," Nixon said of Justice Fortas, and he was "a brilliant lawyer."¹ It was "a crime" that Fortas had to go, the President said later, before adding quickly, "Well, it isn't a crime. He brought it on himself." Since Nixon did not consider Fortas a reliable ally, he now wanted to take advantage of the justice's relationship with Wolfson. Even if Fortas was no "radical," he was no sure vote for the Administration.²²

Lambert's article, "Fortas of the Supreme Court: A Question of Ethics," appeared on the newsstands on Monday, May 5, 1969. Why would a person of the justice's "legal brilliance and high position do business with...Louis Wolfson, a well-known corporate stock manipulator known to be under federal investigation?," the journalist asked. He explained that Fortas had received a check for \$20,000 from the Wolfson Family Foundation in January 1966, which he had returned that December. "Ostensibly, Justice

¹ In fact, as Nixon himself became enmeshed in Watergate, he fantasized about placing Fortas on a commission to investigate Presidential improprieties. The first justice forced out of office would retain considerable appeal for the first President to resign because of scandal. Stanley Kutler, Abuse of Power: The New Nixon Tapes 141, September 12, 1972 (New York: Free Press, 1997);

Fortas was being paid to advise the foundation on ways to use its funds for charitable, educational and civil rights projects,” Lambert noted. “Whatever services he may or may not have rendered in this respect, Justice Fortas’[s] name was being dropped in strategic places by Wolfson and Gerbert in their effort to stay out of prison.”

While Fortas was hardly the first federal justice or judge who had padded his pocketbook by moonlighting as consultant to a charitable foundation, Lambert obviously disapproved of what he knew about Fortas’s relationship with Wolfson. First, that the justice apparently did not realize that Wolfson and Gerbert were mentioning him, he argued, “does not change the fact that his acceptance of the money, and other actions, made the name-dropping effective.” Second, since the foundation’s gross income in 1966 was all of \$115,200, the \$20,000 fee was “generous in the extreme.” Third, in his letter to Life denying any impropriety or participation in Wolfson’s affairs, Fortas did not even admit that he had ever received any money from the foundation, just that he had briefly visited “Mr. Wolfson’s famous horse farm.” Fourth, Lambert obviously suspected that the justice had returned the money only because of Wolfson’s indictment. While the reporter admitted that Life had not “uncovered evidence making possible a charge that Wolfson hired Fortas to fix his case,” his account made the justice’s association with the businessman seem anything but innocent. The article prominently displayed two sections from the American Bar Association’s Canon of Judicial Ethics. One declared that “a judge’s official conduct should be free from impropriety and the appearance of impropriety.” The other warned against conflicts of interest that might “interfere or appear to interfere” with the fulfillment of judicial obligation.²³

Lambert's story ignited a firestorm. In one respect, the facts proved even more damning than those he had reported. The original contract between Wolfson and Fortas, to which the reporter lacked access, stated that the financier would pay Fortas \$20,000 annually for life to become a consultant and the same amount to Carol Agger, should she survive her husband. Instead of following the "cardinal rule of Washington: tell everything right away and make a clean breast of it," however, one liberal Washington insider lamented, the justice stonewalled. On May 5, Fortas released a statement that said nothing about the lifetime contract. Instead he insisted that he had not "accepted" a fee from the foundation, while acknowledging that it had "tendered" him one that he then returned. Yet Fortas also unequivocally denied that he had provided the financier any legal advice or services from the Court.²⁴

So elliptical, incomplete and legalistic was his statement responding to Lambert's story, however, that he just made matters worse. The Washington Post, usually one of Fortas's staunchest supporters, editorialized on May 6 that he had cast "a shadow over the Supreme Court." The justice *might* remove it if he put "the whole story of his dealings in this matter on the public record." If he could not, he should protect the Court by resigning.²⁵

Impeachment was another possibility, as was, Assistant Attorney General William Rehnquist informed Mitchell, indictment. Rehnquist subsequently said that the "arrangement with Louis Wolfson raised a serious question as to whether there might have been a violation of a criminal statute, 18 U.S.C. 205 (in substance prohibiting officers of any branch of the federal government from acting as agent or attorney in any matter to which the United States is a party)." When Robert Griffin and other

Congressional Republicans who had opposed Fortas in 1968 raised the specter of impeachment, the Democrats who had supported him then remained conspicuously silent. But on May 6, Nixon and Attorney General Mitchell dissuaded Congressional Republicans from launching lengthy, divisive impeachment proceedings. The President kept the attention on Fortas's ethical lapses, and Mitchell implied that the justice would soon resign.²⁶

The Nixon Administration and Fortas's Congressional antagonists increased the likelihood of that by playing hardball with people and institutions important to the justice. On May 5, the day the Life expose appeared, Bobby Baker's nemesis, Senator John Williams, went after Fortas's mentor, William O. Douglas. He reminded his colleagues that Douglas received \$12,000 annually from the Parvin Foundation (nearly \$78,000 in 2016 dollars), which was "controlled by a group of Las Vegas gamblers...in trouble with the Department of Justice," and he introduced a bill to penalize judges or public officials who accepted payments from tax-exempt foundations. The Los Angeles Times stressed "an intriguing link" between the two justices who took fees from suspicious charitable foundations when it pointed out that Carol Agger acted as the Parvin Foundation's tax attorney. On May 6, the press also disclosed that the Justice Department had "quietly" launched a grand jury investigation to reopen the question of whether Fortas's old firm, Arnold & Porter, had obstructed justice by deliberately concealing subpoenaed documents in a price-fixing case that the firm had reported as lost, which had recently turned up in Agger's office safe. Arnold & Porter lawyers believed that the Administration was sending Fortas a message it would destroy his wife and the firm he had founded.²⁷

And, the Administration suggested, unless he resigned, it could ruin him too. The press reported that the Justice Department was investigating whether Fortas had violated any criminal statutes. Rumors also swirled about his private life. Those accusations the press did not disclose, probably because reporters considered them unreliable. After talking with Will Wilson's assistant at Justice, Henry Petersen, about them, Fred Graham noted that while Petersen "didn't know of the alleged morals charge(s), he said that 'Fortas and Mrs. Fortas were known to have a loose sense of morals—whatever that means.'" It was a fact that Fortas chased women. His wife had no sexual relationships outside their marriage of which any of their close friends was aware. It was also a fact that Agger tolerated her husband's philandering, since she understood she remained the most important person in his life. If that meant "Fortas and Mrs. Fortas" had "a loose sense of morals," so did plenty of other powerful Washington couples.²⁸

The Administration soon found more acceptable ways of smearing Fortas. Although Justice Department officials had corroborated for Lambert Fortas's receipt of a fee from the Wolfson Foundation, they still lacked hard proof he had accepted one when the Life article appeared. As soon as it did, the IRS subpoenaed the correspondence between Fortas and the Wolfson Family Foundation. When Mitchell and press spokesman Jack Landau arrived back in Washington from New York just after midnight the morning of May 7, Wilson and Petersen met them at the airport. They were carrying a copy of Fortas's contract with the foundation showing that Wolfson had agreed to pay \$20,000 annually to Fortas for his life and to Carol Agger, should she survive him. The contract shocked Mitchell. "It can't be real!," Landau recalled the Attorney General exclaiming repeatedly.²⁹

Though it was, there was still no proof that Fortas had done anything illegal. As John Dean said later, the Justice Department was “not even close” to having “the goods on Fortas.” Justice had no evidence he had ever contacted a government official on Wolfson’s behalf, and its lawyers knew that he had returned his first and only payment from the financier. If the Administration pressed too hard, Fortas might dig in his heels. In addition to turning up the heat on his old law firm and his wife, it needed to convince someone the justice respected that he should resign.³⁰

Warren’s thaw towards Nixon after the dinner made him the obvious nominee. So, as John Ehrlichman later said, the Administration dispatched John Mitchell to share the contract with the Chief Justice and to give him a chance to demonstrate his thankfulness for the President’s hospitality. Particularly given his anger over Jack Landau’s earlier visit about Alderman, Warren probably should have refused to discuss Fortas with the Attorney General. He did not.³¹

Instead the Chief Justice became Mitchell’s accomplice. “He can’t stay,” Warren said privately of Fortas afterwards. The Chief Justice’s own meeting with the Attorney General helped guarantee that. The next Newsweek contained an article by Samuel Shaffer detailing Mitchell’s May 7 “backstairs call on Chief Justice Earl Warren. The message: there was still more damaging material in the Fortas file—and it was sure to surface unless Fortas withdrew.” Washington reporter Robert Shogan remembered that Shaffer’s article created as much of “a sensation” as Lambert’s. Mitchell encouraged the public to imagine the worst and fed the story by admitting publicly that he had seen Warren to provide him with “certain information,” which he still refused to disclose.³²

When the Nixon Administration debriefed the imprisoned Wolfson, though, it received bad news. The financier had agreed to talk with Will Wilson and two FBI agents after the Life story appeared, and he hoped for a deal.² He provided them with a sworn affidavit on May 10 insisting that in a 1966 pre-indictment meeting with Fortas, the justice had dismissed the financier's violations as "technical" and indicated, the affidavit continued confusingly, that he "had or would contact Manuel Cohen of the Securities and Exchange Commission regarding this matter. Fortas indicated that he was somewhat responsible for Cohen's appointment to the Commission as Chairman [by LBJ]." As one Fortas biographer has remarked, this language proved "too vague" for Nixon Administration officials, who understood that a "contact" might encompass anything from a legitimate, if ill-advised, request for an update on the proceedings to a corrupt order to shut down the prosecution. In letters to Wolfson that the financier now handed over to the Justice Department and that Mitchell promptly made available to Warren, Fortas sounded concerned about his friend's legal problems. But the correspondence did not suggest that Fortas did anything for him. Nor did the justice reach out to Cohen on Wolfson's behalf. (When Wolfson asked why after his release from prison, Fortas answered that "would have been like lighting a fuse on our own dynamite.") Wolfson also emphasized that at their last meeting before his indictment, Fortas listened sympathetically, but "made no offer of assistance nor did he indicate he would do anything." After his conviction, the financier urged the justice to ask Johnson to

² Whether Wolfson got one remains unclear. The Justice Department worked hard in 1969 to avoid the impression he was benefiting from his cooperation, but it may have rewarded Wolfson by directing a resistant US Attorney's office in the Southern District of New York to accept his no-contest plea in another case in 1972. Kalman, Abe Fortas, at 363. In the odd way of Washington, Wolfson's attorney was William Bittman, the former Justice Department attorney, who had once prosecuted Bobby Baker, who then became a DC superlawyer.

lobby Nixon for a Presidential pardon, which he did not receive, but Fortas apparently did not do that, either, and Wolfson's pardon file in the Nixon Library reveals no indication of the former President's involvement.³³

Of course, Fortas and Wolfson may not have provided a faithful account of their relationship to the Justice Department and press in 1969. Fortas had lied before the Senate Judiciary Committee the previous year to hide the depth of his involvement in the Johnson White House. And just a few weeks before Wolfson talked with Wilson in May of 1969, the financier informed a skeptical Wall Street Journal reporter that "somebody who is as close as anybody could be" to Lyndon Johnson, had assured him that a Presidential pardon was his for the asking in 1968, but he had decided against doing so "because he didn't want any favors"!³⁴

Still, in the half-century that followed Fortas's May 1969 press statement, it would become clear to most, if not all,³⁵ who studied the episode, that Justice Fortas did nothing for Louis Wolfson beyond, perhaps, soothingly predicting orally that the government would not consider his friend's violations significant and sending him comforting letters that promised nothing. Fortas remained loyal to a fault to those he had represented. His behavior was indiscreet. But after Fortas left the Court, even Attorney General Mitchell admitted that it was not criminal.³⁶

Although the White House repeatedly stressed how "responsibly" it was behaving in the Fortas affair, reporters knew that the Administration was playing them. "The statement by Attorney General Mitchell that he has taken some information of importance to Chief Justice Warren—presumably information relating to Justice Fortas—comes close to being an effort at political blackmail," the Post editorialized. "Although

the statement does not say explicitly Mr. Mitchell knows anything more than the information already made public, that is the obvious implication, and with it comes the further implication that the Nixon Administration is prepared to use it against Justice Fortas unless the Chief Justice persuades him to resign.” It was unseemly for anyone who headed “a department named Justice to feed the rumor mills by confirming the innocuous details of a story in Newsweek while failing to confirm or deny other details which indicate he has derogatory evidence of a serious nature against Mr. Fortas.” The New York Times agreed that the Attorney General was trafficking “in rumors and innuendo” and accused the Administration of making an “ugly squeeze play” to win the justice’s resignation. Meanwhile, NBC characterized Mitchell’s “ominous” visit to Warren as a “deep rare intrusion into the Judicial Branch by the Executive Branch.” The media called on Fortas to break his silence, since his short statement had just sparked confusion and criticism.³⁷

That he refused to do. The Court was taking a short recess, and Fortas had scheduled speeches in Boston, Richmond and Memphis, which he delivered. He had received no payment beyond his travel expenses or donated his \$2000 speaker’s fee (nearly \$13,000 in 2016 dollars) to charitable causes “for some time,” his office ostentatiously made clear. But that news backfired: The justice’s agent said that Fortas had only adopted that policy recently, and the revelation that “a Supreme Court Justice, like an actor or nightclub entertainer, engages a booking agent to drum up business” revolted some. Reporters followed Fortas everywhere he went and besieged his Georgetown house.³⁸

By the weekend, he was edging towards resignation. “The real truth about this,” he subsequently confided to Wolfson, was that the Nixon Administration officials “were bound and determined to get me...because of my association with Johnson” and had promised Strom Thurmond a veto over Fortas’s successor. “I knew that they were after me,” and his arrangement with Wolfson made him vulnerable. Impeachment and/or criminal prosecution seemed possible. Fortas met with Clark Clifford at his house, who recalled that the justice had “unequivocally” decided to resign even before the start of their long conversation. “And I couldn’t understand why because it didn’t seem to me that the offense warranted the action.” But Fortas insisted and appeared eminently rational, as well as “deeply concerned” by a message from the Nixon Administration that if he did not resign, it would prosecute him. Whether that warning came through the press or as a more direct threat remained murky. All that was clear, Clifford said later, was that “[s]ome incident or event had persuaded him that he must resign and nothing any of us could say would change his mind.”³⁹

In a separate meeting at Fortas’s house, William O. Douglas found that out. Adam Stolpen, a close family friend from Westport, who attended college in Washington and spent weekends with Agger and Fortas, helping them with the garden and chores and visiting with them and their friends, witnessed it. As the men stood beside the swimming pool and its bar, Stolpen remembered, Douglas pleaded with Fortas not to resign. “We” had done a firm headcount the previous night, he said, and there were not sufficient votes to ensure impeachment. Who “we” was Douglas did not say, but it most likely included his longtime friend, House Judiciary Committee Chair Emanuel Celler, who would subsequently save Douglas from impeachment. The crisis would blow over, Douglas

counseled. And probably that was good advice. Chief Justice William Howard Taft had survived a similar scandal when the public learned that Andrew Carnegie had left him a \$10,000 annual annuity to him and to his wife should she outlive him (over \$130,000 in 2016 dollars). To be sure, freedom from impeachment would not guarantee Fortas exemption from criminal prosecution. But the latter threat surely represented a bluff; recall that Mitchell later said Fortas had committed no crime. Stolpen remembered Fortas's reply: He himself did not matter. There was no constitutional mandate for the Supreme Court's authority; the Court depended on public opinion to preserve its legitimacy. "I will not be responsible for destroying that." At that moment, Stolpen recalled, Douglas put his hand on Fortas's shoulder to comfort him, and this fastidiously controlled man began to cry.⁴⁰

That theme of falling on his sword had run through Fortas's letter asking LBJ to withdraw his Chief Justice nomination the previous year, and he stressed it again in the resignation letter he submitted to Earl Warren on May 14. It included the fullest public explanation he would ever provide of his relationship with Wolfson. He explained that the financier had recruited him because of their shared interest in social welfare. His \$20,000 annual consultant's fee was not high, he implied, since Wolfson had promised to expand the foundation's budget and its activities. Because their program had been "a long-range one," the two men had decided upon a lifetime contract with payments to Carol Agger should Fortas predecease her. Fortas had received his first and only check in 1966, and after attending a trustees' meeting in June, he had decided to terminate his association because he was busy and he had learned "that the SEC had referred Mr. Wolfson's file to the Department of Justice for consideration as to criminal prosecution."

He wrote Wolfson that month cancelling the arrangement, but did not return the check until December. While the financier had sometimes sent him information about his problems, Fortas correctly observed that Wolfson had forwarded the material to “many other people” as well. “I have not interceded or taken part in any legal, administrative or judicial matter affecting Mr. Wolfson or anyone associated with him,” he reiterated. Nonetheless, “the welfare and maximum effectiveness of the Court to perform its critical role in our system of government” were all-important. “Hell, I feel there wasn’t any choice for a man of conscience,” he explained to a reporter. He had decided for himself that his resignation was right for the Court and the country.⁴¹

Many believed that he had badly wounded both. Los Angeles Times Bureau Chief Robert Donovan maintained that “though the Fortas case was in certain respects the most sensational Washington has ever witnessed,” it had “sickened,” rather than “excited” observers. “If a Supreme Court justice latches onto a fee he should never have touched,” perhaps all society was as “corrupt” as critics of the United States claimed. Citizens were “bred” to see the Court as “their final bulwark against injustice,” and since Warren had arrived there, “it has done more than any other institution to uphold individual rights and undo wrongs to the black, the downtrodden, the accused.” Sometimes the Court stirred controversy, but Americans ultimately revered it. Now, it had become a little less sacred. As “the first Supreme Court justice to resign under personal attack,” Fortas had cast “a shadow of impropriety over a great institution,” the New York Times agreed. For its part, the Nixon Administration increased suspicion that it had blackmailed Fortas by denying repeatedly it had done so and by dropping talk of prosecuting him, his wife or his old law firm now that it had secured two vacant seats at

the Court, Fortas and Warren's. Even so, more condemnation of Fortas followed when the American Bar Association summarily declared that his relationship with Wolfson violated the canons of judicial ethics.⁴²

Fortas was not the only exposed liberal justice, either. "One down, how many more to go?," the conservative Chicago Tribune asked hopefully in stressing that investments in tax shelters and relationships with foundations made at least Brennan and Douglas fair game too. Even when Douglas resigned as the Parvin Foundation's president and relinquished his \$12,000 annual honorarium soon afterwards, his critics continued to complain. Their disapproval grew after Parvin showed a reporter an earlier letter from Douglas discussing the foundation's response to an IRS investigation of its finances and characterizing the probe as a "manufactured" attempt "to get me off the court." Although the Parvin Foundation did valuable work in developing countries, the New York Times editorialized, "nothing could justify a judge in associating his name and the aura of his office with any individual or organization involved in the Las Vegas gambling community." That was mild compared to what conservatives said. "Douglas is next," Strom Thurmond vowed. One of Nixon's political espionage experts reported to John Ehrlichman that a national newspaper felt "it is on to a Fortas type exposure and is using its full weight" to examine Douglas's connections to the Parvin Foundation.⁴³

From France, where he and Agger had gone to recuperate, Fortas wrote Douglas, "I should be in anguish if I thought that my own decision aggravated your problems—because I hoped that it would, whatever else it did, relieve the pressure on you," as he still believed it would. And for the present, at least, the New York Times considered it

“doubtful” that the Justice Department would pursue the case against Douglas “if only because two such incidents might indeed damage the Court beyond repair.”⁴⁴

Earl Warren watched with dismay these developments that overshadowed the many celebrations of his tenure and departure. With Congress, which had adopted its own lame ethics code the previous year, making menacing noises about imposing one on the federal judiciary, he determined to demonstrate that it could police itself. Since the American Bar Association canons did not bind federal judges, Warren, acting in his capacity as Chair of the Judicial Conference of the United States, summoned eleven judges to the Court on Saturday, May 24, a week and a half after Fortas’s resignation, and directed them to draft the federal judiciary’s first code of ethics by early June. “The move marks the first concrete sign that Chief Justice Warren and the Federal judiciary feel an obligation to set their house in order in the wake of the recent Fortas controversy,” one reporter observed.⁴⁵

Since distinguishing “good” from “bad” moonlighting proved so difficult, the new code would bar federal judges from virtually all of it, including accepting remuneration for most teaching and lecturing, joining foundation boards, and acting as executors or trustees for estates, except in the exceptional case, and only then when the Circuit Court of Appeals determined beforehand that such an activity served “the public interest.” Additionally, the code would require judges regularly to file financial disclosure statements of their investments, gifts, income and liability with the Judicial Conference. Despite some favorable publicity for the code adopted at the June 10 meeting of the Judicial Conference, press accounts left no doubt that Warren had “rammed through” its

adoption and angered some federal judges in the process. Some complained that the new restrictions represented a hasty and hysterical overreaction to the Fortas scandal and would relegate federal judges to what Judge Charles Wyzanski referred to as “a monastic magistracy.”⁴⁶

There was some merit to that. “I am so sorry that the Chief Justice felt required to wind up his career by attempting to forge a chastity belt for the judiciary,” John Frank, an expert on judicial ethics, wrote Hugo Black. “I doubt the necessity of the requirements and think, in any case, that they are far too strict—a burst of puritanism which will seriously interfere with the legitimate involvement of the judiciary in the life of the communities in which the judges live.” Warren countered such complaints by pointing out that judges could still participate in public service and that “acquisitiveness while engaging in decision making is not a wholesome thing and can lead to great embarrassment if not illegality,” as all Washington had just witnessed. Like Frank, many remained unconvinced.⁴⁷

Even worse, the Judicial Conference, citing lack of jurisdiction, refused to apply the code to the Supreme Court at its June meeting. Warren, however, assured the Conference that the justices would follow it in embracing the strictures. “I did not say this lightly, and I assure you that I had reason to believe that this would be done,” he wrote one federal judge. But after a lengthy discussion, his colleagues at the Court refused, as the Chief Justice should have anticipated. His brethren had always treated each justice as guardian of his own morality, and at least two, Black and Douglas, were known to oppose a code because it threatened judicial independence. So, as the Washington Post reported, the man “whose persuasive powers produced a 9-0 decision

against school segregation” proved unable “to carry a Court majority for self-imposed reform,” and Warren was embarrassed.⁴⁸

By term’s end, Warren could announce that Stewart, White, Marshall and Brennan had individually agreed to follow the code, but that did not help much.³ “In stark contrast,” the Los Angeles Times acidly observed, “there is the behavior of Justice Douglas, who despite all the concern over the non-judicial activities of justices continues shamelessly to peddle his name and the prestige of his office to virtually any outlet that will give him a forum, including girlie magazines.” (Douglas had recently accepted \$350 for writing an article on folk singing for the racy magazine, Avant Garde). The Senate’s Judicial Improvement Subcommittee Chairman, Joseph Tydings (D-Md.) condemned the “damaging anomaly” that Supreme Court justices had rejected the code, “especially since much of the impropriety that gave impetus to the reforms emanated from the Supreme Court,” and cautioned that if the Court did not “heal itself, Congress may feel obligated to apply its own medication.” Ultimately, the judiciary abandoned Warren’s reforms and punted the issue to the American Bar Association, which updated the Canon of Judicial Ethics in 1972 to encourage public reporting of outside income. By that time, it had become clear that just as Fortas’s fall haunted Warren’s final days as Chief Justice, it would also dog the Court.⁴⁹

³ Actually, Brennan had gone even further: He had divested himself of all investments except federal bonds, cancelled his scheduled speeches, whether or not he received a fee for them, bowed out of a scheduled teaching engagement and refused to accept new ones, and cut his ties to every organization but the Catholic Church and the Court after Fortas left the Court. Since he had never had much money, it was a hardship for him. Seth Stern and Stephen Wermiel, Justice Brennan: Liberal Champion 319-21 (New York: Houghton Mifflin, 2010).

“The Center Seat”

The firestorm sparked by Lambert’s Life Fortas story worried Warren Burger, and not just because he received an honorarium for his work as Mayo Foundation trustee. Though the President’s behavior about Fortas was “carefully correct,” Burger assured Nixon in a letter on May 8, Congressional Republicans were rushing to judgment. “This week is a time for Republican leaders to ‘view with dismay’ and to ‘be saddened’ and ‘disturbed’ but largely silent. They should not ‘attack.’” To do so would seem unfair. It would backfire politically by suggesting that Republicans prejudged the Fortas case, and it would push Fortas’s 1968 Chief Justice supporters in the Senate, who “have really nothing to say now,” out of the spotlight *and* embitter them. “As a consequence when your first nomination goes to the Senate, this suppressed rage will likely assert itself and your nominee may become their whipping boy.” As it turned out, the President’s first nomination went very smoothly.⁵⁰

It was Burger’s, and it was as Chief Justice. On May 20, Nixon told the GOP leadership that in selecting the next leader of the Court and associate justice, “he would be leaning very heavily on the Attorney General,” and “got across the idea that he felt there should be some distance between the President and the men he named to the Court.” Republicans should submit their recommendations of anyone but a member of the House or Senate for the Chief Justiceship or the Fortas vacancy to Mitchell. The Constitution’s emoluments clause barred a member of Congress from assuming a position for which he had voted a salary increase, and the justices had received a pay hike that session. The following day, just a week after Fortas’s resignation, John Mitchell summoned Burger to

the Justice Department to say that Nixon was announcing his nomination on television in what John Ehrlichman called a “prime-time spectacular” that evening.⁵¹

“It was highly symbolic; the Warren era was over and a Nixon Court was coming into being,” Ehrlichman remembered. The President insisted on avoiding leaks and milking his selection for maximum media attention. On May 21, the White House let reporters know in the afternoon that the President would make a televised address naming the new Chief Justice that evening and that his nominee would attend. “This started a frantic game among them of tracking down which prospective candidates would or would not be in Washington at 7 p.m.,” one journalist said. Potter Stewart was on a plane, Sophie Friendly said that her husband was on his way to his New York City home for the evening at 6:30 P.M., and William Rogers was travelling in Asia. But Mitchell cancelled a Mississippi speech. Was he staying in town because he was becoming the next Chief Justice or because the President had invited his Cabinet members to his speech? No one knew. “The air was electric in the East Room” when Nixon entered “with the white-haired man whom a great many in the audience did not recognize.” The Burgers had escaped detection by entering the White House by tunnel. Nixon secured a public relations coup and the great press coverage he sought. In his remarks, the nominee lauded the President for paying “tribute to all of the sitting judges of the federal and state systems in this nomination.” Nixon himself alluded only implicitly to the Court’s travails in rating the nominee as “above all, qualified because of his unquestioned integrity throughout his private and public life.”⁵²

The following day when he met with reporters, the President proved more direct. He explained that he had made his decision in close consultation only with Mitchell, not

with members of Congress or the American Bar Association. “Now, because of the Fortas matter, I determined that the appointee should not be a personal friend,” the President stressed. “I determined also that if possible, I should avoid appointing somebody who would be a political friend or using the Washington vernacular ‘crony.’” And he wanted someone confirmable “without violent controversy.”

He had therefore eliminated a number of individuals for the Chief Justiceship or the Fortas vacancy, including his close friend Charles Rhyne. Four others had taken themselves out of the running. “You all know my high regard for him,” Nixon said of Herbert Brownell. “You know he was the man next to Attorney General Mitchell, who was my closest adviser in selecting the Cabinet. I think he would have made a superb Chief Justice.” But Brownell warned the President that the Senate might hold up the nomination because of his actions as Eisenhower’s Attorney General, which included sending in federal troops to desegregate Central High in Little Rock, and Senate Judiciary Committee Chairman Eastland had delivered the same message. Tom Dewey had disqualified himself because of age. The “superbly qualified” John Mitchell had counseled the President against nominating a political intimate, Nixon continued. Justice Potter Stewart had taken the unusual step of coming to the White House and arguing that “generally speaking, because of the special role that the Chief Justice has to play as the leader of the Court, it would be very difficult to take a man from the Court and put him above the others” and that the President should choose an outsider. (In fact, Stewart had visited Nixon before the Fortas scandal erupted and what mainly motivated him to do so was the awkwardness involved in becoming Chief when the Senate had already denied the position to another sitting justice).⁵³

What brought Nixon to Burger? Though he had known the judge for more than two decades, they were not chums. Moreover, the President had long believed, he volunteered to reporters, that able District and Circuit Court judges deserved Supreme Court appointments. Yet although some had received that reward, “more often than not Circuit Judges do not go to the Supreme Court and very, very seldom does a Judge of the Circuit Court go to Chief Justice.” Burger also possessed the “leadership quality” needed by a Chief Justice and the right judicial philosophy. According to Nixon, his nominee advocated judicial restraint. As a “strict constructionist,” Burger had written criminal law opinions that reflected “the minority view of the Supreme Court” that the President hoped would become “the majority view. But when he gets to the Supreme Court he will be his own man.” Nixon hammered home that point repeatedly as he said that he had not spoken with the nominee about the job “until three minutes before we went to meet the press” and that he had never interviewed Burger about his philosophy. “He will owe his appointment to the fact that I appointed him, but he is to sit there and consider these decisions, these great questions, without any pressure from the White House.” As a lawyer, Nixon sought a “cordial but...arm’s length” relationship between the Supreme Court and the White House.

Obviously, the President was changing the rules of the game. While he carefully refused to rule out the future appointment of individuals from the legal academy or the bar “with substantial constitutional law” expertise, Nixon was reviving Eisenhower’s presumption that federal judges most deserved Supreme Court seats. “[A]s you can tell from this appointment, naturally I would say that Appellate and District Court experience gives an individual an edge.” He also helped create a presumption against the

appointment of anyone vulnerable to the “crony” label. Yet as Dirksen had stressed during the Fortas Chief Justice battle, Presidents had long put their intimates on the Court, often with salutary results.⁵⁴

Whether the President accurately described the process he followed in choosing Burger is unclear. He had not yet begun to tape his deliberations, and the Nixon Library contains strangely few related documents. His remarks to the press contained at least some disinformation. Nixon had no use for Potter Stewart and his Establishment credentials, for example, and it is unlikely that the President ever considered him for the job --though most of Congress, the legal academy, the reporters who covered the Court, and the other justices would have acclaimed a Chief Justice Stewart.⁵⁵

Nixon apparently did decide on Burger himself, and relatively deliberately, especially when compared to the haphazard way he settled on associate justices later. But when Senate Majority Leader Mansfield voiced his certainty that the President and his advisers had reviewed the life of Nixon’s nominee “with a fine-tooth comb,” he overstated the case. A quick FBI investigation had occurred. When Burger reasoned with John Mitchell that his doctor should give him a physical before the President made his announcement, however, the Attorney General said there was no time. What other information had the Justice Department failed to nail down beside that involving the nominee’s health? Obviously, as its behavior in subsequent nominations would soon confirm, it did not yet appreciate the need for that “fine-tooth comb.”⁵⁶

In many ways Burger proved an obvious choice, given Nixon’s promise in 1968 to unleash the peace forces against those of lawlessness. Earl Warren had predicted Burger’s selection, as had the Washington Post’s Supreme Court correspondent. Some

Administration officials assumed, as Mitchell joked, that “Burger’s the first guy to run for the job of Chief Justice—and get it.”⁵⁷

His ambitions, however, had been more modest. Mitchell had shocked him, Burger told Nixon later. “I assumed that it was Herb Brownell” and that “I was going to be second man.” He remembered telling the Attorney General that he was “disappointed in a way” until Mitchell explained that Brownell was too old and too close to the President. Burger had no recollection of what happened afterwards until he found himself in St. John’s Church across from the White House in Lafayette Square, where he had sat for an hour. Justice Department officials confirmed that the news of his selection “dazed” him. Harry Blackmun had thought that Burger had “a very fine chance” of nomination for an Associate Justice. Like Burger himself, though, Blackmun had never foreseen that Nixon would make his friend Chief.⁵⁸

“The Fortas affair, however, made this almost inevitable,” Blackmun concluded. As Pat Buchanan, a conservative White House adviser told the President, it was crucial that his “first choice not in any way be construed as ‘Nixon’s Fortas.’” Whatever led him to Burger, it is significant that the President justified his pick by referring to Fortas and stressing the need to avoid “cronyism.” As ever, recent history played a role in the nomination process.⁵⁹

Nixon won praise and points for how he handled it. He had not consulted the American Bar Association, but it considered Burger “highly acceptable” anyway. “He looks, acts and talks like a Chief Justice,” Senator Dirksen (and many others) observed of the nominee. The press raised some questions about his Mayo trustee post, which the White House had skittishly tried to hide. (Burger would soon succumb to pressure to

resign from the Mayo Foundation.) Yet the media largely acclaimed the nomination. Nixon had every reason to feel pleased with himself, and he did. When he read that the liberal Nation and New Republic mourned the end of the Warren years and complained that Burger lacked “‘leadership’ and ‘intellectual’ qualities,” the President responded with a barbed quip: “Warren, of course, was an intellectual!!??” Even the slight grumbling sparked by the selection seemed halfhearted. “Conservatives were quite pleased with the nomination; liberals, by contrast, were demoralized by the Fortas affair and not disposed to attack a nominee whose only apparent vice was that he was relatively conservative,” one law professor reported.⁶⁰

Burger’s confirmation hearing just two weeks later seemed straight out of a bygone era. It lasted all of one hour and fifty minutes, and it went on that long only because senators vied with each other to praise him. The Senate approved him by a vote of 74-3 six days later.

Though Nixon declared that the desire to dodge cronyism had driven him to Burger, it turned out that the President had simply pushed cronyism underground. That began to become clear when the first Watergate tapes were released in 1974. Reporters noted that Attorney General John Mitchell’s successor, Richard Kleindienst, had visited the President in April of 1973. Kleindienst wanted Nixon to know that the Watergate prosecutor and his team had alerted him that John Dean, who was cooperating with them in the hope of immunity or a reduced sentence, had implicated White House aides H.R. Haldeman and John Ehrlichman in the Watergate cover-up. Kleindienst had been urging Nixon to demand the resignations of Haldeman and Ehrlichman and to appoint a special

prosecutor for some time, and he now renewed his plea. “Incidentally, the Chief Justice and I are very close friends,” the Attorney General volunteered, and Burger suggested a distinguished Chicago attorney with a track record as an able prosecutor. Legal ethics expert John Frank noted the irony: Nixon had cited his desire to avoid cronyism as the reason for Burger’s appointment. Reporters wondered what else the Chief Justice and members of the Administration had privately discussed. They speculated that Burger’s involvement would require him to recuse himself from any Watergate case before the Supreme Court or presiding over an impeachment trial.⁶¹

Instead the Chief Justice put himself in charge of drafting the Court’s opinion that ultimately held that the President must hand over the tapes he tried to hold back. Nixon “reportedly used expletive-deleted language to describe Chief Justice Warren E. Burger and the author of the crushing decision against him,” the Washington Post said in 1974. It was left for Bob Woodward and Scott Armstrong to reveal, accurately, five years later in The Brethren that the other justices had initially considered Burger’s first attempt at the tapes decision dreadful. They had hatched a successful coup to take the drafting of the opinion away from him, and he had been its author in name only.⁶²

While The Brethren ended its coverage of the Court in 1976, it was Nina Totenberg’s turn to create a stir the following year, when she reported that the Court had “secretly voted” by 5-3 to refuse review of the Watergate cover-up convictions of John Mitchell, H.R. Haldeman and John Ehrlichman. Since four justices had to agree to take a case, that left Burger one vote short. She reported that the three justices who wanted to hear the case were Nixon appointees and that Burger was delaying a public announcement of the decision in the hope of winning additional support. Legal

correspondents did not usually reveal Court actions before they became public.

Totenberg said she had “previously received advance notice of some court opinions, but had not reported them because ‘there’s no profit in it except self-glorification’” and maintained that “no one actually ‘leaked’” the news. However she happened on it, her information potentially compromised the Court. As reporters observed, if the justices now denied review of their convictions, Mitchell, Haldeman and Ehrlichman could make a case that publicity about the leak prejudiced their situations. If the justices took the case, Court-watchers would conclude that Burger had successfully persuaded a justice who had originally voted against hearing it to change his vote. (The Court denied review anyway.)⁶³

Then Ehrlichman published his memoir of the Nixon White House in 1982 and revealed that Nixon and Mitchell “made a constant effort to keep in touch with Burger.” Ehrlichman served up the example of a White House breakfast he had attended with the President, Attorney General and Chief Justice in December of 1970, before Nixon began taping his conversations. The four men had privately and “openly” spoken about “the pros and cons of issues before the court,” including busing and criminal procedure, he maintained. Mitchell immediately announced that neither he nor Nixon had any “recollection of such discussions.” Burger angrily knocked a camera out of the hands of a member of the CBS news team that tried to question him about the allegation. He claimed that Ehrlichman was just “trying to sell a book.” At the time, it seemed as if Burger overreacted. As journalist Linda Greenhouse observed, Ehrlichman’s “sketchy” account did not necessarily indicate the Chief Justice had breached judicial ethics. A

discussion of “issues” did not necessarily include talk of pending cases before the Court.⁶⁴

But a decade later, in an article about the still unreleased Nixon tapes, Seymour Hersh revealed that the archivists listening to them had told him that “Burger was more than willing to discuss any issue with the President, whether it involved politics, Watergate, or cases pending before the Supreme Court.” Ehrlichman laughingly agreed. He now admitted to Hersh that his book had actually soft-pedaled the relationship between the President and Chief Justice.⁶⁵

When the tapes were finally released, they bore out the archivists’ observations. In one 1972 conversation, Nixon and Burger discussed the Court’s forthcoming obscenity decision in Miller v. California. “I am struggling with this pornography thing,” Burger said, and was “coming out hard” against it, “whether I get the support or not.” (He got four other justices). After identifying himself as “a square,” Nixon maintained that freedom of the press had “gone overboard.” He also instructed the Chief Justice to drag his feet on busing for as long as possible. “Don’t get anything in before the election, for God’s sake!” The Court had plenty of other “explosive issues” already, Burger reassured him. The two men also discussed the death penalty, which the Chief Justice reported “was still churning around in the Court,” and about which Nixon volunteered he possessed “mixed feelings.”⁶⁶

Burger proved helpful that summer when the Justice Department charged Daniel Ellsberg and Anthony Russo with theft and espionage after they leaked the Pentagon Papers to the press. Acting in his capacity as the justice responsible for the Ninth Circuit, William O. Douglas issued a stay that postponed the trial. Though the Solicitor General

publicly called on the Court to overturn it, Ehrlichman visited Burger privately to explain Nixon would benefit from a delay until after the 1972 Presidential election. The Chief Justice “was kind of intrigued with the political aspects of it,” he reported back, and the Court was soon issuing an order that it would not meet in special session to review Douglas’s decision.⁶⁷

Nixon’s Watergate troubles provided more instances for contact with his Chief Justice. When the government indicted Mitchell, Haldeman and Ehrlichman for their roles in covering up White House involvement in the Watergate break-in, Nixon telephoned Burger in 1973. “[M]y heart goes out to those people who with the best of intentions were overzealous,” he confided. “But as I am sure you know...if I could have spent a little more time being a politician last year and less time being President, I would have kicked their butts out. I didn’t know what they were doing.” Nixon had China and Russia to preoccupy him, the Chief Justice answered diplomatically, before the President jumped in to remind him that the Vietnam War had taken a toll too. Still, Nixon did not want Burger to worry: “I know you as a great jurist, probably, and as an old politician, are naturally concerned about all the hullabaloo, but it will pass, and I will survive it.” But the President added that he did not “see how any of these guys can receive a fair trial.” On the telephone, Burger was discreet. “It’s just one of the times when the boat’s rocking, and this kind of separates the men from the boys,” he laughed. Later that year, when Spiro Agnew had to resign as Vice President, Earl Warren reported, “a rumor at the Court that Chief Justice Burger was to be the new Vice President.”⁶⁸

Chief Justice Burger never approached Fortas in importance as a Presidential adviser, but it was not for lack of trying, and his relationship with Nixon was anything

but arms-length. As we will see, he peppered the President with his opinions whenever a Court vacancy existed. He once telephoned the White House to say that Thurgood Marshall was “much sicker than anyone presently realizes” and to dictate a get-well message Nixon could send. As Fortas backed LBJ on Vietnam, so Burger dropped by the White House to leave a letter of support when Nixon launched the invasion of Cambodia. Like Fortas, he played the courtier: “Very properly the White House lines and all Western Union lines are blocked with loyal Americans who wish to express their support for your courageous decision.” When Nixon faced a hostile White House Press Correspondents’ dinner in 1971, Burger was there to soothe that his “fortitude and forbearance in the face of gross rudeness by your hosts will always have my unbounded admiration” and to remind the President that the press had also treated Washington and Lincoln savagely. The Chief Justice welcomed the fact that the President treated him as a political ally. “Poor, sad Abe Fortas,” Burger had written Blackmun revealingly after Fortas resigned from the Court. “I wonder if he really hurt the Court as much as the 5/4 & 6/3 monstrosities [of opinions] had done before l’affaire Fortas.”⁶⁹

But most of the disclosures about Burger’s involvement in Administration nominations, politics and policymaking occurred decades after Nixon had left office. For the present, what mattered was that the President had reasserted the importance of separation of powers and had apparently dramatically written finis to the Warren era. At a ceremony on the final day of the 1968-69 term that the Nixons attended, Warren administered the oath of office to his successor, and the President saluted the Court and Warren as the embodiment of “fairness, integrity, dignity.” According to the new White House line, Nixon might have “criticized some of the decisions” of the Court, but he

“always defended the institution.” That represented a shrewd shift in tone as the President tried to build support for a new Burger-led majority that would change the Court’s direction.⁷⁰

VI

“Southern Discomfort,” 1969-70

Richard Nixon loved to dream about whom he would put on the Supreme Court. Just six months into his Presidency, he had named a new Chief Justice and had created a vacancy where a liberal once sat. As Fortas had realized, Nixon planned to use that vacancy to court Strom Thurmond and white Southerners angered by the Supreme Court. By capitalizing on hatred for the Warren Court in the nomination and confirmation process, the President continued to believe, he could both grow the Republican Party and unify the disparate elements within it.

It turned out, though, that he faced determined opposition. LBJ’s nomination of Marshall and Fortas had marked “the opening offensive in a persistent struggle for the Supreme Court, eased only by an occasional truce.” At least Johnson had made those nominations when his party controlled the Senate. In 1968, the United States had entered an era of divided government and one in which a Supreme Court seat sometimes, though not always, seemed more momentous. Half of the twenty-two nominations to the Court after 1968 occurred when one party held the Presidency and another controlled the Senate. Now, the pressure groups and the investigative journalism that would help topple Nixon’s Presidency loomed larger too, as the Senate soon noticed. Consequently, as during the Nixon years, the contentiousness of process by which Supreme Court nominees were selected and confirmed, grew.¹

Nixon’s Southern Strategy

By now, the Court traditionally possessed a Jewish seat, just as it featured one for a Catholic and for an African American. Since the public identified Brandeis and

Frankfurter with social justice causes before they came to the Court, and since Goldberg and Fortas belonged to Warren Court majorities that expanded civil rights and civil liberties, the Jewish seat also had become synonymous with liberalism. As the President reminded reporters, however, Arthur Goldberg had recently objected to “the Jewish seat.” The former justice had held a press conference to announce that Nixon was under no “obligation” to appoint a Jew to succeed Fortas. Goldberg condemned the idea of a “‘Jewish seat’ on the Court and claimed that the nation had reached a point “where judicial and political offices could be filled on the basis of individual merit.” He insisted that he had not thought at the time of his own Supreme Court appointment “that I was occupying a Jewish seat.” Whether Goldberg spoke from the heart was unclear. He was mulling over a campaign to become New York’s governor or senator and would have had every incentive to treat the United States as the melting pot that made race, religion and region irrelevant to a person’s success.²

Nixon seized upon those remarks and praised them as he spoke with reporters about his selection of Burger and the next associate justice. “I do not consider that there is a Jewish seat or a Catholic seat or a Negro Seat on the Court,” the President said. He vowed to make Supreme Court appointments on the basis of “competence,” and “the Court will not be used for the purpose of racial, religious, or geographical balance, at least not while I am here.”³

Yet privately, Nixon remained fiercely opposed to Jews. “[T]here’s not going to be any Jew appointed to the Court, not because they’re Jewish, [but] because there’s no Jew... that can be right on the criminal law issue,” he told Pat Buchanan. “They’re all hung up on civil rights.” Had he looked, Nixon might have found Jews who fit his

ideological criteria like Judge Henry Friendly, Chief Judge of the New York Court of Appeals Charles Breitel, and Third Circuit Judge Arlin Adams. But he did not.⁴

Nixon dissembled in another way. He intended to seek “geographical balance” because he saw Fortas’s departure as a political opportunity. In 1968, he had attracted white suburbanites in the metropolitan South by posing as the moderately conservative elder statesman and an alternative to racist demagogues like George Wallace. Now Nixon hoped to capture the Wallace crowd and expand his party’s hold over the region. Harry Dent, his adviser on Southern affairs and a former aide to Strom Thurmond, assured him that the reaction of Southern senators and newspapers to the Burger appointment was “overwhelmingly favorable,” as it was to the President’s loud insistence that the Department of Health, Education and Welfare slow down the pace of school desegregation. “I am convinced that another such good appointment coupled with the changes now being generated at HEW should win for us a very close working relationship among most Southerners on Capitol Hill,” Dent declared. Anticipating that the Senate would easily confirm his next nomination, as it had Burger, Nixon directed John Mitchell to find him a Southerner for the Fortas seat.⁵

Lewis Powell was “my first choice,” Nixon subsequently wrote Powell’s biographer about the lawyer and former American Bar Association President. The President had met Powell, a Democrat, and “knew him well by his representation as one of the preeminent legal scholars of our time,” a remark that would have confounded anyone who knew Powell, a distinguished corporate lawyer, but no scholar. If the President really wanted a Southerner, though, an attorney made sense because he would most likely possess a shorter paper trail on civil rights than an appellate judge. So, at

Nixon's urging, John Mitchell, the search's director, contacted the Richmond, Virginia lawyer. Powell, however, who was older than Burger, cited his age and poor eyesight as reasons for refusing the job. "It was only then that I nominated Judge Haynsworth, who was, incidentally, a very close second choice." Nixon blamed the Attorney General for botching that nomination.⁶

Judge Clement Furman Haynsworth, Jr. of South Carolina was a well-respected and well-off son of the old Confederacy. He looked like the kind of Southerner who wore white suits and two-tone shoes. He had graduated summa cum laude from Furman College, which his family had founded, and, like his father and grandfather, from Harvard Law. After naval service during World War II, he practiced law at South Carolina's largest law firm in Greenville, home to a hub of postwar textile mills and companies that employed him to represent them. An Eisenhower Democrat, Haynsworth had secured his seat on the Fourth Circuit in 1957 and had since become its beloved Chief Judge. The 56-year-old seemed "shy" and "reserved," which some of his many friends attributed to his slight stutter, but never "aloof." When the Administration began to focus on Haynsworth, he mourned the potential disruption in his personal life. He spent one week every month in Richmond, home of the Fourth Circuit, and the rest of his time in Greenville. There, he and his wife, "Miss Dorothy," the president of the local debutante cotillion, owned a large, handsome brick Tudor, raised camellias and roses, watched birds, and collected the art of another Carolinian, Jasper Johns.⁷

Though he relished his life, Haynsworth recounted, "when the fire horse smells the fire, he is bound to go and if it should happen, I could not say no." The way the Administration officials conducted the selection process pleased him too. "Wishing to

avoid every appearance that positions on the Supreme Court are given as rewards for personal friendship or political favor, they decided to turn to a review of the performance of the sitting judges,” Haynsworth said. “When I met Mr. Mitchell for the first time, he informed me that he knew a great deal about me, and on our next meeting he told me that he had read a synopsis of every opinion I had ever written and a great many of the opinions he had read in full. On that basis, I survived the process of elimination of many judges whose work was reviewed and whose performance was considered,” which was “very gratifying.”⁸

Once again, Nixon and Mitchell had dispensed with the practice, standard under the three previous Administrations, of consulting the American Bar Association prior to announcing a Supreme Court nomination. But Mitchell would not have needed the ABA Standing Committee on the Judiciary, which avowedly rated prospective candidates on the basis of their professional competence and integrity rather than their politics and ideology, to conclude that Haynsworth had amassed a distinguished record. After the fact, its chair, Lawrence Walsh, would testify at Haynsworth’s nomination hearing that the committee unanimously deemed him “highly acceptable from the viewpoint of professional qualification” and would praise his “scholarly, well written opinions.” Everyone at the Court from Burger to Brennan, Harlan to Marshall, and Black to White welcomed the prospect of his nomination.⁹

Liberals off the Court did not because Lewis Powell, Haynsworth’s vigorous supporter, accurately described his judicial record as “moderately conservative.” As legal ethicist John Frank, one of the judge’s staunchest defenders at the time and afterwards acknowledged, Haynsworth did not favor labor unions. His devoted Senate

sponsor, South Carolina Democrat Fritz Hollings, who may have first suggested the judge to Nixon, characterized Haynsworth's vantage point as that of "a corporate right-to-work lawyer." Indeed Haynsworth he had once represented the anti-union J.P. Stevens Company and pressed the South Carolina legislature to enact the state's "right-to-work" law. And while some of the judge's opinions advanced the cause of racial equality, he was not "zealous for civil rights," either, though his tone remained refined, rather than rabid. His record on crime, Fred Graham reported, largely but not entirely accurately, showed "no quarrel with the basic direction of the Warren Court on crime, only a tendency to go slower."¹⁰

As the possibility of Haynsworth's nomination was bruited about in July, the NAACP, AFL-CIO and Leadership Conference on Civil Rights, began mobilizing opposition. Founded in 1950, the Leadership Conference was an umbrella group of 125 civil rights, labor, social welfare and religious groups. It included heavyweights such as Roy Wilkins, the executive director of the NAACP, and the NAACP's chief lobbyist, Clarence Mitchell, often called the "101st Senator" because of his influence. Its counsel was the feisty Joe Rauh, vice chair of the still powerful Americans for Democratic Action and a Warren Court enthusiast who "wore the label 'knee-jerk liberal' as a badge of honor." The nomination's opponents could count on the support of a loose group of liberal law students, lawyers, law professors, union leaders, Americans for Democratic Action members, civil libertarians and civil rights workers—many of them associated with the Leadership Conference, NAACP and Marian Wright Edelman's Washington Research Project, the predecessor to the Children's Defense Fund.¹¹

While two of the judge's former clerks decried the "[c]harges by the N.A.A.C.P. and professional liberals" in a lengthy memorandum released before Nixon announced he was nominating Haynsworth to the Court, they accurately recognized that interest group allegations "automatically make headlines despite their hollow and baseless nature." The judge's antagonists considered him no friend to organized labor. And they produced his dissent in one case condemning the majority's contention that racial segregation in publicly funded hospitals violated the Fourteenth Amendment's equal protection clause as "unprecedented and unwarranted." Detractors also scorned Haynsworth's insistence in an opinion that the Virginia Supreme Court should evaluate Virginia's decision to close down all public schools after the Supreme Court handed down Brown v. Board of Education and his eight-month delay in handing it down. They condemned his sympathy for "freedom of choice" plans and other tactics that school boards adopted to delay desegregation too. Like John Parker, the only Supreme Court nominee the Senate rejected between 1894 and 1968, Haynsworth maintained that the Constitution did not require integration, but simply forbade discrimination—even after the Warren Court showed impatience with the judge by reversing him.¹²

In a strange twist, Haynsworth was the protégé of Judge Parker, another Carolinian. Parker's Fourth Circuit opinions had won him the enmity of the same civil rights and labor organizations that likewise decided to fight Haynsworth. Labor's opposition to Haynsworth in 1969 proved especially noteworthy. Its representatives had not testified against anyone before the Senate Judiciary Committee since Hoover nominated Parker to the Court in 1930.

Nearly four decades after Parker's defeat, though, most liberals knew that Haynsworth's labor and civil rights record alone could not defeat him. Who would listen to them in the Senate? Haynsworth would appeal to many Republicans and Southern Democrats there. And the Democrats with whom liberal interest groups had relationships included people like Ted Kennedy, who had attacked Marshall and Fortas's opponents in 1967 and 1968 for inappropriately probing nominee ideologies. To be sure, most legislators did not fear looking like hypocrites to do what they deemed right and/or politic. Still, most in Washington agreed that the labor and civil rights issues could not win the opposition enough votes in the Senate to deny Haynsworth the appointment.¹³

But Haynsworth, who had a stock portfolio valued at more than \$1 million (nearly \$6.5 million in 2016 dollars), had a potential "Fortas problem" that Mitchell and the FBI, which investigated federal judges at the time of their first appointment and then administered "once-over-lightly" checks at the time of their elevation to higher courts, had inadequately vetted. Haynsworth helped launch, and owned stock in, Carolina Vend-a-Matic, a provider of vending machines that dispensed candy, coffee and soda. In 1963, he sided with a majority of the business-friendly Fourth Circuit judges in overturning a National Labor Relations Board ruling related to Darlington Mills, a subsidiary of the notoriously anti-union Deering-Milken Company. Haynsworth and two other judges maintained that an employer could lawfully close part of a business for anti-union reasons even if the purpose was to discourage unionism in the rest of it, a decision that the Supreme Court subsequently vacated. And although Carolina Vend-a-Matic had not managed to get any vending machines into Darlington, it reaped about 3% of its annual gross from machines it had placed in other Deering-Milliken plants. Attorney General

Robert Kennedy had publicly declared his faith in Haynsworth after the Darlington case when a lawyer for the Textile Workers Union of America relayed an anonymous allegation to the Fourth Circuit that Haynsworth had taken bribes.¹⁴

Nixon ignored the warning signals, all of them evident, and imprudently delayed announcing the nomination. On August 1, the Wall Street Journal reported that Roy Wilkins, Executive Director of the NAACP and Chair of the Leadership Conference on Civil Rights, had protested Haynsworth to the White House, and that Clarence Mitchell had condemned him. On August 13, the AFL-CIO associate general counsel telephoned Jerris Leonard, the Assistant Attorney General in charge of the Civil Rights Division, at the “Western White House” in California, where Nixon was vacationing, to warn that Haynsworth’s opinions were anti-labor and that the judge was vulnerable on ethical grounds. That same day, Senate Minority Leader Dirksen, a Haynsworth enthusiast, leaked the prediction that Nixon would soon appoint the judge and that the Senate would approve him. On August 14, AFL-CIO President George Meany sent Nixon a telegram recommending that he choose someone else. Moreover, journalist William Eaton, who worked in the Washington Bureau of the Chicago Daily News and possessed ties to labor and civil rights groups, predicted that they would fight his nomination. On August 15, Haynsworth railed to a reporter against the “blatant falsehoods” alleging his conflict of interest with respect to Darlington Mills. He had not been Vend-a-Matic officer at the time of the decision, the judge added, but he refused to say whether he had owned stock in the company. As opposition mounted, the New York Times reported, speculation rose “that the expected nomination might be coming unglued.”¹⁵

Nevertheless, on August 18, with Nixon still in California, his press secretary, Ron Ziegler, belatedly announced it. Ziegler also released portions of the Kennedy letter that the Administration and Haynsworth insisted cleared the judge. “Since the President’s intention was a badly kept secret, he had ample advance indication of how poorly the appointment would sit with champions of civil rights and others who believe the road to national unity lies in effective enforcement of constitutional guarantees of equal opportunity,” the New York Times groused about the “disappointing” nomination of this “obscure” candidate. And indeed within three days, George Meany had thrown the resources of the AFL-CIO into fighting the nomination, Roy Wilkins was urging local chapter members to bombard their senators with mail opposing it, and labor and civil rights had combined force through the Leadership Conference to battle it.¹⁶

The White House had given the opposition plenty of time to mobilize, and the media made quick to enter the fray. Just as Bill Lambert helped bring down Fortas, so a reporter would play a critical role in mobilizing opposition to Haynsworth. Bill Eaton characterized the nominee as “a jurist with charm and great dignity” on August 21. That day, though, a friend at the AFL-CIO telephoned Eaton and urged him to dig into the nominee’s finances. Checking SEC files, the reporter discovered the news that the judge sold his stock in Carolina Vend-a-Matic for some \$455,000 in 1964 (nearly \$3.5 million in 2016 dollars) after ruling for Darlington Mills. Eaton, who would win a Pulitzer for his coverage of the nomination, now launched a crusade against Haynsworth and his “socialite wife.” Nevertheless, Haynsworth anticipated confirmation.¹⁷

Then Senate Minority Leader Everett Dirksen dropped dead at the beginning of September. The hearings were postponed to enable members of Congress to go to his

Illinois funeral, and Haynsworth's antagonists had more time to plan. To this point, the senators who had opposed the judge had lacked a leader. Three liberal Democratic Senate Judiciary Committee members--Birch Bayh of Indiana, Ted Kennedy of Massachusetts, and Philip Hart of Michigan--discussed strategy on the flight returning from the funeral. Hart, who had guided the fight for Fortas in 1968, did not want to take the lead, and Kennedy's reputation had recently taken a beating when he delayed reporting a fatal car accident involving a young woman to whom he was not married off Chappaquiddick Island. The three agreed that the 41-year-old Bayh, often labeled the "All-American Boy," would take charge of the crusade against Haynsworth.¹⁸

With no investigators or staff of his own to speak of, save his devoted cousin, Harry, Judge Haynsworth tried to fight back. He and Senator Hollings spent an unprecedented two days making the courtesy calls on Judiciary Committee members that until then had occurred irregularly, and the judge disclosed more about his finances than any previous nominee. And his efforts seemed to be bearing fruit. Most senators predicted a relatively easy confirmation in early September. Jacob Javits, who had become the first to declare his opposition, foresaw "a real battle" ahead. Even he, however, told reporters he expected it to end with Haynsworth's confirmation.¹⁹

Yet as Eaton faithfully recounted, the judge's opponents had tapped "a battery of labor lawyers" to compare companies in which the nominee owned stock with decisions in which he participated, "hoping to find a lucky match." They struck potential pay dirt when they showed he had bought a thousand shares of Brunswick Corporation valued at about \$17,500 (nearly \$125,000 in 2016 dollars) while a decision in its favor in which he had participated was pending. Mitchell learned of Brunswick only once the hearings

finally began in mid-September when Bayh blindsided John Frank with the news about the company as Frank defended the ethics of Haynsworth's behavior in the Darlington Mills case to the committee.²⁰

"Clement F. Haynsworth Jr. went before the Senate Judiciary Committee today to establish his fitness to sit on the Supreme Court and spent most of the day explaining the affairs of an obscure vending machine company," Fred Graham wrote after the first day of hearings. Instead of presenting Haynsworth to the committee, Fritz Hollings rightly complained, he had to defend the nominee before it. That task became even more difficult when after eight long days of testimony, including two appearances by Haynsworth and one by his broker, Senate Judiciary Committee Chair James Eastland suddenly decided to end the proceeding without hearing from three constitutional experts supporting the judge, who were encouraged to submit written statements instead. That was probably a shrewd move, since it enabled Eastland to cut off some opposing witnesses, and no one seemed interested in constitutional interpretation anyway.²¹

The focus was on Haynsworth's portfolio and ethics. Though he insisted that he had done nothing wrong and that "when I went on the bench, I resigned from all such business associations I had, directorships and things of that sort," his critics could point out that the judge appeared on the books as the vice-president of Carolina Vend-a-Matic until 1957, and as director until 1963. Haynsworth had also, it developed, become involved in a number of realty deals with Vend-a-Matic after he became a judge and participated in other cases involving companies that did business with Vend-a-Matic and other corporations or their subsidiaries in which he owned a small amount of stock. As for Brunswick, Haynsworth testified that his broker had alerted him to the investment

opportunity after he had reached his decision in the case and he had not thought of the case at the time of the purchase. If he had, he admitted, he would not have bought it. Then there was a revelation that Haynsworth had once been “in partnership” with the notorious Bobby Baker. That clearly horrified the White House, though Haynsworth had not even become aware that he and Baker had invested in the same cemetery until after Nixon announced the nomination.²²

The 1972 revision of the Canon of Judicial Ethics, a reaction to Haynsworth’s travails, as well as Fortas’s, directed judges to disqualify themselves in cases in which they possessed any financial interest, no matter how small. Yet Haynsworth’s defenders could justify much of his specific behavior under the relatively permissive 1923 Canon that still held sway. Moreover, John Frank testified, the Federal Judicial Code provided for disqualification only when judges possessed “a substantial interest” in a matter, and said that they otherwise possessed a “duty to sit.” And as Frank also made clear, few expected judges to disqualify themselves when they owned stock in the supplier or subsidiary of a party to litigation. So what, then, if Haynsworth had ruled in favor of a textile company that did business with another company in which he owned stock? Assistant Attorney General Rehnquist produced a memorandum justifying the judge’s ethics. Past presidents of the ABA stood by Haynsworth, and a “substantial majority” of the organization’s Standing Committee on the Judiciary reaffirmed its support of him by a 2:1 majority after the airing of all his linen, with Chairman Lawrence Walsh contending that “[t]he fact that the committee was divided” provided proof the committee had not participated in a “whitewash.” Moreover, scholars largely dismissed the conflict of interest charges against Haynsworth as “makeweight” and “insubstantial.” None of that

especially bothered his opponents, who simply “retreated to the safer ground” of claiming that Haynsworth was “insensitive to ethical concerns” and fretting about Brunswick, which they insinuated came perilously close to insider trading and had not been the unintentional slip Haynsworth and his defenders maintained. After all, as Fortas’s resignation had shown, even the 1923 Canon indicated that “a judge’s conduct should be free of impropriety or the impression of impropriety.”²³

Though Haynsworth was at least as well qualified to join the Court as most justices in its history,⁴ he proved an unfortunate choice at a moment of heightened concern about judicial ethics. “It is nothing short of astonishing that President Nixon should have nominated for the succession to Abe Fortas’[s] seat on the Supreme Court a man whose prior record as a judge raises ethical questions,” the New Republic predictably editorialized. “Ethics are for liberals,” the cartoonist Herblock joked bitterly. AFL-CIO President George Meany came before the Senate Judiciary Committee to allege that Haynsworth did not deserve elevation because he was “anti-labor, indifferent to civil rights and lacked ethical standards.” The Leadership Conference on Civil Rights also used the hearings to attack the judge as “a “laundered segregationist” whose nomination would deal “a deadly blow” to the Court’s “image.”²⁴

Meanwhile, Bayh dribbled out *tu quoque* arguments and revelations about Haynsworth’s ethics to guarantee the most media attention. All the while, the senator

⁴ After Bayh refused an invitation to debate, Hollings faced off against Senator Eagleton (D-Mo.) on NBC. “I think Judge Haynsworth is probably considered a moderately competent legal craftsman,” Eagleton said. “But these high accolades that are being bestowed on him to make him sort of the second coming of Brandeis I find to be rather new and novel. I don’t think anyone’s ever held him in that high judicial esteem. But we’ll put that aside.” Though Haynsworth may not have been “the second coming of Brandeis,” Eagleton was unfair to him. His was a respectable nomination. And as Hollings told the network, “It’s the philosophy...that everyone opposes. But they won’t say so.” “Senators Eagleton and Hollings Interviewed,” November 13, 1969, 7:00 A.M., Box 127, Folder: Supreme Court Judges, Haynsworth, Ethics Investigations, Hollings Papers.

assured the nervous nominee he was an “honest” man who appeared before the Senate Judiciary Committee at a time when Fortas’s resignation required an irreproachable successor. It was “logical” to use the Fortas precedent Bayh’s staffers assured him, since defeating Haynsworth on grounds of “his philosophy” would prove impossible, and what had been “good for the goose,...a great liberal jurist...may also be the best thing for the gander.” Nixon would “certainly find someone of similar ideology” who could win confirmation if Haynsworth went down to defeat, but at least Bayh would have gained “political mileage” in the process with the civil rights groups, labor and “the Jewish community,” which was smarting from Fortas’s involuntary resignation.²⁵

While Pat Buchanan saw “the naming of a conservative South Carolinian to the ‘Jewish seat’” as an “unmistakable affront” to the Establishment, Assistant Attorney General Rehnquist and others in the Nixon Administration believed that Bayh and other liberals sought revenge for their treatment of Fortas. So did Senator Hollings, who considered Haynsworth’s vilification “payback.” If anything, though, the fear of seeming inconsistent after the Washington Post had urged Fortas’s confirmation in 1968 despite the revelations about lecture fees, forced its editors to declare at hearing’s end in late September “reluctantly and unhappily...that there is no valid reason on the basis of the present record for the Senate to deny the President his choice.” That did not keep Herblock, the Post’s cartoonist, from continuing to preach against the nomination. In one particularly devastating cartoon after Haynsworth had pledged to place his holdings in a blind trust the following week, the cartoonist pictured “Mitchell, Nixon, Thurmond & Associates” telling the public: “None of the things my client did were wrong, and he promises to stop doing them completely.” So, too, the New York Times, another Fortas

supporter in 1968, backed the nomination with an admitted lack of “enthusiasm,” though its editorial staff made clear its preference, which the Post came to share, that Haynsworth withdraw his name.²⁶

What the talk of “payback” missed was that liberals, who believed that Fortas had betrayed them by becoming involved with Wolfson, simply thought that the circumstances of his resignation had handed them a convenient weapon. As John Masarro has shown, at least 15 senators who ultimately voted against the nomination said or suggested that they did so because of the similarity to the Fortas situation. Some, like John Williams, the Republican “conscience of the Senate” who had made Bobby Baker’s life miserable and who the White House wrongly assumed controlled six votes, were doubtless sincere. So were others, such as Senate Republican Conference Chair Margaret Chase Smith, who told Nixon that the Brunswick news had set her to worrying about “the appearance of a double standard.” And so, too, were others, such as Senator Joseph Tydings, the Maryland Democrat and onetime Haynsworth admirer who had called on Fortas to resign. Tydings now decided that Haynsworth showed insensitivity about “the cardinal rule which admonishes judges to avoid even the appearance of impropriety” and was the wrong person to “relieve the cloud over the Supreme Court created by the Fortas affair.” Certainly, Haynsworth’s Senate opponents included individuals in both parties otherwise predisposed to support the President. White House officials rightly suspected that for still others, however, the ethical issue supplied the “smokescreen” behind which they hid ideological opposition and/or their fear of antagonizing labor and civil rights groups.²⁷

“Abe Fortas was there all the time,” the AFL-CIO’s legislative director recalled. According to Joe Rauh, while “Justice Fortas had a potential conflict of interest in his outside activities, Judge Haynsworth had an actual conflict of interest in a case before him at the bench.” One labor leader put it more pungently for the Senate Judiciary Committee when he declared that Haynsworth made “Fortas look like an altar boy.” No allegation irritated the Administration so much or proved so effective. A Harris Poll showed that 53% of the public had reacted negatively to the nomination, with 58% agreeing that “it looks bad to have a man with so many doubts about him taking the place of Abe Fortas.”²⁸

In response, William Rehnquist argued that the Fortas-Haynsworth analogy was useless. The Assistant Attorney General blamed the defeat of Fortas’s Chief Justice nomination on his refusal to return to explain his lecture fees and his involvement in drafting legislation and contended that the Fortas resignation was equally inapposite. In Rehnquist’s telling, Democrats and Republicans had informed Fortas, “in effect,” to “explain or resign”—to give an accounting of his relationship or quit, and Fortas had decided to leave the Court. “The matter was not resolved by the Senate on the merits, but rather by Justice Fortas’[s] choice of resignation.”²⁹

Nevertheless, Fortas still stained Haynsworth. Indeed Fortas’s former partner, Paul Porter, his deputy in the Chief Justice battle and sounding board at the time of his resignation, wrote Haynsworth to commiserate “as a member of the bar who has closely, but vicariously, and in a closely related context, shared your ordeal.” And when Life profiled Haynsworth, some of his supporters groused the author had depicted the judge as “an emasculated Neanderthal spook.” Yet Harry Haynsworth thanked the journalist for

portraying his cousin “as a person who was completely incapable of being a wheeling-dealing Fortas like man. While I feel that your story goes too far in painting Clement as an anachronistic Southern gentleman living in another century, such an extreme view was in my opinion necessary to overcome the Fortas image painted by the Eastern Establishment press”—on which the nominee himself, like the Administration, Hollings and Senate Judiciary Committee Chair Eastland, lay most of the blame for Haynsworth’s poor reception.³⁰

While the media did cover the nomination as if it were a boxing match, Dirksen’s death and the opportunities it opened up for interest groups may have caused just as much trouble. As labor, civil rights and religious groups got their anti-Haynsworth message out and Bayh developed their evidence into his “bill of particulars” against the judge, the Republicans fought over the next Senate leaders. When the dust settled, the new Minority leader was the relatively liberal Hugh Scott of Pennsylvania, who had voted to report the Haynsworth nomination out from the Senate Judiciary Committee; the new whip, Robert Griffin of Michigan. Both represented states where labor unions and civil rights groups mattered, and according to the New York Times, the AFL-CIO “alone” had deployed “40 full-time lobbyists” to press senators to vote against the nomination. Despite the considerable impact of the Citizens for Decent Literature on the Fortas nomination, outside pressure groups proved more effective from the beginning this time around and even more influential.³¹

Neither Griffin nor Scott wanted to vote for the nomination. Griffin knew that if he supported it after opposing Fortas’s ethics so forcefully in 1968, he would seem dangerously hypocritical, not just hypocritical. Even worse he would look like a union

antagonist in Michigan, where the UAW's Walter Reuther was attacking Haynsworth's association "with the notorious anti-labor, anti-social textile mills of J.P. Stevens, a company that discharged 250 workers because they joined a union."³²

Moreover, the Leadership Conference on Civil Rights was alleging that the judge would dole out rights to African Americans "with an eyedropper." African Americans in the House also attacked the nomination. "The Supreme Court is the one institution that has given us hope when everything else has been lost on the city and state level," Representative Shirley Chisolm reminded the Senate Judiciary Committee. Responsible black leaders would be rendered impotent to convince African Americans that "you don't have to riot in the Streets because the Supreme Court will uphold your rights" if Haynsworth won confirmation, she maintained. Then, at the beginning of October, Edward Brooke of Massachusetts, the first popularly elected African American in the Senate and a Republican, stood on the Senate floor publicly to ask Nixon to withdraw the nomination. Griffin and other senators surely feared looking like racists too.³³

No surprise, then, that by early October, Griffin had joined Bayh in whipping up opposition to the nomination, despite his pledges to the Administration that he would not work against it. The whip pointed to Haynsworth's ethical insensitivity and based his decision on the grounds that the Constitution trumped party loyalty. "I have said that the fact that he was a conservative was not a point against him," Griffin stressed. "I hope the next nominee will be a conservative." Unlike Griffin, who sided with six other Senate Judiciary Committee members in voting against the nomination, Scott voted with nine others to report it out on October 9. But the Pennsylvanian believed "that his vote in favor of Haynsworth could by itself defeat him in 1970." He could go no further,

particularly with the Leadership Conference on Civil Rights reminding its members that Scott “needs to hear from constituents in Penna, that in view of his outstanding record in support of civil rights and social welfare causes, it would be shameful for him to support the Haynsworth nomination.”³⁴

With all the Republican leaders united against the nomination and some of them working hand in glove with liberal Democrats to defeat it, the Administration had to rely on Republicans Roman Hruska of Nebraska and freshman Marlow Cook of Kentucky, to become its shepherd. The two had little success rounding up votes in areas where unions remained strong. Ultimately just two Republicans from industrial states—Dirksen’s successor, Ralph Smith in Illinois, the target of intense Administration pressure, and George Murphy of California—voted for the nomination. And why should others? “A wave of anti-Haynsworth mail and telegrams was pouring into the Senators’ office,” John Ehrlichman recalled.³⁵

“We can stimulate mail too,” Ehrlichman remembered Nixon saying. “There should be letters and wires from the Farm Bureaus, Southern bar associations, the National Rifle Association and our other friends.” Those “friends” included the John Birch Society. The American Medical Association was drafted too, though it later characterized its lobbying effort as a “very minor one,” in which ‘a couple of physicians in Virginia’ arranged to tell a Senator, ‘Hey we like this guy Haynsworth.’ One Republican businessman in Ohio wrote a typical letter to his freshman GOP Senator, William Saxbe. “We backed your recent election with generous contributions and tireless door-to-door campaigning,” he said. “We will be watching you. We support Haynsworth.”³⁶

The AFL-CIO, NAACP, and the Leadership Conference had done their job --and kept doing it—too well for such politicking to make much of a difference. “KEEP THE MAIL ON HAYNSWORTH COMING!,” the secretary of the Leadership Conference exhorted member organizations during the first week of November. “Opposition to the Supreme Court nomination of Judge Clement F. Haynsworth has grown so in the Senate that if the vote were taken today his name would most likely be rejected.” But the vote would not come before “mid-November, at the earliest,” and now the Administration was twisting arms and “stirring up mail from back home. Until a week ago, mail in most Senate offices was running overwhelmingly against confirmation,” but thanks to the “White House offensive,” senators were now receiving “large amounts of pro-Haynsworth letters, many of them originating in the South.” So what? The judge’s antagonists had carefully studied their Senate targets, none of whom wanted to lose labor and civil rights support. Saxbe, for example, would ultimately vote no on Haynsworth. So would 21 of the 30 senators running for re-election in 1970.³⁷

It did not help that although Haynsworth’s fellow South Carolinian and Democrat, Fritz Hollings, was spearheading the fight, the judge hailed from Strom Thurmond’s state. In fact, Thurmond may well have won the promised veto over the seat that Fortas suspected. The senator tried to help Haynsworth by keeping his vigorous support covert. He worked behind the scenes to mobilize Phyllis Schlafly and other conservatives in favor of the nomination. But he did testify on the nominee’s behalf, and as the judge later said, there was “a great to-do that I was Strom Thurmond’s boy.” Nixon’s Congressional liaisons acknowledged that the President had “invited” a battle by naming a South Carolinian and putting his “Southern Strategy” on trial “in a forum (the Senate)

where it will always given its present composition be voted down, and where the Republicans will be seriously divided.” Nearly 40% of the Senate Republicans would vote against the nomination. Nixon had gambled, his team concluded, in a forum where he was lucky to win 60 votes on any controversial issue and where his Administration had “poor relations” with 15-20 of its 43 Republicans.³⁸

The President had also done little to ensure Haynsworth’s success. His legislative team admitted that where it should have expected trouble, it was “caught napping.” Nixon had been lazy too, particularly compared to LBJ. He should have announced the nomination himself, for example, and, as Hollings grumbled, made sure people like Scott and Griffin had signed on to the judge’s cause by September. Instead the President remained in the background until after the hearings had ended and the judge’s prospects had become decidedly uncertain. “If we cave in on this one, they will think that if you kick Nixon around you can get somewhere,” the President told Republican senators. Who were “we” and “they?” By this time, Republicans seemed more united in their opposition to the nomination than the Democrats. While he understood that Griffin and others disagreed, Nixon continued, he believed that if the Senate did not confirm Haynsworth, “there is no one the President can appoint” that liberals would not undermine. Because his prestige was on the line and his Attorney General under attack for inadequately investigating Haynsworth, Nixon held a press conference to accuse the judge’s antagonists of “vicious character assassination” and began meeting with individual Republican senators. The President himself used “the total soft sell,” one invitee said. “The other guys do the short-hair business.” As Dean Kotlowski

maintained, the Administration's "hardball" tactics further injured Haynsworth's cause, as did Nixon's own belated lobbying of senators.³⁹

At the President's instruction, his team also clownishly turned up the heat. "They're a bunch of amateurs," Saxbe complained to the New York Times about those running "the Administration's two lobbying centers—Harry S. Dent, Bryce N. Harlow, Kenneth F. BeLieu, Eugene S. Cowen and Clark Mollenhoff at the White House and Attorney General Mitchell and William H. Rehnquist at the Justice Department." The "beserk" television appearance of Mollenhoff on behalf of the judge, for example, created a Washington joke about "the Mollenhoff cocktail—you throw it and it backfires." Even Chief Justice Burger got into the act, Newsweek reported, "buttonholing Senators at social functions and telling them: 'If Judge Haynsworth isn't qualified to sit on the Supreme Court, then I'm not either.'" According to the magazine, his lobbying "has brought astonishment and quiet disapproval from those concerned" and had won "no visible converts." The White House publicized the information, obviously acquired improperly from the Internal Revenue Service, that six justices played the stock market. Moreover, House Minority Leader Gerald Ford revealed that his staff was studying the possibility of impeaching Justice Douglas. "If the Senate votes against a nominee for lack of sensitivity, it should apply the same standards to sitting justices," he maintained. That warning backfired too.⁴⁰

"It will be close," Bill Eaton predicted on November 21 as he wrote about Haynsworth's "day of decision." It wasn't. Though Vice President Agnew was on hand to break the tie in the event of a 50-50 vote, the Senate defeated the nomination by 55-45. Interest group representatives showered the judge's opponents with praise. According to

the Chicago Tribune, “the [s]econd floor hallway of the Capitol, just outside the Senate Chamber, resembled a scene outside the locker room after the home team had won its upcoming football game,” and guards had to restrain the “elated crowd” as senators left.⁴¹

By this time, the President had moved on. He had never cared about Haynsworth as much as LBJ did about his nominees to the Court and, along with Harry Dent, his key Southern strategist, had decided that “we may gain enormously by this incident” if the judge became “a martyr.” The Haynsworth nomination might help Nixon fend off a 1972 challenge from George Wallace, and he had also used it to curry favor with South Carolina’s kingmaker. “The liberal majority, with its ties to organized labor, unfortunately won out,” Strom Thurmond consoled the President, but South Carolinians took comfort in the nomination of “this man we hold in such high esteem.”⁴²

Haynsworth took his defeat stoically. “I have been named South Carolinian of the Year, and on Friday night in New York some four hundred and fifty people turned out for a very elegant dinner and dance at which I was the honored guest, and rose twice to standing ovations,” he wrote Warren Burger with evident bemusement. “In restaurants, theaters, airports, and museums in Europe and New York, and on the streets of New York, strangers recognizing me from pictures, stop me with expressions of a wish to shake my hand.” At Nixon’s request, he remained on the Fourth Circuit, and as “a makeup for his mistreatment,” the House and Senate approved renaming the federal building in Greenville after him fifteen years later—somewhat unusually, while he was still alive. (Homer Thornberry received the same honor in Austin). In 1969, however, the judge himself hoped that mistreatment would serve a larger purpose. “The venom that the Fortas affair has caused has now been expended and many other competing political

interests have engaged in battle in the Senate to the point of apparent mutual exhaustion,” Haynsworth told John Mitchell and former South Carolina governor and US Supreme Court Justice James Byrnes. “I believe that the President’s next nominee, whoever he is, will be a shoo-in, and that no substantial group in the Senate will be anxious soon again to turn a reasonable appointment into a matter of great controversy.”⁴³

“Too Good to Be True”

Wishful thinking, especially when Nixon’s next nomination proved neither “reasonable” nor “a shoo-in.” Nixon’s former partner Leonard Garment, the lawyer the President hoped would become “the Clark Clifford of the Republican Party,” had warned Nixon that he would more easily find someone “whose record is unobjectionable on civil rights” if he looked for someone who had not written much about it. But the President remained fixated on conservative Southern judges whom no one could call cronies. If Haynsworth’s selection was bad for the moment, the next was just bad.⁴⁴

Chief Justice Burger suggested Judge G. Harrold Carswell to Mitchell. Edward Gurney, a conservative who had become Florida’s first Republican senator since Reconstruction, characterized Carswell as “an all-around darned good judge” and promoted him too, with the enthusiastic backing of Senator Richard Russell of Georgia, who had known the judge “all his life” and could not “conceive of a better appointment.” Attorney General Mitchell set William Rehnquist to studying the judge’s opinions, and commended him to Nixon after the Assistant Attorney General deemed him a “strict constructionist.” Harry Dent, whom Nixon had directed to find a candidate “farther South and further right” after Haynsworth’s defeat, championed Carswell too. And there were not many other choices, given the President’s criteria. Mitchell reportedly “angrily”

informed one Republican who proposed the distinguished Fifth Circuit Judge, John Minor Wisdom, that Carswell's colleague was a "damned left winger" who would prove "even worse than Earl Warren."⁴⁵

Carswell was certainly no left-winger. An alumnus of Duke, native Georgian and son of a Democratic politician, he studied law at the University of Georgia until he joined the Navy during World War II. In 1948, he graduated from Mercer Law School in Macon, where he served in student government, rather than on law review. He returned to his small hometown and became editor of one of its two newspapers, the Irwinton Bulletin. At the age of 28, he unsuccessfully sought the Democratic nomination in the Georgia House of Representatives in 1948. Then Carswell changed states and parties. He married a "bubbly" Floridian described as "a petite Southern belle cheer leader type" and "one of the leading social figures of Tallahassee." (Had he won confirmation, the 50-year-old Carswell would have become not just the youngest member of the Court but its first Floridian.) Carswell and his wife, Virginia, built a large house in Tallahassee on ten lakefront acres that he designed himself and that they filled with antiques. Perhaps the influence of his father-in-law, a powerful Florida Republican, helped move Eisenhower Administration officials to name him U.S. Attorney after he had practiced law a few years, and then District Judge, a position he held for eleven years. Nixon had just named him to the Circuit Court of Appeals a few months earlier.⁴⁶

Hunting quail, fishing, playing bridge, partying with Tallahassee's elite, and FSU football evidently engaged Carswell more than judging. He produced some 16 pages of published opinions annually. They proved unusually short not just in length, but also on citations, and Fred Graham complained, "read, for the most part, like plumbers'

manuals.” Higher courts rarely cited and routinely reversed Carswell. Although he insisted he was loyal to Brown, the judge dragged his feet in enforcing desegregation. “While there were ‘worse’ judges in the South when it came to civil rights issues, there simply were not *many* who were worse,” concluded political scientist Bruce Kalk, who painted an absolutely damning portrait of Carswell’s judicial career in the 1950s and 1960s.⁴⁷

Perhaps Burger and others reasoned that Carswell was bulletproof. The judge had won confirmation to the Fifth Circuit despite well-publicized complaints by civil rights and labor groups that he had displayed “a strong bias against Negroes asserting civil rights claims.” Criticism by one Senate Judiciary Committee Republican in 1969 that District Judge Carswell had “been repeatedly reversed and reproached by the Fifth Circuit,” where the NAACP filed many of its civil rights cases, “for his rulings in cases involving desegregation of everything from reform schools to theaters” and was known by civil rights lawyers for his “prolonged temporization,” had reached the Nixon Administration too.⁴⁸

Given these red flags, the White House should have scrutinized Carswell’s record, but no one there apparently carefully studied the judge’s background or opinions. And although Mitchell had reportedly ordered more rigorous FBI investigations of Supreme Court nominees after the Haynsworth fiasco, the Bureau’s check on Carswell was so “superficial,” the FBI’s assistant director later said, “that we never found out that he was a homosexual.” Whether Carswell was gay was unclear, but he may have been bisexual, and at the time of his appointment, the New York Times reported that he was “viewed as being something of a swinger,” whatever that meant. He was subsequently arrested for

propositioning a vice squad officer in a men's room, and on another occasion, a man whom Carswell invited to his hotel room assaulted him. These incidents did not occur until the late 1970s.⁴⁹

As the public then learned of them, it also became clear that the Bureau's agents who investigated the judge in 1970 had largely just checked to see what newspapers said about him until John Pack, a gay high school teacher who had once been Carswell's neighbor, was murdered two weeks after Nixon nominated the judge to the Court. A week after the killing, the sheriff's department located a watch that one of the judge's four children, Scott, had given Pack. Larry Campbell, the deputy who found it, recalled telling Robert Clark, the head of the local FBI office, about the potentially embarrassing, though "tenuous connections between Mr. Pack and the Carswell family, as well as a 'rumor around town' that Mr. Carswell had been involved in a homosexual incident some years earlier." Sources informed the New York Times that the news left Clark "extremely upset." Campbell subsequently said that he was not "certain" he had provided the information to Clark, though "it would have been likely we would have discussed it." What is certain is that no word of the murder ever reached the White House. Surely it would have wanted to investigate the story, if only because, as AP reported, Scott Carswell testified in the December 1970 trial of the victim's alleged killers that he had bought the watch, similar to one he wore, for his teacher after Pack admired his.⁵⁰

When the President and Mitchell settled on Carswell, then, they knew only that civil rights groups would object to him. That suited them. Apparently, Mitchell personally reviewed the judge's accomplishments. "This man is too good to be true,"

Martha Mitchell remembered her husband exclaiming. “He has the most perfect record!”⁵¹

John Dean and historian David Kyvig maintained that the President made his “colossal mistake” in choosing Carswell because he trusted Mitchell and Burger and did not understand how much “the Fortas experience had changed the political culture.” White House speechwriter William Safire hypothesized, however, that the President wanted to “spite” the Senate, while Joe Rauh speculated that Nixon “wanted to win with opposition from the same people who had fought him on Haynsworth.” Most likely, Dean and Kyvig were right.⁵²

Certainly, though, the President was fighting the last battle. He refused to send up a “trial balloon” and give Carswell’s opponents time to mobilize this time. The press reported that the nominee’s name remained “an unusually closely guarded secret.” This time, too, Mitchell consulted with Griffin, Scott and other leaders beforehand. Eager to show their loyalty after they had deserted the White House on Haynsworth, they promised support. It wasn’t until January 16, 1970 that the press began to finger Carswell as the likely candidate. Three days later, some six weeks after Haynsworth’s defeat, White House Press Secretary Ron Ziegler announced the appointment and extolled Carswell as a “strict constructionist” who satisfied Nixon’s criteria, since he had “a good judicial record, an outstanding background and he is young.” According to the Chicago Tribune, “the shadow of the Senate rejection of Nixon’s last appointee...hung heavily” over the event. Ziegler reported that Nixon had received a complete FBI examination, which “cleared Carswell of any suspicions” and included a survey of Carswell’s finances and tax returns. Roman Hruska, one of Carswell’s leading Senate

proponents, observed that the judge was “not a pauper, but he’s far from affluent.”

Unlike Haynsworth, the judge was just worth about \$200,000 (about \$1.4 million in 2016 dollars, mostly in real estate and land) and had himself never owned any stock or bonds, though his wife had inherited some stock in her father’s crate company. “It was a very thorough check,” Ziegler stressed.⁵³

While it was obvious that Carswell was no Holmes and that Nixon had chosen him because of geography and because he did not own much stock, Senate approval seemed preordained. To be sure, there was grumbling. The New York Times editorialized that the nomination “almost suggests an intention to reduce the significance of the Court by lowering the caliber of its membership,” and Fred Graham believed it would set liberals to yearning for Haynsworth. Like the Washington Post, even the Wall Street Journal acknowledged that Carswell’s “outstanding qualification” was “an immunity to conflict-of interest charges quite unusual among men of his age and standing,” rather than “judicial eminence.” Predictably, the NAACP immediately condemned Carswell, while Joe Rauh maintained that the President had “again nominated an unknown, whose principal qualification for the post seemed to be his opposition to Negro rights.” That might be “good Nixon-Mitchell politics in the suburbs and the South,” he added, but would “only add to already dangerous racial tensions in America.” Yet, as Marian Wright Edelman told Rauh, although Carswell had “a pretty tough segregationist image,” that in itself “clearly isn’t enough” to defeat him, and blocking the nomination was “not going to be easy going.” The AFL-CIO initially refused even to oppose it because there was “no hint of a conflict of interest in Judge Carswell’s financial holdings and he has not been involved in any significant labor decisions.” When

Carswell met with reporters briefly after Ziegler's announcement, he said, "I don't really anticipate any problems."⁵⁴

Why should he? Senator Gurney was touting the judge's "middle of the road, moderate record on civil rights" and Carswell's unpopular decision that his own Tallahassee barber could not refuse to cut African Americans' hair to reporters. ("If Judge Carswell is confirmed, God help us, it will be the first time in history that a man ever was confirmed for writing an opinion that his racist barber ought to cut a Negro's hair," Rauh joked.) Embarrassed by their mutiny over Haynsworth, Republican senators readied themselves to play ball, as did Democrats exhausted by the previous battle. Minutes after Ziegler's announcement, Senate Minority Leader Scott, who, of course, had voted against Haynsworth, told reporters the Senate would approve the nomination "with an absolute minimum of difficulty." So, too, Robert Griffin said he was "hopeful the Senate would confirm Judge Carswell without delay," and Senate Majority Leader Mansfield reported that there was "a general feeling of good will toward the President's latest nomination." Doubtless to avoid giving the judge's opponents time for research, Senator Eastland, a Carswell supporter, announced that the Senate Judiciary Committee would begin its hearing on the nomination the following week.⁵⁵

At 4 A.M. the day of Ziegler's announcement that Nixon had selected the judge for the Court, George Thurston, a Tallahassee reporter with a penchant for green or orange socks, and his stringer, Ed Roeder, had driven 250 miles to Irwinton, a town that Carswell's Mercer Law School professor described as "the kind of place (as some of my students say) where white folks get up in the morning, walk down to the corner store, and whittle, chew tobacco, and cuss niggers." When Thurston and Roeder learned that the

county courthouse housed the only extant copies of the Irwinton Bulletin that Carswell once edited, they went there and found the text of a speech Carswell had made in 1948 when he was running for the Georgia House. In it, he proclaimed himself as “a Southern by ancestry, birth, training, inclination, belief and practice” and contended “I yield to no man, as a fellow candidate or as a fellow citizen, in the firm, vigorous, belief in the principles of white supremacy, and I shall always be so governed.” After returning to Tallahassee at 1 A.M. on January 21, Thurston telephoned Carswell, whom he knew casually, and read him the speech.⁵⁶

The judge paused and exclaimed, “God Almighty! Did I say that? It sounds like another person.” He asked the reporter to bring the documentation to the house, and when Thurston and Roeder arrived at 11 A.M., a tense Carswell invited Thurston into his bedroom for an hour-long off-the-record conversation, in which the judge must have unsuccessfully begged the reporter not to publish the story. “I’ve read a summary of what is attributed to me as a young candidate some twenty-two years ago,” the “visibly shaken” Carswell then said of the speech, which he now denounced as “obnoxious and abhorrent” in a hastily-arranged televised statement. “There is nothing in my private life or in my public record of some seventeen years which could possibly indicate that I harbor racist statements,” he insisted. Indeed, he maintained, “I lost that election because I was considered too liberal,” which may well have been the case.⁵ When Walter Cronkite broadcast the news story that night, though, it created a furor, particularly since

⁵ In a 1946 editorial, for example, Carswell had written that the gubernatorial candidate, Gene Talmadge, “has done exactly as expected, yelling ‘Nigger, Nigger,’ as he has for the last 20 years, and put on a show that would be a first-rate comedy were his act not a tragedy of deceit and disgrace.” His 1948 white supremacy statements may well have been opportunistic. “Ol’ Harrold was just playing the game,” one Irwinton official told the New York Times. “Back then this county didn’t hardly know what an integrationist was.” Jon Nordheimer, “Carswell Reviews Copies of Papers He Edited From ’46 to ’48,” New York Times, January 23, 1970.

the surprised and embarrassed White House had to admit that the FBI had missed the speech.⁵⁷

More of Carswell's skeletons began coming out of the closet as other reporters, law students, and the Washington Research Project's Rick Seymour, a "mod young" Harvard Law alumnus who resembled Buffalo Bill, dug in Florida and the libraries. Within a few days of the revelations about the white supremacy speech, for example, the public had learned, thanks to Seymour's interviews with local African American civil rights leaders, that U.S. Attorney Carswell had participated in an apparent dodge to forestall integration of a public golf course by incorporating it as a private club of which he then became a director. When two ABA Standing Judiciary Committee members questioned Carswell on January 26, the night before the Senate hearing on his nomination opened, he denied having been an incorporator and director, though they showed him the documents that proved he was. Nevertheless, as it had already hinted it would, the ABA committee, which had decided simply to rate Court nominees as "qualified" or "unqualified" after Haynsworth, unanimously approved Carswell anyway.⁵⁸

Other potential opponents apparently lacked the will for a brawl. On January 26, as the judge and Gurney called on Senate Judiciary Committee members, George Meany condemned the nomination as "a slap in the face to the nation's Negro citizens." The AFL-CIO, which heretofore had only opposed Supreme Court nominations because of the individual's labor record, would battle Carswell's, he now said. But some suspected that Meany, who opposed Nixon's "Philadelphia Plan" to open up more construction jobs for African Americans, was simply trying to avoid straining labor's relations with civil rights leaders to the breaking point, and it was unclear whether the AFL-CIO would go

all out against the judge. “We’re tired,” its general counsel acknowledged privately. Joe Rauh worried that the anti-Carswell senators “didn’t have their heart” in a fight, either. Bayh, who was contemplating a 1972 Presidential run, did not want to lead the opposition.⁵⁹

So even though the Leadership Conference on Civil Rights, with the full weight of the NAACP behind it, unanimously resolved to oppose Carswell at its board meeting on January 28, it was waging the proverbial lonely battle. Marian Wright Edelman attributed the Leadership Conference’s willingness to undertake it to its short history of active opposition to Supreme Court confirmations. “One of the advantages of neophyte organizations like this,” she said, “is that you don’t know the political realities. So you make a fight because you think it’s important, not because you think you can win.” As Leadership Conference officials told their member organizations after the board meeting, “We realize there is some reluctance to take up this fight so soon after the successful campaign against the nomination of Judge Clement Haynsworth.” That was an understatement. “The impression runs that the Senate cannot be persuaded, twice, to reject the wishes of the President. But the Senate must be made to recognize that confirming a man whose civil rights record is even worse than Haynsworth’s is an affront to its own principles, to millions of Americans who are sickened by its seeming indifference to racism, and to the Supreme Court itself.”⁶⁰

The Judiciary Committee hearings put Carswell’s views on racial justice on display. Where Carswell wanted to present himself as the antidote to the Warren Court by testifying that “the Supreme Court should not be a continuing Constitutional convention,” he was forced to declare, “I am not a racist.” (As LBJ would have said, the

opposition made the judge deny its allegations). “I suppose I believed” in white supremacy in 1948, he acknowledged, but he argued that “the course of 22 years of history” had changed his mind.⁶¹

Civil rights activists, however, saw no evidence of a true “change of heart.” Though Edward Brooke was prudently remaining silent for the moment in the hope that the Senate Judiciary Committee would not report out the nomination and he would not seem to pursue “a vendetta” against the President, African Americans from the House testified against it. Other civil rights leaders and lawyers showcased the judge’s unusually “insulting” behavior towards civil rights lawyers, whatever their race, in his courtroom. In response, the Administration produced a letter from one black lawyer in the Nixon Administration drafted by Rehnquist announcing that when *he* appeared before Carswell, he had always been received courteous treatment. But even a Justice Department attorney who testified under subpoena acknowledged that Carswell had shown “extreme hostility” towards civil rights lawyers and had charged them with “meddling and arousing the local people.” Together with the judge’s decisions, which Joe Rauh eviscerated for the Judiciary Committee, his behavior, Rauh alleged, demonstrated “Judge Carswell is Judge Haynsworth with a cutting edge. He is Judge Haynsworth with a bitterness and a meanness that Judge Haynsworth never had.”⁶²

And while Carswell seemed more relaxed and calmer than Haynsworth, he proved even less frank. Though no one acquainted with previous hearings should have expected candor, the judge’s responses still demonstrated an unusual lack of it. When the segregated golf course took center stage, the nominee initially implied he had learned of the allegation only when he “very hurriedly” read the morning’s newspaper and denied

he was one of its incorporators or directors. Carswell only changed his tune when Ted Kennedy “brandished” the articles of incorporation that the ABA representatives had shown him. Then the judge insisted he had not “looked at the documents” and lamely insisted he had sought to improve the termite-ridden clubhouse and the golf course, rather than stall integration. Even his sense of humor was challenged at the hearings once Newsweek reported that he had “shocked” a Georgia Bar Association audience to whom he had told “the following Negro dialect joke: ‘I was out in the Far East a little while ago, and I ran into a dark-skinned fella. I asked him if he was from Indo-China, and he said, ‘Naw, suh, I’s from Outdo’ Gawgee.’”⁶³

The judge came across not just as racist, but as a male chauvinist pig, to use a phrase becoming all the rage. He had voted to deny a rehearing in a case involving the issue of whether a corporation had legally denied employment to a mother because she had preschool age children when it had said it would hire a similarly situated father. Carswell’s was the first Supreme Court hearing at which NOW testified—not that the Senate Judiciary Committee took its president, Betty Friedan, very seriously. (The Committee did, however, treat Representative Patsy Mink of Hawaii, who made the same points, respectfully, and her testimony and what she herself described as “badgering” of Senate Judiciary Committee member Hiram Fong (R-Hi) helped persuade him to vote against Carswell).⁶⁴

Few considered Carswell intellectually impressive, either, with one AFL-CIO lawyer characterizing him to the Judiciary Committee as “an undistinguished, dull graduate of the third best law school in the state of Georgia, with an undistinguished judicial record.” After damning the judge’s civil rights record to the Senate Judiciary

Committee, Yale Law School Dean Louis Pollak, a member of the NAACP Legal Defense Fund's board of directors, observed that Carswell possessed "more slender credentials than any other nominee for the Supreme Court put forth in this century." He then gracefully withstood hostile cross-examination from Senators Thurmond and Hruska. "[S]uppose some would say that you are the least qualified man since 1900 to be dean of the law school at Yale University, how would you feel?," Thurmond scolded him. The dean, who was known for his modesty, decency and sense of humor, replied, "Well I think that would be a reasonably good estimate." Meanwhile, copies of a recent article by Pollak's colleague, Charles Black, were circulating through the Senate in which that constitutional scholar assured legislators that nothing in the text, structure, or history of the Constitution stopped them from voting against a Supreme Court nominee they believed would likely prove "very bad for the country."⁶⁵

At hearing's end, Joe Rauh begged senators not to "accept the principle that because the Senate refused to confirm someone, it thereby has to confirm somebody worse. Otherwise you will get to the point where you may never refuse to confirm anybody because there will be a threat that it will be worse the second time." Yet it appeared that the Senate would, in part because, one Republican senator said semi-facetiously, if it did not, he had heard the Administration was enrolling George Wallace's 1968 running mate, General Curtis LeMay, in law school. Art Buchwald joked that the Senate had "Judge Caleb Robert E. Lee" waiting in the wings, who had no investments, just slaves.⁶⁶

But it was Nixon who seemed on track for the last laugh, since both Bayh and Pollak predicted the judge's confirmation. "If everyone in this government had to give up

his job if he belonged to a restricted golf club, Washington would have mass unemployment,” the President kidded at a January 30 press conference at which he admitted he had not known of Carswell’s 1948 speech before George Thurston revealed it and said it would have made no difference to his decision to nominate the judge. The President predicted to reporters that the Senate would “overwhelmingly” approve Carswell. The press concurred that confirmation looked likely.⁶⁷

It certainly did. Two-and-a half weeks after Nixon’s press conference, the Senate Judiciary Committee recommended Carswell’s appointment by a vote of 13-4, even though by now, it had also become clear that despite the Court’s declaration that restrictive covenants were unconstitutional in 1948, Carswell had sold land with a covenant restricting its use to Caucasians in 1966. That information, which Nixon also shrugged off, arrived in time for inclusion in the Leadership Conference’s anti-Carswell pamphlet, but not everything did. “It is a measure of the man that we have been unable to keep up with all the evidence of his unfitness for the position of Associate Justice,” the Leadership Conference mentioned when it circulated “Has Judge Carswell Changed?.” It then emerged that Carswell had chartered an all-white FSU booster club. Nevertheless, a majority of the ABA’s Standing Federal Judiciary Committee reaffirmed that the nominee was “qualified” to serve on the Court on February 21.⁶⁸

The steady drip of revelations, though, strengthened the will of the nomination’s opponents to defeat it. In mid-February, the AFL-CIO escalated its attack against this “nonentity whose only appeal is to forces determined to resist progress in civil rights and human rights,” and Meany now said “we are putting out just as much effort to defeat Carswell as members had done with Haynsworth.” Edward Brooke became the

eighteenth senator publicly to oppose Carswell on February 27 and took charge of recruiting Republican senators. That was key, for as Mary McGrory wrote in the Washington Star, “Few Republicans wanted to hear the Senate’s only black member eloquently laying out the case against Carswell and removing, one by one, the props they are leaning on to justify a vote for a Southern judge whose partisans have admitted is mediocre.” And on March 8, when Bayh appeared at a Leadership Conference meeting, his attitude towards making the fight changed. “Bayh made a speech that turned them on,” his assistant said, “and their response turned him on.” The senator would energetically lead the attack on Carswell, whom he portrayed as an undistinguished racist, even though in the middle of the nomination fight, Bayh’s father-in-law murdered his second wife and killed himself. Now Nixon cheered when the media revealed that Bayh had belonged to a fraternity “formed by three ex-Confederate soldiers” and that he had failed the bar exam three times.⁶⁹

As the shift in rhetoric suggested, given the apparent indifference to just the judge’s racial views, his antagonists had to zero in on his mediocrity as well. It turned out that Lou Pollak had made the strongest argument against the judge when he coupled Carswell’s civil rights record and slender credentials. As if to compensate for its reticence with respect to Haynsworth, the Washington Post editorial board jumped on the anti-Carswell bandwagon in mid-February, the same day that John MacKenzie announced in its news section that the judge’s opponents would focus on “a subject rarely put at issue in a contest over a Supreme Court nomination—the nominee’s legal ‘distinction’ or lack of it.” The nominee’s ordinariness was something about which many could agree. “If you’re only ‘above average’ at Mercer Law School, what does this make

you,” Ehrlichman and others at the White House privately scoffed. “Boob. Dummy. What counter is there to that? He is.”⁷⁰

Despite the ties of loyalty to one of their own, some prominent Fifth Circuit judges obviously opposed the nomination too. No wonder: After examining every appellate decision of the Fifth Circuit from 1959-69 and all 122 published and unpublished appeals of Carswell’s, “Law Students Concerned for the Court” joined with progressive Republicans in the Ripon Society to reveal in March that of 67 Federal District Judges in the Fifth Circuit with more than 20 decided appeals, “Carswell ranks 61st in rate of reversals—only 6 judges had higher rates.” Moreover, one columnist stressed, “[t]housands of lawyers, hundreds of [law school] professors and dozens of deans,” denounced him as unfit in what Joe Califano, now a prominent Washington superlawyer, characterized as “the revolt of the attorneys.” So did more than 200 former Supreme Court clerks, who said his record “shows him to be of mediocre ability,” a sentiment privately shared by one of Carswell’s few law professor sponsors. And on the eve of the start of the debate in the Senate, 457 lawyers, including the deans of Yale, Harvard and the University of Pennsylvania Law School, former Attorney General Ramsey Clark, and some of the nation’s most distinguished law professors from all parts of the country signed a letter that FDR adviser Samuel Rosenman had circulated that urged Carswell’s defeat on the grounds of his racism and lack of distinction. In Tallahassee, 9 of 13 law professors at Florida State University Law School created dissension among their colleagues and consternation among the state board of regents by signing a petition opposing Carswell too.⁷¹

By March, the incompetence issue had become for Carswell what ethics proved for Haynsworth. The words “mediocre” and “mediocrity” would appear 133 times in the Senate floor debate, and while that number encompassed supporters’ rebuttals, it was nevertheless telling. “We couldn’t win if we had to make it a strictly civil rights fight,” one of Carswell’s opponents acknowledged later. “We had to have a cover issue.” The lesson of the Fortas and Haynsworth fights, then, was that opponents needed “a cover issue” to show they respected the distinction between law and politics and were not inappropriately concerned with ideology. That way, they could maintain that they respected the President’s right to find someone sympathetic and only sought to make sure there was nothing else wrong with the nominee.⁷²

As with Haynsworth, the Administration’s public responses hurt Carswell. When the Washington Post condemned Carswell’s civil rights record, Rehnquist shot off an angry letter to the editor. He charged that the newspaper really sought “something far broader than just ‘civil rights’; it is the restoration of the Warren Court’s liberal majority after the departure of the Chief Justice and Justice Fortas and the inauguration of President Nixon.” According to him, the Post must admit “all of the consequences that your position logically brings in its train: not merely further expansion of constitutional recognition of civil rights, but further expansion of the constitutional rights of criminal defendants, of pornographers, and of demonstrators.” That argument, according to Rehnquist, “would make up in candor what it lacks in marketability.”⁷³

Some in the Senate agreed with him. Russell Long also waved the bloody shirt of the Warren Court when the debate opened on March 16, 1970. During the 1968 battle over Fortas’s elevation, he remarked, “much was made of the point that he was a brilliant

student. My reaction was, ‘Look at those decisions on law and order....that have made it virtually impossible to punish criminals in this country.’” Hadn’t the Court suffered enough “upside down, corkscrew thinkers” who could make anything sound “logical” even as they crippled law enforcement? “Would it not appear that it might be well to take a B student or a C student who is not able to think straight, compared to one of those A students who are capable of the kind of thinking that winds up getting us a 100-percent increase in crime?” More infamously, Senator Hruska committed a fatal blunder when he publicly said of Carswell, “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises and Frankfurters and Cardozos and stuff like that there.” Did he compare Carswell to three Jews for a reason?⁷⁴

Most senators reported “a light flow of Carswell mail (which seems to be running about 3 to 1 against him)” and seemed less than thrilled about the nomination. Even in the South, where a sense of regional victimization simmered and support for Carswell proved stronger, many disliked the idea of Justice Carswell. True, Senator William Spong, a moderate Democratic lawyer from Virginia who had voted for both Thurgood Marshall and Clement Haynsworth on the grounds that “[h]istory has demonstrated” that the Senate’s “examination of a nominee should be limited to his qualifications, background, experience, integrity and temperament,” received death threats and plenty of angry mail when he decided “as a matter of conscience” that he could not support Carswell. “I did not ask for perfection, I only asked two things: (1) candor from a man who is to sit on the highest court in the land and (2) a reasonable competence when compared with the performance of judges either in the South or throughout the

nomination,” Spong rebuked one constituent. Yet many Virginians applauded Spong’s stand.⁷⁵

And where Haynsworth’s hometown newspaper, after conceding that Carswell “lacks the fine judicial brilliance and sensitivity of Clement Haynsworth,” editorialized that the judge was receiving “the same treatment” as Haynsworth and deserved support “simply because he is qualified,” Haynsworth’s booster, Senator Hollings, was less certain. “Carswell is nothing to get enthused about,” Hollings wrote a friend. “I am proud of the South and when we put our foot forward, it should be our very best foot. Carswell can’t even carry Haynsworth’s law books.” Nevertheless, the senator would “probably vote for him but I am not proud of the vote.” While he did not consider Carswell a racist, “I just believe he is a mediocre lawyer and judge” and could see “no reason why I should promote him to the highest Court.” The best Hollings could say for Carswell, whom he ultimately did vote for, was not very good: “Of course district judges do not attract very bright young lawyers as law clerks, and perhaps on the Court the Judge will have more able assistance and grow.”⁷⁶

Despite his tepid support, the judge’s chances of defeat remained less slim than his credentials. As one reporter said, “Paradoxically, while opposition to that choice was growing outside the Senate, opposition inside it seemed on the verge of collapsing.” The tide had turned in the sense that the Leadership Conference on Civil Rights was no longer alone, and as Herblock made graphically clear, there was “growing public revulsion” against the judge. Yet although a Carswell impersonator dolefully sang “Nobody knows the trouble I’ve seen, Nobody knows but Haynsworth” in the Gridiron Club Banquet skits where Nixon and the Washington press corps mingled the Saturday night before the floor

debate began, Ted Kennedy publicly proclaimed that blocking Carswell remained “a long shot.” Perhaps he was trying to coax the unusually large number of uncommitted senators into declaring themselves. Bayh, however, sounded only slightly more hopeful when he said, “We have a chance of winning. Don’t write us off.” As the debate entered its third day, the New York Times reported, “Confident supporters of Judge Carswell did not even feel required to keep a spokesman in the all-but-empty chamber most of the day as Senator Jacob K. Javits of New York for the Republicans, and Senator Harold E. Hughes of Iowa, for the Democrats, droned through long reading of critical material.” Carswell was still “likely to win,” the Washington Post and New York Times predicted afterwards.⁷⁷

Like the evidence of racial insensitivity, though, the criticism of the judge and his supporters kept coming. On March 23, Arthur Goldberg intervened. Perhaps goaded by a rumor that Burger was lobbying senators for Carswell, which the Chief Justice had condemned as “a malicious falsehood,” the former justice spoke out about the nomination. If the judge were confirmed, he would “occupy the seat of Holmes, Cardozo and Frankfurter,” Goldberg told NBC. “How can it be said that Judge Carswell is qualified to sit in [it]? He is not.” That morning, Anthony Lewis also marveled in the New York Times at the ABA Standing Federal Judiciary Committee’s decision to play “a supporting role in what must be taken as a calculated effort to demean the Supreme Court” by twice bestowing its stamp of approval on Carswell.⁷⁸

Lewis had company within the ABA power structure. Bernard Segal, then the association’s President, would characterize the committee’s failure to reconsider its vote as “without question the major mistake” in its history. “I think the President’s decision

to avoid picking personal friends is a very tragic one for the nation and for the Court,” and represented “an over-reaction to the Fortas affair,” Albert Jenner also said. “Some of Mr. Nixon’s friends would make brilliant Supreme Court justices.”⁷⁹

The once sociable Carswell had reacted to the poor publicity by withdrawing into the cocoon of his home. His admirers accused the judge’s opponents of lying about his record and pointed out that he would succeed Fortas, who was no paragon. “There is a quality of obscenity about the opposition to Judge Carswell on the part of liberals who had nothing but praise for the appointments of Goldberg and Marshall and who profess horror when it is suggested that Douglas is so outrageously unfit to remain on the court that he should be impeached,” the Chicago Tribune editorialized on March 24.⁸⁰

It wasn’t until then that the press reported the plan that the opposition had just hatched and the nomination began to seem endangered “for the first time,” the Washington Post reported. Bayh would propose a motion to recommit the nomination to the Senate Judiciary Committee for more study. In all probability, it would die there, and the Senate would have sent a relatively polite message to the President about its constitutional responsibility to advise and consent.⁸¹

Predictably, Nixon turned down the fig leaf, as did a majority of the Senate Judiciary Committee. And Senator Saxbe, who was receiving lots of pressure from his Ohio constituents to buck the White House over the Supreme Court a second time agreed to come to the Administration’s rescue in an effort to mend his fences. At the urging of the White House, Saxbe wrote the President to ask whether Nixon still fully supported his nominee. On April Fool’s Day, the President released his affirmative reply publicly charging that the Senate’s members wanted to deprive him of “the same right of choice”

to “appoint” a Supreme Court justice that they had awarded every one of his predecessors. That contention ignored the Senate’s overall past rejection of about one-fifth of Presidential nominees to the Court. It also boomeranged because when Nixon maintained that the Constitution entrusted “one person,” the President, with “the power of appointment” to the Court and said the Senate sought “to substitute its judgment” for his, he derogated its constitutional authority. Was this where “strict construction” led? Senators wanted no part of what James Reston described as Nixon’s “emotional and inaccurate argument.” One Republican summed up the response: “The Senate doesn’t like to do very much, but it doesn’t like to be told that it doesn’t have the right to do very much.”⁸²

“This is the fight we never expected to win,” the Leadership Conference said of the motion to recommit because it followed so closely on Haynsworth’s defeat. “The Senate was supposedly too tired of fighting the President to fight him once again. But, incredibly we have reached a point where it is entirely possible that we can defeat the Carswell nomination.”⁸³

Not so fast. The White House used up all its political capital in defeating the motion, and Vice President Agnew cancelled his plans to throw out the first ball at the Washington Senators’ game on April 6 in case he needed to break a tie. He did not. The 52-44 vote against recommital surprised few insiders, who expected Carswell’s antagonists to lose.⁸⁴

After the motion to recommit went down to defeat, though, it became clear the White House had made a fatal error as it frantically lobbied the uncommitted Republicans it had previously neglected. The senators had done what the White House wanted and

now readied to vote their consciences in an up-or-down vote on Wednesday, April 8. White House officials had “shot” their “wad on recommitment,” Bayh subsequently told Time. “They called in all their IOUs on that one. They cranked up for the wrong vote.” By the Post’s count, and despite the fact that 10 senators had not yet declared themselves, 48 senators opposed the nomination and 46 favored it.⁸⁵

On Tuesday night, Bob Dole (R-Kan.) told Nixon that the situation looked grim and that everything depended on Senators Marlow Cook of Kentucky and Margaret Chase Smith of Maine. If those Republicans voted for the nomination, Vice President Agnew could break the tie. Nixon had already met with Cook, a Haynsworth stalwart, for nearly an hour Monday night, but the senator refused to commit himself. The next day, Cook returned to the White House to see Nixon award 21 Medals of Honor to Vietnam soldiers posthumously. “Those young men showed such excellence in their short lives,” he told reporters later. “When I got back to my office, I just made up my mind that I couldn’t vote for Carswell for the Supreme Court and accept such lack of excellence,” and he telephoned Congressional liaison Bryce Harlow to tell him so.⁸⁶

Meanwhile, Smith, who had always taken pride in not announcing how she would vote on key issues, remained on the fence. She had seen Nixon on Tuesday and had not told him how she would vote—which did not stop the Administration from spreading rumors to reporters that she had agreed to support Carswell at their meeting later. That same day, though, one of her aides told Harlow that she would side with the White House on the nomination. As Senator Cook informed Senator Brooke, Harlow immediately began spreading the news to other undecided senators. “We had to do it,” an Administration official rationalized. “We had good information she was going to vote

‘yes,’ and we thought that information might change some votes that we had to have.”

Brooke tracked down Smith in the Senate restaurant to let her know what was happening.

Smith then approached another Republican, Richard Schweiker of Pennsylvania, in the Senate, who acknowledged he had received a call about her plans. “She had a fit of temper right there,” an Administration official said, and voted no soon afterwards.⁸⁷

By this time, Nixon understood that he would lose the battle. Carswell may have figured it out too. One of the two dozen friends and family members who watched the vote on twin television sets at his house said the atmosphere there represented that at “a wake.”⁸⁸

Those who packed the Senate galleries and crowded its floor, though, did not know what would happen. When the vote came, and Cook said “no,” they gasped loudly. When the Democratic Fulbright of Arkansas did the same, they sighed. When Winston Prouty, an Administration loyalist whose Vermont constituents disliked Carswell, followed their lead, some applauded. When Smith cast her vote against the nomination, Haynes Johnson reported, “[a] cry of delight rang through the gallery.” And when Agnew announced that the Senate had rejected the nomination by 51-45 a smaller margin of defeat than Haynsworth’s, ironically, but a loss nonetheless, there was “[a]n explosive sound of emotion,” as people embraced, applauded cheered, and congratulated the Leadership Conference’s Clarence Mitchell. Once again, the Senate had rebuffed the President.⁸⁹

Neither the White House nor the Justice Department had acquitted itself well this time, either. Indeed while Bob Dole had carried water for Carswell, he now derided the White House lobbyists as “those idiots down town.” Others blamed Justice. One

Republican senator complained to a reporter about a disturbing conversation with Assistant Attorney General Rehnquist, who referred to a “Nixon mandate” to reverse the Warren Court. Others grouched that the Justice Department had misled them; “Justice was overconfident; Justice failed to take the senators into its confidence; John Mitchell is inscrutable and aloof, his deputy Richard Kleindienst is ‘an abrasive man who wants to ram things down your throat.’” Senator Hatfield said of the Attorney General, “I don’t know how many times this man can come up as an embarrassment to the administration and remain a powerful figure.”⁹⁰

Martha Mitchell had previously telephoned senators’ wives and staffers to threaten that she would campaign on “national television” against those who did not vote for Haynsworth. Now she contacted the Arkansas Gazette at 2 A.M. to urge its staff to “crucify” Senator Fulbright. She subsequently told her biographer she had done so at her husband’s urging and that the President had telephoned her saying “to keep it up, she was doing fine.” At the time, she reassured a friend that “John Mitchell says that’s the time you get their attention” and defended herself by saying that “crucify” was just an “idiomatic” way of saying ‘Oh, I could kill you.’⁹¹

Mrs. Mitchell had reason for frustration. “She takes his defeats as her defeats,” one Justice Department staffer said, and senators and journalists who had once seen her husband as omnipotent did not hold Rehnquist or Burger responsible for Haynsworth and Carswell. They blamed Mitchell and that “great Justice Department Operation” that should have known “everything about a man since the first time a diaper was put on him.” The Attorney General had replaced Vice President Agnew “as the radix malorum of American society,” Pat Buchanan observed. “Patton’s dictum—Find the Bastards and

Pile On—has been adopted as the operative strategy of the liberal press.” Even though the President boosted Mitchell by taking him boating on the night of Carswell’s defeat, Nixon and much of his staff faulted the Attorney General.⁹²

But why should Mrs. Mitchell take it out on Fulbright? One-third of the Republicans had broken ranks with the Administration. Some, such as Griffin and Scott, who had deserted the Administration on Haynsworth and received pressure from Carswell’s opponents to do so again, did not, but only because they feared doing so a second time. Although Haynsworth was the superior candidate, seven Republicans, some of them party leaders, and one Democrat who had voted against Haynsworth, held their noses and backed Carswell.⁶ The sense on Capitol Hill “was that if senators were free to vote as they wished, Carswell would be overwhelmingly defeated; in fact, one conservative Southerner who publicly supported him confessed in private that if the nomination were to be decided by secret ballot, he would get perhaps ten votes.”⁹³

No wonder Nixon was angry. He sought revenge for Haynsworth and Carswell by directing Representative Gerald Ford to orchestrate those impeachment proceedings against William O. Douglas. That Ford obligingly did in April 1970 one week after Carswell’s defeat when he announced that “an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.” He was correct, but he should have been less candid.⁹⁴

And as Ford’s sympathetic biographer acknowledged, he neither persuasively argued that Douglas had violated federal law by practicing law on behalf of the Parvin Foundation nor that his ties to it represented a conflict of interest. Instead Ford insisted

⁶ The seven Republicans who voted against Haynsworth and for Carswell were John Sherman Cooper (Ky.), Robert Griffin (Mich.), Len Jordan (Idaho), Jack Miller (Ia.), William Saxbe (Oh), Hugh Scott (Pa.) and John Williams (Del.). The one Democrat was Alan Bible (D-Nev.)

that Douglas's "fractious behavior" signaled "the first sign of senility" and that the justice revered "hippie-Yippie style revolution," penned articles for pornographic magazines, and consorted with a gambler. It was a fool's errand, as Ford himself later admitted, that only damaged his own reputation for decency and came back to bite him. Six of the eight members of the House Judiciary Committee who would vote against his confirmation as Vice President in 1973 would point to his opposition to Douglas as justification.⁹⁵

The impeachment drive itself went nowhere. Douglas had long been fractious, and his combativeness made him, unlike Fortas, determined to fight. As a liberal icon, he attracted devoted lawyers, including his prominent Columbia law classmate, former federal judge Simon Rifkind. The House Judiciary Committee Chair, Emanuel Celler, had defended the Warren Court in the 1960s and befriended Douglas since the 1930s. Of course, his committee concluded that Douglas had committed no impeachable offense. When conservatives complained to Ford, they received a form letter declaring that the multitude of Democrats in Congress made it impossible "to obtain an objective committee to conduct a thorough investigation."⁹⁶

Nixon tried to transform Carswell into another martyr. "If they vote him down, we'll send them somebody from Mississippi," he had promised Republican leaders at the peak of the fight. But after the defeat, and in "that indifferent voice he uses when he is really pissed off," he directed Pat Buchanan to draft him a statement to which the President added his own zingers. It exhorted Southerners to vote Republican in the midterm elections: "I have reluctantly concluded—with the Senate presently constituted—I cannot successfully nominate to the Supreme Court any Federal Appellate

Judge from the South who believes as I do in the strict construction of the Constitution.” Carswell and Haynsworth had braved “vicious assaults on their intelligence, their honesty and their character,” and their commitment to racial equality. “But when all the hypocrisy is stripped away, the real issue was their philosophy of strict construction of the Constitution, a philosophy that I share, and the fact that they had the misfortune of being born in the South,” Nixon insisted. He would not impose this indignity again on a Southerner but would find another “strict constructionist with judicial experience.” He understood why the Senate’s “act of regional discrimination” embittered millions of Southerners, and he promised them “that the day will come when men like Judges Carswell and Haynsworth can and will sit on the High Court.” Nixon then delivered the message with a dramatic display of anger in the White House Press Room, and all the networks made it their lead story on the nightly news. Harry Dent rejoiced at the inflammatory language and assured the President he had guaranteed that Haynsworth and Carswell’s rejections would become important issues in the midterm elections.⁹⁷

While Nixon’s statement rightly underscored the continuing ideological hold of liberalism and the Warren Court over many Democrats and Republicans, it remained, some of his staffers understood, a misreading. For all its noise, the Senate still cut the President substantial slack with respect to Supreme Court nominees. Since most senators liked to think they focused on fitness, not ideology, they needed that “cover issue.” Like LBJ, who had made his mistake in nominating two liberal “cronies” so close to the 1968 Presidential election, Nixon had blundered the first time in naming a Southern conservative challengeable on ethical grounds in the aftermath of the Fortas scandal. Then the President had nominated a mediocre Southern conservative. Nixon himself told

Warren Burger later, while Haynsworth should have won confirmation, “I think, actually, looking back, the Carswell nomination was a mistake. He was a nice fellow, but he wasn’t really up to the big league.” The President had erred in permitting Mitchell and Burger to promote two vulnerable Southern conservatives, not two Southern conservatives.⁹⁸

As Senators Bayh, Hart, Kennedy and Tydings said in opposing the nomination, confirmable Southern “strict constructionists” did exist, though the senators did not name them. (Perhaps they feared ruining their chances by bestowing the seal of approval or worried that Nixon would turn to them). On one level, that represented a surprising admission since Senate liberals relished forcing nominees to say that they did not understand what Nixon meant by “strict constructionist.” On another, it simply reflected senatorial realism.⁹⁹

“Raw and Bleeding”

Eighth Circuit Judge Harry Blackmun, a Harvard College and Law School alumnus, now anticipated a summons to Washington. After Nixon told the press he wanted to replace Fortas with a federal judge, Blackmun had mentally reviewed the list of Republican federal candidates of the appropriate age. Few existed. To Warren Burger’s delight, the Washington Star had already listed Blackmun as a possibility for the Court in the summer of 1969, and as Haynsworth’s troubles grew, a mutual friend had visited the Chief Justice to discuss the judge’s prospects. “This bothers me somewhat although I am grateful for his interest,” Blackmun wrote Burger. “Please believe me when I say that (a) I am not instigating this business, (b) I am amazed by offers of support, and (c) above all, I do not want this to be embarrassing to you in any way. I

believe I need say no more. Certainly, I hope that poor guy from South Carolina holds up.” As it turned out, Nixon had selected Carswell. Still, Blackmun remembered later, given the field, “it didn’t surprise me that, almost immediately after the Carswell vote, I had a call from the Attorney General.”¹⁰⁰

The Administration’s desperation was evident. Blackmun recalled his surprise at the amount of time Mitchell, Rehnquist and another Justice Department official spent interviewing him until he realized “that all three were raw and bleeding from the Haynsworth-Carswell incidents and were deeply disappointed about the Haynsworth rejection and embarrassed about the Carswell one. Some reference was made to Senator Hruska’s unfortunate speech in the Senate.” They did not concentrate on Blackmun’s opinions, since Rehnquist had already examined them and concluded that that though sometimes “longer than necessary,” they were scholarly and marked the judge as “conservative-to-moderate in both criminal law and civil rights.” (The biggest black mark he could find against Blackmun related to geography: “He and Chief Justice Burger both hail from Minnesota, and both practiced extensively in the Twin Cities before ascending the bench.”) Instead they focused on his finances, stock ownership and disqualification practices, since, as Rehnquist sarcastically told Mitchell, “[t]he fact that Judge Blackmun sat in two cases involving Ford Motor Company in the early 60s, at a time when he owned 50 shares of Ford Motor Company stock, could be made a basis of an attack on his ‘ethics,’ or the basis for a charge that he was ‘insensitive to the appearance of impropriety in the words of the Great Statesman from Indiana,” Senator Bayh. They also wanted to know whether his daughters were “hippies.”¹⁰¹

The judge's answers satisfied them, and Mitchell took Blackmun to the White House. The President, who had not met with Haynsworth or Carswell before he announced their nominations, "wanted to see this animal who had been suggested to him," Blackmun believed. "Mr. Nixon was obviously irked at the Carswell events and I had the impression that he was irked at the A[ttorney] G[eneral] and the DJ [Department of Justice] staff work." How much money did Blackmun have, the President asked? "We have reached the point where we have to put paupers on the Supreme Court," Nixon tactlessly exclaimed after the judge placed his net worth, excluding his house, at about \$70,000 (less than \$430,000 in 2016 dollars). When Blackmun "flushed" with "annoyance," Nixon reassured him "that anyone with substantial wealth is under a disadvantage from the start," yet another lesson he had obviously drawn from the Haynsworth nomination.

The President soon took the judge's arm and guided him to a window overlooking the Rose Garden. He told Blackmun to stay "independent" from the White House and others when he came to Washington. "I should warn you, however, that the Georgetown crowd will do their best to elbow in on you" with invitations, the judge recalled Nixon saying. "I suspect that two of the Justices have fallen victim to this kind of thing. Can you resist the Washington cocktail party circuit?" Could Mrs. Blackmun? Assured that they could, Nixon told his press secretary to announce the nomination less than a week after Carswell's defeat.¹⁰²

At least, the ABA approved. Unhappy that Senator Hruska had repeatedly used its seal of approval to defend Carswell against charges of mediocrity, the Association had decided to seize more of a voice in the process. Instead of simply evaluating a Supreme

Court nominee as “not qualified” or “qualified,” it was adding a third rating for the candidate who “meets high standards” of professional competence, judicial temperament and integrity, which it awarded Blackmun.¹⁰³

The Administration received precious little from the nomination. “I assume Judge Blackmun is highly qualified,” Senator Dole told Nixon. “He is however the second Minnesotoan [sic] and the second...man in his sixties nominated by you. I fail to see any long-term benefits in this appointment, nor any reason to select a nominee from a state whose Senators [Mondale and Humphrey, both Democrats] led the opposition in part to Haynsworth and Carswell.” As another drawback, though Blackmun did not know the President, he was a crony of the Chief Justice. After chatting up the nominee’s 85-year-old mother, Nina Totenberg’s article, headlined “Judge Worries About Ties to Chief Justice: Nixon Nominee Blackmun Is Old Burger Friend,” revealed that the two talked by phone about all matter of things, including opinions, weekly. “The whole tenor of the article was that I was exerting influence on the Chief Justice and that Mother was freely bragging about it,” Blackmun remembered, and it so “distressed and depressed” and angered him that “I contemplated resigning from the federal bench, and, in fact, asking the President to withdraw the nomination.” He fretted, too, about Burger’s reaction.¹⁰⁴

But when Blackmun spoke with Burger, the Chief Justice made no mention of Totenberg (though he did subsequently warn his friend that “female reporters” had caused “Washington ‘official’ wives to discuss nothing at parties except maybe favorite recipes” and that those “who depart this sound rule live to rue the day.”) Something else explained Burger’s iciness, Blackmun’s openness with the press. Hordes of reporters were pursuing the nominee with the relentlessness of “the mob at the bastille,” and he had

refused to categorize himself as a “strict constructionist.” The judge told reporters that “I had been called both liberal and conservative and that ‘I tried to call them as I see them.’” He had also admitted his personal opposition to capital punishment. Burger advised his friend “that if I felt free to give press interviews and to discuss political subjects, e.g., capital punishment, I should be prepared to discuss other political subjects when my Senate hearing came along.” Just in case the message remained unclear, Nixon directed Mitchell to muzzle the judge until then.¹⁰⁵

The Senate hearing on the nomination, however, proved short and anticlimactic. So what if Blackmun and Burger were lifelong intimates? Blackmun assured a sympathetic Ted Kennedy, who had every reason to agree that family relationships or friendships did not determine policy positions, “I would have no hesitation whatsoever, and he is the first person to be aware of this, in disagreeing with him, or, if I may speak for him, and this is presumptuous so to do, in disagreeing with me.” So what if Blackmun had participated in cases in which he owned stock in one of the parties? He had talked over the issue with his Chief Justice who had directed him to sit anyway because of the insubstantial nature of his holdings. Moreover, he informed the Senate Judiciary Committee that since the Haynsworth nomination, he had declined to sit in cases in which he owned stock in any of the parties. Worn-out senators unanimously approved him. Obviously, it was not just the Administration that was “raw and bleeding over this period in the Court’s history,” Blackmun recalled, but the Senate as well.¹⁰⁶

The President tried to keep his defeats in the spotlight even as he won. He urged his staff to stress Blackmun’s “strict constructionist” credentials and, to southern columnists, the double standard. Nixon considered his new justice as “to the right of both

Haynsworth and Carswell on law and order and perhaps slightly to their left, but very slightly to the left only in the field of civil rights.” It was “of the highest urgency” to get the message out that Blackmun “has the same philosophy on the Constitution as Haynsworth and Carswell” lest anyone conclude “I was forced to back down by the Senate and name a liberal or even a quasi-liberal.” Blackmun’s judicial record resembled Haynsworth and Carswell’s, Nixon stressed, and he had “some of the same problems” on ethics as Haynsworth. “Incidentally,” he added of Blackmun without providing further verification, “you could also point out that as far as his law school record is concerned it was not as distinguished as Haynsworth, that his grades were actually not as good as Carswell’s, and having made all these points nevertheless he got a unanimous approval by the Senate when the others had a battle in which they were the targets of vilification unprecedented in the history of the Senate.”¹⁰⁷

Given his political objectives, Nixon believed his lingering embrace of Haynsworth and Carswell made sense. The President courted the South in 1969 and 1970 by championing Haynsworth and Carswell, attacking “the continual surfacing of radical left ideas” about school desegregation that he blamed on Johnson holdovers and liberals in Health, Education and Welfare, and working to delay the pace of integration. Nixon understood, the Washington Star stressed, that “Wallace is emerging as a greater threat...than any which arises from the Democratic side.”¹⁰⁸

But the President never forgot other constituencies, and as Mitchell famously told civil rights activists who occupied his office in 1969 to press for Southern school desegregation, “You’d be better informed if instead of listening to what we say, you watch what we do.” After the Supreme Court swatted down the Justice Department’s

attempt to delay school desegregation and handed down Alexander v. Holmes, unanimously mandating immediate desegregation that fall, Nixon became convinced that Southern school desegregation was inevitable--though he privately railed against "the Court's naïve stupidity" and its "childish" and "irresponsible" opinion. "We cannot frontally take the Court on," he told Republican leaders. "He said it would be different if we were 'present at the creation,'" as Truman's Secretary of State, Dean Acheson, had called the dawn of the Cold War years. "But we weren't." When Mississippi Senator John Stennis sought to embarrass the North and West by introducing an amendment that would require uniform school desegregation throughout the country, Nixon jokingly asked Mitchell at a Cabinet meeting, "Which side are you on?" The Attorney General answered, "In the right place; right in the middle." That was just where Nixon wanted him.¹⁰⁹

By the spring of 1970, when the Carswell battle occurred, the President was emerging as desegregation's reluctant, surprisingly effective champion. "We could have demagogued it," Nixon subsequently told the media, "and we would have had massive resistance." Instead--and despite the President's frequent willingness to blame the federal courts and woo suburban whites throughout the nation by declaring his opposition to busing to achieve racial balance--Nixon put his duty to obey the law ahead of backlash politics. Less than a month after Carswell's defeat, Mitchell used Law Day to denounce "irresponsible and malicious criticism" of the Supreme Court, and to defend William O. Douglas, Miranda v. Arizona, and school desegregation. That summer, the Administration denied tax-exempt status to segregated private schools. Southerners and conservatives reacted angrily to the President's shift leftwards. One Republican told the

President that his new nickname was “Mister Integrator.” Strom Thurmond dedicated a Senate speech to declaring that Nixon imperiled his own chance of reelection: “I am warning the Nixon Administration—I repeat, I am warning the Nixon Administration today that the people of the South and the people of the nation will not tolerate such unreasonable policies.” But thanks to a President who clearly sympathized with the South, well-placed business interests there now had the cover they needed to accept desegregation. In the words of Bruce Ackerman, “Just as his cold warrior image protected him against right-wing attacks on his rapprochement with Mao, his emphatic gestures to Dixie gained him credibility when he told the South that the time had come to accept defeat.”¹¹⁰

Given his strategy, the President needed to trumpet the Haynsworth and Carswell rebuffs in 1970 to reassure those suffering from “Southern discomfort.” Newspapers in the South saluted Nixon for his bravery in nominating the two men after Harry Dent spread the gospel and made heroes of Nixon, Haynsworth and Carswell. As the midterm elections approached, Vice President Spiro Agnew and “his unabridged Webster’s dictionary” traversed the Midwest and West maligning “pusillanimous pussyfooting,” “the vicars of vacillation,” and “the nattering nabobs of negativism” who had “formed their own 4-H club, the ‘hopeless hysterical hypochondriacs of history.’” But in Greenville, South Carolina, Haynsworth’s hometown, Agnew abstained from alliteration. There, he simply promised that the President would overcome “radical liberals” and appoint “a Southern strict constructionist” to the Supreme Court. In Raleigh, he charged the Senate with displaying “flagrant and inexcusable bias against the South” in rejecting Haynsworth and Carswell.¹¹¹

Yet although rhetorical polarization attracted crowds, it did not pay off the polls. The midterm elections produced some bright spots in Southern states, such as the defeat of Tennessee Senator Al Gore, a Democrat already suspect for a number of reasons besides his opposition to Haynsworth and Carswell. But they did not provide many. Carswell himself had resigned from the Fifth Circuit to seek the Republican Senate nomination, declaring “[o]ne thing for sure—everybody knows my name. I’m a household word, just like Coca-Cola.” The idea of sending this “flag bearer for the strict constructionists” to the Senate that had rejected him tickled many, and the candidate had Nixon’s surreptitious support. “The election of Carswell, of course, would be enormously effective in justifying my positions in appointing him in the first place,” the President reminded an intimate whom he urged to raise money for Carswell on the sly. But Nixon did not want to interfere in a primary too obviously, Carswell lost, and Democrat Lawton Chiles won the Senate seat. (After Carswell’s defeat, to the disgust of some at the White House, he became so eager “to get out of the country” that he was ready to become “Associate Justice in American Samoa. He served in Samoa during World War II and thinks this would be just great.” Asked whether that appointment was “too obscure and trivial,” given that Nixon had tried to put Carswell on the Supreme Court, Charles Colson wrote “absolutely-this is an unmitigated disaster-Stop it!” Carswell became a Tallahassee lawyer.)¹¹²

So it went. As Harry Dent told the Administration, the 1970 elections just “encouraged” the Democrats. No wonder: Historians have shown how Nixon’s tactics, which assumed “a monolithic white South obsessively focused on racial integration,” just undercut southern Republicans. Instead they contributed to the emergence of “new South

Democrats” like Jimmy Carter of Georgia in governors’ mansions and Congress, who advocated “legal compliance and color-blind progress”—as the President himself now did.¹¹³

Elsewhere in the country, the results disappointed the Administration too. Consequently, although Nixon claimed victory in the 1970 elections in front of the cameras and privately, he also fumed behind closed doors at the prospect of a “Senate full of liberal harassers and obstructionists, some from his own party.” His Senate foes would soon flex their muscles about the Supreme Court again.¹¹⁴

VII

The Lost Ball Game, Or How Not to Choose Two Justices, 1971

To Warren Burger, Earl Warren, like Theodore Roosevelt, yearned to be the bride at every wedding and the corpse at every funeral. Warren was “a public man concerned almost exclusively with self” and popularity, his successor maintained. That explained why as a California official “he flagrantly violated” the constitutional rights of the accused, then somersaulted as Chief Justice and destroyed the Constitution in the process. Burger complained to Blackmun about the “booby traps’ and ‘ambushes’” that his “illustrious power hungry predecessor” lay for him, as well as his own isolation at the Court. “It is really incredible to me how 9 men could have gotten so far from reality for so long.” Like Nixon, Burger hoped Old Father Time and the Grim Reaper would cause the Court’s transformation.¹

“I Will Have Named Four”

Given his loneliness, to say Burger welcomed Blackmun with open arms in 1970 after the Fortas seat had sat vacant for a record 391 days is at once trite and an understatement. “The Court is working smoothly for all the disaster of the past two years,” the Chief Justice assured his childhood friend, and he sensed relief that “while they would not have elected me, I was not as bad as some feared!” The task was to “to get people to believe that the Court can be trusted and that it is not a political establishment,” and then they would accept the results it ordered even when they did not understand its reasoning. That made it imperative “to draw away from the attitude that everything unwise or wicked is unconstitutional and that if we but search, we will find some long hidden meaning in Due Process or Equal Protection or whatnot. If this has

slowed down a little—and it is far too little to suit me—it may be that the successive blows on Fortas and Thornberry followed by Haynsworth and Carswell, plus the personal tragedies within the family, took the edge off the sense of omniscience which I think this Court has exhibited in the past dozen years or more.” Burger relished the idea of an intimate to whom he could voice such thoughts frankly. For his part, Blackmun shared “completely your observation that the country desperately needs reassurance about the Court” and anticipated “with more eagerness than I can express to a renewal of our old walking excursions when at least we talked things out and unloaded our gripes and frustrations.”²

Yet Blackmun was anxious. His mother, who had known Burger as long as he had, had warned that he and the Chief Justice would fall out, and Blackmun asked two couples who knew him and Burger well for advice for that “inevitable day when Warren will be belligerently in error. Should I stand my grounds or run for the hills?” Still, Blackmun knew that he was naturally apprehensive, and these moments of doubt were, at first, few. “There will be satisfaction in working with Warren and the others,” he told another mutual friend. “He is giving every indication of being a great Chief Justice.” As a baseball enthusiast, Blackmun remembered joking to the other justices in 1970 that they might refer to him and Burger as the “Minnesota Twins.”³

Just as Burger anticipated Blackmun’s allegiance and loyalty, so did members of the Court with whom Burger was proving less popular and respected than he sensed. Harlan had smilingly told Burger after one Fall 1969 conference that he sounded like Felix Frankfurter. When the new Chief Justice thanked him for “the extravagant compliment and asked why,” he was deluged with copies of Frankfurter’s many

memoranda ineffectually exhorting the Court to change its undesirable ways. “I do not intend my efforts to be vain, and I did not leave the life of relative ease in the Court of Appeals to be frustrated,” Burger vowed. That was clear, and there was suspicion of both him and Blackmun. An unsigned “Ode to the Chief Justice” in the Harlan Papers, probably written by some clerks, concluded:

Burger is being aided and abetted
By his yes-man, Blackmun, for whom he stood up when wedded,
Or was it the other way around, Blackmun standing up for Berger [sic]?
Regardless, it is plain that they still honor their old time merger:
YOU STAND UP FOR ME AND I’LL STAND UP FOR YOU AND
TOGETHER WE WILL SOW DISORDER
To HELL WITH THE CONSTITUTION, WE ARE FOR NIXON’S
LAW AND ORDER.⁴

Law and order was indeed the Chief Justice’s greatest concern. “It has been no secret for a dozen years that in my view the Court went to absurd lengths in criminal law,” he told Blackmun. That the Court had recently overturned Judge Blackmun’s opinion in Ashe v. Swenson was symptomatic. The majority held that under the Fifth Amendment’s Double Jeopardy Clause, once a defendant had been found not guilty of robbing one individual in a burglary, the state could not try him again for robbing a different one in the same operation. “Even now in this term, the Court is still on its emotional binge occasionally, as in your Ashe,” Burger told Blackmun, a case it should never have taken. “I dissented vigorously in part to make it plain that the ‘new boy’ was not going to be over-awed by even the most majestic nonsense.” But Burger had been the only one to do so. Obviously, he expected Blackmun, whose opinion had been reversed, to join him in championing law and order and other causes in the future. “The President did not put us here alone,” Burger reminded his close friend. “It may have been

one of the Good Lord's errors," but it was too unlikely an event to have happened otherwise.⁵

God's will or not, two justices did not make a majority. So when Burger telephoned the White House in September 1971 to report that poor health was forcing Hugo Black's retirement and that John Harlan was in the hospital too, he sounded exultant. "This is it," John Ehrlichman remembered the Chief Justice saying, his voice heavy with "excitement and triumph." Within a week, Black had died, and Burger had informed the President that Harlan was also leaving the bench.⁶

Two giants were departing, and Nixon admired both of them. Had the President had his choice, he would have gotten rid of Douglas and Brennan instead. Still, the prospect of a "double play" delighted him. Like other Presidents, he believed it easy to select justices whose votes on key issues he could predict.⁷

Here was his chance to put his stamp on the Court. During the twentieth century, only three other Presidents (FDR, Taft and Eisenhower) had enjoyed the chance to nominate four or more individuals to the Supreme Court within a three-year period, and Burger had assured the President that more justices were teetering on the edge of death or retirement. Despite Democrats' control of Congress, Nixon hoped that his Burger Court would surpass its predecessor in stature—which made his flirtations with unsuitable candidates for the Court all the more surprising. Even if no further vacancies ensued, "whatever happens in the election, we will have changed the Court," Nixon informed Haldeman. "I will have named four, and Potter Stewart becomes the swing man. He's a goddamn weak reed, I must say."⁸

Stewart had provoked the President when he sided with Black, Brennan, Douglas, Marshall and White in the “Pentagon Papers” case. There, he had ruled that the Nixon Administration’s attempt to block the New York Times from publishing the Defense Department account of America’s tortured history in Vietnam leaked by Daniel Ellsberg and Anthony Russo represented an unconstitutional prior restraint. “Those clowns” on “the stinking Court,” the President raged to J. Edgar Hoover. At least, he majority opinion sparked dissents from Burger, Blackmun and Harlan. It also sent the Administration down the road to Watergate. The Pentagon Papers case inspired the President to approve the creation of the Special Investigations Unit, known as the “Plumbers” because of its dedication to plugging leaks, which fruitlessly and illegally sought to discredit Ellsberg by unsuccessfully burglarizing his psychiatrist’s office. The President was now certain that Stewart had become a captive of the Georgetown cocktail set. “[B]ut if we can only get a him on board, we’ll have the Court,” Nixon added hopefully.⁹

Two changes in the process of selecting justices this time were intended to accomplish that goal. Attorney General Mitchell, who had not previously consulted with the American Bar Association before Supreme Court nominations were announced, had resolved to give the ABA’s Standing Committee on the Federal Judiciary, which traditionally evaluated Court nominees, a real voice. The committee would intensively pre-screen possible Supreme Court candidates before the President announced his nomination, with an eye to deciding whether they met “high standards” of integrity, judicial temperament and professional confidence and were “qualified,” or “not qualified.” Historically, ABA investigations had been cursory. While the Eisenhower,

Kennedy and Johnson Administrations gave the Association ample time to investigate lower federal court judges, they had expected the ABA to deliver its verdict on potential justices in 24 hours or less.¹⁰

The days of quick-and-dirty checks had ended for good, which carried potential risks and rewards. ABA Standing Committee on the Judiciary Chairman Lawrence Walsh had warned Mitchell that “if the Committee’s investigation continued long enough, public disclosure was inevitable because it is impossible to question 200 lawyers and judges and law school deans about a person under consideration for a Supreme Court vacancy and not have the fact of the investigation leak.” Committee members hoped, though, that if the Justice Department provided them with enough time, “we could conduct a discreet investigation for a period of a few days and report on it to you before the scope of our investigation was broadened and then became publicly known.” Another potential problem was that many of the judges, lawyers and law school deans the ABA would poll considered themselves liberal. Though Standing Judiciary Committee members insisted that they did not consider politics or ideology, the views of those surveyed might color ratings. No Federalist Society or conservative legal Establishment existed yet, and Mitchell informed Nixon, “it’s the people in the larger law firms who are the cut-throat liberals.” Elites in the legal profession, after all, had supported the Warren Court and Johnson’s nomination of Abe Fortas as Chief Justice in 1968. Still, the role of the ABA in the process would make it less likely that the Administration would “announce a nomination and discover, too late, that the legal establishment considered it a turkey,” Fred Graham explained. Mitchell was gambling on the discretion and professionalism of the legal profession and, perhaps, on the fact that the ABA itself was

no bastion of progressivism. After all, grumbled civil rights lawyer Joe Rauh, who considered the Association ultra-reactionary, when Nixon nominated Haynsworth and Carswell, the ABA twice approved them “even after the worst was known.”¹¹

Once again, the Administration was well aware, it would face the network of liberal law students, lawyers, union leaders, law professors and civil rights workers to which Rauh belonged. Those activists began preparing for action as soon as Black and Harlan wrote their letters of resignation. This time, they planned to investigate anyone they learned Nixon was seriously considering naming, as well as actual nominees. Perhaps their existence made the Administration see the importance of having the ABA on its side.¹²

As a second change in how Nixon decided on additions to the Court, the White House, through John Ehrlichman, would keep watch on the Justice Department. Justice and the FBI “let you down” with Haynsworth and Carswell and must now do their “homework,” one adviser told the President. Based on his experience with Carswell, Egil Krogh, the head of the Plumbers and architect of the break-in at Ellsberg’s psychiatrist’s office, thought the White House should intervene more aggressively in choosing a justice. “We simply can’t afford to play catch-up ball again,” he stressed to Ehrlichman. While the Justice Department could do the preliminary screening, he advised, the White House should secretly establish a confirmation committee to oversee the process, which it did not do, and task John Dean and Plumber David Young, a “very facile and penetrating” lawyer, with completing “something like a CIA de-briefing” of any top candidate, which was done in some instances. “My experience has shown that the FBI investigations and a

casual luncheon or conversation are not sufficient to extract the kind of information we need,” Krogh warned.¹³

“I Want Poff”

Though the process of vetting a nominee had changed, the objective of the White House had not. Given Black’s Alabama roots, “it would be a slap to the South not to try for a Southerner,” Nixon informed Mitchell. Second, the nominee “must be a conservative Southerner,” with “conservative” defined as someone who was not a racist, but “against busing and against forced housing integration.” (Sometimes the President also talked about finding someone strong on law and order, but not as often. Perhaps, since members of his Administration privately worried that the national crime statistics from his tenure were showing few signs of improvement, he had decided to deemphasize law and order or perhaps Nixon thought anyone good on busing would prove so on crime.) Beyond meeting those criteria, “he can do as he pleases,” and the President did not care whether he was “a socialist.” Party affiliation was also immaterial. So was prior judicial experience: After all, Nixon now often pointed out, Frankfurter had none before he joined the Court. Third, the nominee must be confirmable, since the President did not intend to go “halfway down the road” and find himself with “another Carswell.” He must be young, too, because Nixon wanted someone who could sit on the Court for twenty years.¹⁴

Ironically, busing in the South to achieve racial balance had become a fait accompli. The Court had upheld the use of extensive school busing for schools historically segregated as a matter of law in the spring of 1971 in Swann v. Charlotte-Mecklenburg Board of Education. Burger wrote the opinion, and he labored mightily and

not altogether successfully, to limit it. Indeed the process of producing it became one of the instances in which his efforts to lead the Court came a cropper. Though unanimous, the Chief Justice's opinion in Swann, worsened his relationship with his colleagues. Court tradition required the senior associate justice in the majority to assign the opinion when the Chief Justice was in the minority, as Burger was when the justices first conferred. But he assigned the opinion to himself, as he would in similar circumstances for important decisions time and again. As a result, the opinion went through endless drafts while justices in the original majority insisted on changes to make it tolerable. The case, William O. Douglas said, "illustrated the wasted time and effort and the frayed relations which result when the traditional assignment procedure is not followed."¹⁵

The White House proved more satisfied than the justices. Nixon privately admitted that Swann "could have been worse." He was happy to hear Mitchell credit Burger with keeping his colleagues away from the bramble bush of de facto school segregation outside the South—and probably not dissatisfied that Martha Mitchell, a busing opponent, had angrily told the press that Swann showed that the Supreme Court "should be abolished." As ever, the President himself seized the opportunity at once to blame and declare himself bound by the Court.¹⁶

Especially with George Wallace nipping at his heels, Nixon worried. As a lawyer, the President read Brown v. Board of Education to mean that "legally segregated education was inferior education," he explained to Ehrlichman and Haldeman. If separation of the races continued despite the removal of the legal barriers to it, "the philosophy of Brown would be that any segregated education, whether it was because of law or because of fact, is inferior. That is why I see the courts eventually reaching the

conclusion that de facto segregation must also be legally unacceptable” even though Nixon was sure that “it is only segregated black education which is inferior and that actually segregated white education is probably superior to education in which there is too great a degree of integration of inferior black students with the white students.” Given the depth and geographic breadth of the reaction against busing, the President reiterated his personal opposition to busing to achieve racial balance in August of 1971, resolved to hold it to “the minimum required by law” in the future, and revealed that his Justice Department would “disavow” the plan of the Department of Health, Education and Welfare to use extensive busing to desegregate Austin’s public schools. Housing and Urban Development Secretary George Romney’s ambitious effort to reduce residential segregation by putting low-income housing in suburbs also bothered Nixon. It was not just African Americans who whites did not want moving into their “exclusive neighborhoods,” but “Italians, Mexicans, Irish and others” too, he reasoned. “Putting a public housing project in a neighborhood of home-owners is, of course, totally wrong whether it is Black or White from an economic standpoint because it will not only reduce property values but it raises—and we have to admit—very grave questions with regard to the possibilities of increase in crime, etc.” The bottom line was that the country was “not ready at this time for either forcibly integrated housing or forcibly integrated education,” and the President did not want to put anyone on the Court who believed in either.¹⁷

A Southern conservative on the Court might pay rich political dividends, but given his bitter statement denouncing the Senate for anti-Southern bias after the Carswell defeat, why did Nixon think he would succeed in getting one now? Arguably, the Senate

had moved a bit to the right after the midterm elections, but only very marginally. The answer soon became clear. While the Constitution's emoluments clause, which prohibited Congressional members from taking a job for which they had approved a salary hike, had prevented the President from turning to a legislator in 1969, he could find his candidate in the new Congress. That was a clever decision, since the Court had traditionally included a member of Congress and legislators were less likely to find fault with one of their own.¹⁸

The problem was the President's pick. Nixon had decided to nominate Richard Poff, a decorated World War II bomber pilot, Virginian, and the ranking Republican on the House Judiciary Committee. "He's conservative, but he's not considered to be a racist," Nixon said, and he would become "another Blackmun," which was "basically what I'd like." Then 47, Poff had served in Congress since voters in southwest Virginia elected him in 1952. He had signed both Southern Manifestos, one pledging resistance to Brown v. Board of Education and the other vowing to resist the ineffectual 1957 Civil Rights Act. He had opposed the civil rights legislation of the 1960s, and he was tough on crime.¹⁹

Poff had also sponsored legislation that attacked the Warren Court by requiring Supreme Court justices to possess five years of prior judicial experience. "No one has condemned more vigorously the Supreme Court in the past decade than have I," he had boasted to one constituent. "I believe this judicial experience is absolutely necessary and reveals the temperament and philosophy of a prospective Supreme Court justice than any other method." Poff himself, though, possessed little experience practicing law and none as a judge, since he had joined Congress four years after graduation from University of

Virginia Law School. Nevertheless, he really wanted to become a justice. Poff had said publicly that he would prefer a seat at the Court to the Presidency, and as one of his staffers admitted, “he had been running hard” for one ever since Nixon took office. “The bar will never approve him,” Chief of Staff H.R. Haldeman warned the President.²⁰

“I want Poff,” Nixon said privately and hinted publicly. Mitchell thought highly of him. “I’ve not been quite that impressed with him because I didn’t really see him in action,” the President told his Attorney General. “But on the other hand, he’s a young man, and he’s a good lawyer, and good God, that’s what we need on this Court.” As Nixon exulted to Pat Buchanan, replacing Black with a “strict constructionist conservative who signed the Southern manifesto” was bound “to have a very salutary effect on our Southern friends.” (Was he saying he equated “strict constructionist” with antagonism to civil rights or that he preferred a “strict constructionist” who opposed racial equality?) As an added bonus, the nomination of a Capitol insider would split Senate Democrats.²¹

Within a day of Black’s resignation, the New York Times and Washington Post had identified Poff as the frontrunner. The President maintained that made a quick announcement of his selection necessary. So Mitchell spoke with ABA Standing Committee on the Judiciary Chairman Walsh. “He says he can get Haynsworth past the Bar and confirmed in a breeze,” the Attorney General reported. “He says he has nothing but people all over the country who come up to him” to discuss the mistreatment of onetime nominee Clement Haynsworth. But Mitchell and the President agreed, as Nixon put it, that “it’s a risk we shouldn’t buy. I think it looks like a petulant President...trying to prove to these fellows that they were wrong.” Consequently, the Attorney General

persuaded Walsh to “go out and try to sell” Poff on the grounds that his service on the House Judiciary Committee made up for his lack of experience.²²

Poff possessed other vulnerabilities. He would also surely face questions about why, after he joined Congress, his former law firm listed him as a partner and continued to pay him a percentage of its profits, though he did little work for it. Though some liberals like Lou Pollak and former governor “Pat” Brown of California, who had worked with Poff on the National Commission on the Reform of Federal Criminal Laws, venerated him as a lawyer and human being and welcomed the possibility of his Supreme Court nomination, others would challenge him. Anticipating his appointment, Clarence Mitchell was already denouncing him as “an affable and soft spoken individual” whose “record on civil rights matters is one of the worst in the United States Congress,” while Roy Wilkins was urging Nixon not to appoint anyone who would “evoke divisive confirmation struggles.” Political scientist Gary Orfield declared that he was working with some 20 students to uncover Poff’s “dismal record” on civil rights. And George Meany, who decried Poff’s “racist” record, was proclaiming that “[t]he AFL-CIO does not believe that President Nixon’s narrow election in 1968, coupled with the election of Democratic majorities in both houses of Congress in 1968 and 1970, constituted any mandate to stack the court with reactionary nonentities.” Feminists, who disliked Poff’s position on the Equal Rights Amendment, were unhappy too. So was the Unitarian who lay Hugo Black to rest: Nixon complained that “the goddamn minister made a great eulogy by attacking strict constructionists” as he looked directly at the President, who had reluctantly attended, and his Attorney General.²³

But Poff had eloquently renounced his segregationist views, and he was extremely popular on the Hill, even among House liberals, who, with their Republican colleagues, were fiercely lobbying the President, Senate and public on his behalf. Nixon, who welcomed the pressure, used it to push Mitchell: “Well, we have to realize John, that, you know, the House and Senate are, well, at least the House is so damn strong for this fellow, we’re going to have a hell of a time if we don’t appoint him.” The President told Republican Congressional leaders that since the Court now lacked any Southerners, the Administration “ought to be able to find one” and that it would prove “much more difficult for them to vote against a Southerner who’s been in the House than it is against some damn judge,” like Haynsworth or Carswell.²⁴

Everyone agreed. Republican Whip Robert Griffin predicted that 31 would oppose the nomination; Senate Minority Leader Hugh Scott, 36. “But either way we should have a majority,” Griffin promised the President, and with 64, they could break a filibuster. When Haldeman warned Nixon about anti-Poff senators who would oppose confirmaiton, the President was unphased. “We’re going to get it,” he insisted. “Scott says we can confirm him, and Scott’s no tower of strength.” Oddly, Nixon found that reassuring.²⁵

The naysayers affected the schedule, however. The Senate Minority Leader had urged Nixon to name both candidates at once. “We get a bit of maneuvering room when we get them both together,” Scott explained to Nixon before leaking that advice to reporters. The person who opposed the President on one candidate might compensate by supporting the other and/or the other nominee might “balance” the Southerner. And indeed, though he anticipated “a hard time with our friends” in the civil rights

community, the eminent Republican African American lawyer, William Coleman, was preparing to swallow Poff “and trying to work out with the Attorney General the selection of the other man, who has to be a first-rate lawyer or judge, and then see if it can be put across as a package.” On Thursday, September 30, Mitchell reported to Nixon, “Because of the pressures that have been building up on Poff with the civil rights people and so forth, it became very obvious that we didn’t want to get mouse-trapped by sending somebody else up with him, where we might lose Poff and get the other one in a brokerage pair[off] operation.”²⁶

So as it had done with Marshall, Fortas and Thornberry, the Justice Department just forwarded Poff’s name to the ABA. Justice coupled it with a ten-page memorandum quoting Felix Frankfurter’s much-cited axiom that “the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero” and arguing that Poff’s experience as legislator qualified him for the Court. Standing Federal Judiciary Committee members had expected the Administration to submit more than one name. That might distract inquiring reporters from digging up dirt on the President’s preferred choice while keeping open Administration options. Given the recent conflict around Supreme Court nominees, Justice’s decision seemed “crazy” to at least one ABA power-broker, who told Fred Graham that the department and the White House should have “sent up several names as a smoke screen—but now if Poff draws a lot of opposition, they’ll have to nominate him and have another fight or back down in public.”²⁷

The Administration’s behavior struck some inside the White House as foolish too. John Dean and David Young had spent 3 ½ hours grilling Poff on September 25. They had submitted a lengthy memorandum covering his law firm income; health (occasional

prostatitis, now cleared up; athlete's foot; and hemorrhoids); developmentally disabled uncle; drinking (nightly scotch and soda and an occasional glass of wine "but he has never been drunk in his life"); enemies (just one, a former campaign worker); extramarital affairs (one long ago); marriage (happy); and three children, one of whom was 12 and had not yet been informed he was adopted ("Poff confided that the only time he thinks about this is when he wakes up at 2 o'clock in the morning worrying about how he is going to tell him"). They had covered his reading ("the Constitution straight through two or three times a year just to get a feel on whether or not we are really carrying out what he thinks the Founding Fathers intended"); religion (committed Presbyterian, but not a "Bible quoter"); African American supporters (he thought he could find some); net worth (\$200,000-250,000, about \$1.24-1.5 million in 2016 dollars); and outside income (just one honorarium on which he had paid income tax).

They had also explored his positions. If reminded that he had proposed qualifications for a Supreme Court justice he did not himself meet, Poff planned to say that both the Senate and House had rejected his suggestion. He had stayed out of the Haynsworth and Carswell fights. He considered the former an excellent, if ethically challenged, candidate for the Court. To him, the latter looked qualified at first glance, but was not, which was "why he was glad we were giving him a rough going over." He had "pleaded" with Ford not to launch impeachment proceedings against Douglas and had never publicly discussed Fortas. The three men had also talked about Poff's chances. He repeatedly, though never boastfully, said "he thought that he had more friends than any other man in the House except perhaps Wilbur Mills" and declared himself "absolutely convinced that if nominated he would be confirmed."

Young wrote that Poff possessed the highest morality, integrity and patriotism. He had felt as if “I had been a priest in a confessional,” but that the sinner had nothing to say. Poff had faced “the most difficult and offensive questions that a man can be asked” and answered them amiably and forthrightly.²⁸

By September 30, however, Young was having second thoughts. Poff was a great man, he told Ehrlichman, but he lacked the “deeper and broader legal grounding” that the Court required. If the White House restricted itself to a Southern “strict constructionist” (a term Young thought might just mean “conservative”), perhaps Poff was the best candidate. But if Nixon wanted a Southerner or “strict constructionist,” people of “greater stature” existed.²⁹

Others did not worry about Poff’s intellect, but his prospects of surviving confirmation. It was most important to avoid another battle, and the risk of one here outweighed the advantage of the proposed nomination, Leonard Garment warned the President. “Democratic candidates and others who wish the Administration ill can be expected to move into the contest, seeing in it an opportunity to foment a bitter controversy, to sour the political atmosphere, to open old wounds, and thereby to break the momentum of sustained Presidential achievement of recent months.” What was the rush? And what was the point in presenting “these appointments as surprises”? Why not invite the input of different groups? It would save discomfort at the confirmation stage and demonstrate White House dedication to finding “the best qualified nominees at a critical point in the Court’s history.”³⁰

That was good advice. The singular focus on Poff did reflect bad judgment by the Justice Department and White House. But the candidate by now had captivated the

President. “We all know, John, practicing law is nothing,” he told Mitchell on September 30 in defending Poff’s lack of judicial experience. Who cared if he had signed the Southern Manifesto? “He did what any damn Southerner should do,” and “I’d sign the goddamn manifesto today.” Meany and the liberals were “hypocrites.” Nixon wanted to push forward, “bite the bullet and send [up] the goddamn thing. Fight it. You know, if we lose, fine.” Defeat would mean that no Southerner could win appointment. But Nixon still thought the White House would win. “I don’t think you’re going to have more than 40 votes against him. I think it will be 35.”

Mitchell hedged. Why not wait until the ABA issued its report on Poff, then take a legislative head count and decide then? But the President resisted. Get the Senate count now, he directed because he wanted to send Poff’s name up Monday and capture the week’s news cycle. Would the President nominate him even if the ABA did not rate Poff qualified, the Attorney General wanted to know? “Hell, yes!,” Nixon answered. “I can’t be giving Walsh and his people a veto in this.” And while he hated to part ways with it, the ABA would look “damn small” if it said “that some God damn little lawyer out in Paducah who has practiced law for 15 years is better qualified to be in the Supreme Court than somebody that’s been on the Judiciary Committee in the House for fifteen years.”³¹

But as members of the Standing Committee on the Judiciary gathered in New York at Walsh’s office to evaluate the potential nominee on Saturday morning, October 2, and the Washington Research Project’s Rick Seymour was driving to southwest Virginia to check Poff out, the prospective nominee shocked them. The previous evening, he had dropped a bombshell on the White House when he let John Dean know that he was considering withdrawing his name, though he had promised to sleep on it.

Now he made his decision official and public. Poff cited his desire to avoid another “long and divisive confirmation battle” that could lead to a filibuster and damage his family, the Court and the country.³²

And it was true, up to a point. His intimates promptly told reporters that while Poff had anticipated that the ABA would find him “qualified,” or would express “no opposition,” he had become nervous as he reviewed his own voting record. Then Senator Robert Byrd of West Virginia, a Senate Judiciary Committee member and the Democratic whip, had stopped by Poff’s office Friday afternoon to warn him of a developing fight led by civil rights groups and organized labor, and, possibly, a filibuster. “I told him, ‘I can’t be sure what will happen, but one or two Senators were preparing to examine your background at some length,’” Byrd confirmed. He had also, however, stressed his “certainty” that Poff would ultimately win confirmation. One Poff enthusiast said that the senator’s friendly and encouraging warning had devastated the Congressman.³³

Apparently, Poff also worried about what those senators would uncover. Haldeman maintained that “[t]he real reason for his withdrawal is that as our guys were working him over on the problems he would face on confirmation, they got to the point that he has a very substantial net worth but is unable to document the sources of this money. He just doesn’t have the facts. They’re convinced there’s nothing wrong, but that a lot could be made that would appear to be wrong.” Over at the NAACP, Director-Counsel Jack Greenberg heard that the ABA Standing Judiciary Committee “was prepared to vote against him by a near 2-1 vote,” not because of his views on race, but because of “his role in his law firm and [with respect to] at least one former partner. Poff

decided to withdraw rather than face canvassing of these relationships.” Meanwhile Poff confided to Dean that he had reached his decision principally because he and his wife had begun to fear that the adoption of his son would become public when the Senate considered his nomination. (Ironically, when the Poffs had to tell the boy about his adoptive status after the nomination was withdrawn because columnist Jack Anderson was about to reveal the news, the child took it well enough. Young Tommy had “remained in a traumatic silence all day” until he got hungry, asked for dinner, and assured his parents he knew that they loved him).³⁴

Had a choice for the Court ever so publicly pulled his name before the President could submit it because after two confirmation battles, he foresaw a third? Like Nixon in the Carswell and Haynsworth instances, Grover Cleveland suffered two successive defeats when he nominated William Hornblower and Wheeler Peckham to the Court. But just as Nixon had prevailed with Blackmun, Cleveland had with Edward White. Poff’s withdrawal, like the intense scrutiny by Dean and Young, underlined how hazardous the nomination and confirmation process had become.

Republicans made the most of that. “It’s a sad and shocking day in American history,” Poff’s friend, House Minority Leader Gerald Ford said, “when leaders of the NAACP and leaders in organized labor and a few power-hungry senators can prevent an honorable, fair and qualified man from having his name submitted for the Supreme Court.” In contrast, Joe Rauh saluted Poff’s decision to avoid another “nation-splitting confirmation struggle” as “an act of judicial statesmanship.” However one came down, the episode underscored the messiness of the new confirmation process. Marshall’s treatment by hostile Southern senators in 1967 had made its ugliness clear, and since

then, the Washington Post observed, “the abilities and characters of Justice Fortas and Judges Haynsworth and Carswell” had been “dissected” and rejected. It was beginning to look as if the Burger and Blackmun confirmations were the anomalies.³⁵

As John Dean said, Poff had gone “poof.” The Congressman feared that the President “would think that I had somehow run out on you,” he apologetically told Nixon. “They would have made you look like the worst son of a bitch that ever came down the pike,” the President consoled him, and though the Administration would “probably” have prevailed, it might have taken months. “I hope you tell all the fellows that...we were backing you to the hilt” and that the Administration had not run out on Poff, Nixon stressed. As the President began to tell the Congressman that he could rest easy that the process would yield “two men on that Court...like Burger and Blackmun,” he stopped himself. “Two individuals,” he laughed. That was a significant correction. But before he could reveal its meaning to Poff or the public, another diversion would occur.³⁶

“God, What a Guy to Have On That Court”

The White House and Justice Department were now almost back at Square One, as high-level Administration officials privately acknowledged. The President’s press secretary insisted that “Congressman Poff was under consideration with a number of other people.” Technically, that was correct, since Nixon, Mitchell and White House staffers had discussed other names besides Poff’s.³⁷

They had agreed that if Thurgood Marshall, who Nixon thought was “God damn dumb” and whose health they liked to check, retired, they would have to appoint an African American to replace him. “That’s one you’ve got to do,” the President said.

While he worried it would mean naming a progressive, he had his eye on Senator Edward Brooke, who was “basically a liberal, [as] he had to be,” but “one of the few blacks [who] really talks in an intelligent way,” Equal Employment Opportunity Commission Chair Robert Brown, whom Ehrlichman found “very loyal;” or William Coleman. (In 1973, Nixon would expand the list to include Chicago lawyer Jewel Lafontant, whom he appointed Deputy Solicitor General. “Why not kill two birds with one stone, get a black woman,” he remarked. “When they say she isn’t a towering figure, well, who the hell is a towering figure on that Court?”) After speculating about whether nominating an African American would encourage Marshall to retire, the President and Attorney General had decided to wait.³⁸

They had also ruled out a Jew. “When are you going to fill that Jewish seat on the Supreme Court?,” Mitchell joked. “Well, how about after I die?,” Nixon laughed. Nevertheless, they had briefly considered Yale Law School Professor Alexander Bickel, a Frankfurter clerk and iconoclastic Democrat who had argued the Pentagon Papers case for the New York Times if his position on busing proved satisfactory. “Everybody would say well, we finally appointed a scholar,” Nixon noted. Another possibility was Philadelphia District Attorney Arlen Specter, who was “strong on law enforcement.” They had not mentioned Third Circuit Judge Arlin Adams, an early Nixon supporter with whom Mitchell was reportedly angry.³⁹

But they had not just eliminated candidates. They had talked about the political advantage of naming a Catholic. “If he’s a conservative, a Catholic conservative is better than a Protestant conservative,” Nixon instructed Mitchell. That made Walsh himself a possibility. Another ABA stalwart, former president Lewis Powell, was too old, they

agreed. They had dissected the political advantage of naming a woman, discussed Judges Mildred Lillie and Sylvia Bacon, and dismissed others. They had covered Warren Burger's belief that Nixon had given him the right to name Harlan's successor. "I didn't give the Harlan seat to anybody," the President exploded, though the Chief Justice's suggestion of Arkansas lawyer Herschel Friday intrigued him. They had mentioned as a possibility Governor Ronald Reagan's lawyer, William French Smith, "a hell of a big corporation lawyer," Nixon said, whose wife he liked. They had also spoken of Casper Weinberger. As the President observed, Weinberger possessed two advantages: He was an Episcopalian with a Jewish name and he had an undeserved reputation for liberalism. Then there was Vice President Spiro Agnew. "You'd be accused of putting him adrift in a lifeboat" and using the Court as a port and give the Senate "a golden opportunity to do you in by refusing to confirm your vice president," Ehrlichman warned. They had also discussed Circuit Judge Paul Roney, and Nixon's friends, David Dyer and Charles Rhyne. Mitchell and Nixon had agreed, too, that Senator Roman Hruska "would love the part, act the part, and release the right opinions," but that he was too old. They had even mentioned J. Edgar Hoover, whom they wanted out of the FBI.⁴⁰

It was mostly chatter and badinage, though some names would resurface. To this point, they had always focused on Poff. They had asked the ABA to concentrate on him.

Meanwhile the Supreme Court opened its fall term with tributes to Black and Harlan on Monday, October 4, the day Nixon had hoped to nominate Poff. For the first time Court-watchers could recall, there were not nine chairs behind the bench at which the "grim-faced" justices sat, but seven. The Court had delayed hearing all its most

important cases, and some wondered whether it would remain short two members for its entire term. Once the Nixon Administration had sent along the new names, the ABA would take at least a week to consider them, and Congress planned to adjourn after November. Though Eastland, a Democrat remained chair of the Senate Judiciary Committee and he could be expected to help the Administration, others on it might drag the hearings out, particularly if the nominees proved controversial. Following the example of the Republicans in 1968, the Democrats might follow Robert Griffin and even argue that the winner of the 1972 Presidential election should nominate the next justices.⁴¹

Every indication was that the President was running towards, rather than away from, another fight. After Poff withdrew, Nixon told Haldeman that he would select “a real right-winger now,” whom liberals would consider “worse” and “really stick it to the opposition.” When the Senate voted down Carswell, the President had spoken of nominating Senator Robert Byrd, and he now returned to the idea. The son of a West Virginia coal miner, the Democrat had worked as a butcher and grocer before he became a Congressman and Senator. Byrd had not gone to college. He had graduated from American University Law School, which he attended at night once he reached the Senate, but he had never practiced law and was not a member of the bar. And although Byrd, like Hugo Black, had repudiated his Klan membership, he had voted against the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the nominations of Thurgood Marshall and Abe Fortas in 1967 and 1968. He had supported Haynsworth and Carswell, opposed “activist” judges and justices, and was bombarding the White House with telegrams urging the nomination of a “strict constructionist” with no financial problems

who would “uphold freedom of choice in school integration matters.” What’s more, since the governor of West Virginia, a Republican, would appoint Byrd’s successor, his departure for the Court would bring an additional Republican to the Senate.⁴²

There were Southern senators with better qualifications than Byrd, such as William Spong of Virginia, a Democrat, and Howard Baker of Tennessee, a Republican. But as Haldeman said, the President considered Byrd particularly attractive “because he was a former KKK’er, he’s elected by the Democrats as Whip, he’s a self-made lawyer, he’s more reactionary than [George] Wallace, and he’s about 53.” Nixon had obviously stopped worrying about looking “petulant.”⁴³

On Friday, October 8, when the President and Attorney General met, Byrd became an agenda item. Senators said he would go through Congress “like greased lightning,” Nixon volunteered. “Sure, because he’s part of the club,” Mitchell agreed, but his selection would horrify the public and the American Bar Association would rank him “not qualified.” Undaunted, the President continued his reverie. “God, what a guy to have on that Court. He wouldn’t be like Potter Stewart who came down here pretty clean, nice little fellow from Ohio, and goes out to Georgetown and his wife loves the parties and the rest and then comes the big case, the Times case, and he goes to pieces.” The senator would become “the strongest man on that Court. You couldn’t budge that son of a bitch.” He was “tough” about every issue Nixon cared about, including crime. It would take Byrd years to understand “the nuances” of the Court’s work, Mitchell predicted. “I guess it’s out of the question, but I just sort of think sometimes we got to do something out of the question the way they kicked us in the ass three times now,” the President said. “You get started down this road, the pressures are going to mount on you

tremendously,” Mitchell cautioned repeatedly. “To what, appoint more Senators?,” Nixon asked. “No, to appoint Byrd.”⁴⁴

Later that day, the President traveled with Byrd to West Virginia by plane and remarked that he and the Attorney General had discussed him that morning. The senator, who had already checked his chances with Eastland, assured Nixon that he could win confirmation. The President was amused to see one headline the next day: “Robert Byrd Nixon’s Next Court Choice.” Since the White House had not leaked it, he told Mitchell, Byrd must have.⁴⁵

And the immediate response from Senate Democrats was surprising. Sam Ervin said that Byrd had “a very sound constitutional philosophy and would make a fine appointment.” That was predictable since both Ervin and Byrd were both southerners and constitutional fundamentalists. Even George McGovern, though, the South Dakota liberal who would become the Democrats’ standard-bearer against Nixon in 1972, was on board. While McGovern said he would nominate a woman himself, he maintained that Byrd’s civil rights views had become more moderate, the West Virginian would make “every effort to become a great justice,” and that the Senate would probably confirm him. “What the hell do you think they’re up to?,” Nixon asked Mitchell. “They probably want to get him out of that Whip job,” the Attorney General speculated. “Well, I’m glad to keep the game a little open on this,” the President added. “I’ll bet you they’re regurgitating all over the place, John,” because next to Byrd, Poff was “a flaming liberal.”⁴⁶

If “they” were not regurgitating, they were nevertheless nonplused. In 1971, as one of Byrd’s staffers said, his detractors dismissed him as a “hillbilly ‘Uriah Heep.’” Of

course, that did not mean the Senate would not confirm Byrd. By Monday, the New York Times was reporting “Senator Said to Be Nixon’s First Choice and Easy Confirmation Is Predicted,” thanks to Senate “clubbiness.” As Nixon might have predicted, Byrd’s prospects had topped the conversation at Democratic politician Averell Harriman’s special Sunday party in Georgetown to introduce 500 friends to his bride, Pamela. “Any U.S. senator appointed would be confirmed,” Senator Scott informed the Post. While Abe Fortas “did laugh and started out a sentence this way: ‘I don’t think—guess that’s enough,’” Earl Warren, Arthur Goldberg, Byron White, and Stanley Reed refused comment.⁴⁷

The editors of the newspapers Nixon most despised did not consider Byrd’s candidacy a laughing matter. “If President Nixon and Attorney General Mitchell deliberately set out to destroy the prestige and authority of the Supreme Court, they could hardly pick a more likely course than that which they now seem to be following,” the New York Times editorialized. “Certainly not since President Truman’s blatantly political appointments—such as that of Senator Minton—has the White House put forward for the Supreme Court anyone so lacking in qualifications as the junior senator from West Virginia. Even the Carswell nomination tops this one.” The prospect of Byrd was “deeply distressing,” the Washington Post’s editors agreed. “We simply do not understand what motivates the Nixon Administration to toy with the idea of taking on another divisive confirmation fight after its experiences in 1969 and 1970,” they wrote plaintively on Monday.⁴⁸

What motivated the Administration was Byrd’s value in embarrassing and distracting the Democrats. Left to his own devices, the President might well have

nominated the senator, who genuinely appealed to him. And by the time of Byrd's death in 2010 after 51 years in the Senate, those on both sides of the aisle genuinely believed him one of its giants and saluted his independence and integrity. Among other things in recent years, he had voted against the nominations of Robert Bork and Clarence Thomas to the Supreme Court, championed the rights to abortion and health insurance, attacked George W. Bush's Iraq invasion, and vigorously promoted Barack Obama as a Presidential candidate. He had also published a prize-winning multivolume history of the Senate. Perhaps Nixon saw something in Byrd that became visible to others later.⁴⁹

It seems doubtful, though. The horrified reaction of his Attorney General probably prevented the President from proceeding with the idea, but he did not want the press or Senate to know that. When Spencer Rich at the Washington Post published a story entitled "Byrd Held Unlikely for Court: Nixon Aide Says He is on List But 'Not on Top,'" Nixon summoned Press Secretary Ron Ziegler. "One of our boys got off the reservation on the Byrd thing and just blew a beautiful play I am trying to make here," he complained. Ziegler was to summon Rich and insist that the Administration had Byrd "under very active consideration." Reversing himself, McGovern had said on Monday that he would not vote for his colleague. All the Democratic candidates had to identify their position on the Byrd candidacy. "We're going to make them stand up and be counted." Byrd would also divert attention from the two candidates Nixon had actually chosen, a woman and a southern man, so the opposition could not destroy them "before I get a chance to defend them."⁵⁰

“The Woman’s Seat” and an “Arkansas Harlan”

George McGovern had not been the only person who wanted to see a woman on the Court. For starters, Elvera Burger, Martha Mitchell, and Betty Friedan said they did too. So did the First Lady, who volunteered that she was “talking it up” with the President but that the “best qualified” women were “too old.” Reporters speculated Pat Nixon may have referred to North Carolina Justice Susie Sharp. A “strict constructionist,” she was a favorite of North Carolina’s senators and the University of North Carolina and Duke Law faculties alike and would become the state’s first woman Chief Justice. Or perhaps Mrs. Nixon alluded to District Judge Sarah Hughes, who was then 75, but why would her husband want to name the person LBJ had asked to swear him in as President to the Court? Another possibility was Arizona Supreme Court Chief Justice Lorna Lockwood, the first woman ever to become Chief Justice of a state supreme court and one who could also claim Abraham Lincoln as a cousin. But she was 68, relatively progressive, and she had defended the Warren Court.⁵¹

In response to the talk of a woman justice, the National Women’s Political Caucus, a nonpartisan group peopled mostly of liberal Democrats, had suggested ten women with the right qualifications and age. Its list included three judges--Ninth Circuit Judge Shirley Hufstедler and U.S. District Judges Cornelia Kennedy and Constance Baker Motley. There were five academics—Soia Mentschikoff of the University of Chicago, Herma Hill Kay of Berkeley, Ellen Peters of Yale, USC Law School Dean Dorothy Nelson, and former Howard Law School Dean Patricia Harris. In the miscellaneous category were Representative Martha Griffiths, a Republican from

Michigan, and Rita Hauser, a Nixon appointee to the UN. Two were African American, Motley and Harris.⁵²

Of these possibilities, the most “obvious” was 46-year-old Shirley Hufstedler, Fred Graham reported. She was a graduate of Stanford Law, where her grades placed her fifth in the class, tied with future Secretary of State Warren Christopher. In addition to becoming the highest-ranked woman federal judge in the country, she had been a California superior court and appellate judge. “She is so highly regarded that during the last year she delivered both the Holmes Lecture at Harvard and the Cardozo Lecture in New York --roughly the equivalent of playing in the World Series and the Super Bowl in the same year.” Jimmy Carter would make Hufstedler his Secretary of Education and at her confirmation hearings, she reminisced, senator after senator would quiz her about whether she had her eyes on the Supreme Court. She was an “obvious” choice--but not for Nixon and his Attorney General. Like the other candidates on the list, she had established a distinguished record, and like them, she possessed a “record of demonstrated commitment to human issues particularly civil rights and equal rights,” the National Women’s Political Caucus assured the President. That was not the sort of woman Nixon wanted. Everyone on the NWPC’s list was “a left-wing red,” and to top it off, an ugly “bag,” he grumbled.⁵³

If truth be told, he did not want a woman at all. Women were “erratic and emotional,” Nixon volunteered to Mitchell, and did not deserve government jobs. (In another exchange, he shouted, “I don’t even think women should be educated!,” and in another, that they should be barred from voting.) But politically, he, his staff and Mitchell understood, a woman could help him at the polls in 1972. As Nixon said, no one would

vote against him because he appointed a woman, while “one or two per cent...would say because he appointed a woman, I am for him,” and “we got to pick up every half a percentage point we can.” But a woman nominee must be “conservative.” If he found such a person, he let Republican leaders know, he expected them to support her, and he anticipated confirmation. Senators “can’t vote against the first woman, any more than they can vote against the first Negro. So they’ll take a woman, provided she can read and write.”⁵⁴

So the Justice Department went to work and zeroed in on 56-year-old California Court of Appeals Justice Mildred Lillie, whom reporters typically described as “statuesque and vivacious” and a great cook. (One sign of changing attitudes came when the New York Times drew fire for extolling her “bathing beauty figure,” but progress came slow: Mitchell felt compelled to assure Nixon that Lillie was no “frigid bitch.”). She had a great story. Born in Iowa, the 56-year-old had been raised on a California farm by a single mother and had worked her way through Berkeley and its law school, where after a rough first year, then did well enough. She applied to the Oakland District Attorney’s office, only to be told by Earl Warren that he did not believe in women lawyers. As governor, however, Warren appointed her to the municipal court and later to the Los Angeles Superior Court, where she reorganized its domestic relations division. Warren’s successor put her on the Court of Appeal in 1958, and she had been there ever since. Like many California lawyers, Nixon knew of her. “[S]he’s been a judge longer than I can remember,” he said. Though Lillie was a Democrat in name, one mutual friend wrote the President, she was “as strong a Republican Conservative as I am.” In her 1969 Christmas message to the Women’s Civic League, Lillie had sounded like Vice

President Agnew when she condemned “dissidents and rebellious pseudo-intellectuals” who found Christmas “passé” and “who, by misusing the terms peace and love, can erode our traditions.” And on the basis of the review of her opinions by the “hard-nosed” Rehnquist, Mitchell reported to the President that she was more conservative than anyone Nixon had nominated to the Court and that the California Supreme Court had reversed her frequently enough “to give her a good standing with the law and order people.”⁵⁵

To sweeten the pot, when the Justice Department interviewed her in Washington, Lillie brought along her Italian-American lawyer husband, Alfredo Falcone, whom Mitchell described as “a plodding mediocrity” with lots of debts, but “distinguished looking.” That was good news at a time when Nixon’s Transportation Secretary John Volpe, members of Congress and White House strategists like Pat Buchanan were pressing Nixon to appoint an Italian-American to the Court. Her religion was right too. “[T]ell her if she isn’t a Catholic to get busy, get over there, God damn it and get confirmed,” the President joked to Mitchell. But she was, and an observant one, to boot.⁵⁶

When he was not ribbing Mitchell about their proud legacy of putting the first woman on the Court, Nixon radiated enchantment with their pick. “[T]his is a chance to get a conservative in the Court and at the same time we can get a woman,” he cheered. “[T]hey can vote against a Southerner, but they can’t vote against a woman because she’s conservative.” Nixon also relished credit for historic firsts, and, as he said, Lillie’s would become “the woman’s seat.”⁵⁷

The other likely nominee, 49-year old Herschel Friday, a Democrat in a leading Little Rock law firm, had been one of Burger’s choices from the beginning. A graduate of

Little Rock Junior College (which became the University of Arkansas at Little Rock) and University of Arkansas Law School, Friday had clerked for a US District Judge for five years and taught law at the University of Arkansas before settling into private practice, where, like Mitchell, he specialized in bond law. By 1970, Friday had also defended 13 Arkansas school districts against desegregation lawsuits, which had paid his law firm \$200,000. His clients included the Little Rock School Board in the case in which the Eisenhower Administration ultimately sent in federal troops after Governor Orval Faubus defied court orders to enroll African Americans at Little Rock's Central High. "I've known him, worked with him for twenty-five years, never thought of him, actually," Mitchell volunteered. "Burger keeps coming back to him."⁵⁸

Actually, the Chief Justice probably preferred another Southerner he promoted, 52-year-old U.S. District Judge Frank Johnson of Alabama. Among many other things, Johnson's decisions had ended the Montgomery Bus Boycott by desegregating buses, and helped make possible the 1965 march by civil rights activists from Selma to Montgomery. Martin Luther King maintained that the judge "gave true meaning to the word *justice*"—and at an enormous price. White supremacists bombed the house of Frank Johnson's mother. His only child committed suicide after years of ostracism. The judge himself received so many death threats that federal agents accompanied him everywhere. He had also lost many friends, including his law school buddy, George Wallace. If Nixon wanted a "strict constructionist," Johnson fit the bill. He was a law and order judge, and as he said, "I'm not a segregationist, but I'm not a crusader, either. I don't make the law. I don't create the facts. I interpret the law." Hugo Black had hoped Johnson would succeed him, and legal elites would have cheered the appointment. So,

surprisingly, would the many Alabamians urging him on the White House who were grateful to judge for recently dismantling school segregation in Montgomery without requiring court-ordered busing. Perhaps Nixon should have realized that both non-Southerners, who respected Johnson for the enemies he had made, and Southern whites, who recognized that the judge was not the liberal that outsiders believed, would have applauded the nomination.⁵⁹

As a legendary figure and longtime friend and fishing companion of Burger's, a fellow Eisenhower appointee to the bench, Frank Johnson would have fit in well at the Court. And while he was on his boat one day, he later recalled, he received a radio message that the Chief Justice needed to speak with him. When Johnson returned to shore and telephoned Washington, Burger told him that the White House would soon announce his nomination. According to Johnson, however, three Alabama Republicans in Congress derailed it by persuading Mitchell that it would ruin them.⁶⁰

Burger believed that Friday could work too, under the right circumstances. In a letter to Mitchell that made its way into the hands of the Washington Post's Supreme Court reporter, the Chief Justice said that the Arkansan possessed "superior professional qualifications." He would prove suitable if he were coupled with a "nationally recognized" judge—which Lillie was not.⁶¹

Rehnquist cleared Friday on Tuesday, October 12. "It is evident from our experience in the Haynsworth and Carswell confirmation fights that a demonstrable 'red neck' hostility to civil rights on the par of a nominee, or a personal animus against any minority, could well prove fatal to chances for confirmation," he reminded the Administration. But Friday's public statements had always been "in good taste," and he

had developed a cordial relationship with Thurgood Marshall and other opponents. “It would seem doubtful that any evidence of personal bias, even such as the rather thin case adduced against Carswell, could be proven against Friday.” His tax returns were clean; his lack of experience in public office, no detriment. “Perhaps the actual practicing lawyer is entitled to at least one prototype to represent him on the Supreme Court,” and his work for the ABA constituted “a form of public service.”

While his nomination would doubtless disappoint civil rights activists and labor unions, and they would “probably try to defeat” Friday, Rehnquist predicted their failure. The Administration’s experiences showed that they “together cannot successfully defeat a nominee unless they are able to unfurl some banner other than their own under which they can enlist some of the more middle-of-the road members of the Senate,” he stressed. In the Haynsworth case, they had used ethics; in Carswell, a combination of “mediocrity” and racism. “From what we can tell now, there is no such outside rallying point in the case of Friday.” But the Arkansan’s name should be sent forward as quickly as possible, he cautioned, lest the approaching 1972 election cause the “the parallel” to Fortas’s Chief Justice nomination to become more evident.⁶²

“I think Friday’s going to work pretty good,” Mitchell told Nixon that same day. “Is he a really successful lawyer, big in the ABA?,” the President wanted to know. Yes, he was a senior partner at the largest and most successful law firm in his state and a player in the Association’s House of Delegates and Board of Governors. “Is he conservative?,” Nixon wondered. “No question in my mind,” Mitchell answered. “I think he’ll be to the right of Burger. You see he’s represented all the school boards,” though Mitchell did not believe that would pose a problem in his confirmation, since

everyone deserved legal representation. In addition, Friday had practiced law for years with Pat Mehaffey, who was now on the Eighth Circuit and was “to the right of the Sheriff of Nottingham.” Nixon wanted to make sure Friday did not have “anything like the Klan in his background.” No, Mitchell said. His wife had kept a scrapbook with all his press mentions, “and Rehnquist went all the way through it, beginning to end, and it’s just a lawyer.” (How much more Rehnquist had done by way of background check than review clippings remained unclear). And Friday did not have “any other infirmities that you had with Haynsworth.” Obviously, the memories of Haynsworth and Carswell still stung over at the Justice Department. Friday appealed to Nixon too. “[W]e forget that there’s a hell of a lot of stuff before the Supreme Court that involves corporations,” he reasoned. They would sell Friday as an “Arkansas Harlan.”⁶³

“I’d like to send these two young lawyers down to comb him over,” Haldeman said. “I welcome that,” Mitchell answered. Yet the President did not like the idea that the rules for selection were changing. Told that Dean and Young would ask about extramarital affairs, he wondered aloud “how in the Christ” William O. Douglas had survived confirmation. He also resisted sending them out to California to meet Lillie, though Mitchell himself liked the idea of another look at her husband. “Now look,” Nixon responded, before speculating that Falcone might be a thief, “I’m not going to go for somebody like Caesar’s wife” because that person would have “never done a goddamn thing.” The White House needed to anticipate the opposition, Haldeman and Ehrlichman argued. In the end, the President agreed it was good to “know the worst,” while stressing that the worst would not necessarily deter him. John Dean and David Young would go to Little Rock and Los Angeles.⁶⁴

Meanwhile, the Attorney General would submit a list of six possible candidates to the American Bar Association on Tuesday, October 12, with instructions to Lawrence Walsh to concentrate on Lillie and Friday and to check them out quickly. Over the Attorney General's objections, the list would include Byrd. As further camouflage, it would include three judges. The first, Justice Department alumna Sylvia Bacon, a Harvard Law School graduate with a reputation for fighting crime, must have been surprised. Although she had lobbied for a seat on DC's US District Court, its circuit court of appeals, the US Court of Customs and Patent Appeals, or the US Court of Claims in 1969, Nixon had then only named her to the DC Superior Court Judge. The second, Fifth Circuit Judge Paul Roney, another Harvard Law alumnus, had just taken over the seat Carswell had vacated. The third, University of Mississippi Law School graduate Charles Clark, was also a recent Nixon appointee to the Fifth Circuit, to the disgust of Newsday, which labeled him "the segregationists' Perry Mason" because of the many times he had defended Mississippi's status quo as an attorney. The same day that the Attorney General forwarded the list to the ABA, the President announced at his news conference that Byrd was "definitely" on it, two women were "under consideration," and he would make both nominations the following week.⁶⁵

The Administration had obviously learned the value of disguising its preferred candidates from the Poff experience. But six names in one week? "I expressly warned those acting for you that such an investigation could not be conducted without all of those names becoming public within 48 hours," Walsh reminded Mitchell once the mutual

finger-pointing began later. “I was told that this was an acceptable risk and requested to go ahead as rapidly as possible.”⁶⁶

It took less than 24 hours for the names to leak. Nina Totenberg had the list of four Southerners and two women on the Dow Jones ticker by 4:03 P.M. on Wednesday, and she and other reporters instantly figured out that Lillie and Friday were its persons of interest. Totenberg had telephoned Walsh at his summerhouse, only to be told he would not speak with her on that line. He returned her call from a pay phone. (At the time, Totenberg found him “paranoid,” but after Watergate, she realized that he was not.) The reporter tried unsuccessfully to “cajole” the list from him. Was Edward Gignoux one of the names, Totenberg finally asked? That well-regarded Eisenhower appointee to the First Circuit was a 55-year-old graduate of Harvard College and Law School. Along with HEW Secretary Elliot Richardson and three southerners--Frank Johnson, Fifth Circuit Judge John Minor Wisdom, and University of Texas law professor Charles Alan Wright--Gignoux appeared on just about every list that Harvard law professors made of their ideal nominees. (Mitchell, however, did not consider him a strict constructionist.) “Oh, God, I wish it were,” she remembered Walsh groaning, before he refused further comment. So Totenberg began telephoning the leaders of the legal establishment whom the Standing Committee on the Judiciary was likely to contact from her booth at the Supreme Court. “Lawyers talk,” she said matter-of-factly years later.⁶⁷

Predictably, the reaction to the list was one of dismay. Few outside their own communities had even heard of the potential nominees, only two of whom, Byrd and Friday, possessed entries in Who's Who. “What is the caliber of the candidates,” the New York Times asked rhetorically about the “career politician from West Virginia,

former organizer for the Ku Klux Klan, a Senator whose public record is marked by racism and reaction;” the DC judge “whose only claim to fame lies in the tough ‘law and order’ legislation” she wrote while at the Justice Department; the former Los Angeles “domestic relations judge”; the “Little Rock lawyer whose most notable legal work was in resisting school desegregation;” and the “two respectable if undistinguished Federal Court of Appeals judges who are at least not known to have anything against them”? The unknown and unremarkable candidates, the Washington Post lamented, made it clear that President Nixon insisted on treating the Supreme Court of the United States as though it were “some sort of minor commission.” Even the Wall Street Journal judged that “the President again may not be aiming high enough.”⁶⁸

The mainstream media reflected informed public opinion. Law professors and members of the bar began drafting petitions to oppose the names on the list. Rick Seymour went to Little Rock to investigate Friday’s defense of school boards. Civil rights activists contended that “Nixon wants a racist Court.” The National Women’s Political Caucus pointedly declared that it did not support “women on the Court merely because they were women,” but wanted ones who cared about human rights and deserved “the distinction they are receiving.” In the Senate, some voiced regret over their votes against Haynsworth. And Bayh hinted that he would again lead the opposition if Nixon nominated anyone on the list that Ted Kennedy ranked as “one of the great insults to the Supreme Court in its history.”⁶⁹

Against this outcry stood a lonely and joyous Martha Mitchell. “Friday is my man,” she told the Washington Post of her fellow Arkansan. She liked Lillie too. “We have just got to get a woman on the Court this time,” she insisted.⁷⁰

The criticism enraged Nixon. He and Mitchell blamed the ABA for the leaks, though Totenberg “flatly” denied her source was there. “The bar broke its pick with me,” the President raged to Mitchell on Thursday, and “the next time we have an appointment they aren’t going to get a chance to look at it.” What did it know about judicial candidates anyway? “I mean good God, I can take a bar examination better than any of those assholes.” The ABA had not embarrassed Burger and Blackmun, he added. When Mitchell tried to remind the President that he had appointed Burger and Blackmun without consulting the ABA, Nixon insisted the White House had checked them out with the bar. Not so, the Attorney General responded. “Well, that was our mistake here then, I guess,...letting the bar have a crack at it,” the President finally said. “I expect the bar to be helpful in this picture by coming out with the solid approvals of Friday and Lillie,” Mitchell comforted him.⁷¹

Push the bar to act quickly, Nixon instructed on October 14, and in the meantime, leak to the press that the Administration was also considering other names too. Poff’s name had gotten out, and they had “cannibalize[d]” him. “I just don’t want our guys...to get killed before we get a chance to get in with the positive stuff first.” So, Jack Anderson and Nina Totenberg reported, a “surly” Mitchell obligingly held an off-the-record press conference complete with cocktails, only to be asked by Totenberg which expletives the President had used in discussing the ABA. (It was left for John Osborne of The New Republic to report that the President had said “Fuck the ABA!” and that “the operative word is one of his favorites.”) Nixon’s press secretary encountered an equally skeptical reaction when he said it was “incorrect to assume that there are only six people

under consideration.” Washington’s focus, as well as that of the media, remained on Lillie and Friday.⁷²

Totenberg had “impeccable” sources inside the Court too, who made their own unhappiness clear. According to her, Harlan had considered sending Nixon a sharp protest from his sickbed. The seven members of the Court were “extremely perturbed,” with even “conservative” justices worrying that the President sought to “denigrate” it. Moreover, after reading some opinions of Lillie’s, one liberal justice “promptly got drunk.” Soon afterwards, someone at the Supreme Court complained to the White House.⁷³

Just as Mitchell had always assured Nixon that the ABA would approve Lillie and Friday, so he had promised that the Chief Justice would take the news of Lillie’s nomination like a “good soldier,” though it would prove a “very grave shock” to him. Nixon sympathized with Burger, who Mitchell reported was “dying” and telephoning him “maybe twice a day.” The Justices lived together as closely as astronauts “inside a space ship,” the President reminded Mitchell. “You ought to soften him up a little,” he instructed the Attorney General on October 11, and then Nixon would tell Burger he was naming Lillie. “He’s played the game with us so well that I think we should apprise him in advance,” Mitchell agreed. On October 14, the Attorney General reported that he had heard again from the Chief Justice. Burger had said that Friday was “great,” but argued that “the only way to strengthen the Court” was to reserve the other vacancy for a “nationally known” judge, and reviewed “the same bunch of names.” The Chief Justice had referred to Arthur Goldberg’s departure from the Court, the “completely unwarranted

rejection of Judge Haynsworth and the subsequent rejection of Judge Carswell,” LBJ’s “seemingly hurried” effort to elevate Fortas to the Chief Justiceship, and Fortas’s resignation in disgrace as “wounds” that had bruised the Court. Burger had also made it clear that “he’s not anxious to have a woman” in his long letter to the Attorney General. “No more anxious than I am,” Nixon replied. “I am sure he will take it in good grace,” Mitchell still insisted.⁷⁴

That hope evaporated later that day, when Burger came to visit the Attorney General with a letter resigning effective September of 1972. Of course it was a bluff, but it won him White House attention. “We’ve got Chief Justice problems,” Mitchell informed the President and Ehrlichman on October 15. Burger said that women had not been “exposed to the judicial process long enough” and were not sufficiently “distinguished to rank a seat at the Court. He also maintained that if one had to have a woman, “then you should have a Jew and a black and a Chinaman and a Burmese.” Nixon was incredulous. “He bought that?,” the President asked, and he pointed out that Lillie had served as a judge for as long as Burger. Was the Chief Justice “representing others on the Court?,” Nixon wondered. The Attorney General inferred that “there was a rather wide discussion of the situation up there yesterday” because Burger had said that “Blackmun told him how great an advocate Herschel Friday was.”

Nixon’s immediate instinct was to accept the resignation. “They’re all undistinguished,” he said of the seven justices then on the Supreme Court. Tell Burger to go back and “read the editorials about him” at his appointment. “I had to defend him.” Though Burger’s press had been largely favorable, except at venues like the Nation and New Republic, Mitchell agreed. “I brought that subject matter up with him,” the

Attorney General said, and the Chief Justice replied, ‘Well, we must have been reading different editorials.’” Like most Presidents, Nixon hated prima donnas, and he fumed that Burger was behaving as badly as Federal Reserve Chairman Arthur Burns. “We’d be better off having him resign now” than in an election year, he reasoned. “[T]he Court would just fall apart,” Mitchell warned. “We’ll consult him, but he isn’t going to name them,” the President decided. “Well, we shouldn’t even be consulting with him, actually,” Mitchell responded, in an apparent reference to Nixon’s pledge to avoid cronyism when he named Burger.

Earl Warren had ruined the Court by increasing its workload, the President and the Attorney General now agreed. “Warren Burger has changed that substantially, but they still consider too many cases,” Mitchell said. Elderly justices compounded the problem, Nixon added, sounding like FDR trying to justify packing the Court. But when the Attorney General had told Burger that Black and Harlan “could not carry their load,” the Chief Justice had responded, according to Mitchell, that “White and Potter Stewart and Brennan are so stupid that he can’t assign some of the cases...to them because he doesn’t know what they’re going to write.” Let him know that that Lillie was “a workhorse,” Nixon advised.

Since they also agreed that Burger “is really one of the best appointments we’ve made,” they settled on a strategy by which Mitchell would inform him that “the conversation never happened and that he better go about being Chief Justice in the interest of the Court and country and stop this foolish nonsense.” Tell him that just as the times had demanded an African American on the Court, now they required a woman, the President said. “It was hard for them to take a black, particularly a dumb black, and at

least I have given them a bright woman.” Another vacancy or two would materialize for the Court. Burger had to become Lillie’s “cheerleader,” Ehrlichman emphasized. As Nixon and Mitchell said, the Chief Justice should be reminded that in Friday, he was getting half a loaf.⁷⁵

But serious doubts were developing about that half. Not every Arkansan rejoiced at the prospect of Justice Friday, though the state’s Democratic senators, John McClellan and J. William Fulbright, did. McClellan, who described Friday as “a personal acquaintance of mine for more than twenty years” and “one of the finest advocates I have ever known,” proved especially enthusiastic. So were Representative Wilbur Mills, the Arkansas Trial Lawyers Association, and the Arkansas Association of Women Lawyers. In Little Rock, the Arkansas Democrat, declared that Friday had “our support and the support of a majority of the people of Arkansas if President Nixon decides to nominate him for a seat on the Supreme Court.” But the Democrat’s competitor, the liberal Arkansas Gazette, attacked the prospective nominee’s suitability and accused the local bar of rallying “around Mr. Friday rather like a herd of angry bison protecting one of its own.” Gazette editors could not think of a “better way to cultivate the segregationist South, against the blandishments of George Wallace, than to appoint the lawyer identified more than any other with the fight against school integration in Little Rock.” Governor Winthrop Rockefeller, a progressive Republican, telephoned the White House to complain that Friday was “an avid redneck segregationist whose only qualification was that he is a bond salesman friend of John Mitchell’s.” One Little Rock labor union lawyer described Nixon’s rumored pick as “the smiling face of the old Faubus crowd,”

and the president of the state AFL-CIO accused Friday's firm of "union-busting." The president of the Arkansas NAACP expressed displeasure as well. (Some liberals came to regret their objections later.)⁷⁶

The controversial nature of the nomination, even in Arkansas, did not bother Nixon. But when Dean and Young spent October 13 and 14 in Little Rock interviewing Friday, they sounded alarm bells. After 7 hours with him on Wednesday, they reported that he had no ethical problems and was "not a 'red neck'," but "a 'lawyer' who has represented civil rights defendants." He was "clean as a hound's tooth." He was a "brilliant legal technician," and a very successful one. His Little Rock house was "substantial," and his net worth exceeded \$600,000 (about \$3.5 million in 2016 dollars). He belonged to an all-white Baptist church, and he had no "association with the KKK" or any secret or racist group. Beyond "a slight case of hemorrhoids" and the loss of hearing in one ear, his health was good. He was happily married. "I've had the same girl all these years," Friday informed his interlocutors. He belonged to a luncheon club and country club that included Jewish members, but no African American ones. He liked to hunt quail and play golf. He was a registered Democrat, "but that's not the way I vote." He was not an intellectual. His extracurricular reading was restricted to U.S. News and World Reports and the local paper (doubtless the Arkansas Democrat), and Friday volunteered that he was "not the kind of person that comes home and picks up 'The Life and Times of Chief Justice Marshall.'" ⁷⁷

When they turned to civil rights and crime at the end of the day, Dean and Young began to worry. Ehrlichman reported that Dean had said, "I don't know if this man is conservative" and planned to return the next day and "hit him fresh." After hearing that,

Nixon became anxious. “I can’t do it if he’s not conservative,” the President fretted. “I wonder if we shouldn’t just give out on this Southern thing.”⁷⁸

Thursday morning went no better. Though Rehnquist and others at the Justice Department had spoken with Friday, they had apparently barely covered his views of the Constitution, Dean and Young reported. The potential nominee knew next to nothing about constitutional law and proved unable “to articulate his personal beliefs on many of the fundamental social issues of the times.”⁷⁹

They had reviewed issues with him, ranging from church and state, other First Amendment questions, privacy, capital punishment, arrest, and the jury system, and found his answers largely “superficial.” For all the media focus on Miranda, for example, Friday had no position on it. While his instincts were “conservative, rational, realistic and moderate,” he showed “little evidence of a reflective and strong mind that could lead on the court or articulate a substantive conservative philosophy on fundamental issues.” As Ehrlichman informed the President after another telephone call, Friday had finally told Dean, ““John, you’re going to have to tell me what to say....I want to be with the President,”” by which he presumably meant that he intended to echo Nixon. He could coach Friday through confirmation, Dean added, but he was unsure how he would vote five years for now. ““You’re going to have to tell the President for me that I cannot assure him that Herschel Friday is a conservative,”” Dean concluded, except with respect to civil rights, and there, he was uncertain how solid Friday’s convictions were. Of course, Nixon also wanted to know whether Mrs. Friday was “a socialite” who would fall prey “to that goddamn Georgetown set” that could turn Friday

into another Potter Stewart and leave the President resentful that “I appointed that son of a bitch,” something he knew he would not feel about Lillie.⁸⁰

But the White House had no fallback, and time was short. Given the reactions to those on the ABA list, no one else on it was a winner, and Byrd had telephoned Secretary of Treasury John Connally to say he preferred a legislator’s life and did not want to be considered. (The White House kept that quiet as long as possible in the hope that the senator would “scare the liberals” into approving anyone Nixon nominated who was “not a member of the Ku Klux Klan”). When Mitchell suggested Lewis Powell again, he and the President again agreed he was too old. Why put someone on the Court who would only “last four or five years” or stay there when he became senile? Moreover, Rehnquist and Senator McClellan did not share Dean’s doubts about Friday, the Attorney General emphasized. Given the nature of the Arkansan’s law practice, the President also believed, “[t]here is no potential for this guy to have a liberal bend.” Finally, Nixon concluded, Friday was “pretty close to Burger” and had said he wanted to follow the President. They would educate him about Presidential policies “for the good of the country,” Nixon resolved. “I think we’d better go with Friday, John.” Nobody told them that Dean had privately concluded that the Arkansan would probably “withdraw from consideration, realizing he did not have the credentials. Another session like the one we had put him through in Little Rock would do it.”⁸¹

The 4 1-2 hour interview with Lillie and Falcone by Dean and Young on Thursday afternoon proceeded more positively, though the staffers’ written account of it damned with faint praise. Like others, Dean and Young could not resist commenting on

the appearance of this “large but not overweight and “rather handsome woman with excellent hearing.” They had “found nothing” in the background of either her or her husband that would embarrass the Administration. “We were reasonably impressed with her as an articulate woman of considerable breadth and experience from a legal as well as personal point of view.” Young added that she was apparently “a most able woman” and “not an intellectual lightweight,” possessed “stern and strict” views of justice, and was “confident enough to hold her own on the Court.”

They had uncovered no problems in Lillie’s legal education or judicial record. There was the matter of her first semester in law school, when she had received a D in one course and failed another because of her adored uncle’s death, but she had made them up, and received A’s and B’s in every other course afterwards. Obviously proud of her supervision and reorganization of the Los Angeles Domestic Relations Court, she joked “there are God knows how many little Mildred Lillie Gonzales[s] running around California as a result of my attempts at reconciliation.” She had written more than 1160 opinions as an appellate judge, and she estimated that of her cases that the California Supreme Court then heard, it had reversed two-thirds and affirmed one-third, which she maintained was “about average” for an appellate judge. She had just sniped occasionally and indirectly at the Warren Court in her opinions by, for example, observing that precedent required her to reverse a trial court although the defendant was clearly guilty. She had never sentenced anyone to death, but seemed unworried about doing so. She knew of no newspaper editorials attacking her decisions, and she believed lawyers in her courtroom thought she treated them fairly. “You can’t be a judge and please everyone,” she said, when they asked about her antagonists and advocates. She believed that the

ACLU, local Criminal Bar Association, the National Lawyers' Guild, and liberal Democrats who championed Shirley Hufstedler would oppose her, but she anticipated no problem from labor. She numbered among her supporters Governor Reagan (though he and his circle preferred William French Smith) and Los Angeles Mayor Sam Yorty, who thought "she would be an outstanding appointment because she has not gone along with the Warren criminal law decisions except as compelled to do so." Lillie also included among her referees William French Smith, the Los Angeles County Sheriff and four California Supreme Court justices.⁸²

Dean and Young had found her personal life respectable too. Neither she nor Falcone had any conflicts of interests, and while some tax liens had been filed against them in the past, those issues were resolved. Falcone had once been sued for nonpayment of a bill for a defective hi-fi, but it had been settled. Asked outright if there was anything in his past that could prove embarrassing, Falcone had only mentioned the hi-fi. After a complete physical six months ago, Lillie's doctor had given her "a clean bill," and she had "no psychiatric problems." Africans Americans and Jews lived in her apartment house. She and Falcone were serious Catholics whom a cardinal had married. She gave speeches on Americanism, law and order, and law enforcement, but had never accepted a fee. Her reading outside work was limited to newspapers, news magazines, and recently, Mario Puzo's The Godfather. Her hobbies were cooking and oil painting, and she was very good at both. She did not drink much, did not gamble, and had told Dean and Young that "with an Italian husband who has a Latin temperament," she would be "crazy" to have an affair "even if I wanted to!" Though she had a different name from her husband, that was only because by the time her first husband had died, voters knew

her as Mildred Lillie. She had kept “far away” from “the women’s lib movement” and “personally considered it somewhat dangerous.” That was just fine with Nixon, who was making the appointment not for the “liberals” in “women’s lib” but for “decent women.”⁸³

If Dean and Young did not sound that enthusiastic on paper, Dean made up for it when he telephoned his impressions and also took some of the sting out of Burger’s reaction to Lillie. “He says she’s a goddamn jewel,” Haldeman reported to the President on Friday, October 15, a “tough, able, personable, marvelous woman.” Ehrlichman agreed that Dean described Lillie as “the greatest thing since sliced bread.” Dean had “worked over” her husband and concluded that he was “not great” but would pose no impediment, Ehrlichman added “He says she has all the right vibrations...on crime, on administration of justice, civil rights.” It didn’t matter that she had not issued any civil rights opinions because “we will generally find that somebody that’s hard on law and order is also hard on civil rights,” Nixon reasoned. He was already planning to introduce her to the world as Mildred Falcone.⁸⁴

Dean, however, feared that the ABA would not share his positive assessment. He liked both Lillie and the idea of a woman on the Court. He remembered telling Ehrlichman, though, that her husband warranted further investigation and that the “make-no-waves” Standing Committee on the Federal Judiciary might well find Lillie “not qualified” or “at best—have no opinion” because of her sex. “But they’ll never say that. She’s very conservative on criminal law issues,” and the committee might well base its rating on her reversal rate. Someone should review what the California Supreme Court had said about her opinions, Dean advised. While he agreed to ask Justice for that

evaluation, Ehrlichman seemed untroubled and did not pass along Dean's warnings to the President.⁸⁵

He should have. Lillie herself always blamed the negative contemporary reaction of her critics on sexism, and doubtless there was some. Was she inferior to Harrold Carswell, who had come so close to winning a Supreme Court seat? "I had served two years on the Municipal Court, nine years on the Superior Court and 12 years on the Court of Appeal, and I had heard every kind of case imaginable," she recalled in 1980. "I think I was just as qualified as any Supreme Court justice," and "I fully believe that the fact that I was a woman was [a] very serious [problem] to them." Dean, too, thought her the victim of "shameless gender discrimination." Certainly, by the time she died in 2002, when the legal profession welcomed women, her reputation had soared.⁸⁶

But diminishing chauvinism alone cannot explain why Lillie had become so esteemed. She had broken two records for length of service: She worked 55 years in the California judiciary and 44 years as an appellate judge. In 1984, though she was a Democrat and nearly 70, California's Republican governor, George Deukmejian, had appointed her presiding justice of her division, a position she held for 18 years. Present and past California governors in both parties and the Chief Justice of the California Supreme Court lionized her when she died, and one obituary insisted that "she was staunchly backed [for a seat on the US Supreme Court] by state Supreme Court justices and the Los Angeles County Bar Association." As one of her fellow judges said, she received a send-off "worthy of a head of state" attended by "hundreds of judges and lawyers" that included the ultimate Los Angeles tribute, the shutdown of two freeways by the California Highway Patrol for her funeral cortege. We expect reporters and their

subjects to speak well of the dead. How do we explain, though, the posthumous naming of the enormous Los Angeles County Law Library after Lillie, a singular honor?⁸⁷

Perhaps after 1971, she worked harder at judging. By 1980, Los Angeles lawyers were lining up to report that Lillie was “underrated” because she had not demonstrated “her abilities” during her early years as an appellate justice. “She’s shown a remarkable tendency over the last four to six years to moderate, mellow and accept new ideas,” one said.⁷ “Her opinions today are night and day compared to the ones 10 or 15 years ago.” Though they still found her “somewhat conservative,” he and others agreed she had become “less predictable and dogmatic.”⁸⁸

Just as there was reason to question Friday’s qualifications in 1971, though, there was reason to question Lillie’s, and many did. “A warm personality, she is not known as a judicial thinker, and even her admirers admit that she seems to go out of her way to interpret the law against criminal defendants,” Time observed. She ran her courtroom with an iron hand, and some did not even find her warm. Over the weekend of October 16 and 17, Harvard law professor Laurence Tribe, who was coordinating a group of students who evaluated Nixon’s candidates, wrote his dean that “Lillie is an abrasive, small-minded, unimaginative, embittered woman.”⁸⁹

More important, her opinions were “long, obscure, confused, and often myopically oblivious to critical issues and controlling cases.” Tribe’s devastating study revealed that over a four-month period in the spring and summer of 1971, the California

⁷ Demanding in the courtroom, Lillie also remained “witty and charming”—and peppery. In 1979, she joined an opinion by her ally, Justice Robert Thompson, which included a footnote making clear what the majority thought of the allegation by the dissenter, a frequent opponent, that they favored obscenity. Read together, the first letter of each of footnote 2’s seven sentences spelled out SCHMUCK. When the Los Angeles Times called attention to the note, Thompson pointed out that the German definition of “schmuck” was “jewel.” DeBenedictis, “Justice Mildred L. Lillie” (“witty”); People v. Arno, 90 Cal. App. 3d 505 (1979); Roger Grace, “Div. One: A Court of Appeal Division With a Tradition of Tomfoolery,” Metropolitan News-Enterprise, January 3, 2002.

Supreme Court had reversed four of them and had also identified serious problems with her reasoning. Despite the Court's record for progressivism, it included two conservative members, and it had acted unanimously. In one case, the Court intervened after Lillie had upheld the effort by the city of Los Angeles to apportion representation among City Council voting districts according to the number of registered voters, rather than population. Like the city, Lillie cited as authority a 1965 Hawaii federal court decision that she neglected to mention the United States Supreme Court had subsequently challenged. When the California Supreme Court reversed, it scolded that her reliance on the 1965 decision "is not merely misplaced; it also reveals a cavalier disregard for that basic jurisprudential principle that the decision of a court of superior jurisdiction supersedes contrary holdings of inferior tribunals."⁹⁰

Tribe could respond so quickly and effectively because he had recently spent a year clerking for California Supreme Court Justice Matthew Tobriner before he arrived at the United States Supreme Court to work for Potter Stewart. "That some (perhaps all) of the cases [written by Lillie and reversed] appear at pages of Cal. App. [California Appellate Reports] which are removed from the bound volume as soon as the California Supreme Court grants a hearing makes them so hard to locate as to create a substantial risk that they, and other opinions like them, could well be overlooked by someone without access to law clerks at the California Supreme Court," he explained at the time. He remembered that Lillie was considered "a real lightweight by the justices of California's highest court at the time I clerked there, and not just [by] the more liberal justices either. The lack of respect for Lillie wasn't ideological or, as far as I could tell, at all sexist; it simply reflected what people thought were her woeful inadequacies as a

lawyer, all of them painfully evident in the weak opinions she tended to write.” (That would have been news to Lillie, who, recall, had listed four of the justices as references.) After Tribe briefed reporter John MacKenzie about his research, the Post and Los Angeles Times prominently featured it on Monday morning. An FBI agent visited the Harvard professor at his office that day to demand citations to the opinions he had criticized and to inquire whether he “would say ‘for the record’ that she is unqualified for the Supreme Court,” as he now did. The agent asked “seriously intimidating” questions about Tribe’s motivation, the President of Harvard complained to the Justice Department.⁹¹

Many the FBI did not question agreed with Tribe. Nina Totenberg was new at her job and a college dropout, she remembered, but she knew enough to know that the Lillie’s opinions were unsound. The reporter received “a lot of help” in making the case against the judge from clerks to other California appellate judges, who thought poorly of Lillie and sent along opinions she might otherwise have missed. “How they ever thought they’d get this through is beyond me,” Totenberg said of the Nixon Administration. She compared the President’s promotion of Lillie to George W. Bush’s nomination of Harriet Miers: “It’s Harriet Miersesque.” Twenty UCLA Law School professors signed a petition to the White House maintaining that though the time to name a woman to the Court was “long overdue... Justice Lillie’s judicial decisions indicate that she lacks the competence to be a Supreme Court justice.” The Los Angeles County Bar Association was reportedly unhappy with the idea of Lillie, too, as were other judges. One lawyer who said he spoke for Los Angeles Superior Court judges privately informed the White House that “she just does not follow and/or know the law and rather renders decisions which are completely

inconsistent with case law,” Dean reported. “Mrs. Lillie is a very nice person and no one has any basis to attack her other than her lack of legal judgment,” where her reputation was “very bad,” the attorney had said, and her husband was no great lawyer, either. Roger Traynor, the celebrated former Chief Justice of the California Supreme Court, proved only slightly more positive when he publicly characterized Lillie as a “prodigious” and experienced worker. “I would be hard put to say she is not qualified,” Traynor maintained, “but I couldn’t say she is distinguished.”⁹²

The White House and Justice Department, however, pressed forward. Rehnquist took the unusual step of supplying reporters with a memorandum that avoided discussion of Lillie’s legal reasoning and characterized her reversal rate as “typical.” His defense just supported speculation that she was a front-runner, which, of course, spurred reporters to investigate Lillie further. Their investigation of Los Angeles court records revealed that despite what he told Dean, Falcone had “been sued at least 22 times over the past 10 years by credit bureaus, former employees and others.” Nixon considered the resultant publicity “a goddamn cheap shot.” Then Rehnquist produced a memorandum justifying those lawsuits too. The Assistant Attorney General had not previously provided the document to the ABA Standing Committee on the Federal Judiciary, and several of its angry members questioned Rehnquist’s integrity. Just as discussion of Robert Byrd qualifications, or lack of them, consumed the first weekend after Nixon’s search for two justices began, so discussion of Lillie’s reversal rates, Falcone’s debts, Friday’s defense of school boards, and other bad press filled the second.⁹³

It was now Monday, October 18, and Nixon wanted to announce the nominations on Thursday. A revolt against Lillie and Friday was brewing inside the White House and on the Hill, as well as at the ABA. From the President's legislative team, Chuck Colson reported to Ehrlichman that he was "getting very negative sounds" on Herschel Friday and that his intelligence suggested that "we will have about the same kind of a line up we had in the Haynsworth and Carswell situations." As an additional problem, since Mitchell knew Friday, "there will be an allegation of cronyism with the Attorney General." The nomination would just give Democrats a stick with which to bludgeon the President, and they might defeat it. "As bad as I want to see an Italian on the Court (and Mrs. Lillie comes the closest to it), I think we will run into similar problems although nowhere near as severe." Colson thought the Senate would confirm her, though "not without bloodshed." Leonard Garment warned the President that whether Friday and Lillie had the qualities to succeed as Supreme Court justices was "largely guesswork" and that "there is a growing feeling" that Lillie "is not qualified." The shift from "the utopian activism of the Warren Court" to "the judicial realism of the Nixon Court demanded "not lesser but larger judicial minds and talents."⁹⁴

At his meeting with the President that Monday morning, Haldeman too raised doubts about both candidates. Lillie's critics were hammering away at her record. "Friday just has no distinction other than the fact that John Mitchell had known him," he said, and no one was sure he was conservative. Nixon reassured his chief of staff that "[o]rdinary people" did not worry about "whether a judge is mediocre or not." Unusually, Haldeman disagreed and said they now did "because of Carswell." To read the papers, Nixon insisted, was to think that "everybody in the country" was "just

panting” for the President to name his Supreme Court nominees when a pollster would find that the subject interested just 15% of Americans. “It’s not that big,” Nixon maintained. “And despite all the talk about it, Carswell and Haynsworth didn’t mean all that much either.” The seed Haldeman had planted had sprouted by the time he met with Mitchell that afternoon. “The Haynsworth and Carswell deal sort of rubbed off on me,” the President reminded his Attorney General.⁹⁵

But Mitchell bore unexpectedly glad tidings. Burger was singing a different song about Lillie, the Attorney General announced. The Chief Justice had been ill when he threatened to resign, and he had resolved to stay in bed “and not add to our problems.” (Whether Burger had really changed his tune was doubtful: Dean subsequently learned that he had lobbied at least two members of the ABA Federal Judiciary Panel to oppose Lillie).⁹⁶

Yet there was bad news as well. ABA Standing Committee on the Federal Judiciary Chairman Walsh doubted the Bar would rank Lillie “qualified,” though he had been unable to name any woman in her age group who was. Tribe’s memorandum had dealt her a mortal blow, though the Harvard professor insisted that his work “formed but a part of a large mosaic--pieced together throughout the country--pointing toward the same general conclusion,” and that “many” deserved credit for revealing her inadequacy. “Holmes and Brandeis dissented,” Nixon now illogically informed Mitchell, “so they would have been reversed. Bullshit reversal rate. Goddamn them.” It was not just the “mediocrity issue,” Mitchell stressed. Falcone required further investigation. The committee chairman had reported that interest groups were challenging the candidates too: Walsh had just received an urgent letter from Roy Wilkins and the Leadership

Conference insisting that “mediocrity on the Court is a civil rights issue. Progress has been made in the last two decades because of the preeminent stature and prestige of the Court,” and endangering that stature and prestige would jeopardize the future. Walsh had informed Mitchell that he doubted the ABA would rank Friday highly, though perhaps it might award him a lukewarm “not opposed” rating. “You know these son of a bitches are all looking for somebody that’s nationally known,” Mitchell said. “I don’t think the appointment of the first woman should be of a woman the bar says is not qualified,” Nixon now informed Mitchell, and “I think they’re going to rip Friday up.”⁹⁷

“A Day They’re Going to Remember”

“One thing I want to do is surprise them,” the President said of the ABA, his other critics, and reporters, before adding the obvious: “I want to screw them.” Lewis Powell was a nationally known lawyer based in Richmond, Virginia and past president of the American College of Trial Lawyers, American Bar Foundation, and the American Bar Association. “You think Powell’s the best man?,” Nixon asked that Monday. “I guess,” Mitchell answered skeptically. What did Burger think of him? The Chief Justice saw Powell as “mature” and “tough,” the Attorney General said. “I know that’s a bit of a shock to you,” Nixon now volunteered apologetically to Mitchell, but Powell was the right choice. Who cared if he was a year older than Burger? “We won’t desert the South. I think Powell is perfect for that reason, and I’ll just take the easy older man.” Nixon decided to substitute Powell for Friday. “Virginia means a little more to us than Arkansas,” Mitchell assured him, and no one could call Powell undistinguished.

Even now, however, Nixon was not quite ready to give up Lillie. “Should we make a deal with Walsh if I can?,” Mitchell asked. “Yes. Yes sir,” Nixon enthusiastically

replied. “Don’t you think that really would be better? Then we can say, look, you’ll get her, we’ll give you Lewis Powell. Just say ‘we just don’t want the bar to say that a woman is unqualified.’”⁹⁸

Here was a solution born of desperation. Powell had already said that he did not want to serve on the Supreme Court in 1970. What if he declined, and/or what if the Standing Committee on the Federal Judiciary disappointed the President about Lillie? Over the next two days, as they became increasingly frantic, the President and Mitchell tossed around several possibilities.

One was 45-year-old Senator Howard Baker, the Tennessee Republican who had almost defeated Hugh Scott and become Senate Minority Leader. “He’s no crook,” Nixon rationalized, and the ingrown Senate would not defeat Baker’s nomination even if he were. Besides that, Scott would throw himself into winning Baker’s confirmation “to get him the hell out of the Senate.” Robert Byrd would feel “burned,” but Baker was a “good leader” and “a very persuasive political guy, and you know that court is political as hell.” The President thought he would make “a damn good judge.” Was the Tennessean really conservative?, Mitchell wondered. Nixon thought so. In any event, the President predicted, he would side with the Administration more often than Potter Stewart.⁹⁹

Another option, the President mused, was William French Smith, “a hell of a good looking man,” who had gone to Harvard Law School and chaired the University of California Board of Regents. Anyone who could ride herd on that group, Nixon reasoned, must be “a pretty good politician.” No need to check up on him or submit his name to the ABA, the President said. Did Nixon know anything about Smith’s clients or

background, Mitchell asked? Was that information necessary, the President wanted to know? Smith was the senior partner at one of the two leading Los Angeles law firms, Gibson, Dunn and Crutcher.¹⁰⁰

Another was William Mulligan, the former dean of Mitchell's alma mater, Fordham Law, "a good Catholic school," whom Nixon had recently put on the Second Circuit. "Every play we make to those Catholics" could help, the President and his Attorney General agreed. Nixon also liked the fact that Fordham was not top-tier because "this number one law school bullshit is getting me down." Though Mitchell worried critics might call Mulligan mediocre, Nixon (naively) believed that any dean would impress the bar. He also reasoned that the deans of other Catholic law schools would rush to Mulligan's defense.¹⁰¹

The only appointment that would really pay off politically, the President and Attorney General agreed, was a woman. So in the meantime, Nixon was sticking with Lillie, provisionally, and moving ahead on other fronts. But on Tuesday, while the Attorney General was interviewing Baker as a possible fallback, the President telephoned with new information. A friend of his who was "a big wheel" in the Los Angeles bar had told him Lillie "would get a bad rap" from its members. That could say more about the bar than Lillie, Mitchell observed. "The bar may take us off the hook on the damn thing," Nixon now said hopefully. If Lillie received a "not qualified" rating from the Standing Committee on the Federal Judiciary, the White House and Justice Department could leak it, and women would blame the ABA, not the Administration. He had definitely turned against her. "[T]hings are not going well with the bar, as you might

expect,” Mitchell advised Nixon. “They’re going to turn Lillie down, aren’t they?,” Nixon asked. The Attorney General believed so. “Fine,” the President said.¹⁰²

The following day, the ABA made its evaluations official. The Standing Committee on the Federal Judiciary split 6-6 on Friday, with half its members reporting him “not qualified” and the other half declaring itself not opposed to his nomination. “Why do you think they pissed on Friday?,” Nixon wondered. “Civil rights,” Mitchell answered. “Well, they’ll do the same on Powell then, won’t they?,” Nixon asked. He too had a history of involvement with southern school boards seeking to slow desegregation. “Nobody’s going to have a chance,” Mitchell laughed. The Administration would use this sorry episode as an excuse to terminate its practice of asking the committee to pre-screen potential nominees. It would move ahead, Nixon agreed, without bothering with “all those kikes” at the ABA. “Boy, did Mitchell get burned,” the President told Press Secretary Ron Ziegler. “This whole thing with the ABA is his idea, not mine.”¹⁰³

The vote against Lillie proved even more damning, with eleven members deeming her “not qualified.” Leak that, Nixon directed: “She’s the best qualified woman, but she’s not qualified for the Supreme Court. Jesus, that’s great.”¹⁰⁴

As the President hoped, the news of the ratings hit the press on Thursday, October 21, the day he planned to announce his nominations. When the ABA accused the Justice Department of releasing the information, Mitchell maintained that neither his department nor the White House had done so. Nixon enjoyed the machinations. He directed Ziegler to say that given the President’s own background as a lawyer schooled in the attorney-client privilege, the ABA’s lack of respect for confidentiality had dismayed him. He also

wanted Ziegler to take advantage of a New York Times report that morning that he was set to nominate Herschel Friday that day and that Lillie's candidacy "might be faltering." "Be sure to keep them haring off in the wrong direction," the President directed. "We'll give them a day that they're going to remember."¹⁰⁵

On Tuesday, October 19, Mitchell had sounded out Powell and Baker—a combination that Nixon labeled "Southern strategy with a vengeance." Powell remained unenthusiastic. In fact, by his account, he twice told Mitchell no that day and recommended that the Administration proceed with Herschel Friday. He and his wife did not want to move to Washington. He preferred his life as a lawyer to that of a judge. Civil rights activists would criticize his tenure as chair of the Richmond School Board and the Virginia State Board of Education, his condemnation of Martin Luther King's embrace of civil disobedience, and his membership in an all-white country club. Liberals would assail his client roster of huge corporations and his investments. He had \$1 million in stock holdings (nearly \$6 million in 2016 dollars), and he had seen what happened to Clement Haynsworth. He had already turned the job down on grounds of age the previous year, and he was older now. When his name bubbled up again after Harlan and Black retired, Powell had written his children, "I feel strongly...that a younger man should be put on the bench at this time when we have had a long period of ultra liberal control on the Court" so that the President could restore a "reasonable balance" to it. Moreover, Powell had a serious, deteriorating eye condition, and he had to check with his doctor.¹⁰⁶

Where Powell thought he had turned down the nomination, Mitchell had heard a maybe—or so he reported to the President. “Powell will do it if he possibly can,” he informed Nixon. But he had to speak with his doctor about his eyes. Obviously sensing Powell’s responsiveness to the call of duty, Mitchell had told him how much his appointment would benefit the country. “I think if you called him up and asked him, he would do it if he was blind,” Mitchell informed Nixon. By now, the President had embraced the Powell prospect. “It would give us a terribly prestigious appointment,” he enthused. “[T]wo years of Powell is worth twenty of anyone else, and that’s the damn truth.”¹⁰⁷

Baker, Mitchell reported to Nixon, had been “knocked...off his feet with surprise,” and he did not want to join the Court, either. Baker had pointed out that a justice’s \$60,000 salary would be cut in half by taxes, to which Mitchell had replied that he could supplement his salary by writing articles and giving talks, à la Justice Douglas. (Nixon added that they could “arrange” some additional money.) The senator then disappeared for the rest of the day and, though he had promised to telephone Mitchell by 5 P.M., was unreachable all evening. But Mitchell seemed more worried about Powell than Baker. What if they got the latter, but not the former, he asked Nixon?¹⁰⁸

One option, the Attorney General now added early Tuesday evening, was “this Bill Rehnquist over here that everybody is so high on.” (John Dean and White House aide Richard Moore were promoting him). The 47-year-old was an “arch-conservative,” a “tough guy,” had excelled at Stanford Law. According to Mitchell, Lawrence Walsh had even asked why the Administration did not nominate someone like Rehnquist. It was a change in tune for Mitchell. “It’d be a great appointment,” the Attorney General had

originally told the President after Nixon mentioned that Senator Barry Goldwater had recommended Rehnquist, a fellow Arizonan, early in October, “but what the hell do you get out of that, politically?” It was the President who waxed lukewarm now about how the man he variously referred to as “Renchburg” or “Rensler” and complained “dressed like a clown” could help him. “[H]ow the hell could you just put a guy who’s an assistant attorney general on the Court?,” Nixon asked. Smith and Mulligan interested him more.¹⁰⁹

That Tuesday night, the President thought he might have nailed down Powell. Unlike LBJ, Nixon did not enjoy lobbying people to accept jobs, but he made an exception in this case. “Warren Burger is extremely anxious to have a top-flight appointment at this time, and what happens in the next five years is terribly important,” the President telephoned Powell to say. While Nixon stressed what Powell could do for the Court, he also made it clear how much the criticism of his candidates had damaged the Administration. “Well, let’s put it quite bluntly, nobody could claim that you were a mediocrity,” Nixon laughed. Would Powell accept the appointment? “I think the answer is affirmative Mr. President,” Powell responded. “I am a fairly patriotic guy.” But he refused to commit until he spoke with his wife and law partners, and he also warned that Haynsworth’s opponents would be gunning for him. “[T]here will be plenty of black leaders who will think that I was not active enough in adding integration in Virginia.” Powell added, “I’m sure that the Attorney General’s office is familiar with what I have written.”¹¹⁰

Mitchell was not. There had apparently been no FBI checks or personal data questionnaires. At the very least, before making the announcement, the Administration

should have examined Powell's finances, public statements, and writings for matters that might spark controversy. No one did, more than superficially. Though Mitchell had at least looked at Powell's speech challenging Martin Luther King and knew he supported wiretapping by Tuesday night, the Attorney General could still not tell the President which law school Powell had attended. (The answer was Washington and Lee, where Powell was first in his class, with a year of postgraduate study at Harvard Law to appease his status-conscious father.) Nixon was so desperate to meet his self-imposed deadline that the Administration concentrated exclusively on persuading Powell, whom the President still considered "so old" and who would become the fourth most elderly Supreme Court nominee ever, to take the job instead of investigating his suitability for it. The President directed Mitchell to enlist Burger in persuading Powell and reported that the potential nominee had said that, whatever he decided, he appreciated the telephone call. "[T]hat worries me when he says that." Powell always told him that too, the Attorney General replied. The Virginian had not closed the door, they agreed, but Nixon did not know "how far" he had left it open.¹¹¹

On Wednesday afternoon, Nixon learned that Powell had accepted. "I wasn't expecting that," he remarked. That night, however, the Powells reconsidered. They did not want to leave Richmond or Jo Powell's elderly mother with whom they lived. The prospective nominee tried to withdraw Thursday morning before Nixon's announcement later that day. "The Attorney General received that news with obvious shock and displeasure and said that the matter had already passed the point of no return," Powell remembered. "He said the President had relied on my acceptance the previous afternoon; that he was committed to make the scheduled broadcast; and it would not be possible to

find a replacement for me in the course of a single day.” The Virginian reluctantly decided to allow the White House to proceed with his nomination.¹¹²

Actually, by that point, the President had a potential substitute. On Thursday morning, Howard Baker finally told Mitchell he would take the job, though he seemed only marginally more enthusiastic about doing so than Powell. “I don’t think it’s going to disturb him too much” if Nixon went in another direction, Mitchell observed. And after rejecting Rehnquist Tuesday afternoon, Nixon became belatedly interested in him when he learned that Rehnquist had served as a law clerk to Robert Jackson. Nixon admired Frankfurter’s partner in advocating judicial restraint and regretted that Jackson never became Chief Justice. Only one Supreme Court clerk, Byron White, had ever before become a justice, and Nixon’s aide, Richard Moore, told the President that appointing Rehnquist to the Court “would be an impressive thing.” And there was his record at Stanford. “Stanford’s an elite law school, right?,” the President asked, only to be assured that it was the Harvard of the West Coast. Consequently, Nixon could have chosen Baker and Rehnquist had Powell bowed out—though he and his Justice Department had still done little in the way of vetting either.¹¹³

Baker’s star, however, was falling and Rehnquist’s rising. How had the senator done in law school, Nixon now asked the Attorney General? Once again, Mitchell could not answer, though by now, he could tell the President that Rehnquist had ranked first at Stanford. If Baker “had an outstanding record, so that I can say that he and Powell both had outstanding records, that’s one thing,” Nixon added. “But if it’s a jackass record,” he would choose Rehnquist and send Baker word he could join the Supreme Court if he wished when the next vacancy occurred. Powell and Baker would give him “two

Southerners, which is not good,” while Powell and Rehnquist would give him one “man who’s unknown, but with a hell of a record.” By conversation’s end, the President had resolved to opt for the record, though, Rehnquist’s WASP background disappointed Nixon because he still wanted a Catholic. “Tell him to change his religion,” the President kidded Mitchell, and get him “baptized,” “castrated” or “circum...” “No, that’s the Jews,” Nixon remembered of circumcision, just in time.¹¹⁴

By now, though, the President had become anxious about the very leaks in the White House and Justice Department that had recently served his interest. He resolved to discuss the candidates only with Mitchell and Richard Moore. Not even Haldeman would know their identities. Nixon would write the speech himself. “Are you going to ignore the Bar?,” Mitchell wanted to know. “I’m not even going to mention the Bar,” Nixon responded. When Ron Ziegler told the press just before noon that the President had reached a decision and would address the nation that evening, the press secretary pointedly observed that the Constitution gave the Senate the duty to consent to the nomination, not the ABA.¹¹⁵

What about the also-rans Nixon had hung out to dry? After Lillie had been dragged through the mud and the President had announced his nominees, Mayor Yorty blasted the Administration’s “shoddy” treatment of her, and the president of the Los Angeles County Bar Association belatedly held a news conference to declare, “The bar wishes the public to know it has the utmost confidence in the integrity, dedication and conscientiousness of Mildred L. Lillie.” Even Friday’s most implacable local foe, the Arkansas Gazette, decried the “abominable” way Nixon had handled the nominations. Friday himself had been informed that the White House would telephone him an hour

before the announcement. As friends met at his house in anticipation of a celebration and reporters gathered near his front lawn, the telephone rang. It was not Nixon, but Mitchell, who characterized it as “the hardest telephone call” he would ever make and blamed the ABA rating. “What happened?,” the lawyer’s friends shouted as he put down the receiver. “It didn’t turn out the way we thought,” his wife remembered him saying nearly a quarter-century later. “He had on his face his little smile that I knew meant he was very hurt.” A class act, Friday expressed the hope he had not “brought any discredit to the state” and defended the ABA. His wife and partner were less restrained, describing him as most hurt by the rating of the Standing Committee on the Federal Judiciary after he had devoted so much effort to the Association for nearly two decades.¹¹⁶

Soon after Mitchell’s call, Nixon announced he had selected Powell and Rehnquist. “Presidents come and go, but the Supreme Court, through its decisions, goes on forever,” and “[b]y far the most important appointments” they made were to the Court. Consequently, two criteria had guided him. The first was excellence, the need to people the Court with “the very best lawyers in the Nation.”¹¹⁷

The second was “judicial philosophy.” What did that mean? “I got here by not being loved,” the President informed Moore. “I’m not going to miss this opportunity to say that these two guys are conservative.” Sensing that “strict constructionist” had outlived its usefulness, Nixon replaced that label with “constitutionalist.” It was the justice’s duty, he emphasized, “to interpret the Constitution and not to place himself above the Constitution or outside the Constitution,” or “twist or bend the Constitution in order to perpetuate his personal political and social views.” Honest justices would differ about constitutional interpretation, he added, as did Justices Harlan and Black, the

“Constitutionalists” he was now replacing. Avoiding the swamp of busing, Nixon limited himself to law and order in explicating his views. “As a judicial conservative, I believe that some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society,” the President continued. “I believe we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals must always be protected.”¹¹⁸

Then, finally, the names. He was giving the Court a Southerner, a Westerner, and two individuals who had graduated first in their class from law school—one, a former clerk to Justice Robert Jackson, “one of the most outstanding members of the Supreme Court in the past half-century” and “the President’s lawyer’s lawyer;” the other, a lion of the bar who reminded the President of another Virginian, Chief Justice John Marshall. Nixon closed with the admonition that “it is our duty as citizens to respect the institution of the Supreme Court of the United States.” As soon as the President concluded his fourteen-minute speech, Mitchell informed the ABA that the Administration would no longer submit potential nominees before the President sent them to the Senate.¹¹⁹

The next day, Nixon addressed a “disappointed, but resigned” audience of several thousand, who belonged to the National Federation of Republican Women. He felt “somewhat lonely,” he volunteered, because he was the only man on the dais. “I must say that’s a better break than a woman gets when she goes before the American Bar Association,” he quipped--before suggesting that when the Association’s “jury of 12 decides on the qualifications of individuals that the President of the United States, through the Attorney General, submits to them for consideration, the jury should have at least one woman on it.” He knew that many in the audience, including the First Lady,

wanted to see a woman on the Court, he continued. After all, the women in attendance mobbed Martha Mitchell, who made her disappointment at the failure to select both Lillie and Friday obvious. (“Your wife gives the impression that you let her down,” the Attorney General, who introduced himself as “Mr. Martha Mitchell,” was told by a guest. “She may have given you that impression, but she gave me hell!,” he affirmed.) Nixon stressed to the National Federation of Republican Women that “we have made a beginning. There will be a woman on the Supreme Court,” he promised. Mitchell repeated that message Mitchell too.¹²⁰

For the present, the President and his Attorney General signaled, it should be enough that Nixon had launched serious discussion of that prospect, revealed the sexism of the Establishment bar, divided the Democrats with his Byrd decoy, guided the media down the proverbial garden path, and named two conservatives who led their class. (As ever, Nixon disdained hierarchy at the same time it held him in its thrall. He privately told Burger that he had been third in his class at Duke and that class rank meant “nothing.”) The President also instructed Mitchell and Pat Buchanan “to emphasize to all the Southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is.”¹²¹

And though some might say that Nixon and Mitchell had been searching for Southern bigots or incompetents, the nominations made the harrowing selection process worthwhile for Burger. “I think all of these distasteful things will fade away,” the Chief Justice told Nixon. “I think all of us listen too much to the Washington Post—in Iowa and across the country they get it straight from the President. These two nominations are just tops.” Powell had said that he could no longer work over 50 hours a week, Nixon cheerily confided to the Chief Justice, but he would have clerks. “He doesn’t have to read

the fine print. What you need him for is conferences.” Obviously, the President did not know much about how the Supreme Court went about its business, and the appreciative Chief Justice did not bother trying to educate him.¹²²

Others shared Burger’s thankfulness. Pat Buchanan chortled that liberal commentators like Eric Sevareid and Dan Rather who had talked of a crisis if Nixon named Lillie and Friday were “swallowing their spit” after the President’s announcement. They now predicted confirmation, though Rather marveled at how the President “managed to cause so much controversy, so much division, so many hard feelings, so much potential political damage to himself and...to the Nation’s institutions.” (Nixon’s answer: “the President did not cause the controversy, the press did!”) An internal White House memorandum summarizing press and editorial reaction found consensus that the choices represented “both a surprise and an improvement upon those expected to get the nod,” and that the “approving” reaction reflected “relief.” But there was no media agreement, the memorandum made clear, on whether the six names submitted to the bar had represented “a smokescreen” or whether the President really had intended to choose Lillie and Friday, though an “increasing number” correctly believed he did and credited the ABA and Senate opposition for his turnaround. “In several cases, usually from those generally critical of the Admin, the pre-choice handling of the nomination is sharply rapped as a ‘curious charade’,” the memorandum reported—or, as the New Republic put it, “slapstick, banana peel and all, directed by Keystone Kop Mitchell.”¹²³

The hard part was over now. When the opposing party controls the Senate, the Administration generally struggles more in winning the confirmation of justices than in

choosing them. In this case, however, Nixon experienced more difficulty as he careened from candidate to candidate in the selection phase. That was why the Administration ultimately had to settle for one individual Nixon had always dismissed as too elderly, Powell, and another, Rehnquist, the President considered obscure.

In contrast, winning the confirmations of Rehnquist and Powell proved relatively easy. The liberal network had spent its energy on fighting Haynsworth, Carswell, Poff, and the six individuals on the ABA's list. Ironically, Rehnquist looked more conservative than Haynsworth or Carswell. But as one activist pointed out, "[i]t takes time to dig out the facts and to collect and excerpt a nominee's public statements, to pass them around and explain them to potential allies in the fight," and liberals lacked it. Grateful to be spared Lillie and Friday, senators were now anticipating the Christmas recess. Moreover, as LBJ had believed in 1968, and Hugh Scott told Nixon in 1971, sometimes a President more easily sells two Supreme Court nominees together than just one. The two can complement and compensate for each other. Senate Judiciary Committee Chair Eastland made sure Powell and Rehnquist did in this case by scheduling their confirmation hearings together. In the words of Deputy Attorney General Richard Kleindienst, Eastland held "the confirmation of the popular Powell hostage to the confirmation of Rehnquist."¹²⁴

The American Bar Association Standing Committee on the Federal Judiciary had resolved to press ahead with its evaluations of Rehnquist and Powell for the Senate with or without Administration encouragement. It did not view them as equally desirable. Committee members unanimously bestowed on Powell their highest rating. In contrast, while no one doubted Rehnquist's intelligence, some apparently questioned his devotion

to civil rights and civil liberties. Nine members declared him “one of the best persons available for appointment to the Supreme Court,” but three would say only that he was “qualified.”¹²⁵

Rehnquist was indeed vulnerable, though in the rush, there was little time to expose that. The Washington Research Project dispatched Rick Seymour to explore how the nominee had behaved in the brass-knuckles atmosphere of Phoenix politics, where Republicans in the early 1960s were frequently accused of preventing minorities from voting. There was talk that from the time he became involved in Arizona politics through the 1964 Goldwater-Johnson race, Rehnquist himself had engaged in voter intimidation of African Americans and Latinos. According to civil rights activists in Phoenix, he had also opposed a public accommodations law in 1964, a move to integrate its schools in 1967, and the open housing legislation of 1968. Feminists also mistrusted Rehnquist, though once again, no one much cared.¹²⁶

Then there was his record as Assistant Attorney General. It wasn't just that Rehnquist had ineptly investigated four individuals Nixon intended to nominate to the Court—Haynsworth, Carswell, Friday and Lillie. He was also suspected of involvement in the Administration's attempts to remove two liberals, Fortas and Douglas, from the bench. He had publicly decried the Warren Court and demanded the repeal of the exclusionary rule. He had denounced the “barbarians of the new left” who practiced civil disobedience, defended the Administration's mass arrest of thousands of demonstrators against the Vietnam War in 1971, warned federal employees who criticized the war that they might lose their jobs, and claimed that the President could constitutionally send troops into battle without consulting Congress. He had told one Senate committee that

the federal government had the unlimited right to collect data on anyone it wished and championed wiretapping. He had also drafted a possible constitutional amendment to ban “forced busing to achieve racial balance” in public schools, though reporters and the public would not learn that until 1972.¹²⁷

The Leadership Conference on Civil Rights and NAACP would oppose him. So would the ACLU, which had never before fought a candidate for public office—a step it would not take again until President Reagan nominated Robert Bork as a justice in 1987. But one did not need to belong to the liberal network to predict that Rehnquist would encounter rough sledding before the Senate Judiciary Committee. Reporters assumed that Rehnquist, himself a longtime advocate of forceful questioning of Supreme Court nominees, would receive “the third degree” as he sought to explain his controversial views.¹²⁸

Compared to Rehnquist, confirming Powell looked like a snap. That was why Eastland made the Senate take up both nominations jointly and scheduled Powell’s appearance before the Senate Judiciary Committee first. “If a separate hearing had been held for each nominee,” Deputy Attorney General Richard Kleindienst remembered, “Powell’s would have been concluded in one day; Rehnquist’s perhaps never,” particularly with the specter of the 1972 election looming.¹²⁹

Yet as Powell realized, he was not unassailable. He and his partner talked with Clement Haynsworth, who “said the mistake he made was in not preparing himself to testify in the same way that you would prepare for a major trial” and that “he had not been told, even by the Justice Department, the type of examination that he could expect from members of the Judiciary Committee.” Consequently, Powell drafted lawyers in his

firm as his “staff” to get him ready for confirmation and anticipate every senator’s question. He did not count on an easy time in front of the Judiciary Committee for all the reasons he had given Nixon and Mitchell when he argued against his own appointment. Additionally, liberals knew, Powell had publicly disparaged some Warren Court’s criminal procedure decisions. He had also denounced the “outcry against wiretapping” as “a tempest in a teapot,” and declared that “the radical left” had created a myth of government repression, and “law-abiding citizens have nothing to fear.” Civil rights activists, civil libertarians, labor, feminists and liberals all viewed him skeptically—though less critically than Rehnquist, and some in the civil rights community actively supported Powell. But what if liberals uncovered the summer 1971 confidential memorandum the Virginian had written for the Chamber of Commerce claiming that “Communists, new leftists and other revolutionaries” had mounted a “broad, shotgun attack on the system” and setting out a road map by which businessmen could “conduct guerilla warfare” against the propagandists? Jack Anderson, who publicized the memo after it was leaked to him in 1972, thought it might have raised questions about Powell’s evenhandedness towards business.¹³⁰

Powell’s biographer shrewdly observed that the Virginian needed Rehnquist. Rehnquist’s youth made up for his age—though Powell’s advanced years also made him seem less threatening. As James Eastland said, “all those liberals” supported the Richmond lawyer because he was “old” and they thought he would die soon. Even more important, Rehnquist’s evident conservatism distracted liberals from focusing too closely on Powell’s record. Rehnquist shielded Powell, but the Administration still sent out FBI

officials to question Laurence Tribe, Rick Seymour, Marian Wright Edelman and others about whether they planned to fight both nominees.¹³¹

The presentation of the nominees as two halves of the same walnut to the Senate Judiciary Committee served the Administration well. Powell had a relatively easy time of it. For his part, Rehnquist denied he had intimidated Arizona voters, and Seymour, whose research revealed that the nominee had tried to stop his fellow Republicans from doing so, considered the charge unfounded. Rehnquist also claimed that his votes had changed since he opposed the open accommodations law. Further, he fenced ably with senators who asked him whether he would roll back “the march of progress” made by the Warren Court. The nominee volunteered that since Brown v. Board of Education had been “unanimous” and “repeatedly reaffirmed,” there could “be no question but what that it is the law of the land.” Meanwhile the Attorney General cited the attorney-client privilege in defense of his refusal to testify to Rehnquist’s work at the Justice Department.¹³²

A small roadblock materialized after Rehnquist had testified when the NAACP released two affidavits from African Americans attesting to the nominee’s intimidation of black Phoenix voters in 1964. Nina Totenberg also produced “two highly respected members of the Negro community in Phoenix,” a minister and his wife, who told her, and swore in affidavits submitted to the Senate Judiciary Committee, that if the man harassing African American voters in 1964 had not been Rehnquist, “then ‘he was his twin brother.’” These allegations, along with the discovery by Seymour and a graduate student that Rehnquist was on the mailing list of Arizonans for America, a right-wing group that included many John Birchers, helped to justify Rehnquist’s opponents’

demand to postpone reporting the nomination out of committee for a week. Yet the appearance of a name on a mailing list was thin gruel, and Rehnquist submitted written answers to the Judiciary Committee denying membership in either Arizonans for America or the John Birch Society. His proponents also had their own witnesses to declare him innocent of voter harassment. As Totenberg said, both the Senate Judiciary Committee and the media paid “relatively little attention” to the matter. (The accusation of voter intimidation acquired more weight at the time of Rehnquist’s Chief Justiceship nomination in 1986. At that time, the former U.S. attorney of Phoenix, a Democratic appointee of JFK’s, reluctantly testified before the Senate that the nominee had indeed intimidated Latino and African American voters in South Phoenix).¹³³

As expected, the Senate Judiciary Committee unanimously endorsed Powell and a majority supported Rehnquist over objections articulated by a quartet comprised of Birch Bayh, Philip Hart, Ted Kennedy and John Tunney. After the one-week delay, Rehnquist’s nomination was reported out with only those four opposed. No one expected hostile senators to prevail on the Senate floor. Consequently, one Administration official cheerily told the President on December 4, “It now seems certain that the ‘Conservative Twins’ will join the ‘Minnesota Twins’ on the Supreme Court before the end of the month.”¹³⁴

On Monday, December 6, the day before the Senate was to vote on Powell, though, Washington began buzzing with a new story about Rehnquist. Someone had alerted Newsweek’s Robert Shogan to a memorandum in Justice Jackson’s Library of Congress Papers that Rehnquist had written when he was Jackson’s clerk as the Court considered Brown. It defended the “separate but equal” doctrine the Court lay down in

Plessy v. Ferguson that Brown famously overruled. The memo maintained that Thurgood Marshall and others seeking school desegregation were asking “the Court to read its own sociological views into the Constitution” and urging on it “a view palpably at variance with precedent and probably legislative history.” The conclusion startled many, given the sacred role Brown had assumed in constitutional discourse and American history: “I realize that it is an unpopular and unhumanitarian [sic] position, for which I have been excoriated by ‘liberal’ colleagyes [sic], but I think Plessy v. Ferguson was right and should be reaffirmed.”¹³⁵

Confronted, Rehnquist insisted in a letter to Eastland that the Judiciary Committee chair read aloud to the Senate on Wednesday, December 8, that “I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision.” The “I” in the memorandum, he maintained, referred to his boss. Rehnquist was expressing Jackson’s “tentative views” before he had abandoned them to join his brethren, and he had drafted the memo at the justice’s direction. Jackson’s longtime secretary, Elsie Douglas, immediately called the nominee a liar, and most scholars have concluded that she was correct.¹³⁶

What if the memo had surfaced before Rehnquist testified under oath to the Senate Judiciary Committee? What if he had not attributed it to Jackson? And what if he had not pledged allegiance to Brown? Would the Newsweek revelations have sunk his nomination? Probably not. To be sure, the Rehnquist confirmation did confirm the special place Brown had come to occupy in constitutional culture. As Brad Snyder has written, ironically, Rehnquist canonized Brown.¹³⁷

Nevertheless, reporters understood that Bayh, the leader of a quixotic filibuster against Rehnquist backed by the Leadership Conference, was waging “a losing battle.” Journalists observed that even the nominee’s antagonists agreed they had not persuaded the public or the Senate “that Mr. Rehnquist was dangerously insensitive to individual freedoms and civil rights.” For his part, Bayh insisted that “under normal circumstances, if it were not the tail end of a session, if all of us were not so anxious to return to our constituents and families,...the Senate would be up in arms” over the Newsweek revelations.¹³⁸

The Senate clearly wasn’t. In fact, as soon as the article appeared on Monday, and even before Eastland read Rehnquist’s letter in the chamber, William Proxmire of Wisconsin, a maverick Democrat who had voted against Haynsworth and Carswell, surprised the Senate. He signaled that he would vote for the confirmation of Rehnquist, who had been born and raised in Milwaukee. The White House still counted “70 for, 23 opposed, 5 undeclared and 2 absent.” On Wednesday, the count was 69 for, 18 against, 10 undecided and 3 absent. That senators wanted to leave town and that Majority Leader Mansfield had promised to hold the vote on the nominee before letting them do so was helping. So were Rehnquist’s credentials. Laurence Tribe, for one example, wrote the Boston Globe to deny he was building the kind of case against the nomination that he had helped to develop against Lillie. “Though I personally believe he should not be confirmed, I am undertaking no systematic effort to press that view on others since I believe that, despite my ideological differences with Mr. Rehnquist, his appointment by the President at least reflects a standard of intellectual excellence and legal distinction that shows respect for the Supreme Court as an institution.” As Joe Rauh put it, law

professors did not mobilize against the nominee because “[t]hey think that a reactionary A student is better than a reactionary C student.”¹³⁹

Rehnquist’s critics were speaking to an empty chamber, anyway. Beyond unveiling the nominee’s letter to Eastland, his supporters did not even dignify the charges against Rehnquist with responses. Most senators did not want to go to the mat with the President over another Court pick. Chuck Colson was not just flattering Nixon when he said that Rehnquist’s survival was “more a reflection on you than Rehnquist.”¹⁴⁰

The Senate still approved of Powell more. He won confirmation by 89-1. When the President contacted Powell, the Virginian embodied modesty. “I’m very much aware that I’m the beneficiary of some opposition to Rehnquist,” he said.¹⁴¹

Rehnquist’s vote proved narrower, 68-26. Chief Justice Hughes had received exactly the same vote, Nixon assured Rehnquist in a congratulatory telephone call on December 10. “Just be as mean and rough as they said you were.” _ABC News announced that “[a] long era of liberalism on the Court may have come to an end.”¹⁴²

That Nixon recognized the flaws in the process that led him to celebrate two afterthoughts soon became evident. He anticipated three additional vacancies. “There is Douglas—Powell will be over 70—at least one [justice—Marshall?] has serious physical disabilities,” he reported to his speechwriters. “Let me tell you about...future appointments,” he directed Burger when they got together in the summer of 1972. Without “consulting any of your other colleagues,” the Chief Justice should ready himself for vacancies. “I don’t want to have a situation develop where we have an opening, and we don’t have three or four good names.” Nixon himself “wouldn’t have thought of Rehnquist,” he confided, but he wanted more justices like him. Forget about

the Jewish seat. “[I]f it comes down to the question of just picking a Jew because he’s a Jew, I’m not going to do it,” particularly since Nixon already employed plenty of them already. “I am not going to go for this business, except on the color—the black thing. You have to have a black for a black.” Burger sympathized. “Getting a really outstanding Negro is harder than getting the outstanding Jew,” the Chief Justice remarked. Burger should take a look at William Brown at the Equal Employment Opportunity Commission, the President instructed. The Chief Justice should remember William French Smith for vacancies other than Marshall’s and also that “I want to move away from the Ivy League.” Burger volunteered that his opinion of White had improved. If his plane went down, “Byron White would be the guy unless you brought in somebody from the outside.”¹⁴³

Of course, Burger did not die, and no more vacancies materialized. After 1971, the membership of the “Nixon Court” remained static. As Fred Graham wrote privately, that meant anyone interested in “the theme of the turnabout caused by the new Nixon appointees” must focus on “Warren Burger’s pompous conniving; Harry Blackmun’s timidity; Lewis Powell’s aristocratic manipulations; [and] William Rehnquist’s Teutonic conservatism.”¹⁴⁴

Still, in the second half of the twentieth century, only Eisenhower named more Supreme Court justices. For Nixon, that was insufficient. “The main point that I am afraid that you and your colleagues have not considered is that in our elation over finally having the ‘Nixon Court’ we are now stuck with whatever decisions the new Supreme Court majority hands down,” the President scolded top advisers after the Powell and

Rehnquist appointments. Like senators and representatives, “Supreme Court Justices are softened up by the media they read, the communities they live in, the parties they attend, and the very air they breathe on the Potomac. It is bound to happen to one or more of our new majority on the Court and then we will have lost the ball game.”

Regardless of whether the President correctly diagnosed the reasons for change, he did identify a problem. Within four years, a “softened” Blackmun had declared his independence from Warren Burger. Powell also proved more “centrist” than conservative. A year after his arrival, he handed down an opinion as circuit justice rejecting the attempt by the Augusta, Georgia school system to delay busing its students in compliance with Swann. Nixon publicly attacked “the Powell decision” and used it to justify obviously anti-busing legislation of dubious constitutionality that he was vainly proposing as the Presidential election loomed.¹⁴⁵

But what did Nixon think the ball game was? The scattershot and incoherent way he dealt with the Supreme Court reflected both Administration ineptitude and his disinterest in most issues on the Court’s docket. As Kevin McMahon and Stephen Engel have stressed, despite his acrid rhetoric, the President remained most invested in the Court for strategic political reasons. Beyond that, he cared about it very little, if at all. So, while it was ironic that the Court that Nixon helped create led to his own resignation by forcing him to turn over the Watergate tapes in a unanimous opinion, it was not so startling that it also upheld busing as a means of achieving racial balance in schools outside the South, respected some rights of criminal defendants, and constitutionalized the right to abortion (which the President worried fostered “permissiveness” but thought was necessary to get rid of interracial babies and those conceived in rape).¹⁴⁶

Like many, but not all, historical topics, the Burger Court seems more important as it recedes in time. Constitutional experts in the 1980s portrayed it as the “counter-revolution that wasn’t” because they believed that the Burger Court did not roll back Warren-era jurisprudence. Equally distinguished scholars today emphasize its erosion of the equality that undergirded Warren Court opinions. They show that the Burger Court chomped, rather than nibbled, on its predecessor’s desegregation and criminal procedure decisions. By protecting corporate speech in political campaigns, Burger and his colleagues also lay the foundation for the Roberts Court’s transformation of the electoral process in the next century.¹⁴⁷

Yet the opportunity to exploit the Court for political reasons engaged Nixon. It appealed to him at least as much as the chance to create a new body that confirmed or undercut the legacy of its predecessor—depending on which scholars have described the Burger Court, when they have written, and where they have looked. The President attacked the Warren Court as part of his drive to make the GOP the majority party, and he used seats on the Burger Court to cultivate constituencies and to compensate for disappointments he inflicted on conservatives. But as Rehnquist’s letter affirming Brown showed, the Warren Court did not go away, and neither did the sixties.

Epilogue

Surely no one who has read this far would say that Johnson and Nixon provided a model for how Presidents should choose Supreme Court justices. True, given LBJ's interest in controlling the Department of Justice, securing intelligence about the Court, celebrating a friend, and supporting the Warren Court majority, Abe Fortas represented an excellent choice in 1965. Still, most probably agree that contemporary justices should be less involved with the Presidents who appoint them than Fortas was with LBJ. A justice who can't break the habit of advising a President risks damaging the Court by disclosing its secrets and possesses less time for its pressing business. Thurgood Marshall represented an inspired selection for 1967. But if Johnson wanted to reward Fortas in 1968 by making him Chief Justice, the President should have coupled his nomination with someone other than Homer Thornberry. And if LBJ hoped to maintain the ideological direction of the Warren Court, he might more prudently have nominated another Chief Justice altogether. Nixon did not score enough political points by naming Clement Haynsworth and Harrold Carswell in 1969 and 1970 to compensate for the damage those two nominations did to his Administration. In 1971, he just floundered until he happened upon Lewis Powell and William Rehnquist.

Thankfully, future Supreme Court nominee hunts occurred less haphazardly—though as one Attorney General said, the element of “Russian roulette” remained, as searches uncovered numerous “qualified” prospects, and Administration lists and rankings of prospects changed. Nixon did not really care whether his nominees were qualified. Both the Nixon and Johnson Administrations investigated potential nominees carelessly: Just as Nixon should have been aware of Carswell's 1948 speech, LBJ should

have known about Fortas's lecture fees. The contemporary nomination looks very different, thanks to more carefully chosen and vetted selections.¹

So why is the story set out here significant? Some scholars condemn the modern process of Supreme Court nomination and confirmation as a circus. As Elena Kagan famously did while still a law professor, they criticize the vague and vapid responses it elicits from nominees and "the selling of Supreme Court nominees" like toothpaste to pressure groups, the public and others. Perhaps our story shows that those who *celebrate* the contemporary process as one of democracy's triumphs are correct. Carswell might well have become a justice but for interest group mobilization. Maybe this book demonstrates that as messy as the modern process of Supreme Court nomination and confirmation became in the sixties, the system--at least as it existed through the Kagan confirmation in 2010--"worked" and we should rejoice, rather than regret, that it routinely came to involve not just the President and Senate, but interest groups, the media and the public during the sixties.²

Unlike lawyers, though, historians hate the argument that just because matters were one way in the past, they should stay that way in the present. As Herbert Gutman said, the value of "historical understanding is that it transforms historical givens into historical contingencies." Consequently, I would not say this story provides a justification for how things should be. It may, however, help explain how and sometimes even why they became the way they are—though any historian will stress the difficulty of decoding causation. As Senator Richard Durbin (D-Ill.) remarked in 2001, "congressmen, Senators and Presidents come and go. Supreme Court Justices hang around forever. The hand of Richard Nixon, who has been gone from this city in an

official role, is still on the Supreme Court 25 years later.” So is that of Lyndon Johnson. In my view, the story mattered for the Court. It helped shape the way the Warren Court is remembered. It may have influenced the nomination process, and it definitely affected the confirmation process.³

1 First Street, SE

The fallout from the confirmation battles of the sixties changed the Court as an institution by altering its membership, atmosphere, leadership and perhaps, its doctrinal output. Many inside the Supreme Court Building at 1 First Street had revered Earl Warren, a former governor who guided the Court with ease. Warren’s colleagues, a generation of law clerks turned law professors, and other scholars all but canonized him as the Court’s one true “Super Chief” after he left it.⁴

Even many of the young now claimed Warren as one of their own. As he stepped down from the Court’s helm in 1969, the Harvard Law Review editors dedicated the issue to “Chief Justice Earl Warren who with courage and passion led a reform of the law.” When Warren spoke at the University of California, San Diego in 1970 as antiwar sentiment engulfed the campuses, a student in Renaissance dress suddenly materialized with a trumpet. “For 35 seconds the notes of the cavalry charge echoed across the dark concrete,” the San Diego Union reported. Then the musician and his co-conspirators began unfurling a banner. “A hush fell over the throng, most of whom expected the worst in student graffiti, perhaps ‘F---k the Chief Justice,’” one professor in the audience recalled. But to UCSD administrators’ relief, the banner said, “‘Right on, Big Earl!’ The crowd roared its approval.” Warren beamed, then attacked those who believed that social justice was divisible from law and order.⁵

Warren Earl Burger wasn't there that day, but as at San Diego and in the law reviews, Earl Warren often upstaged him. In one instance in 1972, for example, Chief Justice Burger, who had appointed a blue-ribbon panel to study the problems of the federal judiciary, had but to seem supportive of its idea of a National Court of Appeals meant to improve the quality of the Supreme Court's opinions by reducing their quantity. In addition to resolving some conflicts between the circuits, the judges on the proposed "mini-Court" would screen all certiorari petitions to decide which cases the Supreme Court should consider. Instantly, Warren summoned into existence an army of his former law clerks to denounce this "junior supreme court." Like the Court-curbing proposals of the 1950s and 1960s, Warren charged, a National Court of Appeals entailed "a scuttling of the Supreme Court." And so, despite frequent complaints about overwork from Burger and the newer Nixon appointees, the proposal and others like it went nowhere.⁶

Even without Warren's shadow, many would still have objected to the new Chief Justice. From the beginning, complaints abounded about Burger's highhanded administration of the federal judiciary, his inappropriate lobbying for it, and the way he ran the justices' meetings. "All talking at once," Harry Blackmun recorded of "Conference" in 1970, and ten years later, "Such a kindergarten!" According to some, Burger also hogged the big opinions and, as in Swann, even changed his vote when he was in the minority to maintain control over assigning them. As these and other allegations filtered out to the media, the Chief Justice became obsessed with leaks. Though he once formed an Ad Hoc Committee on Court Secrecy to plug them, the disclosures about the Court's most sensitive opinions and its justices only became more sensational.⁷

Many of the most damaging stories involved Burger, who loathed most reporters and received terrible press. “I have been warned that the media will grasp any stick or stone to beat the Court—and me personally as the ‘lightening rod’ until we bow to their demands,” the Chief Justice confided to Justice Powell in 1979. One article in Time that November, “Inside the High Court: After a Decade It is Burger’s in Name Only,” was written with the cooperation of Justices Byron White, William Rehnquist, and Lewis Powell, who took the unusual step of speaking with the reporters together in the vain hope of producing a good story. “Byron, Bill and I did agree that it might be helpful, by conversation, to let the other Justices know that the three of us interviewed the reporters together, and that we actually spoke well of the Chief Justice as well as of the Court as an institution,” Powell recorded of their futile effort at damage control. They could only take comfort in their “combined judgment...that in light of the forthcoming Woodward/Armstrong book, the Chief’s concern about the Time article will subside into memory quite quickly.”⁸

Some solace. When published a month later, Bob Woodward and Scott Armstrong’s The Brethren: Inside the Supreme Court, did eclipse everything. But it also painted Burger as a paranoid, pompous dissembler who could not guide his colleagues, abused his power, and saw law as the basest form of politics. Despite the Court’s historic emphasis on protecting the secrecy of its deliberations, the book was written with the help of five justices and a multitude of clerks. The Brethren was a blockbuster, and as Justice Powell lamented, it made two points: “(1) the Chief Justice is an arrogant dunce, and (2) the Court is so torn by dissension and discord that it cannot perform effectively its constitutional duty. Each of these messages is totally false.”⁹

Were they? Of course, in the aftermath of the book's publication, the justices circled the wagons around Burger and insisted all was well. But whether or not the Chief Justice actually was an "arrogant dunce," the Blackmun, Brennan, Douglas, and Powell Papers, and, to a lesser extent, the Stewart and Rehnquist Papers, read together and in conjunction with contemporary press accounts, suggested that a number of justices--even, perhaps especially, Burger's boyhood friend, Harry Blackmun--considered him one a good part of the time. So did their clerks and many in the media. Despite Justice Powell's herculean efforts to create harmony, the Burger Court was a less happy place than the Warren Court.¹⁰

When Burger resigned as Chief Justice before the 1986 midterm elections while the Republicans still held the Senate (and, perhaps, to take advantage of that), one pundit accounted for the kind assessments of his tenure by explaining that everyone wanted to see him go. "Liberals have disliked him ever since he was appointed by Richard Nixon to preside over a retreat from Warrenesque activism," while conservatives believed he had "botched" the task. "Quick, somebody, throw him a retirement party before he changes his mind." One internal Reagan Administration memorandum promoting Rehnquist as the next Chief Justice portrayed him as everything Burger was not. He could direct what has been "a generally rudderless Court.... No one can question the depth of his scholarship or intellect, the clarity of his philosophical vision or his ability to build a consensus to implant that vision in the Court's decisions. Moreover, he enjoys a warm collegial relationship with, and is genuinely respected by, all of his fellow justices, even those with whom he often disagrees." Is it any wonder that when Rehnquist became the next Chief Justice, he modeled himself as the anti-Burger?¹¹

If the changes wrought by the 1967-71 battles over its membership left an imprint on the Court as an institution, did they also make a difference to the doctrine it produced? What if Fortas had hidden his relationship with LBJ in 1968 more adeptly, avoided “Flaming Creatures,” and just said no to the lecture fees, or if LBJ had named Goldberg, Brennan or someone else Chief Justice? The possibilities are intriguing. By the late 1960s, for example, some thought that the Warren Court was on the verge of singling out wealth as a suspect classification. Perhaps a Fortas, Goldberg or Brennan Court might have subjected laws that sustained economic, as well as gender and racial inequality, to strict scrutiny. Perhaps it would have required regional busing to achieve racial balance in the schools, announced indigent women’s right to government-funded abortions, and forced Americans to focus more on how class, like race and gender, divides us. Who knows? ¹²

Memories

We do know that the sixties confirmation battles helped shape the way the Warren Court was remembered. Some do hold “misty water-colored” recollections of Earl Warren and his stewardship. Indeed many liberal law professors and their students under “the spell of the Warren Court” transformed it into “judicial Camelot.” Even so, memories of “the way we were” because of Warren Court opinions suffered. Beginning with Brown v. Board of Education, many in the legal community portrayed the Warren Court as a “countermajoritarian” force whose accomplishments or atrocities, depending on the speaker’s point of view, occurred in defiance of popular will. Even contemporary celebrations of Warren and his Court often reinforced the theme that it soldiered on alone. In full, that Harvard Law Review editors’ 1969 dedication to Warren read, “to

Chief Justice Earl Warren who with courage and passion led a reform of the law while the other branches of government delayed.”¹³

Yet Warren and his Court often followed public opinion during the 1950s, and the Chief Justice, LBJ and Congressional liberals saw each other as partners when the Warren Court moved into full throttle in the 1960s. As academic lawyers and political scientists have recently stressed, in reality, the Warren Court was actually majoritarian. Its members, one said, “removed the blocks to majority rule that were lurking within the system” and “knew what was majority sentiment and what wasn’t.” And though the Warren Court did become a lightning rod during the 1960s, many more Americans at the time accepted it than we recall. Liberals retained the power of voice in the Senate and elsewhere until after Watergate. Remember the support for Marshall in 1967 and for Fortas initially in 1968. Even if his baggage doomed Fortas, it seems possible that LBJ could have won the confirmation of another liberal in 1968. The withdrawal of Fortas’s nomination was a sign liberalism was on the ropes, but not that it was down and out. The defeats of Haynsworth and Carswell made clear it retained some vitality.¹⁴

The reverence for Warren was clear when he died on July 9, 1974 twelve days before the Court handed down the opinion compelling Nixon’s surrender of the Watergate tapes, reportedly after exclaiming “Thank God!” three times when Justice Brennan informed him what it would say. Chief Justice Burger arranged for his predecessor’s flag-draped coffin to lie in state in the Supreme Court’s main hall, the first time any justice had received that honor. The Chief Justice, eight associate justices, and former justices Fortas, Goldberg and Clark lined the building’s 53 marble steps as the

pallbearers carried the coffin into the Court. During the next day and a half, while Warren's clerks stood watch, some nine thousand people paid their respects.¹⁵

No commemoration, of course, offers reason to urge a return to the Warren Court. Like the confirmation struggles that accompanied the Warren Court and followed Warren's departure, though, this one helps remind us that it is ahistorical to call the Warren Court in its heyday counter-majoritarian. In the context of the sixties, the Court's liberalism like that of LBJ's Great Society, was hardly radical—which was why many radicals then detested liberalism. Even now, many Warren Court opinions remain largely intact.

Yet today, even liberals run away from the Warren Court because they accept the cartoonish image promoted by its opponents with relatively little success during the confirmation struggles of the sixties. Democrats try to respect and reject the Warren Court by relegating it to history. Think of the approving announcement by the New Republic's legal correspondent that in nominating Judges Ruth Bader Ginsburg and Stephen Breyer to the Court, the Democrats had “weaned themselves from Warrenism at last.” President Clinton had escaped “the ideological excesses of the Warren Court” and ended “[t]he age of judicial heroics.” Recall what happened when candidate Obama called for justices who showed empathy: Prominent conservative Kenneth Starr wondered if that was code for Warren Court types. Not so, said Obama, who maintained before and after his election that judicial “activists” of the sixties “ignored the will of Congress” and “democratic processes.”¹⁶

Thus even as confirmation hearings feature nominees, beginning with Rehnquist in 1971, ritualistically swearing fealty to Brown, they underline the bipartisan acceptance

of the caricature of the Warren Court its opponents advanced in the earlier confirmation battles. The Warren Court, Mark Tushnet reminds us, has molded the contemporary Republican Party, just as Republicans have shaped the Warren Court into an invaluable whipping boy. “Ever since 1968, when Richard Nixon ran on a platform attacking Chief Justice Earl Warren, the Republican Party’s position on the Supreme Court has helped to unite its otherwise anomalous coalition of anti-abortion activists, law-and-order forces, gun-rights advocates and anti-regulatory business interests—not to mention many whites who still, deep down, blame the federal courts for the leveling effects of civil rights,” John Witt observed recently. That’s powerful glue. No wonder Clinton and Obama proceeded so cautiously in making nominations to the Court.¹⁷

Nomination

In 2015, the Supreme Court was comprised of 3 women and 6 men; 3 Jews and 6 Catholics. For the first time in its history, it included no Protestants. Four justices had grown up in New York City. All had attended Harvard or Yale Law School. One was African American. All except Justice Kagan had prior judicial experience, and all except Kagan were not Presidential friends before their nomination. During the sixties, politicians, academics, lawyers, Presidential intimates and judges became justices. How did Presidents come to select members of the Court from this much narrower group?

The sixties struggles likely influenced the nomination process in a number of ways. The events described in this book may have affected the arrival of women at the Court and helped end the tradition of geographical representation. They helped cause the disappearance of the “Jewish seat” for more than twenty years. They also confirmed the symbolic importance of a place at the Supreme Court table for women and minorities and

contributed to the institutionalization of the “black” seat. The contests of the sixties heightened expectations that nominees should possess prior judicial experience. Finally, they made Presidential friends untouchable for decades.

It may seem a stretch to attribute the arrival of women justices to Mildred Lillie. Of course the women’s movement had something to do with their nominations too. Yet while Lillie was not the first woman considered for an appointment, she was, thanks to perceptions of the growing political power of women, the first examined so seriously. As Nixon hinted to Republican clubwomen in 1971, his interest in her ensured that every President after him would face intense pressure to name the first woman to the Court. After submitting an all-male list of Supreme Court candidates to the ABA in 1975 that leaked, the Ford Administration received so many complaints that President Ford’s Special Assistant on Women admonished him about the political fallout. Attorney General Edward Levi obediently sent forward a revised list to the ABA that included two women—neither of whom received serious consideration. When Jimmy Carter nominated Ninth Circuit Judge Shirley Hufstедler as his first Secretary of Education four years later, an enthusiastic Washington Post alluded to her “perennial mention as the female most likely to be the first of her kind named an associate justice of the Supreme Court (a prospect that is still live).”¹⁸

No vacancy on the Court materialized during Carter’s Presidency, but Ronald Reagan capitalized on the demand for a woman justice in his 1980 race against Carter. Realizing that his opposition to the Equal Rights Amendment distressed some women voters, Reagan proclaimed it “time for a woman to sit among our highest jurists.” The Republican promised “that one of the first vacancies in my administration will be filled

by the most qualified woman I can possibly find, one who meets the high standards I will demand for all court appointments.”¹⁹

Though President Reagan knew and liked Lillie, and his California friends recommended her when Justice Potter Stewart retired, he settled on Arizona judge Sandra Day O'Connor instead. Reagan did not face what John Mitchell called “Chief Justice problems,” since by now, Burger acknowledged the political force of the women’s movement and had come to see a woman justice as inevitable. Indeed the Chief Justice cultivated O'Connor before her nomination. From the President’s perspective, O'Connor was a nearly ideal nominee. She had done almost as well at Stanford Law as her friend and classmate, William Rehnquist, and, one feminist wrote with grudging admiration, was “as much of a conservative as you can find in a qualified woman, and as much of a feminist as you can find in a conservative.” Yet religious and social conservatives rightly suspected that O'Connor would not prove a secure vote against abortion. They launched what New Right leader Paul Weyrich described as a campaign of “intense opposition” to her nomination even as they understood that the momentum to put a woman on the Court had become so great that “we were unlikely to get a single vote.” Sure enough, the Senate approved O'Connor by 99-0.²⁰

That she hailed from Arizona, while Stewart came from Ohio was unimportant. The tradition of geographical representation on the Court had been on the wane since the Civil War. But ironically, it was Nixon who, having vainly tried to keep it alive in 1969 and 1970 by nominating a Southerner, sounded its death knell when he consecutively appointed two Saint Paul natives. Once the Court housed Minnesota Twin in Burger and

Blackmun, it was not a big step to a Court with justices from every New York borough but Staten Island.

Meanwhile, thanks in part to Nixon's anti-Semitism, the "Jewish seat" vanished for two decades just as the "black seat" became sacred. The Jewish seat did briefly seem on its way to revival when Ronald Reagan nominated Judge Douglas Ginsburg to the Court in 1987 after the Senate shot down the nomination of Ginsburg's DC Circuit colleague, Robert Bork. The White House considered Douglas Ginsburg's Judaism a plus. Ethnic solidarity, Administration officials correctly predicted, might lead Jewish liberals, who had worked against Bork, a Christian, because they believed he opposed abortion and gender and racial equality, to treat a Jewish conservative more kindly.²¹

But after Reagan withdrew Ginsburg's nomination, the Jewish seat became an historical curiosity. During this period, "I considered myself the Jewish justice," the Catholic Justice Scalia remarked to a friend. "The New York-raised judge was shocked that he had to teach his colleagues how to pronounce 'yeshiva' (Chief Justice Rehnquist...called it 'ye-shy-va') and, Scalia added proudly,... 'I even told them what a yeshiva is.'"²²

That only got the Court so far. When Bush I became President, articles appeared in the New York Times and Jerusalem Report pointing out that no Jew had served on the Court for twenty years and asking what had happened to the Jewish seat. Ninth Circuit Judge Stephen Reinhardt, a Jewish liberal, first raised the question. Reinhardt recognized that as American Jews' politics had become more diverse, "[t]he nomination of a Jew no longer automatically means that humanitarian concerns... will be advanced." Yet the

beauty of a Supreme Court seat was that it required a Presidential nomination and a Senate confirmation but not, for better or worse, election. “It is wrong that the only branch of government in which Jews have been able to reach the top has now been closed to them at that level for an entire generation,” he insisted. Reinhardt blamed the absence of a Jewish justice in part on Nixon, but he also faulted Jews themselves, who had maintained “a conspiracy of silence.” His Ninth Circuit colleague, Alex Kozinski, a prominent conservative, agreed that the lack of Jews on the Court “has been an issue among Jews for 20 years, but most aren’t willing to speak out on it.” When New York Times reporter David Margolick set out to determine whether the victim deserved any part of the blame, he found that despite Jews’ presence at the highest levels of the legal profession, for many of them, “even touching the topic is taboo.” Was it because they feared seeming “chauvinistic or parochial,” Margolick wondered?²³

Perhaps, and it may also have reflected the fact that some Jews had turned against affirmative action. How could they then support “a quota” on the Court? “Most Jewish organizations, and I think most Jews in general, don’t think there’s a need for a Jewish seat,” and thought the Jewish seat was “passé,” one prominent spokesman told The Jerusalem Report. “You can’t oppose the quota system in daily life and then demand one for the Supreme Court.”²⁴

There the matter rested until the 1990s when Clinton became President and the subject reemerged. Should American Jews agitate for the revival of the Jewish seat? At a time when ethnics/minorities/women were lobbying for a Supreme Court nomination, some suggested that Clinton could please Jewish voters by nominating a Jewish justice.²⁵

DC Circuit Judge Ruth Bader Ginsburg's ethnicity/religion did play a role in her appointment, but not a large one. Clinton had spoken of his interest in reviving the Jewish seat, but he had other Jews on his list of prospects, which included non-Jews as well. The President found his way to Ginsburg haphazardly. At first, he delighted liberals by saying he wanted to name someone with "a big heart." He courted New York Governor Mario Cuomo and Secretary of Interior Bruce Babbitt, but Cuomo dithered, and environmentalists told the President that they needed Babbitt where he was. Then Clinton interviewed Ginsburg and loved her story—which, beginning with LBJ and Marshall, had become a more important part of the equation. In announcing her nomination, the President observed that Ginsburg "argued and won many of the women's rights cases before the Supreme Court in the 1970's" and that many who admired her "say she is to the women's movement what former Supreme Court Justice Thurgood Marshall was to the movement for the rights of African-Americans." That accolade, he rightly judged, was the highest "an American lawyer" could receive. But the search for a nominee that had gone on nearly three months, and it also surely helped that Ginsburg had a reputation as a moderate. She had angered the left by defending the Pentagon's right to dismiss gays, and she had annoyed feminists by labeling Roe v. Wade divisive. Ginsburg was appointable, that is, because she was not overtly ideological. So was First Circuit Judge Stephen Breyer, another Jew and a onetime Goldberg clerk, who was considered even more of a centrist. Beset by the Whitewater probe and allegations of ethical impropriety in 1994, Clinton selected Breyer to replace Harry Blackmun.²⁶

These nominations disappointed some who saw a historic passion for social justice undergirding the Jewish seat. "Particularly for organizations that have fought these

battles, there is a sense of frustration, of lost opportunity,” the president of one liberal interest group told the New York Times. “Breyer may be phenomenally talented, but he’s not Blackmun and Ruth Ginsburg is not necessarily Thurgood Marshall. There’s almost an irony here that the Court is becoming more conservative, losing the liberal powerhouses and getting moderates in exchange.”²⁷

What are we to make of such assessments? Not much. Definitions of “greatness” in justices are time-bound. The generation of law professors who hailed Holmes gave way to the one that worshipped Warren. So, too, views of the justices often evolve, just as the justices themselves sometimes do. Blackmun, once dismissed as Burger’s clone, had been transformed into a “liberal powerhouse”! And Ginsburg became a liberal icon.²⁸

Did the Ginsburg and Breyer nominations mean religion, or, at least Judaism, had become irrelevant to Presidential calculations in Supreme Court nominations? In a 2002 address at the law school named after Brandeis, Justice Ginsburg said so. After maintaining that she was so secure that she proudly displayed a mezuzah on the doorpost to her Supreme Court chambers, she contended that “no one regarded Ginsburg and Breyer as filling a Jewish seat. Both of us take pride and draw strength from our heritage, but our religion was simply not relevant to these appointments.” Instead, theirs were, quite simply, American success stories. “What is the difference between a New York City garment district bookkeeper and a Supreme Court justice?,” she asked rhetorically. “One generation—the difference between the opportunities open to my mother, a bookkeeper, and those open to me.”²⁹

Just as Nixon's anti-Semitism drove the Jewish seat into retirement for more than two decades, then, so Jewish ambivalence about claiming a "Jewish seat" probably contributed. One reason for the lapsing of the "Jewish seat" and the survival of LBJ's "black" seat lay in interest group mobilization or, really, lack of concerted Jewish mobilization. After the Parker nomination battle in 1930, interest groups came to prominence in modern judicial politics when the "Citizens for Decent Literature" charged Fortas with peddling porn, and liberals dug for skeletons in the closets of Haynsworth and Carswell.

Small surprise, then, that Nixon planned to replace Marshall with an African American. Presidents carefully cultivated African Americans to nominate in the event that Thurgood Marshall retired, as the Carter Administration apparently made clear it wanted him to do. President Carter, for one example, was reportedly ready to nominate Solicitor General Wade McCree, to replace Marshall. Bush I named Clarence Thomas.³⁰

Interest group mobilization proved crucial in winning Justice Thomas's confirmation. The opposition of civil rights groups and feminists had helped doom Robert Bork. As some had foreseen during the Thurgood Marshall nomination fight, African Americans had become a significant voting block in the South, and senators fretted about alienating them by backing Bork. In the case of the Thomas nomination, Southerners and their constituents would again prove significant. But this time, the White House had put up a conservative African American born in a Georgia shack and opposed to affirmative action and packaged him as an American success story. The civil rights community might mute its opposition to the nomination to help one of its own, and some African Americans might champion Thomas because they liked his message. If

that happened, the Administration could break up the old anti-Bork coalition. Consequently, two white Republican Southerners let the White House know “that we needed to split the blacks on this issue, because if they all lined up against Thomas,” they and others would have a hard time voting to confirm. The Bush Administration’s subsequent success in promoting its nominee as “the living embodiment of the President’s empowerment agenda” and exploiting “the popular support for Judge Thomas outside the beltway” despite “strong interest group opposition inside the beltway” and Anita Hill’s attention-grabbing allegations that the nominee had sexually harassed her made some in the White House hopeful that “the confirmation of Judge Clarence Thomas to the U.S. Supreme Court constitutes a major turning point in American life.” Perhaps liberal interest groups had “become increasingly divorced from their rank and file” and were even “on the run.”³¹

Significantly, Justice Thomas arrived at the U.S. Supreme Court after having served on the D.C. Circuit for a year-and-a-half. The emphasis on prior judicial experience dated back to Eisenhower and also reflected the troubled battles of the sixties. When ill health finally forced William O. Douglas off the Court while the Democrats still controlled Congress in 1975, Chief Justice Burger cited the past as reason to intervene in the selection process. “A nominee with substantial judicial experience would have several marked advantages; the adjustment to the work of the Court would be expedited because of familiarity with the enormous amount of ‘new law’ in recent decades; insulation from controversy and partisanship by reason of judicial service is also likely an advantage (as it was to Justice Blackmun and me),” he wrote President Ford. “For my

part, I am compelled to be candid in saying that we have had all we can sustain of functioning with a ‘crippled court’ since 1969. The delays in 1969-1970 hurt the Court and the country.”³²

The President ignored the Chief Justice’s offer to help with the selection process and instead instructed Attorney General Edward Levi to “look for the best” and not to consider “politics.” Levi’s work transformed the process that LBJ and Nixon had treated as their private domain. He developed the systematic evaluations of candidates in relationship to each other that future Administrations would adopt. After study, Levi placed three prospects at the top of his list: Seventh Circuit Judge John Paul Stevens, Brigham Young University President Dallin Oaks, and Yale Law School Professor Robert Bork. Once the Administration had consulted with the ABA Standing Committee on the Federal Judiciary, as all Presidents but Nixon and Bush II dutifully did, the three top candidates of the White House were all Circuit Court Judges. They were Seventh Circuit Judge John Paul Stevens, 55; Third Circuit Judge Arlin Adams, 54; and Seventh Circuit Judge Philip Tone, 52. Ford chose Stevens.³³

Here was the hardening of Eisenhower and Nixon’s norms. Nixon himself had told reporters that a judicial career gave a prospective nominee the “edge” when he nominated Warren Burger. The he saw how the criterion boxed him in as he searched for replacements for Black and Harlan. Yet it turned out that appellate judges indeed possessed the “edge.” Here too was evidence that the 13 bills introduced in Congress requiring Supreme Court justices to possess prior judicial experience between 1965 and 1967 by Warren Court foes like Richard Poff had borne fruit. Though none became law,

the expectation of prior judicial experience solidified during the 1970s. Federally elected officeholders disappeared from the Court.³⁴

Significantly, despite William Rehnquist's warning that a Court made up only of judges risked resembling "the judiciary in civil law countries," which did "not command the respect and enjoy the significance of ours," prior judicial experience became a prerequisite for every justice over the next three and a half decades, beginning in 1975. Possibly one reason for what we might call "the judicial turn" is that as United States moved politically right after the mid seventies, the experience with the Warren Court helped convince some conservatives that those named to the Court with deep roots in politics like former Governor Earl Warren, Senator Hugo Black, SEC Chair William O. Douglas, and LBJ intimate Abe Fortas, viewed law as politics—even though Justice Brennan, who was responsible for much of the Warren Court's work, however, came to the Court from the judiciary. "Perceptions of the Warren Court's activism fueled a debate about the judiciary; critics wanted the Court to stop legislating from the bench," one law professor hypothesized. "Picking candidates with judicial (as opposed to political) experience may be seen as a way of pursuing this end." Or, as another put it, "The technocrats we've acquired...are somewhat a reaction to what the Warren Court did, and to the feeling that if we can just pick very safe people," new justices would not share its activist tendencies.³⁵

Scholars also stressed Presidents' desire for "predictability." Presidents viewed how a judge voted on lower courts as a reliable indicator of how a justice would decide cases. As one Justice Department official involved in Reagan's 1986 selections of Chief Justice Rehnquist and Justice Scalia wrote of the ideal nominee, "we must know what he

thinks now, and he must have thought about issues enough that he will be unlikely to change his mind. For either, several years of federal judicial experience (since so many issues critical to us are dealt with little if at all by state courts), some time in academia, or a considerable body of written work introduced elsewhere is desirable.” But at most, Reagan and his key partners thought in terms of “and,” not “or.” In his contemporary account of how the President decided on nominees, the White House Counsel stressed that Reagan, Attorney General Meese and he “were all of the view that sitting judges... who had clearly articulated philosophy were the most likely to remain steadfast in their views.” While academic and/or government experience provided a plus, that is, judicial experience was the key.³⁶

Some also explained Presidents’ preference for judges by pointing to their need to select a candidate with a strong resume who could win confirmation to the Supreme Court. Since federal judges who became justices had already survived the confirmation process at least once, they were supposedly not just predictable, but confirmable too. Thus Pat Buchanan told Reagan’s Chief of Staff that the President’s “best bet for confirmation is a sitting jurist—who has already run the gauntlet of the Judiciary committee and the full Senate,” even though their earlier confirmations did not help Clement Haynsworth, G. Harrold Carswell, Robert Bork or Douglas Ginsburg.³⁷

Sometimes, prior judicial experience does prove a good indicator of how a judge will vote in key cases and his or her confirmability. Sometimes, it doesn’t. Careful empirical research has demonstrated the inaccuracy of Presidential assumptions about both confirmability and predictability. While Supreme Court nominees Thurgood Marshall and Ruth Bader Ginsburg enjoyed relatively painless experiences before the

Senate, compared to winning their nominations to the Court of Appeals, federal judges have not routinely enjoyed smooth Supreme Court confirmations. They have also proved no more likely to respect precedent or set aside their own policy preferences as justices than the “politicians” who preceded them on the Court. In fact, they have followed the questionably judicious pattern of disproportionately ruling “in favor of their home [circuit] courts.” It has also become clear that conservative nominees can prove at least as “activist” as liberal ones.³⁸

And the Court may lose something when it draws so many of its members from the judiciary. Exhibit A, Linda Greenhouse reminds us, is Clinton v. Jones. There the justices reached the outlandish conclusion that requiring a sitting President to defend himself against claims of sexual harassment would not harm him. Moreover, when members of the Court are drawn from a professional elite, credentials become crucial, which helps explain why all of the justices went to Harvard or Yale, and most did exceptionally well there. In the past, justices trod a wider path: It wasn’t until sixty years ago, when Stanley Reed retired, and Charles Whittaker joined the Court, that all the justices even had attended law school, as opposed to training in a lawyer’s office. While it is doubtless good for doctrinal analysis to people the Court with a number of top graduates from elite schools and “the judicial monastery,” a bench comprised only of such individuals lacks its historic breadth. When Clinton had his opportunity to reshape the Court, his adviser, Walter Dellinger, reminded him and others involved in the selection process of that. “I said when Thurgood Marshall retired that the court had lost its only--...and people expected me to say ‘black justice.’ But what I said was ‘national figure,’” he remembered.³⁹

It may also prove useful to take Supreme Court justices from the helms of other branches of government. The last justice with experience as a member of Congress was Hugo Black. Yet, as one of Poff's promoters reminded Nixon in 1971, "Since the founding of the Court, over thirty Justices have had previous service in Congress." More tellingly, "there has never been a year when the Court was without a former member of either the Congress or Continental Congress." Congress has its own problems, to be sure, but it might prove useful to add the perspective of legislators to the Court. A number of commentators have noted the contemporary Court's contempt for Congress, which legislators who become justices might help mute. They might even convince skeptics on the Court of the value of legislative history.⁴⁰

And why should William Howard Taft be the only former Chief Executive on the Court in American history, particularly since his record there proved inspirational in some ways? As Chief Justice, Taft helped secure Congressional enactment of the Judiciary Act of 1925, which vastly increased the discretionary nature of the Court's docket, managed the federal courts and organized them as the third branch of government, obtained the funding for the Supreme Court building, and had the imagination to choose Cass Gilbert to design it. Like former legislators, former Presidents often do possess an unusual store of knowledge about law and politics, skills at compromise and conciliation, and useful contacts. Why shouldn't a President who could persuade former President Barack Obama to become a justice nominate him?⁴¹

Over the same period that the expectation of judicial experience bloomed, that of placing Presidential intimates like Fortas on the Court withered. Drawing on his

experience in the Nixon White House, Pat Buchanan warned Reagan's Chief of Staff, "Any friend of the President's who can be painted as a 'crony' will be torn to pieces." When filling his first Court vacancy, Clinton passed over his Arkansas friend, the distinguished Eighth Circuit judge, Richard Arnold, for the Supreme Court and awarded the position to Ruth Bader Ginsburg. While Arnold's status as a WASP male counted against him, his biographer reported, "speculation arose—and was confirmed by a member of Clinton's staff—that White House wariness toward Arnold's appointment to the Supreme Court had more to do with the fact that he was from Arkansas and a friend of the Clintons." When the President received a second Court vacancy, he again considered Arnold. This time, Arnold's Eighth Circuit colleagues voiced their fear that he would not receive the nod to succeed Harry Blackmun *because* he was Clinton's friend and from Arkansas. They fretted needlessly, since Arnold's health did more to explain why he did not get the job, but significantly, they worried.⁴²

Then, when Bush II nominated White House Counsel Harriet Miers in 2005, some complained that she lacked judicial experience ("If Approved, a First-Time Judge, Yes, but Hardly the First in Court's History," one New York Times headline felt compelled to remind readers), while others cried cronyism. Invoking history, David Greenberg told the Fortas story in Slate. He concluded: "The practice of naming presidential pals began to wane decades ago, and...[t]he wisdom of avoiding cronyism is now... settled."⁴³

This "wisdom" is mystifying for several reasons. Lyndon Johnson was not the last President to practice cronyism with respect to the Court. Although Nixon justified his choice of Chief Justice Burger by citing the need to maintain distance from the

Judiciary, Burger was part of his political circle and shared political information about the Court privately with him, just as Fortas did with LBJ. Admittedly, Burger's relationship to Nixon is no argument for cronyism. Still, given the value of transparency, surely it is preferable for a justice to be an overt crony like Fortas than a relatively covert one like Burger. More importantly, we deal out too many excellent prospects when we eliminate Presidential intimates, be they exceptionally smart people, like Fortas, and/or reliable and trusted individuals of high character, like Homer Thornberry. Yes, some cronies who became justices were mediocrities. But not all of them: Recall, for example, John Marshall, David Davis, the first Harlan, Louis Brandeis, Harlan Fiske Stone, Felix Frankfurter, William O. Douglas, Hugo Black and Robert Jackson. Presidential cronies have populated the Court since Washington appointed Jay. Presidents and those who help them select justices could benefit from the reminder that Supreme Court justices need not be federal judges with whom they have no connection.

That mold may already have been broken. It may be noteworthy that in nominating Elena Kagan, Obama selected someone without judicial experience whom he explicitly called a "friend." (In addition to having taught law with Obama at Chicago, Kagan had served as the President's Solicitor General and had many political and social contacts with Administration insiders as well). Yet, as a former Harvard Law School dean and Solicitor General, Justice Kagan occupies a special place in the pantheon. Moreover, but for the Senate, which blocked Clinton's attempt to nominate her to the great feeder of the DC Circuit, Kagan would have arrived at the Court from the bench. Perhaps her selection launched a new era in the nomination process; perhaps it did not.⁴⁴

Confirmation

Whether or not the Kagan nomination proves a game-changer, the 1967-71 contests over the Court's membership heralded the birth of the contemporary confirmation process. Sarah Binder and Forest Maltzman usefully divide commentators into two groups. Do they believe in the Ecclesiastes "nothing-new-under-the-sun theory of judicial selection," which treats "ideological conflict over the makeup of the bench" as an "ever-present force in shaping the selection of federal judges and justices?" Or do they subscribe to the "big bang theory" that identifies "a breaking point in national politics, after which prevailing norms of deference and restraint in judicial selection have fallen apart" and posits "a sea change in appointment politics, evidenced by the lengthening of the confirmation process and the rise in confirmation failure"? In the latter case, commentators often point to the Bork battle and contend that it rang in the modern era of partisan confirmation politics. In the words of Senator Orrin Hatch, "Democrats captured the Senate in 1986...and conspired with leftist legal gurus that dramatically politicized the process."⁴⁵

The Bork battle was politicized. And liberals and conservatives grasped at whatever precedents helped them to justify contesting and championing Bork. Senate Judiciary Committee Chair Joe Biden argued that historically, and as late as the Fortas and Carswell fights, the Senate focused on ideology. Only recently, Biden maintained, had the Senate restricted its review to the more "narrow standard" of character and professional competence. His fellow liberals seized on the ideological argument that Southerners like Strom Thurmond had made against Thurgood Marshall twenty years earlier and maintained that Bork's confirmation would change the "balance" of the Court.

For its part, the Reagan Administration wrongly claimed, “In the 1960s, when Justices Goldberg, Fortas and Marshall were being placed on the Supreme Court—resulting in a body that consisted of (at best) two judicial conservatives—the ‘balance’ theory was never raised.” And Thurmond and others who had inveighed against Marshall in 1967 and Fortas in 1968 on grounds of ideology, now insisted that the Senate only justifiably rejected a nominee because of ability and character. Naturally the Reaganites framed the Fortas story so as to make the case that LBJ’s nominee had not become Chief Justice because of his character flaws, not ideology.⁴⁶

We expect politicians to ransack the past and flip-flop on their positions. Of course, as the New York Times noted, “Both Sides in Bork Debate Seek the Blessing of History.” And someone might legitimately tell the story of the 1968 Chief Justice fight in a way that made ideology all-important and Fortas the first to be “Borked” or focused on LBJ’s insistence on coupling Fortas and Thornberry and on Fortas’s extrajudicial activities and lecture fees.⁴⁷

Yet the claim that Bork was the first to be “borked” doesn’t seem altogether right. That’s not to say it’s implausible. We know that Reagan did think of pairing Rehnquist’s Chief Justice nomination with either that of Scalia or Bork in 1986. His Administration considered Scalia and Bork the leading exponents of judicial restraint and admired Scalia’s commitment to separation of powers and Bork’s to original intent. The White House Counsel observed that Reagan “seemed intrigued by Judge Scalia, who was young enough to serve on the Court for an extended period of time, and [would] be the first Italian-American appointee to the Supreme Court.” Presumably for reasons of youth and/or ethnicity, Scalia, 50, got the nod over Bork, 59, and the Senate unanimously

confirmed him in 1986. (If Powell shielded Rehnquist in 1971, Rehnquist provided cover for Scalia fifteen years later). Thus Bork's ordeal the next year "must" signal a shift.⁴⁸

Bork himself characterized earlier confirmation struggles as "essentially" but not "overtly" political. He specifically mentioned only Haynsworth's. That makes sense: Why would a conservative meritocrat like Bork want to become the bedfellow of Abe Fortas or Harrold Carswell? "In my case," Bork continued, "after the most minute scrutiny of my personal life and professional record, all that was available to the opposition was ideological attack, and so politics came fully into the open. I had criticized the Warren court, and this was the revenge of the Warren Court."⁴⁹

Well, maybe, though if so, Bork's experience provides further testimony to the lasting scars of the sixties. But it may also be that Bork could have won confirmation in 1986 before the Republicans lost the Senate. In fact, one 1986 Administration memorandum promoting him pointed out that Bork had been "considered the frontrunner for the next seat on the Supreme Court since the beginning of the first Reagan Administration," that "even liberals respect Bork's intellectual force," and that he might experience easier going than other candidates before the Senate Judiciary Committee "because he is 'much older and less radical' than some of the alternatives," and "is thought to be about as liberal a nominee as the Democrats believe they will get from President Reagan." Perhaps divided government does not explain the contentiousness of recent confirmation battles. Still, it is worth remembering that like Haynsworth and Carswell, and unlike Scalia and Rehnquist in 1986, Bork faced a Democratically-controlled Senate in 1987.⁵⁰

The 1987 Bork fight *was* significant. Bork himself contended that the opposition defeated a nominee solely because of ideology, without a “cover.” But as A.E. Dick Howard has countered, the Bork battle did not so much change as intensify “everything.”⁵¹

Indeed in a number of ways beyond the allegation that Bork would change the “balance” of the Court, the confirmation politics of 1987 recalled the old battles. As with Haynsworth, Bork’s opponents had plenty of lead-time. That was the reason Ted Kennedy had his speech condemning “Robert Bork’s America” ready for delivery within an hour after Reagan announced the nomination. As with Haynsworth and Carswell, the media and interest groups undermined the nominee. They plunked down a plethora of “well-publicized 50-page ‘reports’ finding that Judge Bork’s records or views are particularly antagonistic” to their point of view and alleging that Bork was not the moderate defender of judicial restraint the President wanted to sell him as, “but rather a result oriented right wing activist,” the White House Counsel complained. “I don’t think anybody imagined the kind of campaign you’d have,” Reagan’s Communications Director said. Consequently, as with Haynsworth and Carswell, the White House was caught off guard at a time when it had already alienated conservative groups by portraying Bork as a centrist, a tactic that seemed particularly hypocritical after a “senior White House aide” was quoted in Newsweek calling Bork a “right-wing zealot.” And like the Nixon White House, the Reagan Administration sometimes behaved as if all grass-roots sentiment was equal as it circulated memoranda enumerating the groups that backed Bork’s nomination. Too often, the Administration did not acknowledge that the American Latvian Association or National Association of Wholesale-Distributors would

not devote the vigor to promoting the nomination that the Leadership Conference, People for the American Way and feminist groups devoted to fighting it.⁵²

The Reagan White House marketed Bork as poorly as the Nixon Administration had sold Haynsworth and Carswell. By contrast, liberals who in many cases had cut their teeth on earlier confirmation fights successfully updated their old playbooks, and the Senate rejected Bork by 58-42. The White House now learned, one veteran said, “that it is entirely unrealistic to expect that a nominee’s ideology—or more precisely the contents of his judicial philosophy—can escape scrutiny by the Senate.” Administration officials shouldn’t have needed the Bork battle to teach them that.⁵³

Bork’s defeat did not still the echoes from the past. As after the failure of the Haynsworth nomination, the President vowed to nominate an ideological clone, then sent up the name of someone vulnerable. The “cover issue” became important again as Judge Douglas Ginsburg had to withdraw his nomination amid a welter of conflict of interest charges, allegations about his truthfulness, and, above all, disclosures by National Public Radio’s Nina Totenberg that he had smoked marijuana. “We never stop learning lessons do we?,” a White House post-mortem concluded. “The brief Ginsburg battle gave us a glimpse of what the post-Bork era will bring us. Everything is fair game to a voracious media. Fed by behind-the-scenes leakers, innuendo specialists and people who appear willing to lie to the FBI but spill their guts to NPR, the media have taken to dining out on Supreme Court nominees.” Once again, the study of recent history might have taught the White House something. The media had helped shape confirmation controversies since the sixties.⁵⁴

Now Reagan sent up the name of Ninth Circuit Judge Anthony Kennedy. And it may have been here, in the wake of the Ginsburg embarrassment, that the modern vetting process emerged in all its glory. Kennedy faced more than 10 hours of FBI interviews and a three-hour session with the Attorney General and White House Counsel in which he was asked, among other things, whether he liked “kinky sex,” how many women he had slept with in college, and whether he had ever contracted a sexually transmitted disease, shoplifted as a child, and shown cruelty to animals. As Harry Blackmun had done before him, Kennedy then sailed through an exhausted Senate “like a greased pig.” He proved almost as much of a changeling on the Court as Blackmun did when he won confirmation after the Haynsworth and Carswell fights.⁵⁵

So the Bork battle doesn’t mark the beginning of the contemporary confirmation process, which is the child of the sixties. And that process has not always been contentious, now or then. Justices Kennedy, Scalia, Blackmun, Powell, Stevens, O’Connor, and Ruth Bader Ginsburg won confirmation by a unanimous, or nearly unanimous vote. While each confirmation follows its own script and the process has changed over the past half-century, it has often sparked the concerns that reverberated during 1967-71. Contemporary commentators frequently condemn the “kabuki confirmations” in which nominees pretend to answer senators’ questions—as most of them have been doing since the Warren era. They show frustration about White House “packaging” of the nominee. They chart the intense media scrutiny that can turn hearings into spectacle. They marvel at interest group mobilization. And they understand that nominees and justices can become more vulnerable because of a “cover issue” than ideology.⁵⁶

Ghosts of the Sixties

The sixties have cast a long shadow over the confirmation process too, particularly since the last justice to win approval in 2010, Justice Kagan, clerked for Justice Marshall. Though the Wall Street Journal reported that she had accused the Warren Court of “overreaching” in her Oxford thesis, Republicans mentioned Marshall repeatedly on day one of her hearing. Would she, like Marshall, use law to help the disadvantaged, a Republican asked on day two? Like other nominees since 2000, this one placed great emphasis on her own neutrality and objectivity, and she responded, “you’ll get Justice Kagan, you won’t get Justice Marshall, and that’s an important thing.” That didn’t answer his question, the senator observed. A Washington Post op-ed semi-facetiously entitled “Kagan May Get Confirmed, But Marshall Can Forget It,” put it this way: “Did Republicans think it would help their cause to criticize the first African American on the Supreme Court, a revered figure who has been celebrated with an airport, a postage stamp and a Broadway show?” Yes, Republicans did. Yet with a Democratic President and Democratic Senate, Kagan received confirmation, but by the relatively slim vote of 63-37. Clearly, the nomination and confirmation process had become more partisan in the twenty-first century.⁵⁷

The next vacancy, a surprise, underlined that. Control of the Senate had changed hands in the midterm elections after Kagan’s confirmation, and Obama now faced a Republicans in the Senate led by Majority Leader Mitch McConnell. During the sixties, McConnell had worked as a legislative assistant to Senator Marlow Cook (R-Ky), a sometime thorn in Nixon’s side. Though Cook worked hard for Haynsworth’s confirmation, he had provided a pivotal vote against Carswell.⁵⁸

McConnell had defended Cook's votes and Presidential power in a 1970 article, "Haynsworth and Carswell: A New Senate Standard of Excellence." Tellingly, McConnell chose a quotation from the French poet and essayist, Paul Valery, as his epigraph: "All politicians have read history; but one might say they read it only in order to learn from it how to repeat the same calamities all over again." Because twentieth-century senators had decided to judge Supreme Court nominees on the basis of "qualifications and not politics or ideology," they had often "sought to hide their political objections beneath a veil of charges about fitness, ethics and other professional qualifications," McConnell explained. Instead, he argued, senators really should judge nominees only on the basis of whether they possessed competence, distinction, temperament, ethical probity, and a clean life off the bench free of "prior criminal conviction" or "debilitating personal problems such as alcoholism or drug abuse." By those standards, he maintained, Haynsworth deserved confirmation, while Carswell did not. "[T]he Senate should discount the philosophy of the nominee" unless he were "a Communist or a member of the Nazi party," McConnell concluded. "In our politically centrist society, it is highly unlikely that any Executive would nominate a man of such extreme views of the right or the left to be disturbing to the Senate," and "the true measure of a statesman may well be the ability to rise above partisan political considerations to objectively pass upon another aspiring human being." So, too, thirty-five years later, during the Bush II years, Senator McConnell continued to defend executive authority when he proclaimed that "the President, and the President alone, nominates judges" and accused "my friends on the other side of the aisle" of altering "the

Senate's 'advise and consent' responsibilities to 'advise and obstruct'" for the first time since ratification of the Constitution.⁵⁹

In 2016, however, McConnell and his Republican colleagues assumed the role of Senator Robert Griffin in the Fortas fight. Scalia's body was barely cold before McConnell declared that the next President should choose the next justice. "The fact of the matter is that it's been standard practice over the last nearly 80 years that Supreme Court nominees are not nominated and confirmed during a presidential election," Senate Judiciary Committee Chair Charles Grassley (R-Ia.) insisted. Though Grassley was wrong, Republicans on the Senate Judiciary Committee vowed not to hold a confirmation hearing. They pointed to a June 1992 speech by Obama's Vice President, Joe Biden, during another period of divided government. As Senate Judiciary Chair, Biden had then argued that if a Supreme Court vacancy materialized (it didn't), Bush I should "not name a nominee until after the November election is completed." If the President did, the Judiciary Committee "should seriously consider not scheduling confirmation hearings on the nomination until after the campaign season is over."⁶⁰

President Obama responded to Republicans by insisting on his responsibility to nominate and calling on the Senate to "do your job." As the Nixon White House might have done, Obama's floated a trial balloon. Its, however, was designed to appeal to the opposition party and was the popular Hispanic Republican governor of Nevada, Brian Sandoval. McConnell and Company seemed unimpressed, and the governor pulled a Poff and removed himself from consideration.⁶¹

By this point in the process, even the possibility of a Republican filibuster or constitutional crisis seemed tame. "Senate Republicans Lose Their Minds on a Supreme

Court Seat,” the New York Times editorialized two weeks after Scalia’s death. All that seemed certain was that any debate that occurred would feature “lofty empty rhetoric and reliance on questionable precedent by all sides” and that “both Republicans and Democrats and their followers will make use of the still-controversial Senate reaction to a Supreme Court nomination in 1968 by President Lyndon Johnson.” No matter what Republican, Democrats and their followers said about those questionable precedents, that still-controversial reaction, and that still-controversial nomination, it seemed clear that they would accuse each other of hypocrisy as well.⁶²

Obama’s eventual nomination of Merrick Garland did nothing to resolve the situation. As Clinton had done in nominating Ginsburg and Breyer, the President had chosen an outstanding candidate who seemed cut from the center. Sometimes, McConnell justified his refusal to hold hearings on grounds of principle and maintained that the next President should name the next justice. At others, he pointed out that the National Rifle Association and National Federation of Business opposed Garland as someone who would move the Court “dramatically to the left.” And the Republicans didn’t just fail to schedule hearings. Many refused even to meet the nominee. When the Republicans met to choose Donald Trump as its nominee in Cleveland that summer, they seemed certain they were on the right course. Trump tweeted that “...if the Dems win the Presidency, the new JUSTICES appointed will destroy us all!” and gave a Nixonian acceptance speech that dwelled on the need for law and order. “Scalia’s ghost” loomed large over the convention, the Charlotte Observer announced in an article whose highlights observed that “Republicans are reminding delegates in Cleveland about the Supreme Court every

chance they get,” “The next president could reshape the court for a generation,” and “The issue could be enough to get some voters off the couch.”⁶³

With the Democrats resorting to equally histrionic rhetoric, the nomination and confirmation process had apparently entered uncharted waters, possibly even a new era. Might the United States be headed for a future in which a President could only successfully nominate a justice when his or her party controlled the Senate? That would politicize the Supreme Court more than ever. In the era of divided government that began in 1968, could that also leave the Court without personnel for such extended periods that it might ultimately “just disappear”? Only time would provide the answer.⁶⁴

NOTES
Abbreviations for Sources Consulted

Manuscript Collections

Bayh MSS

Birch Bayh Papers, Indiana University, Bloomington, IND

Black MSS

Hugo LaFayette Black Papers, Manuscript Division, Library of Congress

Blackmun MSS

Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

Brennan MSS

William J. Brennan Papers, Manuscript Division, Library of Congress

Brennan TH MSS

William J. Brennan Term Histories, Manuscript Division, Library of Congress

Brownell MSS and Brownell Add'l.

Herbert Brownell Jr. Papers and Additional Papers, Eisenhower Library, Abilene, KS

Celler MSS

Emanuel Celler Papers, Manuscript Division, Library of Congress

Charns MSS

Alexander Charns Papers, University of North Carolina, Chapel Hill, Chapel Hill, NC

Cheney MSS

Richard Cheney Papers, Ford Library, Ann Arbor, MI

Clifford MSS

Clark M. Clifford Papers, Manuscript Division, Library of Congress

Contested Materials MSS

White House Special Files, Contested Materials Collection, Nixon Library, Yorba Linda, CA

Eaton MSS

William J. Eaton Papers, Boston University

Ervin MSS

Sam J. Ervin Papers, University of North Carolina, Chapel Hill

Fortas-Thornberry MSS

Special File Pertaining to Abe Fortas and Homer Thornberry, LBJ Library, Austin, TX

Frank MSS

John Paul Frank Papers, Manuscript Division, Library of Congress

Fortas MSS

Abe Fortas Papers, Yale University, New Haven, CT

Goldberg MSS

Arthur J. Goldberg Papers, Manuscript Division, Library of Congress

Graham MSS

Fred P. Graham Papers, Manuscript Division, Library of Congress

Griffin MSS

Robert P. Griffin Papers, Central Michigan University, Mount Pleasant, MI

Harlan MSS

John Marshall Harlan Papers, Princeton University, Princeton, NJ

Hartmann MSS

Robert Hartmann Papers, Ford Library

Haynsworth Mss
 Clement F. Haynsworth Jr. Papers, Furman University, Greenville, SC
 Hollings Mss
 Fritz Hollings Papers, University of South Carolina, Columbia, SC
 Katzenbach MSS
 Nicholas deB. Katzenbach Papers, JFK Library
 Kilpatrick MSS
 James J. Kilpatrick Papers, University of Virginia, Charlottesville, VA
 Leadership Conference MSS
 Leadership Conference on Civil Rights Papers, Manuscript Division, Library of Congress
 B. Marshall MSS
 Burke Marshall Papers, JFK Library
 T. Marshall MSS
 Thurgood Marshall Papers, Manuscript Division, Library of Congress
 McClellan MSS
 John L. McClellan Papers, Ouachita Baptist College, Arkadelphia, AR
 Mink MSS
 Patsy T. Mink Papers, Manuscript Division, Library of Congress
 Morris MSS
 Robert P. Morris Papers, Louisiana State University, Baton Rouge, La
 NAACP MSS
 NAACP Papers, Manuscript Division, Library of Congress
 Parker MSS
 John Johnston Parker Papers, University of North Carolina, Chapel Hill
 Poff MSS
 Richard Harding Poff Papers, University of Virginia
 Pollak MSS
 Louis H. Pollak Papers, Yale University
 Porter MSS
 Paul Porter Papers, LBJ Library
 Powell Mss.
 Lewis F. Powell Jr. Papers, Washington & Lee University, Lexington, VA
 Rauh MSS
 Joseph L. Rauh Papers, Manuscript Division, Library of Congress
 RFK AG MSS
 Robert F. Kennedy Attorney General Papers, JFK Library
 RFK Senate MSS
 Robert F. Kennedy Senate Papers
 Rogers MSS
 William P. Rogers Papers, Eisenhower Library
 Rosenthal MSS
 Jacob "Jack" Rosenthal Papers, JFK Library
 Russell MSS
 Richard B. Russell, Jr. Papers, University of Georgia, Athens, GA
 Safire Files
 William Safire Papers, Manuscript Division, Library of Congress

Scott MSS
 Hugh Scott Papers, University of Virginia
 Smith MSS
 Margaret Chase Smith Papers, Margaret Chase Smith Library, Skowhegan, ME
 Sobeloff MSS
 Simon Ernest Sobeloff Papers, Manuscript Division, Library of Congress
 Sorensen Papers
 Theodore Sorensen Papers, JFK Library
 Spong MSS
 William Belser Spong Papers, University of Virginia
 Stewart MSS
 Potter Stewart Papers, Yale University
 Talmadge MSS
 Herman E. Talmadge Papers, University of Georgia
 Thurmond MSS
 Strom Thurmond Papers, Clemson University, Clemson, SC
 Thurston MSS
 George Lee Thurston III Family Papers, Central Michigan University
 Walters MSS
 Johnnie M. Walters Papers, University of South Carolina
 Warren MSS
 Earl Warren Papers, Manuscript Division, Library of Congress
 White MSS
 Theodore H. White Papers, JFK Library
 White House Special Files, Special Member Office Files, Nixon Library
 Dean MSS John W. Dean III
 Ehrlichman MSS John D. Ehrlichman
 Harlow MSS Bryce N. Harlow
 Krogh MSS Egil Krogh
 Young MSS David R. Young, Jr.
 Whitman MSS
 Ann C. Whitman Papers: Administration Series, Eisenhower Library

Newspapers, Periodicals, and other Publications Cited

<i>ABFJ</i>	<i>American Bar Foundation Journal</i>
<i>AC</i>	<i>Augusta-Courier</i>
<i>AD</i>	<i>Arkansas Democrat</i>
<i>AG</i>	<i>Arkansas Gazette</i>
<i>AHR</i>	<i>American Historical Review</i>
<i>AJ</i>	<i>Alabama Journal</i>
<i>AJLH</i>	<i>American Journal of Legal History</i>
<i>AmSp</i>	<i>American Speech</i>
<i>AvG</i>	<i>Avant Garde</i>
<i>BCLR</i>	<i>Boston College Law Review</i>
<i>BG</i>	<i>Boston Globe</i>
<i>BLJ</i>	<i>Blackletter Law Journal</i>

<i>BrLJ</i>	<i>Brandeis Law Journal</i>
<i>BuffLR</i>	<i>Buffalo Law Review</i>
<i>CA</i>	<i>Commercial Appeal</i>
<i>CaLH</i>	<i>California Legal History</i>
<i>CaLR</i>	<i>California Law Review</i>
<i>CarLR</i>	<i>Cardozo Law Review</i>
<i>CDD</i>	<i>Chicago Daily Defender</i>
<i>CDN</i>	<i>Chicago Daily News</i>
<i>CJR</i>	<i>Columbia Journalism Review</i>
<i>CKLR</i>	<i>Chicago-Kent Law Review</i>
<i>CLR</i>	<i>Columbia Law Review</i>
<i>CO</i>	<i>Charlotte Observer</i>
<i>ConComm</i>	<i>Constitutional Commentary</i>
<i>CorLR</i>	<i>Cornell Law Review</i>
<i>CPD</i>	<i>Cleveland Plain Dealer</i>
<i>CR</i>	<i>Congressional Record</i>
<i>CSM</i>	<i>Christian Science Monitor</i>
<i>CT</i>	<i>Chicago Tribune</i>
<i>Daed</i>	<i>Daedalus</i>
<i>DFP</i>	<i>Detroit Free Press</i>
<i>DLJ</i>	<i>Duke Law Journal</i>
<i>DMR</i>	<i>Des Moines Register</i>
<i>Esq</i>	<i>Esquire</i>
<i>FHQ</i>	<i>Florida Historical Quarterly</i>
<i>FLR</i>	<i>Fordham Law Review</i>
<i>Gaz</i>	<i>The Gazette</i>
<i>GB</i>	<i>Green Bag</i>
<i>GN</i>	<i>Greenville News</i>
<i>HaCLQ</i>	<i>Hastings Constitutional Law Quarterly</i>
<i>Ham</i>	<i>Hamline Law Review</i>
<i>HE</i>	<i>Human Events</i>
<i>Hi</i>	<i>The Hill</i>
<i>HLPR</i>	<i>Harvard Law and Policy Review</i>
<i>HLR</i>	<i>Harvard Law Review</i>
<i>HLRec</i>	<i>Harvard Law Record</i>
<i>HofLR</i>	<i>Hofstra Law Review</i>
<i>InN</i>	<i>Indianapolis News</i>
<i>JAH</i>	<i>Journal of American History</i>
<i>JBSBull</i>	<i>John Birch Society Bulletin</i>
<i>JerP</i>	<i>Jerusalem Post</i>
<i>JerR</i>	<i>Jerusalem Report</i>
<i>JHS</i>	<i>Journal of the History of Sexuality</i>
<i>JPL</i>	<i>Journal of Public Law</i>
<i>JSCH</i>	<i>Journal of Supreme Court History</i>
<i>KyLJ</i>	<i>Kentucky Law Journal</i>
<i>LADJ</i>	<i>Los Angeles Daily Journal</i>

<i>LAT</i>	<i>Los Angeles Times</i>
<i>LDS</i>	<i>Lewiston Daily-Sun</i>
<i>LHR</i>	<i>Law and History Review</i>
<i>Li</i>	<i>Life</i>
<i>LSI</i>	<i>Law and Social Inquiry</i>
<i>MetNe</i>	<i>Metropolitan News Enterprise</i>
<i>MA</i>	<i>Montgomery Advertiser</i>
<i>MinnLR</i>	<i>Minnesota Law Review</i>
<i>MLR</i>	<i>Michigan Law Review</i>
<i>MSLR</i>	<i>Michigan State Law Review</i>
<i>Na</i>	<i>Nation</i>
<i>NCLR</i>	<i>North Carolina Law Review</i>
<i>NEWS</i>	<i>Newsweek</i>
<i>NEWSD</i>	<i>Newsday</i>
<i>NO</i>	<i>National Observer</i>
<i>NR</i>	<i>National Review</i>
<i>NT</i>	<i>Nashville Tennessean</i>
<i>NewT</i>	<i>New Times</i>
<i>NULR</i>	<i>Northwestern University Law Review</i>
<i>NY</i>	<i>New Yorker</i>
<i>NYMag</i>	<i>New York Magazine</i>
<i>NYDN</i>	<i>New York Daily News</i>
<i>NYLSLR</i>	<i>New York Law School Law Review</i>
<i>NYP</i>	<i>New York Post</i>
<i>NYT</i>	<i>New York Times</i>
<i>NYT Mag</i>	<i>New York Times Magazine</i>
<i>NYULR</i>	<i>New York University Law Review</i>
<i>OP</i>	<i>Oakland Post</i>
<i>OB</i>	<i>Ohio Bar</i>
<i>OHSLJ</i>	<i>Ohio State Law Journal</i>
<i>PAMagH&B</i>	<i>Pennsylvania Magazine of History and Biography</i>
<i>PI</i>	<i>Philadelphia Inquirer</i>
<i>POL</i>	<i>Politico</i>
<i>POQ</i>	<i>Public Opinion Quarterly</i>
<i>PSCHA</i>	<i>Proceedings of the South Carolina Historical Association</i>
<i>PSQ</i>	<i>Presidential Studies Quarterly</i>
<i>RAH</i>	<i>Reviews in American History</i>
<i>RLR</i>	<i>Rutgers Law Review</i>
<i>SBCS</i>	<i>San Bernardino County Sun</i>
<i>SCarLR</i>	<i>South Carolina Law Review</i>
<i>SCH</i>	<i>Supreme Court History</i>
<i>SCHSY</i>	<i>Supreme Court Historical Society Yearbook</i>
<i>SCR</i>	<i>Supreme Court Review</i>
<i>SDU</i>	<i>San Diego Union</i>
<i>SFE</i>	<i>San Francisco Examiner</i>
<i>SHT</i>	<i>Sarasota Herald-Tribune</i>

<i>SLPD</i>	<i>Saint Louis Post Dispatch</i>
<i>Sla</i>	<i>Slate</i>
<i>SLR</i>	<i>Stanford Law Review</i>
<i>StP</i>	<i>Saint Petersburg Times</i>
<i>Ti</i>	<i>Time</i>
<i>TxLR</i>	<i>Texas Law Review</i>
<i>TNR</i>	<i>New Republic</i>
<i>TPM</i>	<i>Talking Points Memo</i>
<i>UCDLR</i>	<i>University of California, Davis Law Review</i>
<i>UCLR</i>	<i>University of Chicago Law Review</i>
<i>UPLR</i>	<i>University of Pennsylvania Law Review</i>
<i>URLR</i>	<i>University of Richmond Law Review</i>
<i>USA</i>	<i>USA Today</i>
<i>VaLR</i>	<i>Virginia Law Review</i>
<i>W&LLR</i>	<i>Washington & Lee Law Review</i>
<i>W&MBRJ</i>	<i>William & Mary Bill of Rights Journal</i>
<i>WCR</i>	<i>Western Criminology Review</i>
<i>WMLR</i>	<i>William Mitchell Law Review</i>
<i>WP</i>	<i>Washington Post</i>
<i>WS</i>	<i>Washington Star</i>
<i>WSJ</i>	<i>Wall Street Journal</i>
<i>WDN</i>	<i>Washington Daily News</i>
<i>YLJ</i>	<i>Yale Law Journal</i>
Oral Histories	
COHP	Oral History Project, Columbia
OH	Oral History
OHGRF	Oral History, Ford Library
OHFJH	Oral History, Federal Judiciary Center
OHJFK	Oral History, JFK Library
OHLBJ	Oral History, LBJ Library
OHLC	Oral History, Library of Congress
Other Abbreviations	
DDEL	Dwight D. Eisenhower Library, Abilene, KS
JFKL	John F. Kennedy Library, Boston Ma
LBJL	Lyndon B. Johnson Library, Austin, Tx
RMNL	Richard M. Nixon Library, Yorba Linda, CA
GRFL	Gerald Ford Library, Ann Arbor, Mi
RWRL	Ronald Reagan Library, Simi Valley, CA
GWHBL	George H.W. Bush Library, College Station, Tx
WJCL	William J. Clinton Library, Little Rock, Ar
NARS	National Archives
NPR	National Public Radio
POF	President's Office Files
PPF	President's Personal Files

WHCF

White House Central Files

Abbreviations Related to Tapes Cited

MC	Presidential Recordings Program, Miller Center
EOB	Executive Office Building
OVAL	Oval Office
NT	Nixontapes.Org, http://nixontapes.org/
WHT	White House Telephone

Congressional Hearings and Reports

Hearings before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, U.S. Senate, 107th Cong., 1st Sess., June 26 and September 24, 2001

Roy M.; Jacobstein, J. Myron, Compilers Mersky. *Supreme Court and the U.S. Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee* .

Nomination of Felix Frankfurter

Hearings before a Subcommittee of the Committee on the Judiciary, U.S. Senate, Seventy-Sixth Congress, First Session on the Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court, January 11 and 12, 1939, Volume 4

Nomination of Frank Murphy Copy of the Original Handwritten Minutes of the U.S. Senate Committee on the Judiciary on the Nomination of Frank Murphy to be an Associate Justice of the Supreme Court , 1939, Vol. Volume 4

Nomination of Earl Warren

Copy of the Original Transcript of Hearings Held by the U.S. Senate Committee on the Judiciary on the Nomination of Earl Warren to be Chief justice of the Supreme Court – 1954, Volume 5

Nomination of John Marshall Harlan

Hearings before the Committee on the Judiciary, U.S Senate, Eighty-Fourth Congress, First Session, on Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court of the United States, February 24 and 25,1955, Volume 6

Nomination of William Brennan

Hearings Before the Committee on the Judiciary, U.S. Senate, Eighty-Fifth Congress, First Session on Nomination of William Joseph Brennan, Junior, of New Jersey, to Be Associate Justice of the Supreme Court of the United States, February 26 and 27, 1957, Volume 6

Report to Accompany the nomination of Potter Stewart, 86th Cong., First Session, Executive Report, No. 2, April 29, 1959, Volume 6

Nomination of Charles Whittaker

Hearing Before the Committee on the Judiciary, U.S. Senate, Eighty-Fifth Congress, First Session on Nomination of Charles E. Whittaker, of Missouri to be Associate Justice of the Supreme Court of the United States, March 18, 1957, Volume 6

Nomination of Byron White

Hearing before the Committee on the Judiciary, U.S. Senate, Eighty-Seventh Congress, Second Session, on Nomination of Byron R. White, of Colorado, to be Associate Justice of the Supreme Court of the United States, April 11, 1962, Vol. 6

Nomination of Arthur Goldberg

Hearings Before the Committee on the Judiciary, U.S. Senate, Eighty-Seventh Congress, Second Session on Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States, September 11 and 13, 1962, Volume 6

Nomination of Abe Fortas

Hearing Before the Committee on the Judiciary, U.S. Senate, Eighty-Ninth Congress, First Session on Nomination of Abe Fortas, of Tennessee, to be an Associate Justice of the Supreme Court of the United States, August 5, 1965, Volume 7

Nomination of Thurgood Marshall

Hearings Before the Committee on the Judiciary, U.S. Senate, Ninetieth Cong., First Session, Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States, July 13, 14, 18, 19, and 24, 1967, Volume 7

Nominations of Abe Fortas and Homer Thornberry, Part I

Hearings Before the Committee on the Judiciary, U.S. Senate, Ninetieth Cong., Second Session, on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, July 11, 12, 16, 17, 18, 19, 20, 22, and 23, 1968, Volume 9

Nominations of Abe Fortas and Homer Thornberry, Part 2

Hearings before the Committee on the Judiciary, United States Senate, Ninetieth Congress, Second Session. on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, Part 2, September 13 and 16, 1968, Volume 9A

Report to Accompany the Nomination of Abe Fortas

Report Together with Individual Views to Accompany the Nomination of Abe Fortas, Ninetieth Congress, Second Session, Executive Rept. No. 8, September 20, 1968, Volume 9A

Nomination of Warren E. Burger

Hearing Before the Committee on the Judiciary, U.S. Senate, Ninety-First Congress, First Session, On Nomination of Warren E. Burger, of Virginia, to be Chief Justice of the United States, June 3, 1969, Volume 7

Nomination of Clement F. Haynsworth

Hearings Before the Committee on the Judiciary, U.S. Senate, Ninety-First Congress, First Session, on Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States, September 16, 17, 18, 19, 23, 24, 25, and 26, 1969, Volume 10

Report to Accompany the Nomination of Clement F. Haynsworth

Report Together with Individual Views, Nomination of Clement F. Haynsworth, Jr., Executive Rept. No. 91-12, Ninety-First Congress, First Sess., November 12, 1969, Volume 10

Nomination of George Harrold Carswell

Hearings Before the Committee on the Judiciary, U.S. Senate, Ninety-First Cong., 2d Session, on Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States, January 27, 28, 29 and February 2 and 3, 1970, Volume 11

Report to Accompany the Nomination of George Harrold Carswell

Report Together with Individual Views to Accompany the Nomination of George Harrold Carswell, Ninety-First Congress, Second Session, Executive Rept. 91-14, February 27, 1970, Volume 11

Nominations of William H. Rehnquist and Lewis F. Powell, Jr.

Hearings Before the Committee on the Judiciary, U.S. Senate, Ninety-Second Congress, First Session on Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States, November 3, 4, 8, 9, and 10, 1971, Volume 8

Report to Accompany the Nomination of Lewis F. Powell

Report Together with Individual Views to Accompany the Nomination of Lewis F. Powell, Jr., Ninety-Second Congress, First Session, Executive rept. No. 92-17, November 23, 1971, Vol. 8

Report to Accompany the Nomination of William H. Rehnquist

Report Together with Individual Views to Accompany the Nomination of William H. Rehnquist, 92d Cong., 1st Sess., Executive Rept. No. 92-16, November 23, 1971, Volume 8

Nomination of Justice William Hubbs Rehnquist, Hearings Before the Committee on the Judiciary, U.S. Senate, 99th Congress, 2d Sess., July 29, 30, 31, August 1, 1986, Comp. Roy Mersky, Volume 12A

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Senate Committee Hearings on the Judicial Nomination Process: Hearing before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts, The Judicial Nomination and Confirmation Process, 107th Cong., 1st. Sess., September 4, 2001,

The Senate's Role in the Nomination and Confirmation Process: Whose Burden? Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, U.S. Senate, The Judicial Nomination and Confirmation Process, 107th Cong., 1st Sess., June 26, 2001

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Preface

¹ Katherine Schulten, “Scalia’s Death Offers Best Chance in a Generation to Reshape Supreme Court,” *NYT*, February 19, 2016; Remarks on the Death of Supreme Court Justice Antonin Scalia in Rancho Mirage, California, <http://www.presidency.ucsb.edu/ws/index.php?pid=111571&st=scalia&st1=death>; Burgess Everett and Glenn Thrush, “McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama,” *POL*, February 13, 2016, <http://www.politico.com/story/2016/02/mitchmcconnellantonin-scalia-supreme-court-nomination-219248>.

² Remarks on the Nomination of Merrick B. Garland to be a United States Supreme Court Associate Justice, March 16, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=115077&st=merrick+garland&st1=>; Tom Clark, Sanford Gordon and Micheal Giles, “How Liberal is Merrick Garland?,” *WP*, March 17, 2016.

³ For those who see the Bork battle as the turning point, see, e.g., Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W.W. Norton, 1989); John Maltese, “Anatomy of a Confirmation Mess: Recent Trends in the Federal Judicial Selection Process,” <http://www.jurist.org/forum/symposium-jc/> and epilogue, *infra*. I argue that “the sixties” only ended in 1975 in Laura Kalman, *Right Star Rising: A New Politics, 1974-1980* (New York: W.W. Norton, 2010).

⁴ Laura Kalman, “The Constitution, the Supreme Court, and the New Deal,” 110 *AHR* 1082 (2005); Jeff Shesol, *Supreme Power: Franklin D. Roosevelt vs. the Supreme Court* (New York: W.W. Norton, 2010); Philip Cooper, *Battles on the Bench: Conflict Inside the Supreme Court* 94 (Lawrence: University Press of Kansas, 1994) (quoting Chief Justice Stone on the “difficulty in herding my collection of fleas.”).

⁵ Lucas Powe, *The Warren Court and American Politics* 494 (Cambridge: Belknap, 2000).

⁶ Fred Graham, “Conversation with Potter Stewart,” n.d., Box 11, Graham MSS; Graham, “Conversation with Bill Rehnquist,” march 23, 1973, *id*.

⁷ Editor’s Note, *Taking Charge: The Johnson White House Tapes, 1963-1965*, ed. Michael Beschloss 547 (New York: Simon & Schuster, 1997) (quoting Mildred Stegall memorandum, January 29, 1973).

⁸ *Id.* at 550-51; Laura Kalman, *Abe Fortas: A Biography* (New Haven: Yale University Press, 1990).

⁹ David Shreve, “Preface,” *Lyndon B. Johnson: The Presidential Recordings: The Kennedy Assassination and the Transfer of Power, November 1963-January 1964 I*, ed. Max Holland xxxvii (New York: W.W. Norton, 2005) (lightning); Bruce Schulman, “Taping History,” 85 *JAH* 571, 578 (1998); Kelley Shannon, “Friends, Family Remember Lady Bird,” *USA*, July 14, 2007 (quoting LBJ Foundation Chair Tom Johnson).

¹ Donald Grier Stephenson, *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* 184 (New York: Columbia University Press, 1999).

² Tom Wicker, *One of Us: Richard Nixon and the American Dream* 9 (New York: Random House, 1991). If he had to practice law for the remainder of his life, Nixon confided to one associate after he became a Wall Street lawyer, “I would be mentally dead in two years and physically dead in four.” Patrick Buchanan, *The Greatest Comeback: How Richard Nixon Rose from Defeat to Create the New Majority* 35 (New York: Crown Forum, 2014)

³ James Rosen, *The Strong Man: John Mitchell and the Secrets of Watergate* 50, 490, 127, 71 (New York: Doubleday, 2008) (South, “dour” [quoting William Safire], “lawyer’s lawyer”); Saul Friedman, “Richard Kleindienst: The ‘Mr. Tough’ of Justice Department,” *CT*, February 24, 1972; John Carmody, “Jerry Leonard—a Team Man in Justice’s Civil Rights: Potomac Profile,” *WP*, March 8, 1970; William Rehnquist, Memorandum to the Attorney General, Re: Judicial Selection, Box 1549, Blackmun MSS. (This memo is dated July 10, 1969, but it cannot have been written then, since it refers to the Haynsworth and Carswell battles).

⁴ J.Y. Smith, “H.R. Haldeman Dies,” *WP*, November 13, 1993 (“President’s”); David Stout, “John D. Ehrlichman, Nixon Aide, Jailed for Watergate, Dies at 73,” *NYT*, February 16, 1999 (“fireman”); Alissa Rubin, “Nixon Loyalist Ehrlichman Is Dead at 73,” *LAT*, February 16, 1999 (scowl, eyebrows, “twisting”); John Dean, *Blind Ambition: The End of the Story* (Palm Springs: Polimedia, 2009).

⁵ Laura Kalman, *Right Star Rising: A New Politics, 1974-1980* 7 (New York: W.W. Norton, 2010).

⁶ *Alderman v. U.S.*, 394 U.S. 165; along with consolidated cases, *Ivanov v. U.S.*; *Butenko v. U.S.* (Alderman involved behavior before the Safe Streets Act expanded the right of government to eavesdrop in criminal cases and those affecting national security); Fred Graham, “High Court Faces Plea on Wiretaps: Justice Agency Expected to Ask Bench Today to Change Its Far-Flung Ruling,” *NYT*, March 13, 1969.

⁷ Earl Warren, *The Memoirs of Earl Warren* (Lanham: Madison, 2001, originally published 1977); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* 750-52 (1983); Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* 311-13 (New York: Houghton Mifflin, 2010); “Jack C. Landau, Who Fought For Rights of News Reporters, Is Dead at 74,” *NYT*, August 20, 2008 (Landau’s personality). Warren said in his memoirs that Landau was very tense, and when I worked briefly as his intern in the 1970s, I found him excitable.

⁸ Fred Graham, “High Court Hints Easing of Disclosure of Bugging: Grants Hoffa and Clay New Hearings,” *NYT*, March 25, 1969 (disclosure to Senate); *Giordano v. United States*, 394 U.S. 310 (1969).

⁹ Warren, *The Memoirs of Chief Justice Earl Warren*, at 341; William O. Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas* 259 (New York: Random House, 1980); John Crewdson, “Secret Bid to Court Is Laid to Mitchell,” *NYT*, May 17, 1973 (reporting Landau’s incredulity at Mitchell’s denial); Linda Mathews, “Ex-Aide Says Mitchell Sent Him to See Justices in 1969 Wiretap Case,” *LAT*,

May 17, 1973 (disbarment); John MacKenzie, "Mitchell Aide Tells of Call on Justices," *WP*, May 16, 1963).

¹⁰ Douglas, *The Court Years*, at 259, 139; *Ex Parte Quirin*, 317 U.S. 1 (1942); G. Edward White, "Felix Frankfurter's Soliloquy in *Ex Parte Quirin*: Nazi Sabotage and Constitutional Conundrum," 5 *GB* 2d.. 423, Summer 2002.

¹¹ H.R. Haldeman, Memorandum for Mr. Chapin, February 9, 1969, Supreme Court, Ehrlichman MSS XXX; Dinner Honoring Chief Justice Earl Warren, WHCF, Ex FG 51, Box 1, Folder 1, RMNL; Earl Warren to Richard Nixon, April 25, 1969, id.; "Nixons Fete Warren at White House," *NYT*, April 24, 1969; "Guests at the White House," *WP*, April 24, 1969.

¹² "Nixons Fete Warren at White House" (Rogers, Agnew, Dewey); Julius Duscha, "If It Doesn't Make Good Sense, How Can It Make Good Law?," *NYT*, October 5, 1969 ("turned"); Warren Burger to Herbert Brownell, January 12, 1969, Box 107, Brownell MSS (discussing "imperative" need for Nixon to appoint MacKinnon and another former prosecutor whom Nixon also nominated to the DC Circuit, Roger Robb); Burger to Brownell, December 11, 1968, id., urging MacKinnon; Richard Nixon to the Attorney General, Box 65, Folder 227-OA 3052, Krogh MSS 3052 (relaying Burger's plea for "two strong men" on the DC Circuit Court of Appeals).

¹³ Warren Burger to Herbert Brownell, Friday (c. October 1968), Box 107, Brownell MSS. See, e.g., Fred Graham, "Court Scored by Top Judge Here: A Jurist Nixon May Name Urges Curbs on Liberal Trend," *NYT*, November 10, 1968, referring to Friendly as someone "who has been mentioned as a possible Nixon appointee to the Supreme Court;" John O'Melveny to Earl Adams, January 6, 1969, WHCF Ex FG 51, Box 1, Folder 1, RMNL quoting letter from Friendly to Henry Dreyfuss asking if Adams could do anything to help him: "Anyway it seems to me the best thing Nixon could do on that [the Chief Justiceship] is to promote Mr. Justice Stewart, who has solid Republican support from Ohio; such faint hopes as I have are directed rather to the vacancy this would create."

¹⁴ Joel Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* 113 (New York: John Wiley, 1965).

¹⁵ Duscha, "If It Doesn't Make Good Sense" ("there", "liberal"); Richard Nixon to Harold Stassen, June 25, 1969, WHCF EX FG 51/a, Box 3, Folder 5, RMNL (occasion of first meeting); "Harold E. Stassen, Who Sought G.O.P. Nomination for President 9 Times, Dies at 93," *NYT*, March 5, 2001.

¹⁶ Warren Burger to Harry Blackmun, n.d., c. May 1963, Box 50, Folder 10, Blackmun MSS; Burger to Blackmun, Labor Day 1967, Box 50, Folder 15, id. ("if," "guys."); Burger to Blackmun, n.d., c. 1961, Box 50, Folder 8, id. ("Bastards," "horrible"); Burger to Blackmun, May 21, 1970, Box 51, Folder 3 ("absurd"); Harry Blackmun to E. Barry Prettyman, April 10, 1964, Box 50, Folder 12, id. ("scrapper," "many"); Herbert Brownell, Memorandum to General Eisenhower, September 16, 1965, Box 107, Brownell MSS ("As"). "No, indeed, I am not mad," Burger wrote after Blackmun had rejected yet another proposed trip in the early 1960s. It surely will look funny as Hell when we finally get to that tour with sturdy nurses pushing our wheel chairs and we two fiddle with our hearing aids. I can just hear it: 'What

did you say? Girls, what girls, I don't see any girls.'" Warren Burger to Harry Blackmun, May 31, c. 1962, Box 50, Folder 11, Blackmun MSS.

¹⁷ Daily Diary, February 4, 1969, RMNL; Richard Nixon, Memorandum for the Attorney General, , February 13, 1969, Box 54, Folder 277-OA 3032, Krogh MSS. ("ablest"); Richard Kleindienst, Memorandum for John Ehrlichman, February 18, 1969, id., ("fruitful") Warren Burger to Richard Nixon, March 7, 1969, Box 294, Haldeman Personnel Material, RMNL.

¹⁸ Warren Burger to Harry Blackmun, March 31, 1969, Box 51, Folder 1, Blackmun MSS; Burger to Blackmun, September 17, 1969, Box 51, Folder 2, id.

¹⁹ "Nixons Fete Warren at White House."

²⁰ Don Oberdorfer, "The Gathering of the Storm That Burst Upon Abe Fortas," *WP*, May 16, 1969; Alan Weinberger, "What's In a Name?—The Tale of Louis Wolfson's Affirmed," 39 *HofLR* 645, 676-78 (2011); *U.S. v. Wolfson*, 394 U.S. 946 (1969). At the time of the Chief Justice battle, Robert Griffin had also heard the rumor of Fortas's connection to Wolfson, and his staff had vainly tried to interest the FBI in investigating it. When the FBI's Cartha DeLoach, however, told a Griffin staffer that the FBI could not proceed without the approval of Attorney General Ramsey Clark, the senator's representative replied that Griffin would not pursue the matter because he was sure that Ramsey Clark, who "fully endorsed Fortas," would never approve an investigation that could "discredit him." Laura Kalman, *Abe Fortas: A Biography* 360 (New Haven: Yale University Press, 1990).

²¹ Bruce Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 555 (New York: Morrow, 1998) (confirmation); Will Wilson, *A Fool for a Client: Richard Nixon's Free Fall Toward Impeachment* 18-19 (Austin: Eakin, 2000). Wilson insisted that he had done nothing wrong in confirming the story. He also said the meeting with Lambert at which he did so occurred after he had met with Wolfson's attorney and been informed of the Fortas-Wolfson relationship and after he had taken Wolfson's statement, which seems unlikely, since other accounts indicate that his confirmation preceded Wolfson's statement. *Id.* at 17. Cf., e.g., Murphy, *Fortas*, at 556: "[T]he department had yet to see the actual documents about which Lambert was reporting, and had not yet spoken to Wolfson himself. The Nixon official knew, though, that confirming the story anyway would ensure its publication." Wolfson's statement was dated May 10.

²² *Time v. Hill*, 385 U.S. 374 (1967); OVAL 733-010, June 14, 1972, 2:54 P.M, Nixon, Burger, Sanchez, Bull, Unknown Participant, NT; Kalman, *Abe Fortas*, at 363 ("off")

²³ William Lambert, "Fortas of the Supreme Court: A Question of Ethics," *Li*, May 9, 1969, 32-37.

²⁴ Kalman, *Abe Fortas*, at 322-25, 365; John Frank, *Clement Haynsworth, the Senate, and the Supreme Court* 13 (Charlottesville: University Press of Virginia, 1991) (see *infra* for a discussion of Taft). While Hugo Black, whom Fortas consulted during the crisis, refused to say much about their conversations to his friend and former clerk, John Frank, "he was outspoken that Fortas's major tactical error was his statement immediately upon the publication of the *Life* article. Black felt that the only tactical thing to do was to bring out every last bit of the worst of the matter—whatever could be most criticized--voluntarily. This is about what he did in 1937 in the Klan matter. The want of full disclosure at the time of the first statement

made the Fortas situation impossible.” John Frank, “Visit of May 20, 1969, with Justice Black,” n.d., Box 1, Folder 11, 1967-71, Frank Mss. Fortas later agreed he had erred in not fully explaining his relationship with Wolfson quickly. Benjamin Bradlee, “Fortas: ‘Wasn’t Any Choice for a Man of Conscience,’” *WP*, May 16, 1969.

²⁵ “A Shadow Over the Supreme Court,” *WP*, May 6, 1969.

²⁶ Robert Jackson, “Congressmen Call on Fortas to Quit: Records Show Douglas Still Receives Fee,” *LAT*, May 6, 1969; John MacKenzie, “Fortas Is Silent As Criticism on Hill Continues,” *WP*, May 8, 1969; Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* 242-44 (New York: Bobbs-Merrill, 1972); William Rehnquist, Memorandum to John Ehrlichman, October 10, 1969, Buchanan Briefing Book, Backup, Box 13: Haynsworth, RMNL (“arrangement”); David Kyvig, *The Age of Impeachment: American Constitutional Culture Since 1960* 80 (Lawrence: University Press of Kansas, 2008); Leadership Meeting, May 6, 1969, Box 6, Scott MSS.

²⁷ Jackson, “Congressmen Call on Fortas to Quit”; Ronald Ostrow and Robert Jackson, “Fees Paid to Fortas, Douglas Connected to 1968 Stock Case,” *LAT*, May 9, 1969 (“intriguing”); Fortas’s Old Firm Faces U.S. Inquiry,” *NYT*, May 7, 1969; “Finding of Missing Data in Fortas Safe Probed,” *WS*, May 7, 1969; Kalman, *Abe Fortas*, at 366-67.

²⁸ Kalman, *Abe Fortas*, at 375; “Justice Department Reported Studying Fortas-Wolfson Tie,” *NYT*, May 9, 1969; Fred Graham, conversation with Bill Lambert, August 29, 1969, Box 6, Graham MSS; interview with Henry Petersen, December 24, 1969, id.

²⁹ Kalman, *Abe Fortas*, at 367.

³⁰ John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* 9 (New York: Free Press, 2001)

³¹ John Ehrlichman, *Witness to Power: The Nixon Years* 116 (New York: Simon and Schuster, 1982)

³² Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court, A Judicial Biography* (New York: New York University Press, 1983) (“can’t”); Kalman, *Abe Fortas*, at 368; “Justice Abe Fortas on the Spot,” *News*, May 19, 1969, 29 (copies were available on the weekend of May 10); Shogan, *A Question of Judgment*, at 252.

³³ Kalman, *Abe Fortas*, at 361; Murphy, *Fortas*, at 552-54, 568 (New York: Morrow, 1988) (“offer,” “vague”); Bob Woodward, “Fortas Tie to Wolfson Is Detailed,” Transcript of ’70 Talk Reveals Details of Wolfson-Fortas Tie,” *WP*, January 23, 1977 (“lighting”); Wolfson Pardon File, Egil Krogh Chron File, Box 1, Memos, April 1969, RMNL. Wolfson’s plans to make the correspondence public after he left prison in 1970 upset Fortas, who flew to Florida and talked him out of doing so by warning that the “crooked” and “dirty” would interpret them to mean that Fortas the foundation post “was nothing but a cover-up and that what was really happening was that I was taking a gratuity from you in terms of the statute and supplementing my salary” and was also practicing law illegally. Unfortunately for Fortas, Wolfson secretly taped the meaning, and the *Post*’s Bob Woodward got hold of the transcript in 1977 and released its highlights. “Things are quiet now and I have reached a point where I think I can resume my life,” Fortas

told Wolfson. The former justice worried that the public would think he had written Wolfson handwritten letters “because he wanted to hide something.” While he understandably hoped the letters would remain “buttoned up,” they did not implicate him.

³⁴ Stanley Penn, “Wolfson’s World: Industrialist, Facing a Year in Jail Friday, Turns Cold Shoulder Toward Wall Street,” *WSJ*, April 22, 1969.

³⁵ The skeptic is a significant one, the legendary New York District Attorney Robert Morgenthau. Before his retirement in 2009, Morgenthau told a reporter that in investigating Wolfson, he had proceeded “against the wishes of Wolfson’s friends in the Kennedy and Johnson administrations” and that he was convinced that LBJ had replaced Nicholas Katzenbach as Attorney General in 1966 because “he refused to block Mr. Morgenthau’s indictment and subsequent conviction of Wolfson.” James Freeman, “The World’s District Attorney,” *WSJ*, December 26, 2009; and see Terry Carter, “The Boss,” *ABAJ*, June 1, 2010. But there is no reference to Wolfson on any of Johnson’s tape recorded conversations, which appear to cover that moment in the history of his Administration intensively, and the relatively small file of letters and memoranda from or about Wolfson in the LBJ Library seems “relatively harmless.” Murphy, *Fortas*, at 552. Of course, it is impossible to prove a negative, and Johnson could have pressured Katzenbach on Wolfson’s behalf, as Morgenthau believed. Still, given his suspicions about Katzenbach’s loyalty and how many other sensitive subjects the President was discussing with Katzenbach on tape at the time, it seems likely that he would have done so in a recorded conversation. The tapes and documentary evidence suggest that it is more likely that LBJ got rid of the Attorney General because of his frustration over Katzenbach’s role in the Bobby Baker and Fred Black cases and his relationship with Robert Kennedy than because Katzenbach did not shut down Wolfson’s indictment.

³⁶ Weinberger, “What’s In a Name,” at 672-73; Shogan, *A Question of Judgment*, at 263.

³⁷ “The Plot Thickens in the Fortas Affair,” *WP*, May 13, 1969; “Slander by Indirection,” *NYT*, May 14, 1969; “Fortas,” POF, Annotated News Summary, Box 30, Folder 5, RMNL; Kalman, *Abe Fortas*, at 370; Max Frankel, “Washington’s Dinner Guests Are Served War, Want, and Fortas,” *WP*, May 12, 1969.

³⁸ Kalman, *Abe Fortas*, at 370-71; “At Speech Tonight: Fortas Curbs the Press,” *WS*, May 8, 1969 (“The justice’s office said the booking agent had been under instruction ‘for some time.’ But the agent said the instructions had been passed down in the past few days”); John Barnes to William Spong, May 9, 1969, Box 64, Judiciary Supreme Court Fortas 1969, Spong MSS.

³⁹ John MacKenzie, “Fortas Bars Speech Amid Talk He’ll Quit,” *WP*, May 14, 1969 “Fortas Tie to Wolfson is Detailed;” Kalman, *Abe Fortas*, at 373-74; Clark Clifford to John Frank, February 3, 1987, Box 24, Folder 20, Clifford MSS (“[s]ome incident”).

⁴⁰ Interviews with Adam Stolpen, January 2014 and January 2016; Email, Adam Stolpen to Laura Kalman, January 6, 2016; Frank, *Clement Haynsworth*, at 13 (Taft).

⁴¹ “How Fortas Looks At It,” *NYT*, May 16, 1969 (“conscience”); Bradlee, “Fortas: ‘Wasn’t Any Choice for a Man of Conscience.’” Wolfson had also, for example, asked Senator Richard Russell for help with the Justice Department during LBJ’s Presidency. Richard Russell to Louis Wolfson, November 18, 1967,

Series I, Subseries C, Box 14A, Folder 4: Judiciary,” Russell MSS. Among others, Wolfson enlisted Senator Russell Long to make the case for a pardon with Nixon. John Ehrlichman to Russell Long, May 12, 1969, Egil Krogh Chron File, Box 1, Memos, May 1969, RMNL.

⁴² Robert Donovan, “The Sounds of Silence: A Saddened Capital Ponders Question of Corrupt Society,” *LAT*, May 16, 1969; Sidney Zion, “The Court Crisis: Shadow of Impropriety Over a Great Institution,” *NYT*, May 18, 1969; Robert Jackson, “Senators Demand Full Fortas Story: But Doubts Arise as to Vigor of Justice Department Investigation,” *LAT*, May 17, 1969; “The Fortas Case Cannot Be Closed,” *WP*, May 18, 1969; Christopher Lydon, “Wolfson File Inactive,” *NYT*, July 21, 1969; John MacKenzie, “Fortas Breached Ethics,” *ABA Says*,” *WP*, May 21, 1969.

⁴³ “One Down, How Many More to Go?,” *CT*, May 17, 1969 (and see “Douglas Must Go,” *id.*, May 22, 1969; “Fortas Fallout,” *HE*, May 24, 1969); “A Salutary Reform,” *NYT*, May 24, 1969 (“nothing”); Barnard Collier, “Douglas Says Tax Inquiry Aims to Get Him Off Court,” *id.* May 26, 1969; Ronald Ostrow and Robert Jackson, “Douglas Letter to Parvin Sharpens Court Controversy,” *LAT*, May 27, 1969; George Lardner, “Celler Raps Douglas on Letter to Parvin,” *WP*, May 28, 1969; Strom Thurmond Reports to the People: “Douglas Is Next,” Press Release 15, no. 19, Thurmond MSS; Thurmond to Claude Ragsdale, May 28, 1969, Correspondence, 1969, Box 28, Nominations 3, *id.*; Jack Caulfield to John Ehrlichman, “Newspapers Investigate Possible Justice Douglas Impropriety,” June 4, 1969, Box 39, Supreme Court (2), Ehrlichman MSS.

⁴⁴ Abe Fortas to William O. Douglas, May 28, 1969, Box 1782, Douglas MSS; Zion, “The Court Crisis.”

⁴⁵ Fred Graham, “Warren Seeking a Code of Ethics,” *NYT*, May 23, 1969 (“move”); Robert Jackson, “Judges Meet to Frame First Code of Ethics for U.S. Bench,” *LAT*, May 25, 1969.

⁴⁶ John MacKenzie, “Warren Is Seeking Strict Code,” *WP*, May 30, 1969; “The Honor of the Court,” *NYT*, June 15, 1969; “Warren on Modernizing the Courts,” *WP*, June 5, 1969; Fred Graham, “Warren Is Accused of Pushing Through New Judges’ Code,” *NYT*, June 13, 1969 (“rammed”); Charles Wyzanski to Earl Warren, May 19, 1969, Box 719, Ethics, Warren MSS; and see Judge Robert Ainsworth, “Judicial Ethics—A Crisis of Confidence,” September 15, 1969, *OB*, September 15, 1969, Box 720: Ethics: General Correspondence, *id.*

⁴⁷ John Frank to Elizabeth and Hugo Black, July 15, 1969, Box XXX, Folder: John Frank, Black MSS; Earl Warren to Robert Ainsworth, October 1, 1969, Box 719, Ethics, Warren MSS; and see, e.g., Henry Friendly to Judge Lumbard, n.d., Box 529, Ethics, Harlan MSS (complaining that the resolution forced federal judges “to go through the humiliating task of begging permission to receive compensation for teaching, for giving established lectures, for writing books,” that it failed to provide judges with “elementary due process,” and was “exceedingly ill-considered.”)

⁴⁸ Warren to Ainsworth, October 1, 1969 (“I,” embarrassment); John Mackenzie, “Warren Fails to Get Ethics Code Now,” *WP*, June 18, 1969 (“persuasive”).

⁴⁹ “Ethics and the Supreme Court,” *LAT*, June 19, 1969; William O. Douglas, “Appeal of Folk Singing: A Landmark Opinion,” *AG*, March 7, 1969; “Tydings Assails Supreme Court for Inaction on Code of Ethics,” *WP*, June 19, 1969.

⁵⁰ John MacKenzie, *The Appearance of Justice* 162-63 (New York: Charles Scribner’s Sons, 1974); Warren Burger to Richard Nixon, May 8, 1969 WHCF EX FG 51, Box 1, Folder 1, RMNL.

⁵¹ POF, Pat Buchanan, Memorandum to the President, May 21, 1969, One Observer’s Notes of Legislative Leadership Meeting, May 20, 1969, May 21, 1969, Box 78, RMNL; Ehrlichman, *Witness to Power*, at 117; Robert Donovan, “Nixon Nominates His Chief Justice,” *LAT*, May 22, 1969.

⁵² Ehrlichman, *Witness to Power*, at 117; H.R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* 60-61 (New York: G.P. Putnam’s Sons, 1994).

⁵³ Remarks Announcing the Nomination of Judge Warren Earl Burger to Be Chief Justice of the United States, May 21, 1969, <http://www.presidency.ucsb.edu/ws/?pid=2063>; Conversation with Newsmen on the Nomination of the Chief Justice, May 22, 1969, http://www.presidency.ucsb.edu/ws/index.php?pid=2065&st=nixon&st1=burger_id.; John MacKenzie, “Fortas’s Presence on High Court Deterred Stewart From Top Job,” *WP*, May 28, 1969. Nixon explained in his memoir, “As the search continued, I developed five criteria for the selection process. The next Chief Justice must have a top-flight legal mind; he must be young enough to serve at least ten years; he should, if possible, have experience both as a practicing lawyer and as an appeals court judge; he must generally share my view that the Court should interpret the Constitution rather than amend it by judicial fiat; and he must have a special quality of leadership that would enable him to resolve differences among his colleagues, so that, as often as possible, the Court speaks decisively on major cases with one voice or at least with a strong voice for the majority opinion.” Richard Nixon, *RN: The Memoirs of Richard Nixon* (New York: Simon and Schuster, 2013, Kindle edition. XXX). Nixon mentioned Eastland’s warning to Burger in OVAL 733-010, June 14, 1972, NT, Burger.

⁵⁴ Conversation with Newsmen on the Nomination of the Chief Justice, May 22, 1969.

⁵⁵ See Chapter VI.

⁵⁶ Ehrlichman, *Witness to Power*, at 113; Dean, *The Rehnquist Choice*, at 12 (New York: Free Press, 2001); Donovan, “Nixon Nominates His Chief Justice” (Mansfield).

⁵⁷ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* 11 (New York: Simon and Schuster, 1979) (Warren); John MacKenzie, “Burger, a ‘Law and Order’ Judge, Seen in Running for High Court,” *WP*, April 29, 1969; Dean, *The Rehnquist Choice*, at 14 (“run”); Oval 733-10, June 14, 1972, Burger.

⁵⁸ John Dean, *The Rehnquist Choice*, at 14 (“run”); OVAL 733-10, June 14, 1972; Harry Blackmun to George Register, XXX____, Box 90, Folder 6, Blackmun MSS; Richard Kleindienst, *Justice: The Memoirs of Attorney General Richard Kleindienst* 114 (Ottawa: Jameson, 1985) (“dazed”).

⁵⁹ Blackmun to Register; Pat Buchanan, Memorandum to the President, May 6, 1959, WHCF, Box 1, Folder 1, Ex FG 51. See, e.g., John Mackenzie, “Stewart Indicates Timing of Fortas Influenced Rejection of

the Top Post,” *WP*, May 28, 1969: “Many close observers of the Court considered Stewart to have been, in addition to the Justice most eligible for promotion, the one least likely to stir the human jealousies of his colleagues.”

⁶⁰ John MacKenzie, “Burger Got \$6000 From Foundation,” *WP*, May 23, 1969; MacKenzie, *The Appearance of Justice*, at 162; Nomination of Warren E. Burger, at 1 (ABA Rating); Bryce Harlow, Memorandum for the President: Appointment of Chief Justice, May 22, 1969, WHCF EX FG 51, Box 1, Folder 9, RMNL; Herbert Klein, Memorandum for the President, May 27, 1969, WHCF EX FG 51/a, Box 3, Folder 4, id. (“We have found no editorial wholly critical of the nomination”); Alexander Butterfield to John Ehrlichman, June 2, 1969, Box 65, Folder 277-0A 3032, Krogh MSS (“of course”); Earl Maltz, *The Chief Justiceship of Warren Burger* 10 (Columbia: University of South Carolina Press, 2000) (“Conservatives”).

⁶¹ *The Presidential Transcripts* 378, 386, 392, 398, 400 (New York: Dell, 1974) (“Incidentally,” Burger’s support for Chicago lawyer Barnabas Sears); John MacKenzie, “Crossing the Judicial Line,” *WP*, June 13, 1974; “Transcripts Indicate Kleindienst Got Burger’s Advice in Scandal,” *LAT*, May 3, 1974 (John Frank); “Burger’s Advice on Watergate,” *SFC*, May 6, 1974; Louis Kohlmeier, “Tapes Touch the Chief Justice,” *CT*, May 9, 1974; George Lardner and Walter Pincus, “Nixon Ordered Tapes Destroyed,” *WP*, October 30, 1997 (reporting that Nixon referred to Kleindienst as “that tower of jelly”). Richard Kleindienst discussed his conversation with Burger about the special prosecutor and his showdown with Nixon in *Justice: The Memoirs of Attorney General Richard Kleindienst* 150, 162-64 (Ottawa, Illinois: Jameson Books, 1985); and see John Dean, *The Nixon Defense: What He Knew and When He Knew It* 410-14 (New York: Viking, 2014).

⁶² Lou Cannon, “The Last 17 Days of the Nixon Reign,” *WP*, September 29, 1974 (unanimous, “reportedly”); “Bob Woodward and Scott Armstrong, “The Tapes Case: A Revolt Against Burger,” *WP*, December 7, 1979; Woodward and Armstrong, *The Brethren*, at 309-47. On the basis of his reading of the documents from the period, Justice Powell’s authorized biographer, John Jeffries, deemed the account of the Nixon Tapes case in *The Brethren* “a surprisingly complete and accurate account of the evolution of the Court’s opinion” that represented “a triumph of investigative reporting.” John Jeffries, *Justice Lewis F. Powell, Jr.: A Biography* 392 (New York: Fordham, 2001).

⁶³ T.R. Reid, “Leak Places High Court in Dilemma,” *WP*, April 27, 1977 (quotations); “High Court Reported to Oppose a Review of Nixon Aides’ Case,” *NYT*, April 22, 1977; William Safire, “Equal Justice Under Leak,” *NYT*, April 28, 1977; Morton Mintz, “Court Bars Review of Three Former Nixon Aides,” *WP*, May 24, 1977. See also Stephen Wermiel, “High Court Holds Very Low Opinion of its Recent Leak: Book Next Month Could Lead to Even Tighter Secrecy: Disclosures Involve Burger,” *WSJ*, November 26, 1979. *The New York Post* speculated that the source was Justice Stewart, who was “said to be a close friend of Totenberg’s,” with a leering innuendo that Totenberg accurately characterized as ‘sexist.’” Stewart’s secretary denied he was the source. “Leak Places High Court in Dilemma.” “I just wanted you to know that I am terribly sorry for the embarrassment I have inadvertently caused you,” Totenberg wrote Stewart. “I

fell particularly badly because you have been such a good friend to me, and I did not foresee that this would happen. Still, I'm sure you realize that I had to do the story. I think you should know something I'll never be able to publish. I got my first tip that something was in the wind on the Thursday before the fateful conference. If I could have confirmed the substance of that tip, I would have had a much bigger story than I did. But what I learned during the following week, some of which you may not know, seemed to me to demand publication. You and I know perfectly well that this sort of speculation would never have occurred if a man had broken this story. But it doesn't ease the embarrassment. And I just wanted you to know I am thinking of you." Nina Totenberg to Potter Stewart, April 28, 1977, Box 598, Folder 322, Stewart MSS.

⁶⁴Ehrlichman, *Witness to Power*, at 133; Phil Gailey, "Mitchell Challenges Ehrlichman Account," *NYT*, December 11, 1981; "CBS Says Burger Knocked Camera From Man's Hands," *WP*, December 17, 1981; "Burger Says Ehrlichman Selling Book," *id.*, December 18, 1981; Linda Greenhouse, "The Issues All Justices Confront Out of Court," *NYT*, December 11, 1981.

⁶⁵ Seymour Hersh, "Nixon's Last Cover-Up: The Tapes He Wants the Archives to Suppress," *NY*, December 14, 1992, 76, 81. Nixon stonewalled on releasing his papers too. Stanley Kutler, "What Is Nixon Still Hiding? Sixteen Years After Watergate, He Still Won't Release His Papers," *WP*, January 10, 1979.

⁶⁶ OVAL 733-10, June 14, 1972, NT.

⁶⁷ Dean, *The Nixon Defense*, at 128, 136.

⁶⁸ WHT 046-0138, May 23, 1973, 9:27 A.M., Nixon, Burger, NT; Dean, *The Nixon Defense*, at 580; Earl Warren to Benjamin Swig, Box 119, Box 119, Chief Justice Personal, Warren MSS; and see James Reston, "A New Problem for President: Whether to Choose a 'Best' Man or a...," *NYT*, October 11, 1973 (reporting Burger as possibility).

⁶⁹ Warren Burger to Richard Nixon, April 30, 1970, PPF, Box 6, Burger, RMNL; Warren Burger to Harry Blackmun, September 17, 1979, Box 51, Folder 2, Blackmun MSS; Dwight, Memorandum for the President, May 22, 1970, WHCF, Subject Files, Ex FG 51, Box 1, Folder 3, RMNL ("Nixon's Fortas"); Richard Reeves, *President Nixon: Alone in the White House* 321 (New York: Simon and Schuster, 2001); Warren Burger to Richard Nixon, May 10, 1971, Box 6, Folder: Burger, President's Personal File, RMNL.

⁷⁰ "Burger is Sworn as Chief Justice; Warren Praised," *NYT*, June 24, 1969; Remarks at the Swearing In of Warren E. Burger as Chief Justice of the United States, June 23, 1969, <http://www.presidency.ucsb.edu/ws/?pid=2107>; Alexander Butterfield, Memorandum for Mr. Ehrlichman, July 7, 1969, XXX, RMNL ("criticize," "defended").

VI

¹John Ehrlichman, *Witness to Power: The Nixon Years* 115 (New York: Simon and Schuster, 1982); Donald Stephenson, *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* 183-84 (New York: Columbia University Press, 1999) ("opening").

² Barbara Perry, *A "Representative" Supreme Court? The Impact of Race, Religion, and Gender on Appointments* 78 (New York: Greenwood, 1991); "Goldberg on Successor," *NYT*, May 19, 1969, 12;

David Stebenne, *Arthur J. Goldberg: New Deal Liberal* 375-76 (New York: Oxford University Press, 1996).

³ Conversation with Newsmen on the Nomination of the Chief Justice, May 22, 1969, <http://www.presidency.g.ucsb.edu/ws/?pid=2065>. Nevertheless, William Safire urged Nixon to avoid the subject of the “Jewish seat” altogether. “If the President is not going to appoint a Jew, nothing he says beforehand is going to placate that community. People like Arthur Goldberg may say publicly that this should not be a consideration, but deep down few Jews believe this. If the President is going to appoint a Jew, he should not say beforehand that no ethnic considerations apply, because he will seem to be trying to lay the groundwork for not appointing one, and then seem to be changing his mind under pressure.” Safire to H.R. Haldeman, Presentation of Supreme Court Appointments, May 20, 1969, White House Central Files, EX FG 51A, Box 3, Folder 4, RMNL.

⁴ John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* 147-48 (New York: Free Press, 2001).

⁵ *Id.* at 15-16; Harry Dent, Memorandum for the President, May 26, 1969, WHCF EX FG 51/a, Box 3, Folder 4, RMNL; Matt Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* 232-39 (Princeton: Princeton University Press, 2006).

⁶ Richard Nixon to John Jeffries, March 15, 1990, XXX, Retirement Subject Files: Biography, Powell MSS.

⁷ William Eaton, “Haynsworth’s Stock Holdings Put at Million,” *CDN*, September 16, 1969; “B.J. Phillips, “A Gentle Man’: Clement Haynsworth,” *WP*, September 7, 1969; Ernest Hollings with Kirk Victor, *Making Government Work* 145 (Columbia: University of South Carolina Press, 2008).

⁸ Clement Haynsworth to Brainerd Chapman, August 4, 1969, Haynsworth MSS (“fire”); Clement Haynsworth to Elizabeth Hirsch, August 5, 1969, *id.* (“rewards, “When”).

⁹ Nomination of Clement Haynsworth, 139, 140 (statement of Lawrence Walsh, chair ABA Federal Judiciary Selection Committee); Clement Haynsworth to Warren Burger, September 20, 1969, Haynsworth MSS; William Brennan to Judge and Mrs. Haynsworth, *id.*, August 10, 1969; Byron White to Haynsworth, *id.*, September 10, 1969; Black to John Frank, September 8, 1969, *id.*; Haynsworth to Harlan, August 22, 1979, Box 549, Haynsworth, Harlan MSS; Thurgood Marshall to S. Sidney Ulmer, November 7, 1983, Box 34, Folder 2, T. Marshall MSS (“I consider Judge Haynsworth as one of the greatest of Federal judges and for that reason I have great respect for him.”); John Frank, *Clement Haynsworth, the Senate and the Supreme Court* 28 (Charlottesville: University Press of Virginia, 1991).

¹⁰ Lewis Powell to William Spong, November 4, 1969, Box 112, Powell MSS; “Possible High Court Choice Hit,” *WP*, August 7, 1969; Frank, *Clement Haynsworth*, at 21 (“zealous”); Hollings, *Making Government Work*, at 142, 144; Bruce Kalk, *The Origins of the Southern Strategy: Two-Party Competition in South Carolina, 1950-1972* 102 (Lanham: Lexington Books, 2001) (legislature); Richard Harwood, “Haynsworth’s Defeat: ‘Contemporary Man?,’” *WP*, November 23, 1969 (J.P. Stevens); Sandra Salman, “J.P. Stevens: One Year After the Truce,” *NYT* October 18, 1971; William Eaton, “Why Haynsworth Lost: AFL-CIO Opposition Lit Fuse,” *CDN*, November 22, 1969; Fred Graham, “Nixon and His Motives:

Politics and Attitude on Crime Viewed as Possible Reasons for Court Choice,” *NYT*, August 19, 1969.

Haynsworth was the author of one imaginative habeas decision that the Warren Court approvingly affirmed. *Rowe v. Peyton*, 383 F. 2d. 70, 715 (1967); *Peyton v. Rowe*, 391 U.S. 54, 57 (1968).

¹¹ John MacKenzie, “Nixon May Delay Court Appointment Until August,” *WP*, July 20, 1969 (Haynsworth a “leading contender”); Michael Parrish, *Citizen Rauh: An American Liberal’s Life in Law and Politics* 4, 226-29 (Ann Arbor: University of Michigan Press, 2011); Eaton, “Why Haynsworth Lost,” E.W. Kenworthy, “The Haynsworth Issue: A Study in Pressure Politics,” *NYT*, November 21, 1969; “Civil Libertarians Hit Haynsworth Selection,” *WP*, August 19, 1969. Not all groups in the Leadership Conference on Civil Rights joined in the opposition. The Anti Defamation League and ACLU abstained “because we do not wish to prevent the Leadership Conference from taking a position on this matter.” Sol Rabkin to Arnold Aronson, September 3, 1969, Part 1, Box 105, Folder 5, Leadership Conference MSS. See, e.g., “Memorandum of Leadership Conference on Civil Rights Concerning Judge Haynsworth,” September 9, 1969, Part 1, Box 105, Folder 5, id.

¹² Daniel Grove and Louis Natali, to Dear Sir, August 16, 1969, Box 6, Folder 5, Eaton Mss.; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d. 959, 971 (1963); *Dillard v. School Board of Charlottesville*, 308 F. 2d 902, 927 (1962); *Griffin v. Board of Supervisors of Prince Edward County*, 332 F. 2d. 332 (1963); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964); *Bowman v. School Board of City of Richmond*, 382 F. 2d. 326 (1967); “The Haynsworth Record,” *Ti*, October 17, 1969, 54 (delay); Kalk, *The Origins of the Southern Strategy*, at 103. Parker’s gloss on Brown came to be known as the “Parker Principle.” Kenneth Goings, *The NAACP Comes of Age: The Defeat of Judge John J. Parker* 85-87 (Bloomington: Indiana University Press, 2000).

¹³ “Although labor and civil rights forces, and some senators remained convinced throughout that Haynsworth’s judicial philosophy’ was the key issue, it was commonly understood in the Senate that there would have been no threat to the nomination if ethics had not been made central. That was the legacy of the Fortas resignation, as most senators saw it.” Lyle Denniston, “Haynsworth Vote: The Anatomy of a Defeat,” *WS*, November 23, 1969. Kenworthy, “The Haynsworth Issue.”

¹⁴ Lamar Alexander to Bryce Harlow, n.d., Box 10, Haynsworth, Harlow MSS, RMNL, <http://www.nixonlibrary.gov/virtuallibrary/releases/dec10/77.pdf>, (lack of vetting); William Eaton, “Haynsworth Sequel: Nixon to Tighten Judicial Screening of U.S. Judicial Appointments,” *CDN*, October 6, 1969 (“once-over”); *Darlington Manufacturing Company v. National Labor Relations Board*, 325 F. 2d 682 (1963); *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965); Frank, *Clement Haynsworth*, at 21; William Eaton, “Haynsworth’s Dual Role in Case Is Cited,” *CDN*, August 16, 1969; Eaton, “Haynsworth Attacked by AFL-CIO Attorney,” *id.*, August 30, 1969; Nomination of Clement Haynsworth, at 106-07, 13-15; John MacKenzie, “Kennedy Disputes Testimony RFK ‘Cleared’ Haynsworth,” *WP*, September 18, 1969; Eaton, “Why Haynsworth Lost.” “There is a widespread impression that Haynsworth was nominated after sloppy staff work, that had Attorney General Mitchell checked more carefully into the judge’s business dealings he would never have been picked,” a reporter

observed in 1970. “But Mitchell now flatly denies this. “There was an F.B.I. check, and there were no surprises, except for the intensity of the opposition.”” The FBI check was not apparently that thorough and there were other surprises. John Steele, “Haynsworth v. The U.S. Senate,” *Fortune*, March 1970. Attitude towards conflicts of interest were considerably looser during this period than they are today. When the Nixon Administration announced that it was elevating Haynsworth to the Court, one of his backers, Senate Judiciary Committee member Sam Ervin, who had represented Darlington Mills before the Supreme Court, laughed off the suggestion that he himself possessed a conflict of interest that should disqualify him from voting on the judge’s nomination. John MacKenzie, “Ervin Laughs Off Idea He Can’t Vote on Judge,” *WP*, September 25, 1969.

¹⁵ Washington Wire,” *WSJ*, August 1, 1969; Eaton, “Why Haynsworth Lost” (Dirksen, Leonard); Richard Harwood, “Haynsworth’s Defeat,” *WP*, November 23, 1969 (Leonard); James Wooten, “Carolinian Seen in Line for the Court,” *NYT*, August 13, 1969; E.W. Kenworthy, “The Haynsworth Issue: A Study in Pressure Politics,” *id.*, November 21, 1969 (Meany); “A.J.C. Opposes Judge,” *id.*, August 16, 1969; William Eaton, “Nixon Choice? Haynsworth Rapped by Rights Groups,” *CDN*, August 14, 1969; “Haynsworth Says U.S. Inquiry Cleared Him of Union Charges,” *NYT*, August 16, 1969.

¹⁶ “Neil Sheehan, “C.F. Haynsworth Named by Nixon for High Court,” *NYT*, August 19, 1969; Frank, *Clement Haynsworth*, at 22, 26-27; “Rights and Labor Leaders Oppose Nomination,” *NYT*, August 19, 1969; Roy Wilkins to Members of the Board of Directors, August 21, 1969, Part IX, Box 16, Folder 1, NAACP MSS; G.A. Gallenthin, “The Effect of Interest Groups on the Confirmation of Clement F. Haynsworth of South Carolina, to be Associate Justice of the Supreme Court of the United States,” December 25, 1970, Part IX, Box 16, Folder 3, *id.*.

¹⁷ John Hohenberg, ed., *The Pulitzer Prize Story II: Award-Winning News Stories, Columns, Editorials, Cartoons and News Pictures, 1959-1980* (New York: Columbia University Press 318 (“charm”); William Eaton, “Why Haynsworth Lost;” Eaton, “Haynsworth Had \$450,000 Stock Linked to Suit,” *WP*, August 24, 1969 (“socialite”); Eaton, “How Profits of Haynsworth’s Firm Soared,” *CDN*, August 26, 1969; Gallenthin, “The Effect of Interest Groups on the Confirmation of Clement Haynsworth” (citing author’s contemporary interview with Eaton about the friend and Eaton’s remark that “[t]hese were published in order to stir public opinion and require Haynsworth to expose his finances before the upcoming Senate Judiciary Committee.”); Clement Haynsworth to Circuit Judges, August 21, 1969, Box 13, Clement Haynsworth, Sobeloff MSS: “With all of the flurry news of my appointment has occasioned, I do know whether I can look forward to the pleasure of being with you on the Fourth Circuit in the future. If I am confirmed, I would leave the Fourth Circuit with the greatest regret, for I have been extremely happy in my associations. I would must prefer to work and debate with you fellows than with the Supreme Court Justices, and the Supreme Court would be really enticing to me only if I could take all of you with me...If Judge [Harrison] Winter is shortly to succeed me as Chief Judge, it seems to me that he would benefit by assuming the routine duties of that office now when I am available for discussion with him when he would like it, and it would be a great relief to me.”

¹⁸ John MacKenzie, “Haynsworth Hearings Delayed for a Week,” *WP*, September 9, 1969; William Eaton, “Haynsworth Battle: Judge’s Foes Lack Leader,” *CDN*, August 20, 1969; Eaton, “Why Haynsworth Lost,” “Man in the News: Indiana’s Long-Winning Liberal,” *NYT*, July 26, 1980.

¹⁹ William Eaton, “Haynsworth Pays Visit to Senate,” *CDN*, September 5, 1969 (quoting a “Senate insider” as saying of the visits, “It may not be traditional—but it’s smart”); Frank, *Clement Haynsworth*, at 43; Fred Graham, “Haynsworth Confirmation Faces Little Opposition in the Senate,” *NYT*, September 4, 1969 (Javits). Haynsworth described Harry Haynsworth as “my staff” in a June 26, 1971 conversation with John Frank, Haynsworth MSS; Eaton, “Haynsworth Sequel.”

²⁰ Eaton, “Why Haynsworth Lost” (“battery,” “lucky”); Ronald Ostrow, “Haynsworth Stock Purchase During Firm’s Case Disclosed,” *LAT*, September 21, 1969; Nomination of Clement Haynsworth, at 128; Frank, *Clement Haynsworth*, at 43. Though Nixon press secretary Ron Ziegler “seemed to imply that the Administration may have known in advance of Bayh’s questioning that Haynsworth acquired the Brunswick shares before his court ruling was announced,...a Justice Department source said this was definitely not the case. ‘We spent a frantic Thursday night,’ this source said, referring to efforts to collect information about Haynsworth’s ownership of Brunswick.” Ronald Ostrow, “Haynsworth Recalled to Testify in Stock Purchase Controversy,” *LAT*, September 23, 1969.

²¹ Nomination of Clement Haynsworth, at 37, 66-67, 590-625 (the three supporting witnesses were Charles Wright of the University of Texas Law School, G.W. Foster of the University of Wisconsin, and William Van Alstyne of Duke); Frank, *Clement Haynsworth*, at 52-53; Fred Graham, “Haynsworth Talks of Vending Business Before Senate Unit,” *NYT*, September 17, 1969. For the testimony of Haynsworth’s broker, Arthur McCall, see Nomination of Clement Haynsworth, at 263-70.

²² Graham, “Haynsworth Bought Stock After Ruling for Company,” *NYT*, September 21, 1969; Graham, “No Impropriety, Haynsworth Says,” *NYT*, September 24, 1969; James Wieghart, “Haynsworth Linked to Realty Deals,” *CDN*, September 30, 1969; “New Double-Sale Real Estate Deal by Haynsworth Bared,” *CDN*, November 10, 1969; Warren Weaver, “The Case Against Judge Haynsworth: Three Ethical Questions,” *NYT*, October 21, 1969; Christopher Lydon, “White House Denies any Haynsworth-Baker Link,” *id.*, October 5, 1969; Reports and Rumors about Relationship Between Haynsworth and Bobby Baker, October 4, 1969, Box 39, Supreme Court (2), Ehrlichman MSS.

²³ Frank, *Clement Haynsworth*, at 2, 41, 45, 68-69, 64 55-56, 51 (as Frank conceded, “Brunswick, while involving an insubstantial amount, was at least arguably more open to criticism” than Vend-a-Matic. *Id.* at 93); Nomination of Clement Haynsworth, at 80-81, 470; John Maltese, *The Selling of Supreme Court Nominees* 73 (Baltimore: Johns Hopkins, 1995); “Senate Backers of Haynsworth’s Reply to Charges,” *WP*, September 11, 1969 (citing release of news about Rehnquist memorandum by Haynsworth’s backer, Senator Hruska, as “the latest in a series of extraordinary moves by Judiciary Committee members”); John MacKenzie, “Haynsworth’s Fate Seen in ABA’s Hands,” *id.*, October 12, 1969; Fred Graham, “Bar Unit Endorses Haynsworth Again, But Vote Is Divided,” *NYT*, October 13, 1979 (“fact”); Kalk, *The Origins of the Southern Strategy*, at 106 (“retreated”). After polling its members, the board of governors of the

American Trial Lawyers Association resolved that Haynsworth's confirmation would "undermine" the public's trust in the Court. The National Bar Association, an organization of African American Lawyers, made its opposition clear, then reaffirmed it. John Fenton, "Trial Lawyers' Board Opposes Judge Haynsworth's Approval," *NYT*, October 27, 1969.

²⁴ "Haynsworth Nomination," *TNR*, October 4, 1969, 7; Herblock, "Ethics Are for Liberals," October 3, 1969, *Herblock: The Life and Work of the Great Political Cartoonist with a DVD Containing Over 18,000 of His Major Cartoons*, ed. Haynes Johnson and Harry Katz (New York: The Herblock Foundation and Library of Congress in association with W.W. Norton, 2009); Nomination of Clement Haynsworth, at 163, 465, 423. "I think you can be most proud of the role the Leadership Conference has played in the effort to expose the weaknesses of this appointment, and I am confident that the fruits of your work will show up in the quality of future appointments." Ted Kennedy wrote Roy Wilkins on October 6. "[I]t's still hard to tell what the outcome will be, though I see some encouraging signs." Ted Kennedy to Roy Wilkins, October 9, 1969, Box 105, Folder 5, Leadership Conference MSS.

²⁵ Nomination of Clement Haynsworth, at 81; Tom Connaughton and Bob Keefe, "Judge Haynsworth's Conflicts of Interest," nd., Judiciary Committee Nominations, Supreme Court Haynsworth Working File 1969, Bayh MSS.

²⁶ Pat Buchanan, "The Forgotten Americans," July 1969, WHCF, EX FG 51, Box 1, Folder 1, RMNL; John Jeffries, *Justice Lewis F. Powell, Jr.: A Biography* 225 (New York: Fordham University Press, 2001) (Rehnquist); "The Confirmation of Judge Haynsworth," *WP*, September 29, 1969; John MacKenzie, "Haynsworth Proposes Custody of Holdings," *id.*, October 7, 1969; "None of the Things My Client Did Were Wrong," October 8, 1969, Katz and Johnson, *Herblock*; Herb Block, "Herblock's History—Political Cartoons from the Crash to the Millennium," <http://www.loc.gov/exhibits/herblocks-history/cartoon.html>; Hollings, *Making Government Work*, at 148-49 (maintaining that the cartoon lost Haynsworth's supporters "five votes—exactly the number by which we fell short of confirming Haynsworth"); Clarence Mitchell and Joseph Rauh, Letters to the Editor, *WP*, October 5, 1969 ("Ultimately the position of the *Washington Post* seems to rest on it having urged the confirmation of Justice Fortas a year ago, and hence feels embarrassed to oppose Judge Haynsworth."); "A Way Out of the Haynsworth Affair," *WP*, October 9, 1969; "The Senate and the Judge," *NYT*, September 27, 1969; "...And Again, Judge Haynsworth," *id.*, October 6, 1969. "The idea that the President is entitled to his own man on the Court is still heard from some Senators this year, but the Fortas case has made it much less convincing," the *Post* said. "So labor and civil rights groups are able to press home the argument that Haynsworth is not sympathetic to them and would help reverse the whole trend of recent policy," and after Fortas's resignation, that Haynsworth's behavior showed insensitivity as well. Spencer Rich, "Impact of Fortas Revelations is Hurting Haynsworth," *WP*, November 16, 1969. See, e.g., Herbert Klein to Ben Bradlee, October 7, 1969, WHCF Alpha Name File Clement Haynsworth, Folder 1, RMNL (accusing *Post* of burying endorsement of Haynsworth by 16 former American Bar Association Presidents' endorsement of Haynsworth and trumpeting poll by American Trial Lawyers Association that opposed him); Assistant Attorney General

Johnnie Walters to C. Stanley Blair, December 9, 1969, Box 1, Folder: Nominations and Appointments, 1969-1987, Walters MSS, complaining about the Post's November 20, 1969 "five-column article with a five-column headline reading 'Montgomery [Maryland] Teachers Oppose Haynsworth.'"

²⁷ John Masarro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* 80-81, 87 (Albany: State University of New York Press, 1990); Warren Weaver, "Two Senators Split on Haynsworth," *NYT*, November 20, 1969 (Williams, "who has made a career out of investigating impropriety by public officials announced that he would vote against Judge Haynsworth because 'the restoration of the confidence of the American people in the integrity and fairness of our courts is of paramount importance'"); Bryce Harlow, Memorandum for the President, October 20, 1969, WHCF, Alpha Name File Clement Haynsworth (4), RMNL ("On the Republican side the key vote is Williams. If he votes 'aye' he will influence Aiken, Boggs, Cooper, Dole, Jordan and Prouty." Ultimately, Aiken, Boggs, Dole and Jordan all voted yes, and Cooper and Jordan voted no.); Carol Hoffecker, *Honest John Williams* 222-23 (Newark: University of Delaware, 2000); Margaret Chase Smith to Richard Nixon, September 30, 1969, WHCF, Ex FG 51/a, Box 3, Folder 7, RMNL; John Ehrlichman for the President, October 13, 1969, id. (Brunswick); Statement of Senator Joseph D. Tydings, October 9, 1969, Box 127, Folder: Supreme Court Nominations, Clement Haynsworth (2), Hollings MSS; J. Bill Becker to Al Barkan, National Director, COPE AFL-CIO, October 16, 1969, Bayh Senate Judiciary Committee Nominees: Haynsworth, Letters, Bayh MSS; Clark Mohlenhoff to Clement Haynsworth, November 28, 1969, Haynsworth MSS ("smokescreen").

²⁸ Steele, "Haynsworth v. The U.S. Senate"; Joe Rauh to Dear Senator, Box 35, Folder 5, Rauh MSS; Nomination of Clement Haynsworth, at 354 ("altar boy"); Louis Harris, "Haynsworth Opposed by 53% in Poll," *WP*, November 17, 1969.

²⁹ William Rehnquist, Memorandum for John Ehrlichman, October 10, 1969, Box 39, Supreme Court, Ehrlichman MSS; "Haynsworth's Past and Fortas's Not Alike, White House Asserts," *NYT*, October 12, 1969; Spencer Rich, "Fortas Impact Is Hurting Haynsworth," *WP*, November 16, 1969.

³⁰ Paul Porter to Clement Haynsworth, November 25, 1969, Haynsworth MSS; Marshall Frady, "Haynsworth of Greenville," October 31, 1969, *Li*; John Frank to Haynsworth, November 12, 1969, Haynsworth MSS ("spook"); Ernest Hollings to Leon Wolfstone, October 16, 1969, Box 127, Supreme Court Judges, Clement Haynsworth Pro (1), Hollings MSS; Warren Weaver, "Eastland Assails 'Liberal Press' as Haynsworth Debate Opens," *NYT*, November 14, 1969; Harry Haynsworth to Marshall Frady, November 7, 1969, Haynsworth MSS. Haynsworth himself wrote Frady that while "[m]any Greenvillians are in a state of apoplexy and consternation," others thought it "not as bad as it might have been, while still others are pleased that it makes me appear a very different kind of man than Mr. Justice Fortas." Clement Haynsworth to Frady, November 7, 1969, id. He said the media was "substantially" to blame for his defeat in a December 3, 1987 interview with Richard Morris, Series II, Morris MSS. See Kalk, *The Origins of the Southern Strategy*, at 108 for White House feeling about the press.

³¹ Jules Witcover, "Hugh Scott—Pussycat on a Hot Tin Roof," *WP*, February 24, 1975; Kenworthy, "The Haynsworth Issue" (lobbyists, "alone"); "Haynsworth Case: Senator Birch Bayh's Bill of Particulars and Senator Ernest F. Hollings' Detailed Answer," November 18, 1969, Box 128, Supreme Court Haynsworth Statements, Hollings MSS; Ernest Hollings to Robert Small, November 28, 1969, Box 127, Supreme Court Judges, Haynsworth General Pro (3), id.: "Clement was a good product, but we just couldn't sell. You will remember my desperation in August and September. I could see the gathering storm and then Senator Dirksen died and we had to move fast. The Administration sat back as if they knew how to handle the situation and we never got back in the ball park."

³² Spencer Rich, "Judge Vote Could Hurt Senators," *WP*, November 9, 1969; Reuther's remarks, made at the September 19, 1969 meeting of the UAW Foundry Wage and Hour Council Meeting in Cleveland, are noted in Box 6, Folder 4, Eaton MSS.

³³ Fred Graham, "Negroes in House Oppose Haynsworth," *NYT*, September 26, 1969; Graham, "Brooke Bids Nixon Drop Haynsworth," *id.*, October 1, 1969. Some in the NAACP thought Brooke had waited too long. Kivie Kaplan to Edward Brooke, October 7, 1969, Part IX, Box 16, Folder 5, NAACP MSS.

³⁴ Richard Nixon, Memorandum for Bryce Harlow, October 21, 1969, WHCF Ex FG 51/a, October 21, 1969, Box 3, Folder 8, RMNL ("I have noted that Griffin apparently is lobbying quietly against Haynsworth behind the scenes. I think you should have a frank talk with him along these lines, that we understand his own position, but that as the Whip attempting to work directly against the President will be very hard for most people to justify or understand"); Bryce Harlow, Memorandum for the Staff Secretary, October 23, 1969, WHCF Ex FG 51/a, Box 3, Folder 8, id. ("I discussed the attached with Senator Griffin. He will not work against the Haynsworth nomination, he says"); Nomination of Clement Haynsworth, at 35-36; Kenworthy, "The Haynsworth Issue" (lobbyists); Marvin Kaplan to Washington Representatives and Heads of National Organizations, October 4, 1969, Part 1, Box 5, Leadership Conference MSS ("needs"); John MacKenzie, "Haynsworth Approved by Senate Unit," *WP*, October 10, 1969; E.W. Kenworthy, "All But One of Eleven Senators Regarded as Undecided Vote Against Haynsworth," *NYT*, November 22, 1969; Bryce Harlow, White House Central Files, Alpha Name File, Clement Haynsworth, Memorandum for the President, October 29, 1969, Folder 3, RMNL ("his vote"); Dean Kotlowski, "Unhappily Yoked? Hugh Scott and Richard Nixon," 125 *PaMagH&B*, 233, 245-46 (July 2001); Rowland Evans, "Griffin Bowed to Groups Back Home in Opposing Haynsworth," *LAT*, October 13, 1969.

³⁵ Bryce Harlow, Memorandum for the President, October 28, 1969, WHCF Ex FG 51/a, Box 3, Folder 8, RMNL (referring to Hruska and Cook as "your principal lieutenants in the Senate struggle"); "Undecided on Haynsworth," *CT*, November 7, 1969 (reporting that Smith had moved from opposed on October 2 to undecided); Bryce Harlow, Memorandum for the President, October 30, 1969, WHCF Name File, Clement Haynsworth, RMNL (Smith committed to voting for Haynsworth if White House needed his vote); William Eaton, "Senator Smith Switches to Haynsworth," *CDN*, November 19, 1969; Ehrlichman, *Witness to Power*, at 130.

³⁶ Ehrlichman, *Witness to Power*, at 130; “A.M.A. Confirms and Justifies Lobbying for Haynsworth in ’69,” *NYT*, July 4, 1975, Haynes Johnson, “Haynsworth Case: Politics of Pressure,” *WP*, November 20, 1969 (Saxbe). According to the John Birch Society, “from all we can learn, confirmation of the appointment is anything but certain at the present time. We hereby emphatically request and urge, therefore, that our members not only pour a huge flood of telegrams and letters into Washington at once, in favor of such confirmation, but that you get all of the friends you can, who are not members of the Society to do the same.” The John Birch Society wanted the letters and telegrams sent to Nixon, the two senators from each author’s state, and Senators Griffin, Mathias, Eastland, Smith, Dole, Pearson, Williams, Boggs, Dodd, Jackson, Fulbright, Gore, Ellender, McGee, Packwood, and Miller. “There are many very different reasons why various Senators have been placed on this list. But we believe that using the list is the best way to get the most effectiveness out of your barrage of messages. And we do mean a barrage, to which we hope *every member* of the Society will be responsible from five to ten such messages altogether.” *JBS Bull*, November, 1969. Packwood reported getting 30 pro-Haynsworth letters a day.

³⁷ Arnold Aronson to Participating Organizations, November 5, 1969, Box 35, Folder 5, Rauh MSS; Jerry, Memorandum for Ron Ziegler, October 6, 1969, Haynsworth Mail Survey, WHCF Name File Clement Haynsworth, Folder 4, RMNL (reporting that pro Haynsworth mail had dramatically increased, thanks to Administration show of support for him); Kenworthy, “All But One of Eleven Senators Regarded as Undecided Vote Against Haynsworth” (Saxbe); Kenworthy, “The Haynsworth Issue,” (“dough,” “cajoling”); Warren Weaver, “Haynsworth Lost Aspirants’ Vote: Only 9 of 30 Running in ’70 Backed Nixon’s Choice,” *NYT*, November 23, 1969.

³⁸ John Frank, Notes on June 26, 1971 Conversation, Haynsworth MSS (“boy”); Alexander to Harlow, n.d.; Phyllis Schlafly to Strom Thurmond, October 31, 1969, Box 29, Confirmation 1969, Thurmond MSS, and the other materials and letters in id., Box 28-29; Harry Dent, *The Prodigal South Returns to Power* 208 (New York: John Wiley, 1978) (“I realized it was not in Haynsworth’s interest to have him tabbed as Thurmond’s man, but the plan stopped working.”). See also John MacKenzie, “Nixon May Delay Court Appointment Until August,” *WP*, July 20, 1969 (Thurmond’s “curious” public promotion of Judge Donald Russell as support for Haynsworth gathered strength. As MacKenzie said, Thurmond’s behavior “could make a Haynsworth nomination more palatable to Northern liberals,” and it “puzzled and somewhat amused” politicians and others, “since Thurmond must have known his endorsement was a kiss of death for Russell, former South Carolina Governor and short-term U.S. Senator.”); Hollings, *Making Government Work*, at 144 (The White House must have told Thurmond to lie low); Leon Panetta and Peter Gall, *Bring Us Together: The Nixon Team and the Civil Rights Retreat* 333 (Philadelphia: J.B. Lippincott, 1971) (“There was even one published story that Thurmond only pretended to back another judge just so it wouldn’t appear that he was dictating the Haynsworth choice. It was the sort of story we were inclined to believe by this time.”) That story was apparently by Aldo Beckman, “Thurmond Baffles Foe in Naming of Justice,” *CT*, August 19, 1969.

³⁹ Alexander to Harlow, n.d.; Ernest Hollings to R.K. Wise, December 9, 1969, Box 127, Clement Haynsworth (4) (Pro), Hollings MSS; Hollings to F.A. Ramsaur, October 6, 1969, Box 127, Supreme Court Judges, Clement Haynsworth Pro (1), id. (“The going is rough because the President appointed the fellow in August, and two months later six Republicans called for his withdrawal. The National Chairman of the Republican Party also talks of his withdrawal, and the whip, Bob Griffin, is actively trying to turn some commitments I have so he won’t have to vote. This of course, is in confidence. You can fairly well hold the line if the Republicans hold their side of it. Up until Sunday we had only four Democrats asking the President to withdraw the nomination. Now, like the sheep dog that has tasted blood, everybody is hollering...Things really got out of hand the middle of last week.”); Hollings to W.C. Boyd, March 24, 1970, Box 127, Supreme Court Judges G. Harrold Carswell 1970 (2), id. (“It was the Republicans who defeated Haynsworth. Daily we had their leader, Scott of Pennsylvania, and the Republican Whip, Griffin of Michigan, shouting for the President to withdraw the appointment.”); “Nixon, Mitchell Affirm Support of Haynsworth,” *WP*, September 27, 1969; DJR Bruckner, “Haynsworth Issue Deepens,” *LAT*, October 8, 1969; Warren Weaver, “Mitchell on the Spot in the Haynsworth Conflict,” *NYT*, October 19, 1969; Nixon, “Remarks at an Informal Meeting With Members of the White House Press Corps on Judge Haynsworth’s Nomination to the Supreme Court,” October 20, 1969,

<http://www.presidency.ucsb.edu/ws/index.php?pid=2271&st=vicious+character+assassination&st1=>;

“Nixon Assails Haynsworth Foes as Character Assassins,” *CT*, October 20, 1969; John Osborne, “Making the Case for Haynsworth,” *TNR*, November 1, 1969, 12; Pat Buchanan, Memorandum for the President, “One Observer’s Notes of Legislative Leadership Meeting, Tuesday, October 14, 1969, October 15, 1969, WHCF, EX FG 51/a Box 3, Folder 7, RMNL (“cave in,” “no one”); Haynes Johnson, “Haynsworth Case: Politics of Pressure,” *WP*, November 20, 1969 (“soft sell,” “short-hair”); “The Nomination is Rejected,” *News*, December 1, 1969, 21, 22 (“Even last summer’s ABM vote had not taken so heavy a toll in twisted arms, bent ears, and trampled toes.”); Dean Kotlowski, “Trial by Error: Nixon, the Senate, and the Haynsworth Nomination,” 26 *PSQ*, 71, 77, 80 (Winter 1996). Nixon had ordered a delay in school desegregation in Mississippi in order to win Senator Stennis’s vote on the ABM Treaty. Dean Kotlowski, Nixon’s *Civil Rights: Politics, Principle and Policy* 30-31 (Cambridge: Harvard University Press, 2001)

⁴⁰ E.W. Kenworthy, “The Haynsworth Issue: A Study in Pressure Politics,” *NYT*, November 21, 1969 (Saxbe); Steele, “Haynsworth v. the U.S. Senate (1969),” at 155-56 (“beserk,” “Mollenhoff cocktail”); Ernest Hollings to Clark Mollenhoff, November 12, 1969, Box 127, Supreme Court Judges, Haynsworth Pro (4), Hollings MSS (“you came on too strong for these Senators in doubt. They had become touchy and your strong positive position for Judge Haynsworth immediately triggered them into a defensive position”); “Newsweek Says Burger Seeks Haynsworth Votes,” *NYT*, November 10, 1969; Spencer Rich, “Ford Eyes Ousting Douglas,” *WP*, November 8, 1969; “GOP Blasts at Douglas Hit by Mansfield,” *NYT*, November 10, 1969; William Eaton, “Converts Needed: Delay Haynsworth Vote, Backers Ask,” *CDN*, November 18, 1969 (quoting Senator Metcalf [D-Montana] as accusing “the White House of ‘bartering for votes’ on the bitterly contested nomination. ‘Members of the Senate have been threatened, high-pressured and offered

special projects appointments, all to secure votes for Judge Haynsworth's confirmation,' he charged.") The information about stock ownership is from Leadership Meeting Notes, October 14, 1969, Box 6, Leadership Meeting Notes July-December, Scott MSS ("Six present justices own securities."); Fred Graham's interview with Potter Stewart, Box 624, Folder 33, Stewart MSS. "Graham: [A]t one point, the White House announced the fact that while Haynsworth owned stocks, so did six or seven members of the current Court." Stewart: Well, I remember that, seeing it on television news one evening. And I thought to myself, how could they know that? And the only way they could possibly know that, it occurred to me, was by looking at the income tax returns of the Justices," which both Graham and Stewart agreed was inappropriate and possibly illegal. John Frank later asked Haynsworth about the truth to rumors that "the administration, discovering that it was running into opposition in its own party, and feeling that it had made its Southern gesture and that was all that was required of it, figured it would buy peace by not making a militant effort" and had not used "the major political power of the sort that an administration really uses when it really wants to go someplace." Haynsworth, however, thought the administration had worked hard for him. Frank, Notes on June 26, 1971 conversation. Perhaps this was in part because when Nixon met with Haynsworth after the defeat of the nomination the President told him "that never in history had a President put the efforts of the White House staff so earnestly behind a nominee for the Court." (John Ehrlichman, Meeting between the President of the United States and Judge Haynsworth, December 4, 1969, Box 39, Supreme Court (1), Ehrlichman MSS.) In all likelihood, the Administration worked harder than the rumors suggested, but not as hard as Haynsworth believed. Obviously, Nixon did not take LBJ's promotion of Fortas as Chief Justice into account when he spoke with Haynsworth.

⁴¹ William Eaton, "Haynsworth Faces Day of Decisions," *CDN*, November 21, 1969; Philip Warden, "Haynsworth Denied Post: Senate Bars Nixon Court Choice," *CT*, November 22, 1969 (Agnew); Aldo Beckman, "Haynsworth Opponents Greeted by Elated Crowd in Capitol Hall," *CT*, November 22, 1969.

⁴² Richard Nixon, PPF Memorandum for Bob Haldeman, November 24, 1969, Memoranda from the President, Box 1, Folder 29, RMNL; Harry Dent, Memorandum for the President, November 17, 1969, Box 5, Folder 40, Contested Materials Mss. ("If Haynsworth is confirmed this will further help the [political] situation [in the South] because of the President's good work on the nomination. However, even if we fail, and the President comes back with another Southerner, this could bring bigger political dividends down that way."); Strom Thurmond to Richard Nixon, November 24, 1969, Judiciary Committee Records, Box 271, Thurmond MSS; "Haynsworth Loss Angers South," *CT*, November 23, 1969; "Please Gentlemen, Knock It Off," *GN*, November 24, 1969, Box 127, Supreme Court Judges, Clement Haynsworth Con (5), Hollings MSS (asking that Thurmond and Hollings stop blaming each other's party for the defeat and reporting that "[o]ur people are hurt, deeply resentful, angry over slurs hurled at the nominee and the entire state during the acrimonious national debate preceding the Senate's action"). On the possibility the President wanted to fend off a Wallace threat and had come out ahead, see, e.g., Warren Weaver, "Haynsworth: It Was Not a Total Loss for Nixon," *NYT*, November 23, 1969; Robert Donovan, "Is the Price Too High? Nixon Took Bold Gamble on Haynsworth, War Disunity," *LAT*, November 22, 1969.

⁴³ Clement Haynsworth to Warren Burger, February 16, 1970, Haynsworth MSS; Clement Haynsworth to James Byrnes, November 26, 1969, *id.* (and see Haynsworth to John Mitchell, November 26, 1969, *id.*); Hollings, *Making Government Work*, at 149; “Senate Views on Haynsworth Changed,” *WP*, March 15, 1977; Karlyn Barker, “Haynsworth: Reputation Rebuilt 10 Years Afterward,” *id.*, April 9, 1979; Renaming Ceremony, May 3, 1983, Clement F. Haynsworth, Jr. Federal Building, Box 3, Clement Haynsworth, Walters MSS.

⁴⁴ Leonard Garment, *Crazy Rhythm: My Journey from Brooklyn, Jazz and Wall Street to Nixon’s White House, Watergate, and Beyond...* 146 (Cambridge: Da Capo, 2001) (Clifford); Leonard Garment, Memorandum for the President, January 9, 1970, Box 39, Supreme Court (1), Ehrlichman MSS.

⁴⁵ Dean, *The Rehnquist Choice*, at 19 (Burger); Robert Semple, “Southerner Named to Supreme Court; Carswell, 50, Viewed as Conservative,” *NYT*, January 20, 1970 (Gurney intercession); Aldo Beckman, “Carswell Court Nominee,” *CT*, January 20, 1970 (handshake, “all”); “Carswell Supports Legal Precedents: Favored by Russell,” *WP*, January 20, 1970; Bruce Kalk, “The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration,” 42 *AJLH*, 261, 267 (1998) (Dent); Dent, *The Prodigal South*, at 210; Bill Lawrence, “Judging the Judge,” *CT*, April 25, 1971 (“angrily”).

⁴⁶ Fred Graham, “Carswell May Make Some People Long for Haynsworth,” *NYT*, January 25, 1970 (law review); Martin Waldron, “Supreme Court Choice: George Harrold Carswell,” *id.*, January 20, 1970 (“bubbly,” “cheerleader”); Kenneth Reich, Whites, Blacks: “Judge Carswell—as Viewed in His Home Town,” *LAT*, January 23, 1970 (“leading”).

⁴⁷ B.J. Phillips, “‘Eisenhower Philosophy’: Carswell,” *WP*, January 27, 1970; “Court Nominee Likes Bridge and Football,” *CT*, January 20, 1970; Fred Graham, “Carswell’s Opponents Find a Steadily Growing Debt But No Conflicting Investments,” *NYT*, February 9, 1970 (parties); Waldron, “Supreme Court Choice: George Harrold Carswell”; Fred Graham, “Carswell May Make Some People Long for Haynsworth,” *NYT*, January 25, 1970; Kalk, “The Carswell Affair,” at 274 (“many”); and see, e.g., *Augustus v. Board of Public Education of Escambia County*, 185 F.Supp. 450 (1960), reversed 306 F. 863 (1962), and the many other civil rights and habeas corpus decisions by Carswell that Joe Rauh discussed in his testimony against him in *Nomination of George Harrold Carswell*, 278-307.

⁴⁸ John MacKenzie, “‘Rights Groups Hit Bench Nominee,” *WP*, June 12, 1969; Richard Harris, *Decision* 29-30 (New York: Ballantine, 1972) (quoting Republican Senator Charles “Mac” Mathias). The *Washington Post* also subsequently reported that it had come into possession of a letter from Burger to Mitchell deeming Carswell “well qualified for promotion” from the U.S. District Court to the Fifth Circuit. “Could this have been part of what led Mitchell to believe that Carswell was Supreme Court caliber a year later?” John MacKenzie, “Crossing the Judicial Line,” *WP*, June 13, 1974.

⁴⁹ William Eaton, “Haynsworth Sequel: Nixon to Tighten Screening of U.S. Judicial Appointees,” *CDN*, October 6, 1969; Waldron, “Supreme Court Choice: George Harrold Carswell”; Dean, *The Rehnquist Choice*, at 19-21 (“superficial,” “gay”).

⁵⁰ John Crewdson, "F.B.I. Began Inquiry of Carswell in '70: Agents Apparently Failed to Tell Nixon About Family Ties to a Teacher Later Slain," *NYT*, September 19, 1976 (quotations); "Prober's Memory Hazy on Linking Carswell, Pack," *SHT*, September 23, 1976 (AP story about Carswell testimony); "Defendant Denies Part in Murder of Teacher," *SPT*, December 2, 1976 (UPI story about the trial).

⁵¹ Richard Harris, *Decision 5*, 25 (New York: Ballantine Books, 1971) (Mitchell); Winzola McLendon, *Martha: The Life of Martha Mitchell* 119 (New York: Ballantine, 1979)

⁵² Dean, *The Rehnquist Choice*, at 19; Kyvig, *The Age of Impeachment*, at 91; William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* 267 (New York: Doubleday, 1975); Harris, *Decision*, at 25 (Rauh). Chuck Colson maintained that the White House did not study Carswell's decisions at all until after the nomination's announcement. Maltese, *The Selling of Supreme Court Nominees*, at 14.

⁵³ Fred Graham, "Nixon Preparing to Announce Nominee to Supreme Court; Tight Secrecy Maintained," *NYT*, January 16, 1970 ("trial balloon," "unusually"); "President Expected To Make High Court Nomination This Week," *WSJ*, January 19, 1970; "Not Too Rich Nor Rightist: Nixon Names Southern U.S. Judge to Top Court: GOP Heads Pleased," *id.*, January 20, 1970; Carroll Kilpatrick, "Floridian Picked for High Court," *WP*, January 20, 1970 ("outstanding"); Aldo Beckman, "Carswell Court Nominee," *CT*, January 20, 1970 ("thorough"). Indeed Carswell's antagonists would not find much in the way of conflicts of interest, though they looked hard, and there may have been some potential ammunition in Carswell's relationship with a conservative local millionaire from whose lawsuit, it was alleged, the judge had failed to disqualify himself and his dismissal of a lawsuit against a bank from which Carswell borrowed money and of which his father-in-law was a director. Kenneth Reich, "Inquiry into Carswell Activities Widening; Critics Study Dismissal of \$15,000 Suit Against Bank," *LAT*, February 15, 1970. Journalists did find that Carswell was "a man who has rarely had spare cash available to invest, and who has gone increasingly into debt over the years as he has traveled in high social circles on a Government salary." Fred Graham, "Carswell's Opponents Find a Steadily Growing Debt But No Conflicting Investments," *NYT*, February 9, 1970.

⁵⁴ Jules Witcover, "Carswell Choice Will Help GOP in South," *LAT*, January 20, 1970; "From Obscure to Unknown," *NYT*, January 21, 1970; Fred Graham, "Carswell's Credo Is Restraint," *id.*, January 21, 1970; Graham, "Carswell May Make Some People Long for Haynsworth"; "Judicial Qualifications," *WSJ*, January 22, 1970; "The Symbols of a Nomination," *WP*, January 21, 1970; Ted Lacey, "NAACP in War on New Nixon High Court Choice," *CDD*, January 21, 1970; Robert Semple, "Southerner Named to Supreme Court; Carswell, 50, Viewed as Conservative," *NYT*, January 20, 1970 (Rauh); Marian Wright Edelman to Joseph Rauh, Box 24, Folder 2, Rauh MSS; Harry Bernstein, "AFL-CIO Won't Fight Nixon's Court Choice," *LAT*, January 22, 1970; Robert Donovan, "Senate OK Likely for Court Nominee," *id.*, January 20, 1970 ("I").

⁵⁵ Aldo Beckman, "Carswell Court Nominee," *CT*, January 20, 1970 (Gurney); *Pinkney v. Meloy*, 241 F. Supp. 943 (1965); Nomination of George Harrold Carswell, at 305 ("If"); "Not too Rich Nor Rightist"

(Eastland, Scott); "Expect Quick O.K. in Senate for Carswell: Party Leaders Report No Big Opposition," *CT*, January 21, 1970 (Griffin, Mansfield).

⁵⁶ This information is taken from Morris Abram's unpublished piece on Thurston on which Thurston commented in the George Thurston MSS, and George Thurston to John Cummings, December 10, 1974, *id.*.

⁵⁷ Abram piece; "Carswell Repudiates '48 Racial Speech," *CT*, January 22, 1970 ("obnoxious"); Fred Graham, "Carswell Speech Missed in Check: White House Held Unaware of Nominee's 1948 Talk," *NYT*, January 23, 1970. "I fail to see why I should feel ashamed of the report on Judge Carswell's 1948 speech," George Thurston subsequently wrote a critic. "Rather, I would feel deeply ashamed for the rest of my life if having discovered the speech which he reported in his own newspaper, with his own typographical emphasis on the white supremacy passage, I had failed to report the speech. I did not write the speech for him. I didn't make the speech for him. I didn't publish the speech for him...I took great care to call attention to the age and circumstances of the speech in my story, and to provide Judge Carswell with an opportunity (which, fortunately he used) to rebut the words at the same time as I reported them. Thurston to Alice Brown, April 10, 1970, Thurston MSS.

⁵⁸ Fred Graham, "Carswell: Defeat From the Jaws of Victory," *NYT*, April 12, 1970 ("mod," "Buffalo Bill); "Rick Called," January 20, 1970, Box 24, Folder 2, Rauh MSS; Richard Seymour to Marian Wright Edelman, January 26, 1970, *id.*; Abram Piece (rumors); Email, Richard Seymour to Laura Kalman, October 16, 2015; "Twenty Questions for Judge Carswell," n.d., Part 1, Box 108, Folder 6, Leadership Conference MSS; Spencer Rich, "Memo Cited as Proof Carswell Was Evasive," *WP*, April 3, 1970. Whether Carswell was encouraged to read the documents became a matter of contention later. Lawrence Walsh to Editor, *NY*, February 2, 1971, Box 24; Kalk, "The Carswell Affair," at 279; Nomination of George Harrold Carswell, at 23, 88, 218, 242, 133. On the evolution of the ABA rating system, see George Watson and John Stookey, *Shaping America: The Politics of Supreme Court Appointments* 110 (New York: Harper Collins, 1995).

⁵⁹ Linda Greenhouse, "Bar Panel Is Said to Back Carswell: Committee Chairman Says 'There's a Lot of Basis' to Support Speculation," *NYT*, January 26, 1970; Aldo Beckman, "American Bar Gives Approval to Carswell for High Court," *CT*, January 27, 1970; Fred Graham, "Meany Will Fight Carswell Choice," *NYT*, January 27, 1970 (Philadelphia Plan); "Contempt of Court," *id.*, January 28, 1970 ("Skeptics may conclude that the primary motivation for the Meany move is a desire to defuse the anger felt by many civil rights organizations over the exclusionist policies toward Negroes practiced by many construction unions. The A.F.L.-C.I.O. head is himself the target of much of this anger for his leadership in the fight to block the Administration's 'Philadelphia Plan.'"); Alfred Baker Lewis to Clarence Mitchell, January 28, 1970, Part IX, Box 14, Folder 8, NAACP MSS ("I see George Meany has taken a stand against Carswell because he is unfair to Negroes. No doubt he is trying to be friendly to us to take the heat off our objection to the exclusion of the skilled unions in the building trades and some others. But anything that will strengthen the cooperation between us & organized labor, no matter how tenuous, is good. They did give us some real help in defeating Haynsworth."); Richard Harwood, "The Fight to Reject Judge Carswell," *WP*, April 12,

1970 (“tired”); Willard Edwards, “Capitol Views: Drama Pervades Carswell Quiz,” *CT*, January 29, 1970 (Rauh); Marvella Bayh with Mary Lynn Kotz, *Marvella: A Personal Journey* 199-200 (New York: Harcourt Brace Jovanovich, 1979).

⁶⁰ William Greider, “Finding the Skeletons in Nominees’ Closets,” *WP*, October 22, 1971 (Edelman); Arnold Aronson to Participating Organizations, January 30, 1970, “Judge G. Harrold Carswell,” Part II, Box 59, Folder 5, Leadership Conference MSS.

⁶¹ Ronald Ostrow, “Carswell Declares ‘I’m Not a Racist’,” *LAT*, January 28, 1970; Nomination of George Harrold Carswell, at 20, 10, 21-22, 320.

⁶² Edward Brooke, *Bridging the Divide: My Life* 194, 197 (New Brunswick: Rutgers University Press, 2007; 206-12, 306); Fred Graham, “Senators Are Told Carswell Was ‘Insulting’ to Negro Lawyers,” *NYT*, February 3, 1970; John MacKenzie, “Carswell Defends Conduct: Judge Denies Discourtesy to Rights Lawyer,” *WP*, February 6, 1970; Fred Graham, “Senator and Black Lawyer in Dispute on Praise for Carswell,” *NYT*, March 31, 1970; Richard Lyons, “Negro Official Denies Pressure for Carswell,” *WP*, February 3, 1970; John MacKenzie, “Carswell Hostility on Rights Charged,” *id.*, February 3, 1970.

⁶³ Ostrow, “Carswell Declares ‘I’m Not a Racist’,” (comparison of demeanors); Nomination of George Harrold Carswell, at 11, 36-37, 68, 270-71, 323-24; Fred Graham, “Carswell Denies He Tried to Balk Club’s Integration,” *NYT*, January 28, 1970 (“brandished”); Fred Graham, “Carswell Again Defends Racial Views,” *id.*, January 29, 1970; Spencer Rich, “Signed by 2 ABA Members: Memo Cited as Proof Carswell Was Evasive,” *WP*, April 3, 1970; Fred Graham, “Carswell Denies Being Hostile to Rights Lawyers; Committee’s Vote Put Off,” *NYT*, February 6, 1970 (“Negro dialect”).

⁶⁴ Jane Mansbridge and Katherine Fraser, “Male Chauvinist, Feminist, Sexist, and Sexual Harassment: Different Trajectories in Feminist Linguistic Innovation,” 80 *AmSp* 256, 261 (Fall 2005); Nomination of George Harrold Carswell, at 23; Roy Wilkins to Birch Bayh, January 28, 1970 Senate Judiciary Committee, Nominations: Supreme Court-Carswell-Petitions and Letters for Inclusion, Bayh MSS (“change of heart”); *Phillips v. Martin Marietta Corporation*, 416 F. 2d. 1257 (1969) (After Friedan testified, Bayh said, “I sat here with a great deal of interest not only listening to the words but sensing some of the reaction in the hearing. At the risk of being critical or stepping on toes, I think the fact of some of the reaction here is evidence of a certain amount of male smugness that some of have.” Nomination of George Harrold Carswell, at 98); William Eaton, “Judge Hit on New Front: Carswell Male Supremacist, Rep. Patsy Mink Charges,” *CDN*, January 29, 1970; Patsy Mink to Richard Harris, Box 388, Folder 7, Mink MSS (“badgering”).

⁶⁵ Nomination of George Harrold Carswell, at 218, 242, 252-53. (William Van Alstyne, a liberal Duke professor of constitutional law, who had submitted testimony on behalf of Haynsworth, agreed with Dean Pollak that there was “nothing in the quality of the nominee’s work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States.” *Id.* at 136. On Pollak’s character, see Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill:

University of North Carolina Press, 2005). Charles Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 *YLJ*, 657, 664 (1970); Harris, *Decision*, at 99-100.

⁶⁶ Nomination of George Harrold Carswell, at 305, 46, 249; Warren Weaver, "Carswell's Foes Are Stalling For Time," *NYT*, March 22, 1970 (reporting remarks of Senator Mark Hatfield to reporters about LeMay); Art Buchwald, "Son of Old South Waits in the Wings," *WP*, February 5, 1970; The President's News Conference, January 30, 1970, <http://www.presidency.ucsb.edu/ws/?pid=2558>. "Most of the Committee members obeyed the cardinal principle of cross-examination: when you have a perfect witness, don't cross-examine," Samuel Rosenman wrote Pollak afterwards. Strom Thurmond... apparently had never learned this principle." Rosenman to Louis Pollak, February 25, 1970, Box 41, Carswell Nomination, Pollak MSS.

⁶⁷ See, e.g., Joseph Alsop, "Liberals Played Into Hands of President on Two Judges," *WP*, February 2, 1970 (predicting confirmation by two-one vote); Frank Mankiewicz and Tom Braden, "Carswell Probably Will Be Confirmed Despite Antipathy to Negro Rights," *id.*, February 3, 1970; "The Supreme Court: Approaching the Bench," *Ti*, February 9, 1970 (predicting confirmation)

⁶⁸ Ronald Ostrow, "Senate Panel Resumes Carswell Study Today: Swift Committee Approval and Eventual Confirmation Expected but Battles Looms," *LAT*, February 16, 1970; "Carswell Tract Was Restricted: Florida Land Sold in 1966 Had 'Caucasian' Clause," *NYT*, February 12, 1970; "Senate Unit, 13-4, Backs Carswell," *id.*, February 17, 1970 (the four were Hart, Kennedy, Bayh and Tydings); Aldo Beckman, "President Shrugs Off Carswell Land Deal," *CT*, February 14, 1970; Leadership Conference on Civil Rights to Dear Senator, March 16, 1970, Part 1, Box 108, Folder 6, Leadership Conference MSS; "Has Judge Carswell Changed?," n.d., Box 24, Folder 2, Rauh MSS; Fred Graham, "Carswell Chartered White Club to Aid Florida State U. in 1953," *NYT*, February 21, 1970; Graham, "Former Law Partner Says Carswell Drafted Charter of Whites-Only Club," *id.*, February 27, 1970; "Bar Group Reaffirms Carswell as Qualified," *LAT*, February 22, 1970 (Walsh said "all nine members present voted to support this second endorsement of President Nixon's selection for the vacant court seat. Three committee members were absent.") See Harris, *Decision*, at 131-33. The four senators opposed were Bayh, Hart, Kennedy and Tydings.

⁶⁹ Brooke, *Bridging the Divide*, at 196-97 (quoting McGrory); Frank Porter, "AFL-CIO Hits Carswell As 'Insult,'" *WP*, February 17, 1970; Robert Smith, "Brooke Opposes Carswell; Criticizes Stand on Human Rights," *NYT*, February 26, 1970; Richard Harwood, "The Fight to Reject Judge Carswell: Rights Group Waged Lonely Struggle, Then Bayh 'Turned On' One Night," *WP*, April 12, 1970; "Bayh Father-In-Law Kills 2d Wife, Self," *CT*, April 2, 1970; Television Report, March 26, 1970, POF, Annotated News Summary, Box 31, Folder 6, RMNL (March 24); "Mediocrity?," *InN*, March 25, 1970, *id.*, Box 31, Folder 7.

⁷⁰ John MacKenzie, "Carswell Will Be Challenged on Legal Credentials," *WP*, February 16, 1970; "The Qualifications of Judge Carswell (III)," *WP*, February 16, 1970; Masarro, *Supremely Political*, at 116 (Ehrlichman); Herbert Klein, *Making It Perfectly Clear: An Inside Account of Nixon's Love-Hate Relationship with the Media* 339 (New York: Doubleday, 1980) (After recounting how UCLA

demonstrators had pelted him with marshmallows over the Carswell nomination, Nixon media adviser Herb Klein reflected that while he would “defend Haynsworth again,...Carswell was a bad choice.” “I think it quite clear that your testimony marked the turning of the tide on Carswell,” one friend wrote Lou Pollak. “Prior to that everyone was focusing on the race issue, and it was you who made the first loud clear statement that important as this issue was, even more important was the fact that he is simply not qualified.” Louis Hector to Louis Pollak, April 8, 1970 Box 41, Carswell (1), Pollak MSS.

⁷¹Jack Bass, *Unlikely Heroes* 319-23 (Tuscaloosa: University of Alabama Press, 1990); “Judge Carswell and His Colleagues,” *WP*, March 19, 1970; Richard Harris, *Decision*, at 117-118, 151, 107-08; John MacKenzie, “Carswell’s Record as Judge Scored by Ripon Society,” *WP*, March 6, 1970; Harris, *Decision*, at 107-08; Joseph Kraft, “Size of Vote Against Carswell Shows Rising Taste for Quality,” *WP*, April 7, 1970; “Over 200 Supreme Court Law Clerks Urge Senate Rejection of Carswell,” XXX Senate Judiciary Committee, Nominations: Supreme Court, Carswell 1970, Bayh MSS; Charles Alan Wright to Ernest Hollings, January 30, 1970, Box 127, Supreme Court Judges G. Harrold Carswell 1970 (1), Hollings MSS (“there is nothing in his record to suggest that he is more than an ordinary competent lower court judge. His opinions are rather plodding and he applies precedents in what seems a mechanical fashion.” For Wright’s public defense of Carswell, see his March 18, 1970 letter to Roman Hruska, reprinted in the CR, March 26, 1970, 9615-16); “457 Lawyers Urge Defeat of Carswell,” *WP*, March 13, 1970; Joseph Califano, *Inside: A Public and Private Life* 197 (New York: Public Affairs, 2004); “Carswell Opposed at Florida U. Rally,” *WP*, April 4, 1970 (“It was disclosed this week that [Regents Chairman D. Burke] Kibler, a law partner of Sen. Spessard Holland [D-Fla.] had written Joshua Morse, dean of the Florida State law school, complaining about the nine law faculty members who signed a letter opposing Carswell. The letter, dated, March 19, stated, ‘I am sure you realize, Josh, how imprudent action such as this makes the task of those of us trying to get adequate funding for the University even more difficult.’”); “Florida Prof Hits Attack on Carswell,” *CT*, March 21, 1970 (quoting a senior faculty member as characterizing the petition as an “unwarranted personal attack” on Carswell); R.B. Lillich, Letter to the Editor, *WP*, March 4, 1970.

⁷² Richard Harwood, “The Fight to Reject Judge Carswell,” *WP*, April 12, 1970. See David Greenberg, “The New Politics of Supreme Court Appointments,” *Daed* 5, 8 (Summer 2005).

⁷³ William Rehnquist, Letter to the Editor, *WP*, February 14, 1970.

⁷⁴ *CR*, March 16, 1970, XXX (Long); Harris, *Decision*, 117 (Hruska).

⁷⁵ “Battle Over Carswell: The ‘Silent Ones’ Will Now Decide,” *NYT*, March 15, 1970 (“most.” Hruska and others maintained that Carswell’s opponents had mounted a massive fraudulent mailing campaign.); *CR*, March 20, 1970, 8393-8399. They may have done so, but according to a Harris Poll taken soon after the Senate rejected Carswell, 34% of the public agreed that the judge should have been rejected, 32% disagreed, and 34% were “not sure.” The Harris Poll, April 1970, XXX); William Spong to Laverhne Saint, December 28, 1971, Box 65, Judiciary Rehnquist, Spong MSS; “Spong Got Threats for Court Stand,” *WP*, December 15, 1970; William Spong to William Irwin, April 10, 1970, Box 63, Judiciary Supreme Court Carswell, Spong MSS (“matter”); Spong to C.B. Settle, January 7, 1971, id. (“It was not an easy thing for

me to oppose Carswell and the opposition resulted in some very unpleasant times for members of my family”); Spong to B.J. Weafer, April 14, 1970, *id.* (“perfection”) and see, e.g., Richard Fredland to Spong, February 4, 1970, Box 62, *id.* (“At a time when confidence in the governmental system we have [is] so much in need of bolstering, it would seem that President Nixon could find from among some 500-plus Federal judges and a multitude of state judges someone of less offensive background than Judge Carswell for the Supreme Court. Please vote against this poor choice.”).

⁷⁶ “Hollings Should Support Carswell,” *GN*, March 28, 1970, Box 127, Supreme Court Judges G. Harrold Carswell (1), Hollings MSS; Ernest Hollings to Fulton Creech, March 24, 1970, *id.*, Folder 2; Ernest Hollings to Professors Webster Myers, Douglas Wickham, William McAninch, E.D. Wedlock, April 6, 1970, *id.*, Folder 3. On March 19, 1970, the *Miami Herald* featured a photo with the following caption: “An estimated 100 persons Wednesday night demonstrated against the Supreme Court nomination of Judge G. Harrold Carswell at the Post Office in Tallahassee. Spiver Gordon, above, president of the Council of Black Community Organizations, said, ‘He ain’t no damn hometown boy of mine.’ The demonstrators, about half of them white, said there is little hometown support for Carswell and that his confirmation would be a step backward.” XXX

⁷⁷ Katz and Johnson, *Herblock*, “I Don’t Smell Anything—I Don’t Smell Anything—I Don’t Smell Anything—I Don’t—Whew--,” March 11, 1970; Kenneth Reilly, *Nixon’s Piano: Presidents and Racial Politics from Washington to Clinton* 6 (New York: Free Press, 1995); “Kennedy Pessimistic on Carswell Defeat,” *WP*, March 12, 1970; “Battle Over Carswell: The ‘Silent Ones’ Will Now Decide,” *NYT*, March 15, 1970 (“most Senators,” Bayh); Richard Harris, *Decision*, at 123-24; Warren Weaver, “Carswell Debate Is Losing Impetus: Judge’s Backers Confident He Will Be Confirmed,” *NYT*, March 18, 1970; at 124; Spencer Rich, “Carswell Margin Narrows: Carswell Still Likely to Win Despite Rising Opposition,” *WP*, March 20, 1970; Warren Weaver, “Support in Senate for Carswell Ebbs,” *NYT*, March 21, 1970.

⁷⁸ John MacKenzie, “Conflict in Carswell’s Panel Testimony Shown: Denial of Being Club Incorporator Given After Acknowledging It to 2 Bar Members,” *LAT*, March 26, 1970; “Carswell Foes Finding Gap in His Golf Club Testimony,” *WP*, April 1, 1970; Spencer Rich, “Memo Cited as Proof Carswell Was Evasive: Signed by 2 ABA Members,” *id.*, April 3, 1970; James Wooten, “Carswell Backed by 57 U.S. Judges: But 8 in His Circuit Do Not Sign Telegram—Senate Will Vote Tomorrow,” *NYT*, April 5, 1970; “Burger Denies Report He Lobbied for Carswell,” *WP*, March 27, 1970 (and see Burger to Harry Blackmun, April 27, 1970, denouncing the “false reports about [his] ‘lobbying’ for Haynsworth and Carswell,” <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1067&context=historical>); “Goldberg Asserts Carswell Is Not Fit for Supreme Court,” *NYT*, March 23, 1970; Anthony Lewis, “The American Bar: A Failure of Responsibility,” *id.*, March 23, 1970.

⁷⁹ Bass, *Unlikely Heroes*, at 319 (Segal); Tom Herman, “The Bar on How to Pick a Justice,” *WSJ*, April 6, 1970 (Jenner); John MacKenzie, “Dissatisfied ABA Aides Seek New Role on Court Nominee,” *WP*, April 4, 1970.

⁸⁰“The Seventh Crisis of Richard Nixon,” *Ti*, April 20, 1970 (“Normally gregarious, Carswell withdrew into a virtual state of siege.”); Kenneth Reach, “Carswell Reported Astonished by Senate Response to Charges,” *LAT*, March 29, 1970; Reach, “Carswell’s Friends Start to Fight Back,” *id.*, April 4, 1970; “Carswell Critics Accused of Lying,” *WP*, March 30, 1970; “The Seat Warmed by Goldberg and Fortas,” *CT*, March 24, 1970.

⁸¹ Warren Weaver, “Foes of Carswell Contend They Can Balk Nomination,” *NYT*, March 25, 1970; Spencer Rich, “Nomination Appears In Danger,” *WP*, March 26, 1970; Richard Harris, *Decision*, at 137-42.

⁸² Exchange of Letters with Senator William B. Saxbe on the Nomination of Judge G. Harrold Carswell to the Supreme Court, April 1, 1970, <http://www.presidency.ucsb.edu/ws/?pid=2931>; James Eastland, John McClellan, Sam Ervin, Charles McC. Mathias, Roman Hruska, Robert Griffin, Hugh Scott, Hiram Fong, Marlow Cook, n.d., Box 68, Folder 1969, Nomination of G. Harrold Carswell (2), Scott MSS (“The undersigned, being a majority of the members of the Senate Judiciary Committee, believe that no useful purpose would be served by further hearings on the matter of Judge Carswell and, therefore, urge our colleagues of the Senate to vote against the motion to recommit on Monday, April 6); Harris, *Decision*, at 172, 175 (“like,” quoting Senator Bob Packwood); Roderick MacLeish, “The Carswell Brand,” *WP*, April 12, 1971; James Reston, “Washington: President Nixon’s Gamble,” *NYT*, April 3, 1970; Fred Graham, “Bayh Says Nixon Errs on His Role,” *id.*, April 3, 1970.

⁸³ Arnold Aronson to Participating Organizations, Re: The Carswell Nomination, March 30, 1970, Part I, Box 108, Folder 9, Leadership Conference MSS.

⁸⁴ Warren Weaver, “Carswell Opponents Draft a Plan to Block Vote,” *NYT*, March 24, 1970; Spencer Rich, “Nomination Appears In Danger,” *WP*, March 25, 1970; Harris, *Decision*, at 137-43; “How Senate May Vote,” *NYT*, April 6, 1970; Fred Graham, “Nixon Sees Peril to His Authority in Carswell Fight,” *id.*, April 2, 1970 (Agnew); William Timmons, Memorandum for the President, Judge Carswell Report, April 3, 1970, WHCF G. Harrold Carswell Name File: “We count 46 votes for recommital and 50 against”; Haynes Johnson, “Carswell’s Day of Decision in the Senate Devoid of Drama: Opponents Knew They Would Lose,” *WP*, April 7, 1970 (“day of”); “Judge Carswell, The Method and the Merits,” *id.*, April 6, 1970.

⁸⁵ “The Seventh Crisis of Richard Nixon” (Bayh, neglect); Masarro, *Supremely Political*, at 123-24. See “TV Comment Following the Vote to Recommit the Carswell Nomination,” Box 74, Folder 5, Safire MSS.

⁸⁶ “The Seventh Crisis of Richard Nixon” (Dole); Spencer Rich, “Carswell Decision Is Today: Mrs. Smith, Sen. Cook Hold Key to Result,” *WP*, April 8, 1970; White House Daily Diary, April 6, 1970, RMNL.

⁸⁷ Brooke, *Bridging the Divide*, at 197-98; Telegram, Margaret Chase Smith to Kermit Lansner, Editor, *News*, April 16, 1970, Smith Statement: G. Harrold Carswell, Smith MSS (blaming rumor on President’s staff or a *Newsweek* reporter, not Nixon himself and asking the magazine to publish her telegram); Willard Edwards, “Mrs. Smith Dotes on Vote Secrecy,” *CT*, April 21, 1970; Aldo Beckman, “The Carswell Vote: Rebuff to Pressure: Indignation an Element in Defections,” *id.*, April 10, 1970 (“We,” “fit”); Spencer Rich,

“Cook, Mrs. Smith Seal His Defeat: Carswell Rejected by Senate, 51-45,” *WP*, April 9, 1970. Pat Buchanan claimed that after Carswell’s defeat, Smith was “selling her anti-Supreme Court and anti-ABM votes to the young openly” and that he was “getting readings from Maine that our best chance up there may involve doing a deal to get Mrs. Smith not to run again.” Pat Buchanan, Memorandum for Bill Timmons, October 18, 1971, Box 1, Folder 9, Contested Materials MSS. Smith ran in 1972, however, and Democrat Bill Hathaway defeated her.

⁸⁸ “The Seventh Crisis of Richard Nixon” (“wake”).

⁸⁹ Haynes Johnson, “In Senate: A Gasp...Then Cheers,” *WP*, April 9, 1970; “The Seventh Crisis of Richard Nixon” (Prouty, “wake”) Spencer Rich, “Cook, Mrs. Smith Seal His Defeat,” *WP*, April 9, 1970. “Daddy wouldn’t let on, but it hurt us all,” Carswell’s son, Scott, said later. “Terribly...This going after him for being a bigot, a racist,” which his children found “preposterous.” Paul Hendrickson, “Rejected,” *id.*, March 10, 1989. Where 100 senators had weighed in on Haynsworth, just 96 did on Carswell. Senators Bennett (R-Utah) and Mundt (R-SD), both of whom had voted for Haynsworth, were absent for the Carswell vote.

⁹⁰ Michael Gartner, “Report on the Defeat of a ‘Mediocre’ Judge,” *WSJ*, April 16, 1971 (“idiots”); Haynes Johnson, “2d Mitchell ‘Mess’ Hit by Senators: Carswell Fight Leaving Resentment in Party,” *WP*, April 5, 1970 (“Nixon mandate,” “overconfident,” “don’t”).

⁹¹ Nan Robertson, “Martha Mitchell: Capital’s Most Talked-About Talkative Woman,” *NYT*, May 1, 1970 (“national”); Marlene Cimon, “Outspoken Southern Belle: Mrs. Mitchell Breaks Mold of Cabinet Wife,” *LAT*, January 4, 1970 (Haynsworth); “Did Mitchell’s Wife Say ‘Crucify’ Fulbright?,” *id.*, April 10, 1970; “Mrs. Mitchell Asks Paper to Crucify Fulbright for Vote,” *WP*, April 10, 1970; McLendon, *Martha*, at 116-23 (New York: Ballantine, 1979) (urging, “keep,” “John”); Jerol Garrison, Interview with John Woodruff, October 31, 2000, [http://pryorcenter.uark.edu/projects/Arkansas Gazette/WOODRUFF-John/transcripts/JWoodruff.pdf](http://pryorcenter.uark.edu/projects/Arkansas%20Gazette/WOODRUFF-John/transcripts/JWoodruff.pdf); Roy Reed, Interview with Bob Douglas, June 8, 2000, [http://pryorcenter.uark.edu/projects/Arkansas Gazette/DOUGLAS-Bob/transcripts/BDouglas1997part2.pdf](http://pryorcenter.uark.edu/projects/Arkansas%20Gazette/DOUGLAS-Bob/transcripts/BDouglas1997part2.pdf); Myra McPherson, “Martha Mitchell Wants to Stay and Fight,” *WP*, May 1974, 1970 (“idiomatic,” “Oh”). The Bayh camp was aware of reports that Senator Fulbright [D-Ark] had told constituents “that since he had opposed Fortas he would have to be consistent and oppose Haynsworth; otherwise he might be accused of being anti-Semitic.” J. Bill Becker to Al Barkan, National Director, COPE AFL-CIO, October 16, 1969, Bayh Senate Judiciary Committee Nominees: Haynsworth, Letters, Bayh MSS.

⁹² Cimon, “Outspoken Southern Belle” (“defeats”); Robert Semple, “Who Likes Mitchell? Someone Named Nixon,” *NYT*, April 19, 1970; Johnson, “2d Mitchell ‘Mess’ Hit by Senators” (“Operation,” “diaper”); James Rosen, *The Strong Man: John Mitchell and the Secrets of Watergate* 116-17 (New York: Doubleday, 2008); POF, Pat Buchanan, Memorandum for the President, December 15, 1969 to January 10, 1970, Annotated News Summaries, Box 31, Folder 4, RMNL; and see POF, Television Report, February 3, 1970, Annotated News Summaries, Box 31, Folder 5, *id.*; H.R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* 100, 147 (New York: G.P. Putnam’s Sons, 1994).

⁹³“The Carswell Defeat,” *CT*, April 9, 1970; Harris, *Decision*, at 187-97; Chronology, n.d., Judiciary Committee, Nominations: Supreme Court—Carswell, Staff File: Richard Harris 1970, Bayh MSS; Memorandum for the President, April 6, 1970, WHCF Subject Files, EX FG 51A, Box 4, Folder 2, RMNL, singling out Scott and Griffin for supporting the nominations. Unbeknownst to the White House, apparently, Griffin had almost withdrawn his backing. Harris, *Decision*, at 187. At least, civil rights activist William Coleman had some sympathy for Scott’s position: “After your sterling support in the Haynsworth nomination matter, I never thought that I would have to call upon you again so soon,” he wrote. “However, the testimony before the Judiciary Committee dealing with the nomination of Judge Carswell indicates that he is even more unworthy of confirmation than Judge Haynsworth was,” since his opinions were “uniformly uninspiring, poorly written and exhibit no indication that Judge Carswell has the legal ability or talent which would justify his being appointed to any court in the state or federal system and certainly not to the Supreme Court of the United States” and the evidence suggested that “he has the same views in 1970 that he publicly expressed in 1948.” William Coleman to Hugh Scott, February 3, 1970, Box 68, Judiciary Committee: Nomination of G. Harrold Carswell (1), Scott MSS. Scott subsequently characterized “his vote for Carswell as his ‘worst mistake.’” Kotlowski, “Unhappily Yoked,” at 247.

⁹⁴ Ehrlichman, *Witness to Power*, at 122, 130-31; William Timmons, Memorandum for the President, April 13, 1970, WHCF Ex FG 51, Box 1, Folder 3, RMNL; Remarks by Rep. Gerald R. Ford, Republican Leader, prepared for delivery on the Floor of the U.S. House of Representatives, April 15, 1970, <http://www.fordlibrarymuseum.gov/library/speeches/700415.pdf>.

⁹⁵ Remarks by Rep. Gerald R. Ford, April 15, 1970; James Cannon, *Time and Chance: Gerald Ford’s Appointment With History* 80-81 (New York: Harper Collins, 1994); Kyvig, *The Age of Impeachment*, at 92-107; Nomination of Gerald R. Ford to be the Vice President, of the United States, Hearings Before the Committee on the Judiciary, 93d Congress, 1st Session, 1973 XXX.

⁹⁶ William O. Douglas to Clark Clifford, December 31, 1969, Box 316, Clifford, Douglas MSS (suggesting Clifford advise a group of lawyers including Simon Rifkind, who became Douglas’s attorney), Sidney Davis and Joe Ball; Douglas to his former law clerk, Vern Countryman of Harvard, March 11, 1971, Box 118/119, *id.* thanking him for spending his summer drafting a manuscript in his defense (“I know that Judge Rifkind and his associates will be delighted, because everything public-relations-wise has been, up to now, negative, and this would be one of the few positive things on the record.” Ultimately, however, the book, which argued that Ford was motivated by dislike for Douglas’s judicial record was not published until after the impeachment proceedings. Vern Countryman, *The Judicial Record of William O. Douglas* v [Cambridge: Harvard University Press, 1974]); William O. Douglas to Emanuel Celler, March 24, 1967, Box 315, Celler, Douglas MSS (apologizing for missing a celebration for Celler because he had not received the invitation. “I wanted you to know that if we had known about it we would have been the first to arrive and the last to leave.”); Celler to Douglas, November 14, 1975, *id.* (“I like to remember that our friendship goes back to your SEC days and I glory in that relationship. You have always been an inspiration to me during my years in Congress); Statement of Chairman Emanuel Celler on the Final Report

of the Special Subcommittee on H.Res. 920, Investigation of William O. Douglas, Box 338, Justice William O. Douglas, Celler MSS; Gerald Ford to Dear xxxxxxxxxx, form letter, Ford Congressional, R15, Hartmann MSS.

⁹⁷ Patrick Buchanan, POF, Memorandum for the President, Notes from Legislative Leadership Meeting, March 3, 1970, Box 80, RMNL; William Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* 268 (“indifferent,” Nixon’s additions) and see Ehrlichman, *Witness to Power*, at 127-28; Richard Nixon, Statement About Nominations to the Supreme Court, April 9, 1970, <http://www.presidency.ucsb.edu/ws/?pid=2456>; Harry Dent, Memorandum for the President: Southern Actions Based on the President’s Carswell Statement, April 21, 1970, WHCF Ex FG 51A, Box 4, File 5, RMNL; Dent, *The Prodigal South*, at 212. “Contrived though his show of anger may have been, it left those of us who witnessed the performance in person frozen in our chairs for seconds after he whirled from the microphones and, with Attorney General Mitchell behind him, vanished from view. The President’s spoken remarks were derived from an even stronger and, in language, more impassioned written statement that we were handed after he had returned to the Oval Office.” John Osborne, “The Nixon Watch: Rage at the White House,” May 2, 1970, *TNR*; and see Safire Diary, April 27, 1970, Box 35, Folder 11, John Mitchell, Safire MSS; Television Report, April 10, 1970, Box 74, Folder 5: Carswell, Safire Papers.

⁹⁸ Dean, *The Rehnquist Choice*, at 16 (“anyone”); WHT, Tape 035-051, January 2, 1973, 8:56 a.m., Nixon, Burger, NT.

⁹⁹ Individual Views of Messrs. Bayh, Hart, Kennedy and Tidings, 13, Senate Judiciary Committee Report. Nixon’s list of 150-odd possible nominees for the Court has not survived. Dean, *The Rehnquist Choice*, at 13, 294, n. 42. On the Fourth Circuit, however, there were few of the right age. The beloved Herbert Boreman, for example, who Judge Donald Russell remembered as a “conservative of conservatives,” was in his early seventies. “Remembering the Fourth Circuit Judges: A History from 1941 to 1998, 55 *W&LLR* 471, 482. But there were popular conservative judges of the right age elsewhere in the South, such as Eighth Circuit Judge Pat Mehaffy of Arkansas, though Mehaffy, then 65, would have been considered a bit old and far to the right. Jeffrey Morris, *Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit* XXX (Minneapolis: University of Minnesota Press, 2007). Given the ages of the well-respected judges on the Fourth, Fifth and Eighth Circuits who leaned conservative on civil rights and crime without being considered Neanderthals, Nixon probably was right to look to district judges once the Senate rejected Haynsworth. He was wrong, however, to choose Carswell.

¹⁰⁰ James Simon, Interview with Justice Blackmun, May 7, 1991, Box 108, Folder 2, Blackmun MSS; Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey* 45 (New York: Times Books, 2005) (Burger’s delight); Harry Blackmun to Warren Burger, November 13, 1969, Box 51, Folder 2, Blackmun MSS.

¹⁰¹ William Rehnquist, Undated and Untitled Memorandum to the Attorney General Re: Judicial Selection Undated and Untitled Memorandum on Appointment, Box 1548, Folder 10, Blackmun MSS; HAB’s FOIA

Nomination Material, Box 1549, id. (As I say, while this memorandum is dated July 10, 1969, it cannot have been written then, since it refers to the Haynsworth and Carswell battles.)

¹⁰² Rehnquist, Undated and Untitled Memorandum on Appointment; Spencer Rich, “Hill Gets Data on Blackmun: Blackmun’s Net Worth is \$125,000, Justice Dept. Tells Senate,” *WP*, April 16, 1970.

¹⁰³ John MacKenzie, “Dissatisfied ABA Aides Seek New Role on Court Nominees,” *WP*, April 4, 1970; Fred Graham, “Blackmun to Get Broad A.B.A. Study: Panel Adds Third Category of Evaluation—Change is Linked to Criticism,” *NYT*, April 19, 1970; Fred Graham, “Bar’s Top Rating Given Blackmun: Panel Unanimously Declares the Supreme Court Choice Meets ‘High Standards,’” *id.*, April 29, 1970; Graham, “Early A.B.A. Vote on Court Is Asked: Mitchell Is Urged to Consult on Prospective Nominees,” *id.*, May 18, 1970.

¹⁰⁴ Bob Dole, Memorandum for the President, April 14, 1970, WHCF EX FG 51/a, Box 4, Folder 5, RMNL; Nina Totenberg, “Judge Worries About Ties to Chief Justice: Nixon Nominee Blackmun Is Old Burger Friend; President Is Reassuring, XXX.

¹⁰⁵ Rehnquist, Undated and Untitled Memorandum on Appointment; Burger to Blackmun, April 27, 1970; PPF, Memoranda from the President, Memorandum for the Attorney General, April 22, 1970, Box 2, Folder 4, RMNL.

¹⁰⁶ Nomination of Harry Blackmun, at 40; Frank, *Clement Haynsworth*, at 120-21; HAB Biographical Material, Nomination to Eighth Circuit, September 24, 1981, and Biographical Memorandum, October 5, 1981, Box 1549, Folder 5, Blackmun MSS. “When I was first nominated for this Bench, I was severely criticized by the Chief Justice for submitting to a press conference at Rochester,” Blackmun recorded later. Actually, it was the best thing I could have done, for it cleared the atmosphere, got the press off my back, and I believe helped tremendously in the unanimous confirmation vote both in the Senate Judiciary Committee and in the full Senate.” Memorandum, December 4, 1982, Cable News Network Broadcast, XXX, Blackmun MSS.

¹⁰⁷ Rehnquist, Undated and Untitled Memorandum to the Attorney General; PPF, Memoranda from the President, Memorandum for Bob Haldeman, April 13, 1970, Box 2, Folder 4, RMNL (“to the right,” “highest,” “forced”); PPF, RN Tape 5/13/70, Memoranda from the President, Box 2, Folder 5, id. (“some,” “Incidentally”).

¹⁰⁸ Matt Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* 232-39 (Princeton: Princeton University Press, 2006); Spiro Agnew, Memorandum for the President, May 16, 1969, President’s Handwriting File, Box 2, May 1969, RMNL; POF Annotated News Summary, February 11, 1970, Box 31, Folder 5, RMNL.

¹⁰⁹ *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); Dean Kotlowski, *Nixon’s Civil Rights: Politics, Principle and Policy* 30-31 (Cambridge: Harvard University Press, 2001); Claudia Levy, “30 ‘Occupy’ Attorney General’s Office,” *WP*, July 2, 1969; POF, Annotated News Summary, January 13, 1969, Box 31, Folder 4, RMNL; POF, Pat Buchanan, Memorandum for the President, February 17, 1970, Meeting Series, Box 8/80, id. (“childish,” “irresponsible,” “We”); POF, Jim Keogh, Memorandum for the

President's File, Cabinet Meeting, February 18, 1970, Box 8/80, Meeting Series, id.. "When Holmes v. Alexander came out the 'liberal' press began the rewards-and-punishment ploy," Warren Burger recalled for Harry Blackmun. "Suddenly I was a 'true liberal', I had cast off my sponsor, 'cut the umbilical cord', a la Holmes and TR. This was supposed to give me a taste of what the *Post*, *Newsweek* and the *Times* could do for me and my 'image' if I would 'play ball.' It was nauseous. But I had seen some good men 'hooked' by this cynical technique and more important I never have and never will play to the Law Review galleries, the *Post* or anyone else. Neither have you. You did not have the *Post* to contend with but I survived 14 years of the worse it could hit me with. Unbelievably they courted me at one stage, pointing out how they would like to credit an 'enlightened moderate'—always, of course, if he minded his Ps and Qs-and cooperated with 'David' [Bazelon]." Warren Burger to Harry Blackmun, April 27, 1970, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1067&context=historical>.

¹¹⁰ Statement About Desegregation of Elementary and Secondary Schools, March 24, 1970, <http://www.presidency.ucsb.edu/ws/?pid=2923>; Editorial and Column Reaction to the President's Message on Desegregation, POF, Annotated News Summaries, Box 3, Folder 17, RMNL; Remarks to Eastern Media Executives Attending a Briefing on Domestic Policy in Rochester, New York, June 18, 1971, <http://www.presidency.ucsb.edu/ws/index.php?pid=3049&st=eastern+media+executives&st1=>; ("demagogued"); Lassiter, *The Silent Majority*, at 245; Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* 129-33 (Lawrence: University Press of Kansas, 2007); Kotlowski, *Nixon's Civil Rights*, at 23-38; Dov Grohsgal, *Southern Strategies: The Politics of Southern Desegregation and the Nixon White House* 109 -113 (Ph.D. Dissertation, Princeton, 2013); Fred Graham, "Mitchell Warns of Danger in Attacks on High Court," *NYT*, May 2, 1970; POF, Harry Dent, Report on Meetings of Southerners and Other Conservatives with the President, August 6, 1970, Memoranda for the President, Box 81, RMNL; "Thurmond Warns of Nixon Defeat in '72 Over Desegregation," *LAT*, July 18, 1970; Bruce Ackerman, *We the People 3: The Civil Rights Revolution* 250 (Cambridge: Belknap, 2014).

¹¹¹ Warren Weaver, "Haynsworth: It Was Not a Total Loss for Nixon," *NYT*, November 23, 1969; Kevin Phillips, "Nixon's Southern Discomfort," *HE*, July 31, 1971; Wiley Wasden to Richard Nixon, April 13, 1970, WHCF EXFG51A, Box 4, Folder 5, RMNL (enclosing favorable press from Southern papers); Dent, *The Prodigal South*, at 212; "Traveler Agnew Volubly Verbalizes Viewpoints," *NYT*, September 20, 1970 ("unabridged"); William Chapman, "South to Get Court Seat, Agnew Says," *WP*, October 27, 1970.

¹¹² "Politics: A New Household Word," XXX, May 4, 1970; Randy Sanders, *Mighty Peculiar Elections: The New South Gubernatorial Campaigns of 1970 and the Changing Politics of Race* 82 (Baton Rouge: LSU Press, 2002) ("flagbearer"); PPF, Richard Nixon, Memorandum for Bebe Rebozo, April 21, 1970, Memoranda from the President, Box 2, Folder 9, RMNL; Haldeman, *The Haldeman Diaries*, at 152 ("real vindication"); Billy Hathorn, "Cramer v. Kirk: The Florida Republican Schism of 1970," 68 *FHQ* 403, 412-15 (April 1990); George Bell, Memorandum for Charles Colson, May 7, 1971, WHCF Alpha Name File G. Harrold Carswell (3).

¹¹³ Kyle Longley, *Senator Albert Gore, Sr.: Tennessee Maverick* 220-40 (Baton Rouge: Louisiana State University Press, 2004); Albert Gore, Sr., *Let the Glory Out: My South and Its Politics* 238-40 (Athens: Hill Street, 2000); Dent, *The Prodigal South*, at 178; Lassiter, *The Silent Majority*, at 249, 271-75; Sanders, *Mighty Peculiar Elections*, at 2, 175; “Vote Preserves National Balance,” *LAT*, November 5, 1970: “Except for Tennessee, the ‘Southern strategy’ produced no discernible results.”

¹¹⁴ Press Commentary on the Election Results, November 8, 1970, Box 73, Folder 11: Campaign 1970, Safire MSS; Richard Nixon, Memorandum for H.R. Haldeman, November 22, 1970, Box 49, Folder 54, Contested Materials MSS (“The wisdom of our trying to get across our version of the campaign results is shown by the fact that over half of the staff memoranda understandably reflect the current mood among the columnists in Washington—that we had ‘lost’ in 1970—the gain of two in the Senate, the minimal loss of 9 in the House, obviously failed to get through to most of the people who listened to the media, including members of our staff, except for the political sophisticates like [strategists Murray] Chotiner and [Harry] Dent. This means, again, emphasis needs to be given to what I have mentioned on several occasions previously—the need for staff members who work and live in Washington, and who are constantly exposed to the Washington press corps and the Washington chit chat, to get a balanced point of view. Otherwise, they are going to reflect the downbeat attitude of most of Washington to everything that we are doing.”); Rick Perlstein, *Nixonland: The Rise of a President and the Fracturing of America* 535 (New York: Scribner, 2008).

VII

¹ <http://www.theodore-roosevelt.com/alice.html>; Warren Burger to Harry Blackmun, September 21, 1969, Box 51, Folder 2, Blackmun MSS; Burger to Blackmun, September 17, 1969, id. (“incredible”).

² Warren Burger to Harry Blackmun, May 21, 1970, 1970, Box 51, Folder 3, Blackmun MSS.; (“get people,” “just work”); Burger to Blackmun, June 5, 1970, Box 1361, Folder 2, id.; Blackmun to Burger, May 26, 1970, Box 51, Folder 3, Blackmun Papers.

³ Harry Blackmun, “A Tribute to Warren E. Burger,” 22 *WMLR* 15, 16 (1996); Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey* 51 (New York: Times Books, 2005); Harry Blackmun to Joseph Ryan, June 2, 1970, Box 1359, Folder 9, Blackmun MSS (“every”); Blackmun to Alice and Bob Damkroger, June 2, 1970, Box 1358, Folder 1, id. Blackmun to Myrtle and John Briggs, May 14, 1970, Box 1576, Folder 11, id.; Unsigned undated document, Box 1442, Folder 1, Blackmun MSS (“Twins”).

⁴ Warren Burger to Lewis Powell and William Rehnquist, March 14, 1972, Box 129, Correspondence with the Chief Justice, Powell MSS; “An Ode to the Chief Justice,” n.d., Box 490, Burger, Harlan MSS.

⁵ Warren Burger to Harry Blackmun, May 21, 1970, Box 51, Folder 3, Blackmun MSS; *Ashe v. Swenson*, 397 U.S. 436 (1970); Burger to Blackmun, June 30, 1971, Box 1403, Folder 5, Blackmun MSS (“The President,” “It”).

⁶ John Ehrlichman, *Witness to Power: The Nixon Years* 133 (New York: Simon and Schuster, 1982); .

⁷ OVAL 576-11, September 20, 1971, 11:47 A.M., Haldeman, NT (“double”).

⁸ OVAL 575-7, September 17, 1971, 4:43 P.M., Haldeman, Ehrlichman, id. (Burger); OVAL 576-5, September 18, 1971, 10:05 A.M., Haldeman, id. (“whatever,” “I”).

⁹ OVAL 576-5, 1121, September 18, 1971, id. (“But”); *New York Times v. United States*, 403 U.S. 713 (1971); WHT 6-84, July 1, 1971, 7:00, 6:00 P.M., NT (Pentagon Papers, “clowns,” “stinking,” Georgetown).

¹⁰ Bryce Harlow, Memorandum for the President, WHCF EX FG 51, Box 1, Folder 3, RMNL; “ABA Unit Asks Voice in High Court Selection,” *LAT*, May 18, 1970; John MacKenzie, “ABA to Aid in Picking Justices,” *WP*, July 8, 1970.

¹¹ “Attorney General Mitchell Terminates Association’s Advance Screening of Supreme Court Nominees,” 57 *ABAJ* 1175, 1176 (1971); EOB 291-11, October 18, 1971, 3:47 P.M., Ehrlichman and Mitchell, NT (“cut-throat”).

¹² Egil Krogh to David Young, Supreme Court Nomination, n.d., Box 17, Poff/Supreme Court, Young MSS (“You can bet that the army of students, the ACLU, the ADA, and the Universities are putting to work...will focus on every possible weakness in background.”); William Greider, “Finding the Skeletons in Nominees’ Closets,” *WP*, October 22, 1971.

¹³ Fred Graham, “How to Pick a Justice or Two,” *NYT*, October 3, 1971 (“closer”); OVAL No. 577-3, September 20, 1971, 12:45 P.M., NT (Burns); Egil Krogh, Memorandum for John Ehrlichman, September 24, 1961, Box 17, Friday/Lillie/Supreme Court, Young MSS.

¹⁴ Oval 576-6, September 18, 1971, 10:40 A.M., Mitchell, NT; WHT 10-2, September 24, 1971, 1:52 P.M., Colson, id. (Frankfurter). See John Ehrlichman, Memorandum for H.R. Haldeman, November 6, 1971, Box 5, Folder 59, Contested Materials MSS (“The nationwide crime statistics for the last three years have not been very good. On the other hand, Washington, D.C.’s record has been excellent, given all the problems of this place. In truth, the difference is that we have poured an unbelievable amount of money into law enforcement in the District and it is governed by a dictatorship rather than an elected Mayor and City Council. We’ve been able to do a lot of things in the management of the city government that the electorate would never have stood for if they had had any say in it. And it’s gotten results. I’m not sure how this issue can be handled in the coming campaign....all in all it is not a good national record and we’re going to be on the defensive in this area and we’d better start laying some plans right now for meeting the political onslaught. There is no sign that the statistics are going to get any better in the coming year.”)

¹⁵ *Swann v. Charlotte-Mecklenburg School District*, 402 U.S. 1 (1971); Earl Maltz, *The Chief Justiceship of Warren Burger, 1969-1986* 12 (Columbia: University of South Carolina Press, 2000) (“fiascoes”); Bernard Schwartz, *Swann’s Way: The School Busing Case & The Supreme Court* 111, 86-88 (New York: Oxford University Press, 1986) (Douglas); Opinions of William J. Brennan, Jr., October Term 1970, II: Box 6, Folder 13, Brennan TH MSS.

¹⁶ Kevin McMahon, *Nixon’s Court: His Challenge to Judicial Liberalism and Its Political Consequences* 104-105 (Chicago: University of Chicago Press, 2011) (“worse,” Mitchell); “Angry at Bus Ruling: Abolish High Court—Martha Mitchell,” *CT*, April 22, 1971; Dean Kotlowksi, *Nixon’s Civil Rights: Politics*,

Principle and Policy 49-63 (Cambridge: Harvard University Press, 2001); Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 144, 149 (Princeton: Princeton University Press, 2007). “There is resentment against the decision,” Harry Dent informed the President with relief once Swann was handed down, “but it seems to fall on the Court.” Dent, Memorandum for the President, April 21, 1971, WHCF Ex FG 51, Box 1, Folder 6, RMNL.

¹⁷ PPF, Nixon, Memorandum for John Ehrlichman, January 28, 1971, Memoranda from the President, Box 3, Folder 12, RMNL; Dov Grohsgal, *Southern Strategies: The Politics of Southern Desegregation and the Nixon White House* 203-209, 216 (Ph.D. Dissertation, Princeton, 2013).

¹⁸ John Dean, *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* 34 (New York: Free Press, 2001); John Marsh to Richard Nixon, XXX, 1971, WHCF Name File Richard Poff (2) (Congressional experience).

¹⁹ OVAL 576-6, September 18, 1971; Ben Franklin, “Poff Factors: Civil Rights and Privacy,” *NYT*, October 3, 1971.

²⁰ Dean, *The Rehnquist Choice*, at 90; Richard Poff to Bessie Hawes, June 28, 1967, Box 448, Folder: Supreme Court, 1967, Misc., Poff MSS; Ben Franklin, “Poff Factors: Civil Right and Privacy,” *NYT*, October 3, 1971 (prefer, “running”); OVAL 575-2, 1116, September 17, 1971, 1:17 P.M., Haldeman, NT.

²¹ OVAL 575-2, September 17, 1971, 1:17 P.M., Haldeman, NT (“want”); WHT 9-101, September 20, 1971, 7:40 P.M. Mitchell, id. (“impressed,” “But,” Mitchell’s view); WHT 9-112, September 22, 1971, 11:14 A.M., Buchanan, id..

²² OVAL 576-6, September 18, 1971; WHT 9-101, September 20, 1976 (“go out”).

²³ OVAL 581-4, September 30, 1971, 10:07 A.M., Mitchell (law firm), NT; Robert Semple, “Justice Black, 85, Quits High Court, Citing His Health,” *NYT*, September 18, 1971; Carroll Kilpatrick, “Hugo Black Quits Supreme Court, Cites Bad Health,” *WP*, September 18, 1971; Paul Edwards, “Why Did Poff Shun Chance at Court,” *id.*, October 12, 1971 (law firm); Clarence Mitchell to Quentin Burdick, September 27, 1971, Box 39, Folder 4, Rauh MSS; Leadership Conference, Press Release, September 27, 1971 (Wilkins), Rauh MSS; “ADA Rejects Poff Candidacy to Supreme Court Nomination,” Press Release, Box 39, Folder 4, id.; John MacKenzie, “Court Fitness of Poff Is Attacked: Foes Dig Into Records,” *WP*, September 27, 1971; “Meany Warns Against Court Reactionaries,” *LAT*, September 27, 1971; “Meany Indicates Labor Might Oppose Poff,” *CT*, September 30, 1971; “Acts to Avoid Battle in Senate on Confirmation,” *NYT*, October 3, 1971 (feminists); OVAL 580-13, September 29, 1971, 11:55 AM, Haldeman and Kissinger; WHT 9-101, September 20, 1971 (“minister”); Jack Greenberg to Louis Pollak, September 28, 1971, Box 57, Supreme Court Vacancies, 1971-72, Pollak MSS: “Joe Rauh (to whom I read your letter) is nevertheless determined to do battle and says that Clarence Mitchell feels very, very strongly that Poff should be opposed as vigorously as possible.” Pollak, then in England, had tried to defend Poff to his NAACP colleagues on the grounds “that he has a first-rate legal mind and is otherwise a good person” and “that we do not have the right to insist that only people who would decide cases the way we would like them decided have the right

to sit on the Court.” William Coleman to Louis Pollak, October 1, 1971, October 1, 1971, id. (summarizing and agreeing with Pollak’s position). For Brown’s recommendations of Poff for a Supreme Court seat, see Edmund G. Brown to Nixon, April 9, 1970, WHCF Name File: Richard Poff, Folder 4, RMNL, Edmund G. Brown to Nixon, September 30, 1971, Folder 3, id.

²⁴ Thomas Foley, “Nixon Urged to Name Poff to Supreme Court: Celler and McCulloch of Judiciary Panel Say Virginian Would Make Good Justice,” *LAT*, September 23, 1970; see, e.g., petition from 83 signatories in Congress to Richard Nixon, September 21, 1971, WHCF Alpha Name File Richard Poff 1971-72 (Folder 10) and Gerald Ford to Richard Nixon, September 22, 1971, id., Folder 6 (“There is no more honorable, decent Member of the Congress than Dick Poff.”); WHT 9-101, September 20, 1971; OVAL 579-10, September 28, 1971, 4:23 P.M., Hugh Scott, Robert Griffin, Gerald Ford, Leslie Arends, Clark MacGregor, Ron Ziegler, George Shultz and John Ehrlichman, NT; OVAL 580-13, September 29, 1971.

²⁵ OVAL 580-13, September 29, 1971.

²⁶ OVAL 581-4, September 30, 1971, 10:07 A.M., Mitchell, NT; William Coleman to Louis Pollak, October 1, 1971, Box 57, Supreme Court Vacancies, Pollak Papers.

²⁷ OVAL 581-4, September 30, 1971; Fred Graham, “A.B.A. Panel to Meet Tomorrow on Poff,” *NYT*, October 1, 1971 (reporting divisions within Administration over whether Poff’s name should be sent alone or as part of “balanced ‘ticket,’ with Scott “said to favor...the ticket approach”); Graham, “How to Pick a Justice or Two,” *id.*, October 3, 1971.

²⁸ John Dean and David Young, Memorandum for John Mitchell and John Ehrlichman, September 27, 1971, Box 75, Folder: Supreme Court Appointments (1), Dean MSS.

²⁹ David Young, Memorandum for John Ehrlichman, September 30, 1971, Box 17, Supreme Court Nominations, Young MSS.

³⁰ Leonard Garment, Memorandum for the President, September 30, 1971, WHCF EX FG 51, Box 1, Folder 6, RMNL.

³¹ OVAL 579-10, September 28, 1971; Richard Kleindienst to Lawrence Walsh, September 23, 1971, WHCF EX FG 51, Box 1, Folder 6, RMNL.

³² John MacKenzie, “Poff Rules Out High Court Post, Cites Opposition: Move Adds to Confusion on Vacancies,” *WP*, October 3, 1971; Greider, “Finding the Skeletons in Nominees’ Closets” (Seymour).

³³ Ben Franklin, “Senator Warned Poff of a Floor Battle,” *NYT*, October 6, 1971 (quotations); Franklin, “Poff Is Reported to Have Feared a Senate Filibuster,” *id.*, October 5, 1971.

³⁴ H.R. Haldeman Diaries, October 2, 1971, RMNL; Paul Vitello, “Richard H. Poff, Who Withdrew Court Bid, Dies,” *NYT*, July 1, 2011; Dean, *The Rehnquist Choice*, at 93, 120-21; Jack Anderson, “The Washington Merry Go-Round: Poff Put Family Above Career,” *WP*, November 2, 1971. “Of course many are saying that the prospective opposition of the NAACP and the liberal forces caused Poff to withdraw,” William Coleman wrote Lou Pollak. “I am pretty sure this was not the case, but on the other hand I guess the liberal forces do better by having people think they have that power.” William Coleman to Louis Pollak, October 11, 1971 Box 57, Supreme Court Vacancies, 1971-72, Pollak MSS.

³⁵ MacKenzie, “Poff Rules Out High Court Post” (Ford and Rauh); “Mr. Poff Steps Aside,” *WP*, October 6, 1971; Henry Abraham, *Justices, Presidents & Senators* 114-15 (Lanham: Rowman and Littlefield, 2008).

³⁶ Dean, *The Rehnquist Choice*, at 101; WHT 585-15, October 5, 1971, 5:29 PM, Poff, NT. Poff would later become a justice on the Virginia Supreme Court.

³⁷ See, e.g., “Spurns Court Nomination,” *CT* October 6, 1971: “Ronald L. Ziegler, Nixon’s press secretary, has declared that it was not correct that the President was ‘starting from scratch’ in seeking a replacement for Poff. But high administration officials here said flatly that the White House had counted so heavily on Poff’s successful ascension to the court that no alternate nominees came immediately to mind when the young, popular Virginia conservative abruptly and publicly declined on Saturday.”

³⁸ OVAL 865-14, February 28, 1973, 9:12 A.M., John Dean *The Nixon Defense: What He Knew and When He Knew It* 244 (New York: Viking, 2014) (“dumb,” Lafontant); OVAL 576-11, September 20, 1971 (health); OVAL 576-6, September 18, 1971.

³⁹ OVAL 576-6, September 18, 1971, 10:40 A.M., Mitchell, NT (Bickel); WHT 9-101, September 20, 1971 (Jewish seat); OVAL 575-2, 1116, September 17, 1971 1:17 P.M., Haldeman, id. (Spector). “I do understand that Judge Arlin M. Adams is on the list of ten,” William Coleman reported to Pollak. “He is Jewish, and, I guess, his appointment is a possibility as he was a very early supporter of Mr. Nixon even when the political leaders in Pennsylvania were supporting Governor Rockefeller. Friday night at a dinner party, however, Arlin said he felt his chances were killed because of the Sister Jogues Egan opinion [in which Adams set aside the contempt conviction of a nun Coleman represented, who refused to tell a grand jury what she knew about the plan of Philip Berrigan and other antiwar activists to kidnap Henry Kissinger, blow up government property, and destroy draft records. Adam’s majority opinion instructed the district court to hold a hearing to decide whether the questions asked of Egan grew out of information obtained by federal agents in an illegal wiretap on her order’s telephones. Donald Jamison, “Silent in Berrigan Case, Nun is Upheld on Appeal,” *NYT*, May 29, 1971]. In fact, he remarked that Mitchell had seen him in London, given him hell for writing it and given him even more hell that it caused a 47-page opinion which has resulted in upsetting all of the Government’s grand jury investigations involving political or other so-called radical movements. I think Arlin is as good as you could expect Nixon to appoint. William Coleman to Louis Pollak, October 11, 1971, Box 57, Supreme Court Vacancies 1971-72, Pollak MSS.

⁴⁰ WHT 9-101, September 20, 1971, 7:40 P.M., Mitchell, NT (“Catholic conservative”); OVAL Tape 575-7, September 17, 1971 (“hell,” Agnew, Hoover); OVAL 576-5, September 18, 1971 (Mrs. Smith); WHT 9-101, September 20, 1971, 7:40 P.M. Mitchell, NT (Walsh); OVAL 581-4, September 30, 1971; OVAL 576-6, September 18, 1971 (remainder).

⁴¹ Fred Graham, “Burger Hails Black and Harlan as Supreme Court Opens With Two Vacancies,” *NYT*, October 5, 1971; Ronald Ostrow, “Solemn Opening: Supreme Court Pays Tribute to 2 Justices,” *LAT*, October 5, 1971; John MacKenzie, “High Court Puts Off All Major Cases,” *WP*, September 25, 1971.

⁴² Robert Byrd to Richard Nixon, January 13, 1970, WHCF Ex FG 51, Fox 1, Folder 3, RMNL (“I plan to send this same telegram to the President every day this week”).

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- ⁴³ H. R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* 147, 361 (New York: G.P. Putnam, 1994). Though Spong's opposition to Carswell would have made him a nonstarter, Nixon later considered Baker. *Infra*.
- ⁴⁴ OVAL 587-3, October 8, 1971, 10: 04 A.M., Mitchell and Ehrlichman, NT; "Robert Byrd: Nixon's Next Court Choice," *WDN*, October 9, 1971.
- ⁴⁵ "Robert Byrd: Nixon's Next Court Choice," WHT 11-26, October 11, 1971. See also, e.g., John Herbers, "Robert Byrd Considered for Supreme Court Seat," *NYT*, October 10, 1971; "Call Byrd High Court Choice," *CT*, October 10, 1971.
- ⁴⁶ WHT 11-26, October 11-26; Thomas Foley, "Byrd Called Unlikely High Court Nominee," *LAT*, October 11, 1971 (McGovern); George Lardner, "Robert Byrd Considered for Court," *WP*, October 10, 1971 (Ervin).
- ⁴⁷ David Corbin, *The Last Great Senator: Robert C. Byrd's Encounters with Eleven United States Presidents XXX* (Lincoln: Potomac, 2012) ("hillbilly"); Ben Franklin, "Evidence Grows That Byrd Will Get High Court Seat," *NYT*, October 11, 1971; Dorothy McCardle, "A Georgetown Party for 500 Closest Friends," *WP*, October 11, 1971.
- ⁴⁸ "How to Undermine the Court," *NYT*, October 12, 1971; "The President, the Court and Senator Byrd," *WP*, October 11, 1971.
- ⁴⁹ Adam Clymer, "Robert C. Byrd, a Pillar of the Senate, Dies at 92," *NYT*, June 29, 2010; Corbin, *The Last Great Senator*, XXX.
- ⁵⁰ Spenser Rich, "Byrd Held Unlikely For Court," *WP*, October 12, 1971; WHT 11-49, October 12, 1971, 8:40 A.M., Ziegler, NT; NARA Tape 590-2, RC 1261-2, October 13, 1971, 11:06 A.M., Haldeman, id. ("chance").
- ⁵¹ "Woman on the Court," *WP*, September 30, 1971 (Elvera Burger); Dorothy McCardle, "Friendly Venom Over the Court," *id.*, October 23, 1971 (Martha Mitchell); "Woman on Court Urged by Feminist," *id.*, October 5, 1971 (Friedan); "Pat Believes Age Is a Factor In Putting Woman on the Court," *CT*, September 25, 1971; Fred Graham, "Nixon Problem: Woman Justice?," *NYT*, September 24, 1971 ("talking "); Lynn Lilliston and Marlene Cimonis, *LAT*, September 30, 1971 (speculation); Anna Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (Chapel Hill: 2008); Sonja David, *Lady Law: The Story of Arizona Supreme Court Justice Lorna Lockwood* (Chandler: Brighton, 2012); Philip Vandermeer, "Lorna Lockwood," *Encyclopedia of Women in the American West*, ed. Gordon Bakken and Brenda Farrington (Thousand Oaks: Sage, 2013).
- ⁵² "Caucus Offers 10 Women for Supreme Court," *LAT*, September 28, 1971. An earlier version had included some especially unlikely names, such as those of Carolyn Agger and Pauli Murray. See Isabelle Shelton, "The Women Who Qualify for the Court," *WS*, September 21, 1971, Box 389, Folder 4, Mink MSS. "The list the caucus is drawing up for submission to the White House, currently includes Judge Hufstedler, Rep. Griffiths, Patricia Harris, the District's Judge Bernita Shelton Matthews and tax lawyer Caroline Ager [sic] (Mrs. Abe Fortas, wife of a former justice), Judge Cornelia Blanche Kennedy of the

U.S. District Court of Michigan, District lawyer Marguerite Rawalt, Brandeis University professor Pauli Murray, and Mrs. Rita Hauser, a Nixon appointee to the United Nations' Commission on Human Rights."

⁵³ Fred Graham, "Nixon Problem: Woman Justice?," *NYT*, September 24, 1971; Lee Edmon, XXX Shirley Hufstedler OH,

http://http://www.americanbar.org/content/dam/aba/directories/women_trailblazers/hufstedler_interview_3_authcheckdam.pdf; OVAL 580-13, September 29, 1971; OVAL 579-10, September 28, 1971 ("bag"); Carroll Kilpatrick, "Nixon Widens Criteria for Court Nominee," *WP*, September 21, 1971; Ken Clawson, "Mitchell Tells of 'Serious' Consideration, *id.*, September 24, 1971; "Remarks at a Question-and-Answer Session with 10-Member Panel at the Economic Club of Detroit," September 23, 1971, <http://www.presidency.ucsb.edu/ws/index.php?pid=3151>. Mitchell would tell Nixon that Hufstedler is "a left-winger and a her husband is a leading left-handed Democrat." EOB 291-11, October 18, 1971; Oval 595-4, October 18, 1971, 10:04 A.M., Haldeman, NT.

⁵⁴ OVAL 581-4, September 30, 1971; OVAL 587-3, October 8, 1971 ("educated"); OVAL 579-10, September 28, 1971; OVAL 589-2, October 12, 1971, 5:28 P.M., Ehrlichman, NT.

⁵⁵ WHT 11-35, October 11, 1971, 12:35 P.M., Mitchell, NT ("frigid," "standing"); OVAL 581-4, 1154, September 30, 1971, 10:07 A.M., Mitchell, *id.* ("longer"); Cecil Fleming, "Order in the Kitchen! Justice Lillie Presiding," *LAT*, April 7, 1966; "Potential High Court Nominees," *NYT*, October 14, 1971; Barbara Martin, "Sketch of Judge Lillie," *id.*, October 23, 1971; Mary Blackstone, "Oral History of Justice Mildred Lillie, California Court of Appeals," 5 *CalH* 65 (2010); Blanche Seaver to Richard Nixon, September 24, 1971, WHCF Confidential Name File Mildred Lillie, Folder 3, RMNL; Sue Avery, "Justice Asks Better Use of Traditions," *LAT*, December 8, 1969; OVAL 587-3, October 8, 1971 ("hard-nosed"). Mitchell's list of eligible women included D.C. Superior Court Judge Sylvia Bacon, Assemblywoman Constance Cook (R-NY), Martha Griffiths, Representative Margaret Heckler (R-Mass), Shirley Hufstedler, Cornelia Kennedy, Jewel Lafontant (a Republican lawyer), Mildred Lillie, Soia Mentschikoff, Constance Baker Motley, Dorothy Nelson, Ellen Peters, and Susan Sharp. It was not a very good list from Nixon's perspective, because it included liberals. "Only two Democrats on the list (Sharp and Lillie) were deemed true 'conservatives.' And of the five Republicans listed, only Cornelia Kennedy possessed even minimal judicial experience." It was reduced to four—Heckler, Kennedy, Lillie and Peters, and Mitchell indicated that he supported Lillie. David Yalof, *Pursuit of Justices, Presidential Politics and the Selection of Supreme Court Nominees* 118-19, 120-21 (Chicago: University of Chicago Press, 1999).

⁵⁶ WHT 11-40, October 11, 1971, 2:47 P.M., Mitchell, NT (Volpe, husband); John Dean, "Musing on a Belated Visit with California Justice Mildred Lillie," <https://verdict.justia.com/2015/01/09/musing-belated-visit-california-justice-mildred-lillie> (Lillie later laughingly recalled "the lanky and pleasant young man at the Justice Department who had carried her bags [who] was now Chief Justice of the United States," William Rehnquist); WHT 11-35, October 11, 1971 ("confirmed"); Mario Biaggi and other members of Congress to Richard Nixon, October 14, 1971, WHCF Subject Files, EX FG 51, Box 1, Folder 6, RMNL; Patrick Buchanan, "Memorandum for the President, September 29, 1971, *id.*

⁵⁷WHT 11-26, October 11, 1971, 8:57 A.M. Mitchell, NT (teasing); OVAL589-1, October 12, 1971, 4:20 P.M., Bull, Mitchell and Ehrlichman, id. (“chance,” “vote”); OVAL 581-4 September 30, 1971.

⁵⁸ “Amounts Received by Friday’s Firm in School Suits,” *AD*, October 14, 1971; OVAL 576-6, September 18, 1971.

⁵⁹ Jack Bass, “Frank M. Johnson Jr.,” <http://www.encyclopediaofalabama.org/article/h-1253> (King); John MacKenzie, “Crossing the Judicial Line,” *WP*, June 13, 1974 (Burger’s promotion of Johnson to Mitchell); “Judges: Interpreter in the Front Line,” *Ti*, May 12, 1967 (“I’m”); Roger Newman, *Hugo Black: A Biography* 622 (New York: Pantheon, 1994) (Black’s hope). Because Burger’s papers are sealed until 2026 and the portion of Frank Johnson’s papers involving his possible 1971 appointment to the Supreme Court is also closed, there is little contemporary archival information about his possible nomination, save in the Nixon Library, where there are many endorsements of him from Alabamians, including the mayor of Montgomery, the entire Montgomery police department, the *Alabama Journal*, and the *Montgomery Advertiser*. Earl James to Richard Nixon, September 24, 1971, WHCF Name File, Frank Johnson, Folder 6; Edward Wright to Richard Nixon, September 23, 1971, RMNL; “Johnson in for Black,” *AJ*, September 21, 1971, September 21, 1971, Id., Folder 1; “Why Not Judge Johnson?,” *MA*, September 28, 1971, id. (“Although Judge Johnson may not appreciate it, coming from such a hair shirt as *The Advertiser*, he would be a good choice. And now even the lawyers of this area appear to agree by overwhelming margins, as do many blacks. Strange bedfellows, Judge, but there it is.”). Though Johnson had his Alabama detractors, he also had powerful support. As an unsigned memo in John Dean’s papers said, “Johnson is best known nationally for his rulings in civil rights cases...But Judge Johnson’s civil rights decisions are best viewed in the context of his total performance as a judge and in light of his overall commitment to reason, moderation, and the supremacy of law...In the past 12 months, the prevailing local attitude toward Judge Johnson has changed markedly, perhaps in recognition of the fact that he helped bring the state’s school systems through a turbulent and trying period relatively intact...Judge Johnson is a ‘law and order’ judge in the best sense of the term...The U.S. Attorney’s office, in fact, currently has a 98% conviction rate in his court. But if Johnson is tough in criminal cases, he is also fair...The memo concluded by touting Johnson as “a Southerner who would be confirmed virtually without opposition, and who would provide the Supreme Court with the capacity for work it so desperately needs and with the intellectual leadership it no longer seems to have. The appointment of Judge Johnson would tend to unite the country, rather than divide it again; and it would be a recognition, not of the darkness from which the South is striving to emerge, but of all that is worth preserving in the South, and in the American tradition.” Judge Frank M. Johnson, Jr., n.d. Box 76, Supreme Court Vacancies (2), Dean MSS. In contrast, William Coleman sounded unimpressed. “There is a push for Frank Johnson,” he reported to Lou Pollak. “One of his supporters called me, and when he was finished I was left somewhat disgusted. Judge Johnson’s supporters are saying that he ought to be appointed because he is a strict constructionist and 1) he has never decided a civil rights case where he has gone one inch beyond the existing Supreme Court decisions; (2) that he has never ordered busing in any school desegregation cases; (3) that he is a very strict judge in criminal

matters; (4) that he is the only judge that has ever issued an injunction against Martin Luther King. In other words, men have to do terrible things to achieve their ambitions, particularly when the leadership of the country is of such low moral character.” William Coleman to Louis Pollak, October 11, 1971, Box 57, Supreme Court Vacancies, 1971-72, Pollak MSS.

⁶⁰ Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson, Jr. and the South's Fight for Civil Rights* 78, 275-76 (New York: Doubleday, 1993) (Johnson did not explain why it would have ruined the GOP).

⁶¹ MacKenzie, “Crossing the Judicial Line” (Burger’s promotion of Friday to Mitchell).

⁶² William Rehnquist, Memorandum for the Attorney General, Possible Bases for Opposition to Senate Confirmation of Herschel Friday, October 12, 1971, Box 75, Supreme Court Nominees (1), Dean MSS.

⁶³ OVAL 587-3, October 8, 1971 (“work”, Arkansas Harlan”); OVAL 589-1, October 12, 1971.

⁶⁴ OVAL 589-1, October 12, 1971.

⁶⁵ Id., Milton Young to Harry Flemming, May 15, 1969, WHCF Name File Sylvia Bacon (2), RMNL; “Setback for Justice,” *Newsd*, October 27, 1969, WHCF Name File, Charles Clark (2) (complaining about Clark’s appointment to the Fifth Circuit); The President’s News Conference, October 12, 1971, <http://www.presidency.ucsb.edu/ws/index.php?pid=3186>.

⁶⁶ “Attorney General Mitchell Terminates Association’s Advance Screening of Supreme Court Nominations,” at 1177.

⁶⁷ Conversation with Nina Totenberg, July 14, 2015; OVAL 596-3, RC 285-3, October 19, 1971, 10:14 A.M., Mitchell, NT (Gignoux); Paul Weiner, “Law School Professors Ponder,” *HLRec*, 4, October 15, 1971.

⁶⁸ Fred Graham, “President Asks Bar Unit to Check 6 For High Court,” *NYT*, October 14, 1971; “Camera Obscura,” *id.*, October 15, 1971; “Mr. Nixon and the Court: Doing It the Hard Way,” *WP*, October 14, 1971; “Mr. Nixon’s Court Nominations,” *LAT*, October 17, 1971.

⁶⁹ Greider, “Finding the Skeletons in Nominees’ Closet” (petitions and Seymour); “Nixon Wants A Racist Court,” *CDD*, October 18, 1971; William Raspberry, “Bigots for High Court,” *WP*, October 13, 1971; “Six in Court Race Not Checked Yet,” *NYT*, October 17, 1971 (feminists); Warren Weaver, “Some Regret Votes Against Haynsworth,” *id.*, October 18, 1971; Ronald Ostrow, “Bayh Indicates He’d Fight Confirmation of 6 on Court List,” *LAT*, October 16, 1971 (Kennedy),

⁷⁰ Dorothy McCardle, “Martha’s Man Is Friday,” *WP*, October 5, 1971.

⁷¹ WHT 11-86, October 14, 1971, 9 A.M., Mitchell, NT; OVAL 593-7, October 15, 1971, 9:37 A.M., Haldeman (suspicion); “Attorney General Mitchell Terminates Association’s Advance Screening of Supreme Court Nominees,” at 1176.

⁷² OVAL 593-7, October 15, 1971; John Osborne, “Chosen Two,” *TNR*, November 6, 1971, 12; PPF, Richard Nixon, Memorandum to Bob Haldeman and Ron Ziegler, April 14, 1972, Memoranda from the President, Box 3, Folder 18, RMNL (describing Osborne and *Time*’s Hugh Sidey as dishonest and “totally against us”); Ronald Ostrow, “Unusual Fuss Over Prospects: High Court List May Number 15,” *LAT*,

October 15, 1971; Fred Graham, "Nixon Court List May Be Enlarged," *NYT*, October 15, 1971; Ken Clawson and John MacKenzie, ABA List for Court Not Final," *WP*, October 15, 1971; Jack Anderson, "The Washington Merry-Go-Round: Nixon Bent on Law-and-Order Court," *id.*, October 21, 1971; Nina Totenberg, "Intrigue and Agony: How Nixon Picked Two Men for the Court," *NO*, November 6, 1971.

⁷³ Conversation with Nina Totenberg, July 14, 2015 ("impeccable"); Totenberg, "Intrigue and Agony."

⁷⁴ OVAL 581-4, September 30, 1971 ("soldier," "space"); OVAL 587-3, October 8, 1971 ("dying," "good sport"); WHT 11-26, October 11, 1971 ("soften," "game"); MacKenzie, "Crossing the Judicial Line" (quoting from the letter, which the *Post* had acquired); WHT 11-86, October 14, 1971 ("anxious," "grace"); OVAL 593-11, October 15, 1971 ("great," "nationally"). Burger, who employed one woman law clerk during the 1970s, routinely segregated clerks from their spouses at his annual black-tie dinner for them at the Supreme Court until 1985. "[I]t was the unvarying practice that clerks and spouses gathered together at the Court for cocktails, but separated for the dinner, when Mrs. Burger would gather the spouses and lead them off to dine at another venue. Joseph Zengerle, "Changing of the Chiefs," 9 *GB* 2d. 175, 175 (2006). Of course, he was not the only justice who had trouble adjusting to women at the Court, and there were questions about the treatment of African Americans as well. See, e.g., Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* 472-74 (Boston: Houghton Mifflin, 2010); Nina Totenberg, "The Last Plantation," *NewT*, July 26, 1974, 26.

⁷⁵ OVAL 593-11, October 15, 1971.

⁷⁶ "Friday Leads Court List, Source Says," *AG*, October 15, 1971 (Fulbright, McClellan, Mills); John McClellan to John Smith, October 18, 1971, Box 571, Folder 28, McClellan MSS ("Herschel Friday has my total and unequivocal support for appointment to the Supreme Court of the United States"); Telephone Memorandum, November 2, 1971, From Mr. Long to Buddy Whiteaker, Re: Herschel Friday, Box 575, Folder 3, McClellan MSS (suggesting that Fulbright's support might be less enthusiastic than McClellan's); John McClellan to Everett Jordan, n.d., *id.* ("personal," "one"); Statement, n.d., *id.* (statement that McClellan would have given had Friday gotten the nod); "Lawyers Endorse Friday," *AD*, October 17, 1971 (trial lawyers); "Women Lawyers Support Friday; Labor does Not," *id.*, October 19, 1971; "Our Man Friday," *id.*, October 15, 1971; "Mr. Nixon's List for the High Court," *AG*, October 15, 1971 ("what"); "From the People: The Gazette and Herschel Friday," *id.*, October 19, 1971; "The Central Issue in the Friday Matter," *id.*, October 19, 1971 ("bison"); "In the Beginning," *id.*, October 20, 1971; John Whitaker, Memorandum for John Ehrlichman, October 14, 1971, Box 17, Friday/Lillie/Supreme Court, Young MSS ("avid"); Fred Graham, "Friday Among Six Nixon Considering for Supreme Court," *NYT*, October 14, 1971 (Rockefeller's preference for a Republican); John Bennett, "Nixon's Court List Irks Arkansas GOP," *CA*, October 15, 1971; "Unionists Oppose Choice of Friday," *NYT*, October 21, 1971; "Judge Merit, Not Clients, ACLU Says," *AG*, October 16, 1971; "Labor Lawyer Says Friday Has Shown 'No Leadership,'" *XXX*, October 16, 1971; "AFL-CIO Chief Attacks High Court Candidate," *CA*, October 20, 1971; Roy Reed, "Arkansas Liberals Divided Over Potential Supreme Court Nominee's Role in Integration Resistance," *NYT*, October 18, 1971 (NAACP); David Margolick, "At the Bar," *id.*, April 1, 1994. ("I

grew to know him better,'" Mr. [Philip] Kaplan [a Little Rock attorney who had opposed him in 1970] said. "I learned he was a very gracious, wonderful man, a person who was very giving of his time and his resources, a leader of a profession I love, a man who set an example for kindness and gentility in an age where they're not always at a premium' Mr. Friday's death, at 72, brought condolences from President Clinton and was front-page news in The Arkansas Democrat-Gazette. The newspaper was filled for days afterward with large -- in some cases, full-page -- paid tributes that noted not only that he had built Arkansas's largest law firm and headed the state bar association but also that he was perhaps the state's leading citizen.").

⁷⁷ John Dean and David Young, Memorandum for Attorney General John Mitchell and John D. Ehrlichman, "Interview with Herschel Friday," October 13, 1971, 12:00-7:15 P.M., October 14, 1971: 945-11:30 A.M, Box 17, Friday/Lillie/Supreme Court, Young MSS; Dean, *The Rehnquist Choice*, at 159-60.

⁷⁸ OVAL 592-6, October 14, 1971, 9:36 A.M., Haldeman and Ehrlichman, NT.

⁷⁹ Dean and Young, Interview with Herschel Friday ("He also stated that this was the most detailed discussion of this kind he had had with anyone in connection with his nomination").

⁸⁰ Id.; OVAL 289-15, October 14, 1971, 2:30 P.M, Ehrlichman and Mitchell, NT; Dean, *The Rehnquist Choice*, at 160-61, 171.

⁸¹ OVAL 289-15, October 14, 1971 (Byrd's withdrawal was discussed here); Elsie Carper, "Byrd Says He Pulled His Name Off List," *WP*, October 27, 1971; OVAL 593-6, October 15, 1971, 9:10 A.M., Peterson, NT; Dean, *The Rehnquist Choice*, at 174 ("withdraw"). John Ehrlichman's notes on his meetings with Nixon repeatedly indicated that Friday and Lilley were getting the nod. Ehrlichman, Notes of a Meeting with President III, 1, October 12, 1971, Box 6, Ehrlichman MSS; Notes of Meeting with President, October 15, 1971, id.

⁸² John Dean and David Young, Memorandum for Attorney General John Mitchell and John Ehrlichman, October 15, 1971, Interview with Justice Mildred Lillie, October 14, 1971, 3:30-8:00 P.M, Box 17, Folder: Friday/Lillie/Supreme Court, Young MSS; Sam Yorty to XXX, January 28, 1969, WHCF Name File Mildred Lillie, Folder 3 (he recommended her again in a September 20, 1971 letter to Nixon, id.; Mildred Lillie to John Dean, October 19, 1971, Box 74, Folder 4, Dean MSS (Attorney General Evelle Younger; LA County Sheriff Peter Pitchess and four Supreme Court justices—Chief Justice Donald Wright, Justice Louis Burke, Justice Stanley Mosk and Justice Marshall McComb); OVAL 581-4, September 30, 1971; WHT Tape 13-8, October 26, 1971, 11:13 a.m., Reagan, NT ("My heart was with Smith," Reagan told Nixon); Roger Johnson, Memorandum to John Dean, Supreme Court Vacancies, September 28, 1971, Supreme Court Vacancies, Box 70, Dean MSS (reporting that Reagan's friend, Holmes Tuttle, and "numerous Republicans with whom he has talked, including Governor Reagan," believed that the appointment of Shirley Hufstедler "would be a disaster for the party in California" and recommended Mildred Lillie if Nixon wanted to name a woman. "They also highly recommend for the President's consideration, William French Smith, a senior member of the law firm of Gibson, Dunn and Crutcher in Los Angeles. He has impeccable credentials and his background will stand the closest scrutiny. Tuttle and

his friends believe his appointment would be highly applauded by the entire state of California. Mr. Tuttle told me Governor Reagan was going to give this same information to the Attorney General.”)

⁸³ Dean and Young, Interview with Justice Mildred Lillie, October 14, 1971; OVAL 594-2, October 18, 1971. Dean and Young commented on her painting in the report. For her cooking, see, e.g., Cecil Fleming, “Order In the Kitchen! Justice Lillie Presiding,” *LAT*, April 7, 1966; Earl Johnson, “Introduction: Oral History of Justice Mildred Lillie,” 5 *CaLH* 65, XXX (2010).

⁸⁴ OVAL 593-7, October 15, 1971; OVAL 593-11, October 15, 1971, 10:38 A.M., Mitchell and Ehrlichman.

⁸⁵ Dean, *The Rehnquist Choice*, at 176-77.

⁸⁶ Don J. DeBenedictis, “Justice Mildred L. Lillie,” *LADJ*, September 12, 1980; John Dean, “Musing on a Belated Visit with California Justice Mildred Lillie,” <https://verdict.justia.com/2015/01/09/musing-belated-visit-california-justice-mildred-lillie>. In a lengthy memoir recorded in the twilight of her career, Lillie did not even mention the Supreme Court incident and simply said circumspectly that before “the 1960s, we, as women lawyers, tried as best we could to gain public acceptance,” and though they “weren’t too welcome” and “lacked much clout” with respect to bar association activities, “we did what we could.” Lillie, “Oral History of Justice Mildred L. Lillie,” at 131.

⁸⁷ “Presiding Justice Mildred Lillie Dies; Served 55 Years on Bench,” *MetNE*, October 29, 2002 (Governors Gray Davis and George Deukmejian, Chief Justice Ronald George); Johnson, “Introduction: Oral History of Justice Mildred Lillie,” at 69-70 (2010) (funeral); M. Roger Grace, “Perspectives: Deservedly, Justice Lillie Will Be Honored,” *MetNE*, November 3, 2003.

⁸⁸ DeBenedictis, “Justice Mildred L. Lillie.”

⁸⁹ “The Nation: Nixon’s Not So Supreme Court,” *Ti*, October 25, 1971; Paul Weiner, “Law School Professors Ponder,” *HLRec*, October 15, 1971 (group of students); Laurence Tribe, Memorandum to Dean Sacks, Judge Mildred Lillie, October 17, 1971 (I am grateful to Laurence Tribe for providing me with a copy of this memorandum).

⁹⁰ *Calderon v. City of Los Angeles*, 5 Cal. App. 3d 385, rev’d. 4 Cal. 3d. 251, 257 (1971); *Holt v. Richardson*, 238 F. Supp. 468 (1965); *Burns v. Richardson*, 384 U.S. 73 (1966). Burns may have been somewhat more ambiguous than the California Supreme Court suggested. See Sanford Levinson, “One Person, One Vote: A Mantra in Need of Meaning,” 80 *NCLR* 1269, 1282-84 (2002). The two conservatives on the California Supreme Court were Justices Marshall McComb and Louis Burke.

⁹¹ Email, Laurence Tribe to Laura Kalman, July 14, 2015; “FBI on Campus,” *HLRec.*, November 19, 1971; John MacKenzie, “Researcher Cites Judge Lillie’s Sharp Reversals: High Court Candidate’s Record Hit,” *WP*, October 18, 1971; “Justice Lillie Hit for 4 Reversals,” UPI, XXX; John MacKenzie, “Administration Firmly Defends Justice Lillie’s Judicial Record,” *LAT*, October 20, 1971 (“seriously”); Laurence Tribe, Memorandum to Dean Sacks, October 28, 1971 (“say ‘for the record’”) (memorandum given me by Laurence Tribe); Robert Jackson, “Harvard’s Bok Raps FBI Reaction to Lillie Study,” *LAT*, December 25, 1971; “U.S. Aide Defends Nominee Inquiry,” *id.*, December 26, 1971.

⁹² Conversation with Nina Totenberg, July 14, 2015; UCLA Law Petition, October 19, 1971, WHCF Name File Mildred Lillie (1), RMNL; “Rowland Evans and Robert Novak “Where Was Mitchell?,” *WP*, October 25, 1971 (Los Angeles County Bar Association); Joan Sweeney, “County Bar Official Defends Justice Lillie,” *LAT*, October 23, 1971; John Dean, Memorandum for John Ehrlichman October 20, 1971, Box 75, Folder 2, Dean MSS (reporting telephone call of Paul Iverson); John MacKenzie, “Researcher Cites Judge Lillie’s Sharp Reversals” (Traynor).

⁹³ Fred Graham, “Six in Court Race Not Checked Yet: Husband of Woman Judge in Numerous Debt Suits,” *NYT*, October 17, 1971; Fred Graham, “FBI Is Checking 2 On Court List: Investigates Background of Friday and Judge Lillie,” *id.*, October 19, 1971; OVAL 594-2, October 18, 1971, 8:45 A.M., Haldeman, NT; Nina Totenberg, “Intrigue and Agony” (Rehnquist memorandum, and ABA reactions).

⁹⁴ Charles Colson, Memorandum for John Ehrlichman, Supreme Court Nominations, October 18, 1971, Box 115, Supreme Court, Charles Colson, RMNL, XXX; Leonard Garment, Memorandum for the President, Supreme Court Appointments, October 18, 1971, Box 177, Supreme Court Nominations, XXX, H.R. Haldeman, RMNL; Leonard Garment, Memorandum for the President, Supreme Court, October 20, 1971, WHCF EX FG 1, Folder 6 (“guesswork,” “feeling,” “qualified”); and see Herbert Klein, Memorandum for the Attorney General, October 19, 1971, Box 17, Friday/Lillie/Supreme Court, Young MSS, in which the White House Communications Director recorded his surprise at what happened after he addressed “a group which appeared to be conservative and which applauded my mention of Vice President Agnew and laughed vigorously at a one-liner in which I said, ‘we finally discovered a new way to get a name slandered: say he is a Southerner and suggest him for the Supreme Court.’” Four people had privately criticized the list of six to him. “I find, in a number of circles of those who support us, skepticism regarding what they know about the records of the six names sent to the ABA.”

⁹⁵ OVAL 594-2, October 18, 1971; EOB 291-11, October 18, 1971.

⁹⁶ EOB 291-11, October 18, 1971, Ehrlichman and Mitchell, NT; Dean, “Musings on a Belated Visit with Mildred Lillie.”

⁹⁷ EOB 291-11, October 18, 1971; Laurence Tribe to the Editor, *BG*, November 4, 1971 (letter given me by Laurence Tribe), responding to “Tribe Builds Case Against Rehnquist,” *id.*, November 4, 1971 (claiming that Tribe’s “research on Judge Mildred L. Lillie led the ABA to declare her unqualified for the nomination”); Roy Wilkins to Lawrence Walsh, October 19, 1971, Part I, Box 130, Folder 6, Leadership Conference MSS.

⁹⁸ EOB 291-11, October 18, 1971.

⁹⁹ *Id.*; WHT 11-138, October 19, 1971, Mitchell, NT (“no crook”); OVAL 596-3, October 19, 1971 (Scott, “damn,” Potter Stewart)

¹⁰⁰ EOB 291-11, October 18, 1971.

¹⁰¹ *Id.*; WHT 11-143, Tape 1168, October 19, 1971, 5:38 P.M., Mitchell, NT (“play,” “good”); WHT 11-138, Tape 1168, October 19, 1971, 3 p.m., Mitchell (“bullshit,” Catholic deans).

¹⁰² OVAL 596-3, October 19, 1971 (woman); SS Telephone Transcripts, October 19, 1971, 12:54 P.M., Mitchell.

¹⁰³ WHT 12-15, October 20, 1971, 5:33 P.M., Mitchell, NT; WHT 12-25, October 20, 1971, 6:17 P.M., NT, Mitchell (quotations); “Attorney General Mitchell Terminates Association’s Advance Screening of Supreme Court Nominees”; OVAL 596-3, October 19, 1971; EOB 281-70, October 21, 1971, 10:07 A.M., Haldeman and Ziegler, NT.

¹⁰⁴ WHT 12-15, October 20, 1971; WHT 12-25, October 20, 1971 (quotations).

¹⁰⁵ John MacKenzie, “ABA Says 2 Unfit for Court,” *WP*, October 21, 1971; Ronald Ostrow, “Justice Department Accused of Leak on Bar Rating of Pair for Court: ABA Committee Says Administration Disclosed Adverse Appraisals of Mildred Lillie and Friday; Mitchell Denies It,” *LAT*, November 2, 1971; Spencer Rich, “Hill Sets Nominee Reviews: ABA Dispute Continues on Court ‘Leaks,’” *WP*, October 23, 1971; “ABA Says Report On Friday Leaked by Administration: Isn’t True, Mitchell Tells Committee,” *AG*, November 2, 1971; Fred Graham, “Nixon Is Expected to Pick Arkansan for Seat on Court,” *NYT*, October 21, 1971; EOB 281-70, October 21, 1971 (“haring,” “remember”).

¹⁰⁶ OVAL 596-3, October 19, 1971 (“Southern strategy,” “Powell”); Lewis Powell to Herschel Friday, October 25, 1971, Box 113, Congratulatory Letters?, XXX, Powell MSS (Friday recommendation); John Jeffries, *Justice Lewis F. Powell, Jr.: A Biography* 7 (New York: Fordham, 2001) (reasons); John McKenzie, “Stocks Seen Problem for Powell,” *WP*, October 31, 1971 (\$1 million); Lewis Powell to Jody, Penny, Molly and Lewis, September 23, 1971, Box 112, Pre-Appointment Correspondence, Powell MSS.

¹⁰⁷ WHT 11-133, October 19, 1971, 1:26 P.M., Mitchell, NT (“prestigious,” “blind”); WHT 11-138, October 19, 1971 (“two years”)

¹⁰⁸ WHT 11-133, October 18, 1971 (“knocked off”); WHT 11-143, 5:38 P.M.; WHT 11-155, October 19, 1971, 8:19 P.M., Mitchell, NT (“I can’t find him,” Mitchell told Nixon); WHT 11-157, October 20, 1971, 9:19 A.M., Mitchell, id. (“arrange”).

¹⁰⁹ WHT 11-143, 1168, October 19, 1971 Mitchell, NT (“this,” “arch,” “tough,” Walsh); WHT 10-65, October 6, 1971, 8:25 A.M., Goldwater, id. (Goldwater, “Rensler”); Dean, *The Rehnquist Choice*, at 86, 129-30 (“Renchburg,” “clown,” Dean and Moore); OVAL 587-3, October 8, 1971 (“great,” “hell”).

¹¹⁰ WHT 11-153, October 19, 1971, 7:49 P.M., Powell, NT.

¹¹¹ WHT 11-155, October 19, 1971, 8:19, Mitchell, id.; WHT Tape 12-9, 4:13 P.M., Mitchell, id. (Burger, “so old”); Joel Grossman and Stephen Wasby, “The Senate and Supreme Court Nominations: Some Reflections,” 1972 *DLJ* 557, 575 (1972) (fourth oldest); WHT 12-15, October 20, 1971, 5:33 P.M., Mitchell. (law school, wiretapping, King); Jeffries, *Justice Lewis F. Powell, Jr.*, at 39 (class rank and postgraduate study at Harvard).

¹¹² EOB 282-26, October 20, 1971, 4:23 p.m., Moore, NT (“expecting”); Lewis Powell to Eppa Hunton, April 21, 1975, Box 1, Biographical, Historical Memoranda: Nomination to Supreme Court, Powell MSS.

¹¹³ WHT 12-28, October 21, 1971, 9:33 A.M., Mitchell, NT; EOB Tape 282-26, October 20, 1971.

¹¹⁴ WHT 12-28, October 21, 1971; WHT12-13, RC 1171-13 4:44 P.M, Mitchell, NT; John Jenkins, *The Partisan: The Life of William Rehnquist*, 26 (New York: Public Affairs, 2012). To nit-pick, while Rehnquist had been Editor-in-Chief of the *Stanford Law Review* and had the highest grades of anyone in his class, Stanford did not officially rank its students at the time.

¹¹⁵ WHT 12-30, October 21, 1971, 9:45 A.M., Mitchell (“mention”); EOB 281-34, RC 1189-5, October 21, 1971, 1:17 P.M., Moore; Carroll Kilpatrick, “Nixon Names Powell, Rehnquist,” *WP*, October 22, 1971 (Ziegler).

¹¹⁶ “Yorty Assails Nixon Action,” *LAT*, October 22, 1971; “County Bar Official Defends Justice Lillie,” *id.*, October 23, 1971; “Nixon’s Nominations to the Supreme Court,” *AG*, October 23, 1971; Margolick, “At the Bar,” (Friday); “Friday Learned at 5:30 Decision ‘No,’ Sources Say,” *AD*, October 22, 1971 (“discredit, Beth Friday); “Mrs. Friday Was Surprised: Told of Decision Before Telecast,” *AG*, October 23, 1971; John Bennett, “Friday and Friends Feel Keen Letdown,” *CA*, October 23, 1971 (“hardest”); “Nixon’s Actions Concerning Friday Pondered,” *id.* November 7, 1971 (blamed); John Scudder, “Friday Defends ABA,” *AD*, October 28, 1971; “Friday Admits That Defeat Hard to Swallow,” *id.*, November 21, 1971.

¹¹⁷ Address to the Nation Announcing Intention To Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States, October 21, 1971, <http://www.presidency.ucsb.edu/ws/index.php?pid=3196&st=powell&st1=rehnquist>.

¹¹⁸ *Id.*; EOB 281-34, October 21, 1971.

¹¹⁹ Address to the Nation, October 21, 1971; Kilpatrick, “Nixon Names Powell, Rehnquist.”

¹²⁰ Dorothy McCardle, “Disappointed, But Resigned,” *WP*, October 22, 1971; “Mrs. Mitchell Hits Rejection of Nominee,” *LAT*, October 24, 1971 (“furious,” leaks); Remarks at the National Federation of Republican Women, October 22, 1971, americanpresidency.org; WHT October 20, 1971; WHT Tape 12-25, October 20, 1971 (quotations); “‘Made Beginning’: Woman Next, President Vows,” *LAT*, October 22, 1971; Dorothy McCardle, “Friendly Venom,” *WP*, October 23, 1971.

¹²¹ WHT, 12-98, October 22, 1971, 10:00 P.M, Lewis, NT; WHT 12-62, October 21, 1971, 8:40 P.M., Mitchell, *id.*; WHT12-119, 3:29 p.m., October 25, 1971 Buchanan, *id.*; WHT 12-68, October 21, 1971, 9:03 p.m., Burger, *id.* (nothing, Burger).

¹²² PPF, President’s Speech File, Box 69, Nominations to Supreme Court, October 21, 1971, RMNL (Burger quotation); WHT 12-68, October 21, 1971.

¹²³ POF, John Huntsman, Memorandum for Charles Colson, October 23, 1971, Box 35, Annotated News Summaries, October 21-30, 1971 (1), RMNL; Special Report on the Nominations to the Supreme Court, October 24, 1971, Box 17, Supreme Court Nominations, Young MSS; “Court Appointments,” *TNR*, November 6, 1971, 6; and see also, e.g., “The Awful Truth,” *Na*, November 8, 1971, 450. But see Joseph Alsop, “Nixon’s ‘Aunt Sallies,’” *WP*, December 15, 1971 (liberals played into Nixon’s hands by opposing Lillie and Friday, which enabled the President to make “the quick switch he had always planned”).

¹²⁴ Spencer Rich, “Hill Reaction Is Favorable to Nominees,” *WP*, October 22, 1971; Leon Friedman, “Rehnquist: He Was a Very Elusive Target,” *NYT*, December 12, 1971 (leader); Richard Kleindienst, *Justice: The Memoirs of Attorney General Richard Kleindienst* 123 (Ottawa: Jameson, 1985).

¹²⁵ Nominations of William H. Rehnquist and Lewis F. Powell, Jr., at 1-2, 5.

¹²⁶ John Jenkins, *The Partisan: The Life of William Rehnquist* 82, 86, (New York: Public Affairs, 2012); Spencer Rich, “Rehnquist Civil Liberties Stance Eyed: Rehnquist Critics Design Game Plan For His Defeat,” *WP*, October 26, 1971 (Seymour); Email, Richard Seymour to Laura Kalman, July 30, 2015; Nomination of William H. Rehnquist and Lewis F. Powell, Jr., at 71-72, 181-84, 290-91; 319, 489-492.

¹²⁷ Fred Graham, “Rehnquist’s Statements Indicate He Would Be an Activist Pressing Conservative Views,” *NYT*, November 3, 1971; Richard West, “Rehnquist Backed by Liberals in Hometown: Opposition to Supreme Court Nominee in Phoenix Spearheaded by NAACP Leaders,” *LAT*, October 30, 1971; Fred Graham, “Rehnquist Role in Election Confirmed,” *NYT*, November 3, 1971; James Clarity, “Senators Assail Campus Violence; Inquiries Urged: Justice Department Chiefs Also Critical,” *id.*, May 2, 1969 (“new barbarians”); Mary Perry, “Cold, Hard Examination Shows Up Conservatism of Rehnquist and Powell,” *OP*, November 11, 1971; David Andelman, “Rehnquist Urged a Busing Ban in 1970 Memos to White House,” *NYT*, March 17, 1972.

¹²⁸ “Rehnquist Court Bid Blasted by A.C.L.U.,” *CT*, December 6, 1971; Ronald Ostrow, “ACLU Takes Rare Stand, Opposes Bork,” *LAT*, September 1, 1987; William Rehnquist, “The Making of a Supreme Court Justice,” *HLRec*, October 8, 1959, 7, 10; Glen Elsasser, “Rehnquist Will Undergo Third Degree,” *CT*, October 31, 1971.

¹²⁹ Kleindienst, *Justice*, at 123.

¹³⁰ Mr. Kuhn, Interview with Lewis Powell, November 5, 1990, Box 322, *Georgia Journal of Southern History*, Powell MSS (Haynsworth); Eppa Hunton, Memorandum to File, Nomination of Lewis F. Powell, Jr. For Associate Justice of the Supreme Court of the United States, July 30, 1975, XXX, Box , id. (Haynsworth); Lewis Powell to Clement Haynsworth, December 1, 1971, Box 113, Congratulatory Letters, id. (thanking him for his “experience and advice” and adding, “I can say with complete sincerity that I wish it were you rather than me—both for personal reasons and for the sake of our Country”); Lewis Powell, “Civil Liberties Repression: Fact or Fiction?—Law-Abiding Citizens Have Nothing to Fear,” reprinted in Nomination of William H. Rehnquist and Lewis Powell, at 213-216 (“outcry,” “tempest,” “radical,” “law-abiding”); Lewis Powell to all Lawyers, November 12, 1971, Box 115, Supreme Court Nomination, Memoranda General, Powell MSS (“staff”); Lewis Powell, FJHOH, Interview 6, August 26, 1992, 14; Lewis Powell, Memorandum for Eugene Syndor, “Attack on American Free Enterprise System,” August 23, 1971, <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>; Jack Anderson, “FBI Missed Blueprint by Powell,” *WP*, September 29, 1972..

¹³¹ Jeffries, *Justice Lewis F. Powell, Jr.*, at 10, 229 (see, e.g., Nomination of William H. Rehnquist and Lewis F. Powell, at 344-45, 362-96, 420, 433-34, 457-59); John MacKenzie, “FBI Queries Possible Opponents of 2 Supreme Court Nominees,” *WP*, October 29, 1971.

¹³² “Rehnquist Civil Liberties Stance Eyed: Rehnquist Critics Design Game Plan For His Defeat,” *WP*, October 26, 1971 (Seymour); Email, Richard Seymour to Laura Kalman, July 30, 2015; Nomination of Justice William Hubbs Rehnquist, at 984-1078.

¹³³ Lyle Denniston, “Voting Place Clash Becomes Issue in Rehnquist Inquiry,” *WS*, November 16, 1971; Fred Graham, “2 Negroes from Phoenix, Arizona, Say Rehnquist Harassed Blacks at Polls in 1964,” *NYT*, November 16, 1971; Nina Totenberg, “Recollection of Rehnquist—Or a ‘Twin’: Was It He at Bethune Precinct?,” *NO*, December 4, 1971; Clarence Mitchell and Joe Rauh to James Eastland, November 22, 1971, Box 39, Folder 12, Rauh MSS (justification for delay); Curt Mathews, “Data Link Rehnquist with Right-Wing Group,” *SLPD*, November 17, 1971; “Rehnquist Called an Ex-Bircher,” *NYP*, November 9, 1971; Robert Ravitch, “Last-Ditch Rights Effort Expected Today for New Quiz on Rehnquist,” *LAT*, November 18, 1971; Charles Baker to Inner Circle, November 19, 1971, Box 40, Folder 2, Rauh MSS (crediting Seymour with delay); “Link Rehnquist, Right Wing Unit,” *CT*, November 18, 1971 (crediting graduate student with delay); Glen Elsasser, “Rehnquist Deadline is Delayed,” *id.*, November 19, 1971; Nina Totenberg, “The Confirmation Process and the Public: To Know or Not to Know,” 101 *HLR* 1213, 1215 (1988); Nomination of Justice William Hubbs Rehnquist, at 144-152, 984-1134; Stuart Taylor, “4 Rebut Testimony by Rehnquist on Challenging of Voters in 60’s,” *NYT*, August 2, 1986. Seymour himself continued to believe that Rehnquist had not engaged in voter intimidation. Email, Richard Seymour to Laura Kalman, November 10, 2015: “I believe my 1971 sources were correct and everything else is a mixture of confusion, desire, and an echo chamber.”

¹³⁴ Nomination of William H. Rehnquist and Lewis F. Powell, Jr., at 71-72, 70, 55, 181-84, 290, 295-98, 318-322, 328, 333-34, 489-92; John MacKenzie, “Judiciary Unit Delays Vote on Both Nominees,” *WP*, November 12, 1971; Leon Friedman, “Rehnquist: He Was a Very Elusive Target,” *NYT*, December 12, 1971; Clark MacGregor, Memorandum for the President, Lewis Powell and William Rehnquist, December 4, 1971, WHCF EX FG 51/A, Box 4, Folder 12, RMNL.

¹³⁵ “Memo from Rehnquist,” *News*, December 13, 1971; William Rehnquist, “A Random Thought on the Segregation Cases,” <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-16-6.pdf>

¹³⁶ Remarks of Senator Eastland, *CR*, December 8, 1971, 91st Cong., 1st Sess., 45440, December 8, 1971; Fred Graham, “Rehnquist ’52 Schools Memo Reported,” *NYT*, December 6, 1971; Ronald Ostrow, “Rehnquist ’52 Memo Reportedly Urged Segregation of Schools,” *LAT*, December 6, 1971; Fred Graham, “Rehnquist Says ’52 Memo Outlined Jackson’s Views,” *NYT*, December 9, 1971 (“wish,” “tentative”); John MacKenzie, “Rehnquist Explains ’52 Race Case Memo,” *WP*, December 9 1971; Fred Graham, “2 Oppose Rehnquist,” *NYT*, December 10, 1971 (Douglas); John MacKenzie, “Controversy Deepens Over Rehnquist Memo,” *WP*, December 10, 1971; Brad Snyder, “How the Conservatives Canonized Brown v. Board of Education,” 52 *RLR* 383, 452-59 (2009) (scholars); Brad Snyder and John Barrett, “Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown,” 53 *BCLR*, 6631, 634 (2012).

¹³⁷ Brad Snyder, “How the Conservatives Canonized *Brown v. Board of Education*,” at 431-46.

¹³⁸ Glen Elsasser, “Senate Gets Cloture Plea on Rehnquist,” *CT*, December 9, 1971 (“losing”); “Rehnquist’s Backers Say Critics Have Begun a Senate Filibuster,” *NYT*, December 8, 1971 (“insensitive,” supporters); Clarence Mitchell, Telegram to 35 Senators,” December 9, 1971, Part I, Box 130, Folder 6, Leadership Conference MSS; Remarks of Senator Bayh, *CR*, December 7, 1971, 92d Congress, 1st Sess., 45440.

¹³⁹ Graham, “Rehnquist Says ’52 Memo Outlined Jackson’s Views” (Proxmire); POF, News Summary, December 7, 1971, Annotated News Summary, Box 37, RMNL (all networks had noted “Proxmire’s surprise support”); William Timmons, Memorandum for the President, Bill Rehnquist’s Nomination, December 6, 1971, WHCF Executive FG 51/A, id.; Eugene Cowen and Tom Korologos, Memorandum for the President, Rehnquist Vote Update, December 8, 1971, EXFG 51/A, id.; Willard Edwards, “How Rehnquist Filibuster Failed,” *CT*, December 14, 1971; Friedman, “Rehnquist: He Was A Very Elusive Target” (Rauh).

¹⁴⁰ Graham, “Rehnquist Says ’52 Memo Outlined Jackson’s Views” (empty); “Tribe Builds Case Against Rehnquist,” *BG*, November 4, 1971; Tribe to Editor, *id.*, November 4, 1971; WHT 16-97, December 10, 1971, 8:16 p.m., Colson.

¹⁴¹ WHT 16-27, December 6, 1971, 6:44 P.M., Powell, NT.

¹⁴² WHT 16-86, December 10, 1971, 5:18 P.M., Rehnquist, id.; “Nixon Nominees Should Tip Court Balance,” *HE*, October 30, 1971, 1; POF, News Summary, December 11, 1971, Annotated News Summaries, Box 37, RMNL.

¹⁴³ OVAL 733-10, June 14, 1972, 2:54 P.M., Burger, NT; POF, Ray Price, Memorandum for the President’s File, Meeting with Price Staff, July 24, 1972, Memoranda for the President, Box 89, RMNL.

¹⁴⁴ Fred Graham to Sterling Lord, October 8, 1974, Box 28, God Save This Honorable Court, Graham MSS.

¹⁴⁵ PPF, Richard Nixon, Memorandum from the President for John Ehrlichman, January 28, 1972, Memoranda from the President, Box 3, Folder 12, RMNL; and see Edward Morgan, POF, Memorandum for the President’s File, March 6, 1972, Memoranda for the President, Box 8 (similar complaint); Greenhouse, *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey*, at 122-25 Richard Fallon, “Lewis F. Powell, Jr.,” 101 *HLR* 401 (1987); *Drummond v. Acree*, 409 US 1228 (1972); Labor Day Message, September 3, 1972, <http://www.presidency.ucsb.edu/ws/?pid=3557>; Kevin McMahon, *Nixon’s Court: His Challenge to Judicial Liberalism and Its Political Consequences* 108-09, 232 (Chicago: University of Chicago Press, 2011).

¹⁴⁶ McMahon, *Nixon’s Court*, at 69-82; Stephen Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* 304-21 (Cambridge: Cambridge University Press, 2011). See, e.g., *U.S. v. Nixon*, 418 U.S. 683 (1971); *Keyes v. School District, No. 1*, 413 U.S. 189 (1973); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (broadening right to counsel); *U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (requiring warrant before electronic surveillance in domestic security cases); *Roe v. Wade*, 410 U.S. 113; “Nixon: Abort Interracial Babies,” *TNR*, June 23, 2009.

¹⁴⁷ Compare, e.g., Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1983) with Linda Greenhouse and Michael Graetz, *Unequal Protections: The Lasting Legacy of Warren Burger's Supreme Court* (New York: Simon and Schuster, 2016); Earl Maltz, *The Coming of the Nixon Court: The 1972 Term and the Transformation of Constitutional Law* (Lawrence: University Press of Kansas, 2016). See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down regional busing against equal protection challenge); Frank Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 *HLR* 7 (1969); *Daindrige v. Williams*, 397 U.S. 471 (1970) (denying fundamental right to welfare); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (upholding state system of public school financing through property taxes against claims that it violated federal equal protection guarantees); and the cases constricting defendant protections in lineup identifications, and search-and-seizure and right to counsel situations. (e.g., *Kirby v. Illinois*, 406 U.S. 682 [1972]; *U.S. v. Ash*, 413 U.S. 300 [1973]; *Schneekloth v. Bustamonte*, 412 U.S. 218 [1973]; *Scott v. Illinois*, 440 U.S. 367 [1975]); *Buckley v. Valeo*, 424 U.S. 1 [1976]; *Citizens United v. Federal Election Commission*, 558 U.S. [2010]).

Epilogue

¹ Edward Levi, Interviewed by Victor Kramer, 1989, 95-NLF-031, Box 1, Composite Oral History Accessions, GRFOH.

² Michael Comiskey provides a helpful overview of the debate in *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence: University Press of Kansas, 2004). For laments about the current process, see, e.g., *Judicial Roulette: Report of the Twentieth Century Fund Task Report on Judicial Selection* (New York: Priority Press, 1988); Stephen Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (New York: Basic, 1994); Christopher Eisgruber, *The Next Justice* (Princeton: Princeton University Press, 2007); Elena Kagan, "Confirmation Messes Old and New," 62 *UCLR* (1995); John Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins Press, 1995). For an engaging defense of the contemporary process, see Paul Collins and Lori Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* (Cambridge: Cambridge University Press, 2013).

³ Henry Abelove and E.P. Thompson, eds., *Visions of History*, Interview, Herbert Gutman 187, 203 (Manchester: Manchester University Press, 1983); Statement of Hon. Richard Durbin, The Judicial Nomination and Confirmation Process, at 81, 87.

⁴ See, e.g., Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) (Warren worship); Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court: A Biography* 771 (New York: New York University Press, 1983) ("Brennan, more than any of the Justices, missed Warren. He used to refer to him as the 'Super Chief---a title that was soon adopted by those in the Court who were growing increasingly nostalgic about the Warren years.") Pressed to compare Warren and Burger as Chief Justices, in an interview before his death to be published posthumously, Potter Stewart extolled the former and kept quiet about the latter. "I will say this: That Chief Justice Warren had instinctive qualities of leadership, which meant that he had great tact and sensitivity to the other person's

feelings and point of view. He had been, after all, an extremely successful... politician,...and a very, very popular one. And he did have those instinctive qualities of sensitivity to a very marked degree.” Fred Graham, Interview of Justice Potter Stewart, Box 624, Folder 33, Stewart MSS.

⁵ The dedication appears above Archibald Cox, “Chief Justice Earl Warren,” 83 *HLR* 1 (1969); Michael Parrish, “Earl Warren and the American Judicial Tradition,” 1982 *ABFJ* 1179 (1982); Peter Brown, “Earl Warren Fears U.S. Racial Chaos: Calls for Change of Attitude in UCSD Address,” *SDU*, October 17, 1970, Box 830, Folder XXX, Warren MSS. See Provost John Stewart to Warren, October 22, 1970, id.: “I am sure that you are enough in touch with young people [as you proved so well last Friday afternoon] to understand that the words of the banner that came fluttering down from the residence hall behind us were a very affectionate compliment. ‘Right on, Big Earl’ is the kind of friendly and humorous approval that one doesn’t hear or see too often on campuses these days.”

⁶ Warren Burger to John Harlan, July 15, 1970, Box 491, Burger, Harlan MSS (referring to “the ‘chronic’ problems of the Court, particularly the ‘supermarket’ or ‘production line’” nature of its opinions” because it took too many cases); Fred Graham, “Burger Panel Will Propose a National Court of Appeals,” *NYT*, November 9, 1972; Warren Burger to John Ehrlichman, December 22, 1972, WHCF, EX FG 51, Folder 8, RMNL (“I have no definite conclusions about the recommendations as yet, but I recall the history of the creation of the Circuit Court of Appeals in the late 1880s when a great many people said the sky was falling then. History has shown that the creation of the Circuit Courts did not constitute a wall between the people and the Supreme Court”); Paul Freund, “Why We Need a National Court of Appeals,” 59 *ABAJ*, 247 (March 1973); Eugene Gressman, “The National Court of Appeals: A Dissent,” *id.* 253; Lewis Powell, “An Overworked Supreme Court,” Box 129, Supreme Court, Correspondence with Fellow Justices, Powell MSS; William O. Douglas to Lewis Powell, July 7, 1972, id. (“One’s perspective changes over the years. But I really think that in terms of the present rate of activity inside the Court the job of an Associate Justice does not add up to more than about four days a week.”); Earl Warren, Memorandum to My Law Clerks, November 8, 1972, Box 733, National Court of Appeals (1), Warren MSS; Earl Warren to Peter Ehrenhaft, November 8, 1972, id. (“scuttling”) (the former Chief Justice rebuked Ehrenhaft, his one former clerk who broke ranks and dared publicly to promote the National Court of Appeals, id.); Linda Mathews, “Earl Warren Denounces Proposal to Set up ‘Junior Supreme Court,’” *LAT*, May 3, 1972; Warren Weaver, “Burger Supports Proposal for a New National Court of Appeals,” *NYT*, June 4, 1975; John MacKenzie, “New Court Plan Backed by Five Justices,” *WP*, June 13, 1975; Stephen Wermiel, “Bar Group Opposes Plan to Establish New Appeals Court,” *WSJ*, February 12, 1986.

⁷ See, e.g., “Cracker Barrel Justice,” *WP*, August 12, 1970; “The Chief Justice as Administrator-in-Chief,” *id.*, February 16, 1971; John MacKenzie, “Chief Justice Denies Lobbying Charge,” *id.*, October 14, 1972; “Burger’s Lobbying Tactics: ‘Shouting and Yelling,’” *CT*, October 17, 1978; Linda Greenhouse, “Lobbying by Burger Provokes Criticism,” *NYT*, November 19, 1978; Harry Blackmun, Notes, February 27, 1970, and March 19, 1980, Box 2, Blackmun MSS; Evan Thomas, “Inside the High Court: After a Decade It is Burger’s in Name Only,” *Ti*, November 5, 1979 (opinions and reporting that “Burger regularly

dismisses such assertions as fables”); Nina Totenberg and Fred Barbash, “Burger Loved the Law But Not the Hassle,” *WP*, 1986 (“But nothing so annoyed the other justices as the way Burger handled the chief’s traditional function of assigning opinions. Normally, the chief decides which justice will write what opinion, but only if he is in the majority. Other justices say that on many occasions Burger voted with the majority, assigned the opinion to the person he thought would write the narrowest decision, and then switched to the dissenting side at the end. Some justices called it the ‘Burger-bait-and switch.’ Then too, some justices charge that Burger often ‘passed’ instead of voting, in order to hold onto the assignment function. It is hard to understand how a person of his political acumen could so consistently alienate colleagues”) (Totenberg was one of Burger’s least favorite reporters); “Abortion on Demand,” *Ti*, January 29, 1973; Warren Burger to Potter Stewart and William Rehnquist, March 15, 1973, Box 1571, Folder: October Term 1972 Court Memoranda, Douglas MSS (Ad Hoc Committee on “Court Security”); William Rehnquist and Potter Stewart, Memorandum to the Conference, June 18, 1973, *id.* (reporting on leaks involving when an opinion would be handed down and/or how it would be decided, and sometimes how the justices’ deliberations changed about the issue over time with respect to the abortion cases, *Flood v. Kuhn*, 407 U.S. 258 [1972], and others); William Safire, “Equal Justice Under Leak,” *NYT*, April 28, 1977 (leaks about Watergate-related cases and see *infra*); Josh Marshall, “Plugging a Leak: Justice Burger Plays Detective,” *Ti*, May 7, 1979; “Rites of Spring,” *Esq*, May 22, 1979 (“[T]he increasingly heavy-handed, supercilious Chief Justice Warren Burger is now so disliked by so many clerks—and in many cases by the justices they work for—that there’s a kind of sadistic pleasure derived from giving Burger’s number one enemy, the press, a tidbit or two”).

⁸ Warren Burger to Lewis Powell, July 20, 1979, Box 129, Correspondence with Fellow Justices and Chief Justice, Powell MSS (“warned”); Thomas, “Inside the High Court”; Lewis Powell to Byron White and William Rehnquist, November 26, 1979, *Time* Magazine Article on the Court November 1979, Box 129, Folder: Correspondence with Fellow Justices and Chief Justice, Powell MSS.

⁹ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* 5 (New York: Avon, 1979); Lewis Powell to George Gibson, December 11, 1979, Box 136, *The Brethren*, Powell MSS (“arrogant dunce”); Powell to Powell Clerks, January 16, 1980, *id.* (“juiciest”); David Margolick, “On the Trail of the High Court Sleuths,” *NLJ*, February 19, 1979; David Garrow, “The Supreme Court and the Brethren,” 18 *ConComm* 303 (2001); Stephen McAllister, “Justice White and the Brethren,” 15 *GB* 2d. 159 (2012). Garrow reminds us that clerks had been leakers for decades. David Garrow, “‘The Lowest Form of Animal Life?’ Supreme Court Clerks and Supreme Court History,” 84 *CorLR* 855 (1999). So had justices. Richard Davis, *Justices and Journalists: The U.S. Supreme Court and the Media* at 77-79, 130-41 (New York: Cambridge University Press, 2001). Still, the leaking with respect to *The Brethren* was extraordinary. As Clyde Spillenger has also shown, scholars such as Alexander Bickel and Alpheus T. Mason had taken readers “inside” the Supreme Court long before Woodward and Armstrong. See Clyde Spillenger, “Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis,” 79 *JAH* 125 (1992);

Spillenger, "Lifting the Veil: The Judicial Biographies of Alpheus T. Mason, 21 *RAH* 723 (1993). But biographers did not receive as much attention as Woodward and Armstrong.

¹⁰ Powell's attempts to keep the peace are chronicled in his correspondence with his fellow justices and the Chief Justice, Box 129, Powell MSS.

¹¹ TRB, "Empty Robe," *TNR*, July 14, 1986, 4-5; "William Rehnquist," n.d., Peter Wallinson, OA 152387, Box 3, Supreme Court, Rehnquist/Scalia Notebook I Candidates (1), RWRL; Linda Greenhouse, "How Not to be Chief Justice: The Apprenticeship of William H. Rehnquist," 154 *UPLR*, 1365, 1367 (2006).

¹² See Robert Kagan, "What if Abe Fortas Had Been More Discreet?," *What If? Explorations in Social-Science Fiction*, ed. Nelson Polsby, 153, 179 (Lexington: Lewis, 1982) (Kagan speculated that "America probably would not be very different today in any obvious tangible way" but that a Fortas Court's opinions "undoubtedly would have had a different tone than those of the Burger Court, a tone that invited rather than cautioned against the 'discovery' of new rights in the Constitution, that put greater stress on the value of equality, and that voiced the necessity for judicial activism to protect the less powerful rather than deference to economic constraints or majority sentiment"); Frank Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 *HLR* 7 (1969).

¹³ Alan and Marilyn Bergman, "The Way We Were,"

http://www.alanandmarilynbergman.com/lyrics_pages/twww.htm; Kalman, *The Strange Career of Legal Liberalism*, at 4, 27-52; Russell Caplan, "The Paradoxes of Judicial Review in a Constitutional Democracy," 30 *BuffLR* 451, 456 (1981) ("Camelot).

¹⁴ Linda Greenhouse, "The Separation of Justice and State," *NYT*, July 1, 2001 (quoting Powe) (quoting Lucas "Scot" Powe, "removed," "knew"); Lucas Powe, *The Warren Court and American Politics* (Cambridge: Harvard University Press, 2002) and see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 237-38 (New York: Farrar, Straus and Giroux, 2009); Corrina Lain, "Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution," 152 *UPLR* 1361 (2004); Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker," 6 *JPL* 279 (1957); Justin Driver, "The Constitutional Conservatism of the Warren Court," 100 *CaLR* 1101 (2012); Kevin McMahon, "Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model," 32 *LSI* 919, 927 (2007); Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007); Laura Kalman, *Right Star Rising: A New Politics*, (New York: W.W. Norton, 2010); Peter Wallison, Memorandum for Donald Regan, June 9, 1986, Regan, Series I: Subject File, Box 6, Supreme Court Justices, Burger Vacancy Candidates (3), RWRL; Peter Wallison, "William Rehnquist," n.d., Supreme Court, Rehnquist/Scalia Notebook II Candidates (3), OA 14287, Box 3, id.. Wallison, Reagan's White House Counsel even cited the certainty that Rehnquist's Brown memo to Jackson would resurface as one argument against nominating him as Chief Justice. After a redacted paragraph, Wallison wrote, "On top of all the other considerations raised above, the confirmation process

will undoubtedly cause Rehnquist's old memorandum to his former boss, Justice Jackson to reemerge. In that memorandum, Rehnquist had argued against the principles adopted in *Brown v. Board of Education*. An allegation of racial prejudice is absolutely one of the last things the President's judicial nominees need at this time." *Id.*

¹⁵ Schwartz, *Super Chief*, at 772 ("Thank God!"); Ed Cray, *Chief Justice: A Biography of Earl Warren* 528 (New York: Simon and Schuster, 1997); Jim Newton, *Justice for All: Earl Warren and the Nation He Made* 515 (New York: Riverhead, 2006); "Warren's Body to Lie in Repose," *WP*, July 11, 9174; "Public, Court Pay Respects to Warren," *id.*, July 12, 1974; Lesley Oelsner, "Earl Warren is Buried in Army Rites at Arlington," *NYT*, July 13, 1974. Moreover, the members of the 1962-69 Warren Court majority are still lionized in popular culture and public memory. Who besides Justices Oliver Wendell Holmes, Ruth Bader Ginsburg and Antonin Scalia have been the subjects of celebratory plays and films? William O. Douglas, Thurgood Marshall and Abe Fortas. The Federal Judicial Center is housed in the Thurgood Marshall Building. In the 1980s, federal courthouses were named for Warren Court legal liberals even as the Reagan Administration advocated the rollback of Warren-era jurisprudence. On the one hand, so what? That the Kansas City federal courthouse is named after Justice Charles Whittaker suggests it's not hard to get a courthouse. But on the other, Warren, Brennan, Black and Marshall are among the very few members of the Court to have been honored with postage stamps. Baltimore Washington Airport is now Thurgood Marshall Airport. One of UC San Diego's six colleges bears the Marshall name. Another, Warren, houses the Black, Brennan, Douglas, Goldberg, Frankfurter, Harlan and Stewart apartment complexes and residence halls and Earl's Place, a coffee shop and mini-mart. Fortas's career and one of the Warren era's most celebrated decisions provided the plot for the 1980 movie of "Gideon's Trumpet," with Jose Ferrer playing Fortas. A 1990 Douglas Scott play, "Mountain," starring Len Cariou, focused on Douglas. Twenty years later, Thurgood Marshall became the subject of a one-person "bioplay" written by George Stevens, Jr. and an HBO film, "Thurgood," with Laurence Fishburne portraying Marshall. See Sylvia Tiersten, "What's In a Name? The Long Saga of Third College,"

<http://ucsdmag.ucsd.edu/magazine/vol7no2/features/feat4.htm>; A Short History of Thurgood Marshall College," <http://provost.ucsd.edu/marshall/40th/history/short-history.html>

¹⁶ Jeffrey Rosen, "Even Stephen," *TNR*, June 5, 1994, 11; Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* 80 (New York: W.W. Norton, 2d. 3d. 2007); "What the President Should Look for in a Judicial Nominee," American Bar Association, August 2008 (comments of Kenneth Starr); John Rollett, "Reversed on Appeal: The Uncertain Future of President Obama's 'Empathy Standard'." 120 *YLJ* 89 (2010), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/reversed-on-appeal:-the-uncertain-future-of-president-obama's-%22empathy-standard%22/>; Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* XXX (New York: Crown, 2008); Charlie Savage and Sheryl Stolberg, "Obama Says Liberal Courts May Have Overreached," *NYT*, April 29, 2010.

¹⁷ Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* 228 (Oxford: Hart, 2009); Emily Bazelon and John Witt, “Senate Republicans and the Supreme Court: Where is This Headed Exactly?,” *NYT Mag*, February 24, 2016.

¹⁸ Beverly Cook, “The First Woman Candidate for the Supreme Court—Florence Allen,” 1981SCHSY 19 (1981); Patricia Lindh, Memorandum for the President, WHCF FG 51, Box 137, November 17, 1975, Supreme Court of the United States, GRFL; David Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* 129-30, 136 (Chicago: University of Chicago Press, 1999); “The Hufstedler Nomination,” *WP*, October 31, 1979; Steven Weisman, “Carter to Name Judge to Direct Education Department,” *NYT*, October 30, 1979 (“She is a liberal activist who has long been mentioned as a possibility for elevation to the Supreme Court. Speculation about that possibility continued even today, with one Federal official involved in the search for a new Secretary suggesting that Mr. Carter might still appoint her to the High Court if a vacancy occurred there in the next year.”); “Hufstedler Denies Carter Pledged High Court Seat,” *LAT*, November 3, 1979; Marlene Cimon, “Hufstedler Leaves With No Regrets,” *id.*, November 17, 1980.

¹⁹ Larry Stammer and Eleanor Randolph, “Reagan Vows to Appoint Women to Supreme Court,” *LAT*, October 15, 1980.

²⁰ Ellen Goodman, “He’s Done It Again,” *WP*, July 14, 1981 (“as much”); Paul Weyrich to William Armstrong, September 28, 1987, David McIntosh, OA 16531, Box 1, Bork (2), *id.* (“intense,” “vote”). See the letters recommending Lillie for the Court from Hernando Courtright of the Beverly Wilshire Hotel (July 6, 1981); former Los Angeles Chamber of Commerce President Joseph Mitchell (June 29, 1981); Donald Hanauer, Executive Vice President of the Los Angeles Chamber of Commerce (July 1, 1981), Rabbi Edgar F. Magnin (June 26, 1981), Bixby Ranch Company President Preston Hotchkis (July 1, 1981), all in WHORM Mildred Lillie Name File, RWRL; as well as from former Los Angeles Chamber of Commerce President Joseph Mitchell (June 29, 1981, FG051 030869 *id.*) and former Los Angeles Mayor Sam Yorty (June 29, 1981, FG051 03419, *id.*); Mildred Lillie to Ronald and Nancy and Ronald Reagan, n.d.. (thanking them for including her and her husband as guests at a State Dinner in 1982), WHORM Mildred Lillie Name File, *id.*; Edwin Meese to Preston Hotchkis, July 9, 1981, *id.*, (thanking him for “your letter recommending Mildred Lillie and adding: “She would make a fine choice for a high judicial appointment. We will keep her credentials in mind should a similar vacancy come up.”); Michael Uhlmann to Edwin Meese, July 6, 1981, OA 2408, Box 7, Appointment: Supreme Court (1), RWRL (warning that people-in-right to life movement were saying that “the nomination of Judge O’Connor would trigger a nasty political protest against the President” and might provoke “a potentially disastrous political firestorm”); Joan Biskupic, *Sandra Day O’Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* XXX (New York: Harper Collins, 2009); Linda Hirshman, *Sisters in Law: How Sandra Day O’Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* 128-31 (2015). As Hirshman says, “Many men have claim to the role of godfather to the future Justice O’Connor,” including Burger, Arizona Senator Barry Goldwater, and Justice Rehnquist. “But in all of this historical inquiry

almost no one focuses on the obvious Godfather—Reagan himself. Before he died, Attorney General William French Smith, who was undoubtedly at the center of any Supreme Court nomination process, told an aide that in 1980 Reagan had given him a short list with O'Connor's name written on it in his own hand." *Id.* at 131. Neither Smith's internal Administration history of O'Connor's nomination or his memoir indicate where he got her name. William French Smith, "History of the Nomination of Justice Sandra Day O'Connor," September 1981, FG 051, Box 2, 29000-327999, RWRL ("The Attorney General did not indicate the sources of the names of the various candidates [to Kenneth Starr, who was researching prospective appointments]. "He simply mentioned that the list was based upon discussions with various people on different matters usually unrelated to judicial appointments."); William French Smith, *Law and Justice in the Reagan Administration: Memoirs of an Attorney General* 63-70 (Stanford: Hoover, 1991).

²¹ The "pro" column for Ginsburg included the following items: "Very bright" "very conservative" "age: 41" "conservatives first choice" "Jewish." Judge Douglas H. Ginsburg, Duberstein Files, n.d., Series 1, Box 3, Nomination of Douglas Ginsburg, RWRL. A White House memorandum reported that "[t]he initial reaction to the nomination in the Jewish community was very much a wait and see attitude," which represented an improvement, from the Administration perspective, over its reaction to Bork. Rebecca Range, Memorandum for Tom Griscom, Weekly Report on Public Efforts to Support Judge Ginsburg, November 6, 1987, FG 051/14/546240-546519, RWRL.

²² Nathan Lewin, "The Supreme Court's Jewish Gentile: My Memories of Justice Scalia," February 15, 2016, <http://www.jta.org/2016/02/15/news-opinion/obituaries/the-supreme-courts-jewish-gentile-my-memories-of-justice-scalia>.

²³ David Margolick, "The Law: At the Bar: Jews on the Supreme Court: Were they Different and Why are There None Now?," *NYT*, December 22, 1989; Stephen Reinhardt, "Jewishness and Judging: A Judge's Thoughts on *Two Jewish Justices*," 10 *CarLR* 2345, 2356-57 (1989).

²⁴ Eric Fettman, "Splitting Chairs," *JerR*, October 25, 1990 (quoting spokesman Richard Cohen); Tom Tugend, "Conspiracy of Silence," *JerP*, August 27, 1991. For the arguments in favor of election, see Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* 170-78 (New York: Oxford University Press, 2005).

²⁵ Jonathan Broder, "Jewish Justice," *JerR*, June 17, 1993; and see Andrea Stone, "Groups Call 'Jewish Seat' a Myth," *USA*, June 15, 1993. At the time, some in Israel were beginning to complain about the absence of an Israeli Arab on the Israeli Supreme Court. David J. Forman, "Justice for All," *JerP* December 19, 1993.

²⁶ Background Briefing by Senior Administration Officials, June 14, 1993, <http://www.ibiblio.org/pub/archives/whitehouse-papers/1993/Jun/Background-Briefing-on-Judge-Ginsburg-Selection> ("[W]ith many factors that were listed, that was a factor. But it was not a very important factor. It was something that if you find the right person and that person happened to be Jewish, then you could say you fill the Jewish seat. But really, it was not a driving factor. There were a number of people on the list that were Jewish, many more that were not Jewish."); William J. Clinton, Exchange with

Reporters in Atlanta, March 19, 1993; The President's News Conference, March 23, 1993, <http://www.presidency.ucsb.edu/ws/?pid=46357>; Interview with Dan Rather of CBS News, March 24, 1993, <http://www.presidency.ucsb.edu/ws/?pid=46370>; Remarks Announcing the Nomination of Ruth Bader Ginsburg to Be Supreme Court Justice, June 14, 1993, <http://www.presidency.ucsb.edu/ws/?pid=46684%20>; Martin Walker "Clinton Plays It Safe with Supreme Court Nomination," *Gaz*, June 15, 1993; Ruth Marcus, "Judge Ruth Ginsburg Named to High Court; Clinton's Unexpected Choice Is Women's Rights Pioneer," *WP*, June 15, 1993; Neil Lewis, "High Court Nominee Faces Easy Road Through Senate," *NYT*, July 20, 1993 ("In his first nomination to the Supreme Court, President Clinton has signaled that he was not embarking on an ideological counterrevolution, hoping to balance the Republican appointees with a clearly liberal jurist.").

²⁷ Linda Greenhouse, "The Nation; Judged in the Shadow of the Ghosts of the Past," *NYT*, May 22, 1994 (quoting Arthur Kropp, president of People for the American Way).

²⁸ Linda Przybyszewski, "The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand," 21 *LSI* 135, 137-38 147 (1996); Nina Totenberg, "Notorious RBG: The Supreme Court Justice Turned Cultural Icon," October 26, 2015, <http://www.npr.org/sections/itsallpolitics/2015/10/26/450547606/notorious-rbg-the-supreme-court-justice-turned-cultural-icon>. "Whether we are judging beauty contests, dog shows, concert pianists, politicians or judges, we always will approach decisions with a body of built-in prejudices. As Bert Parks once remarked of the Miss America judges, there are titty men and leg men. So will it ever be with deans and professors rating the high court." James Kilpatrick to John Masarro, December 29, 1980, Box 34, Folder: Supreme Court, Kilpatrick MSS.

²⁹ Ruth Bader Ginsburg, "From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?," 41 *BrLJ* 229, 234-35 (2002). Ginsburg continued to celebrate the historical significance of Judaism for the American experience. Indeed she appeared repeatedly—dressed in judicial robes!—in the 2009 documentary, "Yoo-Hoo, Mrs. Goldberg," about Gertrude Berg, the star of a popular radio and television show from 1929-1956. As Molly Goldberg on the show, Berg regularly leaned out the window of the Bronx apartment she shared with her lower middle-class Jewish family to shout "Yoo Hoo" to her neighbors across the air shaft and exchange gossip in heavily-accented English. Like the show, the documentary celebrated the big-hearted yiddeshemama (though Ginsburg carefully stressed that *her* mother never leaned out a window and shouted "Yoo hoo" at anyone). <http://www.mollygoldbergfilm.org/about.php>

It remained unclear how much Jews were affecting life at the Court. In 1995, the Court was scheduled to hear oral argument on Yom Kippur. According to news reports, when Ginsburg and Breyer protested, Chief Justice Rehnquist said that they could listen to a tape recording of the oral arguments later. But that would not have allowed either of them to question the attorneys. It was just when Rehnquist was scheduled for surgery on Yom Kippur too that Court was postponed. Timothy Phelps, "U.S. Court Conflict Focuses on Yom Kippur," *Gaz*, October 16, 1995. At this time, Rehnquist was still holding Christmas parties at the Court, despite clerks' protests. Tony Mauro, "Roberts Adheres to Precedent on High Court

Revelry,” December 16, 2005 <http://www.freerepublic.com/focus/f-news/1542168/posts>. Only in 2003 did the Court adjust its calendar to take into consideration the High Holidays. Charles Lane, “High Court Yields to High Holy Days,” *WP*, September 1, 2003.

³⁰ Juan Williams, *Thurgood Marshall: American Revolutionary* 362, 372-73 (New York: Broadway, 2000).

³¹ Jane Mayer and Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* 173-80 (New York: Houghton Mifflin, 1994); Ed Carnes, Memorandum for Mark Paoletta, Conversation with Ollie Delchamps about Judge Clarence Thomas and Delchamps, Conversations with Senators Heflin and Shelby,” Clarence Thomas Alphabetical Subject Files, Box 5, OA ID 45504-992, Heflin-Belchamps Conversation, GHWBL; Charles Kolb to Boyden, “Domestic Policy after the Thomas Confirmation,” December 5, 1991, Case No. 29230ICU, FG0511, 292301CU, id..

³² Warren Burger to Gerald Ford, November 10, 1975, Box 11, Folder: Supreme Court Nomination: Letters to the President, November 10-27, 1975, Cheney MSS.

³³ Edward Levi, Interviewed by Victor Kramer (“want”); David Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* 16, 126-29, 172 (Chicago: University of Chicago Press, 1999); Bill Barnhart and Gene Schlickman, *John Paul Stevens: An Independent Life* 184-92 (De Kalb: Northern Illinois, 2010). Burger learned from Ford’s rebuff, and when he visited Reagan to tell him of his retirement, carried with him a list of the six Chief Justice candidates he recommended. (For Burger’s visit to Reagan, see Peter Wallison, Memorandum for the File, August 29, 1985, OA 14287 Peter Wallison, Box 3, Folder: Supreme Court, Rehnquist/Scalia General Selection (1), Reagan Library (indicating that Burger had recommended Justices Rehnquist and White, DC Circuit Judges Bork and Scalia, Ninth Circuit Judge Clifford Wallace, and International Court of Trade Judge Edward Re. The Administration, however, did its own search and concentrated on Justices O’Connor and Rehnquist, Judges Bork and Scalia, Ninth Circuit Judges Kennedy and Clifford Wallace, Fifth Circuit Judge Patrick Higginbotham, and Second Circuit Judge Ralph Winter. After they discussed the issue with Reagan and Attorney General Meese, they zeroed in on Rehnquist, Bork and Scalia. Id.) Somewhat unusually, Burger also testified before the Senate Judiciary Committee on behalf of Judge Robert Bork.

³⁴ Henry Abraham, *Justices, Presidents, and Senators* 46 (Lanham: Rowman and Littlefield, 2007).

³⁵ Kevin O’Driscoll, “The Origins of a Judicial Icon: Justice Brennan’s Warren Court Years, 54 *SLR* 1005 (2002); A.E. Dick Howard, “The Changing Face of the Supreme Court,” 101 *VaLR* 231, 256 (2015) (“Perceptions,” “Picking”); Linda Greenhouse, “The Separation of Church and State,” *NYT*, July 1, 2001 (quoting Powe on “technocrats”). Though David Souter had but half-a-year on the First Circuit, he had logged twelve as a judge and justice in New Hampshire’s courts. From John Stevens to Samuel Alito, only Justice O’Connor did not possess experience in the federal courts, and she had served six-and-a-half-years as an Arizona judge. Coincidentally, perhaps even partially as a result, the Court grayed further: Whereas the average justice from 1788-1970 retired or died at age 68 1/2 and remained at the Court for nearly 15 years, the average justice from 1970-2005 retired or died at age 79 1/2 and served there for 26 years. See Lee Epstein, Jack Knight and Andrew Martin, “The Norm of Prior Judicial Experiences and Its

Consequences for Career Diversity on the U.S. Supreme Court,” 91 *CaLR*. 903 (2003) (quoting Frankfurter at 940 and Rehnquist at 906 and establishing that there is a norm of prior judicial experience at 909-15); Yalof, *Pursuit of Justices*, at 170-71; Steven Calabresi and James Lindgren, “Term Limits for the Supreme Court,” 15, 56-57, *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger Cramton and Paul Carrington (Durham: Carolina Academic Press, 2006); Judith Resnik, “Democratic Responses to the Breadth of Power of the Chief Justice,” *id.*, 1811, 184 (“being a federal judge may correlate with longevity and even be good for one’s health”).

³⁶ “If Approved, a First-Time Judge, Yes, but Hardly the First in Court’s History,” *NYT*, October 4, 2005 (“predictability”); Roger Clegg, “The Ideal Candidate,” Peter Wallison, Memorandum for the File, August 29, 1986, Wallison, Peter, Supreme Court Rehnquist Scalia, General Selection Scenario (1) OA 14287, August 29, 1986, RWRL.

³⁷ Pat Buchanan, Memorandum for the Chief of Staff, July 10, 1985, 2 FG051, 275543, RWRL.

³⁸ Lee Epstein, Andrew Martin, Kevin Quinn and Jeffrey Segal, “Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court,” 157 *UPLR* 833, 834 (2009); Thomas Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).

³⁹ Linda Greenhouse, “The Separation of Justice and State,” *NYT*, July 1, 2001 (and quoting Dellinger); Garrison Nelson, *Pathways to the US Supreme Court: From the Arena to the Monastery* XXX (New York: Macmillan, 2013); Howard, “The Changing Face of the Supreme Court,” at 251-52; David O’Brien made the point about Whittaker in his interview with Lewis Powell, February 16, 1987, Box 322, Powell MSS. “I think I’m one of the few people who serve on the Court in this century who came directly from the Bar,” Powell reflected. “I speak in a prejudiced fashion I suppose, I think the Court would be a bit stronger if there were more lawyers here who practiced law longer....I can never prove that and that shows a bias that I have but I do think the necessity of the rough and tumble of law practice and seeing the effect of cases on clients and the experience I had over the years as a lawyer that has been helpful to me.” But Powell also wished he had judicial experience. [I]deally I think it would have been fine if I’d had say 20 years of law practice and 5 years sitting on the bench before coming up here. *Id.*

⁴⁰ John March to Richard Nixon, XXX____, WHCF Name File: Richard Poff (2), RMNL; Statement by Sanford Levinson, “The Senate’s Role in the nomination and Confirmation Process: Whose Burden,” at 162, 167 (“near contempt”); Statement by Mark Tushnet, *id.* at 198, 203 (“someone sensitive to the realities of the national legislative process would not dismiss legislative history as a guide to interpreting statutes”); Jeff Shesol, “The Court’s Contempt for Congress,” *NY*, December 4, 2013.

⁴¹ Lewis Gould, *Chief Executive to Chief Justice: Taft Betwixt the White House and Supreme Court* 144-45, 153-56, 166-71 (Lawrence: University Press of Kansas, 2014); Robert Post, “The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court,” 85 *MinnLR* 1267, 1271-72 (2001); Robert Post, “Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft,” 1 *SCH* 50 (1998); Abby Phillip and Anne Gearan, “Could

Obama be the Next Supreme Court Justice? Hillary Clinton Is Intrigued,” *WP*, January 26, 2016; “White House: Obama Doesn’t Want to Be a Supreme Court Justice,” January 28, 2016, <http://talkingpointsmemo.com/livewire/white-house-obama-supreme-court>. Given contemporary partisanship, surely no President would look to predecessors from another party. Although a justice need not possess a law degree, politicians and the public expect one, which means that only a Democratic President could pull off appointing a former Chief Executive. The last two Republican Presidents to possess law degrees since Taft are dead, and in any event, Richard Nixon, who resigned from the Supreme Court and California bars to dodge disbarment, something he did not avoid in New York, would not be credible even if he were among the living. So, too, Bill Clinton, who resigned from the Supreme Court bar and was suspended from the Arkansas bar, is not viable.

⁴² Patrick Buchanan, Memorandum for the Chief of Staff, July 10, 1985, Supreme Court: Box 2, FG 061, 275543, RWRL; Polly Price, *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench* 329 (Amherst: Prometheus, 2009); Theodore McMillan, Floyd Gibson, Donald Lay, Gerald Heaney, Myron Bright, Donald Ross, J. Smith Henley, John Gibson, George Fagg, Pasco Bowman, Roger Wollman, Frank Magill, C. Arlen Beam, James Loken, David Hansen, Morris Arnold to Lloyd Cutler and Bruce Lindsey, April 29, 1994, WHORM Alpha File, Richard Arnold, FG 051, Box 1, OA62672 OA ID 21853, WJCL.

⁴³ “Miers: Lack of Judicial Experience Requires Questioning, Specter Says,” *WSJ*, October, 10, 2005; “If Approved, a First-Time Judge, Yes, but Hardly the First in Court’s History,” *NYT*, October 4, 2005; Randy Barnett, “Cronyism,” *WSJ*, October 4, 2005; David Greenberg, “Supreme Court Cronyism: Bush Restarts a Long and Troubled Tradition,” *Sla*, October 5, 2005.

⁴⁴ Remarks on the Nomination of Solicitor General Elena Kagan To Be a Supreme Court Associate Justice, May 10, 2010,

<http://www.presidency.ucsb.edu/ws/index.php?pid=87859&st=elena+kagan&st1=americanpresidency.org>.

⁴⁵ Sarah Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* 7 (DC: Brookings, 2009); Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* 124-25, 297 (New York: W.W. Norton, 1989); Statement of Orrin Hatch, “The Senate’s Role in the Nomination and Confirmation Process: Whose Burden?,” at 144, 145.

⁴⁶ *CR*, 100th Congress, First Session, July 23, 1987, 20908 (Remarks of Senator Biden); “Washington Talk: A Side-Bar Battle,” *NYT*, September 4, 1987 (Thurmond); Joe Rodota, Memorandum for Thomas Griscom: Ideology and Supreme Court Nominations, July 2, 1987, FG051/6/516586 1110, RWRL; “Abe Fortas,” n.d., id.; “‘Balance’ on the Supreme Court,” n.d., James Baker, Series I, Judge Bork, Nomination of (2), id. Biden himself had changed his tune. In 1986 after the Democrats won control of the Senate, Senate Judiciary Committee Member Joe Biden, its incoming chair, suggested the irrelevance of nominee ideology. “Say the Administration sends us Bork and, after our investigation, he looks a lot like another Scalia,” he told one newspaper. “I’d have to vote for him and if the [special interest] groups tear me apart, that’s the medicine I’ll have to take. I’m not Teddy Kennedy.” Colin Levy, “How Joe Biden Wrecked the Confirmation Process,” *WSJ*, May 22, 2009 (quoting Biden’s 1986 comments to *Philadelphia Inquirer*).

By the time the Reagan Administration nominated Bork in 1987, however, Biden, was singing a different tune, perhaps in part because he was now running for the Presidency himself.

⁴⁷ Laura Mansenerus, “Bork Sides in Bork Debate Seek the Blessings of History,” *NYT*, September 13, 1987.

⁴⁸ Peter Wallinson, Memorandum for the File, Supreme Court, Rehnquist Scalia, General Selection Scenario (1) OA 14287, RWRL. The Justice Department also suggested that “as the first Italian-American nominated to the Court, he would have the support of a non-ideological constituency whose exertions in his behalf might sway fence-setting Democrats in an election years.” “Antonin Scalia,” Supreme Court, Rehnquist/Scalia Notebook 1, Candidates (3), id.

⁴⁹ Robert Bork, *The Tempting of America: The Political Seduction of Law* 348 (New York: Simon and Schuster, 1990).

⁵⁰ “Robert H. Bork,” n.d., Peter Wallinson, Supreme Court Rehnquist/Scalia, Notebook II, Candidates (1), OA 14287, Box 3, RWRL; Kevin McMahon, “Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model,” 32 *LSI* 919, 925 (2007).

⁵¹ Howard, “The Changing Face of the Supreme Court,” at 301.

⁵² Bronner, *Battle for Justice*, at 198-99 (Kennedy’s speech). One Bush Administration policy paper pointed out that recalled that Reagan had consulted with Democratic leaders who warned Bork would prompt a fight drily continued: “The consultation did not diffuse the controversy surrounding the nomination, but did get Bork opponents a full week to make their case in the press with no opponents.” C. Boyden Gray, Counsel to the President, Memorandum for the President, February 18, 1992, “The History of Presidential Consultations with the Senate on Supreme Court Nominations,” n.d., FG 051, Box 357, GHWBL; Arthur Culvahouse to Howard Baker, Kenneth Duberstein, William Ball, Thomas Griscom, September 8, 1987, FG051, 5 506706, RWRL (“well-publicized,” “senior,” “zealot.” “The past two weeks have evinced a continuing criticism of the White House’s characterization of Judge Bork as a mainstream jurist. Senator Biden, the ACLU and other Bork opponents describe our characterizations of Bork as a ‘mainstream’ jurist as intellectually dishonest. Some of Judge Bork’s right wing supporters think that it is an extremely poor strategy destined to ensure Judge Bork’s defeat. The brand-new *Newsweek* distressingly quotes a senior White House aide as saying that Bork is a right wing ‘zealot’—which statement is very unhelpful. The mainstream jurist is our strategy; there is no time for another strategy; and it is true that Judge Bork is a mainstream jurist.” Emphasis in the original.”); Morton Blackwell to Ronald Reagan, September 30, 1987, FG051, Box 17, 52300-523129, id. (complaining that “[t]he White House strategy has been to encourage conservative groups to work the grassroots for Bork while itself presenting Bork as another Earl Warren, only smarter.”); Ronald Reagan to Morton Blackwell, October 21, 1987, id. (“Morton, I think there was a distortion of our position as to his philosophy. We never portrayed him as an Earl Warren type, nor did we ever use the word ‘moderate.’ It’s possible some might have used that term in repudiating the charge that he was some kind of radical, but not any of us here in the Administration, to my knowledge.”); “How Reagan’s Forces Botched the Campaign for Approval of Bork,” *WSJ*, October 7,

1987 (quoting Communications Director Tom Griscom, “I don’t think”). On American Latvian Association and National Association of Wholesaler-Distributors, see Culvahouse to Baker, Duberstein, Ball and Griscom, September 8, 1987; Rebecca Range, Update on Pro-Bork Activity, Series I, Subject Files, OA 15172, Box 1 Bork (5), RWRL; Dan Danner, Memorandum for Rebecca Range, Business Support/Activity for Bork, September 22, 1987, id.; Tom Gibson, Memorandum for the Chief of Staff, Office of Public Affairs Activities in Support of Judge Bork,” McIntosh, OA 16531, Box 3, Bork White House Pro Bork Activities—Baker Memo (2), id.

⁵³ Dinesh D’Souza, Memorandum for Gary Bauer, Life After Bork, October 14, 1987 (“ideology”), David McIntosh, OA 16531, Box 3, Bork WHO Postmortem (1), RWRL; Dinesh D’Souza, Recommended Strategy for Judge Ginsburg’s Nomination, November 4, 1987, David McIntosh, OA 16531, Box 3, Ginsburg (2), id.: “Lessons from the failed strategy to get Judge Bork confirmed: First, it is entirely unrealistic to expect that a nominee’s judicial philosophy will escape detailed scrutiny by the Senate. Second, the argument that President Reagan has an inalienable right to his own man on the court carries little or no weight; just as the President has the Constitutional mandate to appoint, the Senate has a complementary right to reject. Third, the audience for the hearing is not just the Senate but also the American public, and a nominee who cannot convince the people watching him on TV is in a weakened position. Fourth, we no longer have any grounds for believing that the swing votes needed to confirm Judge Ginsburg are automatically predisposed in his favor: liberal Republicans feel no obligation to vote with the President, and Southern Democrats cannot be counted on to vote as soul mates. Fifth, the size that seizes the initiative and the agenda enjoys a tremendous advantage. In Bork’s case we fought entirely on turf defined and delineated by Bork’s critics. Our arguments to the effect that Bork didn’t hate women and blacks and actually voted in their favor lots of times carried no weight and, in fact, inspired derision. Sixth, this [is] an extremely high stakes contest for both sides. The left can no more be expected to let this one slide through than they could be to acquiesce in the Bork case. We appeared surprised at their vehemence the last time. We should be prepared now.”

⁵⁴“All Things Considered: Ginsburg Exclusive,” *NPR*, 1987. (Reagan maintained that Ginsburg had been framed by “some people who knew him while he was teaching at Harvard” who considered him too conservative and who leaked his “infrequent” usage of marijuana before he became a judge to destroy his candidacy. Ronald Reagan to Alan Brown, November 20, 1987, FG 051, Box 11, 529300-530999, Handwriting File, RWRL); Dan to Pat, November 10, 1987, Death of a Thousand Cuts, Trial by Media, and the Next Nominee, David McIntosh, OA 16531, Box 3, Ginsburg (2), RWRL; Ronald Reagan to George Murphy, October 29, 1987, FG051, 9 526881, Handwriting File, RWRL: “By the time you get this I will have announced another nominee for the Supreme Court. I promise you he’ll be as conservative as Judge Bork. There is no way I’d go for a touch of liberalism to win over the lynch mob. We’ll see if they have the nerve to repeat their scandalous performance. I don’t think they will. Of course, in the meantime, we have to face up to the loss of a nominee who was, in my opinion, the most outstanding candidate in 57 years.”

⁵⁵ Josh Lederman, “Before Supreme Court Nod, an Intrusive Interrogation,” *AP*, February 16, 2016; Lloyd Cutler, “The Selection of a Supreme Court Justice: The Limits of Advice and Consent,” 84 *NwLR* 876, 875 (1990).

⁵⁶ Richard Brust, “No More Kabuki Confirmations,” October 2, 2009, *ABAJ*, http://www.abajournal.com/mobile/mag_article/no_more_kabuki_confirmations; Jeff Shesol, “Should Justices Keep Their Opinions to Themselves?,” *NYT*, June 29, 2011; Eric Segall, “A Liberal’s Lament on Kagan and Health Care: Should Elena Kagan Recuse Herself in the ACA Case?,” *Sla*, December 8, 2011. Paul Collins and Lori Ringhand made the case that “the process has been marked by incremental and multifaceted change” in Collins and Ringhand, “The Institutionalization of Supreme Court Confirmation Hearings,” 41 *LSI* 126 (2016).

⁵⁷ Nathan Koppel, “Kagan Criticized the Warren Court in Thesis,” *WSJ*, May 19, 2010; “Supreme Court Nominations: ‘You’ll Get Justice Kagan, You Won’t Get Justice Marshall,’” *ABAJ*, June 29, 2010; Carolyn Shapiro, “Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings,” 88 *CKLR* 455, 463-65 (2012).

Dana Milbank, “Kagan May Get Confirmed, But Thurgood Marshall Can Forget It,” *WP*, June 29, 2010; Geoffrey Stone, “Understanding Supreme Court Confirmations,” 2010 *SCR* 381, 456 (2011).

⁵⁸ “Scalia’s Death Offers Best Chance in a Generation to Reshape Supreme Court,” *NYT*, February 19, 2016.

⁵⁹ A. Mitchell McConnell, Jr., “Haynsworth and Carswell: A New Senate Standard of Excellence,” 59 *KyLJ* 7, 13, 32, 33, 34 (1970); “Sen. Mitch McConnell in 2005: ‘The President, and the President alone, nominates judges,’” <http://www.dailykos.com/story/2016/2/13/1484831/-Sen-Mitch-McConnell-in-2005-The-President-and-the-President-alone-nominates-judges>; Statement of Hon. Mitch McConnell, Hearings before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, at 15, 16 (“I doubt if the Founding Fathers were aware that there would be a Judiciary Committee. It probably never occurred to them. When they said ‘advise and consent,’ I think they were talking about the full Senate. Certainly, the Founding Fathers did not envision that there would be a bunch of co-presidents here.”)

⁶⁰ Burgess Everett and Glenn Thrush, “McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama,” *Pol*, February 13, 2016, <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>; “Grassley Statement on Justice Scalia,” February 13, 2016, <http://www.grassley.senate.gov/news/news-releases/grassley-statement-justice-scalia>; Paul Finkelman, “A History of Supreme Court Nominations in Election Years,” <http://blog.oup.com/2016/02/supreme-court-nominations-election/>; David Herszenhorn, “G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected,” *NYT*, February 23, 2016; Charles Grassley, “Supreme Court Vacancies in Presidential Election Years: ‘The Biden Rules,’” February 22, 2016, <http://www.grassley.senate.gov/news/news-releases/supreme-court-vacancies-presidential-election-years-%E2%80%9C-biden-rules%E2%80%9D>;

Amber Phillips, “Why Joe Biden’s 1992 Supreme Court Comments Aren’t a Silver Bullet for Republicans,” *WP*, February 23, 2016; Gregory Korte, “With the Tables Turned, Obama Now ‘Regrets’ His 2006 Alito Filibuster,” *USA*, February 17, 2016. See generally Robin Bradley Kar and Jazon Mazzone, “What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia,” *NYULR* (forthcoming), <http://ssrn.com/abstract=2763304>.

⁶¹ Lindsey Ellefson, “Obama Fights Back at GOP Refusing to Vote on SCOTUS Nominee: #Do Your Job,” February 23, 2016, <http://www.mediaite.com/online/obama-fights-back-at-gop-refusing-to-vote-on-scotus-nominee-doyourjob/>; Barack Obama, “A Responsibility I Take Seriously,” February 24, 2016; <http://www.scotusblog.com/2016/02/a-responsibility-i-take-seriously/>; Chris Cilizza, “Is Floating Brian Sandoval’s Name Just an Elaborate Troll of Senate Republicans?,” *WP*, February 24, 2016; Juliet Elperin, “Sandoval Bows Out of Supreme Court Consideration,” *id.*, February 25, 2016; Dahlia Lithwick, “The Case for Nominating Elizabeth Warren to the Supreme Court,” *Sla*, February 26, 2016, http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_case_for_nominating_elizabeth_warren_to_the_supreme_court.html (characterizing trial balloon as brilliant).

⁶² Jeff Shesol, “How to Recognize a Constitutional Crisis,” *NY*, February 19, 2016, <http://www.newyorker.com/news/news-desk/how-to-recognize-a-constitutional-crisis>; “Senate Republicans Lose Their Minds on a Supreme Court Seat,” *NYT*, February 24, 2016; Rick Hasen, “An Adult Conversation About the Fight to Fill Justice Scalia’s SCOTUS Seat,” February 26, 2016, *TPM Café*: Opinion, <http://talkingpointsmemo.com/cafe/debate-scotus-nomination-obama> (“lofty”); Lyle Denniston, “Judiciary Panel Chair: Wait on Court Until After Election,” <http://www.scotusblog.com/2016/02/judiciary-panel-chair-wait-on-court-until-after-election/> (“both”).

⁶³ Amita Kelly, “McConnell: Blocking Supreme Court Nomination About a Principle, Not a Person,” *NPR*, March 16, 2016, <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> (“principle,” Grassley); Steve Benen, “On Supreme Court, Republicans Can’t Keep Their Story Straight,” March 21, 2016 <http://www.msnbc.com/rachel-maddow-show/supreme-court-republicans-cant-keep-their-story-straight>; Eric Bradner, “McConnell: No Lame Duck Confirmation,” <http://www.cnn.com/2016/03/20/politics/mitch-mcconnell-supreme-court-donald-trump/>, March 20, 2016 (NRA and NFIB); Mitch McConnell and Chuck Grassley, “McConnell and Grassley: Democrats Shouldn’t Rob Voters of Chance to Replace Scalia,” *WP*, February 18, 2016; David Herszenhorn, “Iowans Urge Senator Charles Grassley to Hold Hearings on Court Nominee,” *NYT*, February 19, 2016; Taylor Batten, “Scalia’s Ghost Hovers Over RNC,” *CO*, July 21, 2016, <http://www.charlotteobserver.com/opinion/opn-columns-blogs/taylor-batten/article91108692.html>. (includes highlights and Trump tweet).

⁶⁴ Jonathan Chait, “Will the Supreme Court Just Disappear?,” *NYT Mag*, February 21, 2016, <http://nymag.com/daily/intelligencer/2016/02/will-the-supreme-court-just-disappear.html#>; Bazelon and Witt, “Senate Republicans and the Supreme Court.

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