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PRESIDENTS, SENATES, AND FAILED SUPREME COURT NOMINATIONS

After a decade of stability on the U.S. Supreme Court, in which new vacancies and appointments were eagerly anticipated but long deferred, three nominees for the Supreme Court were sent by the president to the Senate in the space of four months in 2005. Only two of those nominees reached the Court, with the troubled nomination of Harriet Miers being withdrawn before the Senate Judiciary Committee even began its formal deliberations. The appointments process did not play out as many expected.

The shadow of the failed 1987 nomination of Robert Bork has loomed over the judicial appointments process, and the recent vacancies were widely expected to produce a large-scale confirmation battle, with the prospect of nominees being defeated as Bork was. At the outset of Ronald Reagan's second term of office, Laurence Tribe foreshadowed that battle by calling on senators to take a judicial nominee's substantive views into account when deciding on confirmation and to resist presidential efforts to shift the Court in a more conservative direction.[1] Two decades later, at the outset of George W. Bush's second term of office, Cass Sunstein offered similar advice to Democratic senators, looking to the earlier defeat

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[1] Laurence H. Tribe, *God Save This Honorable Court* (Random House, 1985).

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of Bork as a normative model.[2] The increased polarization of American politics raises the prospect of greater conflict over judicial nominations and presumably the greater likelihood of their defeat.[3] Scholars and interest groups have urged, with some apparent success, the Democratic caucus in the Senate to adopt an explicitly ideological test for voting for judicial nominees with a goal of defeating otherwise qualified nominees.[4] Others have held up the nineteenth-century confirmation process, with its greater rate of failed nominations and less apparent deference to presidential selections, as a normative model for the future.[5]

But 2005 did not recreate 1987. The confirmation process for both John Roberts and Samuel Alito was tamer than many expected or hoped. It was the nomination of the apparently more liberal nominee, Harriet Miers, that failed, defeated in large part by conservatives in the president's own party. At the same time, both Roberts and Alito received far more negative votes on the floor of the Senate than would once have been expected given the absence of serious questions about their personal characters or qualifications.[6]

It is time that we paid more attention to failed Supreme Court nominations. A focus on how controversial a nomination might be can obscure the fact that even controversial nominees are generally successful in passing through the Senate and getting to the Court. We ultimately want to account not for controversy but for success or failure in the confirmation process. No doubt presidents and nominees care most about success or failure. Justices have no less power on the Court for having won confirmation by a slim margin rather than by acclamation. They can serve just as long; their opin-

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[2] Cass R. Sunstein, *Radicals in Robes* 13–20, 31 (Basic, 2005).

[3] See, e.g., Jeffrey A. Segal, Charles M. Cameron, and Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 Am J Pol Sci 96 (1992); Charles R. Shipan and Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 Am J Pol Sci 654 (2003); Lee Epstein and Jeffrey A. Segal, *Advice and Consent* 102–19 (Cambridge, 2005).

[4] Neal A. Lewis, *Democrats Readying for a Judicial Fight*, NY Times (May 1, 2001), A19; Edward Walsh, *Panel Debates Senate's Role on Court Choices*, Wash Post (June 27, 2001), A23.

[5] See, e.g., Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 Case W Res L Rev 1331 (1997).

[6] With 42 votes cast against him, Alito's confirmation vote is comparable to that of Clarence Thomas or William Rehnquist, whose confirmations involved serious ethical controversies as well as ideological disagreement.

ions and their votes count for just as much. The game, in the modern Senate in the absence of a filibuster, is to get to fifty-plus-one. The rest is symbolism.

The history of failed Supreme Court nominations can help clarify basic aspects of the politics of judicial appointments. Recent commentary would have led us to expect that the more ideologically extreme Roberts and Alito would have the greatest difficulty being confirmed, not the apparently more moderate Miers. The historical record, by contrast, would have suggested that, given a Republican majority in the Senate, it was Miers, rather than Roberts or Alito, who had the most to fear in the confirmation process. Within the context of unified government and absent scandal, Supreme Court nominees with solid credentials and judicial philosophies that place them within the mainstream *of their own* political parties—nominees like Roberts and Alito—should be expected to succeed. Getting to fifty-plus-one in the Senate means securing the base. Within unified government, it is nominees who are distrusted by the party faithful who fail.

The most salient feature of the Bork nomination was not that he was conservative—the point emphasized by commentators then and now—but that the Senate at the time of the nomination was controlled by the opposition party. Divided government has always been risky for Supreme Court nominees.

The modern era in this regard is unusual in one respect, however, and in this the Bork nomination is indicative of something distinctly new. It is in the modern era, with the defeat of Clement Haynsworth Jr. and G. Harrold Carswell under President Richard Nixon and Bork under President Reagan, that such nominees have failed outside of a presidential election year.[7] The particular perspective on separation of powers provided by failed Supreme Court nominations certainly reinforces the importance of the interaction of the constitutional scheme with the rise of political parties, but the re-

[7] The feature of the modern era also suggests the need to modify the presidentialist perspective of Balkin and Levinson's partisan entrenchment thesis. To their admonition that "if you don't like what the Court is doing now, you (or your parents) shouldn't have voted for Ronald Reagan," the name of the appropriate senator should be added. Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045, 1076 (2001). Control of Congress matters as well to partisan entrenchment. See also Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 Am Pol Sci Rev 511 (2002).

lationship between these two fundamental features of the American political system has not been stable over time.[8]

The record of failed Supreme Court nominations also provides a different perspective on the historical pedigree of normative arguments for a more aggressive senatorial role in the appointments process. Although scholars such as Laurence Tribe are right that substantive judicial philosophy has sometimes been taken as relevant to Senate deliberations on Supreme Court nominees, until the modern era such factors were only determinative when the opposition party held the majority of the Senate *and* the defeat of the nomination meant that a new president would fill the vacancy. Before the modern era, the opposition party did not stand as an obstacle to presidents placing their picks on the Court until the president became a lame duck. Partisan warfare over Supreme Court nominees had once been confined to the last months of a presidential term of office. It no longer is. Others, such as Jeffrey Tulis, have argued that the modern Senate has "abdicated" its historic constitutional role of contesting presidential nominations to the Supreme Court, suggesting that the failed Bork nomination was once the norm.[9] The Miers episode is far more resonant of the nineteenth-century experience, however, than is that of Bork. More generally, however, the assertiveness of the nineteenth-century Senate, though real, is not one that we would likely want to recreate or one that we could revive even if we wanted to do so.

To understand why some nominations have failed when so many others succeed and how the politics of Supreme Court appointments has changed over time, this article examines the record of failed nominations. The first section briefly establishes some basics about the confirmation process and the record of failure. The second section will extract some of the important factors that have caused failed Supreme Court nominations over the course of American history and that help to explain why the nineteenth century was so distinctive. The partisan control of the Senate and the White House and the electoral calendar have played important roles in determining the success or failure of Supreme Court nominations, but those relationships have not been stable over time. Notably, where unified government once posed the most danger to the president's

[8] Cf. Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev (2006).

[9] See Tulis, 47 Case W Res L Rev (cited in note 5).

selection of Supreme Court nominees, divided government is now the primary source of risk for presidential nominees. The concluding section will note a few lessons for the future.

I. The Confirmation Process and Those Who Were Called but Did Not Serve

The founders created the possibility of failed Supreme Court nominations with the design of the appointments process. Article II of the Constitution specifies that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."[10] The involvement of these two independent institutional actors, the president and the Senate, in a two-stage appointments process creates the possibility of deadlock. A majority of the Senate may refuse, perhaps repeatedly, to confirm the president's selections to fill vacancies in the judiciary.[11]

As with much else in the Constitution, the appointments process is the result of a compromise in the Philadelphia convention. James Madison's "Virginia Plan" implied that the president would have the sole power to execute laws and appoint officers.[12] Conceptually, the power of appointment seemed executive in nature and more closely associated with the administration of laws than the making of them.[13] As a practical matter, the experience since the American Revolution seemed to suggest that the appointment power was best placed in a single set of hands. After independence, many states had reacted against the colonial experience, in which the royal governor could use the appointment power to consolidate English control over the colonial governments, by restricting the appointment pow-

[10] US Const, Art II, § 2.

[11] The text of the Constitution does not specify what will constitute adequate evidence of "advice and consent of the Senate" in the case of appointments, but the implication and practice has been that a majority vote is adequate for confirmation. The textual silence, however, leaves room for argument about the propriety of filibusters and other procedural devices that effectively prevent a vote on a nominee or require a higher threshold than a simple majority to confirm an appointment. See Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 Const Comm 445 (2004).

[12] The Virginia Plan called for the "executive rights vested in Congress by the Confederation" to be transferred to a "National Executive," but did not specify what those were. It also indicated that the judiciary would consist of "tribunals to be chosen by the National Legislature," which might imply the legislative selection of individual judges. James Madison, *Journal of the Federal Convention* 62 (ed E. H. Scott, Albert, Scott, 1893). Madison later indicated that he thought the appointment power was included in the executive power. Id at 87.

[13] Id at 87.

ers of the executives in the state governments.[14] The Confederation government did not even have a chief executive or distinct executive branch, so any administrative appointments were made by Congress.[15] The result often seemed to be irresponsibility and discord. Once it became apparent in the debates of the federal convention that some would oppose presidential appointment of judges on the grounds that it seemed too monarchical and others would oppose legislative appointment of judges on the grounds that it bred intrigue, factionalism, and incompetence, Madison and others groped for a compromise.[16] As Gouverneur Morris concluded, the scheme finally adopted in Article II sought to balance the "responsibility" of presidential nomination with the "security" of Senate confirmation.[17]

Although the requirement of Senate confirmation places a check on the presidency, the Senate and the president are not equal players in the appointments process. The president has intrinsic advantages over the Senate, at least in the case of high-profile positions like the members of the Supreme Court. As Alexander Hamilton noted in his commentary on the presidency in *The Federalist Papers*, the only consequence of the rejection of an individual nominee is that the president gets to choose again.[18] The Senate only possesses a negative; it does not have the formal authority to dictate a particular selection. Presidential persistence might well pay off. To the extent that leaving a given position vacant is an unattractive option to the Senate, whether because the position is seen as too important to leave unfilled (as is likely the case with Supreme Court Justices), because delay in confirmations would only invite a series of unilateral recess appointments of "acting" officials, or because the office in question provides particular benefits to senators or their constituents, the president can limit the Senate's choice set within a fairly narrow range.[19] A presidential reputation for determination

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[14] Marc W. Kruman, *Between Authority and Liberty* 111–23 (North Carolina, 1997).

[15] Articles of Confederation, Art IX.

[16] James Madison, *Journal of the Federal Convention* at 108–9 (cited in note 12).

[17] Id at 681.

[18] Federalist 66 (Alexander Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 403 (New American Library, 1961).

[19] There may be some positions that for reason of ideology a president might be content to leave vacant, thus placing pressure on senators sympathetic to the mission of the office in question to accept a nominee rather than have the position crippled by a long-term vacancy. On the other hand, senators may be willing to accept long-term vacancies in

in regard to appointments can force senators to adjust their expectations for an appointment in the president's favor. With the prerogative of nomination and the proper reputation in the capital, presidents can lead senators to calculate whether an otherwise objectionable nominee is nonetheless "the best that we are going to get from this administration."[20]

Presidents have other advantages within the appointments process as well. As the founders expected, decisions are easier to make within the unitary and hierarchical executive than a collective body such as the Senate. Once a nomination is made, senators opposed to the nomination must bear the organizational costs of mobilizing a majority of their colleagues against the nomination and sustaining that majority when confronted with a new nominee. The president has an agenda-setting advantage in considering a possible nomination.[21] In considering whether to make a potentially controversial appointment, the president can often choose whether, when, and for which office to engage in such fights. In his choice of nominee, the president can also choose how to frame the issues of the confirmation, potentially defusing opposition by such stratagems as doubling up on a nomination (as President Ronald Reagan did with the joined appointments of William Rehnquist and Antonin Scalia) or appealing to racial or ethnic loyalties (as President George H. W. Bush did with Clarence Thomas) or choosing polished professionals rather than ideological firebrands (as President George W. Bush did with John Roberts and Samuel Alito). Relatedly, presidents enjoy a potential information advantage in making a nomination, having already sought to exclude potential nominees who would be relatively vulnerable to Senate opposition and to select nominees who can be expected to perform their duties in ways that will be satisfying to the president (of course, the informational advantage

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some positions, such as district or circuit court judges, thereby giving them greater leverage in the game of confirmation chicken with the president.

[20] To apply the point that presidential scholar Richard Neustadt made more generally in his study of presidential leadership within the world of negotiation and compromise in Washington, D.C., the president's reputation in bargaining is crucial in establishing how much political capital he might be willing to expend in a confirmation fight. If the president has a reputation for determination, and thus is seen as willing to absorb the costs of an extended confirmation battle, then senators might well settle quickly. If the president instead has a reputation for avoiding such fights (perhaps in the interest of preserving other priorities), then senators have an incentive to resist a presidential nomination in the expectation that a more attractive nominee will soon be forthcoming. See Richard E. Neustadt, *Presidential Power and the Modern Presidents* (1991).

[21] See Michael J. Gerhardt, *The Federal Appointments Process* 43 (Duke, 2003).

is only relative and contingent, as numerous administrations have discovered). Finally, the mere fact of presidential nomination creates a presumption in favor of the nominee. The burden falls on opposition senators to find suitable public reasons to justify rejecting a nominee.[22]

Such presidential advantages have made themselves felt in practice. The vast majority of presidential nominations—for any office—are successful.[23] Senate confirmation is the default outcome within the appointments process. Obstruction and delay within the Senate is far more of an obstacle to presidential nominations than is the prospect of outright defeat.[24] Only about 1 percent of all Cabinet-level nominations have been defeated on the floor of the Senate.[25] The record is comparable for sub-Cabinet-level appointments.[26] The Senate rarely says no to the president on his choices for filling the executive branch, but it may take its time in saying yes.

The president has not been quite as successful in filling vacancies in the judicial branch, but the presidential record is still formidable. Over the course of the nation's history, there have been 148 nominations to the Supreme Court.[27] Just under a fifth of these presidential selections have failed to be confirmed by the Senate. The Senate has created more difficulty for the president in filling the third branch of government than in filling the subordinate offices of the executive, but the odds remain very much in the president's favor.

This article focuses on the politics of failed Supreme Court nominations. "Failure" is used here in its most basic sense: the failure to win Senate confirmation for a nomination. Most obviously, this focus lays aside the problem of appointment "mistakes," or Justices who do not perform as the appointing president would have expected or preferred. The lost opportunity to shape the Court or push it in a desired direction is, from one perspective, an instance

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[22] See id at 44. That burden may not exist in low-profile posts, where practices such as the "blue slip" allow individual senators to obstruct a nomination with little or no explanation.

[23] See id at xx–xxi.

[24] Nolan McCarty and Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 Am J Pol Sci 1122 (1999).

[25] See Gerhardt, *The Federal Appointments Process* at xx (cited at note 21).

[26] See id at xxi.

[27] See list ast http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm. My count excludes those nominations on which "no action" was taken.

of nomination "failure."[28] Presidents (and historians) may regard their appointments as failures if they do not serve long or well on the bench, for example. A survey of academics evaluated eight Justices as "failures," presumably for such reasons.[29] More notoriously, presidents may regard their appointments as failures if they do not adhere to the substantive commitments of the administration. Thus, President Dwight Eisenhower is frequently said to have thought in hindsight that the appointments of Earl Warren and William Brennan to the Court were mistakes.[30] "Failures" of this sort are beyond the range of this article.

A somewhat less obvious problem is the difficulty in pinning down the number of presidential selections that failed to reach the bench. Relatively easy to lay aside are potential nominees who decline the presidential invitation before the nomination is transmitted to the Senate. Somewhat trickier is the exclusion of nominations that are made known to the public but abandoned before they are officially made to the Senate. Such episodes may range from indecisiveness on the part of presidents and judicial candidates, "trial balloons" leaked to the press, and nominations that derail before they even get started. Excluding this group from consideration leaves out the ill-starred announcement by President Ronald Reagan that Judge Douglas Ginsburg would be his next Supreme Court nominee in 1987, but it has the advantage of drawing a bright line between the public consideration of potential judicial candidates and official nominations subject to Senate deliberation.[31] A final line that is drawn here is the exclusion of official nominations that are subsequently withdrawn and renewed. Thus, the initial nomination of John Roberts to the position of Associate Justice to replace Sandra

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[28] See Michael Ebeid, *Influencing the Supreme Court: Democratic Accountability and the Presidential Threat to Judicial Independence* (Ph.D. diss, Yale University, 1999); Stefanie A. Lindquist, David A. Yalof, and John A. Clark, *The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting with Presidential Blocs*, 53 Pol Res Q 795 (2000).

[29] See Henry J. Abraham, *Justices, Presidents, and Senators* 370 (Chatham House, 1999).

[30] On Eisenhower's views of Warren and Brennan, see Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 Const Comm 515 (1994); Michael A. Kahn, *Shattering the Myth about President Eisenhower's Supreme Court Appointments*, 22 Pres St Q 47 (1992).

[31] See "Supreme Court Nominations" on the website of the U.S. Senate (http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm#official). On Douglas Ginsburg, see Ronald Reagan, *Remarks Announcing the Nomination of Douglas H. Ginsburg to be an Associate Justice of the United States Supreme Court, October 29, 1987*, in Public Papers of the Presidents of the United States: Ronald Reagan, 1987 (1988).

Day O'Connor is excluded rather than counted as a failure because the nomination was withdrawn in favor of his successful appointment to be Chief Justice upon the death of William Rehnquist, as are nominations such as Eisenhower's initial submission of John Marshall Harlan II's name to the Senate just before the expiration of the Eighty-Third Congress. Such "nominations not confirmed" are more a matter of bookkeeping than failure within the politics of Supreme Court appointments.[32]

This article focuses on those nominations to fill vacancies on the Supreme Court that were clearly rejected by the Senate, whether through direct action or deliberate inaction. By these criteria, there have been twenty-seven failed Supreme Court nominations, twenty-seven instances of a nomination being submitted to the Senate and subsequently permanently withdrawn by the president, voted down by the Senate, or voted to be permanently postponed by the Senate (see App. A). These failed Supreme Court nominations have involved sixteen presidents, ranging from George Washington to George W. Bush, and twenty-five candidates (two individuals had the misfortune of being rejected twice by the Senate). In total, 18 percent of the presidential nominations to fill vacancies on the Supreme Court have failed.

Failed Supreme Court nominations have been a common but not regular feature of American political history. The remainder of this article is concerned with what accounts for these failures and what lessons we might learn from them.

II. Accounting for Failed Supreme Court Nominations

What accounts for failed Supreme Court nominations? Any reasonable answer must make sense of one particularly striking feature of figure 1: the nineteenth century was different. One contribution of this article is in indicating exactly how the nineteenth century was different, and how those differences relate to the success and failures of the Supreme Court nominations since the turn of the twentieth century. This article argues that failed Supreme Court nominations can be accounted for by three primary, and partly related, factors: divided government, the timing of vacancies relative

[32] For a list that includes such nominations, see Henry B. Hogue, "Supreme Court Nominations Not Confirmed, 1789–2004," Congressional Research Service Report for Congress (March 25, 2005) (available at http://www.fas.org/sgp/crs/misc/RL31171.pdf).

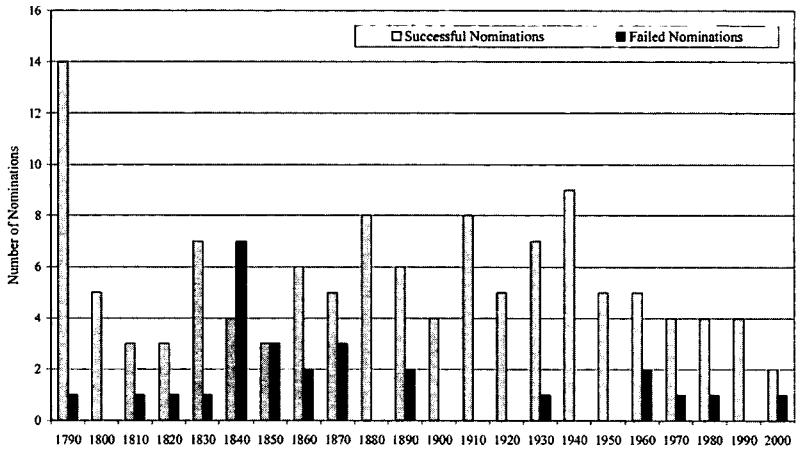

FIG. 1.—Supreme Court nominations by decade. The appointments made in 1789, the first year of the federal government under the U.S. Constitution, are included in the decade of the 1790s. The series ends with the appointment of Samuel Alito in 2006.

to the electoral calendar, and the personal characteristics of the nominees themselves. As it happens, all three factors are also relevant to explaining the transformation in the politics of Supreme Court appointments associated with the close of the nineteenth century. This section begins with a first cut at nominally divided government, with the White House and the Senate under different party control, across American history. It then introduces the electoral calendar and the significance of the proximity of a presidential election for the success of Supreme Court nominations. It then takes a second cut at divided government and examining more closely some apparent anomalies from the previous discussion. It concludes with a closer look at the surprising cases of failed nominations during unified government.

A. DIVIDED GOVERNMENT—A FIRST CUT

The American presidential system, with its independent election of the legislature and the chief executive, creates the possibility of divided government. The bicameral structure of Congress also allows for the possibility of divided party control of the two chambers of the legislature, but for appointment politics what matters is the control of the White House and the Senate and that is the

TABLE 1
SUPREME COURT NOMINATIONS BY PARTY CONTROL, 1789–2006

	Divided Government	Unified Government
Number confirmed	18	103
Number not confirmed	8	19
Failure rate (%)	31	16

focus here. Divided government has not been the norm in American history. For the White House and the Senate to be controlled by two different parties has only been common in the late nineteenth and late twentieth centuries, and was a fairly rare circumstance for most of the rest of American history.[33] Given this backdrop, it is not surprising that most nominations are made during periods of unified government. Over 80 percent of nominations have occurred when the president and the Senate are of the same party.

Divided government is a very difficult environment for Supreme Court nominations. Even though only 18 percent of all nominations occur during periods of divided government, a third of all the failed nominations occurred during these periods. As table 1 indicates, the failure rate for Supreme Court nominations during divided government is twice as high as the failure rate during unified government. Notably, even a slim Senate majority in the president's favor has been sufficient to make the difference. Despite the potential availability of the filibuster in the Senate, and thus arguably an expanded "gridlock interval" within which the minority party can obstruct the actions of the majority party, narrow majorities are not much different than large Senate majorities in approving presidential nominations to the Supreme Court.[34]

That failed Supreme Court nominations would be more likely during periods of divided government is not exactly surprising.[35]

[33] Joel H. Silbey, *Divided Government in Historical Perspective, 1789–1996*, in Peter F. Galderisi, ed, *Divided Government* (Rowman & Littlefield, 1996); Gary W. Cox and Samuel Kernell, eds, *The Politics of Divided Government* 3 (Westview, 1991).

[34] The failure rate for appointments made when the president's party controls a majority of less than 55 percent of the Senate is just 11 percent. There is no evidence of filibuster activity on Supreme Court nominations before 1968. On the expanded gridlock interval in the Senate theoretically created by the supermajority cloture rule, see Keith Krehbiel, *Pivotal Politics* 35–38, 64–73 (Chicago, 1998).

[35] See also John Anthony Maltese, *The Selling of Supreme Court Nominees* 5–8 (Johns Hopkins, 1995).

In general, we would expect more political conflict and disagreement during periods of divided government than during periods of unified government, and it is often thought that divided government would produce greater gridlock in the operation of the government and make cooperation between the president and Congress more difficult across a variety of government activities. Even so, there is some disagreement about how much gridlock divided government actually produces, and it might be thought that presidents would anticipate any possible obstacle that opposite-party Senate majorities might create and make the needed adjustment in their appointment strategies.[36] At least for the confirmation of Supreme Court Justices, however, divided government does appear to create real difficulties for presidents.

The folk wisdom about the obstructions created by divided government in the legislative arena is not often extended to the realm of Supreme Court appointments, which are sometimes portrayed as normatively and descriptively "above politics." The confirmation record of Supreme Court nominations indicates that the normal expectation about the significance of divided government should be extended to our thinking about Supreme Court appointments. Across American history, the appointment of Supreme Court Justices has not been separated from the normal dynamics of partisan politics. Presidents fare much better in getting their preferred nominees on the Court when their own party controls the Senate. If failed Supreme Court nominations are not the rule during divided government, they are at least commonplace.

Looking at the track record of Supreme Court nominations during unified and divided government across all of American history ignores the tendency, visible in figure 1, for Supreme Court nominations to have had greater trouble in the years prior to 1900.

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[36] See generally David R. Mayhew, *Divided We Govern* (Yale, 1991) (finding no effect on legislative output from divided government); Krehbiel, *Pivotal Politics* at 51–75 (cited in note 34) (arguing that legislative process encourages formation of large lawmaking majorities); Charles M. Cameron, *Veto Bargaining* 83–150 (Cambridge, 2000) (arguing that lawmakers will anticipate presidential vetoes and incorporate presidential preferences into legislation); David W. Brady and Craig Volden, *Revolving Gridlock* 13–32 (Westview, 1997) (arguing for importance of legislative institutions in creating gridlock). See also Bryon J. Moraski and Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 Am J Pol Sci 1069 (1999) (arguing that presidents adjust to the Senate in their appointment strategy); Glen S. Krutz, Richard Fleisher, and Jon R. Bond, *From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 Am Pol Sci Rev 871 (1998) (finding that divided government did not increase chance of failure of presidential nominations).

TABLE 2
SUPREME COURT NOMINATIONS BY PARTY CONTROL BEFORE AND AFTER 1900

	Before 1900		After 1900	
	Divided Government	Unified Government	Divided Government	Unified Government
Number confirmed	6	58	12	45
Number not confirmed	5	16	3	3
Failure rate (%)	46	22	20	6

Divided government was not significantly more common before the twentieth century; rather, the significance of divided and unified government for Supreme Court confirmations changed in the twentieth century. As table 2 indicates, the president's prospects over the past century improved under both divided and unified government relative to the earlier period. There have been fewer Supreme Court nominations in the years since 1900 than in those before it (an average of one nomination every 1.3 years before and one nomination every 1.8 years after, a difference that is only partly attributable to the higher failure rate of pre-1900 nominations), but presidents have been more successful in winning confirmation for their nominations whether or not their party controls the Senate (though they still do better when their party controls than when it does not).

Before 1900, presidents nominating Supreme Court Justices during periods of divided government would seem to have no better chance of success in the Senate than in a coin flip. Although the odds of failure during divided government have remained high since 1900, it is striking (at least in comparison to our first century's experience) that presidents could, in the twentieth century, normally expect their nominees to be confirmed even when the Senate was in the hands of the opposition.

B. THE ELECTORAL CALENDAR, LAME DUCKS, AND FAILED NOMINATIONS

To begin to understand the divergence between the experience of the nineteenth century and that of the twentieth century, another factor needs to be added to the partisan control of the government: the electoral calendar. The U.S. government works, of course, to the rhythm of a fixed electoral cycle. Presidents face

election every four years, and although individual senators face election every six years, the Senate is affected by an election every two years. Supreme Court vacancies are not directly tied to this calendar but instead intersect it more or less at random depending on the vagaries of deaths and resignations. The timing of these vacancies, however, matters greatly to how successful the nominations to fill those vacancies will be.

The American electoral calendar is fixed, but it has not been entirely stable across two hundred years of history. The Constitution of 1787 specified that Congress would assemble on the first Monday of December, unless otherwise directed by law.[37] Until the early twentieth century, the result was that the new Congress first met and the new president was inaugurated on March 4.[38] The Twentieth Amendment to the Constitution altered that schedule, specifying that Congress would meet January 3 and the new president would be inaugurated on January 20, beginning with Franklin Roosevelt in 1937.[39] The consequence of the Amendment was to significantly reduce the lame-duck period between when a new Congress and president were elected and when they assumed their offices.[40]

Both the extended lame-duck period and strategic calculations associated with the electoral calendar had significant implications for Supreme Court appointment politics in the nineteenth century. Lame-duck presidents have made fourteen nominations to the Supreme Court. The last of those lame-duck appointments occurred in 1893. Lame-duck nominations were a common feature of nineteenth-century appointment politics, accounting for 16 percent of all the nominations made before 1900, but there have been no lame-duck nominations in over a century. Lame-duck nominations also had a high rate of failure. Half of those nominations failed.

Lame-duck nominations were not doomed to failure. They interacted in predictable ways with partisan interests. As table 3 indicates,

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[37] US Const, Art I, § 4.

[38] See Michael Angelo Mussman, *Changing the Date for Congressional Sessions and Inauguration Day*, 18 Am Pol Sci Rev 108 (1924).

[39] US Const, Amend XX.

[40] "Lame duck" is here used in the narrow sense of officeholders whose successors have already been elected. "Late term" is used to refer to officeholders whose successors will be elected within six months. The meaning and significance of the Twentieth Amendment are explored in Bruce Ackerman, *The Case against Lameduck Impeachment* (Seven Stories, 1999).

TABLE 3
LAME-DUCK NOMINATIONS AND PARTY CONTROL

	Divided Government	Unified Government
Number confirmed	0	7
Number not confirmed	3	4

nominations by outgoing presidents were doomed to failure when the Senate was controlled by the opposition party. Unsurprisingly, an opposition-controlled Senate always preferred to wait for their own party's president-elect to assume office and fill the vacancy on the Court rather than confirm a lame-duck nomination. The most startling thing about this scenario is that presidents even made the attempt.[41] Nonetheless, apparently working on the belief that they possessed a duty and responsibility to act to fill any vacancy that arose during their term of office and on the hope that a qualified nominee could rise above party feelings, both National Republican John Quincy Adams and Whig Millard Fillmore sent Supreme Court nominations to Democratic-controlled Senates in the waning days of their administrations only to see them unceremoniously tabled.[42] The vacancies were quickly filled by Democratic presidents and Senates immediately after the inaugural.

By contrast, the same-party Senate was generally eager to confirm the lame-duck nominations of outgoing presidents.[43] In the months after the election of 1800, the Federalist Senate not only approved a new Judiciary Act expanding and strengthening the federal courts but it also twice voted to confirm John Adams's selections for Chief Justice before the hated Thomas Jefferson could occupy the White House.[44] A Democratic Senate quickly endorsed Martin Van Buren's choice of Peter Daniel to fill a vacancy two days before the Whigs

[41] In each case, the president *and* his party were being replaced at the inaugural. If John Quincy Adams and Millard Fillmore had been able to look forward to their partisan successors filling the vacancy, then they might have been more content to stay their hands.

[42] Nonetheless, the supporters of John Adams's nominee, John Crittenden, complained of the "infernal precedent" being set by "impeding the action of the whole Government" on "party ground" during the lame-duck period. See David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 Nw U L Rev 900, 907 (1990).

[43] The surprising exceptions of the four unified-government rejections of lame-duck nominations are discussed in text at notes 56–63.

[44] Adams's first choice, John Jay, declined to serve. On the final days of the Federalist government, see Bruce Ackerman, *The Failure of the Founding Fathers* 111–245 (Harvard, 2005); Richard E. Ellis, *The Jeffersonian Crisis* (Oxford, 1971); Stanley Elkins and Eric McKitrick, *The Age of Federalism* 691–750 (Oxford, 1993).

TABLE 4
TIMING AND SUCCESS OF SUPREME COURT NOMINATIONS

Time until Presidential Election	After Election (Lame Duck)	Within Six Months (Late Term)	Within Twelve Months	More than Twelve Months
Number confirmed	7	2	21	91
Number not confirmed	7	3	3	14
Failure rate (%)	50	60	13	13

were slated to take over both the presidency and the Senate. More idiosyncratic, and uncharitable, was the congressional action to create two new seats on the Supreme Court on the eve of Andrew Jackson's departure from the capital.[45] Despite the fact that Jackson's own vice president, Martin Van Buren, was to be his successor, Jackson sent the names of his selections for those two seats to the Senate on his last day in office.

The last lame-duck nomination was also the most difficult. When a vacancy opened on the Court after the election of 1892, the defeated Republican President Benjamin Harrison hoped to immediately fill it, denying the seat to his successor, Democrat Grover Cleveland, and what would be only the second Democratic Senate since the Civil War. The Republican leadership in the narrowly divided Senate, however, sent word that the Democratic minority was prepared to obstruct any confirmation through the end of the session. Harrison outmaneuvered the opposition, however, by nominating a former Democratic senator, Howell Jackson, who had been appointed as federal circuit court judge during the first Cleveland administration.[46] The Democratic senators could hardly hold up Jackson's nomination. Although the outgoing Republicans were unable to entrench one of their own on the high court, they were at least able to choose which Democrat would receive the appointment.

Late-term nominations are only a step removed from lame-duck nominations, and they too have difficulty being confirmed. As table 4 indicates, when presidential elections are impending, failed Supreme Court nominations are more likely. Moreover, of the four-

[45] 5 Stat 176 (1837).

[46] Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 Cardozo L Rev 1, 40 (1983).

teen failed nominations that have been lame-duck or late-term efforts, only one occurred after 1900. Late-term and lame-duck nominations account for all but two of the failed Supreme Court nominations prior to the Civil War and for over 60 percent of the failed nominations prior to 1900. With the election in sight, and with it the possibility of a new president, opponents of the incumbent president have an incentive to obstruct any nomination in the Senate and gamble that the next president will nominate a more desirable candidate for the vacancy on the Supreme Court. The lateness of the hour creates both the desire and the means to prevent a vacancy from being filled, countering the advantage that normally falls to a determined president.

One of the six failed nominations since 1900 occurred in these circumstances, when President Lyndon Johnson was unable to secure confirmation of Associate Justice Abe Fortas to replace Chief Justice Earl Warren. This was an instance of a strategic retirement gone awry. Politically debilitated by the Vietnam War, Lyndon Johnson had already announced that he would not stand for reelection in 1968. Once Robert Kennedy was killed during the Democratic primaries that summer, Warren became convinced that the Democrats would not be able to defeat the expected Republican presidential nominee, Richard Nixon, who was not only a longtime political rival of Warren's from their days in California but who was also mounting a "law-and-order" campaign that was as critical of the Warren Court as it was of the Johnson administration. Fearful that he would not be able to outlast a Nixon presidency, the seventy-seven-year-old Warren submitted his resignation, effective with the confirmation of a successor, to Johnson with the understanding that Fortas would be his replacement. Despite a large Democratic majority in the Senate, the Fortas nomination ran into immediate difficulty. Conservative Democrats in the Senate pilloried Fortas at his confirmation hearings and the Republican candidate Nixon and the media questioned the propriety of the coordinated resignation-nomination on the eve of the election. Johnson was forced to withdraw the nomination rather than force a certain defeat in a recorded vote, and President Richard Nixon accepted Warren's resignation upon assuming office in 1969.[47]

Lame-duck and late-term nominations in unfavorable political

[47] Lucas A. Powe, Jr., *The Warren Court and American Politics* 468–75 (Harvard, 2000).

circumstances bedeviled the nineteenth century but were practically unknown in the twentieth century.[48] They account for much of the differential failure rates between the two periods. Of course, the timing of vacancies on the Court largely determines the timing of nominations. Why so many vacancies of this sort in the nineteenth century and so few afterward? Luck cannot be ruled out entirely. Chief Justice William Rehnquist could have died on an election eve during a period of divided government rather than in an odd-numbered year during a period of unified government. But presidents since the nineteenth century have not just been unusually lucky.

An unanticipated side effect of changes in the structure of the government has systematically reduced the incidence of such vacancies. First, prior to the Twentieth Amendment the lame-duck period was much longer, creating more time during which vacancies might occur and making it more difficult to simply wait for the next president to fill any vacancies that might arise. The adoption of the Twentieth Amendment has reduced the odds of lame-duck vacancies and resultant high-risk, lame-duck nominations. Second, Congress took legislative steps in the twentieth century to encourage Justices, and federal judges generally, to retire rather than die in office by creating more generous pensions and terms of retirement.[49] These efforts have been more far-reaching in their consequences for the lower courts than for the Supreme Court, but even so the Justices are more willing to walk away from the job now than they once were.[50] Chief Justice Rehnquist's mode of departure was once the standard. Now Justice Sandra Day O'Connor's is not uncommon.

The failed lame-duck and late-term nominations were almost uniformly predictable given the political situations at the time that the vacancies arose. Absent the strategic miscalculation of the sort

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[48] Midterm elections have posed no special difficulties for the confirmation of Supreme Court nominees. It is the prospect of change in the nominating institution, not the confirming institution, that appears to matter.

[49] David N. Atkinson, *Leaving the Bench* (Kansas, 1999); Artemus Ward, *Deciding to Leave* 136–43 (SUNY, 2003).

[50] Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 Pol Beh 180, 181 (1988); Christopher J.W. Zorn and Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789–1992*, 22 Pol Beh 145, 154–56 (2000). See also James F. Spriggs II and Paul J. Wahlbeck, *Calling It Quits: Strategic Retirements on the Federal Courts of Appeals, 1893–1991*, 48 Pol Res Q 573, 588–91 (1995); Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J Emp L St 495 (2005).

TABLE 5
CAUSES OF VACANCIES RESULTING IN LAME-DUCK AND LATE-TERM NOMINATIONS

	Death	Resignation	New Seat	Unsuccessful Prior Nomination
Pre-1830	1	1	0	1
1831–1900	6	0	2	6
Post-1900	0	2	0	0

that caught up Warren, Johnson, and Fortas, few Justices would have chosen to step down from the bench given those conditions and thereby create the circumstances for an extended confirmation battle over a successor. The Justices can choose the time of their retirement, but they cannot choose the time of their death. Modern Justices looking at a divided government have generally chosen to retire a safe distance from future elections so as to minimize the likelihood that their seats would become entangled in election-year politics. As table 5 indicates, there have been only two late-term (and no lame-duck) nominations since 1900. The strategic miscalculation of the Warren retirement has already been noted. The other was the result of Charles Evan Hughes leaving the Supreme Court in order to claim the 1916 Republican presidential nomination. In those circumstances, Republican senators could hardly object to President Woodrow Wilson filling the vacant seat prior to the election. The GOP was simply willing to trade the Supreme Court seat for the apparent strength of a Hughes candidacy, which almost succeeded in unseating Wilson from the presidency. The number of late-term and lame-duck nominations in the period between 1830 and 1900 is also multiplied by the stubborn determination of two presidents, John Tyler and Millard Fillmore, to refuse to accept "no" for an answer from the Senate. Rather than facing political reality and accepting that the late-term vacancy would be filled by the next president, as Lyndon Johnson did after the Fortas nomination imploded, Tyler and Fillmore persisted in trying to find a nominee that the Senate would accept despite the political season.[51] Tyler's persistence was in fact partly rewarded when the Senate finally confirmed the lame-duck nomination of Samuel Nelson just days before James Polk's presidential inaugural.

[51] The one lame-duck nomination resulting from an unsuccessful prior nomination before 1830 was not the result of a Senate rejection but rather the result of John Jay declining to accept the post of Chief Justice to which he had been nominated and confirmed.

TABLE 6
SUPREME COURT NOMINATIONS BY TIMING AND PARTY CONTROL

	Divided Government		Unified Government	
	Late-Term	Not Late-Term	Late-Term	Not Late-Term
Pre-1900:				
Number confirmed	0	6	8	50
Number not confirmed	4	1	5	11
Post-1900:				
Number confirmed	0	12	1	44
Number not confirmed	0	3	1	2

C. "DIVIDED GOVERNMENT": A SECOND CUT

It is now appropriate to unpack the concept of party government to explain some of the apparent anomalies in the tables above. As table 1 indicates, divided government has been risky but not fatal for nominees, but table 2 also pointed out the fact that divided government was far more risky for nominees in the nineteenth century than it has been since. Why have nominations fared as well as they have under conditions of divided government? At the same time, table 3 included its own surprise in that not all lame-duck nominations during unified government have been successful. Taking into account the electoral calendar and looking more closely at the workings of divided and unified government will help explain these apparent anomalies.

Table 6 focuses our attention on how partisanship and timing intersect to facilitate or hamper the confirmation of Supreme Court nominees, and how that relationship has changed over time. As table 2 indicates, divided government presented extreme difficulties for nominations in the nineteenth century but has been much less of an obstacle since 1900. Table 6 indicates the reason for this. In the nineteenth century, presidents near the end of their terms made several attempts to place Justices on the Supreme Court even though the Senate was in opposition hands, and none of those attempts was successful. Since the nineteenth century, no president at the end of his term has attempted to appoint a Supreme Court Justice without also having same-party control of the Senate.[52] It is the combination of divided government and

[52] Eisenhower, for example, gave William Brennan a recess appointment, waiting until after his own reelection before putting Brennan's name before the Senate. Had Adlai Stevenson won the presidential election in 1956, Brennan would likely never have been converted into a formal nomination.

late-term appointments that has historically been fatal to Supreme Court nominations. In such circumstances, the Senate could reasonably expect to wait the president out.

Through most of American history, divided government was not an obstacle to Supreme Court nominations when the vacancies did not occur near a presidential election. Before 1969, there was only a single exception: Andrew Jackson's January 1835 nomination of Roger Taney to be Associate Justice. On the final day of the Twenty-Third Congress, the lame-duck but Whig-controlled Senate narrowly defeated the Taney nomination. The gesture was purely symbolic. The Whigs had lost control of the Senate in the midterm election of 1834. President Jackson had two more years in office and a friendly Senate on the way. There was little doubt that the president would soon be able to fill the seat. As it happened, John Marshall died before the Twenty-Fourth Congress assembled, so that when Taney was successfully renominated for the Court his appointment was to fill the role of Chief Justice rather than Associate Justice. It is difficult now to appreciate the depth of loathing the Whigs felt for Roger Taney at the time of his original nomination, and as a consequence just how exceptional his defeat on the Senate floor was. Taney had been Jackson's loyal lieutenant, serving first as his attorney general and helping to draft the veto messages that so inflamed partisan passions before the presidential elections of 1832.[53] It was these vetoes that first fed the formation of the Whig Party as an organized opposition to "King Andy" and the emerging Democratic Party.

Far more serious for Taney, however, were the events of 1833 and his involvement in the president's final moves against the Bank of the United States. Having vetoed the rechartering of the Bank in the summer of 1832 and been resoundingly reelected in the fall, Jackson announced his resolve in 1833 to remove the federal government's deposits from the Bank, crippling it. When his Treasury Secretary refused to go along with the plan, Jackson fired him and replaced him with Taney, who had already indicated his belief in the legality and sound policy of the removal plan. As acting Secretary of the Treasury, Taney immediately issued the necessary instructions, setting in motion what would become the

[53] Carl Brent Swisher, *Roger B. Taney* 190–97 (Macmillan, 1935); Charles Warren, 2 *The Supreme Court in United States History* 254–365 (Little, Brown, 1922).

financial panic of 1837.[54] The Whigs, apoplectic at what they took to be Jackson's most extreme abuse of executive power yet but unable to launch an impeachment without the cooperation of the Democratic House of Representatives, were reduced to passing an unprecedented resolution of censure in the Senate in March of 1834.[55] The Senate could, and did, refuse to confirm Taney as Treasury Secretary that summer. It was the first time the Senate had ever rejected a Cabinet nomination. The outgoing Whigs undoubtedly enjoyed the opportunity to take another swing at Taney when Jackson nominated him to the Supreme Court just a few months later. It is hard to imagine a comparable appointment in the modern era. Politically, it would have been like Gerald Ford nominating Richard Nixon to the Supreme Court instead of John Paul Stevens in 1975, or Bill Clinton resigning from the presidency after his 1998 impeachment and Al Gore immediately nominating him for a vacancy on the Court. Even so, Taney fell just three votes short of being confirmed to the Supreme Court just six months after the same Senate had rejected his confirmation as Treasury Secretary by a ten-vote margin.

By comparison, the rejection by Democratic Senates of the mid-term Supreme Court nominations of Republican presidents looks like a historically new level of activism in the exercise of the confirmation power. When he nominated Judge Clement Haynsworth Jr. in the fall of 1969, Richard Nixon had not yet reached the first anniversary of his inauguration as president. He was no lame duck, and the Democratic majority in the Senate could not expect to hold the position open for a president of their own party. The same situation prevailed when Nixon nominated G. Harrold Carswell after Haynsworth was defeated and when Ronald Reagan nominated Robert Bork in the summer of 1987. With the exception of the Taney nomination in 1835, presidents had not encountered significant Senate resistance to their Supreme Court nominations within divided government as such. The threat of ideologically based defeat of Court nominations, without an overhanging election, is a modern phenomenon.

As surprising, from a modern perspective, as the traditional deference of the Senate to presidential nominations during divided

[54] Robert V. Remini, *Andrew Jackson and the Bank War* (Norton, 1967).

[55] 10 Reg Deb 58 (1833); 13 Reg Deb 433–44 (1837).

government is the lack of deference to presidential nominations during unified government. Particularly striking are the five failed late-term nominations during unified government before 1900 shown in column 3 of table 6 (the one such failure since 1900 was Abe Fortas). The expectation would be that partisans would leap at the chance to entrench one of their own on the Supreme Court rather than leaving a vacancy for their successors to fill, burning the midnight oil if necessary as John Adams did with his appointments. The fate of the 1968 Fortas nomination is an indication that "unified government" can be a messy category. The importance of the "conservative coalition" of Republicans and Southern Democrats in Congress, a coalition that helped defeat Fortas, might call into question the easy classification of divided and unified government in the postwar period.[56]

If the conservative coalition complicates the concept of unified government in 1968, the partisan alignments during the five pre-1900 late-term defeats blow it apart. The last of the five came in February 1861, with President James Buchanan's nomination of Jeremiah Black to fill the vacancy left by the death of Justice Peter Daniel several months earlier. By 1861, the lame-duck Buchanan's Democratic majority in the Senate had evaporated as Southern senators resigned to join their home states in secession. At the time of Black's nomination, the Republicans held a one-seat advantage in the Senate, and Black was voted down in a straight party-line vote.[57]

The other four were nominations by President John Tyler, who presided over a government that was only nominally unified under a common party label. Tyler had been a prominent, if idiosyncratic, Virginia politician. Serving in the U.S. Senate during the Jackson administration, Tyler found himself no longer willing to support the president during the deposit removal crisis. Considering the strong support for Jackson in the Virginia legislature, however, Tyler felt honor-bound to resign from the Senate and allow the legislature to select a representative more in tune with their own commitments.[58] Constitutional scruples over executive power had made him a Whig in the Jacksonian era, but like others in the

[56] See Paul Frymer, *Ideological Consensus within Divided Party Government*, 109 Pol Sci Q 287 (1994).

[57] 11 *Journal of the Executive Proceedings of the United States Senate* 278 (1861).

[58] Warren, *Supreme Court in United States History* at 2:288 (cited in note 53).

South he was a "states' rights" Whig, or, as he later told the press, he was a "Jeffersonian Republican" who had never departed from the "principles of the old Republican Party."[59] He was recruited onto the bottom of the Whig presidential ticket in 1840 in order to help lure Southern conservatives like himself to cross party lines, and the Whigs did capture both the White House and Congress in that election.[60] President William Henry Harrison's death weeks after his inaugural put the self-conscious Jeffersonian constitutionalist into the Oval Office just as Congress under the leadership of Henry Clay and former president John Quincy Adams hoped to embark on an activist, nationalist program that depended on the constitutional sensibilities of John Marshall.

The relationship between the president and the congressional Whigs quickly deteriorated, with Tyler and Clay plotting against each other and with Adams, barely able to admit that Tyler even was the president, authoring reports in the House of Representatives calling for his impeachment.[61] Unable to reach a compromise, Tyler effectively gutted the Whigs' legislative program with his vetoes and was struggling to find supporters among Democrats and other Southern independents.[62]

By the time a vacancy opened up on the Court in the final year of his presidency, Tyler had essentially been written out of the party and could expect to receive no deference from the Senate majority. After the Senate rejected his first choice for the seat and another death on the Court created a second vacancy, the leading Whig paper declared that "better the bench be vacant for a year" than filled by a Tyler appointee.[63] Not one to be intimidated and with months still to go before his term of office would be over, Tyler was determined to try again. At one point the president was camped out in a Senate anteroom scribbling names on slips of paper to be passed on to the chamber floor as the Senate shot down one nomination after another, for the Supreme Court and for other offices.[64] One senator later recalled that "[n]ominations

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[59] Quoted in Oliver Perry Chitwood, *John Tyler* 191 (D. Appleton-Century, 1939).

[60] Robert Seager II, *And Tyler Too* 132–35 (McGraw-Hill, 1963).

[61] John Quincy Adams, *The Diary of John Quincy Adams* 522 (Longmans, Green, 1929) ("styles himself president"); Seager, *And Tyler Too* at 167 (cited in note 60).

[62] Robert J. Morgan, *A Whig Embattled* 38–55, 157–71 (Nebraska, 1954).

[63] *The U.S. Judiciary*, National Intelligencer (April 27, 1844), 2.

[64] Thomas H. Benton, 2 *Thirty Years' View* 630 (D. Appleton, 1865).

and rejections flew backwards and forwards as in a game of shuttlecock—the same nomination, in several instances, being three times rejected . . . within the same hour."[65] After the Democrat James Polk surprised the capital by beating Henry Clay in the presidential election of 1844, the Senate finally relented and accepted one of Tyler's Supreme Court nominations: New York chief justice Samuel Nelson. In the course of winning this one victory, Tyler racked up six failed Supreme Court nominations, including one "late term" and three "lame-duck" nominations.

Amazingly, the Tyler presidency was not unique in the nineteenth century. Andrew Johnson, the third vice president to ascend to the Oval Office upon the death of the president (Tyler was the first), was cut from similar cloth. Johnson was a nationalist protégé of Andrew Jackson's from Old Hickory's home state of Tennessee. Johnson was serving in the U.S. Senate when Tennessee seceded, and he was one of the few who chose to stay in Washington rather than follow his state into the Confederacy. His loyalty was later rewarded when Abraham Lincoln appointed him to be the military governor when Tennessee was recaptured for the Union. A minority president in 1860 and mired in a long internecine war, Lincoln needed to broaden his base in 1864 and help frame the war as a national effort rather than a partisan one. Like Tyler before him, Johnson was added to the "Union Party" ticket as a man whose constitutional scruples had led him to break from his party and his region.[66] And as with Tyler, the party managers got more than they had bargained for when that independent-minded token of ticket balancing assumed the presidency in 1865.

By the time Johnson sought to fill a vacancy on the Court in April 1866, he too was effectively a president without a party. Over the two prior months, the president had vetoed the key pieces of congressional Reconstruction and publicly denounced Republican congressional leaders as no better than the secessionists.[67] The Republicans responded by organizing a veto-proof majority in Congress and renouncing the president. By the fall, Johnson would be campaigning against congressional Republicans in the midterm elections of 1866 and trying to organize his own party under the

[65] Id at 2:629.

[66] Eric Foner, *Reconstruction* 44–45 (Harper & Row, 1989).

[67] Id at 240–49.

Union label.[68] Before then, however, the Senate simply ignored his nomination of Henry Stanbery (the reputed author of one of the veto messages) for the Supreme Court. Instead, the House and Senate began deliberations on a judicial reform bill that would eliminate not only the seat for which Stanbery had been nominated but the next seat that might become vacant as well, reducing the Court from ten Justices (where the Republicans had set it in 1863, when Lincoln still held the appointing power) to eight (it was brought back up to nine after the inauguration of Ulysses Grant).[69] Stanbery instead accepted an appointment to be Johnson's attorney general, and later served on the president's defense team at his impeachment. The rejection of Johnson's Supreme Court nominee, like those of Tyler's and Buchanan's, occurred during unified government only in a nominal sense.

Far from being a golden age of Senate activism and responsibility, the nineteenth century was an age of presidential misfortune. Much of the nineteenth-century Senate's record of bold rejections of Supreme Court nominations was solely the product of lame-duck presidents and divided government. In such circumstances, the modern Senate would undoubtedly be equally "bold." It is not the Senate that has changed; it is the circumstances of nomination.

At the same time, the modern Senate is bolder than its predecessors, and has broken from nearly two centuries of precedent in rejecting the midterm nominations of opposite-party presidents. The modern Senate is far more obstructionist during divided government than it was over the course of its history. It once took the nomination of a Roger Taney to trigger a nomination failure in an opposite-party, midterm Senate. It no longer does. Whatever else may be said of them, Clement Haynsworth and Robert Bork were no Roger Taney.

D. SUPREME COURT NOMINEES AND ORDINARY POLITICS DURING UNIFIED GOVERNMENT

The combination of the electoral calendar and divided government largely accounts for seventeen of the twenty-seven failed

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[68] Keith E. Whittington, *Constitutional Construction* 114–15 (Harvard, 1999).

[69] Warren, *Supreme Court in United States History* at 3:144–45 (cited in note 53); Friedman, 5 Cardozo L Rev at 22–24 (cited in note 46).

Supreme Court nominations. The remaining ten failed nominations occurred during genuinely unified governments that were not hampered by the electoral clock. Nearly all of these occurred before 1900—three before 1860, five more before 1900, and two since 1900. Although these nominations were made in what would seemingly be the most favorable circumstances, they were also made in circumstances in which the president's fellow partisans in the Senate had the luxury of sending the president back to the well, confident that a like-minded Justice would eventually be confirmed. In such circumstances, senators in the president's own party can afford to indulge secondary considerations about individual nominees. Particularly in the nineteenth century, the range of those secondary considerations was rather broad.

John Rutledge was the first Supreme Court nominee to be rejected by the Senate. His nomination by George Washington in 1795 was seemingly unobjectionable. Rutledge had already served on the Court as one of Washington's first picks in 1789, before resigning in order in 1791 to accept the job of chief justice in his home state of South Carolina. When John Jay stepped down from the position of Chief Justice, having been elected governor of New York while he was serving on a diplomatic mission in England, Washington returned Rutledge to the Court with a recess appointment in the summer of 1795. When his name officially came before the Senate in December, there had been nine Supreme Court confirmations, all by voice vote and without controversy. By then, however, Rutledge had become a controversial figure. The treaty that Jay had negotiated in England secured the peace and improved America's trading position, but it was widely perceived as to have conceded too much to England and to have done nothing about the emotional issue of the seizure of American ships and impressment of American sailors by the English navy. Sometimes violent demonstrations against the treaty erupted on the streets, the Washington administration was subject to caustic criticism in the press, and the House of Representatives nearly blocked the implementation of the treaty after the more accommodating Senate had ratified it.[70] While still in South Carolina, Rutledge had delivered an angry speech denouncing the treaty. Reports of the speech reached the nation's capital before Rutledge himself

[70] Elkins and McKitrick, *Age of Federalism* at 416–22 (cited in note 44).

did.[71] With the 1796 elections on the horizon and a bitter partisan split emerging over American foreign policy, support for the Jay Treaty was a litmus test issue for the Federalists. Rutledge was sent packing, with the same senators voting for his confirmation as had voted against the ratification of the treaty.[72]

In the spring of 1811, James Madison's nomination of Alexander Wolcott was turned down by the Senate. The death of William Cushing created a vacancy on the Court that would necessarily be challenging for Madison to fill. The expectation that the Justices would be drawn from the geographic circuit for which they would be responsible meant that the nominee would have to be drawn from New England. Although the Republicans had made headway in New England, it was still a Federalist section and an area of Republican weakness. It was as if George Bush were to limit himself to choosing a Supreme Court nominee from New Hampshire. There are Republicans to be found there, but the pickings are slim and they are not very representative of the party as a whole. The timing was not propitious either. The Jeffersonian embargo, unsuccessfully designed to keep the United States out of a war with Britain, hit the shipping and commercial interests of New England especially hard, and the scandal over the Yazoo land claims was still ongoing and tainted many of the region's best lawyers in the eyes of the Republicans.[73] Supporting this federal power over shipping was the critical issue for any Jeffersonian appointee from the region, but insistence on this principle further limited the field of possible candidates. Madison's top choices declined the job. Wolcott, a long-time custom-house collector, was undistinguished, but industrious, loyal, and free of scandal. Wolcott's energy in collecting the import duties and enforcing the embargo had left him deeply unpopular in his home region, and he was largely unknown in the rest of the country.[74] When

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[71] Id at 526–27.

[72] The bloc of ten senators was the same except that Georgia's James Jackson voted against the treaty (but was absent during the Rutledge vote) and South Carolina's Jacob Read voted for Rutledge (but was absent for the treaty vote). *Journal of the Executive Proceedings* at 1:196 (cited in note 57). In lobbying against Rutledge, Alexander Hamilton argued that the judge was "deranged." See Danelski, *Ideology and the Rejection of Bork* at 903 (cited in note 42).

[73] Warren, *Supreme Court in United States History* at 1:407 (cited in note 53).

[74] Id at 1:410–13; Morgan D. Dowd, *Justice Joseph Story and the Politics of Appointment*, 9 Am J Legal Hist 265, 275–76 (1965).

the New Englanders vigorously objected, the Republicans could not move themselves to rally to the cause, and the Senate sent him back to Connecticut.[75]

The third such failure before secession was James Polk's nomination of George Woodward at the end of 1845. Polk seemed little interested in the vacancy on the Court, which had carried over from the preceding Tyler administration. He had offered the position to his secretary of state, James Buchanan, but Buchanan eventually declined.[76] In choosing Woodward, a lower court state judge in Pennsylvania with no broad reputation, Polk followed the advice of his vice president, George Dallas, rather than his secretary of state. In choosing between the two Pennsylvania Democratic leaders in offering this political plum, however, the president's nomination of Woodward was seen as a slap at Buchanan.[77] Worse, it soon emerged that Woodward was a nativist, which was hardly a plus within what was generally the pro-immigrant party.[78] Enough Democrats defected to sink the nomination.

The five postbellum failures were each the result of political infighting. The era marked the highpoint of patronage politics, and presidents and senators engaged in several pitched battles across these decades over who would control the appointment power. Patronage was the lifeblood of party organizations, and appointments of all sorts were highly clientelistic. The struggle was most routinely over such lucrative posts as custom-house official and postmaster, but Supreme Court Justices and department secretaries were not immune from either the constant calculation of political power or the claims of prerogative of individual senators.[79]

President Grant lost three Supreme Court nominations in intraparty struggles. Grant came to the presidency on the strength of his celebrity as a victorious general, and the management of his fractious and demanding coalition proved not to be his strong suit. When Congress created a new seat on the Court in 1869,

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[75] The position eventually went to Joseph Story, who had little reputation beyond being a smart and ambitious young lawyer and consequently had little political baggage.

[76] Abraham, *Justices, Presidents, and Senators* at 80 (cited in note 29).

[77] Warren, *Supreme Court in United States History* at 2:420–21 (cited in note 53).

[78] Id at 2:421.

[79] See generally Wilfred E. Binkley, *President and Congress* 187–204 (Vintage, 3rd ed 1962); Sean Dennis Cashman, *America in the Gilded Age* 151–52 (Nebraska, 3rd ed 1993); Ari Hoogenboom, *Outlawing the Spoils* (Illinois, 1961).

Grant offered his trusted attorney general for the position. Ebenezer Hoar was a respected legal professional and reformer, and his nomination won plaudits from civil service reformers in the press. The nomination received the opposite reaction from the senators, who had already been repeatedly affronted by the attorney general on judicial appointments and civil service reform during his short tenure in the Justice Department.[80] Though it was immediately apparent that Hoar would not be confirmed, he was left to wait for nearly two months before he was finally voted down. At the beginning of his second term, Grant again turned to his attorney general, this time George H. Williams, to fill the position of Chief Justice. Williams had very different problems than Hoar, however. He had been a frontier lawyer in Oregon, and he was widely regarded as out of his depth in the role of attorney general, let alone of Chief Justice. Although the senators initially seemed willing to go along with the nomination, growing criticism from the press and the professional bar in the east convinced the nominee and the president to abandon the effort.[81] Within days, Grant submitted the name of his friend, Caleb Cushing, for the center seat. Cushing had impeccable credentials and unquestioned legal skills, but at seventy-four he was well above the normal age for a Supreme Court nominee and was widely seen as unprincipled and a political opportunist. It was an open question as to whether that would have been enough to stop his confirmation, but he became politically untouchable after the surprising revelation of an 1861 letter of recommendation for an acquaintance seeking a political job from Jefferson Davis, then the president of the Confederacy.[82] Such letters were the common currency of public life in the nineteenth century, but publicity was not kind to this particular example of the professional courtesies of politicians. His nomination was hastily withdrawn.

Grover Cleveland, who had managed to place two Justices on the Court without incident when the Senate was in Republican hands, lost his first two nominations with the Senate in Democratic hands. By 1893, presidents had largely won the constitutional

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[80] Warren, *Supreme Court in United States History* at 3:223–29 (cited in note 53); John S. Goff, *The Rejection of United States Supreme Court Appointments*, 5 Am J Legal Hist 357, 364–65 (1961).

[81] Warren, *Supreme Court in United States History* at 2:275–78 (cited in note 53).

[82] Id at 3:280–81; Goff, 5 Am J Legal Hist at 365–66 (cited in note 80).

struggle with the Senate over appointments and the civil service system was officially in place. Nonetheless, the Democratic senator from New York, David B. Hill, managed to outmaneuver the president when Cleveland sought to replace the deceased Justice Samuel Blatchford with another New Yorker. Cleveland and Hill, both former governors, were old rivals from New York state politics. Cleveland was a reformer, who had soon moved to the national stage. Hill was a machine politician, and as a U.S. senator he was a key player in New York politics.[83] Cleveland had hoped to ignore Hill's recommendations in order to make his own selections from the state. His first pick, William Hornblower, was a leader of the New York bar, but he had also recently exposed the electoral fraud of one of Hill's allies and implicated Hill in the process. In a short-handed holiday-season session of the Senate, Hill was able to rally a majority to his appeal for senatorial courtesy. Defiant, Cleveland immediately sent Wheeler Peckham's name forward. Peckham was a prominent corporate attorney, but he had also been involved in antimachine investigations and was even more offensive to Hill. The Senate again backed Hill.[84] In order to fill the position, Cleveland turned outside of New York entirely and turned senatorial courtesy in his favor, successfully nominating Senate majority leader Edward White of Louisiana to the Court. With the next vacancy, more than a year later, Cleveland gave in and nominated Hill's choice of Rufus Peckham, Wheeler's brother and someone who had stayed out of machine politics.

The two such failed nominations since 1900 reflect presidential missteps both familiar and distinct from the politics of the nineteenth century. Judge John Parker's nomination by Herbert Hoover in 1930 ran aground on the emerging shoals of interest-group politics. When Hoover selected the respected Republican circuit-court judge from North Carolina, the AFL and the NAACP launched an aggressive campaign to block his confirmation. The AFL regarded his decisions on the circuit court to be hostile to unions, and the NAACP argued that he was hostile to black interests, publicizing a statement from an earlier North Carolina gubernatorial campaign in which Parker endorsed black disen-

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[83] Herbert Bass, *"I Am a Democrat"* (Syracuse, 1961).

[84] Allan Nevins, *Grover Cleveland* 568–72 (Dodd, Mead, 1948); Friedman, 5 Cardozo L Rev at 52–54 (cited in note 46); Carl A. Pierce, *A Vacancy on the Supreme Court: The Politics of Judicial Appointment, 1893–94*, 39 Tenn L Rev 555 (1972).

franchisement. The combination was enough to swing some Progressive Republicans against Parker and defeat the nomination by two votes.[85] Both the involvement of organized interest groups and the focus on substantive issues related to the work of the Court distinguished Parker's failed nomination from others. With a handful of centrist senators holding the balance of power, the public campaign was able to weaken party loyalty enough to defeat the nomination even during a period of unified government, forcing Hoover to pull his coalition back together with the nomination of Owen Roberts. George W. Bush's recent nomination of Harriet Miers never reached the floor of the Senate, as her name was withdrawn when it became apparent that there was little enthusiasm among Republican senators for the little-known nominee who was close only to the president. With conservative interest groups at best conflicted about a nominee with weak credentials and no track record, support seemed to erode rather than grow as she made the rounds to visit individual senators.[86] Like U.S. Grant and George Williams in 1874, Bush and Miers decided not to test the loyalty of the Republican senators.

III. Lessons

Some have argued that the nineteenth century was a kind of golden age of Senate scrutiny of Supreme Court nominees. Just as Congress as a whole in this period seemed to take its responsibility for deliberating on the scope of its own constitutional powers and for evaluating the constitutionality of legislative proposals seriously, so the elevated rejection rate of Supreme Court nominees may suggest a Senate more engaged with the task of offering its advice and consent to the appointment of judges.[87] In sharp contrast to a modern "politics of deference" in which the Senate may have abdicated its role in the appointments process, the earlier Senate, it is said, exercised greater independence and

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[85] See Richard L. Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 Miss Valley Hist Rev 213 (1963); Richard Davis, *Electing Justice* 26–28 (Oxford, 2005); Maltese, *Selling of Supreme Court Nominees* at 49–51 (cited in note 35).

[86] Robin Toner, David D. Kirkpatrick, and Anne E. Kornblut, *Steady Erosion in Support Undercut Nomination*, NY Times (Oct 28, 2005), A16.

[87] See Donald G. Morgan, *Congress and the Constitution* (Harvard, 1966) (arguing that there has been a decline in responsibility in Congress for constitutional deliberation since the late nineteenth century).

was more activist in performing its constitutional function.[88]

There is little question that failed Supreme Court nominations were more common in the nineteenth century. Of the twenty-seven presidential nominations to the Supreme Court that have met with failure over the course of American history, twenty-one of them came before 1900, 78 percent of the total. A full quarter of all the Supreme Court nominations made in the nineteenth century failed to get through the Senate. By contrast, only 10 percent of the nominations made since 1900 have failed.

But this failure rate for Supreme Court nominations was not the only distinguishing feature of the nineteenth-century Senate. The period before the twentieth century was different in other ways as well that would not seem to make it an obvious model for contemporary confirmation politics. It is hard to judge the relative quality of deliberation in that period. Until the early twentieth century, it was routine for the Senate to conduct most of its discussion of appointments in executive session, closed to the public and reporters. It was only when the election of senators was thrown open to regular citizens, rather than state legislatures, that the Senate suddenly discovered the need to conduct its business in public. The first public hearing on a nomination and the first public appearance at a hearing of a judicial nominee did not occur until the twentieth century.[89] But neither did the nominee go to the Senate in private. Senators could seek out information about the nominee, but they could not expect to question the nominee himself.

Even presidents, in this age before easy long-distance communication and travel, could not expect always to meet the prospective nominee. Presidents also did not always do the advance spade work to ensure that a nominee would be broadly acceptable to the Senate, or even would be willing to accept the nomination. This gave rise to the rather peculiar phenomenon of the Supreme Court nominee who won confirmation but declined to serve. George Washington twice sent nominations to the Senate and received its assent to Supreme Court appointments only to be later informed that the individuals did not want the job. Four other presidents had the same difficulty with nominees (the last in 1882).

Divided government (in effect, if not always in name) has ac-

[88] See Tulis, 47 Case W Res L Rev (cited in note 5). See also Mariah Zeisberg, *The Constitution of Conflict* (Ph.D. diss, Princeton University, 2005).

[89] Gerhardt, *The Federal Appointments Process* at 67 (cited in note 21).

counted for most failed Supreme Court nominations over the course of American history. At times, the partisan division has been nearly pathological, with Senates resolving to block essentially any nominee that a president might put forward (as with party apostates John Tyler and Andrew Johnson) or spitefully delaying the confirmation of particularly hated nominees (as with Roger Taney).[90] More often, divided government has operated to block nominees when it is expected that an intervening election will soon resolve the disagreement. Divided government has meant that lame-duck and late-term presidents could not expect to fill any vacancies that might arise in the remaining months of their term of office. When a change of administration is not imminent, divided government has historically not been an obstacle to presidents placing their choice of Justice on the Court. Whether out of strategic calculation, a broader sense of deference, or simple approval of the individuals the presidents have chosen, Senate majorities have generally not tried to exercise a veto over the Supreme Court nominations of opposite-party presidents.

Divided government in recent decades has been different. The defeat of Haynsworth, Carswell, and Bork in the Nixon and Reagan administrations were the first, and thus far only, instances in which the party controlling the Senate rejected the nominee of the opposite party controlling the White House without an election in sight. Within the context of "normal" divided government, the modern Senate has been, by historical standards, extraordinarily activist in evaluating Supreme Court nominees. Consequently, this has also been the first era in which Supreme Court nominations failed for primarily ideological reasons, because the party that controlled the Senate was hostile to the jurisprudential goals of the president and was willing therefore to veto presidential choices for the Supreme Court. Somewhat surprisingly, divided government had historically worked to free presidents, at least until late in their terms, to choose as they would from the ranks of their own partisans. The modern Senate has instead shrunk the range of presidential discretion during divided government, attempting to cut off the farther ideological wing of the president's coalition from the available pool of Supreme Court nominees. During the Nixon administration, that meant pull-

[90] See also Silbey, *Divided Government in Historical Perspective* at 14–17 (cited in note 33) (characterizing early episodes of divided government as ones of "disarray" and "vicious acrimony").

ing back from the "Southern strategy" and largely abandoning the search for "strict constructionists." During the Reagan, Bush, and Clinton administrations, that meant looking for more centrist nominees or stratagems for shielding nominees from normal senatorial scrutiny.

Senate confirmation activism in the nineteenth century came in the context of unified rather than divided government and was largely disconnected from jurisprudential concerns. Presidents were frequently blocked from appointing their first choice to the Supreme Court when their own party controlled the Senate. With the Senate safely in friendly hands, party discipline could be relaxed and senators did not need to rally around their president's nominee. Instead, the Senate in such circumstances frequently applied litmus tests of its own, and those litmus tests were usually political rather than jurisprudential. Nominees could not embarrass the party on touchy electoral issues, like the Jay Treaty or nativism, and they could not offend the parochial interests of powerful individual senators. The Senate has sometimes acted as a kind of quality control under such circumstances, forcing presidents to withdraw nominees who come under attack from the outside as unqualified, but they have hardly been diligent or systematic in performing that function.

It is this sort of activism that has declined since the nineteenth century, with only a tiny fraction of nominees failing to be confirmed by same-party presidents since the days of Grover Cleveland. Since the collapse of what Woodrow Wilson dubbed "congressional government" at the end of the Gilded Age, senators have largely deferred to presidents of their own party when it comes to the selection of Supreme Court Justices.[91] Supreme Court appointments within unified government have become a presidential prerogative, requiring little consultation or consideration of senatorial interests. It requires a dramatic misstep (Miers) or a faltering party (Parker and Fortas) to lose a nominee to a same-party Senate. This shift in power within the political parties from the Senate to the president has been accompanied by an increased public focus of jurisprudential credentials and commitments and the near eclipse of confirmation debate over issues about the nominee that cannot be packaged as relevant to the evaluation of "judicial character."

After the Senate confirmation of John Roberts and Samuel Alito,

[91] Woodrow Wilson, *Congressional Government* (Houghton, Mifflin, 1885).

some wondered whether the Democratic strategy for resisting President Bush's Supreme Court nominations had failed.[92] For the Democrats to have been able to defeat the president's nominations, without the help of a major gaffe from the nominees themselves, from their position in the minority would have been truly exceptional. The willingness of a large number of Democratic senators to cast votes against Roberts and Alito despite the fact that their confirmations were assured marks an escalation in the intensity of the ideological conflict surrounding Supreme Court appointments. There is now apparently more to be gained politically from being seen futilely taking a stand against the opponent's nominee than with showing support for a new Supreme Court Justice, for politically tarring the Supreme Court rather than rallying behind it.

The lesson of the Bork nomination, and the broader experience of recent decades, is that the opposition party can and will reject Supreme Court nominees when they control the Senate. The opposition party has never defeated a president's Supreme Court nominee from a minority position. The roots of failure for Supreme Court nominations are to be found in the Senate's majority. It would have been truly unprecedented for the Senate to have failed to confirm Roberts or Alito given the circumstances of their nominations and the characteristics of the nominees. It would no longer be surprising, however, if these same nominations would have failed had they been made during a period of Democratic control of the Senate. The question then becomes how determined a president is to press his natural advantages in the appointments process and how narrowly he defines victory. The modern, more aggressive Senate has heightened the stakes for Supreme Court nominations during periods of divided government. Presidents who primarily want to avoid confirmation battles with the Senate will have to cede ground to the other party in choosing a nominee. Presidents who value placing their own choice on the Court will have to be prepared for an extended fight, and the possibility of making multiple nominations for a vacancy.

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[92] See John Crea, *After Alito, Liberal Groups Look to Reload*, Legal Times (Feb 27, 2006), 18; Lois Romano and Juliet Eilperin, *Republicans Were Masters in the Race to Paint Alito, Democrats' Portrayal Failed to Sway the Public*, Wash Post (Feb 2, 2006), A1; Seth Stern, *A Risky Strategy for Judging Judges*, CQ Weekly Report (Jan 23, 2006), 218.

APPENDIX A

FAILED SUPREME COURT NOMINATIONS, 1789–2006

Nominee	President	Date of Nomination	Divided Government	Senate Action
John Rutledge	G. Washington	Dec. 10, 1795	No	Rejected
Alexander Wolcott	J. Madison	Feb. 4, 1811	No	Rejected
John Crittenden	J. Q. Adams	Dec. 18, 1828	Yes	Postponed
Roger Taney	A. Jackson	Jan. 15, 1835	Yes	Postponed
John Spencer	J. Tyler	Jan. 9, 1844	No*	Rejected
Reuben Walworth	J. Tyler	March 13, 1844	No*	Tabled
Edward King	J. Tyler	June 5, 1844	No*	Tabled
Reuben Walworth	J. Tyler	Dec. 10, 1844	No*	Tabled
Edward King	J. Tyler	Dec. 10, 1844	No*	Tabled
John Read	J. Tyler	Feb. 8, 1845	No*	No Action
George Woodward	J. Polk	Dec. 23, 1845	No	Rejected
Edward Bradford	M. Fillmore	Aug. 21, 1852	Yes	Tabled
George Badger	M. Fillmore	Jan. 10, 1853	Yes	Postponed
William Micou	M. Fillmore	Feb. 24, 1853	Yes	No Action
Jeremiah Black	J. Buchanan	Feb. 6, 1861	No*	No Action
Henry Stanbery	A. Johnson	April 16, 1866	No*	No Action
Ebenezer Hoar	U.S. Grant	Dec. 15, 1869	No	Rejected
George Williams	U.S. Grant	Dec. 2, 1873	No	Withdrawn
Caleb Cushing	U.S. Grant	Jan. 9, 1874	No	Withdrawn
William Hornblower	G. Cleveland	Dec. 6, 1893	No	Rejected
Wheeler Peckham	G. Cleveland	Jan. 22, 1894	No	Rejected
John Parker	H. Hoover	March 21, 1930	No	Rejected
Abe Fortas	L. Johnson	June 26, 1968	No	Withdrawn
Clement Haynsworth	R. Nixon	Aug. 18, 1969	Yes	Rejected
G. Harrold Carswell	R. Nixon	Jan. 19, 1970	Yes	Rejected
Robert Bork	R. Reagan	July 7, 1987	Yes	Rejected
Harriet Miers	G. W. Bush	Oct. 7, 2005	No	Withdrawn

SOURCES.—U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, various editions; Party Division in the Senate, 1789–Present (http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm).

* White House and Senate only nominally under same-party control.