The Case for Returning Politicians to the Supreme Court

Robert Alleman

Jason Mazzone

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Robert Alleman and Jason Mazzone, The Case for Returning Politicians to the Supreme Court, 61 Hastings L.J. 1353 (2010). Available at: https://repository.uchastings.edu/hastings_law_journal/vol61/iss6/3
The Case for Returning Politicians to the Supreme Court

ROBERT ALLEMAN* and JASON MAZZONE**

In the past few decades, prior service in the federal judiciary has become an increasingly important qualification for appointment to the Supreme Court. As a result, the Court has lost one kind of Justice who was very nearly a constant on the Court for 170 years: the politician who joins the Court after distinguished and prominent service in public life. Politicians of national prominence should be returned to the Supreme Court. These statesmen give legitimacy to the Court in an age when confirmation hearings are unrevealing. They have a history of accountability on concrete legal and political issues. They bring wisdom and skills that can improve the work of the Court. Today’s Supreme Court interprets and reviews statutes and decides issues of executive power without any Justice with experience voting on legislation or serving as a cabinet member. Former politicians can enhance the Court’s interactions with the other branches of government and predict and manage the political fallout from unpopular decisions.

* J.D., Brooklyn Law School, 2010.
** Gerald Baylin Professor of Law, Brooklyn Law School. The Brooklyn Law School Dean’s Summer Research Program provided generous support for the preparation of this Article.
INTRODUCTION

On February 1, 2006, with the arrival of Samuel Alito to replace Sandra Day O'Connor, the Supreme Court of the United States became staffed entirely with former federal circuit judges. This was the first time in the Court's history that all of the Justices had previously served on a...

---


circuit court.\textsuperscript{3} O’Connor’s departure also left the Court without a single member who had ever been elected to public office.\textsuperscript{4} With Sonia Sotomayor, who served for seventeen years on the circuit and district courts in New York (and whose only other government service was five years as a prosecutor),\textsuperscript{5} the Court today also consists entirely of former circuit judges, none of whom has held elected office.

These developments represent the culmination of a trend. In the past few decades, prior service in the federal judiciary has become an increasingly important qualification for appointment to the Supreme Court. Since the early nineteenth century, there have been members of the Court who were previously federal judges. However, until very recently, lower court judges who were appointed to the Court had also typically served in other public positions that were of greater prominence than the prior judgeship. Increasingly, service as a federal judge has become the most significant position Supreme Court nominees have held. The job of Supreme Court Justice has become a professional occupation, requiring prior judicial experience—and the more the better. The Court has, in other words, become a bureaucracy.

At the press conference in which he introduced Sotomayor as his nominee, President Barack Obama announced that “[w]alking in the door she would bring more experience on the bench, and more varied experience on the bench, than anyone currently serving on the United States Supreme Court had when they were appointed.”\textsuperscript{6} Soon thereafter, the White House put out the message that “[i]f confirmed, Sotomayor would bring more federal judicial experience to the Supreme Court than any Justice in 100 years . . . .”\textsuperscript{7} President George H.W. Bush viewed service on the circuit court as so essential to marketing his two nominees, Clarence Thomas and David Souter, that he first nominated them to the circuit courts (the D.C. Circuit and the First Circuit, respectively), where they served for very short periods prior to elevation.\textsuperscript{8} Promising...
candidates without prior federal service are, in this manner, laundered through the circuit courts. On occasion, the importance of service on a circuit court has also produced confirmation battles over circuit court nominees when senators have perceived that the President is positioning the nominee for promotion. Miguel Estrada, Janice Rogers Brown, Priscilla Owen, and Sonia Sotomayor all faced opposition on this basis.9

As the Supreme Court has become filled with former judges, it has lost one kind of Justice who was very nearly a constant on the Court for 170 years: the politician who joins the Court after distinguished and prominent service in public life. The last Justice of this kind to be appointed was Earl Warren.10

Politicians of national prominence, we argue, should be on the Supreme Court. These statesmen give legitimacy to the Court in an age when confirmation hearings are unrevealing. They bring a clear record of positions on political issues that may better inform the public of the direction they may take as Justices charged with determining the meaning of our Constitution. They also bring wisdom and skills that vastly improve the work of the Court. There are numerous examples of the impact of statesmen upon the Court. John McLean, author of the powerful dissent in *Dred Scott*,11 was Postmaster General.12 William Howard Taft, the twenty-seventh President and later tenth Chief Justice, created the Judicial Conference,13 secured passage of the 1925 Judiciary Act,14 and persuaded Congress to give the Court the magnificent building in which it now sits.15 Robert Jackson, dissenter in *Korematsu*16 and author of the framework for assessing presidential claims of authority in


10. See infra Table A.


12. See infra Table A.


14. *Id.*

15. *Id.* at xviii–xix.

emergencies," was Attorney General and Solicitor General.\textsuperscript{17} Former Senator Hugo Black was the Court's most able student of the incorporation of the Bill of Rights.\textsuperscript{19} Earl Warren, former Governor of California, was the reason the Court spoke unanimously in \textit{Brown}.\textsuperscript{20} Justices like these would contribute much to a Supreme Court that, today, plays an important policymaking role and whose Chief has vast administrative responsibilities.\textsuperscript{21} Observing that when he joined the Court there were three Justices with no prior judicial experience and now there are none, Justice Scalia has argued that "it's good for the [C]ourt to have people of varying [professional] backgrounds."\textsuperscript{22} We agree.\textsuperscript{23} With

\begin{itemize}
  \item Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654–55 (1952) (Jackson, J., concurring).
  \item See infra Table A.
  \item Adamson v. California, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting).
  \item \textit{Brown v. Bd. of Educ.,} 347 U.S. 483 (1954); see Jim Newton, \textit{Justice for All: Earl Warren and the Nation He Made} 326 (2006) ("\textit{Brown v. Board of Education} had many contributors, but in the end it was Warren's feat. Its unanimity was his singular accomplishment.").
  \item Scalia was not the first to observe that the Court lacks Justices without prior judicial experience, and while we offer a unique approach, we are not the first to call for politicians. See, e.g., \textit{David Alistair Yalof, Pursuit of Justice: Presidential Politics and the Selection of Supreme Court Nominees} 170 (1999) ("[F]ederal circuit court judges have become the 'darlings' of the selection process . . ."); Lee Epstein, Jack Knight & Andrew D. Martin, \textit{The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court}, 91 Cal. L. Rev. 903, 966 (2003) ("Largely as a result of th[e] norm of prior judicial experience, today's Court, while growing more diverse in some dimensions, is becoming less so on the dimension of career diversity." (footnote omitted)); Herbert A. Johnson, \textit{Comments in Reply}, 56 S.C. L. Rev. 451, 455 (2005) ("All of our greatest chief justices—Marshall, Taft, Hughes, and Warren—carried political experience onto the Supreme Court bench. A background of governmental experience and political wisdom would seem to be an essential ingredient for preeminence in this office." (footnote omitted)); Timothy P. O'Neill, \textit{"The Stepford Justices": The Need for Experiential Diversity on the Roberts Court}, 60 Okla. L. Rev. 701, 735 (2007) ("[W]e need to return to a tradition . . . that saw . . . justices coming to the Court with rich backgrounds in the legislative and executive, as well as the judicial, branch. We need some justices with the 'people skills' of politicians, as well as some justices coming straight from the legal academy. We need some justices with 'street smarts' as much as we need some justices who are intellectuals."); Norman J. Ornstein, \textit{Clinton Should Look to Another Member for Court Opening}, Roll Call, Apr. 25, 1994, at 5 ("Nothing could do more to foster appropriate relations and harmony among the branches, and to create a better process of judicial decision-making, than to fill the Court's vacancy with a savvy and experienced Member of Congress."); D.W. Miller, \textit{Verbatim}, Chron. Higher Educ., Sept. 24, 1999, at A28 ("If they're [the Justices] going to settle politically charged cases, it seems to me the relevant expertise is politics. If you go back to the Supreme Court of the '40s and '50s, Justices had substantial experience: Earl Warren[,] Hugo Black[,] Felix Frankfurter[,] Robert Jackson. Today we have these kind-of virgins—nine Justices whose cumulative political experience is slight." (quoting Judge Richard Posner) (internal quotations omitted)); see also Richard A. Posner, \textit{An Affair of State: The Investigation, Impeachment, and Trial of President Clinton} 13 (1999) ("An important lesson [of the Supreme Court's decisions upholding the independent counsel law and allowing Paula Jones's suit against President Clinton to proceed before he left office] is the inability of a Supreme
President Barack Obama likely to have additional opportunities to name Supreme Court Justices, he should look beyond the circuit courts and restore the politician's place on the Court.

Parts I and II trace the ways in which the modern Supreme Court has become bureaucratized. Part I traces the recent increase in Supreme Court appointees from the circuit courts and sets forth the features of bureaucratic organization that characterize the modern judiciary. Part II traces the corresponding disappearance of politicians from the Court. Part III sets out the costs that this bureaucratization entails. Part IV examines the benefits of having distinguished politicians on the Court and argues in favor of returning politicians to the Court today. We conclude by suggesting how the President could go about selecting politicians for the Court.

I. THE RISE OF THE BUREAUCRATIC COURT

The Constitution does not require that Supreme Court Justices be lawyers, and no federal statute has ever required legal training for membership on the Court. Nonetheless, all Justices have been lawyers. However, only recently has prior service as a federal judge been viewed as a desirable qualification for service on the Supreme Court. Thirty-three Supreme Court Justices have previously served on a lower federal court.

Of these, sixteen Justices were appointed in the second half of the twentieth century, and eleven have been appointed since 1970. The first Justice to have previously served on the federal bench was Robert Trimble, who, when appointed in 1826, had served for Court none of whose members has substantial political experience to deal adequately with cases that have a heavy political charge.

24. See generally U.S. CONST. art. III; see also WILLIAM D. BADER & ROY M. MERSKY, THE FIRST ONE HUNDRED EIGHT JUSTICES 7 (2004) ("[N]either the Constitution nor acts of Congress have ever required a legal background for membership on the Supreme Court . . . ."); Adrian Vermeule, Should We Have Lay Justices?, 59 STAN. L. REV. 1569, 1570 (2007) ("By 'lay Justices' I mean Justices of the Supreme Court of the United States who are not accredited lawyers. Currently the number of lay Justices is zero, although there is no constitutional or statutory rule that requires this.").

25. See supra note 24, at 1574 ("In the United States, no nonlawyer has ever served on the federal Supreme Court in the modern era. The qualifier 'in the modern era' refers to the era of accredited law schools and legal requirements that students attend such a school, requirements that became universal around 1950. Even before the modern rules took hold, however, every person nominated to the Supreme Court had received substantial legal training, perhaps by way of apprenticeship or study towards a bar exam. In that sense, we can drop the qualifier and just say that no nonlawyer has ever served on the Court.").

26. See infra Table A.

27. See infra Table A.
nine years on the district court in Kentucky.28 Of the fifty-eight Justices confirmed before the end of the nineteenth century—from James Wilson to Joseph McKenna—just nine Justices, slightly more than fifteen percent, previously served as a federal judge.29 By contrast, of the seventeen Justices confirmed since 1965—the period running from the appointment of Abe Fortas to the appointment of Sonia Sotomayor—thirteen Justices (or seventy-six percent) came from a circuit court, and five of those came from the D.C. Circuit.30 Of the forty-one members of the Court with no prior judicial experience at all, thirty-one were appointed before 1940.31 Yet even these numbers do not tell the whole story. It is not just that recent Justices are more likely to have come from the circuit courts: They also are less likely to have served in any other significant governmental position. While several members of the current Supreme Court have served in government, only two have held prominent political posts: Samuel Alito, who was the United States Attorney for New Jersey,32 and Clarence Thomas, who headed the Equal Employment Opportunity Commission.33 This is a stark departure from the credentials of earlier nominees who served on the lower courts. For example, Peter Daniel, the twenty-eighth Justice, was a federal district court judge, but also a former Virginia legislator and Lieutenant Governor of Virginia.34 William Day, the fifty-ninth Justice, was both a judge on the Sixth Circuit and the U.S. Secretary of State.35 Sherman Minton, the eighty-seventh Justice, served as a circuit court judge and a fiercely partisan U.S. Senator.36 The last sitting Senator to join the Court was Harold Burton, appointed by Harry Truman in 1945.37 It was also once not uncommon to give up a position on a lower federal court to serve in political office before being named to the Supreme Court. Joseph McKenna resigned from the Ninth Circuit after five years to serve in the McKinley

29. See infra Table A.
30. See infra Table A.
31. See infra Table A.
34. See infra Table A; see also The Supreme Court Justices: Illustrated Biographies, 1789-1993, at 137–38 (Clare Cushman ed., 1993).
35. See infra Table A; see also The Supreme Court Justices, supra note 34, at 293.
36. See infra Table A; see also The Supreme Court Justices, supra note 34, at 432–33.
37. See infra Table A; see also The Supreme Court Justices, supra note 34, at 418.
administration. Fred Vinson, named to the U.S. Court of Appeals for the D.C. Circuit in 1937, gave up his judgeship in 1943 to serve in the Roosevelt Administration as Director of the Office of Economic Stabilization, Administrator of the Federal Loan Agency, and Director of the Office of War Mobilization and Reconversion; at the time he was named to the Court, Vinson was serving as Truman's Secretary of the Treasury. The last Supreme Court Justice who left a lower federal court to serve in the government was Thurgood Marshall, who resigned from the Second Circuit to become Solicitor General.

The anomaly of the composition of today's Court is even more apparent when it comes to the position of Chief Justice. Before William Howard Taft, who was a judge on the Sixth Circuit for eight years, became the tenth Chief Justice in 1921, no Chief Justice had ever been a judge on a lower federal court. Taft, of course, was no mere circuit court judge. He was Solicitor General before he became a circuit court judge and left his judgeship to become Governor of the Philippines, Secretary of War, and then President of the United States. Aside from Taft, only three of the nation's seventeen Chief Justices had been lower federal judges before their nomination, all recent: Fred M. Vinson (thirteenth), Warren E. Burger (fifteenth) and now John G. Roberts (seventeenth). Historically, instead of service on a lower court, almost all of the Chief Justices had distinguished political careers: as Attorney General (Stone, Taney), Secretary of the Treasury (Taney, Chase), Secretary of State (Marshall), Congressman (Marshall), Senator (Ellsworth, Chase, Chase, 

38. See The Supreme Court Justices, supra note 34, at 283–84.
39. See id. at 423–24.
40. See id. at 479.
41. See generally infra Table A. Nine Chief Justices preceded Taft: Jay, Rutledge, Ellsworth, Marshall, Taney, Chase, Waite, Fuller, and White. BADER & MERSKY, supra note 24, at 76–78. None of them served as either a federal circuit judge or trial judge. The Supreme Court Justices, supra note 34, at 1–3, 6–9, 11–14, 46–49, 62, 116–18, 191–94, 211–12, 246–49. Nine of the seventeen Chief Justices had their first judicial experience on the Supreme Court. See BADER & MERSKY, supra note 24, at 8.
42. See The Supreme Court Justices, supra note 34, at 342–43.
43. Seven Chief Justices have succeeded Taft: Hughes, Stone, Vinson, Warren, Burger, Rehnquist, and Roberts. Roberts served on the D.C. Circuit. See infra Table A. Warren had no prior judicial experience. See infra Table A. Vinson served on the D.C. Circuit and the Emergency Court of Appeals. The Supreme Court Justices, supra note 34, at 423. Burger served on the D.C. Circuit as well. Id. at 482. Hughes had already served on the Supreme Court, and Rehnquist and Stone were elevated from associate's seats, though none of these three had served in a judicial position prior to joining the Supreme Court. See id. at 306, 365, 500.
44. The Supreme Court Justices, supra note 34, at 362.
45. Id. at 117.
46. Id. at 118.
47. Id. at 193.
48. Id. at 63.
49. Id.
50. Id. at 48.
RETURNING POLITICIANS TO THE SUPREME COURT

White\(^{52}\), Governor (Chase,\(^{53}\) Hughes,\(^{54}\) Rutledge,\(^{55}\) Warren\(^{66}\), or in other prominent positions.\(^{57}\)

The emergence of a circuit court judgeship as a virtual prerequisite for service on the Supreme Court parallels the general evolution in the legal profession towards more rigid qualifications. As the profession itself has become more specialized, the notion of the lawyer—or even judge—as a generalist has faded as well.\(^{58}\) Indeed, although every Justice has been a lawyer, it was not until the appointment of Charles Whittaker in 1957 that all nine members of the Supreme Court were law school graduates.\(^{59}\) Until the late nineteenth century, most people entered the legal profession by reading law under the supervision of an experienced lawyer.\(^{60}\) Holmes was the first Justice to have a “modern” law degree (a Harvard LL.B., Class of 1866),\(^{61}\) but not all Justices since the advent of the modern law school have had a degree.\(^{62}\) Robert H. Jackson, born in 1892, was the last Justice to serve without a law degree, though he completed a two-year course at Albany Law School in a year.\(^{63}\) The trend of selection of Supreme Court Justices from the circuit courts thus appears consistent with the profession’s trend on the whole toward increased standardization and specialized training.

The emergence of a “professional Justice” is also demonstrated by the fact that for the modern Supreme Court Justice, there are no jobs after the Supreme Court. Earlier Justices did not necessarily view appointment to the Court as the final line on their resumes: John Jay resigned as Chief Justice in 1795 to become Governor of New York and served two three-year terms in that position.\(^{64}\) William Cushing, the longest serving of Washington’s six original Justices, ran while on the Court against Samuel Adams in the 1794 Massachusetts gubernatorial

\(^{51}\) Id. at 192.
\(^{52}\) Id. at 272.
\(^{53}\) Id. at 192.
\(^{54}\) Id. at 308.
\(^{55}\) Id. at 7–8. Rutledge was elected “President” of the Republic of South Carolina in 1776; the position was renamed “Governor” under the 1778 Constitution. Id.
\(^{56}\) Id. at 437.
\(^{57}\) See infra Table A.
\(^{58}\) See Edward K. Cheng, The Myth of the Generalist Judge, 61 STAN. L. REV. 519, 525 (2008) (“The . . . legal profession[]], which for years grappled with specialization, [is] today remarkably specialized, particularly at the most elite levels of practice.”).
\(^{59}\) See BADER & MERSKY, supra note 24, at 10.
\(^{61}\) See BADER & MERSKY, supra note 24, at 10.
\(^{62}\) See THE SUPREME COURT JUSTICES, supra note 34, at 406–07.
\(^{63}\) Justice Jackson read onto the New York bar in 1913. Id. at 406.
\(^{64}\) Id. at 4.
election.\textsuperscript{65} Smith Thompson, former Secretary of the Navy, ran for governor of New York as a sitting Justice in 1828.\textsuperscript{66} John McLean, whose career as Associate Justice pre-dated the Taney period and almost saw the end of the same, was Postmaster General (a powerful and significant political appointment at the time) under Monroe, Adams, and Jackson.\textsuperscript{67} After Jackson named McLean to the Court in 1829, he was presidential candidate four times and for four political parties during his thirty-two-year tenure on the bench—first as an Anti-Mason, then as an Independent, then as a Whig and a Free-Soiler, in 1842, and finally as a Republican in 1856.\textsuperscript{68} Salmon Chase angled for the Democratic presidential nomination in 1868.\textsuperscript{69} David Davis resigned from the Supreme Court in 1877 to represent Illinois in the U.S. Senate.\textsuperscript{70} Charles Evans Hughes, who was serving as Governor of New York at the time of his appointment to the Court, resigned his post to accept the Republican nomination for President in 1916.\textsuperscript{71} (President Herbert Hoover reappointed Hughes in 1930, this time as Chief Justice.) Prominent New Deal Senator James Byrnes resigned from the Court after fifteen months to become Director of the Office of Economic Mobilization in 1942,\textsuperscript{72} he would soon oversee the domestic war effort as head of the Office of War Mobilization and later become Secretary of State and Governor of South Carolina.\textsuperscript{73}

To a striking degree, today’s judiciary has the features that Max Weber identified as characteristic of bureaucratic organization. According to Weber, the following features distinguish bureaucratic organizations from traditional administrative forms: (1) jurisdictional areas are clearly specified with rules defining the regular activities of

\begin{itemize}
\item \textsuperscript{65} See Tom W. Campbell, Four Score Forgotten Men: Sketches of the Justices of the U.S. Supreme Court 42 (1950).
\item \textsuperscript{66} The United States Supreme Court: The Pursuit of Justice 522 (Christopher Tomlins ed., 2005).
\item \textsuperscript{67} Henry J. Abraham, Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II 78 (2008). McLean’s own work furthered the power and prestige of his office; he “proved to be an exceptionally able administrator, popular with his employees. He greatly expanded the number of routes and deliveries, [and] established more than 3,000 new post offices . . . . He converted an operational loss of more than $150,000 a year . . . . to a net profit of $100,000 by 1827. The service became the largest department of government, employing almost 27,000 people by 1828.” The Supreme Court Justices, supra note 34, at 103.
\item \textsuperscript{68} Abraham, supra note 67, at 79.
\item \textsuperscript{69} The Supreme Court Justices, supra note 34, at 194.
\item \textsuperscript{70} Id. at 185.
\item \textsuperscript{71} Charles Evans Hughes, The Autobiographical Notes of Charles Evans Hughes xvi, xix (David Joseph Danelski & Joseph S. Tulchin eds., 1973); see also The Supreme Court Justices, supra note 34, at 308.
\item \textsuperscript{72} Irving Stone, They Also Ran: The Story of the Men Who Were Defeated for the Presidency 137 (1943).
\item \textsuperscript{73} The Supreme Court Justices, supra note 34, at 404-05.
\item \textsuperscript{74} Id. at 405.
\end{itemize}
personnel as official duties; (2) the organization is arranged hierarchically with supervision of subordinates by superiors, but the scope of superiors’ authority is circumscribed; (3) a system of abstract rules governs official actions, these rules are stable and can be learned, and official decisions are recorded in permanent files; (4) the means for carrying out administrative functions (such as equipment and privileges) belong to the office not the officeholder, and personal property is demarcated from official property; (5) officials are selected on the basis of technical qualifications, appointed rather than elected, and compensated by salary; (6) employment in the organization is a lifetime career, with the employee (after a trial period) gaining a tenured position with salary protection, protection from arbitrary dismissal, and a pension upon retirement.  

The first four of these features clearly apply to the modern judiciary and require only brief mention. The courts operate under a fixed jurisdiction. Within the judicial branch, functions are defined and distributed among professionals who are arranged hierarchically: appellate judges, trial judges, magistrates, clerks, administrative assistants, courtroom deputies, stenographers, and marshals. The courts are rule-bound and decisions are recorded and often published. There are clear divisions between the property that belongs to the court and is used for official business and that which is personal property.

More significant for our purposes are the characteristics of the individuals who staff the courts and, in particular, the path those individuals take to the Supreme Court. With the Court staffed by former lower court judges, it conforms closely to the Weberian model: Lower court judges advance through the ranks on the basis of technical competence, and judicial service comes to an end only with death or retirement. Earlier courts were quite different. In the past, because many seats were filled by politicians, lower court judges could not reasonably have expected to be on a career path to the Supreme Court. Chief Justice Rehnquist recalled advice he received from Justice Frankfurter during his clerkship with Justice Jackson in the 1952 Term: “I remember Felix Frankfurter talking to a group of us law clerks and saying that the one thing you absolutely should never do was to try to plan to be a member of [the Supreme] Court, because there was no way you could go about it.” Such advice is less sound today. With the path to the Supreme Court


narrowed to proficient service on a lower federal court (and in particular a circuit court), that path shows the aspiring Supreme Court Justice the way to go about achieving the goal. To be sure, as in any bureaucracy, there is no certainty of reaching the highest office—there are many more circuit judges than Supreme Court vacancies—but the surest path to the Court is through the circuit courts.

II. THE MISSING POLITICIANS

Missing from today's Court is the statesman who takes the bench after a distinguished period of service in public life. Of all the government offices the Constitution created, federal judgeships are the only ones whose holders are entitled to serve for life—an honor reserved in the Old World for kings and noblemen. It is, therefore, unsurprising that earlier Presidents, in selecting Supreme Court Justices, looked to distinguished statesmen.

In making his appointments, George Washington evidently believed the position of Supreme Court Justice to be an honorary position—a reward for capable and prestigious service in government. Although at its inception the Supreme Court lacked the prestige it has today and service involved the arduous task of riding circuit, "all twelve of Washington's Supreme Court appointments came from the political party of the Federalists," and all were prominent members thereof. John Jay was President of the Continental Congress in the late 1770s (and had filled other important political posts) before joining the Court as its first Chief Justice. John Rutledge was the famously dictatorial war-time "President" and later Governor of South Carolina, having been a delegate to the Second Continental Congress and a signatory of the Declaration of Independence. William Paterson, a former Governor of New Jersey, signed the Constitution as a representative from the third

77. See generally Rebecca Fraser, The Story of Britain: From the Romans to the Present: A Narrative History (1st Am. ed. 2005).
78. See Letter from George Washington to Robert H. Harrison (Sept. 28, 1789), in 1 The Documentary History of the Supreme Court, 1789-1801, at 35 (Maeva Marcus et al. eds., 1985). In naming Harrison to the Supreme Court, Washington wrote:
   [I]t has been the invariable object of my anxious solicitude to select the fittest characters to expound the Laws and dispense Justice. To tell you that this sentiment has ruled me in your nomination to a seat on the Supreme Bench of the United States, would be but to repeat opinions with which you are already well acquainted, opinions which meet a just co-incidence in the public mind.

Id.
80. The Supreme Court Justices, supra note 34, at 1-4.
81. Id. at 7-8.
RETURNING POLITICIANS TO THE SUPREME COURT

State. 82 Thomas Johnson was the first Governor of Maryland and a Convention Delegate. 83 James Wilson was a member of the Committee of Detail responsible for drafting the Constitution. 84 Although service on today’s Court is generally considered to be more powerful and prestigious and in many ways easier than in times past—today, for example, the Justices no longer ride circuit, and they control their docket—the honorary dimension is all but lost. Instead, a seat on the Supreme Court is now the beginning of a distinguished and prominent career in national service, rather than a reward for such service already performed. 85

While no other President would replicate Washington’s slate of statesmen—Justices, prominent politicians were members of the Court for most of our history. When William Moody joined the Court in 1906, he had served four terms in the House of Representatives, two years as Theodore Roosevelt’s Secretary of the Navy, and two more as Roosevelt’s Attorney General. 86 Congressman Moody was an outspoken progressive who championed civil service reform, voting rights, labor reform for government workers, and the direct election of U.S. Senators; he vigorously fought the disenfranchisement of Blacks in the South. 87 As Attorney General, Moody carried Roosevelt’s trust-busting campaign to

---

82. Id. at 37, 39.
83. Id. at 33–34.
84. Id. at 17. Upon Wilson’s nomination to be Chief Justice, the editors of the Federal Gazette wrote approvingly:

This worthy citizen devoted himself to the cause of American freedom in 1774, and has shared in every toil and danger of the revolution. His hand, his heart, his tongue and his pen, have ever been at the command of his country. To his laborious investigations into the principles and forms of every species of government that has ever existed in the world[,] and to his powerful reasonings in the late federal convention, the United States are indebted for many of the perfections of the new constitution.

The office allotted for that distinguished patriot and legislator by his grateful countrymen, will require an uncommon share of legal and political abilities and information. A new system of federal jurisprudence must be formed; a new region in the administration of justice must be explored, in which genius alone can supply the defect of precedent; and who so equal to those great and original undertakings as that favorite son of Pennsylvania, James Wilson, esq.


85. An analogy to the earlier composition of the Court lies in a feature of the current British system of government. Distinguished British politicians are elevated to noble status in the twilight of their careers. For example, former Prime Minister Margaret Thatcher is a baroness in the House of Lords, the legislative body where, until 2009, the British constitutional court of last resort sat for centuries. See BIOGRAPHICAL DICTIONARY OF BRITISH PRIME MINISTERS 358 (Robert Eccleshall & Graham S. Walker eds., 1998). For the formal judicial functions of the House of Lords, see Appellate Jurisdiction Act, 39 & 40 Vict. c.59 (1876) (Eng.), which was superseded by the Constitutional Reform Act, 2005, c.4 (Eng.), available at http://www.statutelaw.gov.uk/documents/2005/4/ukpga/c4/part3.

86. THE SUPREME COURT JUSTICES, supra note 34, at 298.
87. Id.
its zenith, pioneered the use of the criminal provisions of the Sherman Act to supplement civil enforcement actions, and obtained convictions against Standard Oil and other monopolies. On the Court, Moody combined a strong nationalism in economic matters with deference to state judicial processes.

George Sutherland, the seventieth Justice, served in state office, then for two terms in the United States Senate and later as President of the American Bar Association. Senator Sutherland played an important role in the passage of the Seventeenth Amendment, which provided for the direct election of senators. He was also an outspoken advocate of women’s suffrage and led early efforts that culminated in the passage of the Nineteenth Amendment. So, too, on the floor of the Senate, Sutherland vigorously opposed the extension of federal power in the Federal Reserve Act, the Clayton Antitrust Act, and other statutes that he believed unduly intruded on the rights of individuals and the interests of business. Thus, when President Warren Harding nominated Sutherland to the Court in 1921, he was already a well-known public figure; indeed, the Senate promptly confirmed Sutherland without referring him to committee and without discussion of the nomination. It came as little surprise that Sutherland, as one of the “Four Horsemen” of the New Deal opposition, voted to invalidate New Deal programs.

Besides Taft, Charles Evans Hughes was the most prominent and accomplished politician to serve on the Court. Appointed by Taft, Hughes joined the Supreme Court as an Associate Justice in 1910, four days after his term as Governor of New York ended. Hughes resigned from the Court to run for President in 1916, when he was the Republican Party candidate against Woodrow Wilson. The election was one of the closest in history, with a Hughes electoral defeat of 277-to-254 and a popular split of 49.2 to 46.1%. After the close election, Hughes remained in private practice through the war and returned to public life.

88. Id. at 298–99.
90. See Twining v. New Jersey, 211 U.S. 78 (1908) (Moody, J.) (holding that the Fifth Amendment protection against self-incrimination did not apply in state courts).
91. THE SUPREME COURT JUSTICES, supra note 34, at 348–49.
92. Id. at 348.
93. Id.
94. Id. at 349.
95. Id.
96. Id. at 349–50.
97. See id. at 308; see also infra Table A.
98. THE SUPREME COURT JUSTICES, supra note 34, at 309.
as Harding’s Secretary of State. When Taft resigned from the seat of Chief Justice in 1930, President Hoover appointed Hughes to succeed the man responsible for his original appointment—incidentally, the only other Chief Justice to lose a presidential election to Woodrow Wilson.

This sequence of events laid over a contemporary twenty-year period seems unfathomable. Imagine George H.W. Bush appointing then-Senator Bob Dole to the Supreme Court in 1989, Dole resigning to run against then-Governor Bill Clinton, President George W. Bush appointing his father to be Chief Justice, and an imaginary President John McCain appointing Dole to succeed him. This would seem ridiculous to many modern political observers. But need that be so? Both Taft, a former President, and Hughes, a former presidential candidate, Secretary of State, governor of a large and powerful state, and—amazingly—a former Associate Justice more than a decade earlier, were so well-known at the time that it would have been hard to fathom how a Court of individuals unknown to the public could ever exist. And as Chief Justice, these two men did not lead a Court composed only of career judges, but of other distinguished politicians whose electoral careers had more or less come to an end.

Career politicians did not always “retire” to the Court; some left politics at the height of their national standing and served long and distinguished terms on the Court. Hugo Black, for example, was a two-term Senator when he became Franklin Roosevelt’s first appointment to the Supreme Court. Elected in 1927 to represent Alabama, Black was an ardent New Dealer, having voted for all twenty-four of Roosevelt’s New Deal programs. When Willis Van Devanter, one of the famed Four Horsemen, resigned, Roosevelt sought a “thumping, evangelical New Dealer” to fill his seat. As a legislator, Black had already gained visibility on the national stage as the chairman of the committee that investigated the Air Mail Scandal, a holdover from the Hoover administration that “exposed misappropriation of government subsidies by shipping and airline companies and corrupt lobbying practices by notables such as press baron William Randolph Hearst.” In this capacity, he earned front-page news coverage across the country in the fall of 1933, with Newsweek calling him a “useful Torquemada.” Black was a “vigorous, aggressive Democratic politician,” who fit the bill

100. The Supreme Court Justices, supra note 34, at 309.
101. Id.
102. Id. at 378.
104. Id.
105. The Supreme Court Justices, supra note 34, at 379.
106. Ball, supra note 103, at 81.
Roosevelt had set out to accomplish. In addition, Roosevelt expressed the need for a confirmable candidate from the South, a region underrepresented on the Court. Before his appointment in 1937, Black vocally supported both court-packing and the direct election of federal judges. Even before the President’s controversial court-packing scheme was introduced, Black had written to Roosevelt suggesting that the Court be expanded by two Justices “and that the larger court could sit in two panels.” This was not the only radical change Black supported during his Senate terms. In 1935, Black, from the Senate floor, suggested amending the Constitution to provide for the direct election of federal judges. “If I had my way,” said Black, “the Constitution to the United States would be amended so as to provide that the federal judges should be elected, because I believe in a democracy, and I believe in the election of judges by the people themselves.” Black’s appointment was not without controversy. He was not permitted to enjoy the norm of senatorial courtesy that usually followed the appointment to the Court of a fellow Senator. Instead, his nomination was referred to the Judiciary Committee, the first time a fellow Senator’s nomination would be scrutinized in that fashion since 1853. The revelation of Black’s former membership in the Ku Klux Klan (KKK) caused a year-long national sensation. Time called the nomination a “bombshell” and noted that the anti-New Dealers viewed Black “as a Roosevelt trick to ram the furthest Left-winger available down the Senate’s throat.” Nevertheless, Black’s nomination passed the Senate sixty-three to sixteen in August of 1937.

Black’s realigning appointment in 1937 may be contrasted with the attempted rightward realignment of the Court that occurred under President Richard Nixon. Powell succeeded Black on January 7, 1972, the same day that Rehnquist joined the Court. Together with Blackmun and Burger, Nixon’s two other appointees, these four relative unknowns to the public sphere cut far different figures from the appointees of Roosevelt. While both Roosevelt and Nixon could claim

107. Id. at 92.
108. Id. at 91.
109. Id. at 86-87.
110. Id. at 87-88.
111. Id. at 86.
112. For an illuminating discussion of the historical role of “senatorial courtesy” in the federal appointments process, see GERHARDT, supra note 79, at 63-69.
113. BALL, supra note 103, at 94.
114. Id. at 95-98.
115. Id. at 93 (quoting Judiciary: Nominee No. 93, TIME, Aug. 23, 1937, at 13, 14).
116. Id. at 94-95. Scholars have often ranked Hugo Black as among the “great” Supreme Court Justices. BADER & MERSKY, supra note 24, at 26-27.
117. THE SUPREME COURT JUSTICES, supra note 34, at 498.
electoral mandates for their ideological predilections, the two Presidents went about the task of realigning the Court by picking from markedly different pools of talent. Roosevelt's nine appointees were diverse, and all but two joined the Court with clear records of their views and political activities. Along with Black the Senator sat Reed the Solicitor General, Frankfurter the academic, Douglas the SEC Chairman, Murphy the Governor and Attorney General, Byrnes the Governor, Congressman, Senator, and Secretary of State, Jackson the Attorney General, and Rutledge—Roosevelt's last appointee and the only circuit judge he nominated.118 By contrast, Nixon's first order of business was to appoint Warren Burger, a circuit judge with whom he was familiar from the Eisenhower years and about whose views he had read in *US News & World Report*, to replace Earl Warren.119 Blackmun was also a circuit judge, an Eisenhower appointee, and Powell was President of the American Bar Association.120 Rehnquist was one of the more obscure Associate Justice nominees in history and one of the most unlikely: We learn from the Nixon tapes that it was the peculiar alchemy of Senator Howard Baker's dithering over the nomination and Rehnquist's law school grades (he was valedictorian of his class at Stanford) that won Nixon over in a three-minute conversation with Attorney General John Mitchell.121

Appointing politicians to the Court need not politicize the judiciary.122 Politicians who have joined the Court have often shown that they view their judicial roles quite differently from their former roles in the legislative or executive branch. Robert H. Jackson, for example, took positions on the Supreme Court directly opposed to opinions he had written as Attorney General.123 In *McGrath v. Kristensen*, Justice Jackson concurred with Justice Reed's holding that a Danish national who worked illegally in the U.S. during World War II was not barred from obtaining citizenship by applying for relief from military service as a neutral alien, and that the Attorney General should not have refused to suspend his deportation.124 In his concurrence, Jackson wrote:

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940,

---

118. See infra Table A.
120. See THE SUPREME COURT JUSTICES, supra note 34, at 493; TOMLINS, supra note 66, at 457.
121. See DEAN, supra note 119, at 245–46.
122. The degree to which the Court acts as a political body is a matter of dispute. For one spirited account of the Court as a political body, see Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 34 (2005) ("[T]o the extent the Court is a constitutional court, it is a political body.").
124. Id. at 173–75 (majority opinion).
I owe some word of explanation. I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline questions posed by the Secretary of War unanswered, covering its lack of precision with generalities which, however, gave off overtones of assurance that the Act applied to nearly every alien from a neutral country caught in the United States under almost any circumstances which required him to stay overnight.

The opinion did not at all consider aspects of our diplomatic history, which I now think, and should think I would then have thought, ought to be considered in applying any conscription Act to aliens.125

Jackson's appreciation, reflected in this concurrence, of the difference between the role of an Attorney General in advocating for the government and the role of Supreme Court Justice led a former staffer at the Justice Department to write in an obituary:

A lawyer he had been, and a lawyer he remained until he took his place on the Supreme Court. The separate roles of the client, the lawyer and the judge were always clear to him; and so we find Mr. Justice Jackson, with complete equanimity, rejecting an opinion of Attorney General Jackson as "earlier partisan advocacy."126

Sherman Minton provides a further example of the politician who recognizes the different role of a judge. Minton, a Truman appointee, joined the Court in 1949 and served until ill health and ideological isolation dispirited him and led to his resignation in 1956.127 Though Minton would cut a much different figure from his former Senate colleague Hugo Black during his relatively short tenure on the Court, both served in the Senate during Roosevelt's second term and both were ardent New Dealers.128 However, Minton's journey to the Court would be much longer. Elected to serve in the Senate representing Indiana in 1934 and failing to secure reelection in 1940, Minton charted an unusual political course for a modern Senator. Having supported, like Black, Roosevelt's court-packing scheme, Minton rose to the level of Senate Majority Whip before Roosevelt appointed him to the Seventh Circuit Court of Appeals after the loss of his Senate seat.129 During his eight years of service on the intermediate court, Minton was known for judicial restraint, a record he took with him to the Supreme Court, joining Frankfurter's conservative wing.130 As a circuit judge during World War II, Minton had the opportunity to rule on challenges to recent New Deal

---

125. Id. at 176–77 (Jackson, J., concurring) (citation omitted).
127. The Supreme Court Justices, supra note 34, at 433–35.
128. Id. at 379, 432.
129. Id. at 433.
130. Id.
legislation he himself had a hand in drafting, a degree of experience that from some views could be seen as a great aid to judicial activity. Regardless, given Minton's history in politics as an elected New Dealer, few could have predicted he would ultimately become part of the Court's conservative wing.

The last great modern example of a politician on the Supreme Court is Earl Warren. Warren was not only the last Chief Justice, but also the last Justice altogether, to come to the Court with an impressive national profile and history of electoral success. Before his appointment in 1953, he was a popular three-term Governor of California, the position from which he resigned to serve on the Court. Warren was also the Republican candidate for Vice President on the Dewey ticket in 1948, and he abandoned his own liberal Republican presidential campaign in 1952 only in the formidable shadow of the center-right Eisenhower candidacy. As Governor, Warren supported internment of Japanese-Americans during World War II, an issue of particular importance in California that caused national controversy. In his run for reelection as Governor in 1946, Warren ran effectively unopposed by the other major parties, the Democrats and Progressives. The following year, Warren repealed all state school segregation laws, shortly after the Ninth Circuit ruled that the segregation of Mexican students into Mexican-only schools violated the Fourteenth Amendment. Amici curiae in that case included the NAACP, which submitted a brief written by Thurgood Marshall and Robert Carter, both of whom would persuade Chief Justice Warren and eight other Justices to reach the same conclusion in 1954. Warren's vice-presidential candidacy on the Republican ticket in 1948 was progressive, with the Dewey platform endorsing expansion of Social Security, federal funding for public housing, and civil rights legislation. No Justice since has ever stood as a candidate for one of the country's only two nationally-elected offices, and for readers of the

---

131. Id.
132. Id. at 437–38.
133. Id. at 438; NEWTON, supra note 20, at 209–10, 249. Neither candidate was the darling of the conservative wing. Bob Taft was the clear favorite for the far right. LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 208, 267–71 (1967); NEWTON, supra, at 241.
135. NEWTON, supra note 20, at 196–97.
137. Mendez, 161 F.2d at 775.
Chicago Tribune, Warren was Vice President–Elect for a Tuesday night. 140

On October 9, 1953, one week after Warren took his seat, in a letter to his brother Milton, President Eisenhower expressed sentiments very similar to those Washington and de Tocqueville endorsed in the statements reproduced at the beginning of this Article. He summed up his motivation for appointing a perceived liberal from California succinctly:

I believe that we need statesmanship on the Supreme Court. Statesmanship is developed in the hard knocks of a general experience, private and public. Naturally, a man occupying the post must be competent in the law—and Warren has had seventeen years of practice in public law, during which his record was one of remarkable accomplishment and success, to say nothing of dedication. He has been very definitely a liberal-conservative; he represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court. Finally, he has a national name for integrity, uprightness, and courage that, again, I believe we need on the Court. 145

Yet the President’s spirited defense of his nominee and the public, political character he desired from Warren were not without controversy at the time—indeed Eisenhower himself acknowledged the heterodoxy of Warren’s politics, but also identified with his “liberal-conservative” stripe. 144 Eisenhower’s letter was mostly a response to challenges from politicians and intellectuals in his brother’s academic and political circle—named and unnamed—who believed the President was being “circumvented by the forces of reaction in the Republican Party—by blind and selfish men who are hostile to all that he stands for, and who are playing on his inexperience in politics to seize power once more for the Old Guard leaders,” 143 and that “nothing in [Warren’s] record qualified him for the post of Chief Justice. His legal experience is scant.” 142 While the veracity of these statements is subject to debate (Eisenhower disagreed, and as for legal experience, Warren was Attorney General of California for a full four-year term after fourteen years as a district attorney), 145 there is no doubt that the qualities Eisenhower sought could be objectively evaluated by the Senate, by other peers in government, and most importantly by the American

---

142. Id.
143. Id. at n.2 (quoting author and diplomat Nicholas Roosevelt).
144. Id. at n.4 (quoting author and diplomat Nicholas Roosevelt).
145. THE SUPREME COURT JUSTICES, supra note 34, at 437.
public. And regardless of whether Eisenhower did so publicly, he implicitly acknowledged privately that the President's selection of a Supreme Court Justice is a political decision whose parameters are determined partly by his electoral mandate.

Warren retired in June, 1969, and was replaced by veteran D.C. Circuit Judge Warren Burger. When Hugo Black retired in September 1971, the Court lost its last statesman. Black's seat was filled by Lewis Powell, whose only position of prominence was as President of the American Bar Association. No Justice appointed after Powell has had recognition on the national level, and all but two, Rehnquist and O'Connor, have arrived via the circuit courts. Before Black's retirement, the only period in the Court's history in which it lacked a prominent politician was between the death of Lucius Q.C. Lamar (former U.S. Representative and Senator and President Grover Cleveland's Secretary of the Interior) on January 23, 1893, and the arrival of Howell Jackson (former Senator) on March 4, 1893.146

With the end of the era of politicians on the Court, so too has ended the commitment to regional diversity on the Court. Not only is the Supreme Court today a delegation of circuit court judges, but four of the current Justices (Roberts, Scalia, Ginsburg, and Thomas) arrived from the prestigious D.C. Circuit.147 With one Justice from each of the First (Breyer), Second (Sotomayor), and Third (Alito) Circuits, Justices Stevens (from the Seventh Circuit) and Kennedy (from the Ninth Circuit) are the only Justices who did not originate from what commentators have dubbed the U.S. Court of Appeals for the Acela Circuit.148 The only southerner on the Court today is Clarence Thomas. Even more strikingly, three of the sitting Justices (Scalia, Sotomayor, and Ginsburg) hail from New York City. In the nineteenth century, there were state- and region-bound seats (e.g., the "New York seat" or the "western seat")149 that were maintained by way of informal political norms.150 For example, when Grover Cleveland needed to fill the New York seat upon Samuel Blatchford's death in 1893, he proposed to New York's Senators three possible candidates from their state.151 Only after the New York Senators resisted those choices did Cleveland nominate

146. See infra Table A. During this period, the following Justices, none of whom held prominent public office, were members of the Court: Melville Fuller, Samuel Blatchford, Horace Gray, Stephen Field, Henry Brown, George Shiras, David Brewer, and John Marshall Harlan. See infra Table A.
147. See infra Table A.
148. See Adam Liptak, Obama Has Chance to Select Justice With Varied Résumé, N.Y. TIMES, May 1, 2009, at At1.
149. See The Supreme Court Justices, supra note 34, at 94, 103.
150. Gerhardt, supra note 79, at 64–65.
151. Id.
Edward White, a Louisiana Senator, who was confirmed. Similarly, Abraham Lincoln nominated Stephen Field, a California Judge, as the tenth Justice to a seat created specifically to bring California into the political fold. Today's bureaucratic Court lacks the regional diversity that was once an important feature of a President's selection and, as a result, the Supreme Court's representational makeup.

III. BUREAUCRACY AND ACCOUNTABILITY

The principal difficulty with a bureaucratic court is that it evades the mechanisms of accountability that exist with respect to other kinds of bureaucratic organizations. Government bureaucrats function beyond the purview of the general public. Although bureaucrats may wield enormous power, the public does not typically know who they are or much about their functions. This is generally acceptable in a democracy, because it is understood that bureaucrats are ultimately accountable to an elected superior. Consider the following example: Most Americans do not concern themselves with the day-to-day business of the Undersecretary of State for Public Diplomacy and Public Affairs, or even know who that person is during any given administration, at any given time. What does matter to the public is that the individual who fills this office answers to Secretary of State Clinton and therefore ultimately to President Obama, and that the Undersecretary can be removed from her post if she performs poorly or violates the public's trust. Moving down the hierarchical chain of command, there are thousands of trained civil servants in the State Department who are all nameless to the public, from ambassadors down to the consular officials who process the paperwork for a citizen's passport or a foreigner's visa. The policies these individuals execute are ultimately set by elected officials, and the individuals themselves are replaceable. Because bureaucrats can be readily dismissed, there is no need for the public to be involved in, or even aware of, the process for filling particular positions within the bureaucracy. There is no need to ensure accountability at the front end because it is assured at the back end.

With the bureaucratic Court, however, there are checks at neither the front nor the back ends. Supreme Court Justices enjoy lifetime appointments. While a Justice may be impeached, impeachment requires much more egregious behavior than would result in an ordinary

---

152. Id.
153. The Supreme Court Justices, supra note 34, at 188–89.
bureaucrat being fired and is, accordingly, very rare.\textsuperscript{155} And while Supreme Court decisions on constitutional questions may be overturned by constitutional amendment, that process, too, is arduous.\textsuperscript{156}

Thus, when it comes to a lifetime position, the opportunities for screening and accountability must exist prior to the appointment because they evaporate once the individual is confirmed for the job. However, the Supreme Court nominee who has advanced through the ranks of the federal judiciary has largely evaded the sort of public scrutiny that exists with respect to nominees who have served in national political office. Hence, the recent nominees to the Court, plucked from the circuit courts, have been unknown to the public and are not well known even to legal professionals.

The bureaucratic judge has, of course, been vetted prior to joining the lower federal court. But this is a poor substitute for the screening a national politician receives. Few people pay any attention to nominations to the circuit courts and fewer still to district court nominations, though the politically-charged environment growing around lower court appointments may be a function of the increased importance of obtaining such appointments in order to advance to the Supreme Court.\textsuperscript{157} More importantly, in the bureaucratic model, the nominees for the lower federal courts are typically individuals who have performed satisfactorily, and sometimes with distinction, as lawyers. Because they are not individuals with a national profile, there is little basis for the public to assess whether they will perform well as a lower court judge, let alone down the road as a Supreme Court Justice. The same problems of screening and accountability therefore emerge with respect to lower court nominations as well. Any vetting at that stage is necessarily incomplete because it occurs too early in the long road to the Supreme Court.

\begin{itemize}
    \item \textsuperscript{155} Samuel Chase is the only Justice to have been impeached (in 1804) and he was acquitted by the Senate. See generally William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992) (detailing the events). William Douglas was threatened with impeachment in 1951 and again in 1970. The Supreme Court Justices, supra note 34, at 394–95. Abe Fortas resigned "in the face of public condemnation and talk of impeachment." Id. at 475.
    \item \textsuperscript{156} Only four rulings of the Supreme Court have been directly overturned by constitutional amendments: Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), was overturned by the Eleventh Amendment; Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), was overturned by the Fourteenth Amendment; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), was overturned by the Sixteenth Amendment; and Oregon v. Mitchell, 400 U.S. 112 (1970), was overturned by the Twenty-Sixth Amendment.
    \item \textsuperscript{157} For an overview of the atmosphere of lower court appointments, largely ignored by the general public but acutely felt by politicians and activists, see Nancy Scherer, Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process 1–4 (2005).
\end{itemize}
Presidential elections are likewise a poor mechanism for public oversight of Supreme Court nominees who come from the circuit courts. Although Supreme Court decisions can be an element of presidential campaigns, presidential candidates do not typically promise to appoint particular lower court judges to the Supreme Court. Such a promise would be foolhardy given that the President might not have an opportunity to fill a seat on the Court at all, and that the appointment would require the Senate's approval. Even if a candidate did make such a promise, it would likely be of little meaning to voters who are not in a position to evaluate the named judge or the value of the candidate's promise.

This leaves the confirmation process itself as the only opportunity for the public to assure itself that a nominee is a sound pick for the Court. However, the confirmation process for the bureaucratic judge does not serve this function well. For one thing, the public does not hear from the nominee from the moment of nomination to the start of the confirmation hearing. There are no television interviews or town hall meetings. The public sees only a mute candidate photographed visiting with a senator. With the candidate silent, and in the absence of a public profile and reputation, the mass media has to compensate, filling the public relations gap between the nominee and the people. Thus, immediately after Judge Sotomayor was nominated to the Supreme Court, magazines and newspapers devoted pages to her life story, complete with childhood photographs and interviews with friends and family.158 Prior to the actual hearing, we may learn about the candidate from others, but we learn nothing from the candidate.

As for the actual confirmation hearing, it too fails the public. As the most recent Supreme Court confirmation hearings demonstrate, there is almost a consensus among the participants that the individuals nominated to author the most important judicial opinions should have no opinions of their own. From John Roberts's depiction of judge as umpire159 to Sonia Sotomayor's description of judging as involving "fidelity to the law,"160 nominees now present themselves as the law's

159. Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) [hereinafter Roberts Confirmation Hearings] (statement of Judge John G. Roberts, Jr.), available at http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire.").
servants, robotically applying legal rules to the case at hand so that judging is entirely removed from the personal qualities of the jurist. At every turn, the nominee is required to profess faith that the law always provides the answer. Efforts to prod the nominee into admitting what any legal professional knows—that the law does not always supply the answer, particularly in cases heard by the Supreme Court—result in the nominee expressing, ever more vigorously, faith in the law’s guiding hand.\textsuperscript{161}

Senators who support the nominee ask questions to provide the nominee an opportunity to reinforce this image; Senators who oppose aim to trick the nominee into betraying the image by expressing a viewpoint. Accordingly, by the time they enter the hearing room, nominees have undergone hours of rigorous training in how to answer questions without saying anything that would reveal them to be anything more than faithful enforcers of the law. Besides (selective) invocation of the “rule” against discussing issues that might come before the Court,

\begin{flushleft}
\footnotesize
\textsuperscript{161} There are numerous examples from the most recent hearings. Here are three:

SEN. GRASSLEY: Well, just suppose that Congress had not even acted in a certain area and there are people that are bringing cases before the court that would give an opportunity to fill in on something that Congress didn’t do. What about in—

ALITO: The judiciary is not a law-making body. Congress is the law-making body. Congress has the legislative power and the judiciary has to perform its role and not try to perform the role of Congress or the Executive.


***

SEN. KYL: Do you agree with [President Obama] that the law only takes you the first 25 miles of a marathon and that that last mile has to be decided by what’s in the judge’s heart?

SOTOMAYOR: I can only explain what I think judges should do, which is judges can’t rely on what’s in their heart. They don’t determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it’s not the heart that compels conclusions in cases. It’s the law. The judge applies the law to the facts before that judge.

Sotomayor Confirmation Hearings, supra note 160, at 120.

***

SEN. GRASSLEY: Well, is there any room in constitutional interpretation for the judge’s own values or beliefs?

ROBERTS: No, I don’t think there is. Sometimes it’s hard to give meaning to a constitutional term in a particular case. But you don’t look to your own values and beliefs. You look outside yourself to other sources.

Roberts Confirmation Hearings, supra note 159, at 178.
\end{flushleft}
nominees come to the hearing with six rhetorical devices, now standard components of the question-and-answer sessions, to stay on script:

(1) Admit, Do Not Accept. The first device is for the nominee to respond to questions about whether he or she agrees with a prior Supreme Court decision by stating that the Supreme Court has indeed rendered the decision. Samuel Alito used this device in the following exchange with Arlen Specter:

SEN. SPECTER: Well, Griswold dealt with the right to privacy on contraception for married women. Do you agree with that?

ALITO: I agree that Griswold is now I think understood by the Supreme Court as based on the Liberty Clauses of the Due Process Clause of the Fifth Amendment and the [Fourteenth] Amendment.\(^\text{162}\)

While a literal answer to Specter’s question, Alito’s response does not address what he was plainly being asked: whether he agreed with Griswold itself. Sonia Sotomayor deployed the same device in this exchange with Senator Kohl about the Supreme Court’s decision in Planned Parenthood of Southeastern Pennsylvania v. Casey:

SEN. KOHL: Do you agree with Justices Souter, O’Connor and Kennedy in their opinion in Casey, which reaffirmed the core holding in Roe?

SOTOMAYOR: As I said, I—Casey reaffirmed the core holding in Roe. That is the Supreme Court’s settled interpretation of what the core holding is and its reaffirmance of it.\(^\text{163}\)

(2) Describe What Was Done, Not What You Will Do. A second device is for nominees, when asked how they will approach a question, to respond by describing how the Supreme Court has approached the question and the reasons it has supplied for its approach. The following three exchanges illustrate how Sotomayor and Roberts each used this device:

SEN. DEWINE: In your opinion, what role should a judge play when reviewing congressional fact findings? In your view, how much deference do congressional fact findings deserve?

ROBERTS: Again, and of course, without getting into the particulars, the reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can’t do that. Courts can’t have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. Courts—the Supreme Court can’t sit and hear witness after witness after witness in a particular area and develop that kind of a record. Courts can’t make the policy judgments about what type of legislation is necessary in light of the findings that are made. So the findings play an important role, and I think it is correct to say under the law in this area and others, they’re neither necessary nor

\(^{162}\) Alito Confirmation Hearings, supra note 161, at 318.

\(^{163}\) Sotomayor Confirmation Hearings, supra note 160, at 82.
necessarily sufficient. But I know as a judge that they’re extremely helpful when there are findings.

And judges know when they look at those, that they’re the result of an exhaustive process of a sort that the Court cannot duplicate. We simply don’t have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It’s institutional competence. The courts don’t have it. Congress does. It’s constitutional authority. It’s not our job. It is your job. So the deference to congressional findings in this area has a solid basis.164

***

SEN. KOHL: [T]ell us how you will decide when it is appropriate to alter, amend or even overrule precedent.

SOTOMAYOR: The doctrine of stare decisis is a doctrine that looks to the value in the stability, consistency, predictability of precedent. And it starts from the principles that precedent are important values to the society because it helps those goals. It also guides judges in recognizing that those who have come before them, the judges who have looked at these issues, have applied careful thought to the question and view things in a certain way, and a court should—a judge should exercise some humility and caution in disregarding the thoughts and conclusions of others who came—who came in that position before them.

But that’s not to suggest that the doctrine says that precedence is immutable. And, in fact, I believe that England had an experiment with the question and—and it was not horribly successful. Precedents are precedents. They’re not immutable, they have to change in certain circumstances. And those circumstances generally have been described by Justice Souter in the Casey case, are probably the best articulation people have come to in sort of talking about the factors that courts think about.165

***

SEN. KOHL: Judge, Bush v. Gore. Many critics saw the Bush v. Gore decision as an example of the judiciary improperly injecting itself into a political dispute. In your opinion, should the Supreme Court even have decided to get involved in Bush v. Gore?

SOTOMAYOR: That case took the attention of the nation, and there’s been so much discussion about what the court did or didn’t do. I look at the case, and my reaction as a sitting judge is not to criticize it or to challenge it, even if I were disposed that way, because I don’t take a position on that; that the Court took and made the decision it did.

The question for me, as I look at that sui generis situation—it’s only happened once in the lifetime of our country—is that some good came from that discussion. There’s been and was enormous electoral process changes in many states as a result of the flaws that were reflected in the

164. Roberts Confirmation Hearings, supra note 159, at 218.
process that went on. That is a tribute to the greatness of our American system, which is whether you agree or disagree with a Supreme Court decision, that all of the branches become involved in the conversation of how to improve things. And as I indicated, both Congress, who devoted a very significant amount of money to electoral reform in its legislation—and states have looked to address what happened there.\textsuperscript{166}

(3) \textit{Generalize.} A different device is for nominees to respond to specific questions with vague generalities that provide no indication of what the nominee’s answer to the actual question really is. Here is Samuel Alito using this device:

\begin{quote}
SEN. SPECTER: But do you think there is as fundamental a concern as legitimacy of the Court would be involved if \textit{Roe} were to be overturned?

ALITO: Mr. Chairman, I think that the legitimacy of the court would be undermined in any case if the Court made a decision based on its perception of public opinion. It should make its decisions based on the Constitution and the law. . . . \textit{[I]}t should not sway in the wind of public opinion at any time.\textsuperscript{167}
\end{quote}

(4) \textit{Legalize the Personal.} When asked about their personal beliefs, nominees use the device of responding as though they are being asked about what the law says. Roberts did this in the following exchange with Senator Feinstein:

\begin{quote}
SEN. FEINSTEIN: Do you [believe in the separation of church and state]?

ROBERTS: Senator, I think the reason we have the two clauses in the Constitution in the First Amendment reflects the Framers’ experience. Many of them or their immediate ancestors were fleeing religious persecution. They were fleeing established churches. And it makes perfect sense to put those two provisions together, no establishment of religion and guaranteeing free exercise. That reflected the Framers’ experience.\textsuperscript{168}
\end{quote}

(5) \textit{Make the Specific Abstract.} Another commonly deployed device is for the nominee to deem specific questions too abstract such that—alas—nobody could possibly provide an answer. See how Alito and Roberts recast plain questions as abstract inquiries in these exchanges:

\begin{quote}
SEN. LEAHY: And if the President were to authorize somebody to torture or say that he would immunize somebody from prosecution for doing that, he wouldn’t have that power, would he?

ALITO: Well, Senator, I think the important points are that the President has to follow Constitution and the laws, and it is up to Congress to exercise its legislative power. But as to specific issues that might come up, I really need to know the specifics. I need to know
\end{quote}

\textsuperscript{166} Id. at 80–81.
\textsuperscript{167} Alito Confirmation Hearings, supra note 161, at 319.
\textsuperscript{168} Roberts Confirmation Hearings, supra note 159, at 227.
what was done and why it was done, and hear the arguments on the issue.\footnote{169} 

***

SEN. LEAHY: Do we [Congress] have the power to terminate war? We have the power to declare war. Do we have the power to terminate war?

ROBERTS: Senator, that’s a question that I don’t think can be answered in the abstract. You need to know the particular circumstances and exactly what the facts are and what the legislation would be like, because the argument on the other side—and as a judge, I would obviously be in a position of considering both arguments, the argument for the Legislature and the argument for the Executive. The argument on the Executive side will rely on authority as Commander in Chief, and whatever authorities derive from that. So it’s not something that can be answered in the abstract.\footnote{170}

(6) Make Past Personal Statements Ambiguous. Often, nominees are confronted with statements they have made in speeches, on job applications, in casual conversations, or in published writings that appear inconsistent with the vision of the judge as lacking in views and opinions. Rather than admit error, nominees deem such statements to have been poorly worded or misunderstood. Federal judges, whose tools are words, plead linguistic clumsiness. Here are two examples:

SEN. KENNEDY: Now, in 1985, in your job application to the Justice Department, you wrote, “I believe very strongly in the supremacy of the elected branches of Government.” Those are your words, am I right?

ALITO: It’s an inapt phrase, and I certainly didn’t mean that literally at the time, and I wouldn’t say that today. The branches of Government are equal. They have different responsibilities, but they are all equal, and no branch is supreme to the other branches.

SEN. KENNEDY: So you have changed your mind?

ALITO: No, I haven’t changed my mind, Senator, but the phrasing there is very misleading and incorrect. I think what I was getting at is the fact that our Constitution gives the judiciary a particular role, and there are instances in which it can override the judgments that are made by Congress and by the Executive, but for the most part our Constitution leaves it to the elected branches of Government to make the policy decisions for our country.\footnote{171}

***

SEN. CORNYN: You said that a wise Latina woman would reach a better conclusion than a male counterpart. What I am confused about is, are you standing by that statement? Or are you saying that it was a bad idea and, are you disavowing that statement?

\footnote{169. Alito Confirmation Hearings, supra note 161, at 328.}
\footnote{170. Roberts Confirmation Hearings, supra note 159, at 151–52.}
\footnote{171. Alito Confirmation Hearings, supra note 161, at 346–47.}
SOTOMAYOR: It is clear from the attention that my words have
gotten and the manner in which it has been understood by some people
that my words failed. They didn't work. ... I stand by the words. It fell
flat. And I understand that some people have understood them in a
way that I never intended and I would hope that, in the context of the
speech, that they would be understood.\textsuperscript{171}

The end result is that, as conducted today, the confirmation hearings
for Supreme Court Justices reveal virtually nothing about the nominee.
Over and over, the Senators asking the questions appear content with an
affirmation of the proper role of the judge and rarely push for a more
direct answer to a specific inquiry. Moreover, a Senator who thinks the
nominee is insufficiently forthcoming cannot do much about it. Senators
are typically asking questions that staffers wrote. The frustrated Senator
therefore often does not know how to ask good follow-up questions. The
nominee who is a lower court judge also knows more about the law than
any Senator on the Judiciary Committee. Protocol seems often to
prevent Senators from interrupting the nominee during an answer, and
nominees can run out the clock with long-winded recitations.\textsuperscript{173} And, of
course, the nominee has any and all of the six rhetorical devices to play
as trumps.

If the confirmation hearings do not reveal much about a nominee's
suitability for the Supreme Court, nor does a nominee's record as a lower
court judge. At their confirmation hearings, nominees invoke their
judicial records as evidence of their qualifications. In reality, however, a
solid record as a circuit or district court judge is not good evidence of
how the nominee will perform on the Supreme Court. To be sure, one's
record as a lower court judge can demonstrate qualities that are as
relevant to the position of Supreme Court Justice as they are to many
other professional positions: writing ability, work habits, organizational
skills, and intellect. However, there is a vast gulf between the substantive
work of a lower federal judge and the substantive work of a Supreme
Court Justice. Most of the work of lower court judges is formulaic. The
lower court judge decides largely routine matters for which there are
indeed usually clear legal answers.\textsuperscript{174} By contrast, the Supreme Court
today hears the cases that present the most difficult questions and raise
issues of law that have produced confusion and disagreement. Lower

\footnote{172. Sotomayor Confirmation Hearings, supra note 160, at 327.}
\footnote{173. In announcing he would vote against confirming Sonia Sotomayor to the Supreme Court,
Arizona Senator Jon Kyl complained: "She knew she could dissemble and delay and run out the clock,
and she did." Jan Crawford Greenburg, Kyl to Vote Against Sotomayor, ABC News, July 22, 2009,
(1992) ("[U]nlike the Supreme Court, courts of appeals deal far less frequently with grand
constitutional questions than with less cosmic questions of statutory interpretation or the rationality of
agency or district court decisions.").}
courts judges are bound by Supreme Court precedents and subject to review if they disregard or apply those precedents incorrectly. The Supreme Court is not required to follow its own precedents, and there is nobody to check it if it does not. Faithful application of precedent to facts as a circuit court judge, the very thing recent nominees have emphasized about their records, tells us little about what the nominee will do when there is no precedent or when precedent need not be followed.

Moreover, members of the public cannot easily evaluate a candidacy that is based heavily on a prior judicial record. Most of the nominee’s judicial opinions will involve bland questions of law. Few judges write for the general public. Ordinary members of the public cannot readily evaluate a judge’s work anymore than they can determine whether a functionary in the Internal Revenue Service has performed assigned tasks with distinction. At the hearing, the nominee can turn any cases involving hot-button issues into dull technical issues or questions dictated by precedent. Experts can weigh in on how the nominee has performed, but negative assessments will be countered by positive evaluations, and in any event, a long record will typically be neither wholly flawed nor entirely perfect. The nomination process does not, therefore, provide a basis for holding the nominee accountable for past actions or for

---

175. Roberts and Sotomayor both did this, as shown by the following exchanges:

SEN. DURBIN: What is in your background or experience that can convince the members of this Committee and the American people that you are willing to stand up to this President if he oversteps his authority in this time of war, even if it is an unpopular thing to do?

ROBERTS: Well, Senator, I would just say that my demonstrated commitment to the rule of law, you can see that, I think, in my opinions over the past 2 years, you can see it in how I approach my job as a lawyer, arguing, and what types of arguments I make and how I make those arguments and how faithful they are to the precedents, and you can see it in my history of public service.

The idea that the rule of law—that’s the only client I have as a judge. The Constitution is the only interest I have as a judge. The notion that I would compromise my commitment to that principle that has been the lodestar of my professional life since I became a lawyer because of views toward a particular administration is one that I reject entirely. That would be inconsistent with the judicial oath.

Roberts Confirmation Hearings, supra note 159, at 279–80.

* * *

SEN. LEAHY: And isn’t that what you, having been on the bench for 17 years, set as your goal, to be fair and show integrity based on the law?

SOTOMAYOR: I believe my 17-year record on the two courts would show that, in every case that I render, I first decide what the law requires under the facts before me, and that what I do is explain to litigants why the law requires a result, and whether their position is sympathetic or not, I explain why the result is commanded by law.

Sotomayor Confirmation Hearings, supra note 160, at 67.
generating confidence that all future mechanisms for accountability—lost once the nominee is confirmed—will be unnecessary.

IV. POLITICIANS ON THE COURT

Returning politicians to the Court would confer a variety of benefits. A former politician of exceptional ability and national standing can bring to the Court a history of accountability in taking definite stances on concrete legal and political issues. The nominee who has suffered the slings and arrows of national electoral politics or has served in a high profile administrative office with a public and consequential political portfolio has acquired public trust before being placed in the least accountable of all federal offices. If, for example, President Nixon’s two terms had not ended in the disgraceful improprieties and illegalities of Watergate and President Reagan had nominated him to the Court, the Senate would have had the opportunity to debate on a concrete record of legislative and executive decisions behind which the electoral mandate of an entire population had once stood. In a confirmation hearing, Nixon could not have deflected criticism of his signing into law a bill he believed to be unconstitutional by saying he was expressing the views of a superior. By contrast, when Chief Justice Rehnquist was asked whether and why he had written a memo to Justice Jackson defending Plessy’s doctrine of separate but equal, he could plausibly put the burden of proving his views on a deceased superior. \(^\text{176}\) A former President, Senator, or agency head could attempt to lay the blame elsewhere, but would have a far more difficult time going about it.

More recent events likewise demonstrate the benefits of drawing from a pool of politicians of national stature. During the Supreme Court nomination cycle of 2005—the year that saw the death of Chief Justice Rehnquist, the resignation of Justice O’Connor, and the nominations of Harriet Miers, Samuel Alito, and John Roberts—Attorney General Alberto Gonzales was widely rumored to be on President Bush’s short-list of potential nominees. \(^\text{177}\) At the time, Gonzales had served less than a year in his role as head of the Justice Department, but had judicial experience on the Texas Supreme Court, from which he joined President

\(^\text{176}\) See Catherine L. Fisk, Credit Where It’s Due: The Law and Norms of Attribution, 95 Geo. L.J. 49, 97 (2006); Cass Sunstein, From Law Clerk To Chief Justice. He Has Slighted Rights, L.A. TIMES, May 17, 2004, at B13 (noting that Rehnquist justified the memo by explaining that it had been intended as a statement of Jackson’s views rather than of his own).

Bush’s first administration as White House Counsel. A Hispanic with two decades of political experience in Texas and on the national scene, a former judge with a Harvard Law degree, and a man in the confidence of a two-term President, Gonzales had the profile and experience for a nomination to the nation’s highest court. However, public scrutiny of Gonzales’s actions as Attorney General, including his role in firing United States Attorneys, and his involvement in government programs involving torture and wiretapping, led to Gonzales resigning and his Supreme Court prospects likewise disappearing. Public service thus gives the public the opportunity to consider the qualities of a potential nominee in ways that do not exist when the nominee is a lower court judge.

A comparison of Gonzales’s fate to that of Robert H. Jackson is useful. Jackson’s tenure as Attorney General was brief, much like that of Gonzales. And, like Gonzales, Attorney General Jackson faced controversy over wiretapping. Jackson publicly supported legislation that would authorize broad wiretapping powers in criminal investigations and for national security purposes. As a result of public protests, Congress failed to enact the law Jackson had sought. Yet this controversy did not foreclose Jackson’s later appointment to the Court. Jackson had a reservoir of political capital from his earlier and widely-admired service as Solicitor General. In addition, as Attorney General, Jackson received public acclaim with his successful defense of Franklin Roosevelt’s New Deal program. When Roosevelt nominated Jackson to the Court in 1941, Jackson’s public profile was, on balance, positive.

Beyond the benefits of accountability, a former politician can give legitimacy to judicial decisions. This may be particularly true when it comes to decisions involving the scope of powers of the branches of government. For example, on questions of presidential power, two of Chief Justice Taft’s opinions were in favor of a contested exercise of

179. Id.
181. The Supreme Court Justices, supra note 34, at 408.
184. In appreciation for Jackson’s skill as an advocate, Justice Brandeis remarked that Jackson should be “solicitor general for life.” The Supreme Court Justices, supra note 34, at 408.
185. See Gardner, supra note 126, at 442.
presidential authority. In one of those cases, Myers v. United States, Taft ruled that the President had the authority to dismiss executive branch officials who had been confirmed by the Senate, notwithstanding Congressional attempts to withhold that authority. In defense of his position, Taft wrote over a three-Justice dissent:

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. . . . The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political.

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.

Reasonable jurists may disagree with Taft's pronouncements about how the President may legally run his "official family," but having former President Taft explain the reasons for recognizing executive authority provides credibility that Justices who have not served in high-level executive positions cannot easily match.

In addition to legitimacy, a national politician would bring to the Court a unique skill set acquired through experience in high-level legislative or executive positions. Today's Supreme Court interprets statutes and reviews congressional findings without any member who has experience voting on legislation or compiling a legislative record. It decides cases involving the role of Congress and the President in times of war without any member who has been in Congress or served as a cabinet member. In his concurring opinion in Youngstown, Justice Jackson invoked his own experience in the executive branch as a source of authority. Jackson, who served as Attorney General to President

187. 272 U.S. at 132 (internal citation omitted).
188. Id. at 132–34.
Franklin Roosevelt and took his seat on the Court in the months preceding the attack on Pearl Harbor, began his concurrence by stating: “That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety.”\footnote{190} Jackson next acknowledged that his approach to the issue of executive power derived from his own experience rather than from the usual tools available to judges: “While an interval of detached reflection may temper teachings of that experience [i.e., as Attorney General], they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.”\footnote{191} Jackson went on to assert that traditional methods of constitutional analysis did not provide a reliable basis for resolving the practical issue of executive power that the case presented. Invoking the “poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves,”\footnote{192} he explained: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”\footnote{193} As a result, “partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question” and these quotations “largely cancel each other” because “[a] Hamilton may be matched against a Madison.”\footnote{194} According to Jackson, court decisions also do not provide a basis for resolving a new question of executive authority “because of the judicial practice of dealing with the largest questions in the most narrow way.”\footnote{195} After setting out his own approach to questions of executive power, the three-part rubric with the pivotal “zone of twilight” between the legislative and executive branches,\footnote{196} Jackson assessed his handiwork: “I have heretofore, and do now, give to the

\footnotesize
\begin{itemize}
  \item \footnote{190}{Id.}
  \item \footnote{191}{Id. Of course, Chief Justice Taft might have found it difficult to share Justice Jackson’s sentiment. Not only did Taft have the unique experience among Chief Justices of having been President of the United States, he also had the unique experience among Presidents of having been a career judge before entering executive politics. Taft was a superior court judge in Ohio before becoming Solicitor General (at age thirty-two) and then served eight years on the newly created U.S. Court of Appeals for the Sixth Circuit. The Supreme Court Justices, supra note 34, at 342. President William McKinley accelerated Taft’s unconventional, yet already remarkable, career onto the national stage by appointing him Civil Governor of the Philippines in 1901. Id. at 343.}
  \item \footnote{192}{Youngstown, 343 U.S. at 634.}
  \item \footnote{193}{Id.}
  \item \footnote{194}{Id. at 634–35, 635 n.1.}
  \item \footnote{195}{Id. at 635.}
  \item \footnote{196}{Id. at 635–38.}
\end{itemize}
enumerate powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism."197

Jackson's approach was designed not only for the purpose of resolving Youngstown, but also to provide a general framework for resolving future questions of the scope of executive authority. Chief Justice Roberts and Justices Alito and Sotomayor all emphasized the importance of Justice Jackson's three-part test at their confirmation hearings,198 and the Court has invoked the test in recent cases.199 But the Supreme Court on which Jackson sat looked quite different from today's Court, which lacks a single member with high-level executive or legislative experience. Whether Jackson would have thought his framework could be successfully deployed in the hands of Justices lacking such experience is far from clear.200

More generally, the respected politician of national standing brings statesmanship to the Court. Many Supreme Court decisions have political consequences. Former politicians are adept at predicting those consequences and managing their fallout precisely because they understand the operations of the other branches of government. They can guide the Court to adhere to the intragovernmental norms that shape our national political system and limit overreaching by any one branch. They can soften the blows of unpopular decisions because they more fully understand when and where offense is likely to be taken. Because they have spoken the language of politics and of the public in general,

197. Id. at 640.
198. See Sotomayor Confirmation Hearings, supra note 160, at 97 ("[T]he best expression of how to address [an issue of executive power] . . . in a particular situation was made by Justice Jackson in his concurrence in the Youngstown seizure cases."); Alito Confirmation Hearings, supra note 161, at 323-24 ("I think [Jackson's concurring opinion in Youngstown] provides a very useful framework. . . . [I]t doesn't answer every question that comes up in this area, but it provides a very useful way of looking at them."); Roberts Confirmation Hearings, supra note 159, at 152 ("Now, there often arise issues where there's a conflict between the Legislature and the Executive over an exercise of Executive authority, asserted Executive authority. The framework for analyzing that is in the Youngstown Sheet and Tube case, the famous case coming out of President Truman's seizure of the steel mills.").
200. For example, as Attorney General, Jackson was assigned with advising "the [P]resident whether he had the authority, without seeking the approval of Congress, to conclude an executive agreement with Great Britain" that would transfer fifty "over-age destroyers" to the British, that were "desperately needed to combat German submarines," with the U.S. given in exchange "naval and air bases on British possessions in the Western Hemisphere." THE SUPREME COURT JUSTICES, supra note 34, at 408.
they can ensure that the Court’s messages are not lost or confused in translation.\textsuperscript{201}

**CONCLUSION**

In this Article, we have made a case for returning politicians with distinguished national profiles to the Supreme Court. Although there are different ways in which the pool of suitable candidates might be compiled, based on a combination of historical practices and the relative significance of public offices today, we think that at least the following should qualify: former Presidents, Vice Presidents, Senators, Secretaries of State, Attorneys General, and Governors of large states such as California and New York.

Some may claim that the law has become so technical that, as a practical matter, prior judicial experience is a necessary qualification for membership on the Supreme Court. However, members of each branch of government are closely involved with the technical aspects of the law. The federal statutes judges interpret are drafted to a high degree oftechnicality by legislators and their staff members. On a day-to-day basis, agency heads and administrators propose new statutes and rules based on complex considerations. Presidents consider the opinions of the Supreme Court and the inferior courts and respond. Senators and Congressmen review, in committee, the meaning and effect of judicial decisions and propose responses, such as new legislation. Government executives and legislators read legal memoranda on their proposed courses of action as a part of their job description. In all facets and in every branch, government activity is steeped in questions of legality. A former Attorney General, aided by research from law clerks, could readily master the legal technicalities needed to understand and decide cases at the Supreme Court, even without prior judicial experience. Nonetheless, with the exception of former Presidents and Vice Presidents, who offer unique experience in government service and who have served in the only positions requiring a national election,\textsuperscript{202} we

\textsuperscript{201} See TOQUEVILLE, supra note 2, at 171–72 ("[A]lthough ... [the Supreme Court’s] constitution is essentially judicial, its prerogatives are almost entirely political. Its sole object is to enforce the execution of the laws .... The Supreme Court of the United States summons sovereigns to its bar .... [O]ne is struck by the responsibility of the [Justices] whose decision is about to satisfy or to disappoint so large a number of fellow citizens. The peace, prosperity, and very existence of the Union are vested in the hands of [the Justices].").

\textsuperscript{202} In this respect, a useful comparison is to the French Constitutional Council. Under Article 56 of the Constitution of the French Republic, the Constitutional Council, which exercises judicial review, consists of nine members with nonrenewable terms of nine years. In addition, former Presidents of France are ex officio life-members of the Constitutional Council. 1958 Const. 56.
recommend that all nominees be, like all of the past and current Justices, lawyers by training.203

To support the nomination of candidates whose political views are known to the public is not to endorse the role of the Supreme Court Justice as a political representative of the President or of the legislative branch of government. Likewise, looking to a nominee’s political record in elected or appointed office does not challenge the independence of the judiciary. Indeed, history demonstrates that the decisions of the Justices are difficult to predict, and that Justices often surprise and disappoint their presidential patrons with their independence. When Tom C. Clark, the man who served as President Truman’s Attorney General (traditionally both an ally and confidante of presidents), confounded his old boss with a concurrence in Youngstown on a matter Clark himself once advised Truman would not violate the Constitution, Truman remarked that “Tom Clark was my biggest mistake [as President]. No question about it. . . . He hasn’t made one right decision that I can think of.”204 Truman also noted that “[p]acking the Supreme Court simply can’t be done. . . . I’ve tried it and it won’t work. . . . Whenever you put a man on the Supreme Court he ceases to be your friend. I’m sure of that.”205 Similarly, when asked if he had made any mistakes while President, Eisenhower replied, “Yes, two, and they are both sitting on the Supreme Court.”206 He was referring to Earl Warren and William Brennan.207 In more recent times, Justices White, Blackmun, O’Connor, and Souter have surprised their patrons and parties by going against the political currents that brought them to the Court.208 Justices, including those who were politicians, do not necessarily vote predictably.

Yet the question remains: Do today’s politicians have the qualities of statesmanship that would allow them to serve with distinction on the Supreme Court? Many decry contemporary politics as excessively partisan, with insufficient concern for values, principles, ideals, and compromise. Harry S. Truman once observed that “a statesman is a politician who’s been dead for fifteen years.”209 The observation is apt. The politicians of the past who joined the Court emerged from highly

203. Possible lawyer-politicians today include the following: Attorneys General Mukasey, Ashcroft, Reno, Barr, and Meese; Senators Specter, Leahy, Hatch, Lieberman, and Clinton; Secretaries Clinton and Baker; and Governors Crist, (Jeb) Bush, and Pataki.
204. ABRAHAM, supra note 67, at 193.
207. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 112 (1999).
208. The public, however, would have little cause for surprise, having known so little about their views in the first place.
209. WILLIAM SAFIRE, SAFIRE’S POLITICAL DICTIONARY 557 (2008) (quoting President Harry S. Truman, Speech to the Reciprocity Club (Apr. 11, 1958)).
partisan contexts, and they were often partisans themselves. For example, Hugo Black, long-since lionized as not only a great statesman but also the champion of Bill of Rights incorporation, was one of the most divisive Supreme Court appointees ever. The Hugo Black who left the Court in 1971 as an elder statesman was derided as a KKK member in the 1920s, as an extreme leftist in the 1930s, and in the 1940s, he was dogged by allegations of corruption by a revered co-Justice, Robert H. Jackson. Rather than idealize the politics of the past, we should look instead for nominees who, like their predecessors, have served for extended periods in political office of national importance. The President, and the people, should have confidence that the objective qualities that enabled politicians to serve in public offices, and the experience they gained in those positions, will enrich the Supreme Court and our Constitution.

***

As this Article goes to press, Justice Stevens has retired from the Supreme Court and President Obama has nominated Elena Kagan to replace him. Kagan, the current Solicitor General and a former Dean of Harvard Law School, is obviously accomplished. Kagan has also never been a judge. If confirmed, Kagan will be the first non-judge to join the Court since Rehnquist in 1972. She will be the fourth New Yorker on the Court. Although Kagan has some experience in the executive branch, she does not have the high-level public profile of past politicians who went on to serve on the Supreme Court. Kagan will not, therefore, bring to the Court the statesmanship we think it needs. Nonetheless, President Obama's "short list" of candidates to replace Justice Stevens did include two career politicians: Homeland Security Secretary Janet Napolitano, a two-term Arizona governor and that state's former Attorney General, and Governor Jennifer Granholm of Michigan, also a former State Attorney General. We hope that in considering these candidates, the White House was laying the groundwork for the future appointment of a distinguished politician to the Supreme Court.

210. BALL, supra note 103, at 145.
212. Besides her brief service as Solicitor General, Kagan served in the Clinton Administration as Associate White House Counsel, Deputy Assistant to the President for Domestic Policy, and Deputy Director of the Domestic Policy Council. Joan Biskupic, Will Kagan Be as Open as She Wanted Others to Be?; Court Nominee Gets Her Turn Before Senate on Monday, USA TODAY, June 24, 2010, at 1A.
**Table A. Supreme Court Justices’ Prior Judicial Service and Notable Public Offices**

<table>
<thead>
<tr>
<th>Name of Justice</th>
<th>Nominated By</th>
<th>Years on Court</th>
<th>Prior Judicial Service</th>
<th>Notable Public Offices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sonia Sotomayor</td>
<td>Obama</td>
<td>2009–</td>
<td>U.S. District Court, S.D.N.Y.; U.S. Court of Appeals, 2nd Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Stephen G. Breyer</td>
<td>Clinton</td>
<td>1994–</td>
<td>U.S. Court of Appeals, 1st Circuit</td>
<td>Assistant Special Prosecutor, Watergate; Chief Counsel, Senate Judiciary Committee</td>
</tr>
<tr>
<td>Ruth Bader Ginsburg</td>
<td>Clinton</td>
<td>1993–</td>
<td>U.S. Court of Appeals, D.C. Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Anthony M. Kennedy</td>
<td>Reagan</td>
<td>1988–</td>
<td>U.S. Court of Appeals, 9th Circuit</td>
<td>—</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name of Justice</th>
<th>Nominated By</th>
<th>Years on Court</th>
<th>Prior Judicial Service</th>
<th>Notable Public Offices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antonin Scalia</td>
<td>Reagan</td>
<td>1986–</td>
<td>U.S. Court of Appeals, D.C. Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Sandra Day O’Connor</td>
<td>Reagan</td>
<td>1981–2006</td>
<td>Maricopa County Superior Court; Arizona Court of Appeals</td>
<td>Arizona State Senate (Majority Leader)</td>
</tr>
<tr>
<td>John Paul Stevens</td>
<td>Ford</td>
<td>1975–2010</td>
<td>U.S. Court of Appeals, 7th Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Harry Blackmun</td>
<td>Nixon</td>
<td>1970–1994</td>
<td>U.S. Court of Appeals, 8th Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Abe Fortas</td>
<td>L. Johnson</td>
<td>1965–1969</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Arthur Goldberg</td>
<td>Kennedy</td>
<td>1962–1965</td>
<td>—</td>
<td>Secretary of Labor</td>
</tr>
<tr>
<td>Byron White</td>
<td>Kennedy</td>
<td>1962–1993</td>
<td>—</td>
<td>Deputy Attorney General of the United States</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------</td>
<td>----------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Charles E. Whittaker</td>
<td>Eisenhower</td>
<td>1957–1962</td>
<td>U.S. District Court, Western District of Missouri; U.S. Court of Appeals, 8th Circuit</td>
<td></td>
</tr>
<tr>
<td>William J. Brennan, Jr.</td>
<td>Eisenhower</td>
<td>1956–1990</td>
<td>New Jersey Superior Court; New Jersey Appellate Division; New Jersey Supreme Court</td>
<td></td>
</tr>
<tr>
<td>Earl Warren</td>
<td>Eisenhower</td>
<td>1953–1969</td>
<td>—</td>
<td>Attorney General of California; Governor of California</td>
</tr>
<tr>
<td>Sherman Minton</td>
<td>Truman</td>
<td>1949–1956</td>
<td>U.S. Court of Appeals, 7th Circuit</td>
<td>U.S. Senator</td>
</tr>
<tr>
<td>Tom C. Clark</td>
<td>Truman</td>
<td>1949–1967</td>
<td>—</td>
<td>Attorney General of the United States</td>
</tr>
<tr>
<td>Fred M. Vinson</td>
<td>Truman</td>
<td>1946–1953</td>
<td>U.S. Court of Appeals, D.C. Circuit</td>
<td>U.S. Representative; Director, Office of Economic Stabilization; Administrator, Federal Loan Agency; Director, Office of War Mobilization and Reconversion; Secretary of the Treasury.</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Harold H. Burton</td>
<td>Truman</td>
<td>1945–1958</td>
<td>—</td>
<td>Ohio House of Representatives; Mayor of Cleveland; U.S. Senator</td>
</tr>
<tr>
<td>Wiley B. Rutledge</td>
<td>F. Roosevelt</td>
<td>1943–1949</td>
<td>U.S. Court of Appeals, D.C. Circuit</td>
<td>—</td>
</tr>
<tr>
<td>James F. Byrnes</td>
<td>F. Roosevelt</td>
<td>1941–1942</td>
<td>—</td>
<td>U.S. Representative; U.S. Senator</td>
</tr>
<tr>
<td>Frank Murphy</td>
<td>F. Roosevelt</td>
<td>1940–1949</td>
<td>Recorder’s Court of Detroit</td>
<td>Chief Assistant Attorney General, Eastern District of Michigan; Governor General of the Philippines; Governor of Michigan; Attorney General of the United States</td>
</tr>
<tr>
<td>Felix Frankfurter</td>
<td>F. Roosevelt</td>
<td>1939–1962</td>
<td>—</td>
<td>Chairman, War Labor Policies Board</td>
</tr>
<tr>
<td>Stanley F. Reed</td>
<td>F. Roosevelt</td>
<td>1938–1957</td>
<td>—</td>
<td>U.S. Solicitor General</td>
</tr>
<tr>
<td>Hugo Black</td>
<td>F. Roosevelt</td>
<td>1937–1971</td>
<td>—</td>
<td>U.S. Senator</td>
</tr>
<tr>
<td>Benjamin N. Cardozo</td>
<td>Hoover</td>
<td>1932–1938</td>
<td>New York Supreme Court; New York Court of Appeals</td>
<td>—</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Owen Roberts</td>
<td>Hoover</td>
<td>1930–1945</td>
<td></td>
<td>Special Deputy Attorney General, Eastern District of Pennsylvania; Special U.S. Attorney</td>
</tr>
<tr>
<td>Charles Evans Hughes</td>
<td>Hoover</td>
<td>1930–1941</td>
<td>U.S. Supreme Court (Associate Justice)</td>
<td>Governor of New York</td>
</tr>
<tr>
<td>Harlan F. Stone</td>
<td>Coolidge (Associate) F. Roosevelt (Chief)</td>
<td>1925–1946</td>
<td></td>
<td>Attorney General of the United States</td>
</tr>
<tr>
<td>Edward T. Sanford</td>
<td>Harding</td>
<td>1923–1930</td>
<td>U.S. District Court, Middle &amp; Eastern Districts of Tennessee</td>
<td>Special Assistant to the Attorney General of the United States; Assistant Attorney General of the United States</td>
</tr>
<tr>
<td>Pierce Butler</td>
<td>Harding</td>
<td>1923–1939</td>
<td></td>
<td></td>
</tr>
<tr>
<td>George Sutherland</td>
<td>Harding</td>
<td>1922–1938</td>
<td></td>
<td>Utah Senate; U.S. Representative; U.S. Senator</td>
</tr>
<tr>
<td>William Howard Taft</td>
<td>Harding</td>
<td>1921–1930</td>
<td>Ohio Superior Court; U.S. Court of Appeals, 6th Circuit</td>
<td>U.S. Solicitor General; Civil Governor of the Philippines; Secretary of War; President of the United States</td>
</tr>
<tr>
<td>John H. Clark</td>
<td>Wilson</td>
<td>1916–1922</td>
<td>U.S. District Court, Northern District of Ohio</td>
<td></td>
</tr>
<tr>
<td>Louis Brandeis</td>
<td>Wilson</td>
<td>1916–1939</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>-----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>James Clark McReynolds</td>
<td>Wilson</td>
<td>1914–1941</td>
<td>—</td>
<td>Assistant Attorney General; Attorney General of the United States</td>
</tr>
<tr>
<td>Mahlon Pitney Taft</td>
<td>Taft</td>
<td>1912–1922</td>
<td>New Jersey Supreme Court</td>
<td>U.S. Representative; New Jersey State Senate (President)</td>
</tr>
<tr>
<td>Joseph R. Lamar Taft</td>
<td>Taft</td>
<td>1911–1916</td>
<td>Georgia Supreme Court</td>
<td>Georgia Legislature</td>
</tr>
<tr>
<td>Willis Van Devanter Taft</td>
<td>Taft</td>
<td>1911–1937</td>
<td>Wyoming Territorial Supreme Court</td>
<td>Territorial Legislature; Assistant Attorney General</td>
</tr>
<tr>
<td>Charles E. Hughes Taft</td>
<td>Taft</td>
<td>1910–1916</td>
<td>—</td>
<td>Governor of New York</td>
</tr>
<tr>
<td>Horace H. Lurton Taft</td>
<td>Taft</td>
<td>1910–1914</td>
<td>Sixth Chancery Division of Tennessee; Tennessee Supreme Court; U.S. Court of Appeals, 6th Circuit</td>
<td>—</td>
</tr>
<tr>
<td>William H. Moody T. Roosevelt</td>
<td>1906–1910</td>
<td>—</td>
<td>District Attorney for the Eastern District of Massachusetts; U.S. Representative; Secretary of the Navy; Attorney General of the United States</td>
<td></td>
</tr>
<tr>
<td>William R. Day T. Roosevelt</td>
<td>1903–1922</td>
<td>Court of Common Pleas, Canton; U.S. Court of Appeals, 6th Circuit</td>
<td>Secretary of State; Delegate, Paris Peace Conference</td>
<td></td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Oliver Wendell Holmes, Jr.</td>
<td>T. Roosevelt</td>
<td>1902–1932</td>
<td>Supreme Court of Massachusetts</td>
<td>—</td>
</tr>
<tr>
<td>Joseph McKenna</td>
<td>McKinley</td>
<td>1898–1925</td>
<td>U.S. Court of Appeals, 9th Circuit</td>
<td>District Attorney for Solano County; California House of Representatives; U.S. Representative</td>
</tr>
<tr>
<td>Rufus W. Peckham</td>
<td>Cleveland</td>
<td>1896–1909</td>
<td>New York Supreme Court; New York Court of Appeals</td>
<td>—</td>
</tr>
<tr>
<td>Edward D. White</td>
<td>Cleveland</td>
<td>1894–1921</td>
<td>Louisiana Supreme Court</td>
<td>Louisiana State Senate; U.S. Senator</td>
</tr>
<tr>
<td>Howell E. Jackson</td>
<td>B. Harrison</td>
<td>1893–1895</td>
<td>U.S. Court of Appeals, Sixth Circuit</td>
<td>Tennessee House of Representatives; U.S. Senator</td>
</tr>
<tr>
<td>George Shiras, Jr.</td>
<td>B. Harrison</td>
<td>1892–1903</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Henry B. Brown</td>
<td>B. Harrison</td>
<td>1891–1906</td>
<td>Circuit Court, Wayne County; U.S. District Court, Eastern Michigan</td>
<td>—</td>
</tr>
<tr>
<td>David J. Brewer</td>
<td>B. Harrison</td>
<td>1890–1910</td>
<td>Circuit Court, Leavenworth; Probate and Criminal Courts, Leavenworth County; United States District Court, Kansas; Kansas Supreme Court; U.S. Court of Appeals, 8th Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Melville Fuller</td>
<td>Cleveland</td>
<td>1888–1910</td>
<td>—</td>
<td>Illinois House of Representatives</td>
</tr>
<tr>
<td>Lucius Q.C. Lamar</td>
<td>Cleveland</td>
<td>1888–1893</td>
<td>—</td>
<td>Georgia Legislature; U.S. Representative; U.S. Senator; Secretary of the Interior</td>
</tr>
<tr>
<td>Samuel Blatchford</td>
<td>Arthur</td>
<td>1882–1893</td>
<td>U.S. District Court, S.D.N.Y.; U.S. Court of Appeals, 2nd Circuit</td>
<td>—</td>
</tr>
<tr>
<td>Horace Gray</td>
<td>Arthur</td>
<td>1882–1902</td>
<td>Supreme Court of Massachusetts</td>
<td>—</td>
</tr>
<tr>
<td>Stanley Matthews</td>
<td>Garfield</td>
<td>1881–1889</td>
<td>Superior Court of Cincinnati</td>
<td>Ohio Senate; U.S. Attorney for Southern Ohio; Counsel, Hayes-Tilden Electoral Commission; U.S. Senator</td>
</tr>
<tr>
<td>William B. Woods</td>
<td>Hayes</td>
<td>1881–1887</td>
<td>U.S. Court of Appeals, 5th Circuit</td>
<td>Ohio State House of Representative</td>
</tr>
<tr>
<td>John Marshall Harlan</td>
<td>Hayes</td>
<td>1877–1911</td>
<td>County Court</td>
<td>Attorney General of Kentucky</td>
</tr>
<tr>
<td>Morrison Waite</td>
<td>Grant</td>
<td>1874–1888</td>
<td>—</td>
<td>President, Ohio Constitutional Convention</td>
</tr>
<tr>
<td>Ward Hunt</td>
<td>Grant</td>
<td>1873–1882</td>
<td>New York Court of Appeals</td>
<td>New York Assembly</td>
</tr>
<tr>
<td>Joseph P. Bradley</td>
<td>Grant</td>
<td>1870–1892</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>William Strong</td>
<td>Grant</td>
<td>1870–1880</td>
<td>Pennsylvania Supreme Court</td>
<td>Reading City Council; U.S. Representative</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Salmon P. Chase</td>
<td>Lincoln</td>
<td>1864–1873</td>
<td></td>
<td>U.S. Senator; Governor of Ohio; Secretary of the Treasury;</td>
</tr>
<tr>
<td>Stephen J. Field</td>
<td>Lincoln</td>
<td>1863–1897</td>
<td>California Supreme Court</td>
<td>California State Legislature</td>
</tr>
<tr>
<td>David Davis</td>
<td>Lincoln</td>
<td>1862–1877</td>
<td>Illinois Circuit Court</td>
<td>Illinois State Legislature; Illinois Constitutional Convention</td>
</tr>
<tr>
<td>Samuel F. Miller</td>
<td>Lincoln</td>
<td>1862–1890</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Noah H. Swayne</td>
<td>Lincoln</td>
<td>1862–1881</td>
<td></td>
<td>Ohio Legislature; United States Attorney for Ohio</td>
</tr>
<tr>
<td>Nathan Clifford</td>
<td>Buchanan</td>
<td>1858–1881</td>
<td></td>
<td>Maine Legislature: Attorney General of Maine; U.S. Representative; Attorney General of the United States; U.S. Minister to Mexico</td>
</tr>
<tr>
<td>John A. Campbell</td>
<td>Pierce</td>
<td>1853–1861</td>
<td></td>
<td>Alabama State Legislature</td>
</tr>
<tr>
<td>Benjamin R. Curtis</td>
<td>Fillmore</td>
<td>1851–1857</td>
<td></td>
<td>Massachusetts State Legislature</td>
</tr>
<tr>
<td>Robert C. Grier</td>
<td>Polk</td>
<td>1846–1870</td>
<td>District Court, Allegheny County, PA</td>
<td></td>
</tr>
<tr>
<td>Levi Woodbury</td>
<td>Polk</td>
<td>1845–1851</td>
<td>New Hampshire Superior Court</td>
<td>Governor of New Hampshire; New Hampshire House of Representatives; U.S. Senator; Secretary of the Navy; Secretary of the Treasury</td>
</tr>
</tbody>
</table>
## Returning Politicians to the Supreme Court

<table>
<thead>
<tr>
<th>Name of Justice</th>
<th>Nominated By</th>
<th>Years on Court</th>
<th>Prior Judicial Service</th>
<th>Notable Public Offices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Samuel Nelson</td>
<td>Tyler</td>
<td>1845–1872</td>
<td>Sixth Circuit of New York; New York Supreme Court</td>
<td>New York State Constitutional Convention</td>
</tr>
<tr>
<td>Peter V. Daniel</td>
<td>Van Buren</td>
<td>1842–1860</td>
<td>U.S. District Court, Eastern Virginia</td>
<td>Virginia State Legislature; Virginia Privy Council; Lieutenant Governor of Virginia</td>
</tr>
<tr>
<td>John McKinley</td>
<td>Van Buren</td>
<td>1838–1852</td>
<td>—</td>
<td>Alabama State Legislature; U.S. Senator; U.S. Representative</td>
</tr>
<tr>
<td>John Catron</td>
<td>Jackson</td>
<td>1837–1865</td>
<td>Tennessee Supreme Court of Errors and Appeals</td>
<td>—</td>
</tr>
<tr>
<td>Philip P. Barbour</td>
<td>Jackson</td>
<td>1836–1841</td>
<td>General Court for the Eastern District of Virginia; U.S. District Court, Virginia</td>
<td>Virginia House of Delegates; U.S. Representative; Speaker of the House; President, Virginia Constitutional Convention;</td>
</tr>
<tr>
<td>Roger B. Taney</td>
<td>Jackson</td>
<td>1836–1864</td>
<td>—</td>
<td>Maryland House of Delegates; Maryland State Senate; Attorney General for the State of Maryland; Attorney General of the United States; Secretary of the Treasury;</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>James M. Wayne</td>
<td>Jackson</td>
<td>1835–1867</td>
<td>Savannah Court of Common Pleas; Superior Court of Georgia</td>
<td>Georgia State Legislature; Mayor of Savannah; U.S. Representative</td>
</tr>
<tr>
<td>Henry Baldwin</td>
<td>Jackson</td>
<td>1830–1844</td>
<td>-</td>
<td>U.S. Representative</td>
</tr>
<tr>
<td>John McLean</td>
<td>Jackson</td>
<td>1830–1861</td>
<td>Ohio Supreme Court</td>
<td>U.S. Representative; Commissioner; General Land Office; Postmaster General</td>
</tr>
<tr>
<td>Robert Trimble</td>
<td>John Quincy Adams</td>
<td>1826–1828</td>
<td>Kentucky Court of Appeals; U.S. District Court, Kentucky</td>
<td>Kentucky House of Representatives; U.S. District Attorney</td>
</tr>
<tr>
<td>Smith Thompson</td>
<td>Monroe</td>
<td>1823–1843</td>
<td>New York Supreme Court</td>
<td>New York State Legislature; New York State Constitutional Convention; Secretary of the Navy</td>
</tr>
<tr>
<td>Joseph Story</td>
<td>Madison</td>
<td>1812–1845</td>
<td>-</td>
<td>Massachusetts Legislature; U.S. Representative; Massachusetts Constitutional Convention</td>
</tr>
<tr>
<td>Gabriel Duvall</td>
<td>Madison</td>
<td>1811–1835</td>
<td>General Court of Maryland</td>
<td>Maryland State Council; Maryland House of Delegates; U.S. Representative; Comptroller of the Treasury</td>
</tr>
<tr>
<td>Thomas Todd</td>
<td>Jefferson</td>
<td>1807–1826</td>
<td>Kentucky Court of Appeals</td>
<td>Clerk, Kentucky Statehood Convention</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>-----------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>William Johnson</td>
<td>Jefferson</td>
<td>1804–1834</td>
<td>Court of Common Pleas</td>
<td>South Carolina House of Representatives</td>
</tr>
<tr>
<td>John Marshall</td>
<td>John Adams</td>
<td>1801–1835</td>
<td>—</td>
<td>U.S. Representative; Secretary of State;</td>
</tr>
<tr>
<td>Bushrod Washington</td>
<td>John Adams</td>
<td>1799–1829</td>
<td>—</td>
<td>Virginia House of Delegates; Virginia Ratification Convention</td>
</tr>
<tr>
<td>Oliver Ellsworth</td>
<td>Washington</td>
<td>1796–1800</td>
<td>Superior Court of Connecticut</td>
<td>Connecticut General Assembly; Continental Congress; Constitutional Convention; U.S. Senator</td>
</tr>
<tr>
<td>Samuel Chase</td>
<td>Washington</td>
<td>1796–1811</td>
<td>Baltimore Criminal Court; General Court of Maryland</td>
<td>Maryland General Assembly; Delegate to First &amp; Second Continental Congresses.</td>
</tr>
<tr>
<td>John Rutledge</td>
<td>Washington</td>
<td>1795</td>
<td>U.S. Supreme Court (Associate Justice)</td>
<td>South Carolina Commons House of Assembly; Attorney General of South Carolina; Stamp Act Congress; Constitutional Convention</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>William Paterson</td>
<td>Washington</td>
<td>1793–1806</td>
<td></td>
<td>Provincial Congress of New Jersey; New Jersey Constitutional Convention; Attorney General of New Jersey; Constitutional Convention; U.S. Senator; Governor &amp; Chancellor of New Jersey</td>
</tr>
<tr>
<td>Thomas Johnson</td>
<td>Washington</td>
<td>1792–1793</td>
<td>General Court of Maryland</td>
<td>Delegate to First &amp; Second Continental Congresses; Governor of Maryland; Maryland Ratification Convention</td>
</tr>
<tr>
<td>John Rutledge</td>
<td>Washington</td>
<td>1790–1791</td>
<td></td>
<td>South Carolina Commons House of Assembly; Attorney General of South Carolina; Stamp Act Congress; Constitutional Convention</td>
</tr>
<tr>
<td>John Blair, Jr.</td>
<td>Washington</td>
<td>1790–1795</td>
<td>First Virginia Court of Appeals</td>
<td>Virginia House of Burgess; Virginia Convention; Constitutional Convention; Virginia Ratification Convention</td>
</tr>
<tr>
<td>Name of Justice</td>
<td>Nominated By</td>
<td>Years on Court</td>
<td>Prior Judicial Service</td>
<td>Notable Public Offices</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------</td>
<td>----------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>William Cushing</td>
<td>Washington</td>
<td>1790–1810</td>
<td>Probate Judge and Justice of the Peace; Superior Court of Massachusetts Bay Province; Massachusetts Superior Court; Massachusetts Supreme Judicial Court</td>
<td>Massachusetts Ratification Convention</td>
</tr>
<tr>
<td>John Jay</td>
<td>Washington</td>
<td>1789–1795</td>
<td></td>
<td>Delegate to First &amp; Second Continental Congresses; President, Continental Congress; Diplomatic mission to Spain; Negotiated Treaty of Paris &amp; Jay Treaty</td>
</tr>
<tr>
<td>James Wilson</td>
<td>Washington</td>
<td>1789–1798</td>
<td></td>
<td>Delegate to First &amp; Second Continental Congresses; Constitutional Convention; Pennsylvania Ratification Convention</td>
</tr>
</tbody>
</table>