

## The Jackie Robinsons of the Federal Judiciary: Examining the Appointment of the First Black Federal Judges

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## THE JACKIE ROBINSONS OF THE FEDERAL JUDICIARY: EXAMINING THE APPOINTMENT OF THE FIRST BLACK FEDERAL JUDGES

WILLIE J. EPPS, JR.\*

### *Abstract*

*In this Article, Judge Epps collects and analyzes an unmatched wealth of information about the Nation's first Black judges appointed for life tenure to federal courts. Focused on nine barrier-breaking judges, confirmed between 1950 and 1966, this Article offers insights about well-known Black judges, including Judge William H. Hastie and Justice Thurgood Marshall, in addition to lesser-known Black judges. According to the Author, these judicial pioneers wore the black robe at the dawn of, and during, the Civil Rights Movement when Blacks had few rights under the Supreme Court's interpretation of the Constitution, under the reign of de jure and de facto discrimination throughout the country. This scholarship examines patterns in backgrounds and experiences of these judges, and irradiates those who initiated progress within, and have left an indelible legacy on, the federal judiciary.*

### I. INTRODUCTION

On April 15, 1947, Jackie Robinson famously broke the color barrier in the modern era by starting at first base for the Brooklyn Dodgers on Opening Day at Ebbets Field, what a baseball commissioner would later call “baseball’s proudest moment and its most powerful social statement.”<sup>1</sup> Robinson’s achievement resonates more than seventy-

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<sup>1</sup> Arthur Daley, *Play Ball!*, N.Y. TIMES, Apr. 15, 1947, at 31; *Major League Baseball Declares April 15 Jackie Robinson Day; Jackie Robinson Day Will Be Celebrated Every April 15 Beginning This Season*, BUSINESS WIRE, (Mar. 3, 2004) [link.gale.com/apps/doc/A113863618/ITOF?u=baltcntycpl&sid=bookmark-ITOF&xid=c3201b4e](https://link.gale.com/apps/doc/A113863618/ITOF?u=baltcntycpl&sid=bookmark-ITOF&xid=c3201b4e).

five years later because his story is genuinely heroic, overcoming “the racist obstacles put in his way.”<sup>2</sup> Baseball’s integration is an uplifting saga of courage, triumph, and perseverance, a step in dismantling an American “apartheid system.”<sup>3</sup>

Like the all-white Major Leagues, the federal judiciary initially prohibited Blacks, maintaining a court system that “could be categorized as both exclusionary and racially homogenous.”<sup>4</sup> Judge A. Leon Higginbotham, Jr. reasoned that the problem of a non-representative or exclusionary judiciary is that those in authority “often articulate precepts or rules of law that seem to them to be basically fair,” but could be nothing more than undetected prejudices within the non-diverse group.<sup>5</sup>

To some degree, these prejudices serve to reinforce the public’s lack of confidence in the judicial system. A racially unrepresentative judiciary is seen as an instrument for imposing the will of the ruling race on other racial groups....The danger of a homogeneous court is that there is no “outsider” within the court to challenge the biases the dominant group accepts as “self-evident” truths.<sup>6</sup>

The federal bench desegregated during the twentieth century—front-page news in the leading Black newspapers, but hardly mentioned in the white press. By one measure, the federal judiciary’s color barrier

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<sup>2</sup> Peter Drier, *The Real Story of Baseball’s Integration that You Won’t See in 42*, THE ATLANTIC (Apr. 11, 2013), <https://www.theatlantic.com/entertainment/archive/2013/04/the-real-story-of-baseballs-integration-that-you-wont-see-in-i-42-i/274886/>. “Mr. Robinson’s niche [in] American history is secure – his struggle predated many the emergence of ‘the first black who’ in many areas of the American society.” Dave Anderson, *Jackie Robinson, First Black in Major Leagues, Dies*, N.Y. TIMES, Oct. 25, 1972, at A1.

<sup>3</sup> Drier, *supra* note 2.

“Not only does Jackie Robinson make all of Black America proud to see him compete and excel in the face of the most vicious treatment and threats, but he also changes the hearts and minds of white America through the process,” [President Barack] Obama said. “The number of white guys of a certain generation who will tell me how that changed them or their dads—what it meant for an eight-year-old kid in the stands to be rooting for a Black guy.”

Tim Daniels, *Barack Obama Names Jackie Robinson as His American Sports Hero*, BLEACHER REP. (Apr. 2, 2021), <https://bleacherreport.com/articles/2939133-barack-obama-names-jackie-robinson-as-his-american-sports-hero>.

<sup>4</sup> A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1035 (1993).

<sup>5</sup> *Id.* at 1040-41.

<sup>6</sup> *Id.* at 1041.

was broken a decade before Robinson's breakthrough when William H. Hastie, nominated by President Franklin D. Roosevelt and confirmed by the U.S. Senate, began serving a four-year term in 1937 as a U.S. District Judge on the U.S. District Court for the District of the Virgin Islands.<sup>7</sup> Or, the federal judiciary was first desegregated in 1945 when President Harry S. Truman appointed Irvin C. Mollison to the U.S. Customs Court, the first Black to hold life tenure on the federal bench.<sup>8</sup> The judicial glass ceiling was shattered when President Truman nominated in 1949, and the U.S. Senate confirmed in 1950, William H. Hastie as a circuit judge on the U.S. Court of Appeals for the Third Circuit, the first Black with life tenure on a federal court of general jurisdiction.<sup>9</sup>

The number of Black federal judges with lifetime tenure on a federal court of general jurisdiction has increased substantially since 1950.<sup>10</sup> Today, Blacks occupy judgeships at every level of the federal judiciary.<sup>11</sup> A Black man serves as the senior member of the Supreme Court of the United States, only the second Black man to serve there.<sup>12</sup> A Black woman was confirmed to a lifetime seat on that Court for the first time earlier this year.<sup>13</sup> About twenty-three Black men and women

<sup>7</sup> *The Day in Washington*, N.Y. TIMES, Mar. 20, 1937, at 5; *Hastie Becomes U.S. Judge: Leaves Soon for Virgin Islands Post*, CHI. DEF., Apr. 10, 1937, at 1; *Hastie, William Henry*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/hastie-william-henry> (last visited June 4, 2022).

<sup>8</sup> *18 Negro Federal Judges Appointed by Presidents*, CHI. DEF., Oct. 26, 1963, at 3; *Mollison, Irvin Charles*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/mollison-irvin-charles> (last visited June 4, 2022).

<sup>9</sup> *Hastie Confirmed*, CHI. DEF., July 29, 1950, at 6; *Hastie, William Henry*, *supra* note 7.

<sup>10</sup> This Article focuses on Black judges with life-tenured appointments to federal courts of general jurisdiction—the Supreme Court of the United States, and U.S. courts of appeal and district courts. Nevertheless, the Author acknowledges and cherishes the groundbreaking judicial appointments of William H. Hastie, U.S. District Judge, U.S. District Court for the Virgin Islands, in 1937, then a four-year term; Irvin C. Mollison, Scovel Richardson, and James L. Watson, judges, U.S. Customs Court, in 1945, 1957, and 1966, respectively; and Walter A. Gordon, U.S. District Judge, U.S. District Court for the Virgin Islands, in 1958. CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 214 (1998).

<sup>11</sup> DANIELLE ROOT, *AFRICAN AMERICAN JUDGES IN THE FEDERAL JUDICIARY 1-2* (Center for American Progress 2019).

<sup>12</sup> Clarence Thomas has served as an Associate Justice of the Supreme Court since 1991, replacing Thurgood Marshall, the first Black Justice, who served from 1967 to 1991. See Adam Liptak, *Justice Clarence Thomas, Long Silent, Has Turned Talkative*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/05/03/us/politics/clarence-thomas-supreme-court.html>; *Marshall, Thurgood*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/marshall-thurgood> (last visited Oct. 16, 2022).

<sup>13</sup> Carl Hulse & Annie Karni, *Jackson Confirmed as First Black Woman to Sit on Supreme Court*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/us/politics/ketanji-brown-jackson-supreme-court.html>; Robert Barnes, *Ketanji Brown Jackson Sworn in as First Black Woman on Supreme Court*, WASH. POST (June 30, 2022, 6:07 PM), <https://www.washingtonpost.com/politics/2022/06/30/ketanji-brown-jackson-supreme-court/> [hereinafter Robert Barnes].

actively serve on the various federal courts of appeals, including Roger L. Gregory and Lavenski R. Smith, the first Blacks to serve as Chief Judge on their courts.<sup>14</sup> Blacks hold thirteen percent of the intermediate federal appellate judgeships.<sup>15</sup> Black men and women hold eighty-one federal district judgeships, comprising thirteen and a half percent of district judges.<sup>16</sup> In a sharp contrast, between 1789 and 1949, no Blacks served on the federal bench with general jurisdiction and lifetime tenure.<sup>17</sup> As recently as 1967, the number of Black federal judges could almost be counted on two hands.<sup>18</sup>

This Article examines the appointment of the first nine Black federal judges, both well-known and little-known, addressing why and how presidents from Truman to Johnson named Black judges to the

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<sup>14</sup> *Active African-American Article III Judges*, Minority Corp. Couns. Ass'n, <https://mcca.com/resources/reports/federal-judiciary/african-american-judges/> (last visited Oct. 16, 2022); American Law Institute, *The Hon. Roger L. Gregory*, A.L.I., <https://www.ali.org/members/member/439578/> (last visited Sept. 16, 2022); Press Release, Cir. Exec. Off. U.S. Ct. of Appeals, Appointment of Lavenski R. Smith (Mar. 10, 2017).

<sup>15</sup> There are twenty-two active Black circuit judges among a total of 170. See FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Nov. 21, 2022) (To achieve the results, complete two searches as follows. Search one, filter the results as follows: under 'court' select U.S. Court of Appeals, under 'limit to sitting judges' select active judges. This will show there are 170 active circuit court judges. Search two, filter the results the same as above with the addition of filtering under 'personal characteristics and background – race and ethnicity' and selecting all ethnicities which include African Americans. This will show there are 22 active black circuit court judges).

<sup>16</sup> There are 598 active federal district judges. See FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Nov. 21, 2022) (To achieve the results, complete two searches as follows. Search one, filter the results as follows: under 'court' select U.S. District Courts, under 'limit to sitting judges' select active judges. This will show there are 598 active district court judges. Search two, filter the results the same as above with the addition of filtering under 'personal characteristics and background – race and ethnicity' and selecting all ethnicities which include African Americans. This will show there are 81 active black district court judges).

<sup>17</sup> "Diversity on the United States courts is a relatively new phenomenon." Maya Sen, *Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, Over Time*, 2017 WIS. L. REV. 367, 371 (2017). As noted above, the first Black confirmed to the federal bench was Judge Hastie, in 1950, and the second, Judge Parsons, in 1961. *Id.* "By comparison, the first woman, Florence Ellinwood Allen, was appointed in 1934, and it was not until 1949 that the second woman, Burnita Shelton Matthews, was appointed. The first Mexican-American judge was appointed in 1961, but no Puerto Rican or Cuban-American judges were appointed until 1979 and 1992, respectively." *Id.* The first Black woman was Judge Constance Baker Motley in 1966. *Id.* at 371-72. See generally *Motley, Constance Baker*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/motley-constance-baker> (last visited June 4, 2022).

<sup>18</sup> *Article III African-American Judges by President*, MINORITY CORP. COUNS. ASS'N, <https://mcca.com/resources/reports/federal-judiciary/african-american-judges-by-president/> (last visited Sept. 17, 2022).

bench.<sup>19</sup> Very few written accounts capture their key roles in legal and judicial history. Fortunately, their experiences are alive in archival material, historical data, and personal records, along with news articles, law review articles, and books, which form the basis of this Article.<sup>20</sup> Part II focuses on nine Black judges confirmed between 1950 and 1967, highlighting their backgrounds and key achievements.<sup>21</sup> Part III examines patterns in the backgrounds and experiences of the first Black federal judges, including previous occupations, political activity, social engineering activity,<sup>22</sup> educational background, nature and location of the vacancy, military service, and American Bar Association (ABA) ratings.<sup>23</sup>

## II. THE FIRST BLACK ARTICLE III JUDGES

The first nine Black Article III judges were:<sup>24</sup>

Name	Court	Appointing President	Years of Active Federal Judicial Service
1. William H. Hastie	3d Cir.	Truman	1950-71 (Senior Status: 1971-76)
2. James B. Parsons	N.D. Ill.	Kennedy	1961-81 (Senior Status: 1981-93)
3. Wade H. McCree	E.D. Mich.	Kennedy	1961-66 (District Court) 1966-77 (Court of Appeals)
4. Thurgood Marshall	2d Cir.	Kennedy	1962-65 (Court of Appeals) 1967-91 (United States Supreme Court) (Senior Status: 1991-93)

<sup>19</sup> For a similar but groundbreaking and thought-provoking discussion about the first women federal judges, see Dean Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILLANOVA L. REV. 487 (2004).

<sup>20</sup> See *infra* Parts II-III.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> Charles Hamilton Houston “designed the gradual attack on the ‘separate but equal’ doctrine and pioneered the concept of ‘social engineering’ to alleviate black subordination.” H. Timothy Lovelace, Jr., *Revisiting “The Need For Negro Lawyers”: Are Today’s Black Corporate Lawyers Houstonian Social Engineers?*, 9 J. GENDER RACE & JUST. 637 (2006); see also Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 18 (1998). Houston said, “A lawyer’s either a social engineer or . . . a parasite on society.” GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983).

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See *Article III African-American Judges by President*, *supra* note 18; *Biographical Directory of Article III Federal Judges, 1798-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> (search for judge by name and click on search results for their respective biographies) (last visited Oct. 4, 2022).

5. A. Leon Higginbotham, Jr.	E.D. Pa.	Johnson	1964-77 (District Court) 1977-91 (Court of Appeals) (Senior Status: 1991-93)
6. Spottswood W. Robinson	D.D.C.	Johnson	1964-66 (District Court) 1966-89 (Court of Appeals) (Senior Status: 1989-98)
7. William B. Bryant	D.D.C.	Johnson	1965-82 (Senior Status: 1982-2005)
8. Constance Baker Motley	S.D.N.Y.	Johnson	1966-86 (Senior Status: 1986-2005)
9. Aubrey Eugene Robinson	D.D.C.	Johnson	1966-92 (Senior Status: 1992-2000)

The percentage of judicial appointments for Blacks was diminutive:<sup>25</sup>

President	Number: Court of Appeals Appointments	Number: District Court Appointments	Total: Appointments	Number: Blacks Appointed	Blacks percent of Total Appointments
Truman	27	101	128	1: <i>appeals</i>	0.781%
Eisenhower	47	129	176	0	0.000%
Kennedy	23	102	125	3: 2 <i>district</i> ; 1 <i>appeals</i>	2.400%
Johnson	44	126	170	10: 7 <i>district</i> ; 3 <i>appeals</i> ( <i>elevated</i> )	5.882%

*A. Hon. William H. Hastie (active federal judicial service: 1950-1971)*

William H. Hastie received a recess appointment from President Truman to a new seat on the U.S. Court of Appeals for the Third Circuit on October 21, 1949—the first Black appointed to an Article III judgeship on a court of general jurisdiction.<sup>26</sup> Confirmed by the Senate on July 19, 1950, he received his commission on July 22, 1950.<sup>27</sup> He served

<sup>25</sup> See *Article III African-American Judges by President*, *supra* note 18; *Biographical Directory of Article III Federal Judges, 1798-present*, *supra* note 24 (follow “Directory” hyperlink; then use the advanced search criteria to create a customized list of judges based on appointing president) (last visited Nov. 22, 2022). In addition, President Johnson picked Justice Marshall for the Supreme Court in 1967. *Marshall, Thurgood*, *supra* note 12.

<sup>26</sup> *Hastie, William Henry*, *supra* note 7.

<sup>27</sup> *Id.*

as Chief Judge from 1968 to 1971, the first Black to do so.<sup>28</sup> Before joining the bench, Judge Hastie served as Governor of the Virgin Islands.<sup>29</sup>

Born in Knoxville, Tennessee, on November 17, 1904, the Judge was raised in Washington, D.C., as an only child by his mother, Roberta Childs Hastie, a school teacher, and his father, also named William Henry Hastie, a pharmacist by training, who worked at the Pension Bureau and as a school teacher.<sup>30</sup> The younger Hastie graduated from all-Black Dunbar High School as valedictorian in 1921.<sup>31</sup> One of very few Black students to enter Amherst College, he earned an A.B. degree, *magna cum laude*, in 1925, election to Phi Beta Kappa and, again, valedictorian.<sup>32</sup> During the Great Depression, he received an LL.B. degree from Harvard Law School in 1930, ranking in the top two percent of a class of 690 students (with only five Black students), and becoming the second Black editor of the *Harvard Law Review*.<sup>33</sup> One of his law professors, Felix Frankfurter, later an Associate Justice of the Supreme Court of the United States, said Hastie was “not only the best colored man we have ever had but he is as good as all but three or four outstanding white men that have been here during the last twenty years.”<sup>34</sup>

Hastie joined the faculty at Howard University in 1930.<sup>35</sup> While teaching, he joined the District of Columbia bar, practiced at Houston

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> HAROLD WADE, JR., *BLACK MEN OF AMHERST* 71 (1976).

<sup>31</sup> GILBERT WARE, *WILLIAM HASTIE: GRACE UNDER PRESSURE* 10 (1984).

<sup>32</sup> *Hastie, William Henry, supra* note 7; PHILLIP MCGUIRE, *HE, TOO, SPOKE FOR DEMOCRACY: JUDGE HASTIE, WORLD WAR II, AND THE BLACK SOLDIER* xiii (1988).

<sup>33</sup> WARE, *supra* note 31, at 30-31; *Hastie, William Henry, supra* note 7.

<sup>34</sup> *Frankfurter, Felix*, *FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES*, <https://www.fjc.gov/history/judges/frankfurter-felix> (last visited Oct. 17, 2022). WARE, *supra* note 31, at 28. Offended by Frankfurter’s “compliment,” Hastie told a friend, “This notion that Negroes have got to be better than other people is about as disgusting as the notion that Negroes are inferior. As a matter of fact, I very much fear that they are rationalizations of the same thing.” *Id.*

<sup>35</sup> Howard University School of Law, *Biographical Sketch: William Henry Hastie*, HOW. UNIV. SCH. L.: BROWN@50, <http://law.howard.edu/brownat50/BrownBios/BioJudgeWmHastie.html> (last visited Sept. 18, 2022). When Hastie graduated high school in 1921, there were about 950 (0.78%) Black lawyers in the U.S. among the total lawyer population of 122,519. Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 418 (1987). Upon his law school graduation in 1930, Black lawyers had grown to 1,247 (0.78%) among 160,605. *Id.*; Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107, 112 (1994); see also WARE, *supra* note 31, at 29 (reporting 1,230 Black lawyers among 160,000 attorneys, based on a 1930 census report).



and Houston,<sup>36</sup> and earned an S.J.D. degree from Harvard in 1933.<sup>37</sup> In President Franklin D. Roosevelt's New Deal administration, he served as assistant solicitor in the U.S. Department of Interior from 1933 to 1937, despite southern objections to his connections with the National Association for the Advancement of Colored People (NAACP).<sup>38</sup> In 1937, President Roosevelt appointed him as judge on the U.S. District Court for the Virgin Islands—the first Black appointed to the federal bench.<sup>39</sup>

In 1939, Judge Hastie briefly returned to Howard University as Dean of the School of Law before taking a leave of absence in 1940 through 1943 as a Civilian Aide to Secretary of War Henry L. Stimson.<sup>40</sup> Working to limit segregated facilities throughout the military, Hastie resigned in protest of the continued segregation in the armed forces, rejoining the faculty at Howard, “where he again participated in important public interest litigation.”<sup>41</sup> Judge Hastie and Thurgood Marshall, through the NAACP, argued *Smith v. Allwright*, the landmark Supreme Court case overturning Texas's white primary voting law.<sup>42</sup> They also argued *Morgan v. Virginia*, another landmark case overturning Virginia's law requiring racial segregation on commercial interstate buses.<sup>43</sup> Of “the nineteen cases that Thurgood Marshall, representing the NAACP or the NAACP Legal Defense and Educational Fund, Inc. [LDF], argued before the Supreme Court between 1939 and 1949, Hastie [was] co-counsel or consultant in twelve.”<sup>44</sup> Judge Hastie taught at

<sup>36</sup> Howard University School of Law, *supra* note 35. When “[t]he NAACP first began its fight for equality in education—specifically in graduate and professional education—with the case of Thomas Hocutt, a resident of Durham, North Carolina, who sued for admission to the University of North Carolina's College of Pharmacy,” Charles Hamilton Houston chose William Hastie to be lead counsel. JAMES W. ENDERSBY & WILLIAM T. HORNER, LLOYD GAINES AND THE FIGHT TO END SEGREGATION 32 (2016).

<sup>37</sup> WARE, *supra* note 31, at 30. Hastie, *William Henry*, *supra* note 7.

<sup>38</sup> Hastie, *William Henry*, *supra* note 7; WADE, JR., *supra* note 30, at 72.

<sup>39</sup> “From 1937 until 1939, Hastie served as Federal Judge for the United States District Court for the Virgin Islands. This appointment marked the first time that a Black held the position of federal judge: only 74 years after the Emancipation Proclamation and the 154th year of the Republic.” WADE, JR., *supra* note 22 at 72-73; *Biographical Directory of Federal Judges: Hastie, William Henry*, *supra* note 7.

<sup>40</sup> WADE, JR., *supra* note 30, at 73; *Biographies of the Secretaries of State: Henry Lewis Stimson (1857-1950)*, U.S. DEP'T OF STATE: OFF. HISTORIAN, <https://history.state.gov/departmentthis-people/stimson-henry-lewis> (last visited Oct. 17, 2022).

<sup>41</sup> Mark Tushnet, *Being First*, 37 STAN. L. REV. 1181, 1183 (1985) (book review).

<sup>42</sup> 321 U.S. 649, 650, 663-64 (1944). “Marshall opened and Hastie closed the argument.” WARE, *supra* note 31, at 179. *Smith v. Allwright* abolished the white primary, “a device long used by southern whites to deny black political participation.” Mark S. Cohen, *William Hastie: Grace Under Pressure*, 84 MICH. L. REV. 861, 861 (1986).

<sup>43</sup> 328 U.S. 373, 386 (1946).

<sup>44</sup> WARE *supra* note 31, at 190.

Howard until appointed as Governor of the Virgin Islands by President Truman.<sup>45</sup>

In February 1948, visiting the Virgin Islands, the President struck up a friendship with Governor Hastie, due to their mutual interest in racial justice issues there.<sup>46</sup> Six months later, Governor Hastie visited Truman in Washington, telling the President “that he had never been active in party politics,” but “offered to take leave without pay and campaign for him.”<sup>47</sup> Thankful for the support, Truman told Hastie to contact the Democratic national chairman, leading him to barnstorm the country for the President.<sup>48</sup> “After the 1948 presidential election, President Truman asked Hastie what he could do to show his appreciation for the [B]lack support he had received.”<sup>49</sup> Hastie reportedly “suggested the appointment of Ralph J. Bunch as assistant secretary of state,” but “did not discuss with the President a reward for himself.”<sup>50</sup> What Hastie did not know was that the President had already arranged with Senator Francis J. Meyers of Pennsylvania to appoint Hastie as a circuit judge of the U.S. Court of Appeals for the Third Circuit—the first Black judge on any federal appellate court and the first Black with lifetime tenure on a federal court of general jurisdiction.<sup>51</sup>

After his interim appointment in October 1949, Judge Hastie’s confirmation was prolonged nine months.<sup>52</sup> While many white lawyers in the Third Circuit objected, Black lawyers there objected more, suggesting that a Black lawyer in Philadelphia should have been chosen for a Philadelphia-based seat.<sup>53</sup> One Black lawyer told Walter White:

As I see it, our good friend Bill Hastie has been quite signally honored by the Democratic Party during the last number of years...For that reason alone, if for no other,

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<sup>45</sup> “In 1946 Hastie was named Governor of the Virgin Islands.” Tushnet, *supra* note 4; ENDERSBY & HORNER, *supra* note 36.

<sup>46</sup> WARE, *supra* note 31, at 213-14.

<sup>47</sup> *Id.* at 216.

<sup>48</sup> *Id.* at 216-20. “The literature is silent about Hastie’s contribution to Truman’s victory... Hastie himself called it ‘relatively unimportant’ in a victory he attributed to campaigning by Truman and organized labor.” *Id.* at 220. Justice Marshall said Hastie “did one heck of a good job” on the campaign trail in 1948 and “got the votes.” *Id.*

<sup>49</sup> *Id.* at 225.

<sup>50</sup> *Id.* “Bunch declined the post, saying he did not want to subject his family to racism in Washington and that he would be of greater service remaining at the United Nations.” *Id.*

<sup>51</sup> *Hastie, William Henry*, *supra* note 7; ENDERSBY & HORNER, *supra* note 36.

<sup>52</sup> *Hastie, William Henry*, *supra* note 7.

<sup>53</sup> WARE, *supra* note 31, at 225. Many Black lawyers in Philadelphia would have preferred the appointment of Raymond Pace Alexander, Walter E. Gay, Maceo W. Hubbard, or Carlyle Tucker. *Id.*

it would seem that these few honors which the Negro enjoys, especially in the legal profession, should be passed around[.]<sup>54</sup>

The Senate hold up was due to Hastie's civil rights work. His association with the NAACP LDF and National Lawyers Guild allowed some senators to falsely accuse Judge Hastie of being a communist or an enemy of democracy.<sup>55</sup> In January 1950, Hastie was re-nominated by the White House and referred to the Committee on the Judiciary.<sup>56</sup> Senator James O. Eastland of Mississippi named a subcommittee—Chairman Patrick A. McCarran, Democrat of Nevada, Senator Harlan M. Kilgore, Democrat of West Virginia, and William Langer, Republican of North Dakota.<sup>57</sup> In April 1950, at hearings before Senators McCarran and Langer, the ABA and an assistant to the Attorney General endorsed Hastie.<sup>58</sup> In June 1950, Hastie appeared for the first of three times before the subcommittee, which was quite unusual, with Senator McCarran trying to discredit the ABA's endorsement.<sup>59</sup> The next month, the full Judiciary Committee advanced the nomination, nine to one, with Senator Eastland voting against.<sup>60</sup> Without debate, on July 19, 1950, the Senate unanimously confirmed Judge Hastie.<sup>61</sup>

About a decade later, in 1961, President John F. Kennedy considered Judge Hastie for the Supreme Court (for retiring Justice Charles E. Whittaker's seat).<sup>62</sup> President Kennedy passed over Judge Hastie,

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<sup>54</sup> *Id.* “Hastie's appointment, they argued, was a ‘political reward’; it reflected the view that only one black was qualified to hold important posts; and it was an affront to black lawyers in Philadelphia. . . . A black newspaper told Myers to ‘stop this funny business’ of selecting a Virgin Islander for a job that rightfully belonged to a Pennsylvanian.” *Id.* at 226.

<sup>55</sup> *See id.* at 230-241.

<sup>56</sup> *Id.* at 233.

<sup>57</sup> *Id.* Called “The Voice of the White South,” Senator Eastland was an obstacle to Black advancement within the judiciary due to his opposition to the integration of the races. Mike Wallace, *Interview with Senator James Eastland*, U. OF TEX. AT AUSTIN: HARRY RANSOM CTR., (July 28, 1957), <https://hrc.contentdm.oclc.org/digital/collection/p15878coll90/id/22/rec/11>. He advocated racial segregation because “you have more harmony and the races can make more progress under a system of separate.” *Id.*

<sup>58</sup> WARE, *supra* note 31, at 233.

<sup>59</sup> *Id.* at 236.

<sup>60</sup> *Id.* at 240.

<sup>61</sup> *Id.* The Author is unsure if Senator Eastland was present for the vote.

<sup>62</sup> Note, “*Just One More Vote for Frankfurter*”: *Rethinking the Jurisprudence of Judge William Hastie*, 117 HARV. L. REV. 1639, 1639-41 (2004). Judge Hastie had been placed on John Kennedy's radar screen even before he was sworn-in as president. Dennis J. Hutchinson, “*The Ideal New Frontier Judge*”, 1997 SUP. CT. REV. 373, 378 (1997). Harris Wofford sent Kennedy a 31-page memorandum on December 30, 1960, detailing 16 initiatives for the new administration to undertake in 1961. *Id.* Under a section captioned “Breakthrough in Government Employment

fearing vigorous opposition by southern senators “whose cooperation Kennedy needed on other matters.”<sup>63</sup> Further, outside of civil rights, Judge Hastie was considered too moderate for some in the Kennedy administration.<sup>64</sup> Judge Hastie remained active on the Third Circuit until taking senior status in 1971, serving as a Senior Circuit Judge until his death, at 71, on April 14, 1976.<sup>65</sup> He was survived by his wife, Beryl Lockhart Hastie, and two children, William H. Hastie, Jr. and Karen Hastie Williams, who both became prominent lawyers.<sup>66</sup>

*B. James B. Parsons (active federal judicial service: 1961-1981)*

James B. Parsons was nominated for U.S. District Judge in the Northern District of Illinois by President Kennedy “on August 10, 1961, to a seat vacated by [Judge] Philip L. Sullivan.”<sup>67</sup> He appeared before the Senate committee on August 17, 1961.<sup>68</sup> Confirmed “without a dissenting vote” on August 30, 1961, he received his commission the very same day—the first lifetime appointed Black judge on a federal trial court of general jurisdiction.<sup>69</sup> Judge Parsons served as Chief Judge from 1975 to 1981, assumed senior status on August 30, 1981, and concluded

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of Negroes,” Wofford argued: “A Negro should also get an early Federal District Judgeship in New York City. When the time comes Judge William Hastie of the Third Circuit Court of Appeals should get most serious consideration for appointment to the Supreme Court.” *Id.* See also, *About the Charles Evans Whittaker Courthouse*, U.S. CTS: W. DIST. MO., [https://www.mow.uscourts.gov/outreach/whittaker\\_courthouse](https://www.mow.uscourts.gov/outreach/whittaker_courthouse) (last visited Oct. 18, 2022).

<sup>63</sup> Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J.L. & POL. 425, 445 (2011); see Hutchinson, *supra* note 62, at 384.

<sup>64</sup> Attorney General Bobby Kennedy met with Chief Justice Earl Warren who reportedly “was violently opposed to having Hastie on the Court” because Judge Hastie was “not a liberal” and would be “opposed to all the measures” in which Warren was interested. Note, *supra* note 62, at 1640; see also JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 392 (2006). Additionally, Justice William Douglas opposed Judge Hastie because Hastie “was too conservative” and would be “just one more vote for Frankfurter.” Note, *supra* note 62, at 1640; NEWTON, *supra* note 64; Hutchinson, *supra* note 62, at 379 (1997); Elliot E. Slotnick, *Presidents and Their Judges*, 81 JUDICATURE 172, 174 (1998) (book review).

<sup>65</sup> *William Henry*, *supra* note 7. In 1956, President Eisenhower was urged to appoint Judge Hastie to the Supreme Court as a replacement for Associate Justice Sherman Minton. *Negro Judge on U.S. Supreme Court Urged: Chief Judge California U.S. Court of Appeals Urges Eisenhower to Appoint Judge William H. Hastie Member of United States Supreme Court*, JACKSON ADVOCATE, Sept. 22, 1956, at 1.

<sup>66</sup> *Judge W. H. Hastie Collapses on Golf Course; Pronounced Dead at Hospital*, PHILA. TRIBUNE, Apr. 17, 1976, at 1.

<sup>67</sup> *Parsons, James Benton*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/parsons-james-benton> (last visited Oct. 18, 2022); *James B. Parsons Named Federal Judge: Kennedy Taps Chicagoan for Coveted U.S. Post*, CHI. DEF., Aug. 12, 1961, at 1.

<sup>68</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, CHI. DEF., Jan. 6, 1962, at 6.

<sup>69</sup> *Id.*; *Parsons, James Benton*, *supra* note 67.

his service on June 19, 1993, due to death.<sup>70</sup> Before becoming a federal judge, Judge Parsons served on the Superior Court of Cook County in Illinois.<sup>71</sup>

Born in Kansas City, Missouri on August 13, 1911, he was raised in Decatur, Illinois by his father, a Disciples of Christ minister, and his mother, a school teacher, alongside two older brothers and a sister.<sup>72</sup> He played on the Decatur High School basketball team and in the band and orchestra, graduating as class orator in 1929, on the eve of the Great Depression.<sup>73</sup> His father “hoped [that] he would enter the ministry, but agreed that law should be his field.”<sup>74</sup> Despite that early push toward law, Parsons studied music as an undergraduate.<sup>75</sup> He earned a B.A. degree at Millikin University Conservatory of Music in 1934, majoring in orchestration and conducting, while playing on the college basketball team and working part time as “a composing room helper” at the *Decatur Herald-Review*.<sup>76</sup> “The only Negro of 364 students in his college class, he was class orator, and finished third in his class.”<sup>77</sup>

Parsons viewed teaching as the only way “he could finance his graduate study of law as he finished college in a period of limited opportunities for Negroes[.]”<sup>78</sup> From 1934 to 1940, he taught political science and music at Lincoln University in Jefferson City, Missouri.<sup>79</sup>

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<sup>70</sup> Neil Gale, *James Benton Parsons, First Black Federal Judge; Served the Northern Illinois Court Beginning in 1961*, DIGIT. RSCH. LIBR. OF ILL. HIST. J., (Oct. 24, 2018, 1:57 PM), <https://drloihjournal.blogspot.com/2018/10/james-benton-parsons-the-first-black-federal-judge.html>. “On April 17, 1975, he became the first Black Chief Judge of a District Court; one month later, he was elected the first Black representative to the United States Judicial Conference.” *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68. His father was from Higby, Missouri near Troy and south of Hannibal, and his mother was from Fulton, Missouri. Collins T. Fitzpatrick, *The Unfinished Oral History of District Judge James Benton Parsons*, LIBR. OF THE U.S. CTS. OF THE SEVENTH CIR.: ORAL HISTORIES OF JUDGES, 3, 7, <https://www.lb7.uscourts.gov/oralHistories/parsonsJames.pdf>.

<sup>73</sup> Fitzpatrick, *supra* note 72, at 13-19.

<sup>74</sup> *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, CHI. DEF., Sept. 2, 1961, at 6.

<sup>75</sup> *Id.*

<sup>76</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74.

<sup>77</sup> *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74; Fitzpatrick, *supra* note 72, at 19.

<sup>78</sup> *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74.

<sup>79</sup> Parsons took a leave of absence from Lincoln in 1935 to return home to Decatur to his mother, then “a block club organizer for the Mason County Regular Democratic Organization,

“During his stay at Lincoln, he spent his summers doing graduate studies in political science at the University of Wisconsin.”<sup>80</sup> In 1941, he began teaching music in the public schools of Greensboro, North Carolina.<sup>81</sup>

During World War II, he enlisted as a Navy bandmaster, serving from 1942 until 1945.<sup>82</sup> He then attended graduate school on the G.I. Bill, at the University of Chicago, earning a master’s degree in political science in 1946, and law degree in 1949.<sup>83</sup>

Passing the Illinois bar exam, Parsons practiced law in Chicago from 1949 to 1951, with three other lawyers: Antonio M. Gassaway, James D. Crosson, and Alvin A. Turner.<sup>84</sup> He handled “evictions, divorces, and even a murder case[,]” while concurrently working as an assistant corporation counsel for the City of Chicago, “handling appeals for the city and legal opinions for some of its departments.”<sup>85</sup> He was active in the Black community through the Cook County Bar Association, Kappa Alpha Psi, NAACP, and National Urban League, with life

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in the presidential campaign.” *Jim Parsons’ ‘Savvy’ Came from Old Pros*, DAILY DEF., Oct. 24, 1960, at 8.

I wanted to be a lawyer and that was it. I didn’t want to let this music thing get in my way. Especially since my father compromised his dream about my being a preacher, instead being a lawyer. So when they got me at Lincoln, I went there with the understanding that I was going to be teaching political science. I would just help them out with the music on the side. So they gave me a class to teach in political science and the rest of the week I helped out with music until I was actually carrying the music faculty and the music department. During the last two years, I was the acting head of the music department. So it was music, but I still didn’t get into law. I didn’t have the money to be able to get into law school.

Fitzpatrick, *supra* note 72, at 26.

<sup>80</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; Fitzpatrick, *supra* note 72, at 24.

<sup>81</sup> *James B. Parsons Named Federal Judge: Kennedy Taps Chicagoan for Coveted U.S. Post*, *supra* note 67.

<sup>82</sup> *Id.*

<sup>83</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; *Parsons, James Benton*, *supra* note 67. At the University of Chicago, he was advised to attain a Master’s degree before the law degree, to earn the Doctor degree instead of a Bachelor of Laws degree. *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74. His Master’s thesis was entitled, “A Positive Program for Federal Protection of Civil Rights.” *Id.*

<sup>84</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68. The law firm was named Gassaway, Crosson, Turner, and Parsons. *James B. Parsons Named Federal Judge: Kennedy Taps Chicagoan for Coveted U.S. Post*, *supra* note 67, at 1-2.

<sup>85</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; *Parsons, James Benton*, *supra* note 67; *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74; Eric Pace, *James Parsons, 81, a Black Trailblazer as a Federal Judge*, N.Y. TIMES, June 22, 1993, at B6 [hereinafter Pace I].

memberships in both civil rights organizations.<sup>86</sup> He also taught constitutional law at John Marshall Law School.<sup>87</sup>

In 1951, Parsons was appointed an Assistant U.S. Attorney for the Northern District of Illinois, the first Black in the criminal division.<sup>88</sup> The next year, on Christmas Eve, he married Amy Margaret Maxwell.<sup>89</sup> They adopted a son, Hans-Dieter Parsons, in 1956.<sup>90</sup> Working as a federal prosecutor until 1960, he resigned to run for Judge for the Superior Court of Cook County.<sup>91</sup> Giving its “unqualified endorsement” to Parsons, the *Chicago Defender* called him “a gifted lawyer and political scientist who will bring to the court an intellectual breadth and judicial acumen seldom encountered on the bench anywhere.”<sup>92</sup> His judicial campaign reconnected him with old friends from the U.S. Attorney’s Office, including “gubernatorial candidate Otto J. Kerner and state’s attorney candidate Daniel P. Warad.”<sup>93</sup> Reportedly, Parsons “stumped more for the elections of Kerner and Ward than his own,” winning “a host of new friends for both high ranking candidates with his ‘behind the scenes’ revelations of their qualifications, personalities and beliefs.”<sup>94</sup> Parsons was especially fond of Kerner, a former U.S. Attorney, who had confronted racism by assigning cases “on a regular, rotating basis, without regard to the race, or religion of the prosecutor, or the defendant in the action.”<sup>95</sup> All three were elected in the fall of 1960.<sup>96</sup>

Less than a year later, at the recommendation of Senator Paul H. Douglas, Judge Parsons was nominated and confirmed a U.S. District

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<sup>86</sup> Fitzpatrick, *supra* note 72, at 70, 75-77.

<sup>87</sup> Pace I, *supra* note 85.

<sup>88</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; *Parsons, James Benton*, *supra* note 67; Fitzpatrick, *supra* note 72, at 102. Parsons said, “You see there had been no problem about blacks on the civil side but coming in on the criminal side, there was a question, is he just to prosecute only criminals who are blacks, or is he to prosecute anyone?” *Id.* at 100-02.

<sup>89</sup> Fitzpatrick, *supra* note 72, at 89; Pace I, *supra* note 85.

<sup>90</sup> Fitzpatrick, *supra* note 72, at 91; Pace I, *supra* note 85.

<sup>91</sup> Parsons was picked to run for judicial office by the Democratic County Central Committee, headed by Mayor Richard J. Daley. *James Parsons Named to Run for Judgeship*, DAILY DEF., Aug. 31, 1960, at A3; *Parsons Quits U.S. Position*, DAILY DEF., Sept. 1, 1960, at A3.

<sup>92</sup> *James B. Parsons*, DAILY DEF., Oct. 12, 1960, at 10.

<sup>93</sup> *Parsons Looks Forward to Victory on Nov. 8: Gardner Kerner & Parsons*, DAILY DEF., Nov. 3, 1960, at 4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* “Solidly supported by his boss, Parsons went on to become the top federal prosecutor; the only man in his office to hold top security clearance from the FBI, and the first federal prosecutor in the nation to try a defendant on that portion of the Smith Act which forbids membership in the Communist Party.” *Id.*

<sup>96</sup> *Republicans Are Ousted from Offices in State*, CHI DAILY DEF., Nov. 9, 1960, at 5. Parsons won 1,128,000 votes. Fitzpatrick, *supra* note 72, at 67; *Atty. Parsons Tallies Over Million Votes*, CHI DAILY DEF., Nov. 10, 1960, at 3.

Judge.<sup>97</sup> Judge Parsons recalled a standing-room-only crowd at his confirmation hearing, with the Howard University faculty attending “en banc.”<sup>98</sup> Recommendations from U.S. Attorney General Bobby Kennedy and various bar associations were read into the record.<sup>99</sup> Parsons remembered,

On the committee was [Senator Everett] Dirksen but he absented himself graciously. We listened to this, full of testimonials, one after another. Then finally Senator [Philip A.] Hart, who by the way is from Michigan too, he was Chairman. Senator [John A.] Carroll of Colorado was with him. He said, “we will open it up for any objections or comments from the floor.” He sat there for a long time hitting his pencil or pen on the pad that was in front of him and I was counting subconsciously the seconds as they were turning into minutes, it seemed to me. There was this sea of silence behind me. Then finally came this voice. He perhaps moved over to a microphone, because it could be heard, earlier a microphone had been placed and I couldn’t see it. In this magnificent southern dialect, “Senator, as you know, Senator, my name is Bill Jordan, I am the Washington Assistant to Senator [Richard B.] Russell of Georgia. I wonder, Senator, if you could let your records show that my presence here today is with the approval of the Senator from Georgia.” He sat down which in fact was a tacit approval of the South[.]<sup>100</sup>

In contrast to Judge Hastie’s confirmation, Judge Parsons had an easy, quick confirmation since he had not actively litigated civil rights

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<sup>97</sup> Upon being named by President Kennedy, Parsons issued a statement:

I did not seek this responsibility nor did I request anyone to seek it in my behalf. To have done otherwise would have demonstrated a personality and temperament I consider unworthy of the position. I am impressed at this time by the confidence and approval I have continuously received over the years from Senator Douglas, Mayor Daley, and Congressman Dawson for my performance and dedication to duty in the U.S. Attorney’s office as well as in the Superior [C]ourt. I greatly appreciate the confidence of our President.

*James B. Parsons Named Federal Judge: Kennedy Taps Chicagoan for Coveted U.S. Post*, *supra* note 67.

<sup>98</sup> Fitzpatrick, *supra* note 72, at 78.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*



cases.<sup>101</sup> He was voted out of the subcommittee with a unanimous vote, presented to the full committee the next morning, and confirmed by the entire Senate “without a dissenting vote” about a week later.<sup>102</sup> Over 5,000 persons attended his investiture ceremony, including Illinois Governor Otto J. Kerner, Chicago Mayor Richard M. Daley, and Judge Hastie, who all delivered remarks.<sup>103</sup>

In one notable case as a federal judge, “he gave jail terms and fines to 47 cardboard-box-manufacturing executives who had pleaded no contest to charges of rigging prices in the industry. He later reduced the prison sentences for 14 of them.”<sup>104</sup> His wife of fifteen years died in 1967.<sup>105</sup> He passed away in 1993, at eighty-one, survived by his son, “a sister, Mary Parsons Waters, and a grandson.”<sup>106</sup>

*C. Wade H. McCree (active federal judicial service: 1961-1977)*

Wade H. McCree was nominated for U.S. District Judge for the Eastern District of Michigan by President Kennedy on September 18, 1961, to a new seat.<sup>107</sup> Confirmed by the Senate on September 23, 1961, he received his commission on September 29, 1961.<sup>108</sup> His service terminated on September 13, 1966, with his appointment to the U.S. Court of Appeals for the Sixth Circuit.<sup>109</sup> Judge McCree was nominated to the appellate court by President Lyndon B. Johnson on August 16, 1966, to a new seat.<sup>110</sup> Confirmed by the Senate on September 7, 1966, he received his commission that same day.<sup>111</sup> His service terminated on March 28, 1977, due to his resignation to serve as Solicitor General of the United States, the second Black to do so.<sup>112</sup> Before his two federal

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<sup>101</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68. See WARE, *supra* note 31, at 235-36.

<sup>102</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68; Fitzpatrick, *supra* note 72, at 79.

<sup>103</sup> *Thousands Hail Federal Judge Parsons*, CHI. DAILY DEF., Sept. 25, 1961, at 1.

<sup>104</sup> Pace I, *supra* note 85.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *McCree, Wade Hampton, Jr.*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/mccree-wade-hampton-jr> (last visited June 4, 2022).

<sup>108</sup> *Id.*

<sup>109</sup> *McCree Is 3rd Negro on Appeals*, CHI. DAILY DEF., Sept. 17, 1966, at 35; *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>110</sup> *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*; William K. Stevens, *Solicitor General-Designate: Wade Hampton McCree Jr.*, N.Y. TIMES, Jan. 12, 1977, at A14.

judgeships, Judge McCree served on the Wayne County Circuit Court in Michigan.<sup>113</sup>

Born in Des Moines, Iowa, on July 3, 1920, and raised by two loving and educated parents in Honolulu, Chicago, and then primarily Boston, he was the second of four children.<sup>114</sup> His mother, Lucretia Harper McCree, was a school teacher.<sup>115</sup> His father, also named Wade Hampton McCree, a pharmacist by training, worked as a federal narcotics inspector for the U.S. Food and Drug Administration.<sup>116</sup> Seizing the best educational opportunities, McCree graduated from the Boston Latin School, and then Fisk University, in 1941, with an A.B. degree, *summa cum laude*, ranked number one in his class, and elected to Kappa Alpha Psi and President of the Student Council.<sup>117</sup> He attained an LL.B. degree from Harvard Law School in 1948, graduating twelfth in his class, and with a degree, *nunc pro tunc*, as a member of the class of 1944 due to intervening military service.<sup>118</sup> During the War, “[h]e spent four years on active duty,” two in combat, rising to the rank of Captain and earning a Bronze Star.<sup>119</sup>

After marrying Dores McCrary, a graduate of Simmons College, in 1946, they moved to his wife’s hometown of Detroit where McCree began practicing at Bledsoe & Taylor.<sup>120</sup> Governor G. Mennen Williams, recognizing McCree’s legal acumen, appointed him to the state’s Workers’ Compensation Commission in 1952, and trial judge on the Wayne County Circuit Court in 1954, despite the political risk of elevating a Black.<sup>121</sup> In 1955, he won a retention election for Circuit Judge, becoming Michigan’s first elected Black judge.<sup>122</sup>

<sup>113</sup> *At 34, McCree’s a Circuit Judge*, CHI. DEF., Oct. 30, 1954, at 3; *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>114</sup> Brian C. Kalt, *Wade H. McCree, Jr., and the Office of the Solicitor General, 1977-1981*, 1998 DET. C.L. REV. 703, 704 (1998).

<sup>115</sup> Steven J. Jager, *Wade Hampton McCree Jr. (1920-1987)*, BLACKPAST (Aug. 13, 2012), <https://www.blackpast.org/african-american-history/mccree-jr-wade-hampton-1920-1987/>.

<sup>116</sup> Eric Pace, *Wade H. McCree Jr. Dies at 67; Was Judge and Solicitor General*, N.Y. TIMES, Sept. 1, 1987, at B6 [hereinafter Pace II].

<sup>117</sup> *At 34, McCree’s a Circuit Judge*, *supra* note 113; Horace W. Gilmore, *Wade H. McCree, Jr.: A Compassionate and Great Judge*, 86 MICH. L. REV. 231, 233 (1987).

<sup>118</sup> Kalt, *supra* note 114, at 704-05.

<sup>119</sup> *Id.* at 704.

<sup>120</sup> *Id.* at 704-05; Kin Foley MacKinnow, *McCree, Wade, Jr. (1920-1987)*, HARV. SQUARE LIBR. (July 28, 2012), <https://www.harvardsquarelibrary.org/biographies/wade-mccree-jr/>.

<sup>121</sup> *At 34, McCree’s a Circuit Judge*, *supra* note 113; Kalt, *supra* note 114; at 705; *Judge McCree High Paid Fisk Graduate*, CHI. DEF., Oct. 30, 1954, at 5.

<sup>122</sup> Kalt, *supra* note 114, at 705.

Judge McCree served on the Wayne County bench until 1961, when he became the first Black appointed as U.S. District Judge for the Eastern District of Michigan.<sup>123</sup>

On the Federal bench, Judge McCree showed no hesitation in expressing his views on race and justice. Early in his judicial career, a lawyer urged that he not preside over a case that pitted a white against a Black. Judge McCree replied that he would excuse himself from the case only if a mulatto judge could be found, adding that “the ultimate of arrogance is achieved when a white person thinks another white person can make a judgment without being influenced by race, and a black person cannot.”<sup>124</sup>

President Johnson, in 1966, appointed him Circuit Judge for the Sixth Circuit, making Judge McCree the first Black there and the third Black judge on any federal appellate court of general jurisdiction (behind Judges Hastie and Marshall).<sup>125</sup> Quickly confirmed by the Senate for each judicial appointment, he sat on the Sixth Circuit until President Jimmy Carter appointed him U.S. Solicitor General (after Senate confirmation on March 4, 1977).<sup>126</sup> At the Supreme Court, General McCree enjoyed respect and esteem from the sitting Justices for his good character and impressive personal achievements.<sup>127</sup> McCree would later reveal that sacrificing his lifetime judicial appointment and the higher salary made accepting the Solicitor General’s job difficult.<sup>128</sup> But Judge McCree “felt a patriotic duty to serve”<sup>129</sup> and once said that the role “has to be the most exciting lawyer’s job in the nation.”<sup>130</sup> He resigned as Solicitor General in June 1981, at the end of the Supreme Court’s October 1980 term, to allow appointment of a new Solicitor General by President Ronald Reagan.<sup>131</sup> Leaving government service, McCree eschewed offers from prestigious private firms.<sup>132</sup> He chose instead to

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<sup>123</sup> Pace II, *supra* note 116; Jager, *supra* note 115.

<sup>124</sup> Pace II, *supra* note 116.

<sup>125</sup> Kalt, *supra* note 114, at 705; *McCree is 3rd Negro on Appeals*, *supra* note 109.

<sup>126</sup> *Black Viewed as Top Aide to Bell*, N.Y. TIMES, Jan. 1, 1997, at 23; *McCree is Confirmed as Solicitor General*, N.Y. TIMES, Mar. 5, 1977, at 21.

<sup>127</sup> Pace II, *supra* note 116.

<sup>128</sup> Kalt, *supra* note 114, at 707.

<sup>129</sup> *Id.* at 707-08.

<sup>130</sup> Pace II, *supra* note 116.

<sup>131</sup> Kalt, *supra* note 114, at 716-17; Pace II, *supra* note 116.

<sup>132</sup> Kalt, *supra* note 114, at 708.

teach at the University of Michigan School of Law, where he remained a professor until his death, caused by a heart attack, at sixty-seven, on August 30, 1987.<sup>133</sup> He was survived by his wife, Does; two daughters, Kathleen Lewis and Karen McCree; and a son, Wade H. McCree.<sup>134</sup>

*D. Hon. Thurgood Marshall (active federal judicial service: 1962-1965 and 1967-1991)*

Thurgood Marshall received a recess appointment from President Kennedy on October 5, 1961, to a new seat on the U.S. Court of Appeals for the Second Circuit.<sup>135</sup> Then nominated by the Kennedy administration on January 15, 1962, he was confirmed by the Senate on September 11, 1962, and received his commission on September 14, 1962.<sup>136</sup> His service on the Circuit ended on August 23, 1965, when he resigned to be Solicitor General of the United States, the first Black to do so.<sup>137</sup>

Thurgood Marshall was nominated by President Johnson for Associate Justice of the Supreme Court of the United States on June 13, 1967, to a seat vacated by Justice Tom C. Clark.<sup>138</sup> Confirmed by the Senate, he received his commission on August 30, 1967.<sup>139</sup> Justice Marshall assumed senior status on October 1, 1991, with his service concluding with his death on January 24, 1993.<sup>140</sup> Before the federal judiciary, Thurgood Marshall served as the Director-Counsel of the LDF.<sup>141</sup>

Justice Marshall was born in Baltimore, Maryland on July 2, 1908, to William Marshall and Norma Williams, a railroad porter and school teacher, respectively.<sup>142</sup> As a child, he attended segregated public schools.<sup>143</sup> A self-described “hell-raiser” in school, his “punishment”

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<sup>133</sup> *Id.*; Pace II, *supra* note 116.

<sup>134</sup> Pace II, *supra* note 116.

<sup>135</sup> *Marshall, Thurgood*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/marshall-thurgood> (last visited June 4, 2022).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; *Marshall's New Job: What It Means*, CHI. DAILY DEF., July 14, 1965, at 3.

<sup>138</sup> *Marshall, Thurgood*, *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Thurgood Sworn-In as Federal Judge*, CHI. DAILY DEF., Nov. 4, 1961, at 7.

<sup>142</sup> *Thurgood Marshall*, NAACP: LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/about-us/history/thurgood-marshall/> (last visited Oct. 20, 2022). He was named after his paternal grandfather, a private in the Union Army during the Civil War. Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, N.Y. TIMES, Jan. 25, 1993, at A1.

<sup>143</sup> McKen V. Carrington, *Juan Williams, Thurgood Marshall—American Revolutionary*, 27 S. U. L. REV. 81, 82 (1999) (book review).

was learning parts of the Constitution, which later benefitted him.<sup>144</sup> For high school, he attended Colored High and Training from 1921 to 1925, while also working as a delivery boy for a women's clothing store.<sup>145</sup>

After high school graduation, his parents encouraged him to pursue higher education.<sup>146</sup> He followed his brother, Aubrey Marshall, to Lincoln University in Pennsylvania, originally considering dentistry.<sup>147</sup> After becoming a star debater and graduating with honors in 1930, he applied to the University of Maryland Law School but was denied admission because of his race.<sup>148</sup> Instead, he attended Howard Law School.<sup>149</sup> To pay his entrance fees, his mother pawned her engagement and wedding rings.<sup>150</sup> During law school, he came under the influence of Charles Hamilton Houston, the dean of the law school and grandfather of the legal movement to end segregation.<sup>151</sup> Marshall graduated at the top of his class in 1933.<sup>152</sup>

Thurgood Marshall began his legal career as a solo practitioner in Baltimore, focusing on civil rights work.<sup>153</sup> His first major victory was integrating the University of Maryland, a satisfying win after being denied admission there.<sup>154</sup> In 1936, Charles Hamilton Houston recruited him to the NAACP's legal staff in New York.<sup>155</sup> After Houston resigned

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<sup>144</sup> Greenhouse, *supra* note 142. He recalled that he “made [his] way through every paragraph” of the Constitution. *Id.*

<sup>145</sup> Carrington, *supra* note 143; Greenhouse, *supra* note 142.

<sup>146</sup> See *High Court Appointee: Thurgood Marshall*, N.Y. TIMES, June 14, 1967, at 32. “Both parents were anxious that their two sons (Thurgood had an older brother, William Aubrey, who became a surgeon) should have a strong education, and they devoted their modest means to providing that opportunity.” Ralph S. Spritzer, *Thurgood Marshall: A Dedicated Career*, 26 ARIZ. STATE L.J. 353, 354 (1994).

<sup>147</sup> *About Justice Thurgood Marshall*, U.C. SAN DIEGO: T. MARSHALL COLL., <https://marshall.ucsd.edu/about-us/about-our-namesake.html> (last visited Sept. 19, 2022); *Civil Rights Advocate: Thurgood Marshall*, N.Y. TIMES, Oct. 22, 1964, at 23; Greenhouse, *supra* note 142. He states that he “majored in hell-raising,” as he was temporarily expelled for hazing a freshman. *Id.*

<sup>148</sup> *Thurgood Marshall*, *supra* note 142; A. S. “Doc” Young, *Thurgood Marshall: High Court Next?*, CHI. DAILY DEF., July 22, 1965, at 1; Greenhouse, *supra* note 142.

<sup>149</sup> Greenhouse, *supra* note 124.

<sup>150</sup> *Id.*

<sup>151</sup> José Felipé Anderson, *Maryland Lawyers Who Helped Shape the Constitution: Father of Freedom - Charles Hamilton Houston*, 44 MD. BAR J. 5, 5-6 (2011). Houston “turned Howard Law School into a West Point of civil rights training that produced a cadre of lawyers to carry out operations that he conceived and gave the black community service that had otherwise been unavailable.” Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149, 2161 (1998).

<sup>152</sup> Carrington, *supra* note 143; Spritzer, *supra* note 146.

<sup>153</sup> Spritzer, *supra* note 146, at 354-55.

<sup>154</sup> Stephen L. Carter, *The Judge*, N.Y. TIMES, July 14, 2021, at 24, 26, <https://www.nytimes.com/2021/07/14/magazine/thurgood-marshall-stories.html>.

<sup>155</sup> Greenhouse, *supra* note 142.

for health reasons in 1938, Marshall succeeded him as the NAACP's chief legal counsel at just thirty years old.<sup>156</sup> In 1940, he founded the NAACP LDF, serving as Director-Counsel for twenty-one years, leading the organization's fight for equal pay for Black employees of public agencies, fairness for Black candidates in the political process, and desegregation of interstate buses and trains.<sup>157</sup> Like his mentor Houston, Marshall's ultimate goal as chief legal counsel was to desegregate public schools.<sup>158</sup> In the early days, he focused on graduate and professional schools.<sup>159</sup> But after a series of favorable Supreme Court decisions, he argued and won the monumental case of *Brown v. Board of Education*, invalidating the separate-but-equal doctrine and ending segregation in public elementary and high schools.<sup>160</sup> Many of his remaining years with the LDF litigating cases focused on resistance to *Brown*, handling as many as 450 cases at a time and constantly traveling to the South.<sup>161</sup> He was frequently referred to as "Mr. Civil Rights."<sup>162</sup>

While a busy trial lawyer, he also maintained a family.<sup>163</sup> After his first wife, Vivien Burey, died from cancer in 1955, he married Cecilia Suyat, a secretary at the LDF.<sup>164</sup> They had two children together, Thurgood Marshall, Jr. and John William Marshall.<sup>165</sup>

<sup>156</sup> Spritzer, *supra* note 146, at 355.

<sup>157</sup> *History*, NAACP: LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/about-us/history/> (last visited Sept. 15, 2022); Spritzer, *supra* note 146, at 355–56.

<sup>158</sup> See David B. Wilkins, *The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 *How. L.J.* 557, 561-62 (2010); Spritzer, *supra* note 146, at 356.

<sup>159</sup> Spritzer, *supra* note 146, at 356.

<sup>160</sup> *Thurgood Marshall*, *supra* note 142; Spritzer, *supra* note 146, at 356–63; Greenhouse, *supra* note 142. Marshall's opponent in *Brown* was John W. Davis, who was "one of Marshall's models for great advocacy before the Supreme Court." David B. Wilkins, *Address by Professor David B. Wilkins Washington and Lee University School of Law Commencement Exercises May 5, 2018*, 76 *WASH. & LEE L. REV.* 1, 7 (2019).

<sup>161</sup> "[Marshall] is currently responsible for 400-500 actions involving 2,000 to 3,000 persons. These cases concern school segregation and accommodations in transportation, airports, hospitals, recreation centers and eating places." *Thurgood Marshall Slated to Get Circuit Court Post: Kaufman Named for One of 3 New Judgeships- Hays Considered*, *N.Y. TIMES*, Sept. 14, 1961, at 1; Spritzer, *supra* note 146 at 363-65. He faced a near-lynching in Columbia, Tennessee after defending two Black men who acted in self-defense. Carter, *supra* note 154. He was arrested on the charge of driving while intoxicated on his way home, put in the back of a police car, and taken to a remote turnoff. *Id.* Thankfully, other lawyers followed the police car, and he was eventually brought in front of a justice of the peace. *Id.* After the justice of the peace smelled his breath, the charges were dropped. *Id.*

<sup>162</sup> *Thurgood Marshall Slated to Get Circuit Court Pose*, *supra* note 161.

<sup>163</sup> Greenhouse, *supra* note 142.

<sup>164</sup> *Id.*; *Thurgood Marshall Slated to Get Circuit Court Pose*, *supra* note 161.

<sup>165</sup> *Fighter for His People: Thurgood Marshall*, *N.Y. TIMES*, Sept. 8, 1962, at 11; Greenhouse, *supra* note 142.

In early 1961, William T. Coleman, then a young Black lawyer at a major white law firm, urged the White House to appoint Thurgood Marshall to the federal bench.<sup>166</sup> Coleman wrote that southern U.S. senators might be angered, but President Kennedy “could assure Dixiecrats that Marshall would be in a New York court and would ‘handle no matter which would adversely affect the interests of the south.’”<sup>167</sup> Marshall was first offered a judgeship on the trial court.

That created a problem because Marshall refused to have his name put in for the lower court. He wanted an appeals court job, which would put him on the same level as his old Howard law professor Bill Hastie, who, as a member of the Third Circuit Court of Appeals, was the highest-ranking [B]lack judge in the country.<sup>168</sup>

Marshall reportedly “felt his lifelong accomplishments were being overlooked” because of the political “cost of putting a civil rights lawyer on the appeals court.”<sup>169</sup> Presented a “take-it-or-leave-it offer for the district court”—with the White House stating, “It’s that or nothing”—Marshall indignantly replied, “Well, I’ve been dealing with nothing all my life, there’s nothing new on that.”<sup>170</sup> After prominent lawyers wrote the White House advocating Marshall for the Second Circuit, the White House relented.<sup>171</sup>

The nomination was carefully timed. The Kennedy brothers, anticipating opposition, nominated Marshall a week before the Senate Judiciary Committee was to go out of session for the rest of the year, not leaving the Committee time to act. Thus, the President was able to give Marshall a recess appointment, allowing the new

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<sup>166</sup> JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 291 (1998). Coleman’s letter was received by “Frank Reeves, who had worked for Marshall at the NAACP,” and “was now a special assistant to the president.” *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 292.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* This conversation took place between Marshall and Attorney General Bobby Kennedy, who provided advice to the president on important judicial posts. *See id.* at 292, 294.

<sup>171</sup> *See id.*, at 293. Assistant Attorney General Ramsey Clark wrote a memo to Attorney General Bobby Kennedy’s deputy, Byron White, characterizing Marshall as “a symbol throughout the nation. He stands for peaceful efforts of a race to secure equal justice under law. [The] appointment of Marshall to the second highest court in the nation should be a wonderfully meaningful thing to millions of people and the culmination of a brave fight.” *Id.* “Martin’s efforts got a surprise boost when J. Edgar Hoover sent over a memo that while occasionally critical of Marshall, generally praised the civil rights attorney.” *Id.*

judge to be in place until Congress could reconvene. That meant Marshall would be on the bench and acting as a judge before segregationist opposition to his appointment could take shape.<sup>172</sup>

On October 6, 1961, Marshall received a recess appointment from President Kennedy to the U.S. Court of Appeals for the Second Circuit,<sup>173</sup> followed by nomination on January 15, 1962.<sup>174</sup>

Chairman Eastland handpicked three senators to handle the nomination. The subcommittee included two segregationist Democrats from the South [John McClellan, an Arkansas Democrat, and Olin Johnston, a South Carolina Democrat] and Roman Hruska, a Nebraska Republican who was described by one newspaper as “at best, lukewarm,” when it came to civil rights.<sup>175</sup>

His confirmation was long and contentious. Members of the Senate Judiciary Committee, including Senators Eastland, Olin D. Johnston, Strom Thurmond, and John C. Stennis, worked to block his confirmation.<sup>176</sup>

By April [1962], six months after Marshall had been sworn in, there still had not been a hearing on his nomination, and stories began to appear criticizing the Senate for its stalling. Reporters pointed out that two judges, both ardent segregationists, had been confirmed just

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<sup>172</sup> *Id.* at 294.

<sup>173</sup> *Thurgood Marshall Backed by 11-to-4 Committee Vote: Marshall Backed by Senate Group*, N.Y. TIMES, Sept. 8, 1962, at 1; Greenhouse, *supra* note 142; Spritzer, *supra* note 146, at 365.

<sup>174</sup> Greenhouse, *supra* note 142; 108 CONG. REC. 19051-53 (1962).

<sup>175</sup> WILLIAMS, *supra* note 166, at 298-99. Senator Eastland, a Democrat of Mississippi, became chair of the Judiciary Committee in 1956, leading the committee with jurisdiction over federal courts and judicial appointments for over 20 years. *James O. Eastland Collection*, THE UNIV. OF MISS. LIBRARIES, <http://purl.oclc.org/umarchives/MUM00117/> (last visited October 12, 2022); *James Eastland: A Featured Biography*, U.S. SENATE, [https://www.senate.gov/senators/FeaturedBios/Featured\\_Bio\\_EastlandJames.htm](https://www.senate.gov/senators/FeaturedBios/Featured_Bio_EastlandJames.htm) (last visited Oct. 21, 2022). Eastland, a “Dixiecrat and arch foe of equality of treatment for Negroes,” was named chairman of the Senate Judiciary subcommittee on civil rights in 1949. *Name Civil Rights Foe to Civil Rights Post*, CHI. DEF., Sept. 24, 1949, at 1.

<sup>176</sup> *Marshall Yet Unconfirmed*, CHI. DAILY DEF., Apr. 12, 1962, at 11; Warren Weaver, Jr., *Hearing on Thurgood Marshall Is Recessed Again: Marshall’s Case Is Delayed Again*, N.Y. TIMES, Aug. 21, 1962, at 1; *Senate OK’s Marshall: Senate Finally OK’s Marshall*, CHI. DAILY DEF., Sept. 12, 1962, at 1. It was suggested that the Dixiecrats hoped to bargain off the confirmation against a literacy bill passed a few weeks before the confirmation hearings. *Marshall Yet Unconfirmed*, *supra* note 176.



days after they had been nominated. W. Harold Cox had been confirmed in one week, and J. Robert Elliott had been confirmed in only two.<sup>177</sup>

No action was taken on his nomination until May 1962.<sup>178</sup> Then, the subcommittee assigned for the nomination, led by Senator Johnston, held six hearings but never submitted a report.<sup>179</sup> The subcommittee privately voted two to one to reject Marshall's nomination, prompting Senator Bobby Kennedy to request that Marshall meet with Senator Eastland, "to pay our respects."<sup>180</sup> Marshall refused stating, "I'm not going to go in there and genuflect to that man."<sup>181</sup> Despite "the negative subcommittee vote, the full Judiciary Committee voted 11-4 on" September 7, 1962, to confirm.<sup>182</sup> Before the whole Senate, the southern senators continued to assert that his appointment was "a direct affront to the South" because of his background in civil rights work and alleged, unsubstantiated ties to communists.<sup>183</sup> Despite all this, he was confirmed by the Senate by a fifty-four to sixteen vote on September 11, 1962.<sup>184</sup> While on the Second Circuit, none of his 112 decisions were overturned by the Supreme Court.<sup>185</sup>

<sup>177</sup> Williams, *supra* note 166, at 299.

<sup>178</sup> *Thurgood Marshall Backed by 11-to-4 Committee Vote*, *supra* note 173. "Jackie Robinson wrote in his newspaper column that Marshall was being punished because of his skin color, 'the accident of birth.' Eleanor Roosevelt wrote about the delay, calling it a world-wide embarrassment to a nation that professed equality among its citizens." WILLIAMS, *supra* note 166, at 301.

<sup>179</sup> *Thurgood Marshall Backed by 11-to-4 Committee Vote*, *supra* note 173.

With pressure building Senator Johnston agreed to have one day of hearings in May, a month before his primary contest. But Johnston did not show up, and neither did Senator McClellan. Nebraska's Senator Hruska sat uncomfortably by himself as the two senators from New York, [Kenneth] Keating and Jacob Javits, testified in praise of Marshall's ability. Marshall also made a brief, nervous statement . . . There were no more hearings on Marshall for another two months. The delay left Marshall frustrated and nervous . . . While Marshall worried about every step he made as a judge, President Kennedy did little to press the Senate for speedy action on the nomination.

WILLIAMS, *supra* note 166, at 300.

<sup>180</sup> WILLIAMS, *supra* note 166, at 302. WIL HAYGOOD, SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA 149 (2015).

<sup>181</sup> WILLIAMS, *supra* note 166, at 302-03.

<sup>182</sup> *Id.* at 303. Voting against Marshall were four southern senators: "Eastland of Mississippi, McClellan of Arkansas, Johnson of South Carolina, and Sam Ervin of North Carolina." *Id.*

<sup>183</sup> Young, *supra* note 148. WILLIAMS, *supra* note 166, at 301.

<sup>184</sup> Spritzer, *supra* note 146, at 365; Warren Weaver, Jr., *Thurgood Marshall Confirmed by Senate, 54-16, for Judgeship*, N.Y. TIMES, Sept. 12, 1962, at 1. Only southern Democrats voted against Marshall. WILLIAMS, *supra* note 166, at 303.

<sup>185</sup> Greenhouse, *supra* note 142.

About three years later, President Johnson, on July 14, 1965, appointed him as the United States Solicitor General.<sup>186</sup> He openly admitted that the decision to accept the Solicitor Generalship was extremely difficult, due to the pay cut, lessened job stability, and distance from his family.<sup>187</sup> Many believed that the new position was a steppingstone to the Supreme Court, but he insisted he was interested in the position because President Johnson specifically asked him to represent him before the Supreme Court.<sup>188</sup> Due to his background, when selected as the Solicitor General he had already appeared before every current member of the Court, except for Justices White and Goldberg.<sup>189</sup> “In marked contrast to his second circuit nomination, only one fifteen-minute meeting was held and the subcommittee voted 5-0 to recommend Marshall’s nomination to the full Senate.”<sup>190</sup> Less than a month after his nomination, “the full Senate confirmed Marshall, without debate, to be solicitor general.”<sup>191</sup> In all, he argued thirty-two cases to the Supreme Court, fourteen as a private attorney and eighteen as Solicitor General.<sup>192</sup> He won twenty-nine of them.<sup>193</sup>

In February 1967, President Johnson announced his intention to elevate Ramsey Clark to become the Attorney General.<sup>194</sup> That same day, Ramsey Clark’s father, Justice Tom Clark, announced his resignation from the Supreme Court at the end of the term.<sup>195</sup> “The timing of the announcements seemed to indicate that a deal had been cut.”<sup>196</sup> In June 1967, President Johnson nominated Marshall to the Supreme Court, stating: “He is the best qualified by training and by very valuable service to the country. I believe it is the right thing to do, the right time to do it, the right man and the right place.”<sup>197</sup> His nomination was

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<sup>186</sup> Spritzer, *supra* note 134, at 365; *Thurgood Marshall – ‘Mr. Civil Rights’: Noted Lawyer Given Solicitor General Post*, CHI. DAILY DEF., Feb. 15, 1966, at 4.

<sup>187</sup> *Thurgood Marshall – ‘Mr. Civil Rights’: Noted Lawyer Given Solicitor General Post*, *supra* note 186. He stated, “I told Cissie that it would call for some belt-tightening, that it might mean that she couldn’t get a new dress for a year—and all she said was: ‘So?’” Young, *supra* note 148.

<sup>188</sup> See Young, *supra* note 148. *Marshall’s New Job: What It Means*, CHI. DAILY DEF., July 14, 1965, at 3.

<sup>189</sup> Young, *supra* note 148.

<sup>190</sup> WILLIAMS, *supra* note 166, at 317.

<sup>191</sup> *Id.*

<sup>192</sup> Greenhouse, *supra* note 142.

<sup>193</sup> *Id.*

<sup>194</sup> WILLIAMS, *supra* note 166 at 329.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Roy Reed, *Marshall Named for High Court, Its First Negro*, N.Y. TIMES, June 14, 1967, at 1. President Johnson had some reluctance nominating Marshall because the president “was

primarily due to backing from Attorney General Clark, the son of Justice Clark, who Marshall replaced on the Court.<sup>198</sup> Although twice previously confirmed by the Senate, his nomination still led to one the most contentious Supreme Court confirmations in history.<sup>199</sup> Despite the three most recent Supreme Court nominees—Byron White, Arthur Goldberg, and Abe Fortas—going “from nomination to confirmation and a seat on the Court in under two weeks,” the Judiciary Committee delayed Marshall’s hearing for over a month, wanting “to go over every inch of his background.”<sup>200</sup> Senator Eastland reignited his claims that Marshall was a communist who was “prejudiced against white people in the South.”<sup>201</sup> The opposition also tried to claim “that he would be too sympathetic to criminal defendants, that he would be unlikely to exercise judicial restraint, that he was too enamored with the notion of a ‘living constitution,’ that he was insufficiently sympathetic to states’ rights, and that he was lacking in basic constitutional knowledge.”<sup>202</sup> “Senators Ervin, Thurmond, Eastland, and McClellan engaged in what newspapers called a six-hour mini-filibuster against Marshall’s confirmation.”<sup>203</sup> Nonetheless, when the filibuster ended, he was confirmed by the Senate in August 1967 by a vote of sixty-nine to eleven.<sup>204</sup> When Justice Marshall took his seat in October 1967, he became the first Black Supreme Court Justice in United States history.<sup>205</sup>

On the Court, he continued to address racial inequality.<sup>206</sup> For example, in 1978, when the Court declared unconstitutional a state-run

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displeased over Marshall’s failure to point a finger at Kennedy for authorizing wiretaps and electronic bugging” in a case before the Supreme Court and “concerned that Marshall was too liberal at a time when the country was going through riots and crime waves and a substantial right-wing backlash was under way.” WILLIAMS, *supra* note 166, at 328-29. Johnson reportedly told Ramsey Clark “that putting Marshall on the Court might mean that his hopes for reelection in 1968 were ‘long gone.’” *Id.* at 329. Nicholas Katzenbach stated that President Johnson was considering Judge Bill Hastie for the Supreme Court over Marshall. *Id.* at 330.

<sup>198</sup> Reed, *supra* note 197. Justice Marshall worked closely with Ramsey Clark as the Solicitor General, and Clark enthusiastically endorsed Justice Marshall’s nomination to the Supreme Court. *Id.*

<sup>199</sup> Reed, *supra* note 197; Carter, *supra* note 154 at 25.

<sup>200</sup> WILLIAMS, *supra* note 166, at 332.

<sup>201</sup> Carter, *supra* note 154 at 25.

<sup>202</sup> Linda Sheryl Greene, *A Tale of Two Justices: Brandeis, Marshall, and Federal Court Judicial Diversity*, 2017 WIS. L. REV. 401, 409 (2017).

<sup>203</sup> WILLIAMS, *supra* note 166, at 337. “For his part, Eastland asked Marshall no question more difficult than if he had known when he cited the work of Herbert Aptheker in an opinion that Aptheker had clear ties to the Communist Party. Once Marshall replied in the negative and that he would not knowingly reference a Communist in any future ruling, Eastland ceased his questioning.” J. LEE ANNIS, JR., *BIG JIM EASTLAND: THE GODFATHER OF MISSISSIPPI* 216 (2016).

<sup>204</sup> Spritzer, *supra* note 146 at 367.

<sup>205</sup> *Id.*

<sup>206</sup> Greenhouse, *supra* note 142.

medical school's affirmative action program, Justice Marshall, in a lengthy dissent, critiqued the majority for not addressing the history and impacts of discrimination against Blacks.<sup>207</sup> Again, in 1989, Justice Marshall dissented when the Court invalidated a municipal ordinance setting aside contracts for Black-owned businesses.<sup>208</sup> He vehemently opposed the death penalty, writing more than 150 dissents when the Court refused to hear death penalty cases.<sup>209</sup> His notable majority opinions include *Amalgamated Food Employees Union v. Logan Valley Plaza*, where the Court held that a shopping center was a "public forum" that could not exclude picketers, and *Bounds v. Smith*, where the Court held that state prisons must provide prisoners with adequate law libraries.<sup>210</sup>

Taking everyone by surprise, Justice Marshall assumed senior status in October 1991.<sup>211</sup> He passed away on January 24, 1993, due to heart failure, survived by his wife and sons.<sup>212</sup> The Court approved a special resolution to honor his legacy.<sup>213</sup> Chief Justice Rehnquist wrote, "Inscribed above the front entrance to [the] Court building are the words, 'Equal Justice Under Law.' Surely no individual did more to make these words a reality than Thurgood Marshall."<sup>214</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Greenhouse, *supra* note 142. He had previously asserted that he would not retire, so when he announced his retirement many of his colleagues on the Supreme Court, even those that he often disagreed with, were shocked and saddened. *Id.*; Stephen Labaton, *Justice Marshall Vows to Outlive His Critics*, N.Y. TIMES, Oct. 18, 1987, at 34. Justice Marshall's law clerks include Professors David Wilkins, Randall Kennedy, Martha Minow, Stephen Carter, Howell Jackson, Carol Steiker, and Scott Brewer, among other academics; Karen Hastie Williams, Judge Hastie's only daughter; and Justice Elena Kagan. See Liz Mineo, *Thurgood Marshall: The Soundtrack of Their Lives*, HARV. GAZETTE (Sept. 28, 2017), <https://news.harvard.edu/gazette/story/2017/09/former-clerks-recall-mr-civil-rights-thurgood-marshall/>; Carter, *supra* note 154 at 25; THE DIGITAL REPOSITORY FOR THE BLACK EXPERIENCE, <https://www.thehistorymakers.org/biography/david-b-wilkins> (last visited Nov. 17, 2022); *Biography of Howell E. Jackson*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/faculty/howell-e-jackson/> (last visited Nov. 17, 2022); Emily Langer, *Karen Hastie Williams, Pathbreaking Washington Lawyer, Dies at 76*, WASH. POST (Aug. 11, 2021, 9:35 AM), [https://www.washingtonpost.com/local/obituaries/karen-hastie-williams-dead/2021/08/11/31d5127a-f949-11eb-943a-c5cf30d50e6a\\_story.html](https://www.washingtonpost.com/local/obituaries/karen-hastie-williams-dead/2021/08/11/31d5127a-f949-11eb-943a-c5cf30d50e6a_story.html).

<sup>212</sup> Greenhouse, *supra* note 142; Joan Biskupic, *Thurgood Marshall, Retired Justice, Dies*, WASH. POST., Jan. 25, 1993, at A1.

<sup>213</sup> *Thurgood Marshall's Unique Supreme Court Legacy*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Aug. 30, 2022), <https://constitutioncenter.org/blog/thurgood-marshalls-unique-supreme-court-legacy>.

<sup>214</sup> *Id.*

*E. Hon. A. Leon Higginbotham, Jr. (active federal judicial service: 1964-1991)*

A. Leon Higginbotham, Jr. received a recess appointment from President Johnson to a seat vacated by Judge J. Cullen Ganey on the U.S. District Court for the Eastern District of Pennsylvania on January 6, 1964.<sup>215</sup> He was nominated by President Johnson on February 3, 1964, was confirmed by the Senate on March 14, 1964, and received his commission on March 17, 1964.<sup>216</sup> His service ended November 7, 1977, with his appointment to the U.S. Court of Appeals for the Third Circuit.<sup>217</sup> Judge Higginbotham was nominated to the appellate court by President Carter on September 19, 1977, to a seat vacated by Francis Lund Van Dusen.<sup>218</sup> Confirmed by the Senate on October 7, 1977, he received his commission four days later.<sup>219</sup> He was Chief Judge from 1990 to 1991, the third Black to do so (following Judges Hastie and Robinson).<sup>220</sup> He “[a]ssumed senior status due to certified disability on January 31, 1991[,]” and retired on March 5, 1993.<sup>221</sup> Before federal judicial service, Higginbotham served as a Commissioner on the Federal Trade Commission.<sup>222</sup>

He was born in Trenton, New Jersey on February 25, 1928, the only child of A. Leon Higginbotham Sr. and Emma Douglas Higginbotham.<sup>223</sup> His parents exemplified hard work and self-sacrifice, regularly giving to their church and providing their son as many educational opportunities as possible.<sup>224</sup> Judge Higginbotham initially attended segregated public schools, but after his mother fought for his enrollment, he became the first Black student in the academic high school program in Trenton.<sup>225</sup> After graduating from Ewing Park High School in Trenton

<sup>215</sup> *Higginbotham, Aloyisus Leon, Jr.*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/higginbotham-aloyisus-leon-jr> (last visited June 4, 2022).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*; Michael deCourcy Hinds, *Legal Scholar to Take Helm at Third Circuit*, N.Y. TIMES, Dec. 15, 1989, at B20.

<sup>221</sup> *Higginbotham, Aloyisus Leon, Jr.*, *supra* note 215.

<sup>222</sup> Charles J. Ogletree, Jr., *In Memoriam: A Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801, 1802 (1999) [hereinafter Ogletree I].

<sup>223</sup> *Aloyisus Leon Higginbotham Jr.*, L. LIBR. – AM. L. & LEGAL INFO., <https://law.jrank.org/pages/7350/Higginbotham-Aloyisus-Leon-Jr.html> (last visited Oct. 22, 2022); F. Michael Higginbotham & José Felipe Anderson, *A. Leon Higginbotham Jr.: Who Will Carry the Baton?*, 33 LOY. L.A. L. REV. 1015, 1017 n.7 (2000).

<sup>224</sup> Ogletree I, *supra* note 222, at 1803-04.

<sup>225</sup> *Aloyisus Leon Higginbotham Jr.*, *supra* note 223.

at age of sixteen he enrolled at Purdue University to become an engineer.<sup>226</sup>

At Purdue, Higginbotham was one of twelve Black students forced to live in an unheated, barracks-style attic.<sup>227</sup> One morning, he went to the office of the university president and requested that the Black students be allowed to live in campus dormitories.<sup>228</sup> The president responded that the law did not require Purdue to let Black students sleep in dorms, “and if he didn’t like the housing situation, he could leave.”<sup>229</sup> He transferred to Antioch College in Ohio, studying sociology and graduating in 1949.<sup>230</sup> He cited the interaction with the Purdue president as the reason he decided “to become a lawyer, believing that the law should [not] sanction such injustices.”<sup>231</sup>

Higginbotham graduated at the top of his class from Yale Law School in 1952 and was admitted to the Pennsylvania Bar in 1953.<sup>232</sup> But he continued to battle discrimination.<sup>233</sup> Arriving for an interview with a premier Philadelphia law firm, the interviewing lawyer told him that there was nothing the firm could do for him because they assumed he was a white Yale Law graduate.<sup>234</sup> Undeterred, he began his legal career as a clerk for Justice Curtis Bok of the Pennsylvania Supreme Court.<sup>235</sup> After a stint as an Assistant District Attorney in Philadelphia, he co-founded Philadelphia’s first Black law firm, Norris Schmidt Green Harris Higginbotham & Brown.<sup>236</sup>

<sup>226</sup> *Id.*; Higginbotham & Anderson, *supra* note 223.

<sup>227</sup> F. Michael Higginbotham, *Speaking Truth to Power: A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL’Y REV. 341, 342-43 (2002). *Brown v. Board of Education* was decided about ten years later. *Id.* at 343.

<sup>228</sup> *Id.* at 343.

<sup>229</sup> Charles J. Ogletree, Jr., *From Pretoria to Philadelphia: Judge Higginbotham’s Racial Justice Jurisprudence on South Africa and the United States*, 20 YALE L. & POL’Y REV. 383, 384 (2002) [hereinafter Ogletree II].

<sup>230</sup> F. Michael Higginbotham, *supra* note 227, at 341 n.1; *Aloysius Leon Higginbotham Jr.*, *supra* note 223. At Antioch College, Judge Higginbotham was one of only two black students. Richard W. Rose, *A Tribute to Judge A. Leon Higginbotham, Jr.: Farewell to a Giant*, 4 ROGER WILLIAMS U. L. REV. 387, 392 (1999). The other was Coretta Scott, who later married Reverend Dr. Martin Luther King, Jr. *Id.*

<sup>231</sup> William Glaberson, *A. Leon Higginbotham Jr., Federal Judge, Is Dead at 70*, N.Y. TIMES, Dec. 15, 1998, at B14.

<sup>232</sup> Higginbotham & Anderson, *supra* note 223.

<sup>233</sup> *Glaberson, supra* note 231.

<sup>234</sup> *Id.*

<sup>235</sup> Rose, *supra* note 230.

<sup>236</sup> Victor Williams, *NLRB v. Noel Canning Exposes Judicial Incapacity: Junior Varsity Politicians Foul the President’s Textual Appointment Discretion*, 43 RUTGERS L. REC. 60, 81 & n.76 (2015-2016) (tribute offered to civil rights legends Leon Higginbotham, Spottswood Robinson, and David Rabinovitz).

While in private practice, he also served in numerous public capacities including Special Deputy Attorney General for the Commonwealth of Pennsylvania, Special Hearing Officer in the United States Department of Justice, President of the Philadelphia Chapter of the National Association for the Advancement of Colored People, and a board member for various legal, political, and non-profit organizations within Pennsylvania.<sup>237</sup>

In 1962, President Kennedy appointed Higginbotham to the Federal Trade Commission (FTC)—the first Black commissioner of any federal agency and the youngest person ever appointed to the FTC, at the age of thirty-four.<sup>238</sup>

Just one year later, President Kennedy nominated Higginbotham to be a federal district judge in the Eastern District of Pennsylvania.<sup>239</sup> The nomination was blocked for months by the Senate Judiciary Committee.<sup>240</sup> Following Kennedy's assassination, Judge Higginbotham received a recess appointment from President Johnson in early 1964, with later confirmation by the Senate on March 14, 1964.<sup>241</sup>

Presiding over a class action civil rights case in the early 1970s, the defense counsel requested he recuse because "(1) he had given a speech criticizing some Supreme Court decisions on civil rights and (2) as an African American with a civil rights background, the defendants asserted that he would be partial towards the plaintiffs bringing claims on the basis of race discrimination."<sup>242</sup> In a "thoughtful and frequently cited opinion rejecting these arguments for recusal," Judge Higginbotham stated:

I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as

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<sup>237</sup> *Judge A. Leon Higginbotham, Jr.*, LAWYERS' COMM. FOR CIV. RTS. UNDER LAW, <https://www.lawyerscommittee.org/the-honorable-a-leon-higginbotham-jr/> (last visited Oct. 12, 2022).

<sup>238</sup> Ogletree I, *supra* note 222; *Negro F.T.C. Aide Confirmed*, N.Y. TIMES, Oct. 6, 1962, at 26; Williams, *supra* 236, at 81.

<sup>239</sup> *Negro on F.T.C. is Named for Bench in Pennsylvania*, N.Y. TIMES, Sept. 26, 1963, at 29; Williams, *supra* note 236, at 82. He was the youngest federal judge to be appointed in three decades. deCourcy Hinds, *supra* note 220.

<sup>240</sup> *Senate Fails to Act on Two Negro Judges*, CHI. DAILY DEF., Jan. 2, 1964, at 3; Williams, *supra* note 236, at 82.

<sup>241</sup> *Higginbotham, Aloyisus Leon, Jr.*, *supra* note 215.

<sup>242</sup> Charles J. Ogletree, Jr., *Judge A. Leon Higginbotham, Jr.'s Civil Rights Legacy*, 34 HARV. C.R.-C.L. L. REV. 1, 2-3 (1999) [hereinafter Ogletree III]. See *Pennsylvania v. Local Union 542*, 388 F.Supp. 155, 157-58 (1974).

most other ethnics take pride in theirs. However, that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant. As do most blacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice.<sup>243</sup>

He “served many years as a famed federal trial judge before President Carter [appointed] him to the U.S. Court of Appeals for the Third Circuit” in 1977.<sup>244</sup> According to some historians, he was one of the handful of candidates considered by President Johnson to integrate the United States Supreme Court before Thurgood Marshall’s appointment in 1967.<sup>245</sup>

Judge Higginbotham served as Chief Judge on the Third Circuit from 1990 to 1991, assumed senior status due to disability in 1991, and retired from the bench in 1993.<sup>246</sup> During his time as a judge, he wrote over 650 opinions and was known for a legendary work ethic.<sup>247</sup> He repeatedly used his position to remedy injustice against the powerless.<sup>248</sup> “Higginbotham never served as a rubber stamp for a civil rights plaintiff or a criminal defendant... [H]e was basically a centrist judge, respectful of precedent and judicial tradition. He decided every case on its merits, not on ideology.”<sup>249</sup> Justice William J. Brennan once called Judge Higginbotham the “conscience of the legal profession.”<sup>250</sup>

Besides Judge Higginbotham’s tremendous tenure as a judge, he is also well-known for his contributions as legal scholar, teacher, and mentor.<sup>251</sup> After retirement, he taught at Harvard University, practiced law in New York and Washington, and served on various corporate boards.<sup>252</sup> He wrote two books—one winning several awards—and

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<sup>243</sup> Ogletree III, *supra* note 242 at 3. See *Local Union 542*, 388 F.Supp. at 163.

<sup>244</sup> Williams, *supra* note 236, at 82-83; Higginbotham, *Aloyisus Leon, Jr.*, *supra* note 215.

<sup>245</sup> Glaberson, *supra* note 231.

<sup>246</sup> Higginbotham, *Aloyisus Leon, Jr.*, *supra* note 215.

<sup>247</sup> Edward R. Becker, *A. Leon Higginbotham, Jr.: The Man*, 142 U. PA. L. REV. 511, 511-12 (1993).

<sup>248</sup> Ogletree I, *supra* note 222, at 1803.

<sup>249</sup> Edward R. Becker, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1813, 1815-16 (1999).

<sup>250</sup> Ogletree I, *supra* note 222, at 1804.

<sup>251</sup> Rose, *supra* note 230, at 395-98. See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1991).

<sup>252</sup> Glaberson, *supra* note 231.



published sixty-seven scholarly articles.<sup>253</sup> His first law clerk was the first woman law clerk in his federal court jurisdiction,<sup>254</sup> and he was the first Black on Yale's Board of Directors, where he vigorously advocated for the admission of women to Yale.<sup>255</sup> The recipient of many honors, including the Presidential Medal of Freedom and the Thurgood Marshall Award,<sup>256</sup> Judge Higginbotham's survival and rise above racism created numerous opportunities for future black lawyers, a legacy to this day.<sup>257</sup>

He died of a stroke on December 14, 1998, at age seventy, survived by his wife, Dr. Evelyn Brooks Higginbotham, a professor of history and Afro-American studies at Harvard; two sons, Stephen and Kenneth; and two daughters, Karen and Nia.<sup>258</sup> An earlier marriage, to Jeanne L. Foster, ended in divorce in 1988.<sup>259</sup>

*F. Hon. Spottswood W. Robinson, III (active federal judicial service: 1964-1989)*

Spottswood W. Robinson, III received a recess appointment from President Johnson to the U.S. District Court for the District of Columbia on January 6, 1964, to a seat vacated by Judge James W. Morris.<sup>260</sup> Robinson was nominated to the federal trial judgeship on February 3, 1964; confirmed by the Senate on July 1, 1964; received his commission a day later, and concluded district service on November 8, 1966, with his appointment to the U.S. Court of Appeals for the District of Columbia Circuit.<sup>261</sup> Judge Robinson was nominated to the D.C. Circuit by President Johnson on October 6, 1966, to a seat vacated by Judge George T. Washington.<sup>262</sup> Confirmed by the Senate on October 20,

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<sup>253</sup> Rose, *supra* note 230, at 395. His book *In the Matter of Color—Race and the American Legal Process* won the American Silver Gavel Award, the Frederick Douglas Award, National Conference of Black Journalists, and the National Bar Association Literacy Award, among others. *Id.*

<sup>254</sup> Williams, *supra* note 236, at 83.

<sup>255</sup> Higginbotham, *supra* note 227, at 345-46.

<sup>256</sup> Rose, *supra* note 230, at 388, 399. "In addition to receiving the Presidential Medal of Freedom, the highest civilian honor available in the United States, he was awarded the National Bar Association's highest award, the Stratford Medal, the NAACP's highest honor, the Spingarn Medal, and more than sixty honorary degrees from prestigious colleges and universities throughout America." Ogletree III, *supra* note 242, at 1.

<sup>257</sup> Rose, *supra* note 230, at 399-400.

<sup>258</sup> Glaberson, *supra* note 231.

<sup>259</sup> *Id.*

<sup>260</sup> Robinson, *Spottswood William III*, FED. JUD. CTRC, <https://www.fjc.gov/history/judges/robinson-spottswood-william-iii> (last visited on June 4, 2022).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

1966, he received his commission on November 3, 1966.<sup>263</sup> He assumed senior status on September 1, 1989, and concluded his service on October 11, 1998, due to death.<sup>264</sup> Before joining the federal bench, Robinson served as Dean of Howard Law School and a member of the U.S. Commission on Civil Rights.<sup>265</sup>

Judge Robinson was born on July 26, 1916, in Richmond, Virginia to a lawyer, Spottswood Robinson, Jr., and Inez Irene Clements.<sup>266</sup> Graduating from Armstrong High School, the first public school for Blacks in Richmond,<sup>267</sup> he earned an undergraduate degree from Virginia Union University in 1936.<sup>268</sup> In 1939, he graduated from Howard Law School with an LL.B. degree with the highest academic record in the school's history.<sup>269</sup>

After graduation, he began teaching at Howard Law School,<sup>270</sup> and entered private practice with Oliver W. Hill and Martin A. Martin in 1943.<sup>271</sup> As "one of just a very small handful of practicing lawyers who handled civil rights cases in the late '40s and early '50s in Virginia," his meticulous style and intellectual brilliance became legendary.<sup>272</sup> In 1948, he joined as counsel for the Virginia NAACP LDF, later promoted to Southeast Regional Counsel there in 1951.<sup>273</sup> He played a prominent role in the legal battle against segregation, eventually joining the legal team that argued *Brown v. Board of Education* in the Supreme

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Negro Chosen for U.S. Judgeship*, N.Y. TIMES, Oct. 1, 1963, at 22; Brian Gann, *Spottswood William Robinson (1916-1998)*, BLACKPAST (June 18, 2011), <https://www.blackpast.org/african-american-history/robinson-spottswood-william-1916-1998/>.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Sketches of the Nine Judges Who Are Hearing Appeals on the Watergate Tapes*, N.Y. TIMES, Sept. 11, 1973, at 36; *Robinson, Spottswood William III*, *supra* note 260. A former law clerk recounts that Judge Robinson's father submitted his law school application for him because he was initially uncertain about becoming a lawyer. Carol Chomsky, In Memoriam, *Spottswood W. Robinson, III*, 15 HARV. BLACKLETTER L.J. 11, 12-13 (1999).

<sup>270</sup> Eric Pace, *Spottswood W. Robinson 3d, Civil Rights Lawyer, Dies at 82*, N.Y. TIMES, Oct. 13, 1998, at B11 [hereinafter Pace III]. He mainly taught property law. *Id.*

<sup>271</sup> Oliver W. Hill, In Memoriam, *Spottswood W. Robinson, III*, 15 HARV. BLACKLETTER L.J. 7, 7 (1999). They formed the firm Hill, Martin and Robinson. *Id.*

<sup>272</sup> Pace III, *supra* note 270; Hill, *supra* note 271, at 8.

<sup>273</sup> Pace III, *supra* note 270; *Sketches of the Nine Judges Who Are Hearing Appeals on the Watergate Tapes*, *supra* note 269. When traveling he would always pack a lunch. "A Negro lawyer practicing in some of the outlying county courts had a hard time finding any place to eat," he said. Bart Barnes, *Spottswood W. Robinson, Appeals Judge, Dies at 82*, WASH. POST, Oct. 13, 1998, at B6 [hereinafter Bart Barnes].

Court.<sup>274</sup> When the Court “handed down its decisions, the justices also ruled on four other cases, among them a Virginia case Mr. Robinson had argued challenging conditions at an all-[B]lack high school.”<sup>275</sup> He also litigated cases that led to Supreme Court decisions “prohibiting racial segregation requirements in interstate transportation,” holding “that court enforcement of racially based real estate covenants is unconstitutional,” and “declaring it illegal to deny the use of state park facilities on racial grounds.”<sup>276</sup> Jack Greenberg, a former director of the NAACP LDF and professor of law at Columbia, noted:

‘He was also an exceptionally capable lawyer. He was good with judges and juries. He knew the law. He knew some of the esoteric, technical, sort of obscure parts of legal history.’ Mr. Robinson’s view was that the 14th Amendment had envisioned the establishment of complete equality for all people, regardless of race. Equality was denied to blacks, he held, as long as their children could not go to white schools.<sup>277</sup>

In 1960, Judge Robinson left LDF, becoming Dean of Howard Law School.<sup>278</sup> From 1961 until 1963, he also served as a member of the United States Commission on Civil Rights.<sup>279</sup> At forty-seven, Judge Robinson became the leading candidate for the vacancy on the U.S. District Court for the District of Columbia after Judge James W. Morris

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<sup>274</sup> Pace III, *supra* note 270; Hill, *supra* note 271 at 7-8; *Negro Chosen for U.S. Judgeship*, *supra* note 266. Robinson took on cases that led to major civil rights victories, including *Morgan v. Virginia*, 328 U.S. 373 (1946), where the Supreme Court held that segregation in interstate transportation violated the Commerce Clause. Hill, *supra* note 271 at 7-8. He also was the legal engineer behind cases that invalidated racial restrictions in property transactions, public schools, state parks, and public golf courses. *Id.* When he took on a Virginia desegregation case that was eventually consolidated with *Brown v. Board of Education*, his assignment was to argue the constitutional history of the 14th Amendment in front of the Supreme Court. Pace III, *supra* note 270. Jack Greenberg reflected on Judge Robinson’s performance saying, “He was good with judges and juries. He knew the law. He knew some of the esoteric, technical, sort of obscure parts of legal history.” *Id.*

<sup>275</sup> Pace III, *supra* note 270. In 1951, “he began working on the case of a black student in Prince Edward County, in south-central Virginia, who said that the Robert R. Moton High School there, which had only black students, was inadequate. The lawsuit was eventually combined with the Brown case, out of Kansas, and the other cases, from South Carolina and Delaware.” *Id.*

<sup>276</sup> Bart Barnes, *supra* note 273.

<sup>277</sup> Pace III, *supra* note 270.

<sup>278</sup> *Id.*; see Robinson, *Spottswood William III*, *supra* note 260.

<sup>279</sup> *Negro Chosen for U.S. Judgeship*, *supra* note 266; Pace III, *supra* note 270..

died in 1960.<sup>280</sup> President Kennedy nominated him to the Court, in 1963, shortly before being assassinated.<sup>281</sup> Robinson received a recess appointment from President Johnson in 1964.<sup>282</sup> Confirmed by the Senate later that year, he became the first Black judge on the U.S. District Court for the District of Columbia,<sup>283</sup> and later the first Black judge on the U.S. Court of Appeals for the District of Columbia Circuit when President Johnson appointed him in 1966.<sup>284</sup> “[S]ometimes described as the nation’s second most influential court,” there he sat on the three-judge panel that rejected President Richard Nixon’s attempt to keep some of the Watergate Tapes from being released to the public.<sup>285</sup>

On May 7, 1981, he became the first Black Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit.<sup>286</sup> He stepped down from the position in 1986, assuming senior status a few years later.<sup>287</sup> Passing away in 1998, at age eighty-two, Robinson was survived by his wife of sixty-two years, the former Marian Wilkerson; a daughter, Nina R. Govan; a son, Spottswood W. Robinson IV; one grandson; and a sister, Isadore Burke.<sup>288</sup>

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<sup>280</sup> *Robinson May be Appointed to Judgeship*, CHI. DAILY DEF., July 30, 1963, at A13. The other candidates for the judgeship were Charles T. Duncan, assistant to the U.S. Attorney for the District of Columbia, and William B. Bryant. *Id.* Bryant was later appointed to another vacancy on the Court. *Bryant, William Benson*, FED. JUD. CTR.: BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/bryant-william-benson> (last visited on June 4, 2022).

<sup>281</sup> Margaret Edds, *Spottswood William III Robinson*, ENCYCLOPEDIA VA. (Dec. 22, 2021), <https://encyclopediavirginia.org/entries/robinson-spottswood-william-iii-1916-1998/>; *Negro chosen for U.S. Judgeship*, *supra* note 266. It was reported that President Kennedy’s nomination of Judge Robinson was an effort to ease the backlash he faced after nominating Judge Walter P. Gewin, Judge E. Gordon West, Judge William Harold Cox, and Judge J. Robert Elliott to Southern courts. Marjorie Hunter, *Kennedy Counters Negro Criticism on Judgeships*, N.Y. TIMES, Oct. 6, 1963, at A75. Critics also disapproved of President Kennedy’s choice to only nominate Black judges to courts in Northern states, where they would rarely be able to hear cases on segregation. *Id.*

<sup>282</sup> *5 Nominees Await Senate Approval*, N.Y. TIMES, Jan. 1, 1964, at 28; Hill, *supra* note 271 at 9. Judge Robinson was amongst five other nominees who were held up by Congress’ recess, including Judge A. Leon Higginbotham, Jr., John R. Reilly, Judge John Morgan Davis, and Judge David Rabinovitz. *5 Nominees Await Senate Approval*, *supra* note 283.

<sup>283</sup> *Senate Confirms Three Judges*, N.Y. TIMES, July 2, 1964, at A19; *Negro Chosen for U.S. Judgeship*, *supra* note 266; Gann, *supra* note 267.

<sup>284</sup> Gann, *supra* note 267.

<sup>285</sup> Bart Barnes, *supra* note 273; *Sketches of the Nine Judges Who Are Hearing Appeals on the Watergate Tapes*, *supra* note 269; *Nixon Loses Legal Appeal on Release of Secret Tapes*, N.Y. TIMES, Feb. 10, 1982, at A14. “Away from the courthouse, Judge Robinson was an accomplished woodworker and an amateur architect who designed his own split-level home in Richmond. He was an enthusiastic fisherman.” Bart Barnes, *supra* note 273.

<sup>286</sup> Gann, *supra* note 267.

<sup>287</sup> Pace III, *supra* note 270; *Robinson, Spottswood William III*, *supra* note 260.

<sup>288</sup> Pace III, *supra* note 270; Edds, *supra* note 282.

*G. Hon. William B. Bryant (active federal judicial service: 1965-1982)*

Judge William B. Bryant was nominated to the U.S. District Court for the District of Columbia by President Johnson on July 12, 1965, to a seat vacated by Judge David A. Pine.<sup>289</sup> He was confirmed by the Senate and received his commission on August 11, 1965.<sup>290</sup> He assumed senior status on January 31, 1982, and his service concluded on November 13, 2005, due to death.<sup>291</sup> Before federal judicial service, Bryant was engaged in private practice.<sup>292</sup>

Judge Bryant was born to William Benson Bryant and Alberta Wood on September 18, 1911, in Wetumpka, Alabama.<sup>293</sup> After his family fled a lynch mob shortly after his birth, he grew up in Washington, D.C.<sup>294</sup> When he was five years old, his mother remarried George S. Washington, a porter at Union Station.<sup>295</sup> Bryant attended segregated public schools in D.C., including Lovejoy Elementary School and Dunbar High School, participating in the high school cadet program.<sup>296</sup> Graduating in 1928, he began working as an elevator operator to finance his college education.<sup>297</sup>

He attended Howard University, where he studied political science and worked with Ralph Bunche, a political scientist and diplomat, who later became the first Black recipient of the Nobel Peace Prize for arranging a cease-fire between Israelis and Palestinians.<sup>298</sup> Bryant graduated with a Bachelor of Arts in 1932 and then attended Howard Law School, where he continued to work to finance his education and

<sup>289</sup> Bryant, *William Benson*, *supra* note 281.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* William B. Schultz, *The Honorable William B. Bryant*, HIST. SOC'Y D.C. CIR.: ORAL HIST. PROJECT 1, 4, 6 (Mar. 10, 2015), <https://dcchs.org/wp-content/uploads/2019/01/Bryant-Complete-Oral-History-compressed.pdf>

<sup>294</sup> Douglas Martin, *William Bryant, Top Lawyer and Trailblazing Judge, 94, Dies*, N.Y. TIMES (Nov. 16, 2005), <https://www.nytimes.com/2005/11/16/national/william-bryant-top-lawyer-and-trailblazing-judge-94-dies.html> [hereinafter Martin I].

<sup>295</sup> Shultz, *supra* note 294 at 9-10. His biological father was not in his life and left the family shortly after his birth. *Id.* at 6-7.

<sup>296</sup> Yvonne Shinhoster Lamb, *Pioneering D.C. Judge Beat Racial Odds with Wisdom*, WASH. POST (Nov. 15, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111401699.html>; Shultz, *supra* note 294 at 15, 20, 22-23, 34. He describes himself as studious because “there was nothing else to do but study.” *Id.* at 18.

<sup>297</sup> Schultz, *supra* note 294 at 36. He worked as an elevator operator at 2029 Connecticut Avenue, an upscale residence that housed Justice Sutherland, Justice Sanford, Simon K. Lyon, and Senator Warren from Wyoming. *Id.* at 36-37.

<sup>298</sup> *Id.* at 54-56; Lamb, *supra* note 26.

married Astaire Gonzalez after his first year.<sup>299</sup> Graduating first in his class in 1936, he served as Ralph Bunche's full-time research assistant for a year.<sup>300</sup>

Between 1940 and 1941, he began working as a civilian in the Office of War Information on a research team that surveyed racial attitudes in the military.<sup>301</sup> He then served in the Army from 1943 until 1947, achieving the rank of Lieutenant Colonel.<sup>302</sup> After his service, he began studying for the bar exam while working under Wesley Williams, an attorney in D.C.<sup>303</sup> Passing the exam, he continued to work with Williams, mostly representing indigent criminal defendants charged with misdemeanors.<sup>304</sup> He describes his time with Williams as what "sucked [him] into the law" because he grew from the experience and enjoyed success at trial.<sup>305</sup> He also started a family during this time. His daughter, Astaire "Penny" Bryant, was born in 1948, and his son, William "Chip" Bryant, in 1949.<sup>306</sup>

In 1951, he became one of the first Black Assistant United States Attorneys in D.C., first in the grand jury division, then promoted to the trial section.<sup>307</sup> After only a year, he became the informal head of the office, remaining there until 1954, when he returned to private practice at Houston, Bryant & Gardner.<sup>308</sup> His practice consisted of probate, negligence, traffic, and product liability work.<sup>309</sup> He describes the work initially as very lean, but, based on the respect he earned as a federal

<sup>299</sup> Schultz, *supra* note 294 at 47-49, 52-70, 73. After his first year, he was awarded a scholarship for room, board, and tuition. *Id.* at 49-50. However, Judge Bryant was not awarded the scholarship, citing the school's disapproval of working while attending law school and retaliation from a previous dispute with vice dean Charles Houston. *Id.* 49-50, 52, 61.

<sup>300</sup> Schultz, *supra* note 294, at 74. He assisted Ralph Bunche with work "that later became part of Gunnar Myrdal's '[An] American Dilemma.'" Martin I, *supra* note 295.

<sup>301</sup> Schultz, *supra* note 294, at 78, 80. *See also Hail Report on Wartime in U.S.A.*, DETROIT TRIB., Dec. 19, 1953, at 1.

<sup>302</sup> Lamb, *supra* note 297.

<sup>303</sup> Schultz, *supra* note 294, at 103-105. By working under Wesley Williams while studying for the bar, he qualified for funds through the GI Bill. *Id.* at 104. He tried working under Charles Houston at this time, but the firm rejected him. *Id.*

<sup>304</sup> *Id.* at 105-08.

<sup>305</sup> *Id.* at 116-17.

<sup>306</sup> *Id.* at 117; Lamb, *supra* note 297.

<sup>307</sup> Schultz, *supra* note 294, at 108, 114-15; *William B. Bryant is Named Assistant U.S. Attorney*, EVENING STAR (D.C.), Feb. 12, 1951, at A7.

<sup>308</sup> Schultz, *supra* note 294, at 113-15; Martin I, *supra* note 295. At this time, Charles Houston was deceased, and Joseph Waddy offered him a position at the firm. Schultz, *supra* note 294, at 137-38. Judge Bryant describes being particularly surprised that he was offered a position there after previously being rejected by the firm. *Id.* at 137.

<sup>309</sup> Schultz, *supra* note 294, at 144.

prosecutor, his practice expanded when he was appointed to represent criminal defendants.<sup>310</sup>

He secured countless wins—acquittals and dismissals—including the dismissal of a case against a well-liked Black doctor, Monroe Gregory, who had allegedly performed an abortion.<sup>311</sup> After a particularly devastating cross-examination, the Government moved to dismiss the case, and Dr. Gregory walked away a free man.<sup>312</sup> In another high-profile case, he secured the acquittal of John Winston, who was implicated in a gambling and bribery scheme involving the police.<sup>313</sup> The other defendants in the case were convicted.<sup>314</sup> He secured the acquittal of Matthew Harrison, charged with double homicide, after he made a compelling case that Mr. Harrison had temporarily blacked out during the murders.<sup>315</sup> In his most famous case, Bryant represented Andrew Roosevelt Mallory, charged with rape, who was interrogated for over seven-and-a-half hours before he confessed.<sup>316</sup> Judge Bryant argued the case to the Supreme Court, which unanimously ruled for him, removing his client from death row and implementing procedural safeguards for future criminal defendants interrogated for long periods of time.<sup>317</sup> He also collected one of the largest fees for a Black attorney at the time, \$32,000, as the receiver at the United House of Prayer.<sup>318</sup>

While in private practice, he was elected third vice president of the Citizens Council for the District of Columbia, the top citizens advisory group for the District Commissioners.<sup>319</sup> Frank Reeves, an advisor in the Kennedy administration, also contacted him about serving on the

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<sup>310</sup> *See id.* at 147-176. “Well, you talk about the [criminal] cases, those kind of cases began to give me some business. I had a reputation by virtue of those cases that was far in excess of my real worth, but I had some, well business began to come in. A lot of business, not big paying business but a volume of business and I began to feel kind of secure in practice.” *Id.* at 176.

<sup>311</sup> *Id.* at 148-52.

<sup>312</sup> *Id.* at 151-52. Dr. Gregory was shot and killed shortly after the case against him was dismissed. *Id.* at 152-53.

<sup>313</sup> Schultz, *supra* note 294, at 158-59. John Winston was commonly known as “Lefty” Winston. *Id.* at 154. *See generally* Jack Jonas, *Thoman Called ‘Betrayed’ in Police Payoffs: Defense Hammers on ‘Judas’ Theme in Bribery Trial*, EVENING STAR (D.C.), Apr. 7, 1955, at A1.

<sup>314</sup> Jack Jonas, *What the Bribery Jury Didn’t Hear*, EVENING STAR (D.C.), Apr. 10, 1955, at A24.

<sup>315</sup> *See Policeman Goes on Trial in Double Slaying*, EVENING STAR (D.C.), Oct. 19, 1955, at B27; Schultz, *supra* note 294, at 159-65.

<sup>316</sup> Lamb, *supra* note 297; Schultz, *supra* note 294, at 165-70.

<sup>317</sup> *Mallory v. United States*, 354 U.S. 449, 455 (1957); Schultz, *supra* note 294, at 169; *Mallory Surrenders, Ending 7-Week Search*, EVENING STAR (D.C.), Feb. 25, 1958, at A8.

<sup>318</sup> ‘Daddy’ Grace Church Wins Court Blessing, EVENING STAR (D.C.), May 9, 1962, at D21; Schultz, *supra* note 297, at 145-46.

<sup>319</sup> *Citizens Unit Picks Dudley as Chairman*, EVENING STAR (D.C.), Dec. 14, 1962, at B2.

Domestic Relations Court in D.C.<sup>320</sup> However, Judge Bryant did not take the position because he did not like family law.<sup>321</sup>

In the spring of 1965, an assistant attorney general requested he complete a questionnaire about becoming a judicial nominee.<sup>322</sup> Judge Bryant suspected that Charles Horsky or Abe Fortas may have advocated for his appointment but did not know for certain.<sup>323</sup> He soon met with President Johnson on the presidential yacht where Johnson was hosting Caribbean diplomats.<sup>324</sup> In June 1965, he learned that President Johnson wanted to nominate him to serve on the United States District Court for the District of Columbia.<sup>325</sup>

While a District Judge, he issued many notable opinions and served as an adjunct professor at Howard Law School teaching trial advocacy.<sup>326</sup> In *Campbell v. McGruder*, he ruled against overcrowding at the D.C. jail, after personally visiting the jail, despite the risk to his safety.<sup>327</sup> Another notable ruling was against the National Football League, holding that the draft violated players' negotiation rights.<sup>328</sup> He became Chief Judge in 1977 and remained in the position until 1981.<sup>329</sup> He continued to hear cases until his death on November 13, 2005.<sup>330</sup>

"Judge Bryant's wife of 60 years, the former Astaire A. Gonzalez, died in 1997."<sup>331</sup> He left behind a son, William Jr., a daughter, Astaire, two grandchildren, and a great-granddaughter.<sup>332</sup>

*H. Hon. Constance Baker Motley (active federal judicial service:  
1966-1986)*

Constance Baker Motley was nominated as U.S. District Judge for the Southern District of New York by President Johnson on January

<sup>320</sup> Schultz, *supra* note 294, at 215.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 214, 216-17.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 228.

<sup>325</sup> *Id.* at 219-20.

<sup>326</sup> See U.S. Dist. Ct. for D.C., *Presentation of Portrait of The Honorable William B. Bryant: Chief Judge*, HIST. SOC'Y D.C. CIR.: ORAL HIST. PROJECT 60-62 (Mar. 10, 2015), <https://dcchs.org/wp-content/uploads/2019/08/Bryant-portrait-transcript.pdf>.

<sup>327</sup> *Id.*

<sup>328</sup> Dick Young, *Lords of NFL Football Fear Loss of Balance by Draft Ruling*, PENSACOLA NEWS J., Sept. 12, 1976, at 4. An agreement was later reached between the players' union and the NFL that permitted the draft to continue. Martin I, *supra* note 295.

<sup>329</sup> Martin I, *supra* note 295.

<sup>330</sup> Lamb, *supra* note 297; Bryant, William Benson, *supra* note 281.

<sup>331</sup> Martin I, *supra* note 295.

<sup>332</sup> *Id.*



26, 1966, to a seat vacated by Judge Archie O. Dawson.<sup>333</sup> Confirmed by the Senate on August 30, 1966, she received the commission the very same day, becoming the first Black and first woman on that Court.<sup>334</sup> She assumed senior status on September 30, 1986, with her service concluding with her death on September 28, 2005.<sup>335</sup> Before the federal bench, she was the Manhattan Borough President in New York City.<sup>336</sup>

She was born in New Haven, Connecticut on September 14, 1921, the ninth child of twelve, to Rachel Keziah Huggins Baker and Willoughby Alva Baker, both immigrants from Nevis, British West Indies.<sup>337</sup> Her father, a chef at Yale University, and her mother, a homemaker, taught traditional West Indian values at home while sending the Baker children to integrated public schools.<sup>338</sup> “One of her first experiences with discrimination came at 15, when she was turned away from a public beach because she was [B]lack.”<sup>339</sup> She graduated from Hillhouse High School with honors in 1939, determined to be a lawyer despite lacking the financial resources for college and law school.<sup>340</sup>

To finance her higher education, Judge Motley began working for the National Youth Administration.<sup>341</sup> She met philanthropist Clarence W. Blakeslee who, impressed by her speech at a community meeting, offered to pay her college and law school tuition.<sup>342</sup> Accepting

<sup>333</sup> *Motley, Constance Baker*, *supra* note 17.

<sup>334</sup> *Id.*; *As Constance Motley Becomes a Federal Judge: Lady Lawyer’s ‘Cinderella Story’ Comes to a Happy End*, N.Y. TIMES, Sept. 10, 1966, at A11; see Gary L. Ford, Jr., *The Only Woman in the Courtroom Dismantled Jim Crow: Constance Baker Motley* (2012) (Ph.D. dissertation, University of Maryland, College Park) (ProQuest), 184-85, 187.

<sup>335</sup> *Motley Constance Baker*, *supra* note 17.

<sup>336</sup> TOMIKO BROWN-NAGIN, CIVIL RIGHTS QUEEN: CONSTANCE BAKER MOTLEY AND THE STRUGGLE FOR EQUALITY 228-44 (2022) [hereinafter Brown-Nagin I].

<sup>337</sup> Ford, Jr., *supra* note 336, at 60-61.

<sup>338</sup> *Id.* Judge Motley grew up in an ethnically diverse neighborhood, composed of immigrants. *Id.* at 62.

<sup>339</sup> Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES, Sept. 29, 2005, at B10 [hereinafter Martin II].

<sup>340</sup> Ford, Jr., *supra* note 336, at 68-69. Judge Motley stated that she did not experience segregation until the beach incident. *Id.* at 62-63; Martin II, *supra* note 341. She describes this incident as what began her quest to become a lawyer. Ford, Jr., *supra* note 336, at 62. She was determined to become a lawyer stating, “I was the kind of person who would not be put down. I rejected the notion that my race or my sex would bar my success in life.” *Id.* at 64.

<sup>341</sup> Ford, Jr., *supra* note 336, at 69. She learned how to refinish furniture, earning \$50 a month. *Id.* She reflected on this time as “one of the most stressful periods” of her life because she was determined to become a lawyer, but she was sure that her “chances of going to college [were] diminish[ing].” *Id.* at 70-71.

<sup>342</sup> *Id.* at 71. Judge Motley met with Mr. Blakeslee the day after the community meeting where he offered to pay for her education. *Id.* at 72. Mr. Blakeslee never asked for anything in return. *Id.* at 72-73; Elaine Woo, *Constance Baker Motley, 84: 1st Black Woman to Serve as a Federal*

Blakeslee's generosity, she first attended Fisk University in segregated Nashville, Tennessee, but later transferred to New York University, where she earned a B.A. in Economics, in 1944.<sup>343</sup>

She became the first Black woman admitted to Columbia University Law School.<sup>344</sup> During her third year, she clerked at the NAACP LDF under Thurgood Marshall, chief counsel.<sup>345</sup> In 1946, following graduation, she practiced at LDF as a full-time staff attorney, for many years the only female member of the legal team.<sup>346</sup> Judge Motley quickly proved to be a talented lawyer, taking on important civil rights cases with tenacity, skill, grace, and a sense of humor.<sup>347</sup> She became a legal engineer behind many of the most important civil rights cases, including *Brown v. Board of Education*.<sup>348</sup> She also worked to integrate countless Southern universities in the aftermath of *Brown*, including the Universities of Alabama, Florida, Georgia, Mississippi, Oklahoma, and South Carolina's Clemson College.<sup>349</sup> While working at LDF, she became the

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*Judge*, L.A. TIMES (Sept. 30, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-sep-30-me-motley30-story.html>. He attended Judge Motley's law school graduation in 1946 and passed away shortly after Judge Motley helped secure the landmark civil rights victory in *Brown v. Bd. of Educ.*, 347 U.S. 483, 484 (1954). Ford, Jr., *supra* note 336, at 79-80.

<sup>343</sup> Ford, Jr., *supra* note 336, at 74, 76.

<sup>344</sup> *Id.* at 78.

<sup>345</sup> Woo, *supra* note 344. She had once attempted to find work at a Wall Street firm but was turned away continually. "She visited one firm after accepting an invitation to interview by phone. Once she arrived at the law office and introduced herself as the job candidate, the partner looked at her as if he 'had seen an unidentified flying object.'" BROWN-NAGIN I, *supra* note 338, at 53. She would be forever grateful to Thurgood Marshall for giving her "a professional break," and for treating her with "both common decency and professional respect." *Id.* at 54-55. Yet, during her interview with Marshall, he reportedly "asked her to climb a ladder next to a bookshelf; he wanted to inspect her legs and feminine form. [She] complied with the request." *Id.* at 54.

<sup>346</sup> Ford, Jr., *supra* note 336, at 80, 89-91. Judge Motley's starting salary was \$50 a week. Martin II, *supra* note 341.

<sup>347</sup> See Woo, *supra* note 344. One of Judge Motley's former clients stated, "Mrs. Motley's style could be deceptive, often challenging a witness to get away with one lie after another without challenging them . . . until she suddenly threw a curveball with so much skill and power that she would knock them off their chair." Martin II, *supra* note 341. Former Solicitor General Drew Days recalled Judge Motley as "a woman who was confident, defiant, very firm, very straight forward, but [who] also had a grace about her that . . . made her particularly successful in difficult situations." Ford, Jr., *supra* note 336, at 65 (citation omitted). A former law clerk recalls Judge Motley as "always dignified and controlled in her public statements . . . [b]ut then every once in a while[,] she would come up with something that would both put you off your guard and make you laugh." *Id.* at 196 (citation omitted).

<sup>348</sup> Woo, *supra* note 344. Judge Motley drafted the original complaint in *Brown vs. Bd. of Educ.* 347 U.S. 483, 484 (1954); Woo, *supra* note 347.

<sup>349</sup> *Lifetime Salary of \$30,000: Constance Baker Motley First N.Y. Federal Judge*, PHILA. TRIB., Jan. 29, 1966, at 4. Judge Motley described the day that James Meredith graduated, the first Black man to be admitted to the University of Mississippi, as "the most thrilling day of her life." Martin II, *supra* note 341.

first Black woman to argue before the U.S. Supreme Court, eventually arguing ten cases there and winning nine of them.<sup>350</sup> She continued working at LDF until 1965.<sup>351</sup>

In her final years with LDF, Judge Motley transitioned into politics.<sup>352</sup> From 1958 to 1964, she was a member of the New York State Advisory Council on Employment and Unemployment Insurance.<sup>353</sup> In 1964, she became the first Black woman elected to the New York Senate.<sup>354</sup> A year later, she became the first Black woman elected Manhattan Borough President.<sup>355</sup> She served a year as Borough President working to improve housing and public schools.<sup>356</sup>

During Judge Motley's political rise, Senator Bobby Kennedy became a steadfast advocate for her elevation to the federal bench.<sup>357</sup> Strongly considered for the U.S. Court of Appeals for the Second Circuit—the seat vacated by Thurgood Marshall when he became U.S. Solicitor General in 1965<sup>358</sup>—just the rumor of her nomination stirred

<sup>350</sup> Woo, *supra* note 344. The only case she lost was *Swain v. State of Alabama*, 380 U.S. 202 (1965), which challenged race-based preemptory strikes; it was overturned twenty years later in *Batson v. Kentucky*, 476 U.S. 79 (1966). Ford, Jr., *supra* note 336, at 174-76.

<sup>351</sup> Martin II, *supra* note 341. “Motley was at the center of the firestorm that raged through the South in the two decades after World War II, as blacks and their white allies pressed to end the segregation that had gripped the region since Reconstruction. She visited the Rev. Dr. Martin Luther King Jr. in jail, sang freedom songs in churches that had been bombed, and spent a night under armed guard with Medgar Evers, the civil rights leader who was later murdered.” *Id.*

<sup>352</sup> Ford, Jr., *supra* note 336, at 177. Judge Motley's husband believes the assassination of her friend and civil rights activist, Medgar Evers, and Thurgood Marshall choosing Jack Greenberg to replace Marshall as head of LDF, led to her move into politics. *Id.* at 177-78

<sup>353</sup> *1st Negro Woman U.S. Judge*, CHI. DAILY DEFENDER, Jan. 26, 1966, at 1.

<sup>354</sup> *Negro Woman Wins Seat in N.Y. Senate*, THE ATLANTA CONST., Feb. 5, 1964, at 7. Judge Motley received 3,555 votes, while her opponent, Republican Thomas G. Weaver, received 2,261 votes. *Id.*

<sup>355</sup> Clayton Knowles, *Mrs. Motley Wins Manhattan Post: State Senator Elected by 8 Councilmen- First Woman on the Board of Estimate*, N.Y. TIMES, Feb. 24, 1965, at 1. She was backed by Mayor Wagner to fill the position on an interim basis after Edward R. Dudley, the previous Borough President, was nominated to the New York State Supreme Court. *Id.* While the final vote by the eight Manhattan City Council Members was unanimous, Judge Motley faced significant opposition from supporters of the Deputy Borough President, Earl Brown. *Id.* Nine months later in the citywide election, she was reelected to a four-year term. Martin II, *supra* note 341. Since the Manhattan Borough President served on the New York Board of Estimate, she also became the first Black woman to serve on the New York Board of Estimate. Knowles, *supra*; Martin II, *supra* note 341.

<sup>356</sup> Ford, Jr., *supra* note 336, at 183.

<sup>357</sup> *Mrs. Motley Is Chosen for a Federal Judgeship Here: Court Post Due for Mrs. Motley*, N.Y. TIMES, Jan. 26, 1966, at 1. Senator Kennedy was familiar with Judge Motley after his time serving as Attorney General. *Id.* He proposed that Judge Motley fill a vacancy on the United States District Court for the Southern District of New York in 1965, a year before President Johnson eventually nominated her. *Id.*

<sup>358</sup> *Will Mrs. Motley Go to Bench?*, N.Y. AMSTERDAM NEWS (N.Y.C.), July 31, 1965, at 1.

significant “opposition on the court and among Wall Street lawyers[.]”<sup>359</sup> She later attributed Court opposition to Chief Judge J. Edward Lombard, who reportedly did not want a woman colleague.<sup>360</sup> A subsequent political falling out between Senator Kennedy and Motley ended his overt support for her judicial nomination.<sup>361</sup>

In 1966, President Johnson nominated her to the United States District Court for the Southern District of New York.<sup>362</sup> Seven months passed before she was confirmed.<sup>363</sup> Southern senators, including Senator Eastland, led the opposition.<sup>364</sup> Senator Eastland, a segregationist, had actively opposed Judge Motley’s work at LDF, especially her work to integrate the University of Mississippi.<sup>365</sup> So as chair of the Senate Judiciary Committee, with control over her confirmation process,<sup>366</sup> Senator Eastland stalled and delayed her confirmation, accusing her of “subversive activities” and being an active member of the Communist Party twenty years prior.<sup>367</sup> Others also asserted she was unqualified, claiming that she lacked trial experience “given her ‘narrow’ field of practice [in civil rights law].”<sup>368</sup> Others, including Senator Kennedy,

<sup>359</sup> Ford, Jr., *supra* note 336, at 184; *see also* MOTLEY, *supra* note 10, at 212. There was also opposition from the American Bar Association. *Mrs. Motley Is Chosen for a Federal Judgeship Here*, *supra* note 365; *see Will Mrs. Motley Go to Bench?*, *supra* note 360.

<sup>360</sup> Ford, Jr., *supra* note 336, at 184.

<sup>361</sup> *Id.* at 185. Judge Motley advocated for minority leader Joe Zaresky to become majority leader of the New York Senate, while Senator Kennedy advocated for a different candidate. *Id.* Judge Motley’s son recalls that “[a]fter that, her nomination to the federal bench went nowhere... [Instead] she became Borough President of Manhattan. *Id.*

<sup>362</sup> *Mrs. Motley Is Chosen for a Federal Judgeship Here*, *supra* note 365; MOTLEY, *supra* note 10, at 213-14. During Motley’s Oval Office meeting with President Johnson, she sat in President Kennedy’s rocking chair that had been left behind and thanked Senator Bobby Kennedy for his support when President Johnson “buzzed his secretary and said, ‘Get me Bobby Kennedy on the telephone.’” *Id.*, at 213. Motley was unsure if Kennedy had been helpful and wondered if he was as “stunned” as she was with President Johnson’s nomination. *Id.*; *see also* BROWN-NAGIN I, *supra* note 338, at 250-51.

<sup>363</sup> Edith Evans Asbury, *A Pioneering Judge: Constance Baker Motley*, N.Y. TIMES, May 30, 1970, at 19; *Motley, Constance Baker*, *supra* note 17. “Remarkably, it was Motley’s famed career as a civil rights lawyer that slowed her bid for the Senate’s confirmation.” BROWN-NAGIN I, *supra* note 338, at 251.

<sup>364</sup> Martin II, *supra* note 341.

<sup>365</sup> Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 1691, 1700 (2017) [hereinafter Brown-Nagin II].

<sup>366</sup> *Id.* at 1701.

<sup>367</sup> *Id.* at 1701-02. Senator Eastland was a member of the Senate Internal Security Subcommittee that investigated Communist activity in the United States. *Id.* at 1701. He frequently used the committee to investigate civil rights activists who he claimed were Communists. *Id.* He accused Judge Motley of being a member of the Communist Party for two years in her youth, claims that were never corroborated. *Id.* at 1701-02.

<sup>368</sup> *Id.* at 1702-03. “The ABA hesitated to approve Motley’s nomination on the grounds that she lacked trial experience in New York—a patently ludicrous suggestion given her extensive

worried that her appointment would be perceived as “too political” due to her race and civil rights background.<sup>369</sup> However, after investigating Senator Eastland’s uncorroborated claims, and hearing from Judge Motley’s vocal, long-standing supporters, the Senate moved forward with her confirmation.<sup>370</sup>

She was confirmed by a voice vote in the Senate, where two racialists, Senator Eastland and Senator John L. McClellan, voted against her.<sup>371</sup> She served thirty-nine years on “‘the greatest’ trial court ‘in the country, bar none.’”<sup>372</sup> She most notably ruled that women sportswriters must have equal access to the New York Yankees’ locker room and awarded damages to a prisoner forced to spend 372 days in solitary confinement.<sup>373</sup> From 1982 to 1986, she served as the Chief Judge of her Court.<sup>374</sup> After assuming senior status in 1986, she continued to try cases.<sup>375</sup> As a judge, she hoped to make the world a better place, stating, “The work I’m doing now will affect people’s lives intimately... it may even change them.”<sup>376</sup>

In 2001, President Clinton awarded her the Presidential Citizens Medal for performing “exemplary deeds” for “country or fellow citizens.”<sup>377</sup> She was inducted into the National Women’s Hall of Fame in Seneca Falls, New York, and awarded the NAACP’s Spingarn Medal, in 2003, for “extraordinary” achievement.<sup>378</sup> In 2005, upon her death caused by congestive heart failure at age eighty-four, former Secretary

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experience in courts nationwide. The ABA ultimately rated her merely ‘qualified,’ as opposed to ‘highly qualified.’” BROWN-NAGIN I, *supra* note 338, at 259.

<sup>369</sup> BROWN-NAGIN II, *supra* note 367, at 1703.

<sup>370</sup> *Id.* at 1704

Thurgood Marshall topped the prominent insiders who vouched for her. In his signature folksy style, Marshall—then a judge on the U.S. Court of Appeals—confirmed that he had known Motley for decades and could “guarantee” her allegiance to the United States. He cited their shared experience at the dawn of the Cold War. Inside the NAACP, he said, they both had worked to root out Communists. Motley had “worked as hard as he” had at the NAACP to “kick out” “left wingers.”

BROWN-NAGIN I, *supra* note 344, at 257.

<sup>371</sup> Brown-Nagin II, *supra* note 373, at 1704-05.

<sup>372</sup> BROWN-NAGIN I, *supra* note 338, at 264; Woo, *supra* note 344. “Eleven years after Motley’s appointment to the bench, remarkably little had changed; the number of women working as federal judges across the country had increased by just two.” BROWN-NAGIN I, *supra* note 338, at 313. By the time President Carter left office in 1981, he “had changed the face of the nation’s judiciary: forty women were by then serving on the federal bench.” *Id.* at 314..

<sup>373</sup> Woo, *supra* note 344; Martin II, *supra* note 341.

<sup>374</sup> Motley, Constance Baker, *supra* note 17.

<sup>375</sup> *Id.*; see also Martin II, *supra* note 341.

<sup>376</sup> Martin II, *supra* note 341.

<sup>377</sup> BROWN-NAGIN I, *supra* note 338, at 356.

<sup>378</sup> *Id.* at 357.

of Transportation William T. Coleman, Jr. described Judge Motley as “a great lawyer... If you are a master of the facts, a master of the record, and also a master of the best argument the other side can make...you can usually prevail. And she did.”<sup>379</sup> Her survivors included Joel Wilson Motley Jr., her husband, a New York real estate broker whom she married in 1946; a son, Joel III; three grandchildren; her brother, Edmund Baker; and her sisters, Edna Carnegie, Eunice Royster, and Marian Green.<sup>380</sup>

*I. Hon. Aubrey Eugene Robinson, Jr. (active federal judicial service: 1966-1992)*

Judge Aubrey Eugene Robinson, Jr. was nominated to the U.S. District Court for the District of Columbia by President Johnson on October 6, 1966, to a seat vacated by Judge Matthew F. McGuire.<sup>381</sup> Confirmed by the Senate on October 20, 1966, he received his commission on November 3, 1966.<sup>382</sup> Judge Robinson assumed senior status on March 1, 1992, with his service concluding with his death on February 27, 2000.<sup>383</sup> Before joining the U.S. District Court, Judge Robinson served on the Juvenile Court of the District of Columbia.<sup>384</sup>

Robinson was born on March 30, 1922, in Madison, New Jersey, the first of four children.<sup>385</sup> His father, Aubrey E. Robinson, Sr., a veterinarian, studied at Cornell University before moving to Madison to maintain his own veterinary practice.<sup>386</sup> His mother, Anna Mabel Robinson, was a teacher.<sup>387</sup> He attended first through fifth grade at Madison’s Central Avenue Public School, diagonally across the street from his home.<sup>388</sup> He attended sixth grade at Green Avenue School with a special group of advanced students.<sup>389</sup> In high school, he participated in track, orchestra, and debate, and graduated in 1939.<sup>390</sup>

<sup>379</sup> Woo, *supra* note 344; Martin II, *supra* note 341.

<sup>380</sup> Martin II, *supra* note 341.

<sup>381</sup> Robinson, *Aubrey Eugene, Jr.*, FED. JUD. CTR. BIOGRAPHICAL DIRECTORY OF ARTICLE III FED. JUDGES, <https://www.fjc.gov/history/judges/robinson-aubrey-eugene-jr> (last visited on Sept. 15, 2022).

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> William F. Causey, *The Honorable Aubrey E. Robinson, Jr.*, HIST. SOC’Y D.C. CIR.: ORAL HIST. PROJECT 1, 5 (Jan. 11, 1992) [https://dcchs.org/sb\\_pdf/interview-robinson/](https://dcchs.org/sb_pdf/interview-robinson/).

<sup>386</sup> *Id.* at 3-4.

<sup>387</sup> *See id.* at 4.

<sup>388</sup> *Id.* at 2.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 3, 7-8.

He entered Cornell University in the combined arts and law program, where he began law school after only three years of undergraduate studies, with the A.B. degree awarded after the first year of law school.<sup>391</sup> He participated in debate, tennis, and track as an undergrad, completed his first year of law school, and then entered the U.S. Army during World War II.<sup>392</sup> He completed basic training in the antiaircraft and artillery division at Camp Wallace in Texas, was initially transferred to Tennessee, but was also stationed in Georgia, Alabama, Mississippi, Washington, California, and New Jersey.<sup>393</sup> He served in a segregated unit, the most segregation he had ever experienced.<sup>394</sup> Leaving active duty in 1945, he reentered law school at Cornell, graduating in 1947.<sup>395</sup> He also married, Sara Payne, a teacher and fellow Cornell graduate, during his final year of law school.<sup>396</sup>

After law school, Robinson entered private practice in Washington, D.C. under Belford V. Lawson, though he considered a path to become New Jersey's first Black senator.<sup>397</sup> The firm of three lawyers—Marjorie Mackenzie Lawson, George Windsor, and Belford Lawson<sup>398</sup>—had a mostly civil practice representing small businesses, but also did some criminal defense.<sup>399</sup> In 1949, he helped brief and prepare *Henderson v. Southern Railway*, which Belford Lawson argued and won at the Supreme Court, changing discriminatory practices on interstate railways.<sup>400</sup> In 1953, Robinson began a partnership with Charles T. Duncan.<sup>401</sup> After Frank Reeves joined the practice a year later, the trio practiced together until 1961, when Harvey Rosenberg, Dan Sherry, and Al

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<sup>391</sup> *Id.* at 9.

<sup>392</sup> *Id.* at 9, 44.

<sup>393</sup> *Id.* at 9-10.

<sup>394</sup> *Id.* at 13-14. However, he also describes his time in the Army as a “fascinating experience” because he was exposed to new places and people, especially in the deep South, where had not traveled before. *Id.* at 12. See also *NAACP Seeks GI Protection: Asks Stimson Support of Powell Travel Bill*, PITT. COURIER, Feb. 17, 1945, at 15; *Ask War Dep’t Backing for Anti-Jim Crow Travel Bill*, YORK DAILY REC. (Pa.), Feb. 14, 1945, at 2.

<sup>395</sup> Causey, *supra* note 387, at 15. He attempted to join the legal fraternity but was denied admission because of his race. *Id.* at 14.

<sup>396</sup> *Id.* at 17-18. See also *Reception Held at State for Newlyweds*, PITT. COURIER, May 3, 1947, at 8.

<sup>397</sup> Causey, *supra* note 387, at 16-18. He also considered practicing in New Jersey, but the New Jersey required applicants to practice under a licensed attorney before they could take the bar. *Id.* at 16-17. There were only about ten Black lawyers in New Jersey at the time and none of them had the ability to take him on, so he ended up working in D.C. *Id.* at 17.

<sup>398</sup> *Id.* at 18.

<sup>399</sup> *Id.* at 21.

<sup>400</sup> *Wants Negro in I.C.C. Position*, OHIO DAILY EXPRESS, Apr. 7, 1952, at 3; Causey, *supra* note 387, at 30.

<sup>401</sup> Causey, *supra* note 387, at 21-22.

Hamlin joined the office.<sup>402</sup> His memorable cases include a property dispute, representing an apartment building landlord after a tenant's guest died on the property, and defending union members in a criminal trial.<sup>403</sup> He also sued the District of Columbia Bar Association for refusing to admit Black attorneys or allow them access to its law library.<sup>404</sup>

While practicing, he helped to care for his family and was very involved in the Washington, D.C. community.<sup>405</sup> His daughters, Paula Elaine and Cheryl Louise, were born in 1949 and 1954, respectively.<sup>406</sup> Through a friend of his father, Robinson became a member at Plymouth Congregational Church, singing in the choir and chairing the trustee board.<sup>407</sup> He also served on the social action committee for the Middle Atlantic Conference of Congregational Christian Churches, as a trustee at Cornell University, as the director of the American Council on Human Rights, on the board of directors of Family and Child Services of Washington, as a board member of the District of Columbia United Planning Organization, as a board member of the Family Services Association of America, and as appointee to the Special Police Trial Board.<sup>408</sup>

In 1965, Judge Robinson was appointed to the Juvenile Court of the District of Columbia by President Johnson, replacing Marjorie Mackenzie Lawson, his former colleague.<sup>409</sup> This opportunity was made possible after President Kennedy "signed into law the long-delayed bill to add two judges to the District's Juvenile Court bench" in 1962.<sup>410</sup> The Washington D.C. Bar Association and the Washington D.C. Democrats endorsed him for the newly created judgeship.<sup>411</sup> There, he emphasized

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* at 21-27.

<sup>404</sup> *Ask Court to Revoke Association's Charter*, ALA. TRIB., Sept. 29, 1950, at 8; Causey, *supra* note 387, at 34-36.

<sup>405</sup> Causey, *supra* note 387, at 28-29.

<sup>406</sup> *Id.* at 37-38.

<sup>407</sup> *Id.* at 38-39.

<sup>408</sup> *Rev. Philip G. Scott Elected to Succeed Evans as Moderator*, EVENING STAR (D.C.), May 10, 1951, at A38; Causey, *supra* note 387, at 46; *Ask Ike to End Boys Club Bias*, N.Y. AGE, Sept. 10, 1955, at 1; *Steinberg Named President of Family Agency*, EVENING STAR (D.C.), Mar. 22, 1959, at A9; *Catholic Doctor and Birth Control*, ST. ALBANS DAILY MESSENGER (Vt.), Oct. 29, 1964; *Washington Dateline*, PITT. COURIER, Mar. 3, 1962, at 12; *Biographical Sketch – Hon. Aubrey Eugene Robinson, Jr.*, HIST. SOC'Y D.C. CIR.: ORAL HIST. PROJECT (Nov. 1993) [https://dcchs.org/sb\\_pdf/biographical-sketch-robinson/](https://dcchs.org/sb_pdf/biographical-sketch-robinson/); U.S. CONG. JOINT COMMITTEE ON PRINTING, CONG. DIRECTORY 1999-2000: 106TH CONG. 872 (Claitors Law 1999).

<sup>409</sup> Causey, *supra* note 387, at 46-47.

<sup>410</sup> *President Signs D.C. Court Bill*, EVENING STAR (D.C.), Mar. 11, 1962, at B2.

<sup>411</sup> *Washington Bar Indorses Six for Juvenile Judges*, EVENING STAR (D.C.), Mar. 22, 1962, at B5; *Four Attorneys Backed for Juvenile Court*, EVENING STAR (D.C.), Apr. 4, 1962, at A9. He



the importance of understanding the environment and background a child comes from before trying to help them.<sup>412</sup> He served as a Juvenile Judge for fourteen months.<sup>413</sup>

In 1966, Judge Robinson, in the middle of a juvenile trial, was strongly advised to recess and return to chambers.<sup>414</sup> There, Ernie Friesen, who worked for the Department of Justice, told Judge Robinson that President Johnson intended to nominate him to the U.S. District Court for the District of Columbia.<sup>415</sup> Judge Robinson faced no objection at his confirmation and was sworn in by Judge William Bryant in November 1966.<sup>416</sup> In 1982, Judge Robinson became the Chief Judge for the United States District Court for the District of Columbia and served in that position until 1992.<sup>417</sup>

In an oral history project, he recounted his most notable memories, including a case involving mafia members and drug kingpins, *United States v. Brown*, or the so called ‘Black Hebrew’ case, and the Watergate years, though he was not involved with the Watergate proceedings.<sup>418</sup> He ruled on several landmark cases, including *Dixon v. Sullivan*, a class action involving the hospitalization of the mentally ill, *Laffey v. Northwest Airlines*, an early sex discrimination case, and *Segar v. Civiletti*, a racial discrimination case.<sup>419</sup> “Judge Robinson was also known for his award of ‘punitive damages’ to the surviving relatives of passengers who died in the crash of Korean Air Lines Flight 007, shot down in Soviet airspace in 1983.”<sup>420</sup>

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recalls that he was not involved in political activity at the time, but still was backed by the local democrats. Causey, *supra* note 387, at 47-49.

<sup>412</sup> Causey, *supra* note 387, at 50.

<sup>413</sup> *Id.* at 49.

<sup>414</sup> *Id.* at 51.

<sup>415</sup> *Id.* at 52.

<sup>416</sup> *Id.* at 57-58, 60.

<sup>417</sup> Robinson, *Aubrey Eugene, Jr.*, *supra* note 383.

<sup>418</sup> Causey, *supra* note 387, at 93-95; *United States v. Warren Brown*, Crim. No. 85-0342, 1987 WL 15140 (D.D.C.) July 23, 1987).

<sup>419</sup> Causey, *supra* note 387, at 111-13. Judge Robinson recounted the case as “*Dixon v. Sullivan*.” *Id.* at 112. However, the case was published as *Dixon v. Barry*. 967 F. Supp. 535 (1997). *Laffey v. Northwest Airlines* was named correctly, *see* 746 F.2d 4 (1984). Judge Robinson recounted the *Segar* case by one party name only and stated that the case took place in 1974. Causey, *supra* note 387, at 113. The described case’s name in full is *Segar v. Civiletti* and was first heard in 1981. 508 F. Supp 690 (1981)., *enforced* 516 F. Supp 314 (1981), *aff’d in part and vacated in part sub nom.* *Segar v. Smith* 738 F.2d 1249 (1984).

<sup>420</sup> Causey, *supra* note 387, at 113-14. Eric Pace, *Aubrey E. Robinson Jr., 77, Judge in Jonathan Pollard Spy Case*, N.Y. TIMES, Mar. 1, 2000, at C30 [hereinafter Pace IV]. The punitive damages award, however, was reversed on appeal on the ground that it was not justified under existing law. *Id.*: Causey, *supra* note 387, at 114. *See In re Korea Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135 (1988), *aff’d in part, vacated in part* 942 F.2d 1475 (1991).

In what the *New York Times* called his “most notable” and “enduringly controversial” ruling, Judge Robinson sentenced to life Jonathan Jay Pollard, then a thirty-two year old former civilian intelligence analyst for the Navy’s Anti-Terrorist Alert Center, for spying for Israel.<sup>421</sup> The Justice Department had asked for “‘substantial’ imprisonment,” not life, as Pollard’s lawyer, told Judge Robinson, “The damage here is not serious damage to the United States,” since Israel and the United States were allies.<sup>422</sup> The Judge responded, “‘I fail to see how you can make that claim,’ and he cited a classified affidavit from Secretary of Defense Caspar W. Weinberger that gave the main points of the damage done.”<sup>423</sup>

In addition to sixteen years as a judge on the U.S. District Court for the District of Columbia and ten years as the Court’s chief judge, Judge Robinson was also an adjunct professor at American University from 1975 to 1983, a board member for Federal Judicial Center from 1978 to 1982, and a member of the Judicial Conference of the United States from 1982 to 1992.<sup>424</sup>

Judge Robinson assumed senior status on March 1, 1992, and continued to hear cases until his death, from a heart attack, in 2000, at age seventy-seven.<sup>425</sup> He was survived by his wife, “the former Doris A. Washington, whom he married in 1973,” following the death of his first wife, Sara, who died in 1972; two daughters, Paula Elaine Collins and Sheryl Robinson; a stepdaughter, Jacqueline Washington; a sister and a brother and two granddaughters.<sup>426</sup>

### III. PATTERNS IN BACKGROUND AND EXPERIENCES OF THE FIRST NINE BLACK FEDERAL JUDGES

#### *A. Occupation before Federal Judicial Appointment*

Four of the first nine had judicial experience before their lifetime appointments.<sup>427</sup> Judge Hastie had been a U.S. District Judge for the Virgin Islands from 1937 to 1939 before being elevated to the Third Circuit

<sup>421</sup> Pace IV, *supra* note 422.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Robinson, Aubrey Eugene, Jr.*, *supra* note 383.

<sup>425</sup> *Id.*; Adam Bernstein, *District Court Chief Judge Robinson Dies*, WASH. POST, Feb. 29, 2000, at B1; Pace IV, *supra* note 422.

<sup>426</sup> Pace IV, *supra* note 422.

<sup>427</sup> *Hastie, William Henry*, *supra* note 7; *Parsons, James Benton*, *supra* note 67; *McCree, Wade Hampton, Jr.*, *supra* note 107; *Robinson, Aubrey Eugene, Jr.*, *supra* note 383.

in 1949 via recess appointment.<sup>428</sup> Judges Parsons and McCree were on the state trial courts of Illinois and Michigan, respectively, immediately before their federal trial judgeships.<sup>429</sup> Judge Aubrey Robinson had been a judge on the Juvenile Court of the District of Columbia.<sup>430</sup>

Two of the first nine had been practicing attorneys immediately before their lifetime appointments.<sup>431</sup> Justice Marshall was working as director and counsel of the LDF just before the Second Circuit.<sup>432</sup> Judge Bryant was in private practice when confirmed to the federal bench.<sup>433</sup>

Three of the first nine were in appointed capacities when named lifetime federal judges: Judge Hastie as the Governor of the Virgin Islands; Judge Higginbotham as an FTC Commissioner; Judge Spottswood Robinson as a U.S. Commissioner on Civil Rights, while he was also Dean of Howard Law School, a position held earlier by Judge Hastie.<sup>434</sup>

Judge Motley, the lone woman in the first nine, was the only elected official in the group when named to the bench, as the Manhattan Borough President in New York City and previously an elected New York state senator.<sup>435</sup>

### *B. Political Activity before Federal Judicial Appointment*

Seven out of the first nine were involved in politics before their time on the bench.<sup>436</sup> Judge Hastie served in President Roosevelt's Black cabinet and campaigned extensively for Harry Truman in 1948.<sup>437</sup> Judge Parsons campaigned for a state trial judgeship during the year before becoming a federal trial judge.<sup>438</sup> He also campaigned heavily for other Democratic candidates in Illinois in 1960.<sup>439</sup> Judge McCree had limited political activity before joining the federal bench, but Governor G. Mennen Williams had appointed him to the state Workers' Compensation

<sup>428</sup> *Hastie, William Henry, supra* note 7.

<sup>429</sup> *Parsons, James Benton, supra* note 67; *McCree, Wade Hampton, Jr., supra* note 107.

<sup>430</sup> *Robinson, Aubrey Eugene, Jr., supra* note 383.

<sup>431</sup> *Marshall, Thurgood, supra* note 12; *Bryant, William Benson, supra* note 281.

<sup>432</sup> *Marshall, Thurgood, supra* note 12.

<sup>433</sup> *Bryant, William Benson, supra* note 281.

<sup>434</sup> *Hastie, William Henry, supra* note 7; *Higginbotham, Aloyisus Leon, Jr., supra* note 215; *Robinson, Spottswood William III, supra* note 260.

<sup>435</sup> *Motley, Constance Baker, supra* note 17.

<sup>436</sup> *See infra* notes 439-448 and accompanying text.

<sup>437</sup> *WARE, supra* note 31 at 219-21; *Hastie, William Henry, supra* note 7.

<sup>438</sup> *James Parsons Named to Run for Judgeship, supra* note 91.

<sup>439</sup> *Parsons Looks Forward to Victory on Nov. 8: Gardner Kerner & Parsons, supra* note 93.

Commission, and later Wayne County Circuit Court.<sup>440</sup> In 1955, Judge McCree won a retention election for Circuit Judge, becoming Michigan's first elected Black judge.<sup>441</sup> Judge Higginbotham was the first Black appointed to any federal agency when President Kennedy appointed him to the Federal Trade Commission just one year before his nomination for a federal judgeship.<sup>442</sup> Judge Spottswood Robinson served as a United States Commissioner on Civil Rights before his judicial nomination.<sup>443</sup> Before taking the bench, Judge Motley served as a member of the New York State Advisory Council on Employment and Unemployment Insurance, a senator in the New York Senate, and as Manhattan Borough President.<sup>444</sup> While practicing law, Judge Bryant was elected by area residents to the Citizens' Advisory Council of the District of Columbia.<sup>445</sup> However, neither Justice Marshall nor Judge Aubrey Robinson apparently engaged in any overt political activity before joining the federal bench.<sup>446</sup>

### *C. Prior Social Engineer Activity*

Five of the first nine judges pursued civil rights litigation, with most influenced by Charles Hamilton Houston.<sup>447</sup> Judge Hastie was Houston's law partner, helping create the groundwork for the decision in *Brown v. Board of Education*.<sup>448</sup> Both Hastie and Houston worked closely with Thurgood Marshall, Spottswood Robinson, and Constance

<sup>440</sup> At 34, *McCree's a Circuit Judge*, *supra* note 113.

<sup>441</sup> Kalt, *supra* note 114, at 705.

<sup>442</sup> Ogletree I, *supra* note 222, at 1802; *Negro Named to Federal Trade Commission*, CLEVELAND CALL & POST, Oct 13, 1962, at 5C; *Negro on F.T.C. is Named for Bench in Pennsylvania*, *supra* note 239.

<sup>443</sup> *Robinson, Spottswood William III*, *supra* note 260.

<sup>444</sup> *Motley, Constance Baker*, *supra* note 17.

<sup>445</sup> *Citizens Unit Picks Dudley as Chairman*, *supra* note 321.

<sup>446</sup> See *supra* Sections II.D., II.I.

<sup>447</sup> See *infra* notes 450-57 and accompanying notes 450-57.

<sup>448</sup> See ENDERSBY & HORNER, *supra* note 36, at 32. Houston was selfless and sacrificing—so much so that friends and relatives believed that his exhausting schedule of reform activities contributed to his untimely death in April 1950, just six weeks before the Court handed down its key decisions in the last of the NAACP's major pre-*Brown* desegregation cases. Four years later, former students, associates, and colleagues of Houston would make up much of the team that succeeded in having school segregation declared unconstitutional. He was in many ways, as William Hastie famously eulogized him, 'the Moses of that journey,' a prophet who would lead his people to the promised land but not enter in himself.

Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 268 (2005).

Baker Motley at the LDF on the most important civil rights cases of the twentieth century.<sup>449</sup> Similarly, while in private practice, Judge Aubrey Robinson pursued discrimination claims leading to important victories for Blacks.<sup>450</sup>

Active in the Cook County Bar Association, his fraternity, and civil rights organizations, including the NAACP and National Urban League, Judge Parsons gave back to the Chicago community.<sup>451</sup> He continued social engineering as a federal prosecutor, becoming the first Black to handle criminal cases irrespective of the race of the defendants.<sup>452</sup>

Judge Higginbotham, in 1954, founded the first Black law firm in Philadelphia, later leading as president of the Philadelphia branch of the NAACP.<sup>453</sup> Judge McCree also served on the state Workers' Compensation Commission.<sup>454</sup> Judge Bryant impacted the community through private practice and service as a federal prosecutor.<sup>455</sup>

#### *D. Educational Background*

Two of the first nine—Judges Hastie and Bryant—attended Dunbar High School in D.C., the first public high school in the United States to serve Blacks.<sup>456</sup>

Over half of the first nine pursued undergraduate education at historically Black colleges and universities.<sup>457</sup> Justice Marshall graduated from Lincoln University in Pennsylvania in 1929.<sup>458</sup> In 1936, Judge Spottswood Robinson graduated from Virginia Union University.<sup>459</sup>

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<sup>449</sup> See, e.g., WARE, *supra* note 31, at 32, 169-70, 184-85.

<sup>450</sup> *Wants Negro in I.C.C. Position*, *supra* note 408.

<sup>451</sup> Fitzpatrick, *supra* note 72, at 72, 76-77; *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68.

<sup>452</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68.

<sup>453</sup> Williams, *supra* note 236, at 81; *Biography of A. Leon Higginbotham, Jr.*, *supra* note 244.

<sup>454</sup> *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>455</sup> See, e.g., Schultz, *supra* note 294, at 170-76; Martin I, *supra* note 295.

<sup>456</sup> Schultz, *supra* note 294, at 15; WARE, *supra* note 31, at 7. Charles Hamilton Houston also attended Dunbar High School. *In Nation's First Black Public High School, a Blueprint for Reform*, NAT'L PUB. RADIO: ALL THINGS CONSIDERED (July 29, 2013, 5:41 PM), <https://www.npr.org/sections/codeswitch/2013/08/22/206622688/the-legacy-of-dunbar-high-school>.

<sup>457</sup> See *infra* notes 460-64 and accompanying text. *Historically Black Colleges and Universities*, BLACKPAST, <https://www.blackpast.org/black-past-features/historically-black-colleges-and-universities/> (last visited Oct. 29, 2022).

<sup>458</sup> *Civil Rights Advocate: Thurgood Marshall*, *supra* note 147.

<sup>459</sup> *Negro Chosen for U.S. Judgeship*, *supra* note 266, at 22; Gann, *supra* note 267.

Judge Bryant graduated from Howard University in 1932,<sup>460</sup> Judge McCree from Fisk University in 1941.<sup>461</sup> Judge Higginbotham graduated from Antioch College in 1949, which, while not a historically Black college, was one of the first colleges to offer Black students “equal educational opportunities.”<sup>462</sup>

Three of the first nine graduated from Howard Law School, the first law school established for Blacks, in 1869.<sup>463</sup> Judges Bryant, Marshall, and Spottswood Robinson all attended and graduated from Howard Law in the 1930s.<sup>464</sup> Judges Hastie and Spottswood Robinson taught there and later served as Dean.<sup>465</sup>

Five of the first nine attended Ivy League law schools.<sup>466</sup> Judges Hastie and McCree earned law degrees at Harvard, about a decade apart.<sup>467</sup> Judge Higginbotham was a graduate from Yale Law School, Judge Motley from Columbia Law School, and Judge Aubrey Robinson from Cornell Law School.<sup>468</sup>

Judge Parsons, a graduate of the University of Chicago School of Law, was the only judge of the first nine who did not attend Howard Law or an Ivy League law school.<sup>469</sup> Notably absent from the list of schools attended are the flagship state universities which generally barred Blacks until the 1960s.<sup>470</sup>

<sup>460</sup> Schultz, *supra* note 294, at 47.

<sup>461</sup> At 34, *McCree’s a Circuit Judge*, *supra* note 113.

<sup>462</sup> Rose, *supra* note 237, at 391-92; Higginbotham, *supra* note 227, at 341 n.1; *Mission and Vision*, ANTIOCH COLL., <https://antiochcollege.edu/about/mission-and-vision/> (last visited Oct. 29, 2022).

<sup>463</sup> *Our History*, HOW. UNIV. SCH. L., <http://law.howard.edu/content/our-history> (last visited Oct. 13, 2022); H.R. Res. 684, 111th Cong., 155 CONG. REC. H9831 (2009); *The History Engine; The Establishment of the First Black Law School*, UNIV. RICH., <https://historyengine.richmond.edu/episode/view/3554> (last visited Oct. 13, 2022).

<sup>464</sup> *Our History*, *supra* note 465.

<sup>465</sup> *Hasite, William Henry*, *supra* note 7; *see supra* text accompanying note 35; Pace III, *supra* note 270.

<sup>466</sup> *See infra* notes 469-70 and accompanying text.

<sup>467</sup> MCGUIRE, *supra* note 32 at xiii; Kalt, *supra* note 96, at 704-05.

<sup>468</sup> Higginbotham & Anderson, *supra* note 223; Ford, Jr., *supra* note 339, at 78; Causey, *supra* note 387, at 20.

<sup>469</sup> *Judge Parsons Appointment Very First for Negroes in U.S. Judicial History*, *supra* note 68.

<sup>470</sup> *See, e.g.*, Knight v. Alabama, 14 F.3d 1534, 1538-39 (11th Cir. 1994) (“In the 1960’s, federal courts finally forced the white institutions to admit their first black students. Over the succeeding three decades, although increasing numbers of black students have been admitted to historically white institutions (“HWIs”), their representation in the student bodies of the majority of such four-year universities, notably the state’s ‘flagship’ research institutions, the University of Alabama and Auburn University, has remained proportionally quite low.”).

Most of the first nine were also academic all-stars.<sup>471</sup> Judge Hastie graduated from Amherst College number one in his class, and graduated from Harvard Law School.<sup>472</sup> Judge Parsons graduated third in his class at Millikin.<sup>473</sup> Judge McCree graduated at the top of his class at Fisk, and twelfth in his class at Harvard Law School.<sup>474</sup> Justice Marshall graduated from Lincoln University in Pennsylvania with honors and at the very top of his class at Howard Law School.<sup>475</sup> Judge Higginbotham graduated at the very top of his class at Yale Law School (yet could not get a job with any large law firms in Philadelphia).<sup>476</sup> Judge Spottswood Robinson graduated from Howard Law School with the highest academic record in the school's history.<sup>477</sup> Judge Bryant also graduated first in his class at Howard Law School.<sup>478</sup>

### *E. Nature of Federal Judicial Vacancy*

Of the first nine, three filled newly created seats.<sup>479</sup> Judge Hastie was nominated for a new seat on the Third Circuit.<sup>480</sup> Judge McCree twice filled new seats, for both district judge and circuit judge.<sup>481</sup> Judge Marshall was appointed to a new seat on the Second Circuit.<sup>482</sup> The other six judges profiled followed departing judges.<sup>483</sup>

<sup>471</sup> See *infra* notes 474-80 and accompanying text.

<sup>472</sup> MCGUIRE, *supra* note 32, at xiii; WARE, *supra* note 31, at 31.

<sup>473</sup> *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 75.

<sup>474</sup> *At 34, McCree's a Circuit Judge*, *supra* note 113; Kalt, *supra* note 114, at 704-05.

<sup>475</sup> *Civil Rights Advocate: Thurgood Marshall*, *supra* note 147, at 23; Spritzer, *supra* note 146, at 354.

<sup>476</sup> Glaberson, *supra* note 231; Higginbotham & Anderson, *supra* note 223.

<sup>477</sup> *Sketches of the Nine Judges Who Are Hearing Appeals on the Watergate Tapes*, *supra* note 269.

<sup>478</sup> Lamb, *supra* note 297.

<sup>479</sup> See *infra* notes 482-84 and accompanying text.

<sup>480</sup> *Hastie, William Henry*, *supra* note 7.

<sup>481</sup> *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>482</sup> *Marshall, Thurgood*, *supra* note 135.

<sup>483</sup> See *Parsons, James Benton*, *supra* note 67 (Judge Parsons filled seat vacated by Judge Sullivan); *Higginbotham, Aloysius Leon, Jr.*, *supra* note 215 (Judge Higginbotham filled seat vacated by Judge Ganey); *Robinson, Spottswood William III*, *supra* note 260 (Judge Robinson filled seat vacated by Judge Morris); *Bryant, William Benson*, *supra* note 290 (Judge Bryant filled seat vacated by Judge Pine); *Motley, Constance Baker*, *supra* note 17 (Judge Motley filled seat vacated by Judge Dawson); *Robinson, Aubrey Eugene, Jr.*, *supra* note 383 (Judge Robinson, Jr. filled seat vacated by Judge McGuire).

*F. Geographic Location of Judicial Vacancy to Which Appointed*

Of the first nine, four sat in Washington, D.C., two in Philadelphia, one in Detroit, two in New York, and one in Chicago.<sup>484</sup> Judges Spottswood Robinson, Aubrey Robinson, and Bryant held federal judgeships in Washington, D.C.,<sup>485</sup> as did Justice Marshall after prior service in New York on the Second Circuit.<sup>486</sup> Judges Hastie and Higginbotham were in Philadelphia.<sup>487</sup> Judge McCree was based in Detroit, Michigan.<sup>488</sup> Judges Marshall and Motley both served in New York, with Justice Marshall later sitting on the Supreme Court of the United States.<sup>489</sup> Judge Parsons sat in Chicago, Illinois.<sup>490</sup> Absent are Black judges sitting on courts in the South and West.

*G. Military Service*

Most of the first Black federal judges served this country during World War II.<sup>491</sup> The very first Black federal judge, however, never served in uniform.<sup>492</sup> Rather, Judge Hastie served in a top-level civilian post in the War Department between his two historic federal judgeships, when civil rights leaders were pressuring President Roosevelt and his War Secretary to eliminate segregation in the military.<sup>493</sup> As a Civilian

<sup>484</sup> See *infra* notes 487-92 and accompany text.

<sup>485</sup> *Robinson, Spottswood William III*, *supra* note 260; *Robinson, Aubrey Eugene, Jr.*, *supra* note 383; *Bryant, William Benson*, *supra* note 290.

<sup>486</sup> *Marshall, Thurgood*, *supra* note 135.

<sup>487</sup> *Hastie, William Henry*, *supra* note 7; *Higginbotham, Aloyisus Leon, Jr.*, *supra* note 215.

<sup>488</sup> *McCree, Wade Hampton, Jr.*, *supra* note 107.

<sup>489</sup> *Marshall, Thurgood*, *supra* note 135; *Motley, Constance Baker*, *supra* note 17.

<sup>490</sup> *Parsons, James Benton*, *supra* note 54; *Parsons Says Local Negroes Lead Nation: Story of a Judge—Won 1st Case at 15*, *supra* note 74.

<sup>491</sup> See *infra* notes 495-509 and accompanying text.

On September 16, 1940, the United States instituted the Selective Training and Service Act of 1940, which required all men between the ages of 21 and 45 to register for the draft. This was the first peacetime draft in United States' history. Those who were selected from the draft lottery were required to serve at least one year in the armed forces. Once the U.S. entered WWII, draft terms extended through the duration of the fighting. By the end of the war in 1945, 50 million men between eighteen and forty-five had registered for the draft and 10 million had been inducted in the military.

The National WWII Museum, *The Draft and World War II*, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/draft-and-wwii> (last visited June 10, 2022).

<sup>492</sup> *Hastie, William Henry*, *supra* note 7; see generally PHILLIP MCGUIRE, HE, TOO SPOKE FOR DEMOCRACY: JUDGE HASTIE, WORLD WAR II, AND THE BLACK SOLDIER.

<sup>493</sup> Willie J. Epps, Jr., *Resignation in Protest: Judge William Hastie's Uncompromising Battle Against Discriminatory Treatment of Blacks in the Armed Forces*, 90 UMKC L. REV. 549, 562-63 (2022).



Aide to the Secretary of War, he helped chisel away at a segregationist system imposed long before the War that would crumble within years after Hastie famously resigned the job “in protest over the continued segregation of [B]lacks in the military.”<sup>494</sup>

Judge Parsons enlisted as a Navy bandmaster during the War, serving from 1942 until 1945.<sup>495</sup> Judge McCree “spent four years on active duty, including two years in combat[,]” rising to the rank of Captain and earning a Bronze Star.<sup>496</sup>

In 1941, Judge Bryant began working as a civilian in the Office of War Information on a research team that surveyed racial attitudes in the military.<sup>497</sup> He then served in uniform in the Army from 1943 until 1947, achieving the rank of lieutenant colonel.<sup>498</sup> Judge Aubrey Robinson’s law school education was interrupted by the War.<sup>499</sup> After his first year at Cornell Law in 1942, he entered the U.S. Army, completing basic training in Texas before being stationed in segregated units at half a dozen installations across the country.<sup>500</sup>

Justice Marshall, while in his mid-thirties during the War, “held lengthy conversations with officials on the New York draft board to avoid being drafted.”<sup>501</sup> According to Marshall, “The director of selective service thought [Marshall] was more valuable in than out” where he could continue to run the NAACP and handle courts-martial for Black soldiers, which he did.<sup>502</sup> As the War progressed, civil rights leaders thought Marshall might end up being drafted. In an abundance of caution, Judge Hastie “wrote a strong letter to the draft board” on Marshall’s behalf “asking them to consider the damage that would be done to the NAACP and the nation’s race relations if Marshall were drafted.”<sup>503</sup> The appeal worked.<sup>504</sup> Marshall was never drafted.<sup>505</sup>

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<sup>494</sup> *Id.* at 563; WILLIAMS, *supra* note 166, at 123-24.

<sup>495</sup> James B. Parsons Named Federal Judge: Kennedy Taps Chicagoan for Coveted U.S. Post, *supra* note 67; Judge Parsons Appointment Very First for Negroes in U.S. Judicial History, *supra* note 68.

<sup>496</sup> Kalt, *supra* note 114.

<sup>497</sup> Schultz, *supra* note 294, at 80.

<sup>498</sup> Lamb, *supra* note 297.

<sup>499</sup> Causey, *supra* note 387, at 8-9, 15.

<sup>500</sup> *Id.* at 9-10.

<sup>501</sup> WILLIAMS, *supra* note 166, at 123.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 123-24 (footnote omitted).

<sup>504</sup> *Id.* at 124.

<sup>505</sup> *Id.*

Judges Higginbotham, Motley, and Spottswood Robinson did not serve in the military.<sup>506</sup>

### H. ABA Ratings

The ABA Standing Committee (the Committee) on Federal Judiciary was established on July 3, 1946, four years before a Black lawyer was admitted to the ABA.<sup>507</sup> The Committee was formed to promote federal judicial candidates it, after investigation, found competent and oppose those it found unqualified or unfit.<sup>508</sup> The Committee was empowered also to take action against sitting federal judges “deemed disqualified or unfit to continue on the bench.”<sup>509</sup>

“The ABA’s “15-person screening committee contacts...lawyers and judges about a nominee’s qualifications, focusing on three critical factors: competence, integrity, and temperament.”<sup>510</sup> It does not evaluate a candidate’s political beliefs or judicial philosophy. “After the ABA review is complete, candidates are assigned one of three ratings:

<sup>506</sup> Compare Higginbotham, *Aloyisus Leon, Jr.*, *supra* note 215 (conveying absence of military service in professional career); Motley, *Constance Baker*, *supra* note 17 (conveying absence of military service in professional career); Robinson, *Spottswood William III*, *supra* note 260 (conveying absence of military service in professional career), with Robinson, *Aubrey Eugene, Jr.*, *supra* note 383 (showing military service in professional career).

<sup>507</sup> *Bar Sets up Group to Test Judiciary: New Committee Will Pass on Candidates and Act to Oust Unfit from Bench*, N.Y. TIMES, July 4, 1946, at 12.

In 1911, William H. Lewis was admitted as the first Black member of the ABA, though the ABA was unaware of his race. A graduate of Amherst College and Harvard Law School, Lewis was the first Black to serve as an Assistant United States Attorney in 1903. The same year he joined the ABA, Lewis was appointed United States Assistant Attorney General by President Howard Taft – the first Black to hold this position. In 1912, learning of Lewis’s race, the ABA rescinded his membership. More than three decades later, in 1943, the ABA reversed course, passing a resolution that “membership in the [ABA] is not dependent upon race, creed or color.” Regardless, a Black lawyer was not admitted as a member until 1950.

Willie J. Epps, Jr., *Black Lawyers of Missouri: 150 Years of Progress and Promise*, 86 Mo. L. Rev. 1, 163 (2021).

<sup>508</sup> *Bar Sets up Group to Test Judiciary: New Committee Will Pass on Candidates and Act to Oust Unfit from Bench*, *supra* note 510; *Bar Would Name Federal Judges: House of Delegates Empowers Group to Promote or Oppose Those Proposed for Bench*, N.Y. TIMES, Feb. 25, 1947, at 30.

<sup>509</sup> *Bar Sets up Group to Test Judiciary: New Committee Will Pass on Candidates and Act to Oust Unfit from Bench*, *supra* note 510;

<sup>510</sup> Mike Zubrensky, *Trump, lower court nominees need American Bar Association review*, HILL: THE JUDICIARY (Apr. 25, 2017 12:00 PM) <https://thehill.com/blogs/pundits-blog/the-judiciary/330414-trump-lower-court-nominees-need-non-partisan-american-bar/>.

Well Qualified, Qualified, and Not Qualified.”<sup>511</sup> The purpose of these ratings “is to convey to both the [P]resident and the Senate the legal profession’s level of esteem for the candidate.”<sup>512</sup> The rating is made public once the candidate is nominated by the White House.<sup>513</sup>

During his confirmation hearing for the Third Circuit, Judge Hastie stated he was not a member of the American Bar Association (in the 1940s) because the ABA “did not welcome the membership of Negroes” then.<sup>514</sup> While the ABA “endorsed” Judge Hastie for the appellate judgeship, the Author is unaware of any specific ABA rating for Judge Hastie.<sup>515</sup> Judge Parsons was rated “well qualified” by the ABA, as was Judge McCree for both the federal district and circuit judgeships.<sup>516</sup> Justice Marshall was rated “well qualified” for the Second Circuit, and “highly acceptable from the viewpoint of professional qualification” for elevation to the Supreme Court.<sup>517</sup>

<sup>511</sup> *Id.*

<sup>512</sup> Lauren C. Bell, *Federal Judicial Selection in History and Scholarship*, 96 JUDICATURE 296, 301 (2013).

The ABA’s “privileged position” in the appointment process has been extensive, and critics have observed that by the middle of the twentieth century, and continuing today, the ABA had “replaced the influence of political parties in judicial selection with the influence of the Bar.” *Id.* Some contend the ABA is “known to this day for systematically rating people of color and female lawyers lower than white and male lawyers, regardless of education, age, ideology, or the length and nature of their experience.”

BROWN-NAGIN I, *supra* note 338, at 258-59.

<sup>513</sup> Zubrensky, *supra* note 510.

<sup>514</sup> *On the Confirmation of the Nomination of Honorable William Henry Hastie of the Virgin Islands to be Judge of the United States Court of Appeals of the Third Circuit: Hearings Before the Comm. on the Judiciary*, 81st Cong. 167 (1950).

<sup>515</sup> WARE, *supra* note 31, at 233.

<sup>516</sup> During the confirmation hearing on Judge Parsons’ nomination, Senator Douglas stated that the ABA rated Parsons “well qualified.” *Nomination of James B. Parsons to be United States District Judge for the Northern District of Illinois: Hearing Held Before Subcomm. of the Comm. on the Judiciary*, 87th Cong. 4 (1961) (statement of Sen. Douglas, Member, Comm. on the Judiciary). During a hearing on Judge McCree’s nomination, Senator Hart stated that in a letter dated September 19, 1961, the ABA was of the view that McCree is “well qualified” for his appointment to the Eastern District of Michigan. *Nomination of Wade Hampton McCree, Jr. to be United States District Judge for the Eastern District of Michigan: Hearing Held Before Subcomm. of the Comm. on the Judiciary*, 87th Cong. 2 (1961) (statement of Sen. Hart, Member, Comm. on the Judiciary). In a letter to the Senate Judiciary Committee, the ABA “unanimously” rated Judge McCree “well qualified” for his appointment to the Sixth Circuit. *Nomination of Wade Hampton McCree, Jr., of Michigan, to be United States Circuit Judge, Sixth Circuit: Hearing Held Before Subcomm. of the Comm. on the Judiciary*, 89th Cong. (1966) (letter from Albert E. Jenner, Jr., Chairman, American Bar Association Standing Comm. on Fed. Judiciary).

<sup>517</sup> During a hearing on Marshall’s nomination to the Second Circuit, Senator Hruska stated that in a letter dated April 10, 1962, the ABA “unanimously” found Marshall “well qualified.” *Nomination of Thurgood Marshall, of New York, to be United States Circuit Judge for the Second Circuit: Hearings Before a Subcomm. of the Comm. on the Judiciary*, 87th Cong. 1 (1962)

During a hearing on A. Leon Higginbotham's nomination to the federal district court, Senator Hart stated that the ABA advised in a letter dated December 14, 1963, that Higginbotham was "qualified" for his appointment.<sup>518</sup> During the hearing on Judge Higginbotham's nomination to the Third Circuit, however, Senator DeConcini stated that the ABA "unanimously" found Judge Higginbotham "exceptionally well qualified."<sup>519</sup>

Judge Spottswood Robinson was rated "well qualified" for both his federal judgeships, as was Judge Bryant for the U.S. District Court for the District of Columbia.<sup>520</sup>

During Constance Baker Motley's confirmation hearing, the Committee referred to a letter from the ABA dated March 16, 1966,

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(statement of Sen. Hruska, Member, Comm. on the Judiciary); *see also* Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237, 238 (1993) (quotation omitted). During Marshall's Supreme Court confirmation hearing, Senator Eastland stated that in a letter dated July 10, 1967, the ABA found Judge Marshall "highly acceptable from the viewpoint of professional qualification." *Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 90th Cong. 1 (1967) (statement of Sen. Eastland, Chairman, Comm. on the Judiciary). "[T]he ABA uses a different set of procedures and criteria for evaluating Supreme Court nominees" than those of lower courts. Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 2 n.1 (2001); *see also* *Supreme Court Evaluation Process*, A.B.A., [https://www.americanbar.org/groups/committees/federal\\_judiciary/ratings/supreme-court-evaluation-process/](https://www.americanbar.org/groups/committees/federal_judiciary/ratings/supreme-court-evaluation-process/) (last visited Oct. 29, 2022).

<sup>518</sup> *Nomination of A. Leon Higginbotham to be U.S. District Judge for the Eastern District of Pennsylvania: Hearing Held Before Subcomm. of the Comm. on the Judiciary*, 88th Cong. 2 (1963) (statement of Sen. Hart, Chairman, Comm. on the Judiciary).

<sup>519</sup> *Hearing On Nominations for District and Circuit Court Judges: Hearing Before the S. Comm. on the Judiciary*, 95th Cong. 36 (1977) (statement of Sen. DeConcini, Acting Chairman of the Comm., Comm. on the Judiciary).

<sup>520</sup> During a nomination hearing, Senator Hart referred to the ABA letter which stated that a majority of the ABA found Robinson "well qualified," and the remainder of the Committee found him "qualified" for his appointment. *Hearing Before Subcomm. of the Comm. on the Judiciary: Nomination of Spottswood W. Robinson to be U.S. District Court Judge for the District of Columbia*, 88th Cong. 2 (1964) (Statement of Sen. Hart, Member, Comm. on the Judiciary). During Judge Robinson's hearing for confirmation to the D.C. Circuit, the Committee referred to a letter from the ABA dated October 13, 1966, in which an "overwhelming majority" of the ABA found Judge Robinson "well qualified." *Hearing Before Subcomm. of the Comm. on the Judiciary: Nomination of Spottswood W. Robinson to be U.S. Circuit Judge for the District of Columbia Circuit*, 89th Cong. 1-2 (1966) (Statement of Sen. Hart, Member, Comm. on the Judiciary). During William B. Bryant's nomination hearing, Senator Hart referred to a letter from the ABA dated July 19, 1965, in which a majority of the ABA found William B. Bryant "well qualified" for his appointment. *Hearing Before Subcomm. of the Comm. on the Judiciary: Nomination of William B. Bryant to be U.S. District Court Judge for the District of Columbia*, 89th Cong. 2 (1964) (Statement of Sen. Hart, Member, Comm. on the Judiciary).

where the Committee found her “qualified” for her appointment to the U.S. District Court for the Southern District of New York.<sup>521</sup>

#### IV. CONCLUSION

The first nine Black federal judges were among the most accomplished and consequential legal figures of the twentieth century.<sup>522</sup> They chose to become lawyers when Blacks had few rights under the Supreme Court’s interpretation of the Constitution, graduating at the top of their classes from the finest law schools.<sup>523</sup> They were leaders in the legal community, some litigating and winning, the most important civil rights cases in our nation’s history before taking the bench.<sup>524</sup> They did not let barriers stop them from becoming federal judges when segregated schools, employers, restaurants, hotels, public bathrooms, water fountains, and swimming pools prevailed.<sup>525</sup> The inequality during this period makes their ascent to the federal bench even more impressive.

Jackie Robinsons exist in every profession. To be the first is never easy, often requiring struggle and sacrifice in the face of resistance. Our pioneers need to be celebrated and recognized, not just in sports, but in law, politics, medicine, business, math and science, and the arts.<sup>526</sup> Men and women, who collectively comprise the firsts, are

<sup>521</sup> Hearing Before Subcomm. of the Comm. on the Judiciary: Nomination of Constance Baker Motley to be U.S. District Court Judge for the Southern District of New York, 89th Cong. 1-2 (1966) (Statement of Sen. Burdick, Member, Comm. on the Judiciary); see also Brown-Nagin, *supra* note 344, at 1691.

<sup>522</sup> See *supra* Section III.D.

<sup>523</sup> See *supra* Section III.C.

<sup>524</sup> See *supra* Section III.C.

<sup>525</sup> See *supra* Section II.

<sup>526</sup> James McCune Smith was the first Black physician, earning a medical degree at the University of Glasgow in the 1830s, “when no American university would admit him.” Bryan Greene, *America’s First Black Physician Sought to Heal a Nation’s Persistent Illness*, SMITHSONIAN MAGAZINE, February 26, 2021, <https://www.smithsonianmag.com/history/james-mccune-smith-america-first-black-physician-180977110/>. Robert Robinson Taylor, the first Black to graduate from MIT in 1892, was also the first accredited Black architect, best known for the two-dozen buildings he designed for Tuskegee University. Jesse Dorris, *10 Pioneering African American Architects and the Legacy Buildings They Designed*, INTERIOR DESIGN, June 1, 2020, <https://interiordesign.net/designwire/10-pioneering-african-american-architects-and-the-legacy-buildings-they-designed/>. Mae Carol Jemison, an aerospace engineer and graduate of Stanford and Cornell’s medical school, was the first Black woman to travel to space in 1992. Mae Jemison, *I Was the First Woman of Color in Space. Here’s What Katherine Johnson Means to Me.*, N.Y. TIMES, Feb. 29, 2020, <https://www.nytimes.com/2020/02/29/opinion/contributors/Katherine-johnson-nasa.html>. In 2008, “America broke the ultimate political color barrier: It elected a man who was not white to be president of the United States, Barack Obama.” Mike Jones, *Barack Obama is the Jackie Robinson of American politics*, ST. LOUIS AM., Jul. 2, 2015, [http://www.stlamerican.com/news/columnists/guest\\_columnists/barack-obama-is-the-jackie-robinson-of-american-politics/article\\_f9dd1dee-2038-11e5-bd09-cb3a40a0c2fb.html](http://www.stlamerican.com/news/columnists/guest_columnists/barack-obama-is-the-jackie-robinson-of-american-politics/article_f9dd1dee-2038-11e5-bd09-cb3a40a0c2fb.html).

often profiles in courage who can inspire the next generation. It is this Author's hope that this Article inspires law students and young lawyers to dream bigger and reach a little higher, for we all stand on the shoulders of these early judicial pioneers.