

Perspectives on the Selection of Federal Judges

Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts, and the Politics of Presidential Vengeance in Retrospect

BY PETER G. FISH*

VARIETIES OF RETRIBUTION

Presidential revenge as a motivating force behind Supreme Court nominations is an ineluctable thread running through American judicial selection politics. Such nominations emerge out of varied contexts, but are characterized by common elements of: (1) a judicial and/or senatorial attack on the president's political ideology or programs, including appointments, or both, (2) injury suffered by the president, and (3) executive branch retaliation aimed at the United States Supreme Court, the Senate, or both.

Retaliation may take the form of a spite nomination. In its least controversial form, such an appointment may reflect generalized presidential disagreement with the constitutional jurisprudence crafted by the existing Court. An excellent example is Richard Nixon's choice of Warren Burger to succeed judicial "activist" Earl Warren as Chief Justice of the United States. To fill the latter's place, Nixon named one who, even if he failed to roll back the Warren Court's record in civil rights, criminal

* Professor of Political Science and Law, Duke University; A.B., Princeton University, 1960; M.A., Pol. Sci., Johns Hopkins, 1965; Ph.D., Pol. Sci., Johns Hopkins University, 1968. The author is indebted to Kathleen A. Wasch, Duke Law '90, for copyediting assistance, and to Sandra L. Perkins for manuscript preparation.

procedure, and reapportionment, would perceive "himself as a 'caretaker' of the Constitution and not as a 'super-legislator' with a free hand to impose . . . social and political view-points upon the American people."¹

Andrew Jackson's appointment of Roger B. Taney to succeed Chief Justice John Marshall reflected the President's acute dissatisfaction with the Senate, rather than with the Court on which he had already placed three loyalists.² Another vacancy enabled Jackson to reward his former Attorney General and Treasury Secretary with a nomination to the Supreme Court. Intense Senate opposition to the Jackson ally and inveterate opponent of the Bank of the United States led, however, to Senate "pigeonholing" of the nomination. An incensed Jackson then successfully named Taney to the chief justiceship over the bitter-end opposition of a then-reigning congressional trio composed of John C. Calhoun, Daniel Webster, and Henry Clay.³

A third variety of executive branch political retribution may be aimed at both the Court and the Senate. Franklin D. Roosevelt's choice of Hugo Black as his first Supreme Court nominee constituted a presidential response not only to the disheartening judicial record compiled by the Court under Chief Justice Charles Evans Hughes, but also to the Senate's previous treatment of the President. The appointment of the young Alabama senator was seen by Secretary of the Interior Harold Ickes as a Roosevelt-orchestrated "blow . . . to the prestige of Chief Justice Hughes [and] a distinct slap in his face, and in those of Van Devanter, McReynolds, Roberts, and Sutherland, who have constituted the old guard majority."⁴ At the same time, Black's selection constituted a blow to the Senate that had torpedoed the President's Court-packing bill, an issue on which the nominee had stood loyally with the White House.⁵

¹ H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 14 (2d ed. 1985).

² C. SWISHER, THE TANEY PERIOD, 1836-64, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 46-49 (John McLean), 49-52, (Henry Baldwin), 53-55 (James M. Wayne) (1974).

³ *Id.* at 15-38.

⁴ 2 H. ICKES, THE SECRET DIARY OF HAROLD L. ICKES: THE INSIDE STRUGGLE, 1936-1939, 66 (1954).

⁵ G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 45-47 (1977); J. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-1936, 157-58 (1967).

Another class of spite nomination exists, and it is with this class that modern presidents have enjoyed relatively little success. As in the Taney and Black prototypical nominations, the Senate looms so large as a target of presidential wrath that the Court is subordinated as an issue. To be sure, the inter-branch contest occurs against the background of a present or prospective rising or ebbing constitutional tide. But the most marked characteristic of this inter-branch contest is the time-bound nature of the struggle. Such spite nominations occur in the wake of a senatorial defeat administered to the president's original choice for the Court, thereby provoking the White House to make public or private expressions of resentment and to nominate a successor whose obvious or intrinsic political-judicial profile seemingly differs little from that offered by the vanquished predecessor. The profile may also represent a qualitative diminution. Whatever its relative merits, to constitute a meaningful spite strategy, the second choice nomination must pose a political challenge to a Senate with a composition unchanged from that which dealt a defeat to the president's most favored candidate. In this manner, the president hopes to retrieve lost political capital, discipline the Senate, and compel the Upper Chamber to capitulate and accept the nominee whose presence on the Supreme Court is perceived by both White House and Senate as making a material impact on constitutional jurisprudence.

PRESIDENTIAL CHOICES

By refusing to confirm a president's first-choice nominee for the United States Supreme Court, the Senate starkly demonstrates its constitutionally prescribed prerogative of advising on and consenting to executive nominations.⁶ Three times in the twentieth century the Senate has wielded its power to reject a president's most favored Supreme Court nominee: Robert H. Bork in 1987,⁷ Clement F. Haynsworth, Jr. in 1969,⁸ and John J. Parker in 1930.⁹ In each instance, the president submitted a

⁶ U.S. CONST., art. II, § 2, cl. 2.

⁷ See 133 CONG. REC. 167, S15011 (daily ed. 1987) (Judge Bork's nomination was rejected on October 23, 1987).

⁸ See 115 CONG. REC. 26, 35396 (1969) (Judge Haynsworth's nomination was rejected on November 21, 1969).

⁹ See 72 CONG. REC. 8, 8487 (1930) (Judge Parker's nomination was rejected on May 7, 1930).

second choice, a choice which came in the wake of an arduous, prolonged and bitter confirmation fight. That struggle made the president's first choice a highly politicized, if not demonized, symbol, and required that the White House mobilize extensive political resources in a losing cause.

The president retains the initiative notwithstanding the Senate's treatment accorded his first nominee. Yet the appointment options may be more limited than they appear on their face. The president must somehow prevent further losses and recoup lost political capital in selecting a successor nominee to stand in the shoes of the fallen first choice. In the emotion of the moment, the beaten president must choose. The chief executive may extend an olive branch to the triumphant senatorial majority by nominating a successor nominee acceptable to its members, and thereby appear to "sell out" to political enemies. The president may remain adamant and take vengeance on those who had defeated the original choice, by picking a second choice anathema to the senators who had voted against the first choice. Finally, the president may seek out a nominee whose spite nomination credentials are masked by a public image and/or reputation that makes the nominee acceptable to the president's opponents in the Senate. Whether an obvious clone of the vanquished first choice or a masquerader is selected as the substitute nominee, the president has confronted the Senate with a spite nomination, likely with the intention of putting political enemies in the Senate to the test.

Three modern American presidents have confronted the second choice nominee dilemma: Ronald Reagan, Richard Nixon, and Herbert Hoover. Only Hoover, however, produced a winning successor Supreme Court nominee. Why did Hoover succeed where Nixon and Reagan failed? In considering the second choice nomination of Owen J. Roberts and the background of the analogous nominations of Douglas H. Ginsburg and George Harrold Carswell, it may be possible to suggest the manner in which presidents have resolved tensions between fidelity to political ideology and resort to political pragmatism in responding to senatorial defeats of their first choices for a Supreme Court position. Furthermore, it may answer the question of whether the nomination of Roberts constituted abject capitulation to his worst enemies or the only successful spite nomination of the

century by a president whose political leadership qualities have long been denigrated.¹⁰

FIRST CHOICE DEFEATS

Nonconfirmation of President Ronald Reagan's Supreme Court nominee Robert Heron Bork in the autumn of 1987¹¹ evoked memories of earlier defeats administered by the Senate to similar first choices advanced by Presidents Richard Nixon and Herbert Hoover. The nominations of Clement F. Haynsworth, Jr. and John J. Parker ignited political storms in their times.¹² All three were, when nominated, sitting judges on United States Courts of Appeals who tendered impressive professional credentials.¹³ Yet, their initial selections involved political, regional, and ideological calculations. Hoover and Nixon both named candidates compatible with a "southern strategy" of promoting Republican party development in the South and with ideological attributes, primarily business progressivism, temperance, and mild judicial activism in Parker's case and judicial self-restraint in the case of Haynsworth.¹⁴ Regionalism figured not at all in Bork's selection, but the nominee's notable reputation for holding long articulated "conservative" positions on

¹⁰ See J. BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* 58-66 (3d ed. 1985).

¹¹ See *supra* note 7.

¹² See 115 CONG. REC. 18, 24198 (1969) (the Senate received the nomination on August 21, 1969); 72 CONG. REC. 6, 5849 (1930) (Judge Parker was nominated on March 21, 1930); PUB. PAPERS: RICHARD NIXON 1969, 1071 (1971) (Judge Haynsworth was nominated on August 18, 1969).

¹³ Parker's pre-judicial and judicial careers are summarized by Fish, *John Johnston Parker*, *DICTIONARY OF AMERICAN BIOGRAPHY, SUPPLEMENT SIX: 1956-1960*, 493-96 (J. Garraty, ed. 1980). See *Clement F. Haynsworth, Jr.: Hearings on Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States Before the Committee on the Judiciary of the United States Senate*, 91st Cong., 1st Sess. 591-602 (1969) [hereinafter *Hearings*] (statement of Charles Alan Wright, Charles T. McCormick, Professors of Law at the University of Texas); S. REP. No. 100-7, 100th Cong., 1st Sess. 215 (1987) (Bork's qualifications presented).

¹⁴ Fish, *Torchbearer for Pre-New Deal Southern Economic Development: Judge John J. Parker of the U.S. Court of Appeals for the Fourth Circuit*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 253-95 (K. Hall and J. Ely, Jr., eds. 1989). On Parker as a "dry," see memorandum on "John J. Parker" by Mabel Walker Willebrandt (copy), accompanying Willebrandt to Parker, April 22, 1929, John J. Parker Papers, box 18, Southern Historical Manuscripts Collection, University of North Carolina-Chapel Hill, Chapel Hill, N.C. On Haynsworth, see *Hearings, supra* note 13, at 602-11 (Statement by G.W. Foster, Jr.).

privacy, civil rights, and the first amendment made him a politically attractive first choice.¹⁵

Whatever the intrinsic professional merits of Judges Bork, Haynsworth, and Parker, their at least putative political and ideological attributes generated ultimately fatal opposition. Challenges to the nominees came from groups that represented interests antithetical to those of the president and that depended in varying degrees on public policies as enunciated by the Supreme Court. Bork and Haynsworth were perceived as capable of tilting a narrowly divided Court against the civil rights-civil liberties record achieved by the Warren Court and preserved by its successor—the Burger Court.¹⁶ Parker's potential membership was seen quite differently; his presence would not likely be a catalyst for changing the anti-labor record developed by the Taft Court.¹⁷ On the other hand, Parker might prove to be unsympathetic toward preservation of the meager civil rights gains achieved by black Americans in the Court under Chief Justices White and Taft.¹⁸ Thus, those interests that regarded themselves as threatened by the prospective confirmation of these three Associate Justices waged successful battles inside and outside of the Senate forum.

REAGAN AND NIXON

Defeat of their first choices distressed the appointing presidents. Each suffered political and psychological loss, and they reacted: Reagan and Nixon publicly, Hoover privately. "I am saddened and disappointed that the Senate has bowed to a campaign of political pressure . . .," Reagan declared following

¹⁵ D. Rutkus, *Senate Consideration of the Nomination of Robert H. Bork to be a Supreme Court Associate Justice: Background and an Overview of Issues*, CRS Report for Congress, 87-761 GOV, 35-66; N.Y. Times, Sept. 13, 1987, at 1, col. 1-3.

¹⁶ On Bork's projected impact, see Rutkus, *supra* note 15, at 32-34; on Haynsworth's projected impact, see *Hearings, supra* note 13, at 614-18 (statement of Victor Rabinowitz, President, National Lawyers Guild); H. ABRAHAM, *supra* note 1, at 294-307.

¹⁷ See *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing on the Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States*, 71st Cong., 2d Sess. 23, 56 (1930) [hereinafter *Parker Hearing*] (statement of William Green, President, American Federation of Labor).

¹⁸ See *Parker Hearing, supra* note 17, at 75-76 (statement of Walter White).

the defeat of Judge Bork's confirmation.¹⁹ Previously, Reagan had denounced the Senate for allowing "[t]he confirmation process [to become] an ugly spectacle, marred by distortions and innuendoes, and casting aside the normal rules of decency and honesty."²⁰ In contrast, Nixon, in private, was even more enraged on receiving news that the Senate had rejected the Haynsworth nomination. He reportedly "[i]nveighed against the liberal press which had built the opposition to Haynsworth, against organized labor for its vendetta against the judge, and most of all against those Republican senators who had betrayed their President."²¹ Nixon muted his public rage. He regretted the Senate's action and especially its contribution to "[t]he brutally vicious and . . . unfair attack on [Judge Haynsworth's] integrity. . . ."²²

Both Reagan and Nixon did more than emit public wrath. They publicly promised retaliation in the form of a successor nominee no more, and perhaps less, satisfactory to the Senate majority which had so recently vanquished their first choices. Thus, in a moment of high emotion, they opted to "hold the course," compelling senators whose energy had been spent in successful opposition to swallow pride, scruples, and partisan interests and accept the president's second choice.

With the nomination of Judge Bork facing rejection, President Reagan, in the context of an emotional partisan conclave, made a promise to search for a successor "[t]hat they'll object to just as much as they did for this one."²³ The reality of defeat evoked a somewhat tempered promise to select someone who shared "Judge Bork's belief in judicial restraint: that a judge is bound by the Constitution to interpret laws, not make them,"²⁴ who did not "[c]onfuse the criminals with the victims, [and] who does not invent new or fanciful constitutional rights for

¹⁹ President's Statement on Senate Action on the Nomination of Robert H. Bork, 23 WEEKLY COMP. PRES. DOC. 1223 (Oct. 23, 1987).

²⁰ President's Address to the Nation on the Robert H. Bork Nomination, 23 WEEKLY COMP. PRES. DOC. 1172 (Oct. 14, 1987).

²¹ R. EVANS, JR. & R. NOVAK, NIXON IN THE WHITE HOUSE: THE FRUSTRATION OF POWER 163 (1971).

²² President's Statement on the Senate Vote on Judge Haynsworth's Nomination, 5 WEEKLY COMP. PRES. DOC. 1638 (Nov. 21, 1969).

²³ President's Remarks to the New Jersey Republican State Committee, 23 WEEKLY COMP. PRES. DOC. 1169 (Oct. 13, 1987).

²⁴ President's Statement on Senate Action on the Nomination of Robert H. Bork, *supra* note 19, at 1223.

those criminals. . . ."²⁵ President Nixon similarly pledged that

when the Congress returns for its second session . . . I will nominate another Associate Justice. The criteria I shall apply for this selection, as was the case with my nomination of Judge Haynsworth, will be consistent with my commitments to the American people before my election as President a year ago.²⁶

GINSBURG AND CARSWELL

True to their word, Reagan and Nixon named nominees who, if confirmed by the Senate, would snatch a presidential victory from the jaws of what appeared to be resounding defeat at the hands of the Senate. Thus, Reagan and Nixon both pursued an ill-disguised strategy of vengeance against the Upper Chamber—a strategy intended to hold the constituency mobilized behind the initial nominee and to force the Senate into a posture of ironic acceptance of a second-choice nominee possessing professional credentials widely perceived as inferior to those of the original nominee.

Reportedly at the behest of Attorney General Edwin Meese III and conservative Republican Senator Jesse Helms of North Carolina, President Reagan named another court of appeals judge, Douglas Ginsburg.²⁷ The forty-one-year-old Ginsburg, sporting a "paper trail" vastly shorter than his prolific predecessor's, was, the President assured Bork loyalists, "a believer in judicial restraint [and in courts that] administer fair and firm justice, while remembering not just the rights of criminals but, equally important, the . . . rights of society."²⁸ No similar ideological assessments accompanied Nixon's nomination of George Harrold Carswell.²⁹ At a subsequent press conference, however,

²⁵ President's Address to the Nation on the Robert H. Bork Nomination, *supra* note 20, at 1173.

²⁶ President's Statement on the Senate Vote on Judge Haynsworth's Nomination, *supra* note 22, at 1638.

²⁷ See Cohodas, *Ginsburg Nomination May Be Test for Senate*, 45 Cong. Q. 2670-71 (1987). See generally President's Remarks Announcing Douglas H. Ginsburg's Nomination, 23 WEEKLY COMP. PRES. DOC. 1246 (Oct. 29, 1987) (the Ginsburg nomination was not submitted to the Senate).

²⁸ President's Remarks Announcing Douglas H. Ginsburg's Nomination, *supra* note 27, at 1247.

²⁹ See President's Announcement of Intention to Nominate Judge George Carswell, 6 WEEKLY COMP. PRES. DOC. 52-53 (Jan. 19, 1970).

the President lauded the Judge's record "[o]f strict constructionism as far as the interpretation of the Constitution and the role of the Court, which I think the Court needs."³⁰ Word soon spread that the naming of Carswell had all the trappings of a spite nomination. Attorney General John Mitchell had reportedly scrutinized the nominee's judicial record, afterwards exclaiming: "He's almost too good to be true."³¹ A prominent Republican senator learned that the Justice Department had rated Carswell well below Haynsworth and several other candidates.

That made it clear that the choice of Carswell was vengeance—to make us sorry we hadn't accepted Haynsworth—and, at the same time, it was an attempt to downgrade the Supreme Court and implement the Southern strategy. The Attorney General obviously believed that we had no stomach for another fight after Haynsworth, and that we would accept any dog³²

The second choice nominations of Ginsburg and Carswell turned to ashes, thereby thwarting a presidential strategy of retaliation against the Senate. Ginsburg's chances of confirmation disintegrated in the wake of news that he had previously used marijuana and had misrepresented or concealed his record as an official in the Reagan Justice Department.³³ Unlike Ginsburg, who responded to the disclosures of his pre-judicial activities by requesting that Reagan withdraw his nomination, Carswell and Nixon fought the Senate down to the final vote—in vain. Carswell's racism, manifested prior to and during his service on the federal bench, mobilized the same pressure groups that had opposed Haynsworth's nomination. The nominee's deception of the Senate Judiciary Committee and his mediocre professional qualities, publicized by Senator Roman Hruska, Nixon's floor manager of the nomination, further dimmed confirmation prospects.³⁴

³⁰ President's News Conference, 6 WEEKLY COMP. PRES. DOC. 92-93 (Jan. 30, 1970).

³¹ R. HARRIS, DECISION 11 (1971).

³² *Id.* at 11-12.

³³ See Cohodas, *Ginsburg Hurt Badly by Marijuana Admission*, 45 Cong. Q. 2714 (1987) (The nomination was withdrawn at Ginsburg's request on November 7, 1987); see also President's Statement on the Withdrawal of Douglas Ginsburg's Nomination, 23 WEEKLY COMP. PRES. DOC. 1298 (Nov. 7, 1987).

³⁴ See H. ABRAHAM, *supra* note 1, at 16-17.

THIRD CHOICE PRAGMATISM

Their spite nominations destroyed, both Reagan and Nixon acted as political pragmatists. Both selected third choice candidates encumbered with little pre-judicial political baggage and endowed with extensive and highly professional records. Reagan named another federal appellate judge, Anthony M. Kennedy of the Ninth Circuit.³⁵ Reagan presented Kennedy as "a true conservative" and as a key contributor to "keeping our cities and neighborhoods safe from crime."³⁶ Kennedy's candidacy had been pressed, however, by White House chief-of-staff Howard Baker, Jr. as a "moderate."³⁷ When asked: "Did you cave into the liberals, Mr. President?" Reagan vehemently denied harboring such a motive.³⁸ Some observers wondered, however, if the once calculating and then defiant Reagan had not succumbed to pragmatic temporizing by "appointing someone who can be confirmed, but not appointing someone who is going to turn the Court around."³⁹ Nixon obscured the suggestion that he had abandoned his loyal Haynsworth-Carswell constituency with a verbal blast at the Senate's reputed regional bias. The President charged "[t]hat it is not possible to get confirmation . . . of any man who believes in the strict construction of the Constitution, as I do, if he happens to come from the South."⁴⁰ With that, Nixon announced that his "[n]ext nominee must come from outside the South. . . ."⁴¹ Minnesotan Harry A. Blackmun, then Judge of the United States Court of Appeals for the Eighth

³⁵ See President's Remarks Announcing Anthony M. Kennedy's Nomination, 23 WEEKLY COMP. PRES. DOC. 1318 (Nov. 11, 1987); see also 113 CONG. REC. 188, S16771 (daily ed. 1987) (the Senate received the nomination on November 30, 1987).

³⁶ President's Remarks Announcing Anthony M. Kennedy's Nomination, *supra* note 35, at 1319.

³⁷ Cohodas, *supra* note 27; Cohodas, "Cautious Senate Wants to Like Judge Kennedy," 45 CONG. Q. 2786-88.

³⁸ President's Remarks Announcing Anthony M. Kennedy's Nomination, *supra* note 35, at 1319; see 134 CONG. REC. 7, S516 (daily ed. 1988) (Justice Kennedy was confirmed on February 3, 1988).

³⁹ President's Remarks Announcing Anthony M. Kennedy's Nomination, *supra* note 35, at 1319.

⁴⁰ President's Remarks Regarding Court Nominations, 6 WEEKLY COMP. PRES. DOC. 504 (Apr. 9, 1970).

⁴¹ *Id.*

Circuit, became choice number three.⁴² He possessed impeccable professional and apparently satisfactory ideological credentials. The nomination proved anticlimactic and noncontroversial; the Senate confirmed the future author of the landmark abortion opinion in *Roe v. Wade* by a vote of 94-0.⁴³

HOOVER AND PARKER

Of the three twentieth century presidents whose first choice Supreme Court nominees suffered defeat in the Senate, only Herbert Hoover successfully achieved confirmation of his second choice, Owen J. Roberts. That the confirmation came on a unanimous voice vote suggests that Hoover, unlike Nixon and Reagan in their second tries, abandoned an initial strategy of political calculation and eschewed a spite nomination, instead making a pragmatic and temporizing one.

“The White House is gloom-encircled,” newsman Frederic Wile reported in the wake of what he termed “the newest of a pitilessly long list of ‘breaks’ which have gone against the President.”⁴⁴ Supreme Court nominee John J. Parker had suffered defeat on May 7, 1930.⁴⁵ White House sources intimated that Hoover was at least “resentful” of the treatment accorded his

⁴² See 116 CONG. REC. 9, 11861 (1970) (The Senate received the nomination on April 15, 1970); PUB. PAPERS: RICHARD NIXON 1970, 1177 (1971) (nominated on April 14, 1970).

⁴³ 116 CONG. REC. 11, 15142 (1970); see H. ABRAHAM, *supra* note 1, at 19. Not classifiable as actual nominations were the six Supreme Court candidates publicly advanced in 1971 by President Richard M. Nixon. Upon the resignation of Hugo L. Black, retired effective September 17, 1971, *Justices of the Supreme Court*, 404 U.S. iiii (1971), and John Marshall Harlan, retired effective September 23, 1971, *id.* at ivn, and prior to the customary inquiry by the Federal Bureau of Investigation, N.Y. Times, Oct. 17, 1971, at 39, col. 1, the President submitted to the American Bar Association’s Standing Committee on Federal Judiciary the names of six potential nominees: Mildred Lillie, Herschel H. Friday, Sylvia Bacon, Robert C. Byrd, Charles Clark, and Paul H. Roney. N.Y. Times, Oct. 14, 1971, at 1, col. 8. While the Bar Committee had the six names under consideration, the President named two nominees not on the list. Whether or not he ever actually intended to nominate any one of the six candidates remained unclear. *Id.*, Oct. 22, 1971, at 1, col. 8; see H. ABRAHAM, *supra* note 1, at 21. On October 21, 1971, William H. Rehnquist and Lewis F. Powell, Jr. were nominated to fill the two vacancies on the Court. PUB. PAPERS: RICHARD NIXON 1971, 1053-57 (1972) (Submitted to the Senate on October 22, 1971); 7 WEEKLY COMP. PRES. DOC. 1441 (October 25, 1971); 117 CONG. REC. 34, 44857 (1971) (Powell was confirmed on December 6, 1971); 117 CONG. REC. 35, 46197 (1971) (Rehnquist was confirmed on December 10, 1971).

⁴⁴ Wile, *Washington Observations*, Evening Star (Washington, D.C.), May 9, 1930, at A8.

⁴⁵ See *supra* note 9.

nominee by the Senate.⁴⁶ A story in the black press suggested a more advanced state of distress. The Chicago *Defender* reported him as declaiming that Parker's defeat "is an outrage. I do not know what this country is coming to when it can be run by demagogues and Negro politicians."⁴⁷

The Senate vote represented a presidential defeat of major proportions. Hoover had "staked his own political prestige on the outcome," waging an unrelenting campaign to win converts to his cause, especially from among regular Republican senators in a Senate nominally controlled by the President's party.⁴⁸ Shortly after success had narrowly eluded him, Hoover huddled for over an hour with Senator Henry Justin Allen of Kansas, a key Hoover administration operative on the Senate floor, and two of his "ablest attorneys," Secretary of State Henry Stimson and Undersecretary of State Joseph Cotton, later joined by Attorney General William Mitchell.⁴⁹ They pondered the President's response to the outcome of the vote.

Whether or not to issue a public statement became the threshold question. White House "insider" and syndicated newspaper columnist Mark Sullivan had previously advised against such a release. It would be interpreted as either "gloating over *victory*" or, if Parker lost, as "resentment."⁵⁰ The nomination spoke for itself. It demonstrated that Hoover "picks good men, backs up appointees and fights to the last, [and] wants to do equity to

⁴⁶ World (New York, N.Y.), May 8, 1930, at 1-2.

⁴⁷ Chicago *Defender*, June 7, 1930, at 1, col. 4; see D. LISIO, *HOOVER, BLACKS, AND LILY-WHITES: A STUDY OF SOUTHERN STRATEGIES* 232-33 (1985).

⁴⁸ Post-Dispatch (St. Louis, Mo.), May 8, 1930, at 2A; Sun (Baltimore, Md.), May 8, 1930, at 2. The Republicans enjoyed an apparently safe voting margin in the Senate (R:56, D:39, F-L:1) *U.S. Bureau of the Census, 2 Historical Statistics of the United States, Colonial Times to 1970*, 1083 (Bicentennial ed. 1975). Weak party cohesion caused by the presence of western progressives split the senatorial majority party along an east-west geographical axis. J. Hoadley, *Congressional Voting Patterns in an Era of Party Realignment: The U.S. Senate, 1927-1941*, at 30 (1981) (unpublished manuscript). In the Seventy-first Congress, this bloc enjoyed a hard core membership of fourteen, and, when in coalition with Southern Democrats, it became what Senate majority leader James E. Watson called the "real majority." C. Dollar, *The Senate Progressive Movement, 1921-1933: A Roll Call Analysis*, 239 (unpublished Ph.D. dissertation, Department of History, University of Kentucky, 1966); J. WATSON, *AS I KNEW THEM: MEMOIRS OF JAMES E. WATSON* 264 (1936).

⁴⁹ Evening Star (Washington, D.C.), May 8, 1930, at A1; World (New York, N.Y.), May 8, 1930, at 1, col. 8; Sun (Baltimore, Md.), May 8, 1930, at 1, col. 8; Herald Tribune (New York, N.Y.), May 8, 1930, at 10.

⁵⁰ Memorandum by Mark Sullivan [May, 1930], Presidential Personal File, Herbert Hoover Papers, box 210, Herbert Hoover Presidential Library, West Branch, Iowa.

the South.”⁵¹ Notwithstanding the resident journalist’s misgivings, drafts of a press release made the White House rounds. All of these drafts emitted presidential hostility toward those who had brought defeat upon Hoover’s nominee. The several drafts also defended the nomination by portraying Parker’s personal and professional qualifications as unassailable, by noting endorsements from bench and bar, and by arguing the politically neutral character of the appointment.⁵²

Hoover, unlike Nixon and Reagan, assumed the garb of Supreme Court defender in asserting that the Senate’s injection of politics trenched on the separation of governmental powers. The paramount question, as Hoover declared in a draft statement, was: “Shall the legislative branch control the decisions of the Supreme Court? That issue is clearly drawn.”⁵³ Describing as “sinister” the hostility of senators to Supreme Court nominees based “solely upon the ground that the nominee had not proven himself to be an adherent to certain political theories,” the President berated those who “would impel [the Justice] by judicial decisions to change the Constitution and laws in accordance with their desires and theories.”⁵⁴ The Constitution, not the popular will, must prevail. The draft statement thus emphasized efforts long pursued by Court critics to utilize the ordinary political process to promote constitutional change. It noted:

The attempt to control the decisions of the Supreme Court by recall, or by a review of decisions, by the legislative branch of the government had repeatedly failed. Baffled at the polls in the attempt to subordinate the Supreme Court, this group of Senators would now achieve their end by intimidation and humiliation of nominees. They would therefore amend the Constitution by confirming the appointment of those only who believe that the Constitution should, by judicial decision, be made to mean something else. The ultimate result of their corrosive efforts would be a Court subordinated not merely to the legislative branch, but to the prevailing political views of

⁵¹ *Id.*

⁵² See draft of statement by Herbert Hoover, May 7, 1930, Presidential Subject File, Judiciary, Supreme Court Endorsements, “Parker, Judge John J.,” Herbert Hoover Presidential Library, West Branch, Iowa, box 192; Final Draft, May 8, 1930, *id.*, box 193.

⁵³ Draft of statement by Herbert Hoover, no date, Hoover Papers, *supra* note 52, box 192.

⁵⁴ *Id.*

the Senate alone.⁵⁵

The early emphasis on the Senate's collective performance reportedly reflected Cabinet support for an all-out frontal attack intended to "blow the Senate out of the water."⁵⁶ Such sweeping criticism would necessarily include within its ambit Hoover loyalists Arthur Vandenberg (R-Mich.), Arthur Capper (R-Kan.), Frederick Steiwer (R-Ore.), and others who voted against Parker largely because of his reputed racism.⁵⁷ The attack strategy faded because of such concerns as well as because of the related fear that after the lapse of little more than a year in office, an emotional Hoover response would "start a feud and cripple the rest of his administration."⁵⁸

Revisions of the press release de-emphasized Senate volition and instead stressed the destructive role played by what the President termed "new influences" which had "carried the question of selection of a Justice into the field of political issues rather than [into that of] personal and professional fitness."⁵⁹ Paramount among the "new influences" on the landscape of American political pluralism were black Americans. Senator Allen of Kansas entertained no doubts about the role played by the race issue in Parker's defeat. It was "the thing that really beat him," he declared, adding that "everybody down here realizes that."⁶⁰ An early White House draft statement assailed blacks for promoting "wicked misrepresentations in connection with the eminent rights of the colored people to participate in citizenship."⁶¹ Parker's 1920 campaign remarks had been little more than "an offhand statement," Mark Sullivan subsequently

⁵⁵ *Id.*

⁵⁶ Sun (Baltimore, Md.), May 9, 1930, at 1, col. 1.

⁵⁷ Sullivan, *Parker's Defeat is Laid to Drive by 24 Senators*, Herald Tribune (New York, N.Y.), May 8, 1930, at 11; World (New York, N.Y.), May 8, 1930, at 1; *Contrasting Roll Calls* (editorial), N.Y. Times, May 11, 1930, sec. III, at 4; Memorandum by Arthur H. Vandenberg, "The Parker Vote," May 7, 1930, Scrapbook no. 2, Arthur H. Vandenberg Papers, Michigan Historical Collections, University of Michigan, Ann Arbor, Michigan.

⁵⁸ Sun (Baltimore, Md.), May 9, 1930, at 1, col. 1.

⁵⁹ Final Draft, May 8, 1930, *supra* note 52.

⁶⁰ Letter from Henry J. Allen to M.J. Barris, May 19, 1930, Henry Justin Allen Papers, box C-58, Manuscript Division, Library of Congress, Washington, D.C.; *see also* Sullivan, *supra* note 57.

⁶¹ Draft, *supra* note 52.

rationalized.⁶² However disingenuous the NAACP's attack, another draft muted the point; it stressed instead the error of using Parker to symbolize black disfranchisement. Such personification departed from reality "as evidenced by his decisions as a judge upholding the negro rights and the support of leading colored men of his own state."⁶³

Organized labor's early and intense opposition to Parker was discounted in one draft as a "misunderstanding," founded on what insider Sullivan considered "an utterly narrow triviality."⁶⁴ Concentration on his opinion in the labor injunction case of *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*⁶⁵ associated Parker with the anti-labor jurisprudence of the Taft Court and/or with widely assailed labor injunctions, notwithstanding Hoover's draft plea "that in the case alleged against him he was judicially bound to follow the Supreme Court decisions."⁶⁶ Transformation of Parker into an anti-labor symbol via interest group politics had "confused the main issue" as the President saw it.⁶⁷ Worse still, the opposition's achievement served to place "many Senators in the position of appearing to vote for or against some of these issues with which Judge Parker had little to do."⁶⁸

That legislators had reacted to a demonized Parker attested to the triumph of public opinion. All true democrats must endorse "the vital importance of public opinion," Hoover stated, but when mass opinion functioned as it had in the Parker vote, it threatened to alter "fundamentally . . . the structural balance of our institutions."⁶⁹ Public opinion could play such a role in executive nominations largely because of a then recent change in the Senate rules that opened Senate sessions when debates

⁶² Sullivan, *Senate Politics Called Menace to High Court*, Herald Tribune (New York, N.Y.), January 24, 1932, sec. II, at 1, 2, col. 2.

⁶³ Draft, May 7, 1930, *supra* note 52. Although Hoover used the plural form, only one pre-1930 Parker opinion involved the constitutional status of black Americans, *City of Richmond v. Deans*, 37 F.2d 712 (4th Cir. 1930), *aff'd*, 281 U.S. 704 (1930). On support of North Carolina blacks for Parker, see *Hearing, supra* note 17, at 8 (C.M. Eppes to Lee S. Overman, April 7, 1930); *id.* at 18 (S.G. Atkins to Overman, April 9, 1930); *id.* at 76 (J.E. Shepard to Overman, March 29, 1930).

⁶⁴ Draft, *supra* note 53; Memorandum by Sullivan, *supra* note 50.

⁶⁵ 18 F.2d 839 (4th Cir. 1927).

⁶⁶ Draft, May 7, 1930, *supra* note 52.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

and votes were held on presidential appointments.⁷⁰ Under conditions of openness, antagonists could effectively present their case. Hoover later remarked that their case in the Parker fight consisted of unprecedented "outright statements of untruth . . . put abroad . . . by people antagonistic to any Republican administration."⁷¹ But once in the arena of public opinion, the nominee and his supporters found themselves at a peculiar disadvantage. "No man fit for the position of a Supreme Court Justice can or will organize counter-propaganda against mistaken impressions or strive for the weighting of public opinion in his own favor," Hoover stated.⁷²

HOOVER AND ROBERTS

However vindictive the President may have felt, he determined not to assail the Senate publicly, to denounce interest group politics, or to berate public opinion. Instead, he concluded that public silence combined with action afforded the best strategy. Perhaps, as friendly journalist Frederic William Wile suggested, Hoover thought that the American public would perceive as self-evident the unfair Senate treatment accorded his nominee "as just one bit more of its characteristic and incurable cantankerousness."⁷³ More likely, as Hoover wrote an Iowa newspaper editor, "the stronger answer would be to present a new man at once."⁷⁴

Nomination rumors swept the Capital; "Hoover Expected To Name Westerner to Supreme Court," Scripps-Howard's *Washington Daily News* headlined.⁷⁵ From the East, Benjamin N. Cardozo once more loomed as a possibility.⁷⁶ However, forty-eight hours after the Senate's vote on Parker, the second-choice

⁷⁰ The important rule change made in 1929 is discussed in J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 253-55 (1953).

⁷¹ Hoover Papers, *supra* note 50, box 166 (Letter from Herbert Hoover to Beverly A. Johnson, July 18, 1930).

⁷² Final Draft, May 8, 1930, *supra* note 52.

⁷³ Wile, *supra* note 44.

⁷⁴ Letter from Herbert Hoover to Verne Marshall, May 9, 1930, File on "Parker Appointment by Hoover," Verne Marshall Papers, Herbert Hoover Presidential Library, West Branch, Iowa.

⁷⁵ Daily News (Washington, D.C.), May 8, 1930, at 1 (mentioning both Curtis D. Wilbur (9th Cir.) and Frank H. Rudkin (9th Cir.)).

⁷⁶ *Id.*

nomination went to Owen Josephus Roberts.⁷⁷ Roberts had previously surfaced as a candidate for a high position in the administration. With Justice Brandeis' confiding to Felix Frankfurter the "uncommonly good impression on our Court" made by advocate Roberts, and Frankfurter's assessment of him as "one of the few lawyers at present carrying a national reputation" communicated to "Medicine Ball Cabinet" member Harlan F. Stone, the Philadelphian had been the focus of previous strenuous White House recruitment efforts.⁷⁸ Both before and after the death of Justice Edward T. Sanford, but before Parker's nomination to fill the vacated seat, Roberts had figured as Supreme Court timber.⁷⁹ With Parker's fall, Robert's star rose once more.

CREDENTIALS: ECONOMIC REACTIONARY

Roberts must have impressed Hoover as the ideal post-Parker Supreme Court nominee. First and foremost Roberts possessed unassailable credentials as an economic reactionary. Robert's life story was the virtual antithesis of Parker's as well as that of most western Republican insurgents who had waylaid Hoover's legislative program in the Senate and had led the initial assault on Parker.⁸⁰ Son of an affluent hardware merchant, Roberts emerged, in the words of the *Literary Digest*, "from the bosom of a well-to-do, middle class family" to become a "jolly and

⁷⁷ 72 CONG. REC. 8, 8658 (1930) (Roberts was nominated on May 9, 1930).

⁷⁸ Letter from Louis D. Brandeis to Felix Frankfurter, December 21, 1926, reprinted in 5 LETTERS OF LOUIS D. BRANDEIS: ELDER STATESMAN (1921-1941) 255 (M. Urofsky and D. Levy, eds. 1978); Letter from Felix Frankfurter to Harlan F. Stone, April 29, 1929, Harlan Fiske Stone Papers, box 49, Manuscript Division, Library of Congress, Washington, D.C.; Carmen, *The President, Politics and the Power of Appointment: Hoover's Nomination of Mr. Justice Cardozo*, 55 VA. L. REV. 622 (May 1969) (Roberts as potential chairman of the National Commission on Law Observance and Enforcement).

⁷⁹ Associate Justice Edward T. Sanford died on March 8, 1930, 281 U.S. iii, n.3 (1930); Memorandum by Herbert Hoover, Hughes Views, no date, Presidential Subject File, Judiciary, U.S. Supreme Court, Appointment of Cardozo, Hoover Papers, *supra* note 50, box 193; see *World* (New York, N.Y.), March 10, 1930, at 2, col. 1; that Hoover "knew" Roberts was attested to by Justice Van Devanter, Letter from Willis D. Van Devanter to Frank B. Kellogg, March 17, 1930, Willis D. Van Devanter Papers, Letterbook 42, box 14, Manuscript Division, Library of Congress, Washington, D.C.

⁸⁰ See Fish, *supra* note 13; H. SAVAGE, POLITICAL INDEPENDENTS OF THE HOOVER ERA: THE PROGRESSIVE INSURGENTS OF THE SENATE 9-35 (dissertation microcopy, 61-4374, Department of History, University of Illinois, Ann Arbor, Mich.: University Microfilms, Inc., 1961).

fun-loving" country "Squire" who attended to his scientifically managed 800-acre rural estate outside Philadelphia replete with "blooded beeves, his hogs of irreproachable ancestry, and thorough-bred [sic] colts."⁸¹ It was a posh lifestyle made possible by development of a lucrative law practice.

The President had before him a typed biography of Roberts. It stressed the candidate's identification "with much important litigation in Philadelphia," the very type of association with capitalistic interests that had evoked heated opposition from among Senate progressives to the then recent chief justiceship nomination of Charles Evans Hughes.⁸² The report noted that Roberts had

successfully represented large sugar concerns in several litigated cases; represented the underlying companies in a suit brought by the Phila. Rapid Transit Co. to annul the underlying leases, from which these companies were collecting about \$10,000,000 annually from the operating co.; one of the attorneys in North Penn Bank failure; counsel for Corn Exchange Nat. Bank in a test suit which established the rights of National banks in Pennsylvania to act as administrators, executors, and guardians and to fill other functions of trust companies.⁸³

Presumably, Hoover also knew what the press soon made public knowledge: that the Philadelphian had served as counsel in the successful suit by the John Wanamaker estate to compel the United States Treasury to refund the merchant prince's heirs \$100,000 in tax payments, and that he sat on the Board of Directors of the Equitable Life Assurance Society of the United States as well as on that of a great public utility, the American Telephone and Telegraph Company and its subsidiary, the Bell

⁸¹ *An Oil-Fight Champion for the Supreme Court*, 105 LITERARY DIGEST 13 (May 24, 1930); see also A. MASON, *Owen Josephus Roberts*, DICTIONARY OF AMERICAN BIOGRAPHY, SUPPLEMENT FIVE: 1951-1955, 571-77 (passim) (1977). The title of "Squire" became the Justice's telephone code reference for his Supreme Court brethren, see N.Y. Times, October 23, 1977, at 34, col. 6.

⁸² Hon. Owen J. Roberts, no date, Presidential Subject File, Judiciary, Supreme Court of U.S., "Biographies of Men Considered," Hoover Papers, *supra* note 50, box 198. Charles Evans Hughes was nominated on February 3, 1930, 72 CONG. REC. 3, 2949 (1930); confirmed on February 13, 1930, *id.*, pt. 4, at 3591. The fight on Hughes is summarized in J. HARRIS, *supra* note 70, at 124-27.

⁸³ Hon. Owen J. Roberts, *supra* note 82.

Telephone Company of Pennsylvania.⁸⁴

Roberts' economic ideology had publicly surfaced in 1923 when he addressed an American Banker's Association gathering at the Waldorf-Astoria Hotel in New York City. Press reminders of this speech occurred immediately after the Senate received the nomination.⁸⁵ Roberts, in his remarks, had warmly embraced the tenets of economic conservatism, vehemently warning against the evils of state socialism that would bring in its train "the suppression of ambition . . . the deterrence of industry . . . the holding back of men who want to arrange their affairs for their good and the economic good, then for the good of us all."⁸⁶ His well-heeled listeners were goaded by a call to "take off your coats, and root for old-fashioned Anglo-Saxon individualism."⁸⁷ Even in that era of "normalcy," the national government threatened to absorb "too much control over everything" and to subject every toiling entrepreneur to "a minion of Government looking over his shoulder with an upraised arm and a threatened scowl."⁸⁸ Such antipathy to the incipient regulatory state put him in the camp of economic "laissez-faire" advocates to which neither the President nor Parker belonged.⁸⁹

Hoover reportedly knew of his second choice's primitive economic attitudes and knew perfectly well that to name Roberts would be to make "another appointment which will be regarded as conservative rather than progressive."⁹⁰ In fact, the situation called for such a spite nomination. To name a "liberal" candidate was simply not politically feasible, Hoover told his Senate ally Henry Allen.⁹¹ Hoover obliquely stated that "circumstances

⁸⁴ Post-Dispatch (St. Louis, Mo.), May 9, 1930, at 1; Herald Tribune (New York, N.Y.), May 10, 1930, at 6.

⁸⁵ Sun (Baltimore, Md.), May 10, 1930, at 1, col. 1.

⁸⁶ Reprinted in 65 CONG. REC. 3, 2563 (1924).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Parker's economic views are considered in Fish, *supra* note 14; on Hoover's, see Romasco, *Herbert Hoover's Policies for Dealing with the Great Depression: The End of the Old Order or the Beginning of the New?* in HERBERT HOOVER REASSESSED: ESSAYS COMMEMORATING THE FIFTIETH ANNIVERSARY OF THE INAUGURATION OF OUR THIRTY-FIRST PRESIDENT 292-309 (1981).

⁹⁰ Letter from Henry J. Allen to William Allen White, May 12, 1930, William Allen White Papers, box C-163, Manuscript Division, Library of Congress, Washington, D.C.

⁹¹ *Id.*; PUB. PAPERS: HERBERT HOOVER, 1930, 736 (noting Hoover's May 8 meeting with Senator Allen) (1976).

seemed to make [a liberal's] appointment at this moment unwise."⁹² Republican old guardsman and Senate majority leader James E. Watson had already made the same point to the President, and made it emphatically. The Parker battle, Watson reportedly lectured Hoover, had created a White House political debt to the Republicans who had stood loyally by the President in that fight, and "it would be rank ingratitude to them to select a substitute appointee of liberal or progressive or anti-conservative tendencies."⁹³ Nor could Hoover bring himself to make an appointment that might justify the anti-Parker opposition of Republican deserters, especially the progressive insurgents. Such would likely be interpreted as capitulation to that obstreperous opposition bloc whose members reportedly favored Judge William S. Kenyon of the Eighth Circuit.⁹⁴

It was a satisfied majority leader who left the White House on an early May morning, confident in the knowledge that the President "would name no man whom the progressives—the unfaithful Republicans, could cheer."⁹⁵ Henry Allen came away with the same conviction, albeit a disheartening one for him, but confident that after Roberts, the President "has in mind a liberal who will succeed to the next vacancy."⁹⁶ Perhaps under different political circumstances, Hoover's desire for regional representation in a Supreme Court appointment would be realized in the naming of a Westerner, an ardent "dry," and an economic progressive like ex-Senator Kenyon.⁹⁷ Meanwhile, Hoover eyed responses to his nomination of Roberts. Should the nominee's economic philosophy fail to generate opposition from among those who had opposed Parker, other repulsive credentials existed.

⁹² White Papers, *supra* note 90.

⁹³ Thurston, *Politics from the Sidelines*, World (New York, N.Y.), May 18, 1930, at 2E.

⁹⁴ *Judge Kenyon, Please*, 5 THE PEOPLE'S BUSINESS 1 (March, 1930); World (New York, N.Y.), May 9, 1930, at 4, col. 1; *LaFollette's Comment*, The Progressive (Madison, Wisc.), March 22, 1930, at 1.

⁹⁵ Thurston, *supra* note 93.

⁹⁶ White Papers, *supra* note 90.

⁹⁷ Kenyon's congressional accomplishments as a leader of the "farm bloc" are summarized in 24 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 60-61 (1935).

CREDENTIALS: "RED" HUNTER

Unlikely to endear Roberts to old anti-war progressives was his decidedly bleak wartime record on civil liberties, a subject of passing press attention in 1930.⁹⁸ Roberts had served during 1918 as Special Deputy Attorney General of the United States,⁹⁹ in which capacity he had successfully prosecuted several important Espionage Act cases against alien radicals deemed to be threats to internal security. One target was the Lithuanian Socialist Federation and *Kova*, its press organ, which echoed the world-wide outcry of socialists against the Great War. National Secretary Joseph Stilson mimeographed anti-war leaflets subsequently distributed outside Holy Trinity Lithuanian Church in Wilkes-Barre, Pennsylvania.¹⁰⁰ One Baltic language tract warned:

The whole present world war is nothing more than the cruel play of the capitalists of the warring countries and other exploiters for the purpose of gaining wealth from the lives of the people of their own countries. . . . War brings death to the workingman and profits to the capitalists. . . . Down with the war and compulsory conscription! Long live peace and the will of the people!¹⁰¹

In a fifty-minute oration to the jury, prosecutor Roberts assailed the "red" journalists for belittling patriotism and military service and for seeking to arouse political, as distinguished from traditional religious, objections to military obligations.¹⁰² Overt acts of publication constituted a wartime conspiracy to cause insubordination, obstruction of enlistment efforts, and inciting draftees to desert whether or not success capped the

⁹⁸ Herald Tribune (New York, N.Y.), May 10, 1930, at 6.

⁹⁹ Letter from Thomas W. Gregory to Owen J. Roberts, May 2, 1918, Owen J. Roberts Personnel Folder, R-163, National Personnel Record Center, St. Louis, Mo.; Letter from Roberts to Gregory, May 7, 1918, *id.* (reporting that he commenced his duties on May 6, 1918); Letter from Samuel J. Graham to Owen J. Roberts, July 1, 1918, *id.* (extending a temporary appointment which expired on June 30, 1918 to one "for the duration of the present war, or until further notice"); Letter from Carroll Todd to Owen J. Roberts, February 3, 1919, *id.* (accepting resignation of Roberts effective December 31, 1918).

¹⁰⁰ Transcript of Record, *Stilson v. United States* (no. 795) and *Sukays v. United States* (no. 796) (E.D. Pa.) at 13, 157-158, United States Supreme Court Appellate Case Files, File 26881-82, U.S. Supreme Court Records, Record Group 267, National Archives, Washington, D.C.

¹⁰¹ *Id.* at 10-11 (English translation).

¹⁰² *Id.* at 349.

propaganda effort.¹⁰³ Waving aside defenses based on the first and fourth amendments, the federal trial judge gave Roberts and his cohorts a smashing courtroom victory.¹⁰⁴ Further vindication of Roberts' performance came late in 1919, when the Supreme Court upheld Stilson's conviction in the wake of the then recently decided *Schenck*,¹⁰⁵ *Frohwerk*,¹⁰⁶ and *Debs*¹⁰⁷ cases.¹⁰⁸

Affirmed the next year was Roberts' handiwork in *Schaefer v. United States*.¹⁰⁹ Prosecution of Peter S. Schaefer, President of the Philadelphia Tageblatt Association and editor of a German language newspaper, had gone awry when the Justice Department invoked the treason statute and then the Espionage Act against the defendants.¹¹⁰ Into the fray stepped Special Assistant United States Attorney Owen Roberts. His legal acumen enabled the government to defeat the defendant's efforts to arrest the trial court's judgment and receive a new trial.¹¹¹ Triumph for Roberts in the Eastern District of Pennsylvania was followed by Supreme Court endorsement of broad restrictions on wartime freedom of speech and rejection of the then recently coined "clear and present danger" principle proffered by dissenters Brandeis and Holmes.¹¹²

CREDENTIALS: INTERNATIONALIST AND ANTI-PROHIBITIONIST

In the post-war era, Roberts had become an eastern internationalist who favored American adherence to the World

¹⁰³ *United States v. Stilson*, 254 F. 120, 122-23 (E.D. Pa. 1918).

¹⁰⁴ Transcript of Record, *supra* note 100, at 414.

¹⁰⁵ *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁰⁶ *Frohwerk v. United States*, 249 U.S. 204 (1919).

¹⁰⁷ *Debs v. United States*, 249 U.S. 211 (1919).

¹⁰⁸ *Stilson v. United States*, 250 U.S. 583 (1919).

¹⁰⁹ 251 U.S. 466 (1920).

¹¹⁰ *United States v. Werner*, 247 F. 708 (E.D. Pa. 1918). The district judge charged that,

[e]ven mere words may be fraught with consequences which, although too remote to constitute the crime of treason, may nevertheless be words which are fraught with the most awful consequences . . . and, therefore, it is properly within the province of the law to prohibit . . . and make it a crime even to utter them.

Schaefer, 251 U.S. 493 n.1 (Brandeis, J., dissenting); Act of June 15, 1917, 40 Stat. 217, as amended by Act of May 16, 1918, 40 Stat. 553; 1918 ATT'Y GEN. ANN. REP. 42.

¹¹¹ *United States v. Schaefer*, 254 F. 135 (E.D. Pa. 1918).

¹¹² *Schaefer*, 251 U.S. at 482-83.

Court.¹¹³ This international element in his background could only have agitated Senate Foreign Affairs Committee Chairman William Borah, the loud opponent of such foreign entanglements as the League of Nations and its judicial satellite.¹¹⁴ It had been Borah who spearheaded the anti-Parker forces in the Senate.¹¹⁵

Leading anti-Parker progressives, including Borah, and their southern Democratic allies were prohibitionists, or "drys." Replacement nominee Roberts had spoken out, however, against national prohibition. He had assailed the eighteenth amendment for reducing the American Constitution to the status of a lowly city ordinance.¹¹⁶ As would soon become public knowledge, it turned out that his law partner was not only a militant "wet," but also served as a director of the Association Against the Prohibition Amendment.¹¹⁷ Hoover reportedly knew, prior to making the nomination, about Roberts' anti-prohibition views, which were sure to unsettle senatorial "drys" who had deserted him on the temperate Parker.¹¹⁸ News about Roberts' anti-prohibition attitude and associations thoroughly discomfited such senatorial pro-labor "drys" as anti-Parker eighteenth amendment author Morris Sheppard of Texas and pro-Parker Wesley Jones of Washington State, sponsor of the "Five and Ten" Act.¹¹⁹ Decisive in soothing their agitation were assurances given by pillars of both the Methodist Board of Temperance, Prohibition, and Public Morals and the Anti-Saloon League.¹²⁰

CREDENTIALS: FRIEND OF BLACKS

If Hoover's second choice represented an apparent appeasement of the anti-Parker constituency, the appeasement resulted from Robert's reputed racial attitudes. No evidence exists that Hoover possessed any information on those attitudes nor, if he did, that the nomination pivoted on them, although the NAACP

¹¹³ See *Herald Tribune* (New York), May 10, 1930, at 6, col. 2.

¹¹⁴ See L. ASHBY, *THE SPEARLESS LEADER: SENATOR BORAH AND THE PROGRESSIVE MOVEMENT IN THE 1920's* 202 (1972).

¹¹⁵ Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 *THE MISS. VALLEY HIST. REV.* 213, 226 (September 1963).

¹¹⁶ See *supra* note 86.

¹¹⁷ *Herald Tribune* (New York), May 10, 1930, at 1, col. 1.

¹¹⁸ *Id.* May 11, 1930, at 14.

¹¹⁹ *Id.* May 13, 1930, at 10, col. 5.

¹²⁰ Letter from Morris L. Cooke to George W. Norris, May 10, 1930, Harry A. Slattery Papers, box 20, Manuscripts Department, Duke University, Durham, N.C.

Publicity Director would later claim that Roberts had been nominated "largely to satisfy the demands of Negroes for a man of his character and views."¹²¹

Acting NAACP Secretary Walter Francis White, who had organized and directed the Association's notable fight against Parker, received early word from a Philadelphia contact that "OWEN J. ROBERTS IS ALL RIGHT."¹²² A similar assessment came from Jewish leader Jacob Billikopf, who felt "quite certain" that the new nominee was "very liberal" on the subject of race, albeit not "so on economic matters."¹²³ Decisive was Roberts' relationship with black Lincoln University that was located forty-five miles southwest of Philadelphia. To it, Roberts had reportedly donated \$250.00, had given the 1929 commencement address, and had become a trustee that same year.¹²⁴

Apparently impeccable race credentials doubtlessly elated White and members of the NAACP's Board of Directors who met on May 12th. They were as predisposed in favor of Roberts as they had formerly been against Parker. All agreed that Roberts was, as Board Chairman Mary White Ovington would subsequently write, "a liberal on the race question."¹²⁵ Even if the nominee had been less attractive, Board officials would have hesitated to oppose him. After all, they realized that in the wake of their campaign to defeat Hoover's first choice, "it would be psychologically advantageous for the Association to demonstrate that it is not a pure 'anti' organization."¹²⁶

QUIESCENT "LIBERALS"

With the exception of its race aspects, which received little publicity, the Roberts nomination had all the trappings of a spite nomination. A fight was initially "assumed in every quarter.

¹²¹ P. BAKER, *NEGRO-WHITE ADJUSTMENT: AN INVESTIGATION AND ANALYSIS OF METHODS IN THE INTERRACIAL MOVEMENT IN THE UNITED STATES* 86 (1934).

¹²² Letter from Isadore Martin to Walter White, May 10, 1930 (telegram), box C-391, National Association for the Advancement of Colored People Papers [hereinafter NAACP Papers], Manuscript Division, Library of Congress, Washington, D.C.; see also B. ROSS, J.E. SPINGARN AND THE RISE OF THE NAACP, 1911-1939 (1972).

¹²³ Letter from Jacob Billikopf to Walter White, May 12, 1930, NAACP Papers, *supra* note 122.

¹²⁴ Letter from Henry C. Patterson to Walter White, May 12, 1930, *id.*

¹²⁵ M. OVINGTON, *THE WALLS CAME TUMBLING DOWN* 257 (1947).

¹²⁶ "Minutes of the Meeting of the Board of Directors," May 12, 1930, at 2, Board of Directors Minutes 1930-1943, NAACP Papers, *supra* note 122, microfilm roll 2.

Day after day," Washington-based investigative reporter Paul Y. Anderson of the Saint Louis *Post-Dispatch* recalled,

through publicity avenues usually recognized as reflecting White House views, it was dinned into the Senate's ears that Roberts was a corporation lawyer, that his economic and social views were ultra-conservative, that he belonged to the Mellon school of thought, that he was infinitely more reactionary than either Hughes or Parker, and that failure of Senate liberals to oppose his confirmation would constitute an abandonment of their principles.¹²⁷

Roberts' publicly known economic associations and attitudes seemed sure ingredients for inciting hostility from Senate progressives and organized labor. But five days after submission of the nomination, an unenthusiastic A.F. of L. President William Green announced that the Federation would "not interpose any objection to . . . confirmation."¹²⁸ He vaguely reasoned that the nominee's "experience and training, have been in a field where he has had wide opportunity to understand the problems which grow out of human relations in industry and those profound economic and social problems which so vitally affect human relationships."¹²⁹ Others harbored doubts. Socialist party leader Norman Thomas suspected one who was "by reputation a conservative and a leader of the bar in an ultra-conservative city."¹³⁰ He wanted the Senate Judiciary Committee to "find a way to frame questions which would bring out the [nominee's] . . . opinions . . . on cases involving rates . . . and . . . valuation of public utilities, and in general, the right of the Court to overrule Congress and the public in the field of social legislation."¹³¹ But Committee progressives and anti-Parker leaders George Norris and William Borah deemed such requests "sarcastic" and turned a deaf ear to them.¹³²

¹²⁷ Anderson, *Plots and Counterplots*, 130 *THE NATION* 651 (June 4, 1930).

¹²⁸ William Green, Press Release for Wednesday morning, May 14, 1930, Circular Neostyle File, 1906-1937, *American Federation of Labor Records: The Samuel Gompers Era*, Part 1 (Records held by the AFL-CIO, Washington, D.C.), microfilm roll 57 (Microfilming Corporation of America, 1979).

¹²⁹ *Id.*; see Greensboro Daily News, May 14, 1930, at 1.

¹³⁰ Letter from Norman Thomas to George W. Norris, reprinted in *Post-Dispatch* (St. Louis), May 18, 1930, at 5A, col. 4.

¹³¹ *Id.*

¹³² Greensboro Daily News, May 20, 1930, at 1, 3.

The "liberal" press, fresh from its deep and successful involvement in the Senate fight on Parker,¹³³ grappled heroically with the known economic views and associations of Hoover's substitute Supreme Court nominee. Editor Walter Lippmann in *The World* smothered his initial doubts expressed on the very day of Robert's nomination, and asked Felix Frankfurter: "What do you know about Owen Roberts?"¹³⁴ His editorial in the next morning's *World* echoed Frankfurter in hailing Roberts as "a thoroughly creditable choice" and one that would fully satisfy all "who feel that it is of the highest importance to preserve the balance between those who take a liberal and those who take a conservative view of the Constitution."¹³⁵ Hoover's second choice generated greater consternation at Scripps-Howard newspapers. Bothersome to chief editorial writer Ludwell Denny was "[h]ow far his associations as corporation attorney have colored his thinking on economic questions involving human rights."¹³⁶ This point had special saliency because of the editorial writer's earlier anti-Parker editorial on "Widow Cook, Abe Span-And The Supreme Court."¹³⁷ An alert reader of the *Washington Daily News* subsequently flagged the paradox. "The News must know," he protested, "that Owen Roberts was the eager advocate whom the big insurance corporation chose to take its [wrongful death] case to the Supreme Court after Span had defeated it in all the lower courts."¹³⁸ All true, admitted the mortified *Washington Daily News*, which expressed relief that the nominee "wasn't something worse" and irrelevantly confessed to liking "his at-

¹³³ George H. Manning, *Press Opposition Was Determining Factor in Parker Defeat*, 62 EDITOR AND PUBLISHER 28 (May 17, 1930).

¹³⁴ Letter from Walter Lippmann to Felix Frankfurter, May 9, 1930, Walter Lippmann Papers, Series 1, box 10a, Manuscripts and Archives, Yale University, New Haven, Conn.; see Letter from Frankfurter to Harlan F. Stone, May 22, 1930, Harlan F. Stone Papers, box 13, Manuscript Division, Library of Congress, Washington, D.C.

¹³⁵ Lippmann, *The Appointment of Owen J. Roberts*, *World*, May 10, 1930, p.12. Authorship identified in Anthony Collection, microfilm roll 8 (World editorials from January 29, 1930 through February 27, 1931), Walter Lippmann Papers, Manuscripts and Archives, Yale University, New Haven, Conn.

¹³⁶ Denny, *The Supreme Court Nominee*, *Daily News* (Washington, D.C.), May 10, 1930, at 12. Authorship identified in Ludwell Denny Papers, microfilm roll 1 (Micro 612), Division of Archives and Manuscripts, State Historical Society of Wisconsin, Madison, Wisc.

¹³⁷ Denny, *Widow Cook, Abe Span-And the Supreme Court*, unidentified newspaper clipping, but authorship identified in Denny Papers, *supra* note 136.

¹³⁸ Letter from Gerald W. Brooks to Editor, *Daily News* (Washington, D.C.), May 12, 1930, at 13.

titude toward the Eighteenth Amendment."¹³⁹

The Baltimore *Sun's* pro-Parker columnist Frank R. Kent delighted in the dilemma confronting those who had opposed Hoover's first choice. He sarcastically asked "why no piercing screams of protest have come from our pure-hearted Senatorial Progressives over the prospect of Mr. Owen J. Roberts going upon the Supreme Bench."¹⁴⁰ Had they not assailed Hughes "because of his 'attitude of mind,' his 'corporate connections,' the 'character of his legal practice,' and his 'mental slant'?" Their opposition to Parker had likewise rested on "principle."¹⁴¹ Those whom Kent dubbed "disinterested champions of the common people, defenders of 'human rights' as against 'property rights'" had promised "that this battle would go on unceasingly, it being in the nature of a high duty and a sacred trust."¹⁴² Their silent acquiescence when confronted by Roberts' nomination led Kent to question whether "the Progressives are in front of or in the rear of their principles . . . [and whether] they have 'sold us out.'"¹⁴³

Roberts' appointment enabled administration spokesmen "to hurl shafts of ridicule at the Republican independents for gagging at Hughes and Parker and accepting Roberts."¹⁴⁴ Hoover knew that however out of phase Roberts' ideological proclivities were with those of the Senate progressives, his nominee enjoyed an acknowledged professional reputation of national dimensions.¹⁴⁵ Uniquely, he possessed great visibility arising out of his service as special prosecutor in the "Teapot Dome" scandals. The latter had given Roberts the aura of a reformer and created a symbiotic bond with progressive Senators and allied press sleuths who had pursued Warren Harding's cronies.¹⁴⁶ Had Roberts not for six years waged "the people's fight in the oil cases?" Denny asked.¹⁴⁷ So impressed was Paul Anderson of the Pulitz-

¹³⁹ Letter from Editor to Gerald W. Brooks, *Daily News* (Washington, D.C.), May 12, 1930, at 13.

¹⁴⁰ *The Great Game of Politics*, *Sun* (Baltimore, Md.), May 15, 1930, at 1.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Thurston, *supra* note 93; Anderson, *supra* note 127.

¹⁴⁵ Hon. Owen J. Roberts, *supra* note 82.

¹⁴⁶ A.F.C., *Backstage in Washington*, 155 *OUTLOOK AND INDEPENDENT* 100 (May 21, 1930).

¹⁴⁷ Letter, *supra* note 139.

er's *Post-Dispatch* with that prosecutorial performance that he hailed Roberts' "brilliant and indefatigable record" which had given him "a singularly high standing with the Senate, where the oil investigation originated."¹⁴⁸ Nothing could undo Roberts' prior service to the reformers' cause. A press-instigated form of "doublespeak" developed to defend the former Teapot Dome special prosecutor. Roberts, it seemed, was "distinctly liberal in thought," although he had admittedly compiled an "imposing record of economic conservatism."¹⁴⁹ Perhaps he was "not a liberal in the constructive sense in which Holmes and Brandeis are liberals," Anderson mused, but he was surely "at least an intelligent conservative, thoroughly honest and utterly independent . . . [whose] judgments will never be mere echoes of the devious sophistries of Mr. Chief Justice Hughes."¹⁵⁰ Thus did Washington reporters rally to their hero's side, silence their doubts, and bestir "themselves for one whom they [had] come to regard almost as a colleague."¹⁵¹

HOOVER TRIUMPHANT

Special satisfaction must have come over the President when, ten days after submission of the nomination, Senator Borah reported it favorably from the Judiciary Committee.¹⁵² A day later, Democratic leader Joseph Robinson of Arkansas stated on the Senate floor his understanding that a unanimous Committee had reported the nomination favorably. When Judiciary Committee Chairman Norris confirmed this fact, Robinson announced his assent to immediate consideration. In less than a minute and with no more than twenty senators present, Vice-President Curtis intoned "without objection the nomination is confirmed," blissfully unaware that he had never called the question.¹⁵³ Such summary action by often irascible senators caused prescient syndicated humorist Will Rogers to speculate that "there must be something the matter with this fellow Judge Roberts of the Supreme Court." That the Senate "passed him

¹⁴⁸ *Post-Dispatch* (St. Louis), May 9, 1930, at 1, col. 8.

¹⁴⁹ *Id.* at 1-2.

¹⁵⁰ Anderson, *The Supreme Court Victory*, 130 *THE NATION* 599 (May 21, 1930).

¹⁵¹ A.F.C., *supra* note 146.

¹⁵² 72 *CONG. REC.* 9, 9115 (1930).

¹⁵³ Sun (Baltimore, Md.), May 21, 1930, at 2. Roberts was confirmed on May 20, 1930, reported in 72 *CONG. REC.* 9, 9217 (1930).

unanimously” only suggested to the Oklahoman that “he must be queer, can’t be human.”¹⁵⁴

As would soon become apparent, the essence of Mr. Justice Roberts’ prospective judicial philosophy was very much in the eyes of the beholder in 1930. The jurist’s performance thereafter became all “gall and wormwood” to Parker’s antagonists.¹⁵⁵ In the short run, however, it seemed that Hoover had temporized in his second nomination. During the Supreme Court’s three terms beginning in October 1930, Chief Justice Hughes presided over a generally united Court which cast a sympathetic eye on economic regulation by governments, chiefly those of the several states. Rarely did Roberts dissent; when he did, it was usually to uphold government activity.¹⁵⁶ Roberts’ performance seemed especially noteworthy in the 1930 term, his first. A careful Court-watcher tallied the votes cast that term in nonunanimous decisions by the nine Justices. Both Roberts and Hughes came down on the “liberal” side an even dozen times as compared to Brandeis in sixteen cases, Stone in fifteen, and the iconoclastic McReynolds in only one.¹⁵⁷ Consequently, the jurisprudential tide seemed to have shifted.

Evidence that the two Hoover appointees might prove unreliable allies of Stone, Holmes, and Brandeis surfaced even in the 1930 term, and again the following term, when the Court majority including Roberts overturned Interstate Commerce Commission rulings with alacrity.¹⁵⁸ Thereafter Roberts’ true economic colors became increasingly obvious. In Supreme Court terms from 1931 through 1935, the former favorite of the Senate progressives found himself far more often in agreement with the Chief Justice and Justices Sutherland, Van Devanter, Butler, and McReynolds in nonunanimous decisions than he ever did

¹⁵⁴ Rogers, *Will Rogers Finds It a Good Law that Forbids Asking for a Ride*, 2 WILL ROGERS’ DAILY TELEGRAMS, THE HOOVER YEARS: 1929-1931, 170 (J. Smallwood and S. Grager, eds. 1978).

¹⁵⁵ D. PEARSON & R. ALLEN, THE NINE OLD MEN 140 (1937).

¹⁵⁶ See C. LEONARD, A SEARCH FOR A JUDICIAL PHILOSOPHY: MR. JUSTICE ROBERTS AND THE CONSTITUTIONAL REVOLUTION OF 1937 28-35 (1971).

¹⁵⁷ G. HANKIN & C. HANKIN, PROGRESS OF THE LAW IN THE U.S. SUPREME COURT: 1930-1931, A REVIEW OF THE WORK OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1930, 16 (1931).

¹⁵⁸ See A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 310-11 (1956). The I.C.C. cases were: *United States v. Chicago, Mil. and St. P. & Pac. R.R.*, 282 U.S. 311 (1931); *United States v. Baltimore & O.R.R.*, 284 U.S. 195 (1931); *Chicago, R.I. & Pac. R.R. v. United States*, 284 U.S. 80 (1931).

with Brandeis, Stone, and Cardozo.¹⁵⁹ This period witnessed the Court's drift toward narrow construction of state and federal powers over economic matters. It was a drift to a pre-1930 jurisprudence for which one scholar credits Roberts as "the man most responsible . . . joined from time to time by Chief Justice Hughes."¹⁶⁰ New Deal measures would receive an especially chilly reception from this Justice who outpaced Hughes in voting against them.¹⁶¹ True to his pre-Court beliefs, Roberts as Associate Justice compiled a fifteen-year record marked by striking anti-labor and anti-economic regulation votes, not to mention his warm embrace of mechanical jurisprudence as attested by famous dicta in *United States v. Butler*.¹⁶²

Confidence in Roberts' fidelity to equal rights received great impetus in 1932 when he joined four Supreme Court colleagues behind Justice Benjamin Cardozo's opinion in *Nixon v. Condon*.¹⁶³ It was the first major voting rights test to come before the High Court in years and the NAACP could barely restrain its enthusiasm. "Texas White Primary Victory in [United States Supreme Court] by Five to Four Vote Demonstrates," it proclaimed, "[the] Wisdom [of the] NAACP in Excluding Parker from Bench. . . ." ¹⁶⁴ In 1935, however, Roberts would author a unanimous opinion in *Grovey v. Townsend*.¹⁶⁵ *Grovey* upheld Texas' white primary—now disentangled from all forms of overt statutory connection and thus free of "state action" subject to

¹⁵⁹ Pritchett, *Ten Years of Supreme Court Voting*, 50 Soc. SCIENCE Q. 979 (March 1970).

¹⁶⁰ C. LEONARD, *supra* note 156, at 47.

¹⁶¹ *Id.* at 78.

¹⁶² 297 U.S. 1 (1936) (Roberts stated that all legislation must conform to the principles laid down by the Constitution).

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, - to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does or can do, is to announce its considered judgment upon the question.

Id. at 62-63. See C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, 89 (1969) (Table XV shows Robert's voting record on state taxation and regulation and table XXI shows Robert's record with regard to labor). With regard to Robert's voting record between 1941-45, Pritchett noted that "Roberts is of course isolated on the far right." *Id.* at 208.

¹⁶³ 286 U.S. 73 (1932).

¹⁶⁴ D. HINE, *BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS* 141 n.56 (1979) (quoting the press release to major black newspapers, May 3, 1932).

¹⁶⁵ 295 U.S. 45 (1934).

restraints imposed by the fourteenth amendment.¹⁶⁶ Nine years later in *Smith v. Allwright*,¹⁶⁷ the Court would take an expansive view of "state action" and subvert Roberts' handiwork in *Grovey*.¹⁶⁸ A solo dissent rang out from none other than an outraged Owen Josephus Roberts.¹⁶⁹

CONCLUSION

When subjected to close examination the Roberts appointment evinces the hallmarks of a spite nomination. Hoover had been politically wounded by the Senate's defeat of his first-choice nominee, John J. Parker of North Carolina. The President reacted; he seethed in private while remaining publicly silent. Finally, he reacted by making a second nomination likewise enveloped in public silence. The foreshadowed essence of his nominee became apparent over the course of time. But even with the elapse of nearly sixty years, agreement is not unanimous on classification of Roberts' appointment as a spite nomination.

Denial of reality is the approach taken by Harvard Law Professor Laurence Tribe. He regards Roberts as one "less wedded to the wisdom of the past" than was Parker and as the judicial savior of the New Deal whose 1937 "switch in time" salvaged vital social and economic welfare legislation.¹⁷⁰ Thus is the prescience of the substitute nominee's anti-Parker supporters vindicated by scholarly hindsight. In the wake of the Bork and Ginsburg setbacks, Anthony Lewis in the *New York Times* compared Hoover's response to Parker's defeat with Reagan's response to Bork's rejection by the Senate. Hoover, Lewis praised, "put the merits above politics" and named Benjamin N. Cardozo.¹⁷¹ But the year of Cardozo's appointment was 1932, not 1930. Thus, Lewis' comments suggest that the Roberts nomination had become a forgotten event a half century after it occurred.

¹⁶⁶ *Id.* at 52-55.

¹⁶⁷ 321 U.S. 649 (1944).

¹⁶⁸ *Id.* (overruling *Grovey*).

¹⁶⁹ *Id.* at 666 (Roberts, J., dissenting).

¹⁷⁰ L. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 90-91 (1985).

¹⁷¹ Lewis, *Abroad and at Home: Playing with the Court*, N.Y. Times, November 8, 1987, § 4, at 25, col. 1.

Even in its own time, the Roberts nomination had been regarded as a truly ironical one. "The fighting liberals of the United States Senate" had confirmed Roberts "as one of their number," Drew Pearson and Robert Allen observed in 1937, the year of Franklin Roosevelt's Court-packing bill. But the Justice, the political commentators mocked, "has turned out to be the foremost meat-axe of their cause."¹⁷² For the fifteen years of Roberts' tenure (1930-1945), Parker's antagonists "ate crow." Hoover had offered them, and they had accepted with alacrity, the consummate spite nomination.

Hoover had managed to select as his second choice what successors Nixon and Reagan failed to find, a Supreme Court candidate whose public image belied deeply held attitudes on the paramount public issues of the day. An engaging personality, lawyerly reknown, and a reformer image promoted by journalists who had directly benefitted from their association with him combined to make Roberts a viable second choice. Subordinated were a laundry list of credentials that should have made him anathema to those who had successfully defeated Hoover's original choice: economic conservative, "Red" hunter, internationalist, and anti-prohibitionist. Less fortunate in their choices were Nixon and Reagan. Both acted with overt vindictiveness and stressed political ideology as a key appointment criterion. Nixon selected a successor nominee whose credentials practically parodied those of first-choice Haynsworth and whose professional standing fell far short of that of either Haynsworth or Roberts. Reagan's second choice, Douglas Ginsburg, suggested the dangers confronting presidential decision-making in the context of bitter defeat: haste, emotion, and inadequate investigation of the successor nominee's background. Haste also marked Roberts' nomination; however, no confirmation-quashing skeletons toppled out of his closet, as they did from Ginsburg's and Carswell's closets. When the barely concealed skeletons of 1930 did fall, they fell not on the appointing President, but on his opponents in the Senate.

¹⁷² D. PEARSON & R. ALLEN, *supra* note 155, at 139.