



8-18-2023

Texans Shortlisted for the U.S. Supreme Court: Why Did Lightning Only Strike Once?

The Honorable John G. Browning

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Judges Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

The Honorable John G. Browning, *Texans Shortlisted for the U.S. Supreme Court: Why Did Lightning Only Strike Once?*, 54 ST. MARY'S L.J. 991 (2023).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol54/iss4/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

ARTICLE

TEXANS SHORTLISTED FOR THE U.S. SUPREME COURT: WHY DID LIGHTNING ONLY STRIKE ONCE?

THE HONORABLE JOHN G. BROWNING*

As a student at the University of Texas School of Law in the late 1980s, I used to walk past the portrait of one of the school's most distinguished alums, Supreme Court Justice Tom C. Clark, and wonder why only one Texan has been chosen to serve on our nation's highest Court?¹ Given Texas's size and outsized role in American politics (including producing presidents like Lyndon B. Johnson, George H. W. Bush, and George W. Bush), why has lightning only struck once? In their 2020 book, *Shortlisted: Women in the Shadows of the Supreme Court*, University of Houston Law Center Professor Renee Knake Jefferson and California Western School of Law Professor Hannah Brenner Johnson included a discussion of the few Texas women who were considered and shortlisted for the Court, including

*John G. Browning is the distinguished jurist in residence at Faulkner University's Thomas Goode Jones School of Law and previously served as a justice on Texas's Fifth District Court of Appeals. A graduate of Rutgers University and the University of Texas School of Law, Justice Browning is the author of five law books, more than fifty law review articles, and hundreds of other legal articles. He has received Texas's highest honors for his contributions to legal ethics, legal writing, and continuing legal education, and his work in legal history has received such accolades as the ABA Silver Gavel Award. Justice Browning gratefully acknowledges the invaluable support and unflagging inspiration of his wife, Lisa.

1. Some observers claim Justice Sandra Day O'Connor was the second Texan on the Court by virtue of her El Paso birthplace and the time she spent during her childhood with her maternal grandmother there. However, Justice O'Connor has always publicly identified as a proud Arizona native, where she served as a judge and legislator.

Fifth Circuit Judges Edith Jones and Priscilla Richman (formerly Priscilla Richman Owen).² Their book also detailed the nomination (later withdrawn) of former White House Counsel Harriet Miers.³ However, the history of Texans who were shortlisted for possible nomination to the Supreme Court is just as interesting and illuminating.

The demographics of the Court have always engendered considerable debate. Long before President Biden announced that he was restricting his search for retiring Justice Stephen Breyer's replacement to a black woman (ultimately selecting Justice Ketanji Brown Jackson), concerns have been voiced about the Court's ethnic, religious, and racial diversity. For decades, presidents were mindful of a so-called "Jewish seat" on the Court after the nomination of Justice Louis Brandeis in 1916.⁴ And seventy-seven years before the media proclaimed Justice Sonia Sotomayor the first Hispanic Justice, Justice Benjamin Cardozo, a Sephardic Jew of Spanish and Portuguese descent, was appointed in 1932.⁵ But before the twentieth century, the geographic diversity of Supreme Court candidates was a major concern for presidents seeking to maintain some semblance of regional balance. Some states have enjoyed what might be called "over-representation" because fewer states existed in early American history. For example, New York has produced fifteen Justices, while Ohio has furnished ten, with Massachusetts and Virginia adding nine and eight, respectively.⁶

Here again, the relegation of Texas to the bottom tier of justice-producing states is curious.⁷ More justices were born in England than hailed from Texas (Justice James Iredell, who served from 1790 to 1799, was from Lewes, while Justice George Sutherland, whose tenure ran from 1922 to

2. See generally RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* (2020) (addressing the women who have been considered for the Supreme Court).

3. *Id.* at 117–21.

4. Ken Rudin, *The 'Jewish Seat' on the Supreme Court*, NPR: POL. JUNKIE (May 28, 2009, 7:19 AM), https://www.npr.org/sections/politicaljunkie/2009/05/heres_a_question_from_carol.html [<https://perma.cc/ZTC7-TF2D>].

5. *Cardozo Was First, but Was He Hispanic?*, ABC NEWS (May 26, 2009, 10:36 PM), <https://abcnews.go.com/Politics/story?id=7683870&page=1> [<https://perma.cc/4GY3-WUC9>].

6. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/7MNZ-KLBL>].

7. Like Texas, Wyoming, Utah, Maine, Missouri, Mississippi, and Kansas have only produced one Justice. *Id.* Nineteen states have no such boast. *Id.*

1938, was born in Buckinghamshire).⁸ Have modern presidential administrations displayed an anti-Texas bias?

The truth is somewhat more complicated. Going back to President Herbert Hoover in 1931, Texas jurists have routinely appeared on the presidential radar but have rarely made it as far as the nomination stage. Supreme Court scholar Christine L. Nemacheck made a detailed study of nominations, drawing upon a wealth of primary source material, including personal correspondence and papers from presidential libraries and government archives.⁹ Some sources were detailed lists with supporting memoranda and even investigatory notes about candidates who had undergone preliminary vetting, while others were brief lists featuring a president's handwritten notes.¹⁰ Nemacheck's work, however, is more of an overview of the dynamics at work in the selection process (including congressional reactions and approval) rather than a nuanced examination of each of the nominations themselves.¹¹

Nevertheless, it is a valuable resource. Beginning with President Herbert Hoover in 1930, the book's appendix features the shortlists of every Supreme Court vacancy through the George W. Bush Administration.¹² Hoover had to replace Justice Edward Terry Sanford after his death in 1930.¹³ Before ultimately choosing John J. Parker (who was not confirmed), Hoover had narrowed the field to ten candidates, including Parker.¹⁴ It was an impressive list that included jurisprudential icons like Judge

8. Compare Debra Cassens Weiss, *Six Justices Were Foreign-Born, and so Is Canadian-Born Granholm*, ABA J. (May 22, 2009, 2:11 PM), https://www.abajournal.com/news/article/six_justices_were_foreign_born_and_so_is_canadian-born_granholm [<https://perma.cc/TJ57-FS2L>] (listing the six foreign-born Justices), with *Justices 1789 to Present*, *supra* note 6 (revealing Texas has only had one Justice serve on the Supreme Court).

9. See generally CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH (2007) (basing the majority of her analysis on archival resources).

10. See, e.g., *id.* at 56 fig.3 (introducing President Ford's handwritten notes, which named Judge John Paul Stevens as his first choice to replace Justice Douglas).

11. *Id.* at 16 ("[I]n this book[,] I advance our understanding of the political and institutional factors that shape the selection decision by systematically and quantitatively analyzing the selection stage of the nomination process . . .").

12. *Id.* at 147–55.

13. Justice Sanford has an interesting claim to fame as the last sitting district court judge to be elevated directly to the Supreme Court; he served on the District Court for the Middle District of Tennessee until his 1923 nomination to the Supreme Court. *Edward Terry Sanford*, BALLOTEDIA, https://ballotpedia.org/Edward_Terry_Sanford [<https://perma.cc/KY4H-LP2X>].

14. NEMACHECK, *supra* note 9, at 147.

Learned Hand and Judge (and future Justice) Benjamin Cardozo.¹⁵ But it also included a Texan, Judge Joseph Chappell Hutcheson.¹⁶

Judge Hutcheson was born in Houston in 1879.¹⁷ After earning his bachelor's degree from the University of Virginia, Hutcheson attended the University of Texas School of Law.¹⁸ He graduated first in his class in 1900 and was admitted to the Texas bar that same year.¹⁹ After practicing with his father's firm, Hutcheson was named chief legal advisor for Houston in 1913.²⁰ In 1917, he was elected mayor of Houston.²¹ In 1918, President Woodrow Wilson appointed the rising star as a district judge for the Southern District of Texas.²² Judge Hutcheson had a transformative impact on that federal district as Southeast Texas grew in economic, social, and political importance.²³

On December 20, 1930, Judge Hutcheson was nominated by President Hoover to a newly-created seat on the Fifth Circuit and was confirmed on January 13, 1931.²⁴ But even before that, Hutcheson's growing reputation had placed him in august company, as his spot on Hoover's shortlist reflects.²⁵ Justice Sanford died on March 8, 1930.²⁶ Seeking to move quickly, Hoover bypassed Hutcheson, Hand, Cardozo, and others on his list in favor of Judge John J. Parker of the Fourth Circuit.²⁷ Parker, however, had baggage. His nomination was vigorously opposed due to his role in a controversial decision involving the United Mine Workers and so-called "yellow dog" contracts (contracts in which employees agree,

15. *Id.*

16. *Id.*

17. *Hutcheson, Joseph Chappell, Jr. (1879–1973)*, TEX. ST. HIST. ASS'N, <https://www.tshaonline.org/handbook/entries/hutcheson-joseph-chappell-jr> [<https://perma.cc/SZD5-MX2Y>].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See generally Charles Zelden, *Regional Growth and the Federal District Courts: The Impact of Judge Joseph C. Hutcheson, Jr., on Southeast Texas, 1918–1931*, 11 HOUS. REV. 67 (1989) (providing an excellent look at Judge Hutcheson's pivotal role as a member of the judiciary).

24. *Joseph Chappell Hutcheson*, BALLOTPEDIA, https://ballotpedia.org/Joseph_Chappell_Hutcheson [<https://perma.cc/WJ5V-N5BF>].

25. See NEMACHECK, *supra* note 9, at 147 (containing Benjamin Cardozo, Learned Hand, and Owen Roberts).

26. *Edward Terry Sanford*, *supra* note 13.

27. NEMACHECK, *supra* note 9, at 147.

as a condition of employment, not to join a labor union).²⁸ Parker's nomination also sparked opposition from the NAACP over remarks Parker made while a candidate for North Carolina governor in 1920. Parker described black participation in politics as "a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina."²⁹ Parker's nomination was rejected in a 39–41 vote—the Senate's only rejection of a Supreme Court candidate during the seventy-four years from 1894 to 1968.³⁰

Stung by the rejection, Hoover returned to his list, choosing the considerably less controversial Owen J. Roberts.³¹ Once again, legal luminaries like Cardozo and Hand were passed over, just like the up-and-coming Texan, Joseph C. Hutcheson.³² In fact, neither Hand nor Hutcheson made the eight-person list from which Hoover chose Roberts (Cardozo was on both lists).³³ And when Hoover got his next opportunity to fill a vacancy (that of the retiring Justice Oliver Wendell Holmes Jr.), Hutcheson once again did not make the shortlist.³⁴ Benjamin Cardozo was instead chosen and confirmed.³⁵

Even without the chance to serve on the nation's highest court, Joseph C. Hutcheson's judicial career was nothing short of stellar.³⁶ He rose to the chief judge of the Fifth Circuit in 1948 and continued serving until 1959.³⁷ In 1945, he was named "chairman [of] the British-American commission on the settlement of Jews in Palestine,"³⁸ where he played an important role in persuading Great Britain to increase the number of Jewish refugees allowed to settle in what was then Palestine. Hutcheson took senior status on

28. Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 260 ("[I]n 1930[,] the Senate rejected the nomination of John J. Parker to the Supreme Court largely because Parker had upheld the validity of yellow-dog contracts in the *Red Jacket Coal* case.").

29. *Senate Rejects Judge John J. Parker for Supreme Court*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/nominations/judge-parker-nomination-rejected.htm> [<https://perma.cc/FMU5-4CFQ>] (internal quotation mark omitted).

30. *Id.*

31. NEMACHECK, *supra* note 9, at 147.

32. *Id.*

33. *Id.*

34. *Id.* at 148.

35. *Id.*

36. See *Hutcheson, Joseph Chappell, Jr. (1879–1973)*, *supra* note 17 (documenting Hutcheson's bulletproof resume, including the fact that "[h]e never had a major ruling overturned upon appeal").

37. *Id.*

38. *Id.*

November 4, 1964.³⁹ “He continued to serve in this capacity until his death on January 18, 1973.”⁴⁰

President Franklin D. Roosevelt filled a staggering eight vacancies on the Supreme Court during his lengthy tenure.⁴¹ However, none of the successful nominees hailed from Texas, and his short lists are similarly devoid of anyone from the Lone Star State.⁴² It would fall to Roosevelt’s successor, Harry S. Truman, to finally appoint a Texan to the Supreme Court when he filled his third vacancy with his then-Attorney General Tom C. Clark.⁴³ Yet Clark’s nomination was not without controversy. As Professor Vincent Johnson noted, “Clark was caricatured as the [P]resident’s lackey, a lawyer incapable of demonstrating the independence and judgment that is expected on the nation’s highest tribunal.”⁴⁴ Critics like former Vice President Henry Wallace assailed Clark for his role while heading the Justice Department in compiling lists of subversive organizations as part of President Truman’s loyalty program.⁴⁵ Wallace accused Clark of “us[ing] spies in labor unions” and overseeing “the whole dirty business of wire-tapping.”⁴⁶ Another former cabinet member, Harold Ickes, maintained that Truman’s elevation of Clark to the Court merely degraded it to his level of mediocrity.⁴⁷

However, as Professor Johnson observed, “Clark was an important voice in a judicial revolution that transformed American society through an expansive recognition of individual rights and a broad construction of the [C]ommerce [C]lause.”⁴⁸ Clark’s service, which lasted from 1949 to 1967,

39. *Joseph Chappell Hutcheson, supra* note 24.

40. *Id.*

41. Paul M. Sparrow, *FDR and the Supreme Court: A Lasting Legacy*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM: FORWARD WITH ROOSEVELT (Feb. 23, 2016), <https://fdr.blogs.archives.gov/2016/02/23/fdr-and-the-supreme-court-a-lasting-legacy/> [<https://perma.cc/8YDL-UYG2>].

42. NEMACHECK, *supra* note 9, at 148–49.

43. Vincent R. Johnson, *The Kavanaugh Controversy Has Texas Precedent*, MYSA (Sept. 13, 2018), <https://www.mysanantonio.com/opinion/commentary/article/The-Kavanaugh-controversy-has-Texas-precedent-13227916.php> [<https://perma.cc/4AGB-9RJZ>].

44. *Id.*

45. *Id.*

46. *Id.* (internal quotation marks omitted).

47. *See id.* (“Truman had not elevated Clark to the court but had degraded the court to Clark’s level.”).

48. *Id.*

included the peak years of the Warren Court (lasting from 1953 to 1969).⁴⁹ The initial controversy over his appointment soon evaporated, and Clark was confirmed by a vote of 73–8.⁵⁰ Clark not only demonstrated his judicial independence by voting against Truman’s attempt to seize the steel mills for the Korean War effort in the *Steel Seizure* case,⁵¹ but he also wrote the majority opinion in the landmark Fourth Amendment case of *Mapp v. Ohio*⁵² and voted to end segregation in *Brown v. Board of Education*.⁵³ The Dallas-born jurist’s contributions to the Court are worthy, indeed.⁵⁴

Clark, however, would remain the Court’s lone Texan until his departure in 1967.⁵⁵ Neither Presidents Dwight D. Eisenhower nor John F. Kennedy nominated or considered any Texans for the Supreme Court.⁵⁶ And when a Texan finally arrived in the White House in the form of Lyndon B. Johnson, he filled his first vacancy with Abe Fortas, his longtime attorney.⁵⁷ No Texans were among the twelve distinguished lawyers, judges, and legal academics on his initial shortlist.⁵⁸ In fact, President Johnson was responsible for the departure of Clark, the Court’s only Texan.⁵⁹ Eager to create a vacancy so that he might appoint the first black justice to the Supreme Court, Johnson held a phone conversation in 1967 with then-Deputy Attorney General Ramsey Clark.⁶⁰ In it, Johnson asked whether Justice Clark could remain on the Court if his son became Attorney General.⁶¹ While Ramsey Clark indicated that there would be no conflict of interest, Johnson disagreed: “[I]f [Clark] became Attorney General, [his father] would have to leave the Court. Every taxi driver in the country, he’d tell me that the old man couldn’t judge ‘em fairly if his own boy’s sending ‘em up.”⁶² President Johnson did, of course, appoint Ramsey Clark

49. John R. Vile, *Tom Clark*, FREE SPEECH CTR.: FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1327/tom-clark> [<https://perma.cc/256S-8PZ9>].

50. *Id.*

51. *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579 (1952).

52. *Mapp v. Ohio*, 367 U.S. 643 (1961).

53. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

54. *See generally* MIMI CLARK GRONLUND, *SUPREME COURT JUSTICE TOM C. CLARK* (2010) (providing a comprehensive look at Justice Clark’s life, career, and accomplishments).

55. Vile, *supra* note 49.

56. NEMACHECK, *supra* note 9, at 149–50.

57. *Id.* at 150.

58. *Id.*

59. *See id.* at 18 (explaining to Ramsey Clark how his father would need to leave the Court).

60. *Id.*

61. *Id.*

62. *Id.* (alterations in original) (internal quotation marks omitted).

Attorney General, prompting Justice Clark's resignation from the Court—thus leading to “Johnson's historic appointment of Thurgood Marshall.”⁶³

To Johnson's credit, he attempted to place another Texan on the Supreme Court—Austin-born William Homer Thornberry of the Fifth Circuit.⁶⁴ Born January 9, 1909, to deaf parents who were both teachers at the Texas School for the Deaf, Thornberry grew up dirt poor.⁶⁵ After graduating from Austin High School in 1927, he attended the University of Texas and its law school while working as a deputy sheriff.⁶⁶ Thornberry earned his bachelor's degree in 1932, his law degree in 1936, and was even elected to the Texas legislature during law school, serving in that capacity from 1937 to 1941.⁶⁷ He served as the district attorney for Travis County from 1941 to 1942 and in World War II as a Navy Lieutenant Commander.⁶⁸

Thornberry was a friend and longtime political ally of Lyndon Johnson, winning election to Johnson's former congressional seat (the Tenth Congressional District) in 1948 just as Johnson won a seat in the Senate.⁶⁹ Thornberry served in the House of Representatives until John F. Kennedy nominated him to the federal bench on July 9, 1963.⁷⁰ Two years later, President Johnson appointed his longtime friend to the Fifth Circuit; Thornberry was confirmed on July 1, 1965.⁷¹

Foreshadowing future battles over judicial nominations, the direction of the Supreme Court, and the Senate's role in “provid[ing] ‘advice and consent’ to the president on Supreme Court nominees,” President Johnson's attempt to cement his legacy on the Court was contentious.⁷² In late June 1968, Johnson announced that Chief Justice Earl Warren intended to retire at “such time as a successor is qualified.”⁷³

63. *Id.*

64. Meredith Hindley, *Supremely Contentious: The Transformation of “Advice and Consent,”* HUMANS., <https://www.neh.gov/humanities/2009/septemberoctober/feature/supremely-contentious> [<https://perma.cc/E2QM-YLGS>].

65. *Id.*

66. *Id.*

67. *Thornberry, William Homer*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/thornberry-william-homer> [<https://perma.cc/9B6S-BPAQ>].

68. *Id.*

69. Hindley, *supra* note 64.

70. *Thornberry, William Homer*, *supra* note 67.

71. *Id.*

72. See Hindley, *supra* note 64 (suggesting “the changes in [the] political process” were “long-lasting” and transformative).

73. *Id.* (internal quotation marks omitted).

Johnson planned to name Justice Abe Fortas as Chief Justice while naming Homer Thornberry to Fortas's seat as Associate Justice.⁷⁴ Johnson's dual nominations were not greeted warmly.⁷⁵ Republican senators felt "that Johnson and Warren were conspiring to prevent the next president" (expected to be a Republican) from picking a new chief justice and howled that the nominations were "cronyism at its worst."⁷⁶ Meanwhile, Southern Democrats, upset with Justice Fortas's liberal rulings, were not keen on seeing him at the helm of the Court.⁷⁷

"[T]he Senate Judiciary Committee opened hearings on July 11," with the Committee primarily fixated on Fortas.⁷⁸ The days-long hearings ended without a vote before the summer recess.⁷⁹ After Congress resumed, the hearings re-opened; this time, the focus was on Fortas's receipt of a \$15,000 stipend to teach a course at American University Law School.⁸⁰ The stipend had been paid for with donations by "two directors for Braniff Airways, two department store [magnates], along with the chairman of the New York Stock Exchange," which had senators claiming that conflicts of interest abounded.⁸¹ All told, the rough and tumble hearings ran for eleven days, a far cry from the three hours it had taken to confirm Fortas just three years earlier.⁸²

In early October, the full Senate voted.⁸³ After four straight days of debate, the senators voted 45–43 in favor of a cloture petition to end debate.⁸⁴ Recognizing that he was well short of the two-thirds majority needed to compel a vote and facing a filibuster, Fortas asked President Johnson to withdraw his name from contention.⁸⁵ With

74. *Id.*

75. *See id.* ("Howls of outrage rose from Capitol Hill about Chief Justice Warren's retirement, which shocked Johnson.").

76. *Id.* (internal quotation marks omitted).

77. *See id.* ("Georgia Democrat Richard Russell privately told Griffin that while he and other Southern Democrats would not make any public statements against Fortas, they would vote against him when the time came.").

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Thornberry's nomination now moot, his name was also withdrawn without a vote.⁸⁶

Fortas would later resign in 1969 over a separate financial scandal.⁸⁷ Thornberry continued serving on the Fifth Circuit and took senior status on December 21, 1978.⁸⁸ He died on December 12, 1995.⁸⁹ After President Richard Nixon took office in 1969, he filled four Supreme Court vacancies: the seats of Chief Justice Warren (replaced by Warren E. Burger), Justice Fortas (ultimately replaced by Harry Blackmun), Justice Hugo Black (replaced by Lewis F. Powell), and Justice John M. Harlan II (replaced by William Rehnquist).⁹⁰ Nixon did not choose any Texans; only one figure from the Lone Star State even made it onto the President's shortlist.⁹¹

That Texan was the legendary University of Texas Law Professor Charles Alan Wright, whose name appeared on a twelve-person list of potential replacements for Justices Hugo Black and John Marshall Harlan II in 1971.⁹² Once called "a Colossus [who] stands at the summit of our profession" by Justice Ruth Bader Ginsburg,⁹³ Wright was a Texan by choice rather than birth. Born in Philadelphia in 1927, Wright was educated in Connecticut, earning his undergraduate degree from Wesleyan University in 1947 and his law degree from Yale in 1949.⁹⁴ After clerking for Judge Charles Clark on the Second Circuit, Wright taught at the University of Minnesota Law School from 1950 to 1955.⁹⁵

In 1955, Wright began teaching at the University of Texas School of Law, a position he held until his death in 2000.⁹⁶ Widely considered the preeminent scholar on constitutional law and federal courts, Wright was perhaps best known for co-authoring (with Professor Arthur Miller of

86. *See id.* ("Fortas asked Johnson to withdraw his name, a move that also spelled the end of Thornberry's nomination as well.")

87. *See id.* (reporting Attorney General John Mitchell "threatened to indict Fortas for his involvement" with a stock manipulator).

88. *Thornberry*, William Homer, *supra* note 67.

89. *Id.*

90. NEMACHECK, *supra* note 9, at 151–52.

91. *Id.*

92. *See id.* (misspelling Professor Wright's name "Charles Allen Wright").

93. Carl Tobias, *Charles Alan Wright and the Fragmentation of Federal Practice and Procedure*, 19 YALE L. & POL'Y REV. 463, 463 (2001) (alteration in original) (internal quotation marks omitted).

94. *Charles Alan Wright*, TEX. ST. CEMETERY, https://cemetery.tspb.texas.gov/pub/user_form.asp?pers_id=7810 [<https://perma.cc/DM8N-SUVA>].

95. *Id.*

96. *Charles Alan Wright*, UNIV. OF TEX. AT AUSTIN: UT NEWS (July 7, 2000), <https://news.utexas.edu/2000/07/07/charles-alan-wright/> [<https://perma.cc/J78R-6SSN>].

Harvard) the fifty-four volume treatise *Federal Practice and Procedure*.⁹⁷ Wright would have undoubtedly felt right at home had he been chosen for the Supreme Court; he argued before the Court thirteen times (winning eleven of those),⁹⁸ and throughout his remarkable career, he was on a first-name basis with virtually all the serving Justices. But Professor Wright was an amazing figure in the classroom as well.⁹⁹ As intimidating as his perfect recall of case citations (down to the page number)¹⁰⁰ could be, Professor Wright was unfailingly kind to his students outside the classroom.¹⁰¹ Wright's commitment to sports was equally impressive. Not only did he serve on the NCAA Infractions Committee from 1973 to 1983,¹⁰² but Wright took particular pride in coaching the Legal Eagles intramural football team, which won 330 games during his forty-five-year tenure.¹⁰³

Although Wright's stature as a universally respected legal scholar had put him on President Nixon's radar before 1971, he will be forever remembered for his service to Nixon as special counsel on constitutional issues during the Senate's 1973 investigation of the Watergate break-in.¹⁰⁴ After the infamous "Saturday Night Massacre" and the ensuing impeachment proceedings, Nixon and Wright parted ways.¹⁰⁵ By early 1974, Nixon was represented by James St. Clair, and Wright had returned to teaching.¹⁰⁶

After Nixon's resignation, Gerald R. Ford, his successor, also had a chance to put a Texan on the Court but failed to do so. In weighing possible

97. *Id.*

98. *Id.*

99. *See id.* (quoting Michael M. Sharlot, the former dean of the University of Texas School of Law, who called Wright "the paradigm of the American lawyer-scholar" (internal quotation marks omitted)).

100. *Id.*

101. As a University of Texas School of Law graduate (Class of 1989), who had the privilege of having Charles Alan Wright as a professor, the author can personally attest to this.

102. *Charles Alan Wright*, UNIV. OF TEX. ATHLETICS, <https://texassports.com/honors/hall-of-honor/charles-alan-wright/843/kiosk> [https://perma.cc/5XA7-JK7N].

103. *Charles Alan Wright's Legal Eagles*, TARLTON L. LIBR., https://tarltonapps.law.utexas.edu/exhibits/legal_eagles/index.html [https://perma.cc/RWU5-UXX9].

104. *E.g.*, J.Y. Smith, *Watergate Lawyer Charles Wright Dies*, WASH. POST (July 9, 2000), <https://www.washingtonpost.com/archive/local/2000/07/09/watergate-lawyer-charles-wright-dies/> /f16e9187-0f11-4fdc-b74c-085ab7a4ffea/ [https://perma.cc/7CMC-5WN9] (remembering Wright as the "professor who helped defend President Richard M. Nixon during the Watergate scandal").

105. *See id.* (noting Wright resigned from the White House after the Watergate scandal).

106. *See* K.A. McNeeley-Johnson, *United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly—an Exploration of Executive Privilege*, 14 N. ILL. U. L. REV. 251, 267 (1993) (discussing the resignation of Wright and replacement with James St. Clair).

replacements for ailing Justice William O. Douglas, President Ford's shortlist (which was eventually narrowed down to the successful nominee John Paul Stevens) included a Texan named Malcolm R. Wilkey.¹⁰⁷ Although Wilkey was then serving as a judge on the Court of Appeals for the District of Columbia, the Tennessee-born, Kentucky-raised, and Harvard-educated jurist actually began his legal career in Texas.¹⁰⁸ Wilkey was in private practice in Houston from 1948 to 1954 (and taught at the University of Houston Law Center during the same period).¹⁰⁹ In 1954, Wilkey was tapped to become the United States Attorney for the Southern District of Texas, a post he held until 1958.¹¹⁰ After stints in Washington, D.C., at the Office of Legal Affairs and as Assistant Attorney General at the Department of Justice, Wilkey returned to private practice in Texas in 1961.¹¹¹ By 1963, Wilkey had gone in-house for Kennecott Copper Corporation.¹¹² In 1970, President Nixon nominated him to Warren Burger's vacated seat on the D.C. Circuit.¹¹³

Although Ford did not select him, Judge Wilkey was highly regarded on the influential court, and President Ronald Reagan once again shortlisted him for the seat vacated by Justice Potter Stewart.¹¹⁴ Of course, history was made when Sandra Day O'Connor was nominated instead. Wilkey's service on the D.C. Circuit continued until November 8, 1985, when he retired.¹¹⁵ President Reagan appointed him Ambassador to Uruguay, a post he held until his retirement in 1990.¹¹⁶ Judge Wilkey and his Chilean-born wife of thirty-one years moved to Santiago, Chile, in 1990, where he died on August 15, 2009.¹¹⁷

Judge Wilkey was not the only person with ties to Texas that President Reagan shortlisted. On the same list as Sandra Day O'Connor

107. NEMACHECK, *supra* note 9, at 152.

108. *Wilkey, Malcolm Richard*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wilkey-malcolm-richard> [https://perma.cc/RX5E-8HP5].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. NEMACHECK, *supra* note 9, at 153.

115. *Wilkey, Malcolm Richard*, *supra* note 108.

116. *Id.*

117. Matt Schudel, *Judge, Ambassador Malcolm Wilkey Dies; Led Probe of House Check-Kiting Scandal*, WASH. POST (Sept. 7, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/09/06/AR2009090602327.html> [https://perma.cc/W9KS-WHXL].

was A. Kenneth Pye.¹¹⁸ While Pye was best known as a renowned law professor and dean at Duke University School of Law (Pye also served as Duke's chancellor and acting president), in 1987, he became the president of Southern Methodist University.¹¹⁹ Pye led SMU in the aftermath of its football program scandal and only left shortly before his death from cancer in 1994.¹²⁰

When contemplating a replacement for the retiring Justice Lewis Powell in 1987, President Reagan had two Texans on his shortlist.¹²¹ One was Judge Edith H. Jones of the Fifth Circuit—who would become a perennial “shortlister” for Republican presidents, appearing on the shortlists of Presidents George H. W. Bush and George W. Bush.¹²² The other was Judge Jones's colleague on the Fifth Circuit, Judge Patrick E. Higginbotham.¹²³ Born in McCalla, Alabama, on December 16, 1938, Higginbotham attended the University of Alabama on a tennis scholarship and completed college and law school in just five years.¹²⁴ After graduating in 1961, Higginbotham served as a JAG officer in the Air Force until 1964.¹²⁵ He was in private practice in Dallas in 1975 when President Ford appointed him to the United States District Court for the Northern District of Texas,¹²⁶ making him the youngest sitting federal judge in the country.

On July 1, 1982, President Reagan nominated Judge Higginbotham to the Court of Appeals for the Fifth Circuit, and the Senate confirmed him just twenty-six days later.¹²⁷ In 1987, with Justice Powell's resignation looming, President Reagan initially turned to another mainstay of his judicial shortlist, who had been considered for the vacancies filled by Justices

118. NEMACHECK, *supra* note 9, at 152 (referring to A. Kenneth Pye as August K. Pye).

119. *A. Kenneth Pye, 62, S.M.U. President Who Restored Sports*, N.Y. TIMES (July 12, 1994), <https://www.nytimes.com/1994/07/12/obituaries/a-kenneth-pye-62-smu-president-who-restored-sports.html> [<https://perma.cc/4NYX-2LSW>].

120. *See id.* (noting Dr. Pye is credited with rebuilding the SMU athletic program after the football team faced a two-season suspension for their involvement in a player payment scheme).

121. NEMACHECK, *supra* note 9, at 152–53.

122. *Id.* at 153–54.

123. *Id.* at 153.

124. *Patrick Errol Higginbotham*, TEX. ST. CEMETERY, https://cemetery.tspb.texas.gov/pub/user_form.asp?pers_id=10672 [<https://perma.cc/7FUP-JRSD>].

125. *Higginbotham, Patrick Errol*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/higginbotham-patrick-errol> [<https://perma.cc/NU5X-6BHL>].

126. *Id.*

127. *Id.*

William Rehnquist and Antonin Scalia, respectively.¹²⁸ That ill-fated choice was Judge Robert Bork, whose nomination was rejected by the Senate 58–42 in a highly publicized and contentious hearing on October 23, 1987.¹²⁹ While the Bork nomination was floundering, speculation about a potential replacement candidate drawn from the President's shortlist was rife.¹³⁰ Higginbotham's name was prominently mentioned as the logical choice and even garnered early support from Democratic senators such as Lloyd Bentsen of Texas and Dennis DeConcini of Arizona.¹³¹ The Reagan Administration, however, declined to nominate him.

President Ronald Reagan initially announced his intention to nominate Judge Douglas Ginsburg on October 29, 1987.¹³² But after revelations about Ginsburg's past use of marijuana surfaced in the media, Ginsburg withdrew his name from consideration.¹³³ Less than two weeks later, President Ronald Reagan formally nominated Judge Anthony Kennedy, who the Senate confirmed in early February 1988.¹³⁴ Judge Higginbotham continued his distinguished service on the Fifth Circuit, assuming senior status on August 28, 2006.¹³⁵

With the arrival of another Texan in the White House in George H. W. Bush, one might expect lightning to strike twice and place a second Texan on the high court. Indeed, President Bush had Judge Edith Jones shortlisted for his first chance to fill a vacancy and replace Justice William Brennan, but he ultimately chose Judge David Souter.¹³⁶ With his

128. NEMACHECK, *supra* note 9, at 153.

129. Edward Walsh & Ruth Marcus, *Bork Rejected for High Court*, WASH. POST (Oct. 24, 1987), <https://www.washingtonpost.com/archive/politics/1987/10/24/bork-rejected-for-high-court/514f34f9-10d7-4ca5-aa21-d96274657854/> [https://perma.cc/M3YF-FPYM].

130. *E.g., id.* (discussing Bork's replacement immediately following his rejection by the Senate); *see also* NEMACHECK, *supra* note 9, at 153 (revealing Anthony M. Kennedy as a possible replacement for the failed nomination of Bork).

131. Stuart Taylor Jr., *More Names Are Quietly Studied for Nominations to Supreme Court*, N.Y. TIMES (Oct. 9, 1987), <https://www.nytimes.com/1987/10/09/us/more-names-are-quietly-studied-for-nomination-to-supreme-court.html> [https://perma.cc/DFN3-Z5Z5].

132. *Remarks Announcing the Nomination of Douglas H. Ginsburg to Be an Associate Justice of the United States Supreme Court*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Oct. 29, 1987), <https://www.reaganlibrary.gov/archives/speech/remarks-announcing-nomination-douglas-h-ginsburg-be-associate-justice-united-states> [https://perma.cc/FH7J-74MU].

133. Scott Bomboy, *How Justice Kennedy Replaced Powell (and Bork) at the Court*, NAT'L CONST. CTR.: CONST. DAILY BLOG (June 27, 2018), <https://constitutioncenter.org/blog/how-justice-kennedy-replaced-powell-and-bork-at-the-court> [https://perma.cc/KW5N-D3RF].

134. *Id.*

135. *Higginbotham, Patrick Errol, supra* note 125.

136. NEMACHECK, *supra* note 9, at 154.

second opportunity to replace a trailblazing member of the Court, Justice Thurgood Marshall, Bush considered naming Judge Emilio Garza of the Fifth Circuit.¹³⁷

Judge Garza would have made history as the first Mexican American on the Supreme Court. Born August 1, 1947, in San Antonio, Garza earned a bachelor's and master's degree from the University of Notre Dame by 1970.¹³⁸ Following service as an officer in the Marine Corps, Garza enrolled at the University of Texas School of Law, graduating in 1976.¹³⁹ After a ten-year stint in private practice in San Antonio, Garza served as a state court judge in Bexar County from 1987 to 1988.¹⁴⁰ In February 1988, Garza was nominated by President Reagan to the United States District Court for the Western District of Texas.¹⁴¹ The Senate confirmed him on April 19, 1988.¹⁴²

Less than three years later, President George H. W. Bush nominated Garza to the Court of Appeals for the Fifth Circuit.¹⁴³ The Senate confirmed him on May 24, 1991.¹⁴⁴ When the time came to choose Justice Marshall's successor, President Bush interviewed Judge Garza of the Fifth Circuit and Judge Clarence Thomas of the D.C. Circuit.¹⁴⁵ On July 1, 1991, Bush announced Thomas as his choice to replace the civil rights icon.¹⁴⁶ Thomas's formal confirmation hearing began on October 11, 1991.¹⁴⁷ The high-profile hearing became contentious with Anita Hill's accusations of sexual harassment, but on October 15, 1991, Thomas was

137. *Id.*

138. *Garza, Emilio M.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/garza-emilio-m> [<https://perma.cc/626U-YB7M>].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See John E. Yang & Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST (July 2, 1991), <https://www.washingtonpost.com/archive/politics/1991/07/02/bush-picks-thomas-for-supreme-court/943b9fda-e079-405e-974e-14c2d0cd999b/> [<https://perma.cc/Y8BT-X8XA>] (discussing Thomas's interview and suggesting Garza was a finalist alongside Edith Jones); see also NEMACHECK, *supra* note 9, at 154 (listing Thomas and Garza as the only two candidates to replace Justice Marshall).

146. Yang & LaFraniere, *supra* note 145.

147. Nina Totenberg, *Thomas Confirmation Hearings Had Ripple Effect*, NPR (Oct. 11, 2011), <https://www.npr.org/2011/10/11/141213260/thomas-confirmation-hearings-had-ripple-effect> [<https://perma.cc/9W78-UE4V>].

confirmed by a 52–48 vote¹⁴⁸—the slimmest margin for approval since 1886. Judge Garza continued to serve faithfully on the Fifth Circuit.¹⁴⁹ He took senior status on August 1, 2012, and retired on January 5, 2015.¹⁵⁰

No Texans were shortlisted during President Bill Clinton's tenure, much less nominated.¹⁵¹ But with the arrival of yet another Texan in the White House, President George W. Bush, it is hardly surprising that judicial candidates from Texas figured prominently in his plans for the Court. Those plans included, at least initially, female prospects like Judges Edith Jones and Priscilla Owen from the Fifth Circuit, along with his unsuccessful nominee Harriet Miers.¹⁵² However, Bush's initial plans for replacing Justice Sandra Day O'Connor in 2005 involved a list that included not only the eventual nominee, John G. Roberts, but also a holdover from his father's Administration, Judge Emilio Garza.¹⁵³

Judge Garza was not the only candidate for a history-making Latino justice. Also on Bush's shortlist was his friend, former White House Counsel, and then-Attorney General, Alberto R. Gonzales.¹⁵⁴ Gonzales, the highest-ranking Latino to serve in the Executive Branch, had the President's trust as a longtime adviser dating back to Gonzales's tenure as general counsel to then-Governor Bush.¹⁵⁵ Born August 4, 1955, in San Antonio, Gonzales had served in the Air Force before earning his undergraduate degree from Rice University (1979) and his law degree from Harvard (1982).¹⁵⁶ He was in private practice in Houston until 1994, when his ties to Bush led to serving first as the governor's general counsel, then as Texas's secretary of state, and finally on the Supreme Court of Texas.¹⁵⁷ When Bush was elected President, Gonzales resigned from the court and joined the Bush Administration as White House counsel.¹⁵⁸

148. *Id.*

149. *See Garza, Emilio M., supra* note 138 (devoting twenty-four years to the Fifth Circuit).

150. *Id.*

151. NEMACHECK, *supra* note 9, at 154.

152. *Id.* at 154–55.

153. *Id.* at 154. John Roberts was not confirmed for Justice O'Connor's seat because the intervening death of Chief Justice Rehnquist gave Bush the opportunity to name Roberts as the new Chief Justice instead. Following the withdrawal of Harriet Miers's nomination for the O'Connor spot, President Bush chose Judge Samuel Alito as his nominee.

154. *Id.*

155. *Attorney General: Alberto R. Gonzales*, U.S. DEPT OF JUST., <https://www.justice.gov/ag/bio/gonzales-alberto-r> [<https://perma.cc/5LEC-K9BA>].

156. *Id.*

157. *Id.*

158. *Id.*

After President Bush announced Gonzales on November 10, 2004, as his nominee for Attorney General, speculation mounted that he might be Bush's choice for a future Supreme Court vacancy.¹⁵⁹ Some conservative groups and individuals even proclaimed their opposition to such a potential nomination based on their perception that Gonzales supported abortion rights by his vote in one of several parental notification decisions issued by the Texas Supreme Court in 2000.¹⁶⁰ Yet, while he was on the shortlist for the vacancy for which Harriet Miers (and eventually Samuel Alito) was nominated, Gonzales continued as Attorney General. Controversy over his role in the allegedly politically motivated firings of several United States Attorneys ultimately resulted in his resignation in September 2007.¹⁶¹ In 2012, Gonzales entered legal academia as a professor at Belmont University School of Law in Nashville, Tennessee, and was later named dean—a position he currently holds.¹⁶²

No Texans are known to have been considered by President Barack Obama for the two Supreme Court vacancies he filled with Justices Elena Kagan and Sonia Sotomayor.¹⁶³ However, with President Obama's nomination of Judge Merrick Garland to fill Justice Antonin Scalia's seat stalled by the Republican-controlled Senate, then-Democratic presidential nominee Hilary Clinton had a contingency plan that included at least one Texan. Following the WikiLeaks release of Clinton's emails in 2016, her campaign chair John Podesta confirmed the veracity of an email entitled "Scalia replacement" that floated several potential candidates.¹⁶⁴ One was

159. E.g., Neil A. Lewis, *The Supreme Court: Court Vacancies; Some on the Right See a Challenge*, N.Y. TIMES (June 24, 2003), <https://www.nytimes.com/2003/06/24/us/the-supreme-court-court-vacancies-some-on-the-right-see-a-challenge.html> [<https://perma.cc/X9MV-SZSP>].

160. E.g., Katherine T. Phan, *Pro-Life Group Disagrees with Gonzales as AG*, CHRISTIAN POST (Nov. 12, 2004), <https://www.christianpost.com/news/pro-life-group-disagrees-with-gonzales-as-ag.html> [<https://perma.cc/AS3Q-3LHY>]. These decisions began with *In re Doe*, 19 S.W.3d 346 (Tex. 2000).

161. *Attorney General Gonzales Resigns*, ABC NEWS (Jan. 8, 2009, 12:06 AM), <https://abcnews.go.com/TheLaw/Politics/story?id=3421219&page=1> [<https://perma.cc/XTQ5-DH2H>].

162. Paul Chenoweth, *Judge Alberto Gonzales Appointed New Dean of Belmont University College of Law*, BELMONT UNIV. (Apr. 2, 2014), <https://news.belmont.edu/judge-alberto-gonzales-appointed-new-dean-of-belmont-university-college-of-law/#:~:text=Judge%20Gonzales%20joined%20Belmont%20Law,law%20and%20first%20Amendment%20Law> [<https://perma.cc/XWM4-3UZM>].

163. JEFFERSON & JOHNSON, *supra* note 2, at 121 & 247 n.60.

164. Alex Daugherty, *WikiLeaks Reveals Clinton Considered a Texas Republican for the Supreme Court*, MCCLATCHY DC (Oct. 24, 2016, 3:21 PM), <https://www.mcclatchydc.com/news/politics-government/election/article1100149702.html> [<https://perma.cc/C4CX-2HW9>] (internal quotation marks omitted).

Wallace Jefferson, former chief justice of the Supreme Court of Texas from 2004 to 2013, and now an appellate attorney in private practice with Alexander Dubose Jefferson Townsend.¹⁶⁵ Although a surprising choice for such a list because he was elected and re-elected as a Republican, observers like Professor James Riddlesperger quickly pointed out that Jefferson was “a moderate force” and “never a controversial justice.”¹⁶⁶

Meanwhile, Clinton’s Republican presidential opponent, Donald J. Trump, made no secret of his regard for certain Texans as prospective members of the Supreme Court.¹⁶⁷ Even before his 2020 election, Trump released (and later added to) a list of potential nominees to the Court.¹⁶⁸ Although the list included those he eventually chose to fill vacancies on the Court—Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—it also contained several Texans.¹⁶⁹ Some, like former Texas Supreme Court Justice Don Willett and former Texas Solicitor General James C. Ho, were widely respected conservative stalwarts who Trump eventually appointed to the Fifth Circuit.¹⁷⁰ But the list also grew to include three sitting senators, including Trump’s former primary opponent, Senator Ted Cruz of Texas.¹⁷¹ Senator Cruz, a graduate of Princeton and Harvard Law School and former law clerk to Chief Justice Rehnquist, made the following statement in response to his public shortlisting:

I am grateful for the president’s confidence in me and for his leadership in nominating principled constitutionalists to the federal bench over the last four years. As a member of the Senate Judiciary Committee, I’ve been proud to help confirm to the bench over 200 of President Trump’s judicial nominees, including two to the Supreme Court. It’s humbling and an immense honor to be considered for the Supreme Court. The High Court plays a unique role in

165. *Id.*

166. *Id.* (internal quotation marks omitted).

167. JEFFERSON & JOHNSON, *supra* note 2, at 187.

168. *Id.*

169. *Id.* at 189.

170. Katie Leslie et al., *Trump Picks Texas Conservatives Willett and Ho for Powerful Appeals Court*, DALL. MORNING NEWS (Sept. 28, 2017, 6:45 PM), <https://www.dallasnews.com/news/politics/2017/09/28/trump-picks-texas-conservatives-willett-and-ho-for-powerful-appeals-court/> [<https://perma.cc/6L6H-86YH>].

171. Cory McCord, *Sen. Ted Cruz Named by President Trump as Potential SCOTUS Nominee*, KHOU 11 (Sept. 9, 2020 10:21 PM), <https://www.khou.com/article/news/politics/sen-ted-cruz-named-as-potential-scotus-nominee/285-1c0def19-a1be-42ae-9f2d-e032a2bb13e1> [<https://perma.cc/FF2G-UBHU>].

defending our Constitution, and there is no greater responsibility in public service than to support and defend the Constitution of the United States.¹⁷²

Whether they appear on public shortlists like President Trump's or private ones only revealed through later research, Texans have been a staple for presidential consideration for the Supreme Court for the past hundred years. Despite this, only Justice Tom C. Clark has ascended to this legal Olympus. The lack of Texas representation has troubled at least one prominent Texan, Senator John Cornyn. The Texas Republican and member of the Judiciary Committee stated in 2018 that the Court "ought to represent different regions" and that he was troubled by the "scarcity of high [C]ourt nominees from Texas."¹⁷³

Just what would it take for lightning to strike twice? Given the ever-shifting winds shaping the American political landscape, we may never know. The fortunes of those Texans considered for the Court over the last century offer some insight. But we can also gain an additional—and rare—perspective by examining the only known nineteenth-century instance of a Texan shortlisted for the Court. That Texan was none other than William Pitt Ballinger, a prominent Galveston lawyer.

Ballinger's representation of the railroad industry helped fuel Texas's growth and transform tort law.¹⁷⁴ But Ballinger is also noteworthy because his professional reputation was such that he was offered a seat on the Supreme Court of Texas, came incredibly close to a nomination to the Supreme Court, and ultimately remained with his practice in Texas.¹⁷⁵ At a time in history when critics argue the Supreme Court is too susceptible to political influences, the story behind Ballinger's near appointment to the

172. Press Release, Ted Cruz, Sen., U.S. Senate, Statement on President Trump's Second Term SCOTUS List (Sept. 9, 2020) (on file with the St. Mary's Law Journal) (internal quotation mark omitted).

173. Ken Stickney, *Cornyn: Would Love to See More Texans as Court Nominees*, PORT ARTHUR NEWS (Aug. 2, 2018), <https://www.panews.com/2018/08/02/cornyn-would-love-to-see-more-texans-as-court-nominees/> [<https://perma.cc/SJ2J-5UKP>] (internal quotation marks omitted).

174. See JOHN ANTHONY MORETTA, WILLIAM PITT BALLINGER: TEXAS LAWYER, SOUTHERN STATESMAN, 1825–1888, at 235–36 (2000) (relying on the new doctrines of contributory negligence and assumption of the risk, Ballinger influenced the development of Texas tort law through his work defending railroad companies in myriad lawsuits); see also *William Pitt Ballinger (1825–1888)*, TARLTON L. LIBR., <https://tarltonapps.law.utexas.edu/justices/profile/view/2> [<https://perma.cc/8L9K-9JR3>] ("Ballinger's reputation as a leading trial lawyer and his expertise in tort and railroad law were known nationally . . .").

175. See *William Pitt Ballinger (1825–1888)*, *supra* note 174.

Court offers insight into the role politics once played in determining the Court's composition.

No account of Ballinger's life is complete without acknowledging the significance of Professor Moretta's masterful biography of the man: *William Pitt Ballinger: Texas Lawyer, Southern Statesman, 1825–1888*.¹⁷⁶ Born in Kentucky on September 25, 1825, Ballinger moved to Texas at the age of eighteen to “read the law” in the Galveston office of his uncle, Judge James Love.¹⁷⁷ After a sojourn serving in the Mexican War, Ballinger was admitted to the bar in 1847 and promptly began practicing in his uncle's firm—then the largest in Galveston.¹⁷⁸ Young Ballinger was a rising star, and in 1850, he was appointed the United States Attorney for the District of Texas.¹⁷⁹ Ballinger became one of the leading attorneys in Texas, attracting clients from “Boston, New York, Philadelphia, Mobile, and New Orleans.”¹⁸⁰ By 1860, Ballinger enjoyed considerable success “and had an annual income approaching \$10,000”—an impressive sum for the time.¹⁸¹

Then the Civil War broke out. Ballinger opposed secession, but once it became a reality, he supported the Confederate cause.¹⁸² He served as a “receiver of alien enemy property,” helping fill the Confederacy's coffers by selling confiscated Northern-owned property.¹⁸³ Once the war ended, Governor Pendleton Murrah asked Ballinger to help negotiate the terms of Texas's surrender with Union General Edward Canby.¹⁸⁴ In the conflict's aftermath, Ballinger traveled to Washington to receive his pardon; as the consummate practitioner, he also handled pardon requests for several clients, earning at least \$7,500.¹⁸⁵ By 1866, Ballinger was as prosperous as ever, and his professional reputation grew.¹⁸⁶

176. See generally MORETTA, *supra* note 174 (detailing the life of William Pitt Ballinger). Some scholars discussing Ballinger have incorrectly claimed that he was offered and turned down a nomination to the Supreme Court. As Professor Moretta's book and this Article make clear, no such offer was made, much less declined.

177. *Id.* at 15, 24 (internal quotation marks omitted).

178. *William Pitt Ballinger (1825–1888)*, *supra* note 174.

179. *Id.*

180. Kenneth R. Stevens, *William Pitt Ballinger: Galveston's Reluctant Rebel*, 40 E. TEX. HIST. J. 37, 37 (2002).

181. *Id.*

182. *Id.* at 38.

183. *Id.* at 39.

184. *Id.* at 40–41.

185. *Id.* at 41.

186. *Id.* at 41–42.

Such was Ballinger's reputation that by January 1874, newly-elected Governor Richard Coke asked to see the Galveston attorney "on a matter of utmost urgency."¹⁸⁷ They met on January 23, 1874, and Governor Coke affirmed his desire to appoint Ballinger to the Supreme Court of Texas, stating, "[T]he People of Texas, as well as this office, would be greatly honored by your presence on the Bench. There would be no greater service that you could perform for the People of this State."¹⁸⁸ Ballinger, while flattered, waffled due to the uncertainty of his pecuniary position.¹⁸⁹ After all, he was a highly successful, handsomely compensated attorney with a thriving private practice; in contrast, justices on the Supreme Court of Texas were not well paid. The *Dallas Herald* would later report:

[N]o individual with as distinguished and as lucrative a practice as Mr. Ballinger would willingly accept a salary of \$4,500, which is about the compensation of a first-class clerk. Few men who are worthy of the position earn less than \$8,000 to \$12,000 per annum, and it is as unnecessary as it is absurd to assume the greatest responsibilities of the State at a personal sacrifice and possible personal embarrassment.¹⁹⁰

Still, many in Ballinger's inner circle wanted him on the court—including his brother-in-law Guy Bryan, speaker of the house of the Texas legislature. Bryan assured Governor Coke that Ballinger would accept the appointment out of civic duty.¹⁹¹ The Texas Senate officially confirmed Ballinger, prompting the governor to write the Galveston lawyer again and argue: "Justice to the People of Texas demanded that Ballinger 'make any ordinary sacrifice' to accept the . . . confirmation 'as an Associate Justice of the Supreme Court [of Texas].'"¹⁹² Ballinger seemed inclined to accept the judgeship, confessing in his diary that "it [would] be entirely to my taste—it would fill to the full the measure of my ambitions. . . . This is the very point in time for useful service to the State."¹⁹³ But, after discussing the matter at length with his wife, Hally, and hearing her concerns about the pay cut, Ballinger declined.¹⁹⁴ He wrote Governor Coke that he could not accept

187. MORETTA, *supra* note 174, at 206 (internal quotation marks omitted).

188. *Id.* at 207 (internal quotation marks omitted).

189. *Id.*

190. *Id.* at 209 (internal quotation marks omitted).

191. *See id.* at 207–08 (encouraging Governor Coke to offer Ballinger the position).

192. *Id.* at 208.

193. *Id.* (internal quotation marks omitted).

194. *Id.*

because the judicial salary would “not afford me that exemption from pecuniary embarrassment which should be the condition, above all men, of a judge upon the bench.”¹⁹⁵ Ballinger informed the governor that it was “not a question with me of gain, but of adequate support of my family.”¹⁹⁶

Reluctantly, Governor Coke honored Ballinger’s request and removed his name from the nomination.¹⁹⁷ The *Austin Democratic Statesman* lamented Ballinger’s decision, expressing “‘great regret’ that Ballinger had resigned, for there were ‘very few men in Texas’ who had his ‘requisite virtues for a position on the Supreme Bench, a position which, we feel assured he would have adorned.’”¹⁹⁸ But not everyone was sad to see Ballinger turn down a seat on the Texas Supreme Court. In addition to Guy Bryan, Ballinger had another prominent brother-in-law, Supreme Court Justice Samuel F. Miller, who had married Ballinger’s sister, Lucy, in 1842.¹⁹⁹ In a March 21, 1874, letter to Ballinger, Justice Miller clarified that he felt the Galveston lawyer was better suited for a bigger legal stage. He wrote:

I think you acted very wisely in declining the judgeship. Yet I fully appreciate your desire for the highest honour of the profession. I was myself willing to have accepted the same position in the Iowa courts.

I know now how very unwise it would have been to do so. For I should have been struggling through old age with very limited means for the demands of my family. I am well satisfied that there is as much honor, as much respect and esteem of the kind which you and I both value in being recognized as the first, or among the few that are first in the profession in a State as to be a judge of its highest court. . . .

I hope yet to see you in our Court. If ever the republican party is overthrown or divided, events which are far from improbable, those who succeed to power must recognise the right of the South to representation on our bench. The first requisite for such a place is the knowledge of that peculiar system of local law of which Louisiana and Texas are the principal examples.²⁰⁰

195. *Id.* at 209 (internal quotation marks omitted).

196. *Id.* (internal quotation marks omitted).

197. *Id.*

198. *Id.*

199. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 15 (1939). Interestingly, William Pitt Ballinger (at seventeen) was serving as a deputy clerk of the Knox County Court in Kentucky at the time and, in fact, issued the happy couple’s marriage license. *Id.* at 15 n.24.

200. *Id.* at 347–48.

Clearly, Miller envisioned a future Court whose makeup would be more representative of the United States itself, and he saw his brother-in-law as part of that future. Just three years later, his wish seemed about to come true. With the Compromise of 1877 and the installation of Rutherford B. Hayes as President, many in the South expected that the new President would, as a conciliatory gesture, appoint several prominent Southerners to key public offices.²⁰¹ Texans especially had a right to be hopeful since one of Hayes's closest friends was his classmate from Kenyon College (class of 1842)—Guy M. Bryan, Texas's speaker of the house and Ballinger's brother-in-law.²⁰² But first, there had to be a vacancy on the Court. That problem resolved itself at the beginning of President Hayes's term when Justice David Davis (appointed by Abraham Lincoln in 1862) assumed office as a Senator from Illinois.²⁰³

Now, the stars had aligned, and prominent Texans—including Governor Coke and multiple former governors—began lobbying for Ballinger's appointment. Although Ballinger had asked his brother-in-law not to “exert the slightest influence upon [the President],” fearing that he would be viewed as presumptuous, Bryan ignored Ballinger and repeatedly pitched him in letters to his dear friend President Rutherford “Rud” Hayes.²⁰⁴ A letter dated June 6, 1877, was typical:

I have seen it stated that you will not appoint Democrats, South. If such be your action you are wrong. *Appoint as many Democrats as you can well do, the more the better* Adhere to your resolution in regard to Supreme Bench from Texas; the one we spoke of *is your man above all others*. . . . Texas is opening her mind and heart to you; no appointment that you could make would commend you more to the judgment of both parties here, than that of Ballinger.²⁰⁵

A week later, Bryan was writing Rud again, reminding the President that Ballinger was “recognized as *the Lawyer* of Texas, the peer in learning and character of any man whose claims can be considered by the President, and

201. *Cf. The Presidency of Rutherford B. Hayes, 1877–1881*, RUTHERFORD B. HAYES PRESIDENTIAL LIBR. & MUSEUMS, <https://www.rbhayes.org/hayes/presidency/> [<https://perma.cc/4Y7T-75ZJ>] (“In hopes of broadening the Republican base of support in the South, [Hayes] appointed several southern Democrats . . . to important federal positions, and made several well-publicized trips to Dixie.”).

202. FAIRMAN, *supra* note 199, at 349.

203. *Id.*

204. *Id.* at 350.

205. Ernest W. Winkler, *The Bryan-Hayes Correspondence* (pt. 8), 27 SW. HIST. Q. 52, 72–73 (1923).

by reason of his known acquirements in the civil law as eminently qualified.”²⁰⁶ Whispering in President Hayes’s other ear was Ballinger’s *other* brother-in-law, Justice Miller.²⁰⁷ As he had done with Bryan, Ballinger asked Justice Miller not to intervene on his behalf.²⁰⁸ Ballinger even wrote to Justice Miller recommending other candidates he considered better choices, such as former Supreme Court Justice John A. Campbell, who resigned from the Court in 1861 to join the Confederacy.²⁰⁹ Ballinger wrote that Campbell was “the right man to appoint” and that putting Campbell back on the bench “would electrify the South.”²¹⁰ Ballinger also suggested that a Southern Republican like Judge William B. Woods would “meet with strong approval here.”²¹¹

But Justice Miller would have none of it, responding in a March 18, 1877, letter that Ballinger’s reluctance was “very unsatisfactory” and “wanting in common sense.”²¹² Miller was quick to point out that his motivation was not simply friendship and familial ties but concern about the aging members of the Court:

There is no man on the bench of the Supreme Court more interested in the character and efficiency of its personel . . . than I am. . . .

Within five years from this time three other of the present Judges will be over seventy. Strong is now in his sixty ninth, Hunt in his sixty eighth, and broken down with gout, and Bradley in feeble health and in his sixty sixth year.

In the name of God what do I and Waite and Field all men in our sixty first year want with another old, old man on the Bench.²¹³

Miller went on, noting that John A. Campbell was not only old (Campbell was born June 24, 1811) and “looks five years the older,” but “if an old man was appointed we should have within five years a majority of old imbeciles on the bench, for in the hard work we have to do no man ought to be there after he is seventy.”²¹⁴ But Miller’s opposition to Campbell was not just age-

206. Ernest W. Winkler, *The Bryan-Hayes Correspondence* (pt. 9), 27 SW. HIST. Q. 164, 165 (1923).

207. FAIRMAN, *supra* note 199, at 349.

208. *Id.* at 350.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 351.

213. *Id.*

214. *Id.*

based. He also felt that Campbell's service to the Confederacy was disqualifying. Miller stated: "I think his course in resigning and giving to the rebellion the full influence and support of his name and character and services should forbid it."²¹⁵ To Miller, Campbell had violated his convictions "to aid in overthrowing a government he had sworn to support and in whose service he held one of the highest posts of honor his country had to give."²¹⁶ Moreover, unlike other former Confederates whose post-war activities had been more conciliatory, Miller felt Campbell had shown "all the evidences of a discontented and embittered old man."²¹⁷

Miller went on to share some inside information with his brother-in-law, observing that, while other prospective nominees had been suggested to President Hayes and even interviewed by him (including Judge John Bruce of Alabama, a Grant appointee just two years earlier to the Southern District of Alabama), "the President was hesitating between [John Marshall] Harlan of Kentucky or possibly Bristow."²¹⁸ Bristow, of course, was Benjamin H. Bristow, a Kentucky native and former Union officer who had served in the Grant Administration—initially as the first Solicitor General of the United States and later as Secretary of the Treasury.²¹⁹ But the difficulty in finding "a real Southern man" for the job, in Miller's view, was that "all the men who before the rebellion had made high reputation as lawyers are either dead or too old for the place."²²⁰

Miller strongly felt that the vacancy should "be filled with a lawyer familiar with the civil code system of Louisiana and Texas" and urged Ballinger to abandon his self-deprecation, asking: "Where can a man be found more suitable under all the circumstances than yourself?"²²¹ Miller continued to press his case, listing his brother-in-law's qualifications beyond simply his professional reputation and legal acumen:

You are about the right age with I thank God a fair hope of such health and vigor as gives promise of good service.

You are from the right geographical quarter and familiar with the civil codes I have named.

215. *Id.* at 352.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Benjamin H. Bristow (1874–1876)*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/about/history/prior-secretaries/benjamin-h-bristow-1874-1876> [<https://perma.cc/4MHK-HX4G>].

220. FAIRMAN, *supra* note 199, at 352.

221. *Id.*

You have not been an active politician and did nothing to promote secession. You have shown no disposition to foster the animosities of the late war.²²²

Justice Miller concluded his letter by urging Ballinger to express his interest and allow others to wield their influence on his behalf. He reminded his brother-in-law:

The thing is within possible reach if you or your friends will do what is necessary and what I take the liberty of saying is in these times not indelicate, or improper. . . .

A place in the Supreme Court is so much more important, besides being a life office, than anything . . . Bryan could possibly get that I see no reason why one should stand in the way of the other.²²³

On April 23, 1877, Justice Miller wrote to Ballinger again and conveyed the results of Guy Bryan's meeting with President Hayes. Bryan had suggested Ballinger as "the proper man" for the vacancy and reported that the President was not only familiar with Ballinger but had even remarked that "it seemed wrong that so large a part of the Union should be without a representative in that Court."²²⁴ At the same time, however, Miller tempered his enthusiasm by passing on a conversation with the Attorney General in which the latter had doubts about the chances for any candidate "who had not been always a Union man."²²⁵

A few weeks later, on May 6, 1877, Miller wrote to Ballinger again to report his progress in advocating for his brother-in-law, noting "the ball is in motion."²²⁶ Justice Miller had met with President Hayes and conveyed the many letters of support from Governor Coke and others.²²⁷ Miller also shared his impressions that the vacancy should be filled with "a true Southern man" familiar with the law "which entered so largely into the jurisprudence of Louisiana and Texas."²²⁸ Miller then formally

222. *Id.* at 353 (footnote omitted).

223. *Id.*

224. *Id.* at 354–55.

225. *Id.* at 355.

226. *Id.* at 356.

227. *See id.* ("I then told him of the correspondence which Senator Coke had voluntarily opened up with you and with me, of the recommendations which I then had in my hand including one from myself.").

228. *Id.*

recommended Ballinger for the opening.²²⁹ According to Miller, the President discussed several other candidates he was considering, including William H. Hunt of New Orleans and the two Kentuckians, Benjamin Bristow and John Marshall Harlan.²³⁰ Hayes felt that “Bristow’s presidential aspirations were to be feared” (during the 1876 presidential election, Bristow had failed to win the Republican nomination that went to Hayes).²³¹

Hayes also clarified that he “had been very favorably impressed” with Ballinger but that “his judgment might be unduly influenced by his great friendship for Bryan.”²³² The President was concerned about the chance that any nomination of Ballinger would be criticized as induced by favoritism.²³³ Justice Miller updated Ballinger on other efforts being made on his behalf. Miller’s backroom lobbying for Ballinger included talking him up to certain colleagues on the Court, including Justice Joseph Bradley and Chief Justice Morrison Waite.²³⁴ Justice Miller reported that the Chief Justice was “decidedly opposed to all three” of Ballinger’s primary rivals—Hunt, Bristow, and Harlan.²³⁵ Waite considered Hunt “not up to the mark in ability,” while he thought it “unpolitic” to fill the vacancy with a candidate from a circuit that had two members on the Court already (Justices Waite and Swayne were both from Ohio, in the same judicial circuit as Kentucky).²³⁶ Miller also lobbied cabinet members like Secretary of War McCrary and Secretary of State Evarts.²³⁷

After riding circuit that summer, Justice Miller reported the latest developments to Ballinger upon his return to Washington in the fall.²³⁸ Writing on October 8, 1877, Justice Miller conveyed a mixed bag of news.²³⁹ Miller stated that he had called upon the President the previous Saturday “intending to talk with him about the judgeship,” but since President Hayes was absent, Miller instead had “a long and confidential conversation” with

229. *Id.* at 355–56.

230. *Id.* at 357.

231. *Id.*

232. *Id.*

233. *See id.* (worrying the public would believe a Bollinger appointment was induced by his personal friendships).

234. *Id.* at 358.

235. *Id.*

236. *Id.* at 358 & n.33.

237. *Id.* at 358–59.

238. *See id.* at 361 (“Back in Washington in the autumn, Justice Miller lost no time in getting the situation in hand.”).

239. *Id.*

the President's secretary, W. K. Rogers (also Hayes's former law partner).²⁴⁰ Rogers confirmed that, while the candidacies of Harlan and Wood had been the subject of intense lobbying (Rogers said they were "pressed very much"), the President was not "much inclined to Hunt," the Louisiana prospect.²⁴¹ Rogers also purportedly told Miller that "he believed the President's personal preferences lay between Harlan and [Ballinger]."²⁴² Miller went on to report how he suggested several disqualifying factors against Harlan's nomination:

That his appointment would make three Judges of our Court from one circuit. That the appointment would be no concession to the Southern men and would be a marked offence to Judge Davis'[s] circuit as Harlan lived out of the circuit and in a State which never seceded. That it would embarrass the President in the probable event of Judge Swayne's retirement during his administration.²⁴³

Miller shared no additional insights from his visit with Rogers, but he did pass along some inside intel from Secretary of War McCrary, who, while he was "also of the impression that the President is hesitating between you and Harlan," made it clear that President Hayes had "a personal inclination to appoint Harlan."²⁴⁴ Rogers relayed to Miller that, "if any one not a republican was appointed he believed it would be you," but the harsh reality was that "the Cabinet did not favor the appointment of a democrat."²⁴⁵ Miller's letter continued in a tone that tried to be upbeat, saying, "I have still strong hopes of success" and, while he believed the President favored Harlan: "If not Harlan then there is much hope for you."²⁴⁶ Miller acknowledged President Hayes's track record "thus far in making appointments shows the strong perhaps too strong influence of his personal wishes."²⁴⁷ However, he added hopefully, "Next to Harlan I think his wishes are in your favour."²⁴⁸

240. *Id.* at 361 & n.37.

241. *Id.* at 361.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 362.

247. *Id.*

248. *Id.*

Miller's conclusion to this letter to his brother-in-law makes it clear he was aware the nomination campaign had become an uphill struggle, but, if nothing else, it might lay the foundation for some future effort on Ballinger's behalf. Miller declared, "We shall make a good fight. We may succeed. If we do not we shall have so presented your name that it will be one to be considered on some future occasion."²⁴⁹

But just five days later, Justice Miller struck a markedly more defeated tone in writing Ballinger. Miller stated, "I believe that if at any time [President Hayes] had made up his mind to appoint a Democrat he would have taken you."²⁵⁰ Miller went on to share the latest from Secretary McCrary, who was convinced, since Democrats had been elected to all vacant state offices in Ohio's 1877 election, President Hayes would "not have the courage to appoint any one but a recognized Republican" to the Court's vacant seat.²⁵¹ Secretary McCrary also believed Harlan's name would be sent the following week.²⁵²

Indeed, just days later, on October 16, 1877, President Hayes formally nominated John Marshall Harlan of Kentucky.²⁵³ Miller was bitterly disappointed, and in a letter to Ballinger, he made no effort to disguise it: "While my judgment approves of what the President *wishes to do*, I am disgusted with the *method* he adopts to accomplish these purposes."²⁵⁴ He went on to pen: "I have fairly paid the party to whom I owe my place by honest and conscientious service to the country for that place. . . . I have rendered fifteen years of faithful irreproachable service. We are quits."²⁵⁵

Miller also explained that he felt a certain guilt for prodding the reticent Ballinger into pursuing the nomination, adding with a note of hope that it could only help his brother-in-law's chances for a future judicial vacancy:

The failure to secure your appointment weighs on me more than I expected, for I never really believed in success though I had come to hope for it. I feel myself responsible *to you* for the effort that has been made for I think without my urging it on you it would never have been made. But it has done you no harm unless it be that a hope was inspired to be disappointed But you have been brought prominently before the country in a most creditable

249. *Id.*

250. *Id.* at 363.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 364.

255. *Id.* at 367.

manner. . . . If additional circuit judges are made . . . , I see no one now who can rival you for one of the places.²⁵⁶

In truth, Ballinger—whether due to excessive humility or his reading of the political landscape—never got his hopes up.²⁵⁷ Ballinger wrote Guy Bryan that he feared, even if he were nominated and confirmed, his lack of “judicial reputation” and experience would relegate him to the status of being “a third or fourth rate Judge,” which did “*not* greatly attract [him].”²⁵⁸ Ballinger seemed content to be a big fish in a small pond, telling Bryan that his place in Texas’s legal community was good—built by long years of service to the bar.²⁵⁹ Ballinger also reminded Bryan that he had always been the type to devote himself to his legal work, seeking advancement “as an independent gentleman, and wholly a nonoffice-seeker.”²⁶⁰ Ballinger told his brother-in-law that his turning down the Supreme Court of Texas appointment had been done “with a very fixed feeling that I should adhere throughout to the pursuit of my profession & to private life.”²⁶¹

Justice Miller was not alone in his disappointment with Harlan’s nomination. Prominent Chicago lawyer Melville W. Fuller (who would later join the Court himself as Chief Justice) called the appointment “a disagreeable surprise,” adding that feelings would be different if President Hayes “had selected Mr. Hunt of New Orleans or any other well known lawyer in the extreme South & particularly where the Civil law prevails I hope the nomination will fail of confirmation.”²⁶² Naturally, the reaction from prominent Texans was equally disapproving. Ballinger did his best to assuage these feelings, publicly announcing: “[T]he President, upon my request and honoring my wishes to withdraw my name from nomination, graciously complied.”²⁶³ And he called Harlan “a man of great

256. *Id.* at 367–68 (footnote omitted).

257. See Ernest W. Winkler, *The Bryan-Hayes Correspondence* (pt. 10), 27 SW. HIST. Q. 242, 246 (1924) (“I have suffered myself, on account of the greatness of the place, and the opportunity for a useful and honorable name, to become somewhat enlisted, tho’ never with any serious expectation of appointment . . .”).

258. *Id.* at 247.

259. *Id.*

260. *Id.* at 246–47.

261. *Id.* at 246.

262. Ellwood W. Lewis, *The Appointment of Mr. Justice Harlan*, 29 IND. L.J. 46, 58 (1953).

263. MORETTA, *supra* note 174, at 228.

integrity” and an “eminent jurist” who would “serve the Bench honorably and faithfully.”²⁶⁴

On November 29, 1877, the Senate confirmed Harlan’s nomination.²⁶⁵ He would serve nearly thirty-four years on the Supreme Court; “the Great Dissenter” had one of the most distinguished careers in the Court’s history and would author memorable dissents in *Plessy v. Ferguson*,²⁶⁶ *The Civil Rights Cases*,²⁶⁷ *Giles v. Harris*,²⁶⁸ and others. From a purely political standpoint, it is easy to see why Hayes chose Harlan. He was Southern enough, but besides being a well-regarded lawyer, he was a Republican from a state that had not seceded. Equally important, Harlan had (after initially supporting fellow Kentuckian Benjamin Bristow) campaigned for Hayes’s presidential nomination in 1876 and served the President loyally as a member of the much-maligned Louisiana commission.²⁶⁹

As for William Pitt Ballinger, while this episode marked the closest he would come to a federal judgeship, it was not the last vacancy for which he was considered. When Chief Justice Waite approached his colleague Miller twice in 1878 about whether Ballinger would accept an appointment to the Court of Claims, he replied to his brother-in-law that he was uninterested.²⁷⁰ Once again, financial security was Ballinger’s primary concern, as he wrote in his diary: “Salary \$4,500—too little to support my family—a judge of all men ought to be independent pecuniarily.”²⁷¹ In the waning days of the Hayes Administration, another Supreme Court seat became vacant, that of Justice William Strong.²⁷² Once again, Justice Miller advocated on behalf of his brother-in-law, but to no avail. President Hayes nominated Judge William B. Woods of the Fifth Circuit on December 15, 1880, and he was confirmed six days later.²⁷³ While Woods was the first person to be named to the Court from a former “Confederate state after the civil war,” he had

264. *Id.*

265. Lewis, *supra* note 262, at 73. See generally David G. Farrelly, *A Sketch of John Marshal Harlan’s Pre-Court Career*, 10 VAND. L. REV. 209 (1957) (discussing Justice Harlan’s career leading up to his elevation to the Court).

266. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

267. *The Civil Rights Cases*, 109 U.S. 3 (1883).

268. *Giles v. Harris*, 189 U.S. 475 (1903).

269. In fact, after the Republican convention’s seventh ballot had eliminated all candidates except Rutherford Hayes and James Blaine, Harlan swung the Kentucky delegation’s votes to Hayes, in effect deciding the outcome. Lewis, *supra* note 262, at 48–49.

270. FAIRMAN, *supra* note 199, at 370.

271. *Id.* at 370 n.54 (internal quotation mark omitted).

272. *Id.* at 370.

273. *Id.* at 383.

only moved to Alabama in 1866.²⁷⁴ That was after the Buckeye had served in the Union during the Civil War, rising to the rank of Major General.²⁷⁵

There was one last gasp for Justice Miller in landing a federal judgeship for Ballinger. In 1883, Judge Amos Morrill, the district judge for the Eastern District of Texas (then located in Galveston), had expressed his intention to retire.²⁷⁶ Miller asked President Chester A. Arthur to nominate Ballinger and even enlisted the support of colleagues like Justice Bradley.²⁷⁷ Ultimately, Arthur nominated Chauncy B. Sabin—a transplanted New Yorker who had served as a state court judge and city attorney in Galveston—on March 25, 1884.²⁷⁸ The Senate confirmed Sabin on April 5, 1884.²⁷⁹

Ballinger was no more interested in these later opportunities than in the Supreme Court vacancy that went to John Marshall Harlan. In response to the Galveston opening, Ballinger once again told Miller that such a move was financially out of the question. Writing to his brother-in-law in 1883, he stated that a judicial appointment

this late in life was supremely foolish from a practical and financial standpoint. The pecuniary needs of my family prevent me from accepting it. A salary of \$5,000 annually is impossible for my needs. Tho' I am eternally in your debt for the kindness you shown me over the years, *please* cease all efforts on my behalf.²⁸⁰

Ballinger continued to work as one of Texas's most successful and highly regarded attorneys until his death in 1888.²⁸¹ Justice Miller served on the Supreme Court until his death on October 13, 1890.²⁸² While Miller may have been frustrated by what he perceived as his brother-in-law's steadfast

274. *William B. Woods, 1881–1887, SUP. CT. HIST. SOC'Y*, <https://supremecourthistory.org/associate-justices/william-b-woods-1881-1887/> [<https://perma.cc/FU5R-TCSD>].

275. *Id.*

276. FAIRMAN, *supra* note 199, at 371 (“Miller asked that this office be given to Ballinger, and quotes President Arthur as replying that ‘he had found so much difficulty in getting an acceptable republican among the names presented that he did not know but he would have to appoint you.’”).

277. *Id.*; MORETTA, *supra* note 174, at 228–29.

278. *Chauncy Brewer Sabin*, BALLOTPEDIA, https://ballotpedia.org/Chauncy_Brewer_Sabin [<https://perma.cc/8VFD-9X5A>].

279. *Id.*

280. MORETTA, *supra* note 174, at 229 (alterations omitted) (internal quotation marks omitted).

281. *See, e.g., id.* at 258 (recounting Ballinger as “a man who filled [the] idea of a lawyer in the best and largest sense” of the word).

282. FAIRMAN, *supra* note 199, at 424.

refusal “to rise above [his] present station,” the two remained close to the end of their days.²⁸³

William Pitt Ballinger came as close as any Texan (other than Tom C. Clark) to serving on the Supreme Court. Because of Justice Harlan’s stature, it is difficult to argue that the Court and the nation would have been better served with Ballinger on the Court. Ballinger’s story, however, reveals realities behind the nomination process that still resonate today. Partisan politics played as dominant a role in 1877 as it does today. While concerns about geographic representation have been supplanted by questions about a prospective justice’s ideology and judicial philosophy, Ballinger’s experience with the judicial selection rollercoaster demonstrates that some things never change. Considerations about judicial candidates’ past political affiliations and predictions about their likely future voting record were as prevalent in Ballinger’s time as they are today. It also remains true—as it was for Ballinger—that judicial service requires a financial sacrifice that dissuades prospective judges.

Why has lightning only struck once for a Supreme Court candidate from Texas? Given the various backgrounds and philosophies of presidents and prospective nominees, there may not be a “one size fits all” answer to that question. Those nominated from Texas have been greeted with criticism, accusations of cronyism, and attacks on their credentials. In the case of Tom C. Clark, the hostility proved unsuccessful, while with Harriet Miers, it led to a withdrawn nomination. Even when the stars have aligned to put a Texan (of either party) in the White House, priorities that dwarf state pride have intervened. In the case of Lyndon B. Johnson, an opportunity to bolster his political agenda while making history, or in the examples of George H. W. Bush and George W. Bush, a chance to build or add to the Court’s conservative ideological bloc. Ultimately, lightning is no more likely to strike in the Court’s near future than in 1877.

283. MORETTA, *supra* note 174, at 229 (internal quotation marks omitted).

