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Supreme Court Nominations Not Confirmed, 1789-2004

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Summary

Of the 154 nominations to the U.S. Supreme Court between 1789 and 2004, 34 were not confirmed by the Senate. The 34 nominations represent 29 individuals whose names were sent forward to the Senate by Presidents (some individuals were nominated more than once). Of the 29 individuals who failed to be confirmed the first time they were nominated, however, five were later nominated again and confirmed. The Supreme Court nominations discussed here were not confirmed for a variety of reasons, including Senate opposition to the nominating President, nominee's views, or incumbent Court; senatorial courtesy; perceived political unreliability of the nominee; perceived lack of ability; interest group opposition; and fear of altering the balance of the Court. The Senate Committee on the Judiciary has played an important role in the confirmation process, particularly since 1868.

These nominations have been the subject of extensive legal, historical, and political science writing, a selected list of which is included in this report.

This report will be updated in the event of a Supreme Court vacancy.

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Over the course of United States history, approximately one-quarter of the presidential nominations to the U.S. Supreme Court have failed to place a new Associate or Chief Justice on the bench. Of the 154 nominations to the Court between 1789 and 2004, 112 individuals were confirmed and served, 7 individuals were confirmed and declined to serve, 1 confirmed nominee died before he could take his seat, and 34 nominations were not confirmed. This report discusses this last group of Supreme Court nominations. The 34 failed nominations represent 29 individuals whose names were sent forward to the Senate by Presidents (some of those 29 individuals were nominated more than once). The Supreme Court nominations discussed here were not confirmed for a variety of reasons, including Senate opposition to the nominating President, the nominee's views, or the incumbent Court; senatorial courtesy; perceived political unreliability of the nominee; perceived lack of ability; interest group opposition; and fear of altering the balance of the Court. The Senate Committee on the Judiciary has played an important role in the confirmation process, particularly since 1868.

Summary discussions of the Senate confirmation process and the unsuccessful nominations follow. The reasons some nominations have failed confirmation and the role of the Senate Judiciary Committee are also discussed. Finally, the report includes a detailed table that identifies each nomination and provides, for each, the facts that can be documented about the dates of relevant activity and votes in the Judiciary Committee and the full Senate. A list of additional relevant literature is also provided.

The Confirmation Process

The Constitution of the United States provides for the appointment of a Justice to the Supreme Court in Article II, Section 2. This section states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the [S]upreme Court." The practices involved in following this constitutional mandate have varied over the years, but they have always involved the sharing of the appointment power between the President and the Senate.[1]

Nominations that failed to be confirmed by the Senate have been disposed of in a variety of ways, including withdrawal by the President, inaction in the committee,

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[1] For a more detailed history of the Supreme Court nominations process, see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee and Senate*, by Denis Steven Rutkus; and CRS Report RL32821, *The Chief Justice of the United States: Responsibilities of the Office and Process for Appointment*, by Denis Steven Rutkus and Lorraine H. Tong.

inaction in the Senate, postponement, tabling, rejection on the Senate floor, and filibuster on the Senate floor. **Table 1** provides a summary of the unsuccessful nominations by final disposition.

Table 1. Supreme Court Nominations Not Confirmed, 1789-2004, by Final Disposition

Rejected by a vote of the full Senate	11
Withdrawn by the President without Senate action	2
Postponed or tabled by the Senate, but not withdrawn by the President	5
Postponed or tabled by the Senate and withdrawn by the President	3
No record of referral, motion to consider unsuccessful	2
Referred to committee, but never reported or discharged from committee	5
Discharged from committee, no record of action by the full Senate	1
Reported from committee, considered by the Senate, recommitted, and withdrawn by the President	1
Reported or discharged from committee, motion to consider unsuccessful	2
Reported or discharged from committee, withdrawn by the President	1
Withdrawn by the President after defeat of cloture motion	1
Total Supreme Court nominations not confirmed	**34**

Summary of Unsuccessful Nominations

The 34 Supreme Court nominations not confirmed by the Senate represent 29 individuals. Five of these 29 were later re-nominated and confirmed for positions on the Court. Of the other 24 nominees, four were nominated and failed confirmation more than once. **Table 2** provides summary information concerning unsuccessful nominations.

The first of the five nominees who were not confirmed only to be later re-nominated and confirmed was William Paterson, nominated by President George Washington. Washington withdrew the nomination on the day following its submission. He noted that Paterson "was a member of the Senate when the law creating that office was passed, and that the time for which he was elected [had] not yet expired."[2] For this reason, President Washington felt that the nomination was in violation of the Constitution.[3] President Washington re-nominated Paterson at the

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[2] U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of American*, vol. 1, p. 135. (Hereafter cited as *Executive Journal*.)

[3] Article I, Section 6 of the Constitution provides that, "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office ... , which shall (continued...)

beginning of the following Congress a few days later, and Paterson was immediately confirmed.[4] All of the other unsuccessful nominations faced opposition in the Senate.

Table 2. Summary of Supreme Court Nominations Not Confirmed, 1789-2004

Total Supreme Court nominations	154
Total Supreme Court nominations not confirmed	34
Nominees who failed to be confirmed at least once	29
Unconfirmed nominees who never served in the position to which they were nominated	23
Unconfirmed nominees later re-nominated and confirmed	5
Unconfirmed nominee who served as a recess appointee in a position to which he was nominated	1
Nominees subject to two or three failed nominations (for a total of nine nominations)	4
Unconfirmed nomination to elevate sitting Associate Justice to Chief Justice	1
Unconfirmed nomination of former Associate Justice to Chief Justice	1

Source: Total Supreme Court nominations calculated using data from Elder Witt, *Guide to the U.S. Supreme Court*, 2nd ed. (Washington: Congressional Quarterly, 1990), pp. 995-998; and Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* (Washington: Congressional Quarterly, 1994), pp. 284-290. Other totals summarize information from Table 4 of this report.

The other four nominees who were later re-nominated and confirmed were Roger B. Taney, nominated twice by President Andrew Jackson; Stanley Matthews, nominated first by President Rutherford B. Hayes and later by President James A. Garfield; Pierce Butler, nominated twice by President Warren G. Harding; and John

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[3] (...continued)
have been created ... during such time...." The office to which Washington was nominating Paterson, Associate Justice, was created by the Judiciary Act of 1789 on September 24, 1789, during which time Paterson was a Senator. Paterson began serving in the Senate on March 4, 1789 and resigned on November 13, 1790, having been elected Governor of New Jersey (U.S. Congress, House, *Biographical Directory of the American Congress*, H.Doc. 607, 81st Cong., 2nd sess. [Washington: GPO, 1950], p. 1655). His term, however, did not conclude until March 3, 1793 (U.S. Congress, Senate, *Senate Manual*, S.Doc. 106-1, 106th Cong., 1st sess. [Washington: GPO, 2000], p. 859), and so his appointment to Associate Justice prior to that date would have been unconstitutional. President Washington re-nominated, and a special session of the Senate of the new Congress confirmed, Paterson on March 4, 1793. Paterson's Senate position had covered four years, rather than six, due to the staggering of Senate terms at the outset of the First Congress, which was called for in the Constitution (Article I, Section 3) and was implemented in the Senate in May 1789.

[4] *Executive Journal*, vol. 1, p. 139.

Marshall Harlan II, nominated twice by President Dwight D. Eisenhower. Taney's first nomination, to Associate Justice, was postponed indefinitely by the Senate. During the next Congress, he was nominated and confirmed as Chief Justice, and he went on to author the *Dred Scott* decision. Matthews's first nomination was never reported out of committee, but in the following Congress, under a new President, he was re-nominated and confirmed by a one-vote margin.[5] Butler was first nominated to the high court during the third session of the 67th Congress. Confirmation was blocked during that session, but Butler was re-nominated and confirmed during the fourth session. Harlan was initially nominated to be an Associate Justice late in the 83rd Congress, and this nomination remained in committee at the time of adjournment. His second nomination, at the beginning of the following Congress, was confirmed a few months later.

Four individuals were the subjects of more than one unsuccessful nomination. The first three, John C. Spencer, Reuben H. Walworth, and Edward King, were nominees of President John Tyler. President Tyler had the opportunity to fill two vacancies on the high court. He made nine nominations of five men in the space of the last 15 months of his presidency. Eight of these nominations were not confirmed, giving President Tyler the highest tally of unconfirmed Supreme Court nominations. President Tyler nominated Spencer for the first vacancy. After the Senate rejected Spencer, Walworth was put forward for the position, and the Senate tabled this nomination. On June 17, 1844, the last day of the congressional session,[6] President Tyler withdrew the tabled Walworth nomination and re-nominated Spencer. Unable to gain unanimous consent for the Spencer nomination to be acted upon, Tyler then withdrew Spencer's name on the same day and re-nominated Walworth.[7] By this time, the nomination (June 5, 1844) of King for the second vacancy had also been tabled. Tyler went on to re-nominate Walworth and King at the beginning of the following congressional session. After these two nominations were once again tabled, they were both withdrawn. The nomination of John M. Read, which followed, was reported out of committee but never acted upon by the full Senate. Samuel Nelson was President Tyler's fifth nominee, and he was confirmed.

The fourth individual subject to multiple unconfirmed nominations was William B. Hornblower, who was nominated in successive sessions of Congress by President Grover Cleveland. His first nomination was never reported out of committee; the second nomination was reported out and rejected.

One of the unsuccessful nominees had previously been Associate Justice, had left the Court, and this time was being nominated for Chief Justice. Another was a sitting Associate Justice nominated for elevation to the Chief Justice position. The first of these was also the first nomination in which the Senate voted not to confirm. John Rutledge had previously served as one of the first Associate Justices from 1789 to 1791. In addition, he served as Chief Justice in 1795 under a recess appointment

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[5] *Executive Journal*, vol. 23, pp. 14, 75-76.

[6] 28th Congress, 1st Sess.

[7] "Washington: Adjournment of Congress," *Daily National Intelligencer* (Washington), June 18, 1844, p. 3.

by President Washington. When the President nominated him later that year to succeed John Jay as permanent Chief Justice, however, the Senate asserted its constitutional power and voted against confirmation. The second such nominee, Justice Abe Fortas, was a sitting Associate Justice at the time of his nomination by President Lyndon B. Johnson to be Chief Justice in 1968. The nomination was favorably reported out of committee but filibustered on the floor of the Senate until the President withdrew the nomination.[8]

One unsuccessful nomination coincided with a legislative initiative to decrease the size of the Court. On April 16, 1866, President Andrew Johnson nominated Henry Stanbery to replace John Catron, who had died the previous May. By the time Stanbery was nominated, however, the House of Representatives had passed a bill decreasing the number of justices in the Supreme Court.[9] The act, as signed into law on July 23, 1866, called for a decrease in the number of Associate Justices from nine to six through the process of attrition.[10] At the time the bill was initiated and also at the time its final version was signed, only one vacancy, that to which Stanbery was nominated, existed on the Court. Eight Associate Justice positions remained on the bench until the death of James M. Wayne in July 1867. Seven Associate Justice positions remained until a law was passed in April 1869 to increase the number back to eight.[11]

Several scholars have suggested that, by reducing the number of Associate Justice positions,[12] the Republican Congress was trying to thwart the ability of Democratic President Johnson to shape the Supreme Court, although the record of House and Senate debate is silent as to each chamber's intention in this regard.[13] The law increasing the Associate Justice positions to eight was passed within two months of the beginning of the Administration of President Ulysses S. Grant.

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[8] For more on the Senate's consideration of the Fortas nomination, see CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer.

[9] H.R. 334 (39th Congress), passed Mar. 8, 1866.

[10] An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits, *Statutes at Large* 14, chap. 210, sec.1, p. 209 (1866).

[11] An Act to amend the Judicial System of the United States, *Statutes at Large* 15, chap. 22, sec. 1, p. 44 (1869).

[12] See Joseph P. Harris, *The Advice and Consent of the Senate* (New York: Greenwood Press, 1968), p. 304; Henry J. Abraham, *Justices and Presidents*, 3rd ed. (New York: Oxford University Press, 1992), pp. 124-125; and J. Myron Jacobstein and Roy M. Mersky, *The Rejected: Sketches of the 26 Men Nominated for the Supreme Court but Not Confirmed by the Senate* (Milpitas, CA: Toucan Valley Publications, 1993), pp. 67-74.

[13] See "Supreme Court of the United States," *The Congressional Globe*, vol.72, Mar. 8, 1866, p. 1259; "Supreme Court Judges," *The Congressional Globe*, vol. 74, July 10, 1866, p. 3697; "United States Supreme Court," *The Congressional Globe*, vol.75, July 18, 1866, p. 3909.

Factors Behind Unsuccessful Nominations

There have often been multiple reasons behind the failure of the Senate to confirm a nomination. The official Senate records, particularly those prior to the twentieth century, have usually been silent on the issues involved. Scholars have used other records in an effort to shed more light on the factors underlying unsuccessful Supreme Court nominations. This scholarship consists of analysis and interpretation of these records, and it provides a general understanding of the reasons that more than one in five nominations has failed to be confirmed by the Senate.

One widely cited scholar in the area of the Supreme Court appointments process and history, Henry J. Abraham, has developed categories of unsuccessful nominations:

> Among the more prominent reasons have been: (1) opposition to the nominating president, not necessarily the nominee; (2) the nominee's involvement with one or more contentious issues of public policy or, simply, opposition to the nominee's perceived jurisprudential or sociopolitical philosophy (i.e., politics); (3) opposition to the record of the incumbent Court, which, rightly or wrongly, the nominee presumably supported; (4) senatorial courtesy (closely linked to the consultative nominating process); (5) a nominee's perceived political unreliability on the part of the party in power; (6) the evident lack of qualification or limited ability of the nominee; (7) concerted, sustained opposition by interest or pressure groups; and (8) fear that the nominee would dramatically alter the Court's jurisprudential lineup.[14]

The sections below discuss the nominations with respect to these categories based on the preponderance of scholarly evidence. Many of the nominations fall into multiple categories.

Opposition to the President. Opposition to the nominating President played a role in at least 16 of the 34 nominations that were not confirmed. Many of the 16 were put forward by Presidents in the last year of their presidency — seven occurred after a successor President had been elected, but before the transfer of power to the new administration. Each of these "lame duck" nominations transpired under nineteenth-century Presidents when the post-election period lasted from early November until early March. Four one-term Presidents made these nominations. President John Quincy Adams nominated John J. Crittenden in December 1828, after losing the election to Andrew Jackson.[15] President Tyler's third nomination of Walworth, second nomination of King, and only nomination of Read all came after Tyler had lost to James Polk.[16] President Millard Fillmore nominated George E.

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[14] Abraham, p. 39.

[15] Charles Warren, *The Supreme Court in United States History*, revised edition, vol. 1 (Boston: Little, Brown, and Company, 1926), pp. 701-704; William F. Swindler, "The Politics of 'Advice and Consent,'" American Bar Association Journal, v. 56, 1970, p. 537.

[16] Warren, vol. 2, pp. 115-120; Swindler, pp. 537-538. Notably, Tyler also put forth his one successful nomination out of nine, of Samuel Nelson, a month before the transfer of power.

Badger and William C. Micou after Franklin Pierce had been elected to replace him.[17] Finally, President James Buchanan forwarded the name of Jeremiah S. Black to the Senate less than a month before Abraham Lincoln's inauguration.[18] Other nominations where opposition to the President was a major factor include the remaining unsuccessful Tyler nominations, Fillmore's nomination of Edward A. Bradford, and Andrew Johnson's nomination of Henry Stanbery.[19]

President Lyndon B. Johnson's two unsuccessful nominations (Fortas and Thornberry) occurred during the last seven months of his presidency, when, having announced he was not seeking re-election, he was considered by some to be a lame duck even before the election of his successor. Nineteen Senators issued a statement indicating that, on this basis, they would oppose any nomination by President Johnson.[20] The committee report accompanying the nomination of Abe Fortas to Chief Justice, however, suggests that the opposition to Justice Fortas was based, to a considerable extent, on concern about money received by Fortas for delivering university lectures while an Associate Justice, Fortas's close relationship and advisory role with President Johnson while an Associate Justice, and his judicial philosophy.[21]

President Rutherford B. Hayes nominated Stanley Matthews in late January 1881, about six weeks before the transfer of power to the Garfield administration. In this case, however, the opposition seems to have centered on the nominee and his views, as discussed below, rather than on the nominating President.

Opposition to the Nominee's Views. President Washington's nomination of John Rutledge to Chief Justice, in 1795, was the first unsuccessful nomination to fail based on the nominee's political views. Shortly after his nomination, Rutledge made a strong speech denouncing the controversial and newly ratified Jay Treaty between the United States and Great Britain. The Senate, which was dominated by Federalists and had ratified the treaty, rejected the Rutledge nomination. Of the 14 who voted for rejection, 13 were Federalists, putting them in the position of rejecting a nomination by a President from their own party.[22]

Alexander Wolcott's nomination 15 years later was the next to be rejected by the Senate. Wolcott's strong enforcement of the controversial embargo and non-

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[17] Warren, vol. 2, pp. 242-245; Swindler, pp. 538-539.

[18] Warren, vol. 2, pp. 363-365.

[19] Abraham, pp. 39-41, 124-125. As previously discussed, Congress initiated legislation to reduce the number of Associate Justices around the time of Stanbery's nomination.

[20] Jacobstein and Mersky, pp.131-132.

[21] U.S. Congress, Senate Committee on the Judiciary, *Nomination of Abe Fortas*, report to accompany the nomination of Abe Fortas, 90th Cong., 2nd sess., Exec. Rept. 8 (Washington: GPO, 1968).

[22] See Warren, vol. 1, pp. 129-139; Harris, pp 42-43; Ruth Bader Ginsburg, "Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate," *University of Illinois Law Review*, Winter 1988, p. 101-117, at 106; Swindler, pp. 534-535.

intercourse acts while a U.S. collector of customs cost him support in the press and the Senate. His qualifications for the position were also questioned.[23]

Andrew Jackson's first nomination of Roger B. Taney in 1835 was the third nomination for which the lack of success is often attributed to the nominee's views. In this case, there was also opposition to the nominating President's policies. Prior to the nomination, President Jackson had given a recess appointment to Taney to be Secretary of the Treasury. In that capacity, Taney had, under Jackson's direction, removed the government's deposits from the United States Bank. Jackson's Whig opponents in the Senate were incensed by this move, and this led first to the rejection of Taney as permanent Secretary of the Treasury and then to the failure of his first nomination to the Court.[24]

President James Polk's nomination of George W. Woodward in 1845 was rejected when six Democrats, led by a Senator from the nominee's home state of Pennsylvania, joined with the Whigs to oppose it. Woodward's nativist views are cited for the failure of his nomination.[25]

Ebenezer R. Hoar served as President Ulysses S. Grant's Attorney General prior to his nomination to be Associate Justice in 1869. In that capacity, Hoar had alienated Senators by recommending to Grant nominees for Circuit Judge without regard for the Senators' preferences. In addition, the majority of the Senate disliked "his active labors on behalf of a merit civil service system for the federal government ... and his opposition to Andrew Johnson's impeachment."[26] Despite praise for Hoar's nomination in the press, the Senate rejected it.

Stanley Matthews was nominated first by President Rutherford B. Hayes in 1881, in the last weeks of Hayes' presidency. The Senate opposed the nomination because of Matthews' close ties to railroad and financial interests, and the Judiciary Committee postponed the nomination. Although Matthews was subsequently re-nominated by President James Garfield and confirmed, concerns about him persisted, and the Senate vote, at 24-23, was the closest for any successful nominee.[27]

Pierce Butler's first nomination, by President Warren G. Harding in 1922, was reported favorably by the Judiciary Committee but blocked from consideration on the Senate floor in part because of alleged pro-corporation bias and his previous advocacy for railroad interests in cases that were to be coming before the Court.[28]

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[23] Warren, vol. 1, pp. 410-413; Swindler, pp.535-536; Abraham, pp. 41, 88.

[24] Harris, pp. 59-64; Warren, vol. 1, pp. 798-802.

[25] Abraham, pp. 41, 109; Warren, vol. 2, pp. 146-147; Harris, p. 69.

[26] Abraham, p. 127. See also Warren, vol. 2, pp. 501-504, 507; Harris, pp. 74-75.

[27] Warren, vol. 2, pp.622-623; Abraham 135-137.

[28] Abraham, pp. 190-192; "Senate Sends Back Butler Nomination," *The New York Times*, Dec. 5, 1922, p. 1; and "Shipstead Attacks Butler on 4 Points," *The New York Times*, Dec. 9, 1922, p. 5.

During the succeeding session, Butler was re-nominated and confirmed, with 61 Senators in favor and eight opposed.[29]

John J. Parker, nominated by President Herbert Hoover in 1930, was opposed by the National Association for the Advancement of Colored People (NAACP) and organized labor based on his previous statements and writings.[30] The NAACP testified in opposition to Parker's racial views at his confirmation hearing. Their testimony was based on a statement Parker had made in the course of an unsuccessful campaign for governor of North Carolina in 1920, in which he opposed the participation of African-Americans in politics.[31] In addition, Parker's record on labor issues, as chief judge of the U.S. Fourth Circuit Court of Appeals, was criticized by labor at the hearing. The American Federation of Labor (AFL), representing several labor groups, objected in particular to an opinion, authored by Parker, that affirmed a lower court opinion in support of "yellow dog" contracts, in which employees agreed not to join a union as a condition of employment.[32]

President Dwight D. Eisenhower first nominated John Marshall Harlan II to be an Associate Justice in late 1954, but that nomination was never reported from committee. Among the objections to his nomination was the perception by some Senators that Harlan was "'ultra-liberal,' hostile to the South, [and] dedicated to reforming the Constitution by 'judicial fiat.'"[33] Eisenhower re-nominated Harlan at the beginning of the next Congress, in early 1955, and he was then confirmed.

As noted previously, President Lyndon B. Johnson's nomination of Justice Abe Fortas in 1968 for elevation to Chief Justice failed for several reasons, including his judicial philosophy. Although the Committee on the Judiciary reported the nomination favorably, several committee members strongly dissented in the committee's printed report. One Senator wrote that Fortas's "judicial philosophy disqualifies him for this high office." Another criticized Fortas as part of the majority on the Supreme Court led by Chief Justice Earl Warren (the Warren Court) making an "extremist effort ... to set itself up as a super-legislature." A third Senator also found Fortas lacking on the "broader question of the nominee's judicial philosophy which includes his willingness to subject himself to the restraint inherent in the judicial process." Yet another Senator objected to "positions taken by Justice Fortas since he went on the Supreme Court as Associate Justice [which had] reflected a view to the Constitution insufficiently rooted to the Constitution as it is written."[34]

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[29] *Executive Journal*, vol.61, part 1, pp. 76, 104-105.

[30] For a description of the Parker nomination and a differing perspective on his record, see Harris, pp. 127-132. Abraham (pp. 42-43) also discusses the nomination and contests the claims offered by opponents.

[31] U. S. Congress, Committee on the Judiciary, Subcommittee, *Confirmation of Hon. J. Parker to be an Associate Justice of the Supreme Court of the United States*, hearings, 71st Cong., 2nd sess., April 5, 1930 (Washington: GPO, 1930), pp. 74-79.

[32] Ibid, pp. 23-60.

[33] Abraham, p. 263.

[34] All quotes from U.S. Congress, Senate Committee on the Judiciary, *Nomination of Abe* (continued...)

Opposition to Fortas was also based on money received for delivering university lectures while an Associate Justice and his close relationship and advisory role with President Johnson while an Associate Justice.

President Richard M. Nixon's nomination of Clement F. Haynsworth, Jr. in 1969 also failed partly on the basis of his perceived views. Like the Fortas nomination, the Haynsworth nomination was reported favorably by the Committee on the Judiciary. In this case, the dissenting views in the committee's written report focused on perceived ethical lapses on the part of Judge Haynsworth. In addition, a joint statement by five Senators referred to "doubts about his record on the appellate bench," and one Senator opposed the nomination on the basis of the judge's record on civil rights issues.[35] Furthermore, Haynsworth drew criticism from labor and minority groups on the basis of his record. One historian has suggested that because of the recent rejection of Fortas on the basis of ethical questions, the ethical questions concerning Haynsworth played the largest role in his rejection.[36]

President Nixon's nomination of G. Harrold Carswell in 1970 was also opposed partly on the basis of his perceived views. The Committee on the Judiciary reported the nomination favorably with several dissenting views. One statement, issued jointly by four Senators, opposed the nomination in part because his "decisions and his courtroom demeanor [had] been openly hostile to the black, the poor, and the unpopular."[37] A more persistent theme in the dissent, however, was a perceived lack of competence and qualification for the position.[38]

Robert H. Bork, nominated by President Reagan in 1987, is the most recent Supreme Court nominee not to be confirmed by the Senate, as well as the most recent to be rejected on the basis of his views. Much has been written about this nomination, and it remains controversial. The Committee on the Judiciary reported the nomination unfavorably after 12 days of hearings. Although the written report raised some concerns about the nominee's evaluation by the American Bar Association and academic and legal communities and his role in the firing of Special Prosecutor Archibald Cox during the Nixon administration, the bulk of the report detailed concerns about and opposition to his publicly stated positions and judicial philosophy.[39]

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[34] (...continued)
Fortas, report to accompany the nomination of Abe Fortas, 90th Cong., 2nd sess., Exec. Rept. 8 (Washington: GPO, 1968), pp. 15-44. See also Abraham, 43-45.

[35] U.S. Congress, Senate Committee on the Judiciary, *Nomination of Clement F. Haynsworth, Jr.*, report to accompany the nomination of Clement F. Haynsworth, Jr., 91st Cong., 1st sess., Exec. Rept. 91-12 (Washington: GPO, 1969), pp. 24, 48.

[36] Abraham, pp. 14-15.

[37] U.S. Congress, Senate Committee on the Judiciary, *Nomination of George Harrold Carswell*, report to accompany the nomination of George Harrold Carswell, 91st Cong., 2nd sess., Exec. Rept. 91-14 (Washington: GPO, 1970), p. 13.

[38] Abraham, pp. 15-18.

[39] U.S. Congress, Senate Committee on the Judiciary, *Nomination of Robert H. Bork to be*
(continued...)

Opposition to the Incumbent Court. The rejection by the Senate of a Supreme Court nominee on the basis of opposition to the incumbent Court is closely related to opposition on the basis of the nominee's views. In this case, the views and record of the incumbent Court majority are opposed, whereas the nominee is presumed to support the Court's views. In the case of Abe Fortas's nomination for Chief Justice, for example, the opposition of many Senators to the Warren Court has been cited as an influential factor. Fortas had been an Associate Justice for almost three years at the time of his nomination, and some opposition hinged on his positions while on the Court, as discussed above. In addition, however, his elevation was opposed because of his affiliation with the Warren Court and its wider reputation. This opposition to the Warren Court in the context of the Fortas nomination is reflected in the individual views of a Senator in the committee report.[40] In addition, during the confirmation hearings, another Senator pointedly brought up a Warren Court opinion with which he disagreed, *Mallory v. United States*,[41] although, as he acknowledged, the case had preceded Fortas's appointment as Associate Justice by eight years.[42]

Senatorial Courtesy. At least seven Supreme Court nominations have failed to be confirmed partly on the basis of deference to the objections of the nominees' home-state Senators. New York's Senators objected to the nominations of Reuben H. Walworth by President Tyler.[43] President Polk's nomination of George W. Woodward of Pennsylvania was rejected, in part, due to the objection of one of the Senators from that state.[44] The last failed Supreme Court nominations that were attributed, in part, to senatorial courtesy came before the Senate in 1893-1894, when opposition by New York's Senators was instrumental in the failure of the nominations of William Hornblower and Wheeler H. Peckham, both also of New York.[45] No unsuccessful Supreme Court nomination since that time has been attributed to senatorial courtesy.[46]

Allegations of Political Unreliability. One unsuccessful nominee was opposed in the Senate in part because of the perception that he was a "political

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[39] (...continued)
an Associate Justice of the United States Supreme Court, 100th Cong., 1st sess., Exec. Rept. 100-7 (Washington: GPO, 1987).

[40] U.S. Congress, Senate Committee on the Judiciary, *Nomination of Abe Fortas*, report to accompany the nomination of Abe Fortas, 90th Cong., 2nd sess., Exec. Rept. 8 (Washington: GPO, 1968), pp. 20-30.

[41] 354 U.S. 449 (1957). For the Senator's remarks, see U.S. Congress, Senate Committee on the Judiciary, *Nominations of Abe Fortas and Homer Thornberry*, hearings, 90th Cong., 1st sess., July 11, 12, 16, 17, 18, 19, 20, 22, 23, 1968 (Washington: GPO, 1968), p. 191.

[42] Abraham, p. 44.

[43] Abraham, p. 27-28.

[44] Swindler, p. 538; Abraham, p. 41.

[45] Swindler, p. 541; Abraham, pp. 27-28.

[46] For a discussion of senatorial courtesy, see Harris, pp. 215-237.

chameleon."[47] One of President Grant's nominees for Chief Justice, Caleb Cushing, "had been, in turn, a regular Whig, a Tyler Whig, a Democrat, a[n Andrew] Johnson Constitutional Conservative, and finally a Republican."[48] The failure of his nomination has also been attributed to his advanced age (74) and a letter of introduction of a friend Cushing wrote to Confederate President Jefferson Davis in 1861.[49]

Perceived Lack of Qualification or Ability. As noted previously, President Madison's nomination of Alexander Wolcott[50] and President Nixon's nomination of G. Harrold Carswell[51] were opposed in part because of their perceived lack of qualification and ability. President Grant's nomination of George H. Williams faced similar opposition.[52] Williams also suffered from allegations of ethical misconduct.[53]

Interest Group Opposition. Interest groups were involved in confirmation fights as far back as 1881, when the Grange mounted a campaign in opposition to the Matthews nomination.[54] Interest groups testified in opposition to (and, in some cases, support of) many of the Supreme Court nominations that were not confirmed in the twentieth century — Parker, Fortas, Thornberry, Haynsworth, Carswell, and Bork. The number of organized interest groups testifying at the confirmation hearings grew from two for the Parker nomination to more than twenty for the Bork nomination.[55] Interest groups have been active in unsuccessful Supreme Court confirmation processes in a number of other ways, as well, including conducting research on nominees' positions, lobbying Senators, providing information to the media, conducting television ad campaigns, sending mailings, and organizing constituent letters and calls.[56] Observers of the Supreme Court confirmation process

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[47] Abraham, p.45. See also Harris, p. 76; Swindler pp. 540-541.

[48] Abraham, p. 45.

[49] Harris, p. 76; see also Jacobstein and Mersky, pp. 87-93 for a description of this nomination.

[50] Abraham, p. 41; Jacobstein and Mersky, pp. 14-17; Swindler, p. 535.

[51] Abraham 16-17. See also U.S. Congress, Senate Committee on the Judiciary, *Nomination of George Harrold Carswell*, report to accompany the nomination of George Harrold Carswell, 91st Cong., 2nd sess., Exec. Rept. 91-14 (Washington: GPO, 1970), pp. 13-17, 32-33, 36-38.

[52] Abraham, pp. 45-56; Harris, pp. 75-76.

[53] Jacobstein and Mersky, pp. 82-87.

[54] John A. Maltese, *The Selling of Supreme Court Nominees* (Baltimore: The Johns Hopkins University Press, 1995), chapter 3.

[55] Maltese, chapter 6.

[56] Christine DeGregorio and Jack E. Rossotti, "Campaigning for the Court: Interest Group Participation in the Bork and Thomas Confirmation Processes," in *Interest Group Politics*, 4th ed., Allan J. Cigler and Burdett A. Loomis, eds. (Washington: CQ Press, 1995), p. 215; and Gregory A. Caldeira, Marie Hojnacki, and John R. Wright, "The Lobbying Activities (continued...)

have suggested that interest group opposition has not only grown, but has also been effective in preventing confirmations. The impact of interest group opposition relative to other factors is a matter of continuing study.[57]

Fear of Altering the Court. In addition to the above-mentioned reasons for not confirming a nomination, the Senate may fear altering the jurisprudential philosophy of the Court. In this case, opposition would be not only to the perceived views of the nominee, but also to the impact the nominee could have on the Court's ideological balance. The best-documented case where this factor appears to have been influential was President Reagan's nomination of Robert H. Bork. Bork was nominated to replace Associate Justice Lewis F. Powell, Jr., who had been the swing voter on an often evenly divided bench. If confirmed, Bork was expected to tip the Court to the conservative side, and some of the opposition to his nomination came from those who opposed this change.[58]

The Committee on the Judiciary and Unsuccessful Nominations

Since 1816, the Senate has had a standing Committee on the Judiciary. Prior to that development, one of the three unsuccessful nominations was referred to a select committee. Between 1816 and 1868, 11 of the 16 unsuccessful nominations were referred to the Judiciary Committee. Since 1868, almost all Supreme Court nominations, including all that were ultimately not confirmed, have been automatically referred to the Judiciary Committee.[59]

Of the unsuccessful nominations that have been referred to the Judiciary Committee, five were never reported or discharged. The first four, Henry Stanbery, Stanley Matthews, William Hornblower, and John Marshall Harlan II, are discussed above. The fifth was Homer Thornberry, nominated by President Lyndon B. Johnson to replace Justice Abe Fortas as Associate Justice when he was nominated for elevation to Chief Justice. When Fortas's nomination was withdrawn by the President, the open position for Thornberry was effectively eliminated, and his nomination was also withdrawn. At that time, the nomination had not been reported by the Judiciary Committee.

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[56] (...continued)
of Organized Interests in Federal Judicial Nominations" (paper presented at the 1996 Annual Meeting of the Midwest Political Science Association).

[57] See, for example, Jeffrey A. Segal, Charles M. Cameron, and Albert D. Cover, "A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations," *American Journal of Political Science*, vol. 36, Feb. 1992, p. 96; and Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate," *American Journal of Political Science*, vol. 42, April 1998, p. 499.

[58] Abraham, 356-359; Jacobstein and Mersky, 160-170.

[59] U.S. Congress, Senate Committee on the Judiciary, *History of the Committee on the Judiciary, United States Senate, 1816-1981*, Senate Document no. 97-18, 97th Cong., 1st Sess. (Washington: GPO, 1982), p. iv.

Although their first nominations were never reported, second nominations of Matthews, Hornblower, and Harlan in subsequent sessions of Congress were reported to the full Senate. Only in the cases of Stanbery and Thornberry did nominations that had been referred to committee fail to be reported out of committee on any occasion; both of these nominations were associated with Associate Justice vacancies that ceased to exist while the nominations were pending.

Additional Information on Nominations

This report provides two additional tables of information concerning Supreme Court nominations. **Table 3** shows, by President, the number of vacancies, number of nominations, and disposition of nominations. **Table 4** provides detailed information on the course and fate of each of the 34 unsuccessful Supreme Court nominations. A variety of sources were used to develop this table, as identified in the table notes. Although most of these sources are widely available, some, particularly older committee records, are located at the National Archives and Records Administration. Among the official sources, the *Journal of the Executive Proceedings of the Senate of the United States of America* and committee records, where available, provided the most information. Where the *Journal* showed no evidence of a debate or vote on the floor of the Senate, the indices of other official sources were also checked for evidence of any other Senate activity related to the nomination. These sources included the *Congressional Globe*, *Congressional Record, Annals of Congress*, and *Senate Journal*. Where the table indicates that there was no debate or further Senate action, there is no known official record that provides additional information. A list of related literature follows Table 4.

Table 3. Supreme Court Nominations by President, 1789-2004

President (party)	Vacancies During Presidency[a]	Nominations	Confirmed and Served	Not Confirmed	Confirmed, and Declined or Died Prior to Service
Washington (Federalist)	10	14	10	2	2
J. Adams (Fed)	3	4	3	0	1
Jefferson (Democratic-Republican)	3	3	3	0	0
Madison (Dem-Rep)	2	5	2	1	2
Monroe (Dem-Rep)	1	1	1	0	0
J. Q. Adams (Dem-Rep)	2	2	1	1	0
Jackson (Democratic)	7	8	6	1	1
Van Buren (Dem)	2	2	2	0	0
W. H. Harrison (Whig)	0	0	0	0	0
Tyler (Whig)	2	9	1	8	0
Polk (Dem)	2	3	2	1	0
Taylor (Whig)	0	0	0	0	0
Fillmore (Whig)	2	4	1	3	0
Pierce (Dem)	1	1	1	0	0
Buchanan (Dem)	2	2	1	1	0
Lincoln (Republican)	5	5	5	0	0
A. Johnson (Dem)	2[b]	1	0	1	0
Grant (Rep)	4	8	4	3	1
Hayes (Rep)	3	3	2	1	0

President (party)	Vacancies During Presidency[a]	Nominations	Confirmed and Served	Not Confirmed	Confirmed, and Declined or Died Prior to Service
Garfield (Rep)	1	1	1	0	0
Arthur (Rep)	2	3	2	0	1
Cleveland (1) (Dem)	2	2	2	0	0
B. Harrison (Rep)	4	4	4	0	0
Cleveland (2) (Dem)	2	5	2	3	0
McKinley (Rep)	1	1	1	0	0
T. Roosevelt (Rep)	3	3	3	0	0
Taft (Rep)	6	6	6	0	0
Wilson (Dem)	3	3	3	0	0
Harding (Rep)	4	5	4	1	0
Coolidge (Rep)	1	1	1	0	0
Hoover (Rep)	3	4	3	1	0
F. D. Roosevelt (Dem)	9	9	9	0	0
Truman (Dem)	4	4	4	0	0
Eisenhower (Rep)	5	6	5	1	0
Kennedy (Dem)	2	2	2	0	0
L. B. Johnson (Dem)	4[c]	4	2	2	0
Nixon (Rep)	4	6	4	2	0
Ford (Rep)	1	1	1	0	0
Carter (Dem)	0	0	0	0	0

President (party)	Vacancies During Presidency[a]	Nominations	Confirmed and Served	Not Confirmed	Confirmed, and Declined or Died Prior to Service
Reagan (Rep)	4	5	4	1	0
G. H. W. Bush (Rep)	2	2	2	0	0
Clinton (Dem)	2	2	2	0	0
G. W. Bush (Rep) 2001-2004	0	0	0	0	0
Totals	**122**	**154**	**112**	**34**	**8**

[a] Includes unfilled vacancies remaining from previous administration; some vacancies are counted for more than one administration.
[b] Both positions were abolished, one until the Grant administration, the other permanently.
[c] One of these vacancies was the expected Associate Justice vacancy created when Johnson nominated Abe Fortas for elevation to Chief Justice. When the Fortas nomination was not successful, this expected vacancy ceased to exist.

Table 4. Supreme Court Nominations Not Confirmed, 1789-2004

Nominee	President	Date nomination received in Senate[a]	Confirmation hearing date(s)[b]	Committee votes, reports, and recommendations	Date(s) of Senate debate	Final disposition (vote)
William Paterson[c]	Washington	Feb. 27, 1793	Nomination predates standing Judiciary Committee; no record of other committee referral		No record of debate	Withdrawn, message received Feb. 28, 1793
John Rutledge (for Chief Justice)[d]	Washington	Dec. 10, 1795	Nomination predates standing Judiciary Committee; no record of other committee referral		Dec. 11, 15, 1795	Rejected (10-14), Dec. 15, 1795
Alexander Wolcott[e]	Madison	Feb. 4, 1811	Nomination predates standing Judiciary Committee; referred to select committee on Feb. 7, 1811. The committee reported on Feb. 13, 1811; no record of committee hearings, vote or recommendation		Feb. 5, 6, 7, 13, 1811	Rejected (9-24), Feb. 13, 1811
John J. Crittenden[f]	J. Q. Adams	Dec. 18, 1828 (referred)	No record of hearings	Reported on Jan. 26, 1829 with the recommendation that the Senate not act on the nomination during that session	Jan. 29, 30, 1829; Feb. 2, 3, 4, 5, 9, 12, 1829	Postponed[g] (23-17), Feb. 12, 1829
Roger B. Taney[h]	Jackson	Jan. 15, 1835	No record of referral to the Judiciary Committee		Jan. 20, 1835; Feb. 2, 1835; Mar. 3, 1835	Postponed indefinitely (24-21), Mar. 3, 1835
John C. Spencer[i]	Tyler[j]	Jan. 9, 1844 (referred)	No record of hearings	Reported on Jan. 30, 1844; no record of committee vote or recommendation	Jan. 31, 1844	Rejected (21-26), Jan. 31, 1844
Reuben H. Walworth[k]	Tyler	Mar. 13, 1844 (referred)	No record of hearings	Reported on June 14, 1844; no record of committee vote or recommendation	June 15, 1844	Tabled (27-20), June 15, 1844; withdrawn, message received June 17, 1844
Edward King[l]	Tyler	June 5, 1844 (referred)	No record of hearings	Reported on June 14, 1844; no record of committee vote or recommendation	June 15, 1844	Tabled (29-18), June 15, 1844
John C. Spencer[m]	Tyler	June 17, 1844 (withdrawn on the same day)	No record of referral to the Judiciary Committee		No record of debate on the nomination	Withdrawn, message received June 17, 1844
Reuben H. Walworth[n]	Tyler	June 17, 1844	No record of referral to the Judiciary Committee		Motion to consider the nomination was objected to, June 17, 1844	No record of further action

Nominee	President	Date nomination received in Senate[a]	Confirmation hearing date(s)[b]	Committee votes, reports, and recommendations	Date(s) of Senate debate	Final disposition (vote)
Reuben H. Walworth[o]	Tyler	Dec. 10, 1844 (referred)	No record of hearings	Reported on Jan. 21, 1845; no record of committee vote or recommendation	No record of debate	Tabled, Jan. 21, 1845 (no record of vote); withdrawn, message received Feb. 6, 1845
Edward King[p]	Tyler	Dec. 10, 1844 (referred)	No record of hearings	Reported on Jan. 21, 1845; no record of committee vote or recommendation	No record of debate on the nomination	Tabled, Jan. 21, 1845 (no record of vote); withdrawn, message received Feb. 8, 1845
John M. Read[q]	Tyler	Feb. 8, 1845 (referred)	No record of hearings	Reported on Feb. 14, 1845; no record of committee vote or recommendation	Unsuccessful motion to consider nomination, Feb. 26, 1845	No further record of action
George W. Woodward[r]	Polk	Dec. 23, 1845 (referred)	No record of hearings	Reported on Jan. 20, 1846; no record of committee vote or recommendation	Jan. 21, 22, 1846	Rejected (20-29), Jan. 22, 1846
Edward A. Bradford[s]	Fillmore	Aug. 21, 1852 (referred)	No record of hearings	Reported on Aug. 30, 1852; no record of committee vote or recommendation	Aug. 31, 1852	Tabled Aug. 31, 1852 (no record of vote)
George E. Badger[t]	Fillmore	Jan. 10, 1853	No record of referral to the Judiciary Committee		Jan. 14, 20, 24, 1853; Feb. 7, 11, 1853	Postponed (26-25), Feb. 11, 1853
William C. Micou[u]	Fillmore	Feb. 24, 1853 (referred and discharged on the same day)	No record of hearings	No record of committee vote; ordered discharged on Feb. 24, 1853, the same day as referred	No record of debate	No record of action after discharge
Jeremiah S. Black[v]	Buchanan	Feb. 6, 1861	No record of referral to the Judiciary Committee		Motions to consider the nomination unsuccessful, Feb. 6, 12, 21, 1861	No record of further action
Henry Stanbery[w]	A. Johnson	Apr. 16, 1866 (referred)	No record of hearings	No record of committee action[x]	No record of debate	No record of action after referral[y]
Ebenezer R. Hoar[z]	Grant	Dec. 15, 1869 (referred)	No record of hearings	Reported adversely on Dec. 22, 1869; no record of committee vote	Dec. 22, 1869, Feb. 3, 1870	Rejected (24-33), Feb. 3, 1870

Nominee	President	Date nomination received in Senate[a]	Confirmation hearing date(s)[b]	Committee votes, reports, and recommendations	Date(s) of Senate debate	Final disposition (vote)
George H. Williams (for Chief Justice)[aa]	Grant	Dec. 2, 1873 (referred Dec. 4, 1873)	Hearings held Dec. 16, 17, 1873 after recommittal	Reported favorably on Dec. 11, 1873; no record of committee vote Hearings held after recommittal; nomination withdrawn by the President; committee returned nomination to the Senate[bb]	Debated Dec. 11, 15, 1873; nomination recommitted to the Judiciary Committee, Dec. 15, 1873	Withdrawn, message received Jan. 8, 1874
Caleb Cushing (for Chief Justice)[cc]	Grant	Jan. 9, 1874 (referred)	No record of hearings	Reported favorably on Jan. 9, 1874[dd]	No record of debate	Withdrawn, message received Jan. 14, 1874
Stanley Matthews[ee]	Hayes	Jan. 26, 1881 (referred)	No record of hearings	Addressed on Feb. 7, 1881; addressed and postponed Feb. 14, 1881[ff]	No record of debate	No record of action after committee postponement[gg]
William B. Hornblower[hh]	Cleveland	Sept. 19, 1893 (referred)	No record of hearings	Addressed on Sept. 25, 1893; October 25, 30, 1893	No record of debate	No record of further action
William B. Hornblower	Cleveland	Dec. 6, 1893 (referred)	No record of hearings	Addressed on Dec. 11, 14, 18, 1893; Reported adversely, Jan. 8, 1894[ii]	Jan. 15, 1894	Rejected (24-30), Jan. 15, 1894
Wheeler H. Peckham[jj]	Cleveland	Jan. 22, 1894 (referred)	No record of hearings	Addressed Jan. 29, 1894; Feb. 5, 6, 12, 1894; committee reportedly equally divided;[kk] reported without recommendation, Feb. 12, 1894	Feb. 15, 16, 1894	Rejected (32-41), Feb. 16, 1894
Pierce Butler[ll]	Harding	Nov. 23, 1922 (referred)	No record of hearings	Reported Nov. 28, 1922	No record of debate	Placed on the Executive Calendar on Nov. 28, 1922; No record of further action[mm]
John J. Parker[nn]	Hoover	Mar. 21, 1930 (referred)	April 5, 1930[oo]	Reported adversely, Apr. 21, 1930[pp]	Apr. 28, 29, 30, 1930; May 1, 2, 5, 6, 7, 1930	Rejected (39-41), May 7, 1930
John Marshall Harlan II[qq]	Eisenhower	Nov. 9, 1954 (referred)	No record of hearings	No record of committee vote or report	No record of debate	No record of further action[rr]

Nominee	President	Date nomination received in Senate[a]	Confirmation hearing date(s)[b]	Committee votes, reports, and recommendations	Date(s) of Senate debate	Final disposition (vote)
Abe Fortas (for Chief Justice)[ss]	L. Johnson	June 26, 1968 (referred)	July 11, 12, 16, 17, 18, 19, 20, 22, 23, 1968; Sept. 13, 16, 1968[tt]	Committee voted to approve on Sept. 17, 1968[uu]; reported favorably on Sept. 20, 1968	Sept. 24, 25, 26, 27, 30, 1968; Oct. 1, 1968	Cloture motion defeated (45-43), Oct. 1, 1968; Withdrawn, message received Oct. 4, 1968
Homer Thornberry[vv]	L. Johnson	June 26, 1968 (referred)	July 11, 12, 16, 17, 18, 19, 20, 22, 23, 1968; Sept. 13, 16, 1968[ww]	No record of committee vote or report	No record of debate	Withdrawn, message received Oct. 4, 1968[xx]
Clement F. Haynsworth, Jr.[yy]	Nixon	Aug. 18, 1969 (referred)	Sept. 16, 17, 18, 19, 23, 24, 25, 26, 1969[zz]	Committee voted 10-7 in favor of confirmation on Oct. 9, 1969[aaa]; reported favorably on Nov. 12, 1969	Nov. 13, 14, 17, 18, 19, 20, 21, 1969	Rejected (45-55), Nov. 21, 1969
G. Harrold Carswell[bbb]	Nixon	Jan. 19, 1970 (referred)	Jan. 27, 28, 29, 1970; Feb. 2, 3, 1970[ccc]	Committee voted 13-4 in favor of recommending for confirmation on Feb. 16, 1970[ddd]; reported on Feb. 27, 1970	Mar. 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 31, 1970; Apr. 3, 6, 7, 8, 1970	Rejected (45-51), Apr. 8, 1970
Robert H. Bork[eee]	Reagan	July 7, 1987 (referred)	Sept. 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, 30, 1987[fff]	5-9 against on Oct. 6, 1987; reported on Oct. 13, 1987[ggg]	Oct. 21, 22, 23 1987	Rejected (42-58), Oct. 23, 1987

[a] The date of the President's nomination and the date the nomination is received in the Senate are often, but not always, the same. As used in this column, "referred" indicates that the nomination was referred to the Senate Committee on the Judiciary on that date.

[b] The committee's deliberations were held in closed session until the early twentieth century. CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee and Senate*, by Denis Steven Rutkus.

[c] Nomination information from U.S. Congress, Senate, *Journal of the Executive Proceedings of the Senate of the United States of America*, vol. 1, pp. 134-135. (Hereafter cited as nominee, *Executive Journal*.) Paterson was later nominated again and confirmed.

[d] Rutledge, *Executive Journal*, vol. 1, pp. 194-196. Rutledge served as Associate Justice from Feb. 15, 1790 through Mar. 5, 1791. Although Rutledge was never confirmed as Chief Justice, he served in the position from Aug. 12, 1795 through Dec. 15, 1795 under a recess appointment by President Washington. ("Members of the Supreme Court of the United States," PDF document accessed at [http://www.supremecourtus.gov/about/about.html], visited Aug. 9, 2001.)

[e] Wolcott, *Executive Journal*, vol. 2, pp. 165-67.

[f] Crittenden, *Executive Journal*, vol. 3, pp. 622-623, 636-639, 643-644.

[g] Although the Senate did not take up a motion to "postpone indefinitely," as it did on other similar occasions, it passed a resolution which had the effect of postponing. (See Crittenden, *Executive Journal*, vol. 3, p. 644.)

[h] Taney, *Executive Journal*, vol. 4, pp. 459, 463, 465, 484. Taney was later nominated for Chief Justice and confirmed.

[i] Spencer was the subject of two nominations not confirmed. Information concerning the first nomination can be found at *Executive Journal*, vol. 6, pp. 207-208, 227, 229.

[j] In 1844 and 1845, President John Tyler forwarded nine nominations involving only five men. Eight of the nine were not confirmed. Of those nominees who were not confirmed, Walworth was nominated three times, Spencer and King were nominated twice, and Read was nominated once. Samuel Nelson was nominated once and confirmed.

[k] Walworth was the subject of three nominations not confirmed. Information concerning the first nomination can be found at *Executive Journal*, vol. 6, pp. 243-244, 332, 344-345, 353.

[l] King was the subject of two nominations not confirmed. Information concerning the first nomination can be found at *Executive Journal*, vol. 6, pp. 306, 332, 345.

[m] Spencer, *Executive Journal*, vol. 6, pp. 353-354.

[n] Walworth, *Executive Journal*, vol. 6, p. 354.

[o] Walworth, *Executive Journal*, vol. 6, pp. 355, 357, 387, 391.

[p] King, *Executive Journal*, vol. 6, pp. 355, 357, 387, 392.

[q] Read, *Executive Journal*, vol. 6, pp. 392, 396.

[r] Woodward, *Executive Journal*, vol. 7, pp. 10, 36-38.

[s] Bradford, *Executive Journal*, vol. 8, pp. 440-441, 448, 452.

[t] Badger, *Executive Journal*, vol. 9, pp. 10, 18-20, 26-28, 34. President Millard Fillmore indicated that he regarded the postponement of the Badger nomination as "equivalent to a rejection" in his message nominating William C. Micou (p. 34).

[u] Micou, *Executive Journal*, vol. 9, pp. 34-36.

[v] Black, *Executive Journal*, vol. 11, pp. 260-261, 271, 278.

[w] Stanbery, *Executive Journal*, vol. 15, part 1, pp. 720-721.

[x] Senate Judiciary Committee minutes are available for the session during which this nomination was pending. Specific information regarding this nomination or any other nomination, however, was not recorded. See U.S. Congress, Senate Committee on the Judiciary, "Senate Judiciary Committee, 39th-40th Congress, 1st sess.: Minutes," RG 46.15, U.S. National Archives.

[y] There is no record of action on this nomination. The Associate Justice position to which Stanbery was nominated was eliminated by statute after his nomination. He was nominated and confirmed for U.S. Attorney General in July 1866.

[z] Hoar, *Executive Journal*, vol. 17, pp. 314, 316, 328-330.

[aa] Williams, *Executive Journal*, vol. 19, pp. 119, 166, 183, 188-189, 210.

[bb] The date of this action is not specified in committee records. See U.S. Congress, Senate Committee on the Judiciary, "Papers re Nominations (P-W)," drawer Sen: 43B-A5 12, RG 46.15, U.S. National Archives.

[cc] Cushing, *Executive Journal*, vol. 19, pp. 212-213, 218.

[dd] The official vote of the committee is not reported. According to one press account, the committee was unanimous ("The Chief Justiceship," *New York Tribune*, Jan. 10, 1874, p. 1), while another reported a waiving of the formal referral of the nomination ("The Chief Justiceship," *New York Times*, Jan. 10, 1874, p. 1).

[ee] Matthews, *Executive Journal*, vol. 22, p. 469.

[ff] According to committee minutes, "The nomination of Stanly [sic] Matthews was taken up and on motion the further consideration of same was postponed until next Monday [Feb. 21, 1881]." The committee minutes contain no further report of action on the nomination during the remaining days of the 46th Congress. (U.S. Congress, Senate Committee on the Judiciary, *Senate Judiciary Committee 46th-48th Congress, 1st Session*: *Minutes*, pp. 53-54.)

[gg] Matthews was later nominated by President James A. Garfield and confirmed.

[hh] Hornblower was the subject of two nominations not confirmed. The first was at the end of the first session of the 53rd Congress, and the second was at the beginning of the second session of the same Congress. *Executive Journal*, vol. 29, part 2, pp. 138, 142, 243, 251, 339, 352-353.

[ii] The official vote of the committee was not recorded. The *New York Times* reported the vote as 7-4 against ("Unfavorable to Mr. Hornblower," *New York Times*, Jan. 9, 1894, p. 1), and the *New York Tribune* reported 5-3 against ("To Reject Mr. Hornblower," *New York Tribune*, Jan. 9, 1894, p.2).

[jj] Peckham, *Executive Journal*, vol. 29, part 2, pp. 356, 408, 421-423.

[kk] The official vote of the committee was not recorded. The *New York Times* reported the vote as 5-5 ("Peckham's Friends Hopeful," *New York Times*, Feb. 13, 1894, p. 1).

[ll] Butler, *Executive Journal*, vol. 60, pp. 29, 63.

[mm] Butler was later re-nominated by President Harding and confirmed.

[nn] Parker, *Executive Journal*, vol. 69, part 1, pp. 525, 643, 655, 673, 682, 691, 695-696, 699, 705, 710, 718-722.

[oo] See U.S. Congress, Senate Committee on the Judiciary, *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States*, hearings, 71st Cong., 2nd sess. (Washington: GPO, 1930).

[pp] The official committee vote was not reported in the *Executive Journal*. The *New York Times* reported a 10-6 vote against the nomination on Apr. 21, 1930 ("Committee, 10 to 6, Rejects Parker," *New York Times,* Apr. 22, 1930, pp. 1, 23). Another source provides a different vote count, 9-8, with the same outcome (Joseph P. Harris, *Advice and consent of the Senate; a Study of the Confirmation of Appointments* [New York: Greenwood Press, 1968], p. 129).

[qq] Harlan, *Executive Journal*, vol. 96, p. 834.

[rr] Harlan was later re-nominated by President Eisenhower and confirmed.

[ss] Fortas, *Executive Journal*, vol. 110, pp. 332, 516, 521, 527, 529, 554-556, 569-570, 592.

[tt] U.S. Congress, Senate Committee on the Judiciary, *Nomination of Abe Fortas,* report to accompany the nomination of Abe Fortas, 90th Cong., 2nd sess., Exec. Rept. 8 (Washington: GPO, 1968). See also U.S. Congress, Senate Committee on the Judiciary, *Nominations of Abe Fortas and Homer Thornberry*, hearings, 90th Cong., 2nd sess. (Washington: GPO, 1968).

[uu] The official committee vote was not reported in the *Executive Journal*. The *New York Times* reported an 11-6 vote in favor of the nomination on Sept. 17, 1968 ("Fortas Approved by Senate Panel; Filibuster Looms," *New York Times,* Sept. 18, 1968, pp. 1, 13).

[vv] Thornberry, *Executive Journal*, vol. 110, pp. 332, 592.

[ww] The Thornberry hearings were conducted in conjunction with the Fortas hearings. See U.S. Congress, Senate Committee on the Judiciary, *Nominations of Abe Fortas and Homer Thornberry*, hearings, 90th Cong., 2nd sess. (Washington: GPO, 1968).

[xx] With the nomination of Abe Fortas to be Chief Justice withdrawn, there was no longer an Associate Justice vacancy.

[yy] Haynsworth, *Executive Journal*, vol. 111, pp. 590,768-770, 772-773, 776.

[zz] See U.S. Congress, Senate Committee on the Judiciary, *Nomination of Clement F. Haynsworth, Jr.*, hearings, 91st Cong., 1st sess. (Washington: GPO, 1969).

[aaa] Vote tally from U.S. Congress, Senate Committee on the Judiciary, *Nomination of Clement F. Haynsworth, Jr.*, report to accompany the nomination of Clement F. Haynsworth, Jr., 91st Cong., 1st sess., Exec. Rept. 91-12 (Washington: GPO, 1969); date of vote from U.S. Congress, Senate Committee on the Judiciary, *Legislative and Executive Calendar*, 91st Cong., 1st and 2nd sess. (Washington: GPO, 1970), p. 434.

[bbb] Carswell, *Executive Journal*, vol. 112, pp. 1, 79, 117, 121, 125, 127-130, 139-141, 144-148.

[ccc] See U.S. Congress, Senate Committee on the Judiciary, *George Harrold Carswell*, hearings, 91st Cong., 2nd sess. (Washington: GPO, 1970).

[ddd] Vote tally from U.S. Congress, Senate Committee on the Judiciary, *Nomination of George Harrold Carswell*, report to accompany the nomination of George Harrold Carswell, 91st Cong., 2nd sess., Exec. Rept. 91-14 (Washington: GPO, 1970); date of vote from U.S. Congress, Senate Committee on the Judiciary, *Legislative and Executive Calendar*, 91st Cong., 1st and 2nd sess. (Washington: GPO, 1970), p. 442.

[eee] Bork, *Executive Journal*, vol. 129, pp. 493, 665, 669-771.

[fff] See U.S. Congress, Senate Committee on the Judiciary, *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, hearings, 5 parts, 100th Cong., 1st sess. (Washington: GPO, 1987).

[ggg] U.S. Congress, Senate Committee on the Judiciary, *Legislative and Executive Calendar*, S.Prt. 100-153, 100th Cong., 1st and 2nd sess. (Washington: GPO, 1989). See also U.S. Congress, Senate Committee on the Judiciary, *Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court*, report to accompany the nomination of Robert H. Bork, 100th Cong., 1st sess., Exec. Rept. 100-7 (Washington: GPO, 1987).

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