Caveat Emptor, lessons from the Eisenhower presidency: a comprehensive overview of the politics of judicial appointments and Ike's three "Biggest Damn-Fooled Mistakes"

Zachary Kaufman

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Caveat Emptor: Lessons from the Eisenhower Presidency
A Comprehensive Overview of the Politics of Judicial Appointments and Ike’s Three “Biggest Damn-Fooled Mistakes”
Zachary Kaufman

Abstract

This project looks into one of the most profoundly important aspects of a president’s job, namely, making appointments to the Supreme Court. Article II of the Constitution tasks the president with appointing justices to the Supreme Court, by and with the advice and consent of the Senate, but gives little further instruction as to what that might entail. Over time, both the executive and legislative branches have forged their own paths in what has become a fairly complex and extraconstitutional governmental process. By shedding light on the factors that presidents take into account when making such nominations, this paper seeks to examine what can happen when part of that process goes awry, specifically, by looking at President Eisenhower’s three botched appointments of Justices Warren, Brennan, and Whittaker. In Eisenhower’s view, two of the three were viewed as political or ideological mistakes, and the third has widely been regarded as a failure by historians and scholars of the Court for other reasons. This thesis delves into the stories surrounding these three appointments, with the intent of extrapolating how the appointments came to be. It examines the roles of Eisenhower and his Attorney General, Herbert Brownell, and seeks to analyze the decision-making style of the Eisenhower administration and learn how, if at all, Eisenhower’s military experience may have contributed to his “three greatest mistakes.”
Acknowledgements

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The Politics of Judicial Appointments

I. Introduction

The president of the United States has often been referred to as “the most powerful man in the world.” He is the commander-in-chief, head of state, leader of his political party, public opinion molder, legislative agenda setter, and so much more. One of his more significant powers as president, though, is the selection and appointment of justices to the Supreme Court. The reason that this particular decision is so vitally important is because a justice, once confirmed by the Senate, sits on the Supreme Court for a life term, which for some, has lasted for thirty years or more. Consequently, when a president has the opportunity to make an appointment to the Supreme Court, he is potentially making a decision that will affect the laws and policies of the United States for decades. For some presidents, however, appointments to the Supreme Court have been considered as major regrets or mistakes. There is no one for whom this holds truer than for President Dwight D. Eisenhower.

Over the course of his presidency, Eisenhower made five appointments to the Supreme Court. Of these five, arguably, three were major blunders. But how did one of the most important decisions and responsibilities that a president is faced with get so bungled, not once, not twice, but three times? Over the course of this paper, I will seek to answer this mystifying question by looking carefully at the deliberative selection processes of the Eisenhower Administration with respect to the nominations of Earl Warren, William J. Brennan, Jr., and Charles Evans Whittaker to
the Supreme Court, in order to determine what was the central cause behind these apparent colossal mishaps.

Two of the three, Warren and Brennan, had ideologies and voting records on the High Court that contrasted rather sharply with that of their nominator, and the third, Whittaker, suffered a serious mental breakdown from the pressures that came with the job and resigned after a few short years. Did Eisenhower expect this kind of behavior from these justices when he appointed them? What was he thinking when he nominated them to the Court? Were these mistakes the result of poor vetting on the part of the president and his advisers or was it something else? How could such an effective administrator as Eisenhower botch such a pivotal decision no less than three times? Were the nominations of Warren, Brennan, and Whittaker really the “mistakes” that Eisenhower and his advisers claimed that they were? All of these mystifying quandaries will be addressed over the course of this comprehensive examination of the intricate and vitally important presidential task of selecting and appointing members to the Supreme Court of the United States. As we shall see, the answer to these questions ultimately reside in the type of man that Eisenhower was, the life experiences that informed the type of president that he would become, and the political climate he presided over.
II. Constitutional Origins

Before we can begin to understand what went so painfully wrong for Eisenhower, it is necessary first to understand the origins of the process for appointing Supreme Court justices. Much as for everything else in American government, the Constitution remains the best place to begin to understand the basic structure and processes. On the question of who should nominate justices to the Supreme Court, Article II, Section Two simply reads: “and he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...judges of the Supreme Court.”¹ No requirements for the office are presented; not age (as with the President and Congress), not even prior legal training.

Selecting justices had proved to be just one of many points of contention amongst the delegates tasked with revamping the failed Articles of Confederation. Perhaps the fact that thirty-four of the fifty-five delegates assembled in Philadelphia in the summer of 1787 for the Second Constitutional Convention were lawyers, led to a divergence of opinion as to what role the federal judiciary ought to hold in the new government and how its members ought to be selected.² History has provided us with several examples, Bush v. Gore probably being the most famous, of why the appointment process is such a serious one. Certain decisions handed down by the Supreme Court have arguably been decided along partisan lines, and so who in government enjoys the power of placing members on the High Court has proven to

be of great consequence. But how did the delegates come to decide on the language we see today in the Constitution?

The delegates spent the better part of twelve days, spread over June, July, August, and September of 1787, at the Constitutional Convention trying to find a solution for how federal judges should be appointed. The central issue that inspired the most intensive debate concerned the degree of power that was to be vested in the executive and the extent to which the legislative branch, by way of the Senate, would participate in the process. Some ideas that were proposed included judicial selection by an executive elected by the legislature (William Paterson’s “New Jersey Plan”), thereby conferring the Senate with exclusive power to appoint judges, and James Madison’s proposal of appointment by the president subject to two-thirds of the Senate’s disapproval. Many of the delegates, such as John Rutledge of South Carolina, having just fought a bitter war to overthrow King George, were fearful of placing such an important power in the hands of a “monarchical” executive. These fears seemed to have been allayed with the proposal of having the responsibility shared with the upper house of the legislature, and it was ultimately agreed that the Congress should be given a role in the judicial appointment process. Much debate ensued, though, as to the actual extent of legislative participation.

The records of the Constitutional Convention are not wholly adequate due to the desire of the delegates to have the proceedings held in secret; the controversial

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nature of their business dictated that secrecy would be of paramount importance. Nonetheless, William Jackson, the appointed Secretary of the Convention, was tasked with recording the minutes of the Constitution, and other individual members recorded the details of the proceedings on their own. Accordingly, we have a somewhat cogent idea of what transpired at the Convention and what led to the finished product we have today.

At the Constitutional Convention, delegates debated for months, often with very little progress, as to where the power to appoint justices to the judiciary ought to reside. There were three primary viewpoints at the convention concerning the proper degree of legislative participation in the judicial appointment process. Charles Pinckney of South Carolina, Roger Sherman of Connecticut, and William Paterson of New Jersey were all of the opinion that the bulk of the responsibility of appointing members to the “Supreme Tribunal” ought to reside with the Congress.\textsuperscript{6} They believed that this would lead to a judiciary that was representative of all the diverse geographic regions of the country.

James Wilson, one of the most influential delegates at the Convention, wholeheartedly disagreed. Wilson, a delegate from Pennsylvania and a future Supreme Court Justice, was an outspoken critic of giving the entire Congress such a powerful voice in the process. According to Madison’s notes from the Convention, Wilson thought that delegating much of the responsibility to both bodies of Congress would lead to “intrigue, partiality, and concealment.”\textsuperscript{7} Wilson believed that vesting such a powerful decision in the hands of Congress, an institution that was

\textsuperscript{6} Farrand 121.
\textsuperscript{7} Farrand 119.
expected to be partisan and highly political, was not an appropriate mechanism for selecting justices to what was supposed to be an independent Court, not beholden to political majorities.

James Madison concurred that the proposal to have justices selected by Congress was problematic, but he preferred a different solution. In his view, “[m]any of them [members of Congress] were incompetent judges of the requisite qualifications...they were too much influenced by their partialities.” According to his own personal records, Madison feared the possibility that a judge who “had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations but possessed of every necessary accomplishment.” Instead, Madison argued that the power to appoint should be given only to the Senate, the more select and less numerous body, which could evaluate candidates more competently than the House.

Ultimately, it was Nathaniel Gorham, a delegate from Massachusetts, who proposed the system we have in place today. Gorham argued that the appointment process for federal judges should be modeled after the appointment process used in Massachusetts, which entailed a nomination by the executive and subsequent

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8 Farrand 232.
9 Farrand 232.
approval by the Senate.\textsuperscript{11} Gorham argued that the Senate was “too numerous, and too little personally responsible, to ensure a good choice.”\textsuperscript{12} On the other hand, according to Gorham, the executive “would certainly be more answerable for a good appointment, as the whole blame for a bad one would fall on him alone.”\textsuperscript{13} Thus, motivated by the system already in place in his home state of Massachusetts, Gorham proposed that the executive would appoint justices, by and with the advice and consent of the Senate. Initially, the delegates failed to pass Gorham’s proposal and the debate raged on for a number of weeks without resolution. It was not until the Special Committee on Postponed Matters recommended appointment by the executive with the advice and consent of the Senate that the delegates finally adopted the proposal, interestingly, without much fanfare or dissent.\textsuperscript{14}

Although it had been definitively codified in the Constitution that the President and the Senate would jointly share the responsibility of appointing justices to the Supreme Court, there was still a considerable amount of confusion concerning the Framers’ intent for the Senate’s actual participation in the process. While the delegates had finally come to agreement on the wording of the appointment clause, there was not much discussion as to how the proposal would be carried out in practice. On one side stood those who favored an expansive role for the Senate, in which it would have the right or responsibility to reject a president’s unqualified or otherwise undeserving nominees. That the delegates ultimately

\begin{thebibliography}{9}
\bibitem{11} “Constitutional Origins of the Federal Judiciary”, \textit{Federal Judicial Center}, at \url{http://www.fjc.gov/history/home.nsf/page/index.html} (Date Visited: 14 October 2012)
\bibitem{12} Ross.
\bibitem{13} Ibid.
\bibitem{14} Ibid.
\end{thebibliography}
endorsed the idea of “advice and consent” suggests that the Framers thought it imperative that the Senate be included in the process and that they did not envision a passive role for the Senate. On the other hand, some delegates, believed in a much more limited role for the Senate with respect to making judicial appointments.

Articulating this viewpoint in Federalist #76, Hamilton wrote,

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\text{[i]t is not very probable that his (the president's) nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them...}^{15}
\]

Since the Senate had no way of ensuring that its preferred nominee would ever be selected by the president in the event that it was to reject his choice, there would be no real purpose for the Senate to invoke its veto power with respect to judicial appointees. Instead, Hamilton saw the Senate’s role in the judicial selection process to serve as nothing more than a “silent operation,” in which the president would be forced to choose a truly proper nominee, lest he suffer rejection in the Senate.\(^{16}\)

Ultimately, that the appointment clause appears in Article II with the powers of the executive, as opposed to Article I, which lists the powers delegated to the legislature,

\(^{15}\) Alexander Hamilton, “Federalist #76,” in The Federalist Papers, para. 7. At http://thomas.loc.gov/home/histdocs/fed_76.html

\(^{16}\) Epstein and Segal 19.
serves to indicate that the Framers wanted the bulk of the responsibility to reside with the President as opposed to the Senate.¹⁷

One final thing to consider with respect to the concept of “advice and consent” might be the degree to which the Senate truly ought to exercise this duty. Some scholars have raised the issue that the Senate should be more aggressive with respect to judicial appointments than for other types of presidential appointments. For as Robert Dahl has noted, since the President and the Senate, in their respective roles in the judicial appointment process, serve as the only check on an otherwise independent judiciary, perhaps the nomination of a judge deserves more scrutiny by the Senate than, say, an ordinary cabinet appointment.¹⁸ After all, the cabinet members report to the president and assist him with the management of his administration, and thus, he should be able to name his team, subject only to broad limitations. Over the years, the Senate has reacted to this question by crafting its own unique niche in the complex process of judicial appointments, in which its role greatly exceeds the narrow confines of “advice and consent” as established by the Framers in the Constitution.

¹⁷ Epstein and Segal 18.
Part III – Extraconstitutional Considerations

Nowadays, most of the ritual for nominations to the Supreme Court is *extraconstitutional*, or beyond the prescriptions provided by the Constitution. The reason that this is so is probably because the Constitution offered no real detailed methodology for how presidents should select nominees and how the Senate was meant to exercise its “advise and consent” role. Consequently, over time, the executive and the Senate have come up with their own processes that, by and large, have endured until today. Generally speaking, the Senate enjoys a greater role in the process than was probably originally intended by the Framers. While the president is widely seen as having broad discretion in nominating the justices of his choosing, the Senate has assumed a more active role by way of the Senate Judiciary Committee and more recently, by preventing nominations from coming to a vote on the Senate floor, on one occasion, via the procedural barrier known as the filibuster.

The committee structure of Congress that is widely believed to be a more efficient and productive way for it to handle its business, is not found anywhere in the Constitution. To be sure, though, the Constitution did allow the bodies of Congress to devise their own bylaws governing procedure and structure within each respective house, for as Article I, Section V, Cl. 2 of the U.S. Constitution simply states, “[e]ach House may determine the rules of its proceedings.”19 Most of the rules have been codified over centuries in what has become known merely as “House

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19 U.S. Constitution, Art. I, sec. 5, cl. 2
Rules” and “Standing Rules of the Senate.” While the committee structure utilized by Congress has been around since the founding, albeit on a smaller scale, the number of committees in Congress exploded around the time of the Civil War, as a result of massive population increases and economic growth. As more and more areas came under the purview of Congress, the use of committees was seen as a way to boost efficiency and allow for increased specialization. Although the Senate Judiciary Committee had been created as a standing committee in 1813, it was not until the latter half of the nineteenth century that the committee pursued a more active role in the judicial appointment process.

Over the past two centuries, the Senate failed to confirm twenty-seven of the one hundred forty-seven nominees to the Supreme Court; twelve were rejected outright and another fifteen were defeated by inaction on the part of the Senate. Whereas many Americans tend to view the botched Bork nomination of the 1980's as an anomaly in which the Senate lashed out against a high-profile conservative nominee, in fact, the Senate had been rejecting nominees since the founding. Indeed, the Senate rejected two otherwise highly qualified Supreme Court nominees as early as 1795 and 1811, when the Senate, for seemingly political and ideological reasons,

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22 Ibid.
23 Epstein and Segal 20.
rejected John Rutledge, a Washington appointee, and Alexander Walcott, a Madison appointee, respectively.24

Washington initially appointed Rutledge as Associate Justice in 1791. He greatly admired Rutledge, whom he referred to as the “man who wrote the Constitution,” and wanted to appoint him as Chief Justice but instead opted for John Jay, in an honorable gesture to New York for playing a decisive role in the ratification process.25 After several months, Rutledge resigned and assumed the position of Chief Justice of South Carolina, his home state. When Chief Justice Jay resigned in 1795 to run for governor of New York, Washington sought to re-nominate Rutledge to replace him. Rutledge became the second Chief Justice to take to the bench as a recess appointment, a post he held for about four months. When the Senate reconvened in December, 1795, it voted to oust Rutledge by a vote of 10:14, the only Justice on record among the fifteen who functioned as recess appointments, who was not subsequently confirmed by the Senate. Although several theories abound as the why the Senate rejected Rutledge, there is a consensus that the Senate tossed out the recess appointment due to Rutledge’s outspoken opposition to the Jay Treaty, which had been popular in the Senate and which it proceeded to ratify within months.26

Several years later, in 1811, the Senate rejected Madison’s appointment of Alexander Wolcott to fill the seat of Justice Samuel Chase, by a vote of 9:24, the

25 Abraham 73.
26 Ibid.
largest margin of defeat for a Supreme Court justice to date.\textsuperscript{27} Wolcott, a Democrat-Republican like Madison, was very unpopular in the Senate due to his previous position as U.S. Collector of Customs.\textsuperscript{28} Wolcott’s strong enforcement of the controversial Embargo and Non-Intercourse Acts, combined with his lack of judicial experience, led to his defeat.

Hence, the history of an active role for the Senate in confirming or rejecting presidential nominees to the Supreme Court has an early origin. Then-Senator Joe Biden, Chairman of the Senate Judiciary Committee from 1987 to 1995, expressed this sentiment during the spirited Bork confirmation hearings, when he was accused of leading an unprecedented challenge against the Reagan nominee. In his disagreement with the claim that the Senate ought to have a small role in the process, Biden pointedly argued,

\begin{quote}
[I]t appears that some of those who are advocating the voicing of concern for judicial independence here really mean a judicial appointment process that is independent of the Senate. They seem to suggest that the Senate should play no role in determining who sits on the Court. That advice and consent, they seem to be saying, is fine so long as the Senate always agrees and consents to the President’s first choice. Mr. President, that is not our Constitution, and that is not our history…\textsuperscript{29}
\end{quote}

To be sure, though, the Senate has not always been aggressive in its role of “advice and consent.” Nonetheless, it is clear that the idea of an only recently active role for

\textsuperscript{27} Abraham 88.
\textsuperscript{28} Henry B. Hogue, \textit{Supreme Court Nominations Not Confirmed, 1789-2007} (Congressional Research Service, 2008) at \url{http://www.fas.org/sgp/crs/misc/RL31171.pdf}.
the Senate in the judicial appointment process is merely myth and nothing more, although the techniques used by the Senate have certainly evolved over time.

Broadly speaking, the means by which the Senate has gotten involved in the process of judicial appointments have been through the Senate Judiciary Committee, the use of filibusters and preventing floor votes on a particular nominee, and the norm of senatorial courtesy (typically invoked, though, regarding appointments to lower federal courts). It is virtually impossible for the Senate to vote on a nominee without a favorable recommendation from the Senate Judiciary Committee.\(^{30}\) When a president makes a nomination, generally the committee will schedule confirmation hearings at which its members will subject the nominee to a litany of questions pertaining to credentials, jurisprudence, legal theory, and his or her views on various political issues. The committee will then either approve a nominee, paving the way for consideration by the whole body, or reject a nominee, essentially ensuring the candidate and the president certain defeat. However, a third option exists whereby the chairman of the committee does not schedule confirmation hearings, effectively killing the nomination before the nominee “gets his day in court.” Take, for example, the 1990’s, when the Senate Judiciary Committee granted hearings to ninety percent of President Clinton’s circuit court nominees when the Senate was under Democratic control. That figure dropped to 74%, then 79%, and finally 47% in the Republican-led sessions of 1995-96, 1997-98, and 1999-2000, respectively.\(^{31}\) The Senate has used this strategy more often with respect to lower courts than with the Supreme Court, but it is clear that the Senate has used the

\(^{30}\) Epstein and Segal 25.

\(^{31}\) Ibid.
Senate Judiciary Committee to guarantee itself a say in the judicial appointment process with great efficacy.

The Senate has also utilized the infamous filibuster at least on one occasion in recent history to block a nominee from coming to a floor vote. In 1968, when it became clear that Richard Nixon would win the presidential election, a coalition of Southern Democrats in the Senate utilized the filibuster to prevent President Johnson from seeking to elevate his close friend, Justice Abe Fortas, to the position of Chief Justice.\(^{32}\) The filibuster was successful, Fortas’s confirmation was never brought to a floor vote, Nixon won the election, and a more judicially conservative Warren Burger became the fifteenth Chief Justice of the United States.

The norm of senatorial courtesy has generally only been used with respect to judicial appointments to federal circuit and district courts, whereby if the two senators (or the senior senator of the president’s party) from the home state of the appointee oppose the nomination, the chances of confirmation are next to nil. On several rare occasions, though, Senators trying to block Supreme Court nominees have invoked senatorial courtesy. In 1844, Reuben Walworth of New York, a Tyler (Whig) nominee, was rejected after both Democratic Senators from New York opposed the nomination, likely due to the lack of support Tyler engendered among congressional Democrats. Again, in 1845, George Woodward of Pennsylvania, a Polk (Democrat) nominee, was rejected after the Democratic Senator from Pennsylvania declared his fellow Pennsylvanian “personally objectionable,” probably due to Woodward’s outspoken nativist tendencies and his role in the 1837 Pennsylvania

\(^{32}\) Epstein and Segal 25.
Constitutional Convention. At the convention, Woodward took a controversial hardline stance on restricting voting rights and the ability for foreigners to hold government office. In both instances, an age-old customary practice in the Senate was employed to deny the president his nominee to the Supreme Court. In any event, it is quite clear that with respect to the judicial appointment process, the Senate has crafted a larger role for itself, primarily through extraconstitutional means, than the simple constitutional prescription for “advice and consent” allowed.

Any discussion of the extraconstitutional aspects of the judicial appointment process would be incomplete without, at least, a passing mention of the increasingly large role occupied by the media and interest groups. Until the early- to mid-twentieth century, the nomination process largely took place behind closed doors, far away from the prying eyes of the media and the public. Confirmation hearings were not open to the public until 1916, when the Senate was considering Louis Brandeis, and only in 1955 did the bulk of all Supreme Court confirmation hearings begin to take place before the Senate Judiciary Committee, which only started to televise its hearings in 1981. This gradual process has led to a heightened interest from the public with respect to the confirmation of Supreme Court nominees. Accordingly, the media have made it their business to provide coverage of the proceedings, while also over time becoming part of the process themselves, by helping to unearth controversies that might otherwise have gone unnoticed.

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33 Abraham 28.
35 Yalof 14.
Coinciding with the heightened public interest in the Supreme Court appointment process has been the rise in power of the organized bar and greater participation in the process by interest groups. In 1947, the American Bar Association’s Standing Committee on the Federal Judiciary was founded “to promote the nomination of competent persons and to oppose the nomination of unfit persons.” With different administrations giving larger and smaller roles to the ABA, the group generally gave ratings to each of the nominees put forward by the president, and naturally, the nominees with favorable ratings would sail through confirmation hearings and those with less than favorable ratings encountered a more difficult path. Beginning in 1954 with Eisenhower’s nomination of Justice Harlan, the ABA has formally reviewed all Supreme Court nominees for the Senate Judiciary Committee, enjoying an effective veto power over any nominee it disliked—something that the Framers certainly did not envision.

In March, 2001, though, President George W. Bush announced that his administration would no longer allow the ABA to prescreen judicial candidates before their nominations are made public and forwarded to the Senate. The Bush administration believed that given the ABA’s propensity to take public positions on “divisive political, legal, and social issues that come before the court,” it was “particularly inappropriate” to allow the ABA to have a “quasi-official role” in judicial evaluation. While some have argued that the Bush administration cut the ABA loose merely because it took the wrong public positions on issues that came

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36 Yalof 15.
37 Ibid.
before the court, it was entirely within Bush’s prerogative to end the ABA’s prescreening of judicial candidates, although the ABA continues to issue “grades” on judicial nominees, which surely are respected in the halls of the Senate.

In addition to the ABA, other powerful interest groups have also become part of the appointment process, lending support or providing opposition to prospective judicial nominees. The influence of interest groups on the appointment process has risen in recent years and is directly correlated to the heightened attention given to the appointment process by the media, although the involvement of interest groups is not entirely a new phenomenon by any means. Organized business and labor groups, such as the National Grange and the Anti-Monopoly League, figured prominently in the defeat of President Rutherford B. Hayes’s nomination of Stanley Matthews to the Supreme Court in 1881.39 For much of the 1870’s, the Grange was successful in lobbying various state governments to pass “Granger” laws regulating railroads and railroad monopolies. As the laws began coming under review before the Supreme Court, the Grange feared that if Matthews were to be confirmed, he would complete a new majority on the Court that would strike down the regulations. While still in the Senate, Matthews was an ardent supporter of the railroad industry, and it was assumed that he would continue his support, if he were successfully appointed to the Supreme Court.40 Accordingly, the Grange mobilized their supporters and successfully lobbied the Senate to prevent the Matthews confirmation vote from coming to the floor, effectively killing the nomination.

39 Yalof 16.
More recently, organized interests have also featured prominently in the famous Bork nomination of 1987. Interest groups on the left and the right tried to heavily influence the confirmation of Reagan’s famous nominee by trying to paint a picture of what Justice Bork would look like. Groups on the left, such as the National Women’s Law Center, the NAACP Legal Defense and Education Fund, and the National Abortion Rights Action League, publicized Bork’s writings and controversial opinions on abortion and civil rights.\(^{41}\) Similarly, groups on the right, such as the American Conservative Union, Coalitions for America, and Concerned Women for America, tried to focus on Bork’s qualifications and his less-extreme legal opinions.\(^{42}\) Ultimately, Bork was defeated, and in no small part his defeat can be attributed to the lobbying efforts of organized interest groups.

All things considered, it is easy to see how the intricate process of appointing judges to the federal judiciary, and certainly to the Supreme Court, is very different from the simple prescription found in Article II, Section Two of the Constitution. It is also quite evident that there has been considerable activity on the part of the Senate pertaining to the judicial appointment process that marks a departure from the small “advice and consent” role envisaged by the Framers. Nonetheless, the process that exists today reflects a larger role for the Senate to coexist and influence the make-up of the Supreme Court – something that history has proved to be a rather important power. It remains to be seen, however, how exactly, if at all, this evolved process has changed the quality of the appointed justices or the make-up of


\(^{42}\) Ibid.
Supreme Court, and how, if at all, this evolving process factored in to President Eisenhower's botched appointments to the Court.
Part IV – Judicial Qualifications

In order properly to understand what went wrong with President Eisenhower’s judicial appointees, it might be useful to examine what has been the traditional course of action for presidents with respect to this important task of nominating judges to the Supreme Court. So, what factors or qualifications do presidents typically look for in a prospective justice?

One unique aspect of the judicial appointment process in the United States that sets it apart from other countries is the lack of constitutional or statutory guidelines for appointing judges. In Italy, for example, to be appointed to serve on the Constitutional Court, one must have previously served as a judge, been a university professor of law, or practiced as a lawyer for at least twenty years.\textsuperscript{43} In Spain, appointees to the Supreme Court must have previously served as a magistrate or prosecutor, a university professor, a public official, or a lawyer – and “must be jurists of acknowledged competence with at least fifteen years of professional experience.”\textsuperscript{44} In the United States, however, the Constitution and subsequent legislation relating to the judiciary are silent on the matter of qualities to be possessed by a judicial appointee. Accordingly, with tradition being the one possible exception, there are virtually no constraints governing who a president may appoint to the Supreme Court, giving him a great deal of liberty in the appointment process.

What, then, has guided presidents in their appointments? Broadly speaking, all presidential appointments have fit into four or five categories describing the

\textsuperscript{43} Epstein and Segal 68.
\textsuperscript{44} Ibid.
motivating factors behind each appointment. These categories, in no particular order, are electoral or partisan goals, ideological affinities, personal friendship, and balancing the “representativeness” of the Court, i.e., having the Court mirror the composition of the general population.\textsuperscript{45} Sometimes, presidents are also driven to appoint certain judges because of an “objective merit” that the appointee is said possess, as was the case when Republican President Herbert Hoover appointed Democrat Benjamin Cardozo, a man of outstanding accomplishments and unparalleled reputation, to replace Justice Holmes in 1932.\textsuperscript{46} While the factors seem distinct, often, the appointment of a justice incorporates all of these ideas to some extent.

Contrary to the fact that prior to the 2004 presidential election, a statistically insignificant .5% of respondents to a poll asking what was the most important issue for a president to address answered “the Supreme Court,” electoral and partisan goals have certainly factored into the calculus of many presidents appointing justices to the High Court.\textsuperscript{47} Presidents have historically used the importance of appointing justices to the Supreme Court to their advantage on the campaign trail, sometimes turning their appointment opportunity into nothing more than merely honoring a campaign pledge. In 1980, during the course of his presidential campaign, Ronald Reagan famously pledged to appoint the first woman to the Supreme Court, and he was true to his word when he appointed Sandra Day O’Connor to replace Justice Potter Stewart within the first few months of his

\begin{flushright}
\textsuperscript{45} Abraham 5.
\textsuperscript{46} Ibid.
\textsuperscript{47} Epstein and Segal 56.
\end{flushright}
presidency.\textsuperscript{48} Some scholars have contended that Eisenhower was motivated by the importance of the Catholic vote in his 1956 re-election bid, when he instructed his trusted aide and Attorney General to find a suitable Catholic judge for his next appointment, but more on this later.\textsuperscript{49} In terms of the role that “party affiliation” plays in appointing judges, one need not look further than the staggering statistic that for the vast majority of the twentieth century, 84\% of Supreme Court nominees were of the same party as the president who nominated them.\textsuperscript{50}

Historically, presidents have also sought nominees with whom they share a common political and ideological affinity. This has been possibly the most essential quality sought after in a nominee, for presidents believe that by appointing someone like them, they will ensure a lasting impact on the Supreme Court after they leave office. For instance, Reagan who is four presidents removed from the present one, has had a lasting conservative impact on policy through his two appointees, Justices Scalia and Kennedy, who continue to serve on the Supreme Court and who impact national policy in a clear and meaningful way.\textsuperscript{51} Likewise, President Clinton has seen his politics furthered through his appointees, Justices Ginsberg and Breyer, two consistent liberal judges, who continue to serve over a decade since Clinton left office. The practice of appointing justices with a shared ideological affinity is not by any means a recent development. President Washington, who liked to think of himself as above the fray of politics, appointed only like-minded Federalists to the

\textsuperscript{49} Yalof 55.
Supreme Court. President Jefferson similarly made it his stated goal to clear the Court of the Federalists appointed by his predecessors, Washington and Adams, which he accomplished when he appointed Justice William Johnson, the first non-Federalist justice, and Justices Livingston and Todd, both of whom were non-Federalists.52

What of the personal friendship and “representativeness” factors? Presidents have always looked to close aides and confidants when tasked with filling a vacancy on the Supreme Court. In 1836, President Andrew Jackson appointed Roger Taney, his close friend and loyal adviser, as Chief Justice.53 President Truman appointed four justices, all close friends and acquaintances, including Chief Justice Fred Vinson, Truman’s “favorite poker companion.”54 More recently, President Johnson’s selection of Fortas, a close friend who continued to serve as adviser and aide during the four years he was on the Court, reiterates the point that presidents have sometimes appointed close friends to the Supreme Court.55

When looking to fill vacancies on the Supreme Court, some presidents have also been guided by the desire to make the Court’s membership more representative of the general population. Initially, presidents sought to have geographic regions represented on the Court for purely practical reasons. The Judiciary Act of 1789, the earliest embodiment of a framework for the federal judiciary, divided the fledgling nation into six judicial circuits. The first justices presided over cases in the Supreme Court but also served as circuit court judges,

52 Epstein and Segal 61.
53 Abraham 5.
54 Clark Clifford, Counsel to the President (New York: Random House, 1991) 70.
55 Yalof 90.
travelling within the circuit to hear cases. The judges were expected to serve the circuits in which they were residing prior to appointment, and thus, it made sense for presidents to appoint justices from the various geographic regions.\textsuperscript{56} Although this process changed over the years and Supreme Court justices no longer serve as circuit court judges, presidents, sometimes not so successfully, have continued to appoint judges to ensure that various geographic regions of the country felt represented on the Supreme Court.

Presidents have also taken it upon themselves to appoint justices with the goal of having a Court membership that is representative in terms of race, religion, and gender of the overall population. For years, presidents sought to retain certain “Catholic seats” or “Jewish seats” such that the makeup of the Supreme Court corresponded to the general population, with the appointments of Justices Brennan and Brandeis, serving as prime examples of this phenomenon.\textsuperscript{57} Although some presidents, such as Jimmy Carter and George W. Bush, were unable to appoint minority justices to the Supreme Court, their desire to create a more diverse judiciary may be seen more on lower federal court appointments, where presidents are understood to have considerably more leeway with whom they can appoint. President Carter appointed forty women and thirty-seven African-Americans, more than all of his predecessors combined, to district and circuit courts around the nation.\textsuperscript{58} In Bush’s first term in office, 10.4\% of his two hundred and two appointments to lower courts were Hispanic Americans, a higher percentage than

\begin{footnotes}
\item[56] Epstein and Segal 58.
\item[57] Ibid. 59.
\item[58] Ibid.
\end{footnotes}
any of his predecessors.\textsuperscript{59}

It is quite evident that presidents look at a myriad of factors when making appointments to the Supreme Court. While we have broken down the factors into distinct categories, presidents are usually more likely to choose a nominee who embodies more than one of the aforementioned qualities, thus making it difficult to say which of these factors has been more prevalent than the others. Before proceeding to examine what particular factors influenced President Eisenhower’s appointments of Justices Warren, Brennan, and Whittaker, a brief analysis of how appointees have matched up to the expectations of their appointing presidents is in order.

\textsuperscript{59} Epstein and Segal 59.
Part V – Measuring “Concordance”

When presidents submit judicial nominations to the Senate for consideration, presumably, they have selected candidates whom they believe will decide cases much as they would like them to. However, history has shown that sometimes, presidents’ appointments have yielded some wildly unpredictable justices and equally unpredictable decisions that have emanated from the very institution they sought to mold after their own image. There have been several forays into this area that have used statistical data analysis to measure “concordance,” or the degree to which justices, once appointed, have behaved in a manner that is consistent with the expectations of their nominating presidents. The vast majority of these studies seem to conclude that, by and large, most justices have conformed to the expectations of those who nominated them and that the few deviating justices seem to be the exception and not the rule.

Before one can ascertain whether justices have conformed to the expected behaviors of those who nominate them, it is necessary to determine quantifiable metrics by which to measure the ideologies or political preferences of the nominating presidents. There have been numerous studies of considerable prominence that have measured presidential preferences in several different ways. Some, such as Rhode and Spaeth, have relied on base-line metrics, such as party affiliation, to determine ideologies of presidents. Others, such as Heck and Shull, have looked to infer presidential preferences by analyzing expressed presidential

60 David Rhode and Harold Spaeth, Supreme Court Decision Making (San Francisco: Freemen Inc., 1976)
However, problems abound with both approaches. For instance, by looking at presidential preferences based merely on party affiliation, an erroneous assumption is made that all presidents who belong to the same party have the same beliefs. On the other hand, by looking at presidential statements to infer ideological preferences, statisticians are taking for granted that presidents express their true ideological beliefs in their public statements, perhaps an ideal, but not a realistic assumption.

A third way of measuring presidential preferences that hoped to evade these problems was used by Segal, Timpone, and Howard. They randomly surveyed experts on the American Presidency with the intention of placing all modern presidents, from 1937 until the time of publication on a broad conservative-liberal spectrum with respect to both social issues and economics. Although the study relies upon reputational surveys, which may sometimes yield unreliable results, political scientists have been using this surveying technique extensively to provide “valid and reliable measures of otherwise immeasurable variables.” They compiled their results in the following table:

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63 Ibid.
64 Ibid.
As depicted in the table, President Johnson was found to have had the most liberal social policies, whereas President Roosevelt was found to have had the most liberal economic policies. President Reagan, as one would assume, was found to have had the most conservative social and economic policies. The inefficacy of using the Heck and Shull metrics are clearly demonstrated when considering Eisenhower's rating of ninety-seven (extremely liberal) by their standards and Eisenhower's ratings of around thirty-seven using the Segal, Timpone, and Howard standards.

Having already shown which presidents they found to be more conservative or liberal, they then proceed to measure the liberal tendencies of the justices by looking at the percent of liberal votes cast by each justice. The evidence overwhelmingly indicated that liberal presidents tend to select liberal justices and conservative presidents tend to appoint conservative justices. Nevertheless, there
are some striking outliers that highlight several “deviating justices.” The following table contains the results of the Segal, Timpone, and Howard study:65

Clustered together in the bottom left corner are the justices with the smallest percent of liberal votes cast and corresponding to those conservative justices are the conservative presidents who appointed them. In the top right corner are found the justices with the highest percentages of liberal votes cast by justices corresponding to the liberal presidents who appointed them. Justice Stevens, a Ford appointee, Justice Souter, a George H.W. Bush appointee, Justice Blackmun, a Nixon appointee, and Justice White, a Kennedy appointee, seem to be somewhat deviant

65 Segal, Timpone, and Howard.
justices.

But perhaps the most striking cases of deviating justices seem to be two Eisenhower appointees, Justices Warren and Brennan. Of the presidents who have deviant justices, only Eisenhower has two. Both of those two deviating justices hold the two highest percentages for liberal votes cast, about seventy-seven percent for Warren and seventy-three percent for Brennan, and Eisenhower, a moderate conservative, appointed both of them. The evidence begs the question of how President Eisenhower botched these two appointments? The remainder of this paper seeks to answer this question by addressing the two appointments and analyzing the various historical and political factors associated with each of the appointments. A third troubling Eisenhower appointee, Justice Whittaker, felt so out of his depth upon his appointment that he became depressed and resigned. On its own, this tragic tale might not be of significance in answering the question of how presidents appoint justices to the Supreme Court, but when combined with the botched appointments of Warren and Brennan, it further serves to indict the judicial appointment apparatus of the Eisenhower administration. What, then, can explain the failings of Eisenhower’s appointments to the Supreme Court? As we shall see, the answer rests in a series of historical events and politically motivated decisions that left an undeniable impact on the laws and policies of the United States for the remainder of the twentieth century.
Ike’s Mistakes

I. The First Vacancy

The year was 1953, and President Eisenhower had only been in office eight months when he received word that Chief Justice Fred Vinson had died of a sudden heart attack. Vinson’s death was unexpected, it caught Eisenhower and his Attorney General, Herbert Brownell, by surprise, and it created a vacancy on the Supreme Court. Conventional wisdom holds that Eisenhower’s hands were tied with respect to his first appointment because of a promise he had made a year and a half earlier when he was running for President. In reality, though, the history of Eisenhower’s first appointment is far more complicated than just fulfilling a promise.

In his first presidential campaign, Dwight Eisenhower was somewhat of a reluctant candidate. Eisenhower, who had previously led the United States to victory in World War II, had been appointed by President Truman in 1950 to be the Supreme Commander of the North Atlantic Treaty Organization (NATO), tasked with overseeing the buildup of a NATO military force. Based out of Paris, it was a comfortable post Eisenhower enjoyed; he firmly believed in the fledgling institution and its role in preventing another world war, and felt that his presence and dedication was needed to ensure its survival. He also feared that his entry into politics as a military man might upset the American tradition of keeping the military

66 Abraham 251.
out of politics and civilian affairs. It was only after a persistent recruitment effort by leaders of the Republican Party, particularly, leaders of the Eastern Establishment wing of the party, such as Gov. Thomas Dewey, Gen. Lucius Clay, Sen. Henry Cabot Lodge, and Brownell, Chairman of the Republican National Committee, that Eisenhower agreed to consider running for President as the Republican nominee in 1952. After several encouraging signs, such as winning the New Hampshire primary, receiving over a hundred thousand write-in votes in Minnesota, and an impressively large Eisenhower-for-President rally held in Madison Square Garden in New York City, Eisenhower resigned from his NATO post and the U.S. Army on May 11, 1952 and returned to the United States to begin his fight for the Republican nomination.

The Republican National Convention began only a few months later in Chicago with what seemed to be a major rupture in the GOP. At the outset of the convention, Senator Robert Taft of Ohio, a staunch conservative, was seen as the ideological favorite among a majority of the delegates. Moreover, Taft forces dominated the Republican National Committee and many state Republican parties, bringing him a solid advantage with respect to the organization and the rules governing the convention. It was clear that the contest between Eisenhower and Taft would be a dead-heat, and the nomination would likely hinge on a small contingent of delegates committing to one side or the other. It was in this context that special attention was given to Gov. Warren, who led the California delegation,

71 Brownell 90.
72 Ibid. 103.
73 Ibid. 108.
which was seen as the key group of delegates who would decide the fate of the nomination.\textsuperscript{74} The tide had turned, though, and in Eisenhower’s favor, when the Convention voted to adopt the Fair Play Amendment, a procedural change that allowed only uncontested delegates to vote on the question of whether to seat contested delegates as permanent delegates.\textsuperscript{75}

Before the amendment passed, contested delegates temporarily placed on the convention rolls were allowed to vote themselves into becoming permanent delegates. As Taft and Eisenhower battled for the nomination, their respective forces worked on getting uncontested delegates to seat delegates friendly to them from delegate-rich contested states like Texas, Louisiana, and Georgia. After serious campaigning and tough negotiating, Eisenhower managed to get many of his delegates from all three states seated at the convention and was well on his way to victory. At the end of the first ballot, Eisenhower stood at five hundred and ninety five votes (just nine shy of clinching the nomination), Taft had five hundred, Gov. Earl Warren of California had eighty-one, Gov. Harold Stassen of Minnesota had twenty, and Gen. Douglas MacArthur had ten.\textsuperscript{76} Before the results were announced, however, Stassen surrendered the entire Minnesota delegation to Eisenhower, and Eisenhower won a majority, effectively becoming the Republican nominee for President.\textsuperscript{77}

\textsuperscript{75} Brownell 111.
\textsuperscript{76} Ibid. 119.
\textsuperscript{77} Ibid.
The story of the 1952 Republican Convention is intrinsically tied to the story of Earl Warren’s nomination to the Supreme Court. When Warren arrived in Chicago for the convention, he brought with him a delegation from California that was committed to voting for him on the first ballot. He had hoped that the ensuing stalemate between Taft and Eisenhower would lead to a brokered convention, which, in his view, might select a popular moderate, like himself. At the early stages of the convention, both Taft and Eisenhower forces tried to court Warren and the California delegation, with Taft even offering Warren the vice-presidency, a commitment he had already made to Gen. MacArthur, but which he made clear he would rescind. Warren refused, and maintained that his delegation was committed to supporting him in the first ballot. The exchange troubled him, leading him to doubt both Taft’s “sensitivity to human relations” and whether he could be elected President.

Warren was similarly disillusioned with the Eisenhower campaign’s efforts to sway the California delegation’s support in his favor. At the forefront of this maneuver was the ambitious junior Senator from California, Richard Nixon, who, according to Warren, had his supporters “hold caucuses and urge other delegates to support Eisenhower on the first ballot.” When Eisenhower ultimately clinched the nomination, Brownell asked Warren to join the committee tasked with selecting a vice presidential candidate, but Warren refused, believing it to be a “fait accompli”

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78 Warren 252.
79 Ibid.
80 Ibid. 253.
81 Ibid. 251.
that Nixon would get the nod in recognition of his efforts to steer Warren’s committed delegates towards Eisenhower.\textsuperscript{82}

Many, including Eisenhower’s biographers, Chester J. Pach and Elmo Richardson, have held that Warren’s Supreme Court nomination was the result of a commitment that was made to him at the convention.\textsuperscript{83} According to this version of events, Lucius D. Clay, one of Eisenhower’s convention managers, promised Warren a position in the cabinet in return for getting the seventy-man California delegation, which he headed, to withhold voting for Taft, thereby creating a stalemate, and to support the Fair-Play Amendment. Although Warren was indeed presented with an offer by Eisenhower’s transition team to head the Interior department, which he refused, the likelihood of such a deal being struck between Eisenhower and Warren is suspect.\textsuperscript{84}

While Warren’s support was instrumental in passing the Fair-Play Amendment, without which Eisenhower’s nomination would not have been possible, Warren never threw the support of the California delegation behind Eisenhower, even after Eisenhower clinched the nomination, contrary to popular belief.\textsuperscript{85} Moreover, there are several theories that would even give Warren considerable motivation for not backing Eisenhower at the convention, which would further suggest that no grand bargain of any sort took place. According to one theory, Sen. William Knowland, Warren’s campaign manager, had been promised by

\textsuperscript{82} Warren 254.  
\textsuperscript{84} Ibid.  
\textsuperscript{85} Brownell 119.
Sen. Everett Dirksen, a Taft supporter, that if Taft and Eisenhower deadlocked, he would swing Taft’s votes to Warren, giving Warren the nomination.\textsuperscript{86} Certainly this would have provided sufficient motivation for Warren to want to prevent Eisenhower from securing the nomination. According to another theory, Warren never gave Eisenhower his overt support because he suspected that would preclude him from taking a position in the Eisenhower administration, fearing the perception of a backroom political deal.\textsuperscript{87} Yet another view held that Warren harbored resentment towards Eisenhower for his refusal to support Warren’s opposition to loyalty oaths for faculty of state universities in California two years earlier, and thus would have not likely helped Eisenhower win the nomination.\textsuperscript{88} Still, according to Bernard Shanley, Eisenhower's special counsel, brokering such a secretive political deal was antithetical to everything that Eisenhower believed in. On the myth of the Eisenhower-Warren bargain, Shanley once said, “Eisenhower would not do that...I think he figured he’d rather lose than...get into that type of discussion. He was not a politician, and he wasn’t prepared to do it.”\textsuperscript{89} Eisenhower thought himself a morally upright individual, and, accordingly, he would have been opposed to his staff working out such a deal to secure his nomination, which would have tarnished his reputation of being an honest and widely respected military general.

Furthermore, despite Eisenhower’s refusal to use the Supreme Court as a talking point in either of his two presidential campaigns, he frequently admonished, both in public and private, the policies of Truman and F.D.R., his predecessors, of

\textsuperscript{87} Brownell 119.
\textsuperscript{88} Yalof 45.
\textsuperscript{89} Oral History interview, Bernard M. Shanley, 16 May 1975, Dwight D. Eisenhower Library
using Supreme Court appointments to reward loyalty. Eisenhower criticized the practice of awarding judgeships on the basis of “patronage” and “partisanship,” and made it clear that he intended to appoint only “individuals of the highest possible standing.” In this light, it seems highly improbable that Eisenhower would have engaged in similar practices for his first appointment to the Supreme Court, though unfortunately, hypocrisy is not foreign to politics, and Eisenhower's other Supreme Court appointments seem to portend that he was not quite as meritocratic in his selections as he might have liked to think.

Eisenhower claimed that though he was greatly appreciative of Warren’s support of the Fair-Play Amendment, he personally never believed he was indebted to him. If Eisenhower was not bound by such a secret commitment, what, then, could have led him to choose Warren to fill his first vacancy on the Supreme Court? Eisenhower's interest in Warren as a possible contender may be traced back to the transition period during which President-Elect Eisenhower and his most trusted aide, Brownell, who had been tasked with heading the transition team, worked on finding suitable cabinet members and others to fill various administration posts. Brownell, who had been offered the Attorney General position by Eisenhower on election night, was the cabinet member the President knew best upon taking office, though their association dated back just a few short months to several lengthy conversations they had when he visited Eisenhower in Paris in 1952 to implore him.

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to run in the first place.\textsuperscript{92} During a visit to his transition headquarters in December, 1952, Eisenhower concluded he would not be able to offer Warren, then-Governor of California, a position of appropriate stature in his new administration.

These positions, Attorney General and Secretary of State, had already been offered to Brownell and John Foster Dulles, respectively.\textsuperscript{93} Though Warren had also been considered for the Secretary of Interior (he was not much interested in the post), his nomination for the position would have been seen as provocative. At the time, there was a controversial dispute between California and Arizona over water rights to the Colorado River, which would have precluded a nominee from either state.\textsuperscript{94} Thus, there was no available spot for Warren in the newly formed Eisenhower Cabinet. According to Brownell,

\begin{quote}
Ike was worried that Warren might feel sort of left out...[H]e said ‘we want to keep him enthusiastic for the Eisenhower administration and if we go ahead and announce the whole Cabinet without any mention of Warren, I’m afraid he will misunderstand and feel he wasn’t a top-ranking Republican.’ He told me that he wanted to call Warren on the phone, and offer him the first available vacancy on the Supreme Court.\textsuperscript{95}
\end{quote}

If Warren did not provide any material support for Eisenhower at the 1952 Republican National Convention, what was it about Warren that led Eisenhower to make such an offer?

\textsuperscript{92} Brownell 132.  
\textsuperscript{93} Yalof 44.  
\textsuperscript{94} Brownell 175n.  
\textsuperscript{95} Yalof 44.
Although Warren was not readily supportive of an Eisenhower nomination at the convention, once Eisenhower won the nomination, Warren played an influential role in the general election campaign in the following weeks and months. After Eisenhower was nominated, Warren directed the California campaign for the Republican ticket and served as a surrogate, travelling to other parts of the country to stump for Eisenhower, despite his personal animosity for his running mate, Richard Nixon, then, a senator from California. When Eisenhower was campaigning on the West Coast, Warren frequently joined him, and the two men met regularly. Eisenhower was impressed and almost captivated by the statesmanship exhibited by Warren. He admired the degree to which Warren spoke and governed his state in a nonpartisan way, as well as Warren’s broad appeal across the political spectrum. After all, just two years earlier, both the Republican and Democratic parties had nominated Warren for a third term. It was this kind of statesmanship that appealed to Eisenhower, a fellow politician who endeavored to be a similarly nonpartisan, middle-of-the-road type president.

Having already promised Warren an appointment to the Supreme Court upon the first vacancy, Eisenhower approached Brownell in the spring of 1953, looking to fill the solicitor general position. In preparation for an eventual vacancy on the Supreme Court, Eisenhower felt it a good idea to offer the position to Warren, as an opportunity to reacquaint himself with the law, as he had not been a practicing

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96 Brownell 164.
97 Ibid.
98 Yalof 45.
attorney for almost ten years. Warren graciously accepted the offer and informed Brownell that he would begin preparations for the move as soon as he returned from his trip abroad, as part of the U.S. delegation to England for Queen Elizabeth’s coronation.

Before Warren could even begin serving as the Solicitor General, though, Chief Justice Vinson died, leaving Eisenhower with his “first vacancy” – a vacant chief justiceship. As Attorney General, Brownell was asked by Eisenhower to compile the records of four or five people whom the President seriously considered, including Warren. Although Warren had been promised “the first vacancy,” no one would have imagined that that would necessarily mean the chief justiceship, and Eisenhower was not sure how to proceed. In the president’s own words,

A few months prior to the death of Chief Justice Vinson, I had talked to Gov. Earl Warren of California...During this conversation I told the Governor that I was considering the possibility of appointing him to the Supreme Court and I was definitely inclined to do so if, in the future, a vacancy should occur. However, neither he nor I was thinking of the special post of Chief Justice nor was I definitely committed to any appointment.

Eisenhower dispatched Brownell to California to meet with Warren and assess how Warren had interpreted the earlier phone call concerning the appointment. In the meanwhile, Eisenhower instructed Brownell to continue researching the other prospective nominees, which included Chief Judge John T. Parker of the U.S. Court of Appeals for the Fourth Circuit, Chief Justice of New Jersey Arthur T. Vanderbilt, and

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99 Brownell 165.
100 Eisenhower 228.
the possible elevation of Associate Justice Robert Jackson. While vacationing in Colorado the week after Vinson’s funeral, Eisenhower wrote a letter to his brother and trusted advisor, Milton, in which he outlined his thoughts on the ideal candidate for the Chief Justiceship appointment. He wanted a man of “known and recognized integrity, of wide experience in government, of competence in the law, and of national stature in reputation so as to be useful in my effort to restore the Court to the high position of prestige that it once enjoyed.” Here, he was most likely hinting at his predecessor, Harry Truman’s, penchant for nominating friends to the Supreme Court, and in doing so, diminishing the image of the High Court, but also to the highly political and activist Court of the 1920’s and 30’s, which had seen its reputation as a respected and independent institution diminished.

Ultimately, Parker, a previously failed Supreme Court nominee in 1930, was removed from the short list because of his old age. Vanderbilt, who had suffered a recent heart attack and was perceived to be too ill for the job, was removed from the list, as well. Brownell and Eisenhower also decided against elevating Associate Justice Robert Jackson for two principal reasons. Firstly, Jackson had aroused the hostility of several important senators in his acceptance of the position for chief prosecutor at the Nuremberg Trials of Nazi war criminals while he was a sitting Supreme Court justice. Secondly, Jackson had been an advocate for F.D.R.’s

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101 Abraham 251.
103 Yalof 47; Eisenhower would later list sixty-two as the age limit for any future Supreme Court nominees. See Dwight D. Eisenhower to William D. Pawley, 26 January 1955, Official File 100-A, Supreme Court 1953-1956 File, White House Central Files, Dwight D. Eisenhower Library
104 Brownell 166.
controversial Court-packing bill when he served as Roosevelt’s Solicitor General.\textsuperscript{105} For these reasons, coupled with the fact that Jackson was viewed as somewhat of a divisive figure, who publicly feuded with Justice Black, Eisenhower and Brownell ruled out the possibility of elevating Jackson to Chief Justice.\textsuperscript{106} Thus, with no one left to consider, Warren seemed somewhat of an inevitable nominee.

The President had first become acquainted with some of Warren’s views when he and Brownell met in Paris in 1952, and had a lengthy discussion on leading figures in the Republican Party and likely candidates for the nomination. Brownell had explained to Eisenhower that Warren was an internationalist and a supporter of the United Nations, and, domestically, he was considered a progressive who supported legislation for fair-employment practices for black citizens, as well as an expansion of public health and social security programs.\textsuperscript{107} When Eisenhower appointed Warren to the U.S. delegation to attend the Queen’s coronation, he had the opportunity to briefly discuss with him his views and general political philosophy. Eisenhower found him to be a “man of high ideals and common sense.”\textsuperscript{108} Until that time, Warren and Eisenhower had discussed their political views only once, on a public television program that aired during the presidential campaign, and although they met frequently throughout the campaign, discussions were centered predominantly on the state of the presidential race.\textsuperscript{109} Looking for more information prior to what seemed to be an inevitable appointment,

\textsuperscript{105} Brownell 166.
\textsuperscript{107} Brownell 165.
\textsuperscript{108} Ibid.
\textsuperscript{109} Warren 261.
Eisenhower informed his Attorney General that he should travel to California to ascertain Warren’s interpretation of the earlier commitment and to study the Governor’s public record.

Preceding his departure to meet with Warren, Eisenhower had also relayed to Brownell the necessity for a Chief Justice to be a nonpartisan figure, someone above the “fray of politics.” Warren had been a popular and successful three-term Governor and an effective and competent administrator with a proven record as a political moderate. His national stature, another important factor for Eisenhower, as Thomas Dewey’s vice presidential running mate in 1948 and as a 1952 presidential primary candidate, added to his extensive list of qualifications. Lastly, Eisenhower wanted a chief justice with previous experience in public affairs; he needed someone who would command instant public confidence, not only for his personal integrity and professional competency, but also for his proven success in public life. With that, Eisenhower dispatched Brownell to meet with Warren.

During the secret meeting at McClellan Air Base near Sacramento, Warren made it abundantly clear to Brownell that he understood Eisenhower’s offer of “the next vacancy” to mean the very next vacancy, regardless of the type of vacancy that might occur. While meeting with Warren to learn of his interpretation of Eisenhower’s earlier commitment, Brownell also took the opportunity to interview Warren for the post. They had a discussion on the proper relationship between the executive branch, specifically the Attorney General, and the Court on the

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110 Brownell 167.
111 Ibid. 165.
112 Ibid.
administration of the federal court system. Warren seemed to indicate that despite the doctrine of separation of powers, there had to be certain areas of cooperation. For example, Warren suggested the development of programs designed to expedite judicial procedures and to eliminate backlogs in court calendars. He also believed that the president needed to expand the Judicial Conference, an administrative body of the federal court system presided over by the Chief Justice and composed at the time of senior members of various federal appeals courts, through the addition of younger federal judges.\textsuperscript{113} Brownell’s focus, in short, seems to suggest that he was more interested in Warren’s views on the administrative issues pertaining to the federal court system than on matters of constitutional jurisprudence—a glaring oversight that, if true, would seem to indicate that Eisenhower and Brownell found Warren’s judicial philosophy unimportant. Nonetheless, there is some reason to believe that Brownell, while an astute political strategist, was much more concerned with administrative issues in general. For instance, during his stint as chairman of the Republican National Committee, he was more interested in improving fundraising initiatives and ballot techniques than, say, ordinary politicking.\textsuperscript{114} Upon his return to Washington, Brownell reported to the President all that had transpired in the meeting, and the following day, Eisenhower nominated Warren to become the fourteenth Chief Justice of the United States.\textsuperscript{115}

President Eisenhower officially forwarded Warren’s name to the Senate on October 2, 1953, less than a month after Chief Justice Vinson’s death. Although

\textsuperscript{113} Brownell 168.

\textsuperscript{114} Kim Isaac Eisler, interview by the author, 14 February 2013.

\textsuperscript{115} Brownell 168.
Warren was not confirmed until many months later, on March 1, 1954, he began sitting as Chief Justice immediately. Justice Frankfurter, speaking for himself and several other members of the Court, informed the president that a number of important cases, including a rehearing of *Brown v. Board of Education*, were before the Court at the beginning of the October term, and that it was imperative for Warren to hear the cases, even though he remained unconfirmed.\footnote{Brownell 171.}

Eisenhower’s recess appointment of Earl Warren was the first of its kind in well over a century.\footnote{Yalof 50.} Article II, Section Two of the Constitution authorizes the president to fill vacancies even when the Senate is in recess, allowing the nominee to legally serve until the Senate returns to act on the nomination.\footnote{Ibid.} When Congress returned to session in January 1954, Warren’s recess appointment faced a few minor hurdles, as Republican Senator William Langer of North Dakota, Chairman of the Judiciary Committee, and a few conservative Southern Democrats on the committee attacked Warren’s “left-wing” and “ultraliberal” views.\footnote{Abraham 255.} They lodged a series of ten protests arising from Warren’s stint as California Attorney General, which included corruption charges and allegations of Warren being illegally under the influence of the notorious liquor lobbyist, Artie Samish.\footnote{Jim Newton, *Justice For All: Earl Warren and the Nation He Made* (New York: Penguin Group, 2006) 283.} They succeeded in preventing a vote for several weeks, but after the Judiciary Committee...
recommended confirmation twelve votes to three, and the vote finally came to the Senate floor on March 1st, Warren was confirmed unanimously.\(^\text{121}\)

Presumably, Eisenhower and Brownell understood the significance attached to Supreme Court appointments, and one would expect that they did not take the President’s responsibility to appoint a justice lightly. In a letter to his boyhood friend discussing civil rights in the wake of the highly controversial 1954 school desegregation cases, Eisenhower wrote,

> There must be respect for the Constitution—which means the Supreme Court’s interpretation of the Constitution...We cannot possibly imagine a successful form of government in which every individual citizen would have the right to interpret the Constitution according to his own convictions, beliefs, and prejudices. Chaos would develop...\(^\text{122}\)

Although he seems to exhibit a basic understanding of the role of the Supreme Court, his apparent lack of interest evidenced by the absence of a comprehensive vetting of Warren’s views on civil rights and national security, or anything else, for that matter, indicates that either Eisenhower may have greatly underestimated the due diligence demanded by such an important decision, or just that he did not necessarily think it was relevant to ascertain Warren’s political views.

If, in fact, he did not fully appreciate the opportunity to nominate a justice to the Supreme Court, certainly Brownell, who purportedly possessed a keen sense for politics, and who, as a top attorney, should have understood the importance of investigating a judge’s political views, could have been expected to undertake a

\(^{121}\) Abraham 255 and J.E. Smith 606.

careful vetting of Warren. In his memoirs, Brownell wrote, “[n]ominating an individual to the position of chief justice of the United States Supreme Court is one of the most important exercises of a president’s constitutional powers.” However, as was the case with Eisenhower, Brownell's recitation of platitudes about the court and the importance of appointing justices to the court are belied by his actions that suggest the contrary. In reality, it seems to be the case that, by design, they chose not to look deeply into Warren's political views, perhaps because they thought they knew him well enough.

When Warren was being considered for the appointment, it was understood that Vinson's seat had to be filled quickly, as the justices had ordered a rehearing of oral arguments in the Brown case. Eisenhower and Brownell knew, or they certainly should have known, that Warren would have to vote on the merits of the case. Eisenhower had taught constitutional law at West Point, and, personally, he believed that segregation ought to remain a state issue. He was a firm believer in states' rights and federalism, and was opposed to the view that the federal government would enforce racial integration of public schools. Moreover, Eisenhower was raised in Kansas, where segregation had been practiced, and had spent his whole life in the military—a segregated environment. Although the President had warmed to the civil rights movement, as evident by his desegregation of naval bases in the

123 Brownell 163.
South and of virtually all public facilities in Washington, D.C., in accordance with a pre-existing District of Columbia local ordinance, he certainly was not looking forward to presiding over a civil rights revolution.\textsuperscript{127} Yet though aware of Warren’s efforts to end racial discrimination in employment in California, Eisenhower nominated him for Chief Justice. Perhaps the President and Attorney General failed to foresee the enormous consequences of Brown, but as the legal community could talk of little else, this is hard to fathom.

Another point worth mentioning is how Eisenhower felt compelled to nominate Warren to the Supreme Court, given his ostensible lack of legal distinction. Why did Eisenhower call Warren and offer him “the first vacancy” to begin with? Why could he not have promised him a nomination to State or Attorney General when they became vacant? The answer to this question primarily resides in Eisenhower's deep admiration for the type of politician that Earl Warren was. Warren possessed the principal quality that Eisenhower looked for in a judge—he was the ultimate statesman. After it had become known that Warren would be the nominee, Eisenhower’s brothers, Edgar and Milton, both criticized the choice and argued that nominating Warren would be a mistake that would cost the President “a lot of support; in their view, it was important for Eisenhower to appoint a lawyer to the Court, and not another professor or politician.”\textsuperscript{128}

Eisenhower’s response to his brother’s criticisms captures the essence of the rationale behind the Warren nomination. Eisenhower wrote,

\begin{footnotesize}
\textsuperscript{128} Edgar Eisenhower to Dwight D. Eisenhower, 28, September, 1953, \textit{The Presidency}, Dwight D. Eisenhower Library
\end{footnotesize}
I believe we need statesmanship on the Supreme Court. Statesmanship is developed in the hard knocks of general experience, private and public. Naturally, a man occupying the post must be competent in the law—and Warren had seventeen years of practice in public law, during which his record was one of remarkable accomplishment and success...He has been very definitely a liberal-conservative; he represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court.129

Prior to becoming Governor of California, Warren had served as deputy district attorney of Alameda County, California from 1920 to 1925, and then as district attorney until 1939. He then served as Attorney General of California from 1939 until 1943, where he infamously advocated the internment of Japanese during World War II.130 But it seems that Eisenhower was drawn to Warren not because of his legal expertise, but because he respected his statesmanship and because he envisioned that Warren resembled the man Eisenhower believed himself to be. He offered him the first vacancy because he felt the Court “lacked statesmen” of “national stature” with “middle-of-the-road views.”131 He believed that Warren would bring to the Supreme Court what he himself had brought first to the military and then to politics and the White House—a philosophy of leadership rooted in common sense, practicality, and balance. Thus, even though Warren was by no means a top legal scholar, he was chosen because he exhibited other qualities Eisenhower wanted in a Supreme Court justice, and, undoubtedly, because Eisenhower saw a lot of himself in his first nominee.

130 J. E. Smith 605.
131 Newton, Eisenhower: The White House Years 115.
Such is the story of how Earl Warren filled Eisenhower’s first vacancy on the Supreme Court. While Eisenhower and Brownell vigorously denied any “grand bargain” at the 1952 Republican National Convention, many scholars still believe that Warren’s appointment was simply repaying a debt incurred by Warren’s behind-the-scenes work at the convention. We may never know the full truth surrounding Warren’s nomination, as the historical record seems to be somewhat inconsistent. Nevertheless, we do have a fairly decent and workable understanding of the story behind Eisenhower’s first appointment to the Supreme Court.

Eisenhower’s second appointment came in October 1954 with the death of Justice Jackson. This time, Brownell’s promise to his longtime friend, John Marshall Harlan II, led to his eventual nomination. In fact, Brownell never considered anyone else for the post, and Eisenhower remained extraordinarily passive with respect to one of his most important responsibilities. Eisenhower greatly respected and trusted Brownell and delegated a considerable amount of authority to him in making decisions in his area of expertise, the law.

In fact, Eisenhower routinely delegated authority and tasks to his subordinates, something, for which he was often criticized. Indeed, Eisenhower’s propensity to rely on subordinates, who were tasked with carrying out the bulk of his responsibilities, has come to be regarded as one of the most defining characteristics of his presidency, leading some, such as Fred Greenstein to go as far as labeling Eisenhower’s time in office as the “hidden-hand presidency.” His wartime experience of commanding a vast, intricate organization and his extensive

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132 Yalof 53.
staff experience in the army, an institution with an explicitly defined and elaborate organizational structure, undoubtedly accounted for the way in which the President approached the delegation of authority in the White House.\footnote{Fred I. Greenstein, \textit{The Hidden-Hand Presidency} (New York: Basic Books, Inc., 1982) 80.} He had grown accustomed to working in and leading a highly compartmentalized hierarchical structure, in which his staff worked on matters in their fields of expertise and came to him only with their recommendations.\footnote{Sander 31.} As president, he expected his cabinet officers to run their departments, and not come to him with problems within their purview. To Eisenhower, they were the equivalent of army commanders; if problems arose concerning any particular unit, the respective army commanders would have handled it on their own.\footnote{J. E. Smith 566.} In the area of judicial appointments, Eisenhower did not have much to contribute, and he believed Brownell would be better suited to lead a comprehensive and well-informed search for judicial nominees.

According to Brownell, when asked to compare Dewey and Eisenhower, two men he served for prolonged periods of time, he offered that whereas Dewey involved himself more in the “mechanics of government and the operations of his subordinates,” concerning the members of his Cabinet, Eisenhower took the position of “this is your job, you go ahead and do it.”\footnote{Oral History interview, Herbert Brownell, 24 February 1977, Dwight D. Eisenhower Library} Similarly, according to Robert Anderson, who, over the course of two terms served as Eisenhower’s Secretary of the Navy, Defense, and Treasury,
President Eisenhower’s background in history was a military one. He came up through all of his life in the atmosphere of having staffs, delegating large amounts of responsibility, assuming large responsibility delegated to him, but having a very tight staff operation. For example, when I was in the Treasury, I have no recollection of the President ever calling me to suggest a policy or anything of the sort. It was always the other way around...\textsuperscript{137}

A common theme running through these testimonials is that clearly Eisenhower’s military experience informed the way in which he approached government. Additionally, it was precisely that experience that made him more comfortable relying on his subordinates to carry out large tasks because, in his view, he had been expected to do the same for his superiors.

Ostensibly, for Eisenhower, it was all about efficiency and organization, which he understood as essential to effectively managing the White House and its peripheral bureaucratic agencies. Eisenhower saw a tremendous failure in the management styles of his predecessors, Truman and F.D.R., because they were too involved in the day-to-day operations of the White House.\textsuperscript{138} Truman met every morning with the senior members of his staff, and would assign daily tasks and lay out priorities for the day.\textsuperscript{139} What Truman saw as hands-on management, Eisenhower understood as overbearing and not conducive to efficient administration. One of Eisenhower’s first administrative concerns as president-elect was to devise a White House structure that suited his management style; he strongly

\textsuperscript{137} Oral History interview, Robert B. Anderson, 8 July 1969, Oral History Collection, Lyndon Baines Johnson Library  
\textsuperscript{138} Sander 12.  
\textsuperscript{139} Ibid.
believed in the need for an effective personal staff to assure an efficient government.\textsuperscript{140}

Prior to his inauguration, he created the President’s Advisory Committee on Government Organization, which he later incorporated into the Executive Office of the President, which was tasked with developing and implementing immediate improvements in the organization and management of the executive branch.\textsuperscript{141} He also instituted a major organizational innovation with the advent of a White House Chief-of-Staff, a position that endures to this day. In the military, Eisenhower had grown accustomed to having a chief-of-staff, relying heavily on Walter Bedell Smith for ensuring that his high command ran smoothly. As Eisenhower’s Chief-of-Staff, Smith was seen as the “principal coordinating agency of the command,” and his duties included nearly everything from keeping the General informed to seeing through the execution of Eisenhower’s orders and instructions.\textsuperscript{142}

For his White House Chief-of-Staff, Eisenhower turned to one of his former campaign managers, Sherman Adams. Adams quickly became a central figure in the White House, and was responsible for handling the President’s appointments and his schedule, overseeing White House personnel, communicating with the press, speechwriting, and managing congressional relations.\textsuperscript{143} It was his job to ensure that any and all advice given to the President had multiple credible sources, that it had been properly staffed out before it made its way to the Oval Office, and that once

\begin{flushright}
\textsuperscript{140} Sander 12
\textsuperscript{141} Ibid. 13.
\textsuperscript{143} Sander 14.
\end{flushright}
the President had made a decision, it was communicated back down the “chain of command.” Adams also stood between the President and some of the members of his Cabinet, often reviewing their work before allowing them to offer advice to Eisenhower, although Brownell insisted that Adams never interfered with any business between him and his department and the president. Thus, Brownell still enjoyed relatively direct and open lines of communication with the President.

To the point of why Eisenhower may have been so passive on Brownell’s recommendations, we can look further into the President’s views on the utility of delegating authority. In a letter to Henry Luce, Eisenhower’s friend and co-founder of Time, Inc., he wrote,

> The government of the United States has become too big, too complex, and too pervasive in its influence on all our lives for one individual to pretend to direct the details...Competent assistants are mandatory; without them, the executive branch would bog down. Principal subordinates must have confidence that they and their positions are widely respected, and the chief must do his part in assuring that this is so.

Evidently, Eisenhower relied extensively on delegating authority to his subordinates, and felt that doing so was integral to effectively managing the executive branch. In this light, his almost blind passivity towards Brownell’s recommendations may best be interpreted as an effort on the President’s part to make Brownell feel comfortable in his role as trusted advisor and confidante. That the President may have used the opportunity of appointing a justice to the Supreme

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144 Sander 14.
145 Oral History interview, Herbert Brownell, 24 February 1977
Court solely on Brownell’s insistence to convey that message to his Attorney General offers reason to suggest that perhaps Eisenhower may have misunderstood the significance of being presented with the opportunity to name a justice to the Supreme Court.
II. A Third Opportunity

President Eisenhower was gearing up for his re-election, when, on September 7, 1956, just two months shy of Election Day, he received a letter from Justice Sherman Minton, informing him of his decision to retire, effective October 15th.147 Minton’s retirement resulted from a combination of a fundamental lack of interest in his activities on the Court and his deteriorating health; he suffered a heart attack in 1945 prior to his appointment, badly broke his leg in 1949 that left him walking with a cane for the rest of his life, and battled with anemia all his life.148 Minton, a staunch Democrat, retired the moment he became eligible for full retirement benefits, despite the implication that it presented Republican Eisenhower with a third vacancy.149

The story behind Eisenhower’s third appointment of William J. Brennan to the Supreme Court is a very different one from the previous two nominations. The following is the little known tale of how Eisenhower came to nominate Justice Brennan to the Supreme Court, in what would amount to Eisenhower’s second potential mishap with respect to judicial appointments.

As had been the standard practice for judicial appointments, Attorney General Brownell led the search for prospective nominees. As previously noted, Eisenhower had been known to extensively delegate authority to cabinet members

147 Sherman Minton to Dwight D. Eisenhower, 7 September 1956, Supreme Court of the United States File, White House Central Files, Dwight D. Eisenhower Library
149 Ibid.
to carry out tasks; his experience as a highly skilled and effective administrator as a former commander of the Allied Forces in Europe and of NATO and as a General of the U.S. Army, had allowed him to rely heavily on delegating considerable authority to his aides.¹⁵⁰ No one within the Eisenhower administration, perhaps with the lone exception of Secretary of State Dulles, enjoyed as much unrestricted power and influence as Brownell. Unlike certain members of the cabinet who did not have the president’s complete trust, such as Defense Secretary Charles Wilson, Brownell had far more latitude in policy-making than he had ever expected. Eisenhower rarely, if ever, corrected him.¹⁵¹

Brownell, like his boss, was a mid-westerner, who hailed from Nebraska. He went on to graduate from Yale Law School and was a successful securities lawyer at the firm of Lord, Day, & Lord.¹⁵² After just two years at the firm, in 1932, he waged a successful battle for a seat in the New York State Assembly, then-considered a part-time job, winning as a Republican against a Democratic incumbent, despite F.D.R.’s landslide victory that same year.¹⁵³ After five successful political campaigns and five years in the Assembly, Brownell stepped down and became the general counsel for the World’s Fair of 1939-1940.¹⁵⁴ Shortly thereafter, in 1941, Brownell was asked by Thomas Dewey, then-District Attorney of Manhattan, to run Edgar Nathan, Jr.’s campaign for Manhattan borough president, which he did successfully.¹⁵⁵

¹⁵¹ Greenstein 85.
¹⁵² Jim Newton, Eisenhower: The White House Years 49.
¹⁵³ Brownell 23.
¹⁵⁴ Ibid. 31.
¹⁵⁵ Ibid. 36.
In 1942, Brownell continued on to successfully manage Dewey’s 1942 campaign for New York governor, and subsequently served as a key aide to Dewey and as an appointed member of the New York State Judicial Council, a group of judges tasked with recommending measures to improve the administration of the New York State court system.\textsuperscript{156} Brownell then took the reins of the Republican National Convention from 1944 until 1946, and oversaw Gov. Dewey’s two failed presidential campaigns in 1944 and 1948.\textsuperscript{157} Throughout his political career, Brownell had established himself as what Time Magazine would call “the cleanup man.”\textsuperscript{158} He was regarded as “the best political strategist of his party,” and was known for remaining behind-the-scenes, preferring to be holed up in a backroom somewhere, directing campaigns and offering political advice.\textsuperscript{159}

After he successfully secured Eisenhower’s nomination at the 1952 Chicago Convention from the confines of his Conrad Hilton Hotel room, though, he packed his bags and returned to New York to continue working at his law firm, knowing his management of Dewey’s 1948 defeat would preclude him from taking an active role in Eisenhower’s campaign. Some may find it peculiar that Eisenhower placed his trust in a man who had previously managed two failed presidential campaigns, but the fact remains that no one had more political connections and was more capable at working the GOP delegates than Brownell. Despite his past failures, Brownell was an expert in American politics where Eisenhower was not, and as previously noted,

\textsuperscript{156} Brownell 45.
\textsuperscript{157} Ibid. 62.
\textsuperscript{158} “The Cleanup Man,” Time Magazine, 2/16/1953, Vol. 61, No. 7
\textsuperscript{159} Ibid.
he knew when to cede responsibility to more capable subordinates.\textsuperscript{160} Through his success at securing the nomination, he had made his mark on Eisenhower, who was “tremendously impressed” by Brownell’s judgment and equanimity, and who ended many post-nomination strategy conferences by saying, “Let’s ask Herb.”\textsuperscript{161} Shortly thereafter, Brownell returned to the campaign and served as one of Eisenhower’s top political aides.

By the time Brownell rose to the rank of U.S. Attorney General and close advisor to President Eisenhower, he had established himself as a highly competent and politically savvy “fixer,” of sorts. Eisenhower’s admiration of Brownell was also quite palpable, having praised him in the middle of his first year in office, as a man of “consummate honesty, incapable of an unethical practice,” a “lawyer of the first rank,” and “an outstanding leader.”\textsuperscript{162} Eisenhower would go on to pay a compliment to Brownell in a way he rarely, if ever, did to others, saying he was “perfectly confident that he (Brownell) would make an outstanding President of the United States.”\textsuperscript{163} Thus, it is no surprise that Eisenhower entrusted Brownell with considerable independence in compiling shortlists for prospective judicial nominees, considering the degree to which he held Brownell in such high esteem. The president naturally expected Brownell to initiate the decision-making process for all vacancies – it involved a deep understanding of the law and the courts, as well as the political knowhow of getting a nominee through senatorial confirmation.\textsuperscript{164}

\begin{footnotes}
\footnotetext[160]{Jim Newton, \textit{Eisenhower: The White House Years} 56.}
\footnotetext[161]{“The Cleanup Man,” \textit{Time Magazine}, 2/16/1953, Vol. 61, No. 7}
\footnotetext[163]{Jim Newton, \textit{Eisenhower: The White House Years} 88.}
\footnotetext[164]{Oral History interview, Bernard M. Shanley, 16 May 1975}
\end{footnotes}
What did come as a surprise, though, was how Brownell botched the appointments he was tasked with. This, according to some Court historians, such as David Yalof, rests on Eisenhower’s imposition of a set of excessively rigorous criteria that greatly restricted Brownell’s ability to select prospective nominees.\textsuperscript{165} In fact, a heavy reliance on a predetermined set of criteria was quite characteristic of Eisenhower’s use of selectively delegating authority. One kind of selective delegation he practiced before and during his presidency consisted of assigning a clearly defined mission to an able subordinate who, in effect, would become more of a deputy than a delegate.\textsuperscript{166}

By the time that the Minton vacancy occurred, Eisenhower had already come up with a set of criteria that prospective judicial nominees would have to meet, and by which Brownell and his deputy, William Rogers, were bound. Eisenhower was no stranger to appointments, and as Supreme Commander of the Allied Forces, he had utilized a similar method of personnel selection, delegating the bulk of staff appointments to his Chief of Staff, Walter Bedell Smith, who was to operate independently under a set of loose criteria.\textsuperscript{167} In arriving at the particular criteria for Supreme Court nominees, Eisenhower drew largely from his rudimentary political sense and life experiences. For example, learning from his “mistake” of nominating Warren, he henceforth required all prospective nominees to have previous judicial experience, believing such service would “provide an inkling of his

\textsuperscript{165} Yalof 41.
\textsuperscript{166} Greenstein 82.
\textsuperscript{167} Snyder.
Although this seems to suggest that Warren hid his political views prior to his confirmation, in reality, no one had bothered to ask him of his views and question his constitutional jurisprudence. In theory, what Eisenhower was now instructing Brownell was to look deeply into any prospective nominee’s record and try to discern from judicial opinions, what the political views of that individual were, although it seems as though this was never carried out in practice, for one reason or another.

Eisenhower continued the process inaugurated by Truman of consulting with the American Bar Association on nominees for lower courts, and became the first president to submit his Supreme Court nominees to the ABA for formal vetting. As part of this arrangement, Eisenhower agreed to appoint no one unless that individual was “enthusiastically recommended by the American Bar Association,” and in return, the ABA agreed to discontinue its practice of suggesting names of its own in advance of being asked by the administration to evaluate a particular candidate. The President also required that prior to any official announcement, the FBI would have to perform a confidential check to determine that there was “nothing in [a candidate’s] record which could be brought up to diminish his effectiveness as a judge.”

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168 Eisenhower 230.
169 Yalof 43.
170 Dwight D. Eisenhower, Diary entry of 17 January 1955, Dwight D. Eisenhower Diary (1955-56)(2) file, DDE Diary Series, Ann C. Whitman Files, Dwight D. Eisenhower Library. The practice of submitting names for a formal review by the ABA continued until President George W. Bush ceased it, although it has since been renewed by President Obama. See J. E. Smith 606.
171 Dwight D. Eisenhower, Diary entry of 17 January 1955
In addition to instituting these new practices, as early as 1954, Eisenhower also required of his nominees that they be younger than sixty-two years of age.\(^\text{172}\) He saw this as an important requirement because he understood the need to have young judges who would be able to remain on the Court for many years after he would leave the White House. Ideally, Eisenhower preferred “a number of outstanding jurists in the low 50’s.”\(^\text{173}\) After the Warren appointment, Eisenhower came to see the need for prior experience on the bench, a requirement he imposed on future prospective nominees.\(^\text{174}\) He no longer believed that a “statesman of national stature” was the best fit for a Supreme Court justice, arguing that it would be “completely futile to try and use a Supreme Court vacancy as a mere reward for long and brilliant service.”\(^\text{175}\) Eisenhower, the military man, also favored elevating judges from the ranks of federal appellate courts and state supreme courts – such a system of hierarchal promotion from within, made the most sense to him.\(^\text{176}\) In this context, Brownell struggled to find nominees who could match the highly restrictive set of criteria imposed on him by the President.

Much like the story surrounding Warren’s nomination, the details behind Brennan’s nomination are shrouded in rumor and myth. It is often said of the Brennan nomination that it was an accident, a mistake, and the result of a haphazard vetting process. In reality, the story is more complicated than that, and reflects a


\(^{173}\) Dwight D. Eisenhower to Edward E. Hazlett, 23 October 1954, October 1954 (1) file, Ann C. Whitman Files, Dwight D. Eisenhower Library


\(^{175}\) Dwight D. Eisenhower to Edward E. Hazlett, 23 October 1954

\(^{176}\) Yalof 44.
deliberate intention on the part of Eisenhower and Brownell to use the Minton vacancy to score some political points in the weeks leading up to Eisenhower’s reelection bid. That Brennan was a state judge from New Jersey, a Catholic, a Democrat, and well under sixty-two, made him an ideal nominee for Eisenhower and Brownell.

The story may be traced back several months before the vacancy even became realized, to the Attorney General’s Conference on Court Congestion and Delays in Litigation, which took place in May, 1956. Brownell called upon his close friend, and noted administrator, New Jersey Chief Justice Vanderbilt, to deliver a keynote address at the conference. Having already accepted Brownell’s offer and unexpectedly being detained with other matters, Vanderbilt sent Brennan, his colleague on the New Jersey Supreme Court, as a replacement, or so the story goes. On the second day of the conference, Brennan delivered a rousing address outlining New Jersey’s experience with court reform. In Brownell’s words, the address “made the conference a success,” and it was the beginning of a long “friendship” between the two men.

It has been said that Vanderbilt called Brennan at the last minute as a substitute, and that Brennan had merely read from Vanderbilt’s prepared notes. His subsequent Supreme Court nomination, the story continues, was a mistake because it was based on a false impression created by Brennan’s remarks at the conference,

178 Brownell 180.
which were really those of Chief Justice Vanderbilt.\textsuperscript{179} If the story were true, the nomination may have been a literal mistake.

However, there is ample evidence to suggest that Brennan had, indeed, prepared the remarks himself. Robert Seaver, then Assistant Deputy Attorney General, who was tasked with doing most of the staff work for the conference, has since recalled that while Brownell floated Vanderbilt’s name as a possible speaker, there was never serious consideration of Vanderbilt’s participation in the conference because he was “too ill.”\textsuperscript{180} If that is the case, it is unlikely that he would have even prepared a speech and thus highly implausible that Brennan delivered a speech ghostwritten by his colleague. However, there is also the distinct possibility that Vanderbilt, who as Chief Justice was tasked with additional administrative responsibilities, had standard remarks on matters pertaining to judicial reform, and that Brennan, in drafting his speech, relied on many of his colleague’s ideas.

Though Brennan’s remarks were barely ideological and touched solely on administrative issues on court congestion, Brownell erroneously believed that they had seemed markedly conservative.\textsuperscript{181} Indeed, there is reason to suggest that Brownell entirely misinterpreted Brennan’s address. When Brennan spoke about the need for court reform, specifically for processes such as pretrial depositions that would speed litigation, Brownell mistook him for the type of judge who would not entertain technical arguments about constitutionality, especially in criminal matters. In reality, though, Brennan’s views on this matter were quite clear, with his

\begin{footnotes}
\footnotetext{179}{Wermiel.}
\footnotetext{180}{Ibid.}
\footnotetext{181}{Kim Isaac Eisler, \textit{A Justice For All} (New York: Simon and Schuster, 1993) 85.}
\end{footnotes}
advocacy for pretrial disposition stemming from his desire to secure as many rights for defendants in criminal proceedings as possible. Just a few months prior to the Justice Department conference, he offered a vehement condemnation of the practices employed by Sen. Joseph McCarthy’s Permanent Investigations Subcommittee, telling an audience at the Monmouth Rotary Club,

A system of inquisition on mere suspicion or gossip without independent proofs tending to show guilt is innately abhorrent to us. The power to extract answers will beget a forgetfulness of the just limitations of power...But there are hopeful signs in recent events that we have set things aright...it is indeed reason for pure joy and relief that at long last our collective conscience has sickened of the excesses and is demanding the adoption of permanent and lasting reforms to curb investigatory abuse...\(^{182}\)

Once on the Court, Brennan was known as a champion of individual liberties, and judging from statements like these, this could have certainly been expected. Evidently, though, Brownell failed to see this in Brennan, as he failed to take heed of his unambiguously liberal judicial philosophy and political views.

Interestingly, Brownell seems to have also placed an emphasis on administrative issues as a prerequisite for someone to be considered for a Supreme Court appointment. While this certainly seems to have been the case with Warren, who was being considered for the Chief Justiceship, the preoccupation with administrative matters can hardly be justified when considering someone for associate justice nominee, as was the case with Brennan. This, once again, seems to imply that Brownell may have completely misunderstood the role and importance

\(^{182}\) Eisler 82.
of Supreme Court justices, and that perhaps he was not the politically savvy operator Eisenhower believed him to be.

Whatever the case might be, while Brennan’s celebrated address served to introduce him to Brownell, demographics and electoral politics played a far larger role in the nomination. According to notes taken by Eisenhower’s personal secretary, Ann C. Whitman, within minutes of hearing of the Minton vacancy, Eisenhower phoned Brownell and spoke of his desire to appoint a “very good Catholic, even a conservative Democrat,” so as to reinforce his non-partisan image right before the election.183 The seeds for this idea, though, were sowed well before any such vacancy existed, when Francis Cardinal Spellman, the Archbishop of New York, visited Eisenhower. Spellman, who at times had been referred to as the “American Pope,” wielded an enormous amount of power and influence in conservative and Republican circles, and was not afraid to use it.184

Spellman had visited Eisenhower in late 1954 in the wake of Justice Jackson’s death and reminded him that there had not been a Catholic on the bench since Justice Frank Murphy’s death in 1949.185 According to Bernard Shanley, Special Counsel to Eisenhower, Spellman wanted to see a Catholic appointed to the Supreme Court upon the next vacancy.186 Spellman was quoted as saying, “Mr. President, [i]t isn’t that I want a Catholic on the Supreme Court...I want someone

183 Wermiel.
185 Abraham 263.
186 Bernard Shanley, Diary entry of 26 October 1954, White House Years File, Bernard M. Shanley Diary, Bernard M. Shanley Papers, Dwight D. Eisenhower Library
who will represent the interests and views of the Catholic Church.” With an eye towards the impending midterm elections, Eisenhower would have liked to use his second vacancy to appease Catholic voters, an increasingly critical constituency. At the time, though, Brownell had already settled on Harlan, and there was no convincing him otherwise, which seems strange considering who the real decision-maker ought to be. Now, with another opportunity to appoint someone to the bench, Eisenhower would be sure to honor the wishes of the Archbishop, especially at a time when he needed the votes and the support of one of the most politically active American religious figure in modern times.

The 1956 presidential election did not worry the President much, though. He was the heavy favorite to win, and he knew it, opting to forego the traditional and exhaustive process of traveling across the country that had marked the ’52 effort. Instead, he campaigned from the White House, preferring to employ advertisements at the expense of making personal appearances. However, shortly after the California primary, Eisenhower had undergone major abdominal surgery, which served to cast doubt on his overall health and his ability to live through a second term. Suddenly, the attention was taken off President Eisenhower and cast onto Vice President Nixon and the likelihood of Nixon having to serve out the duration of Eisenhower’s term if his condition worsened. On the issue of Eisenhower’s deteriorating health and Nixon’s qualifications, many Democrats believed Stevenson

188 Yalof 54.
189 Jim Newton, Eisenhower: The White House Years 221.
190 Ibid.
191 Eisler 86.
could win. Nevertheless, Eisenhower largely ignored the campaign to unseat him, although to be sure, he did have some areas of weakness, among them, his relatively mediocre standing among Catholic Democrats.

Notwithstanding the historical record that seems to indicate that voters pay little attention to a president’s Supreme Court appointments, electoral politics were a large motivating force behind the Brennan nomination. At a White House meeting held in late September, 1956, to discuss the progress of the presidential campaign, it became apparent that Catholic voters, a swing constituency who had voted for Eisenhower in 1952, were a top priority for his reelection prospects. The “Catholic vote” was listed as the second of seven major items on the political agenda for that day. Around the same time as Eisenhower and Brownell were canvassing possible nominees, Adlai Stevenson, the Democratic candidate for President, was set to begin a six-day tour of seven electorally vote-rich Northeastern states, including New Jersey and Massachusetts. Brownell, an astute political observer, relished the prospect of making Brennan’s nomination public just as Stevenson was making his way through New Jersey and other states, where Catholics comprised a large share of the electorate. In Massachusetts, Democratic Sen. John F. Kennedy, an Irish-Catholic, was making inroads with Catholic voters

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192 Eisler 86.
193 Epstein and Segal 56.
194 Yalof 228.
195 Agenda of 28 September 1956, September 1956 File, Gerald Morgan Papers, Dwight D. Eisenhower Library
196 Driscoll.
who had voted for Eisenhower in 1952, and Eisenhower and his advisors saw the Brennan nomination, as an opportunity to retain this core constituency.197

To be sure, it seems as though Brennan’s entire nomination was predicated on his record as a good Catholic, and not on his judicial philosophy. When the search began for a Catholic judge, Brownell and his deputy, William Rogers, immediately floated Brennan’s name, impressed by his speech at the Justice Department conference several months earlier. In their early conversations, Brownell seemed to argue that Brennan’s religious observance was of paramount importance. “I want to make sure he’s really a member of the Catholic Church,” he told Rogers.198 Rogers called Cardinal Spellman to verify Brennan’s “fitness” as a practicing Catholic and whether he would be acceptable to Spellman. In turn, Spellman called Brennan’s parish priest and reported back to Brownell that he had attended Mass virtually every week and that Brennan was a legitimate practicing Catholic.199 Brownell interpreted Spellman’s findings as a sign of his approval of Brennan, and with that, he arranged for Brennan to come to Washington to meet with the President.

Ironically, Spellman was a staunch conservative who would have detested Brennan’s future liberal opinions, yet without Spellman’s crucial role in the appointment process, Brennan might never have made it to the High Court. Equally mystifying is how Spellman only seemed concerned with the amount of time Brennan attended Mass and did not question his beliefs, though presumably, he interpreted Brennan’s record of going to weekly Mass as indicative of him being in

197 Driscoll.
198 Eisler 89.
199 Ibid.
accord with traditional Catholic dogma and he probably thought Brownell would vet him to ensure his views were acceptable. For Eisenhower, the meeting with Brennan was just a formality, as he, too, assumed that Brownell had already asked the important questions. After a short twenty minutes, and without even doing as much as consulting with New Jersey’s two senators or its governor, Eisenhower offered Brennan the job.\textsuperscript{200} In reality, though, the only “important” question Brownell had bothered to ask was how religious Brennan actually was and how often he attended Mass.

Catholic groups were not the only ones whom Eisenhower sought to placate with his selection of Brennan. The Association of State Court Judges and the Conference of Chief Justices of the State Courts claimed that the “existing Court was weakened” because none of the sitting justices had any experience on a state court.\textsuperscript{201} In fact, since Justice Benjamin Cardozo had died in 1938, there had not been a single justice who had any judicial experience at the state court level. Accordingly, the groups believed that the Court lacked a proper understanding of the states’ position in federal-state relationships.\textsuperscript{202} For Eisenhower’s reelection prospects, it was important to embrace state courts because it served to reinforce his credentials as a Republican, who believed in strong states and was suspicious of centralization. Thus, Eisenhower was able to satisfy these groups’ grievances by nominating Brennan, a Catholic Associate Justice of the Supreme Court of New Jersey.

\textsuperscript{200} Eisler 90.
\textsuperscript{201} Brownell 180.
\textsuperscript{202} Ibid.
Furthermore, Eisenhower had run for President in 1952 against his Democratic predecessor’s practice of turning Supreme Court appointments into mere party-handouts. However, two years into his presidency, both of his Supreme Court nominations and all but a handful of lower court nominations had gone to fellow Republicans. In order to fulfill his prior campaign promises, he believed that his next appointment ought to be a Democrat, preferably of the “anti-New Deal” ilk. This, too, Eisenhower believed, would serve to bolster his nonpartisan, middle-of-the-road image—a critical perception that contributed to his widespread appeal and popularity.

It is interesting to note that Eisenhower selected his third nomination just a month before the 1956 presidential election. While Eisenhower was extremely popular, he may have feared that his deteriorating health and the possibility of his Vice President, Nixon, having to succeed him, might imperil his reelection prospects, and he felt he needed a boost. Eisenhower had defeated Stevenson, the Democratic candidate, once before, in 1952, but the political climate had changed in the wake of several pro-civil rights Supreme Court decisions. Stevenson was walking a fine line on the issue of civil rights, attempting to satisfy the general national sentiment in favor of expanding civil rights without alienating Southern voters, whom Eisenhower believed were integral to his reelection efforts. In such an environment, it would have been reasonable for Eisenhower to postpone

203 Yalof 56.
204 Yalof 56.
205 Wermiel.
207 Ibid.
nominating someone until after he was safely reelected, especially since the Supreme Court was at the heart of the renewed civil rights debate. Nonetheless, Eisenhower used the vacancy to score critical political points by appealing to moderate Democrats, Catholics, and Northerners with his selection of Brennan, a respected figure in the electorally important state of New Jersey.

Whatever the case may be, William J. Brennan, only fifty years old at the time, was sworn in as a recess appointment on October 16, 1956, his nomination having been made public just two weeks earlier.208 A few weeks later, Eisenhower handily defeated Stevenson for a second time, winning 57% of the popular vote and carrying forty-one states in the Electoral College, including New Jersey and Massachusetts.209 Eisenhower also received 54% of the Catholic vote, a six percent increase from 1952, and until today, a level of support from Catholics that Republican presidential candidates have matched only twice, in the 1972 and 1984 landslide victories.210 Though it is clear that Eisenhower won big among Catholic voters, it might be difficult to ascertain the total effect that Brennan’s nomination had on the outcome of the election. After several weeks, the Senate confirmed Brennan on March 19, 1957 without much dissent.211

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208 Yalof 60.
210 Presidential Vote of Catholics, Center for Applied Research in the Apostolate at Georgetown University, at http://cara.georgetown.edu/presidential%20vote%20only.pdf
211 Yalof 60.
III. A Fourth Appointment

President Eisenhower’s second term had not yet been a week old when he received a letter from Associate Justice Stanley Reed on January 28, 1957, informing the President of his intent to retire. Reed, from then-segregated Kentucky, was viewed as a discordant member of the Court, who often took a hardline on civil rights issues, an increasingly prominent area for the Supreme Court at that time. It is said that Reed initially wanted to write a dissenting opinion in Brown v. Board of Education, before Warren was able to convince him otherwise. Reed ultimately decided to retire because he feared his stances on civil rights would taint the “impartiality of the federal judiciary.” With Reed’s decision, Eisenhower was given his fourth opportunity to make a lasting impact on the composition of the Supreme Court. Unfortunately, it is generally understood that Eisenhower dropped the ball in this regard; his selection of Charles Evans Whittaker is widely viewed by scholars of the Court as an unmitigated failure. Whereas Warren and Brennan may be seen as having views counter to those of their nominator, the Whittaker nomination was a blunder for other reasons. This is the story of Eisenhower’s fourth appointment to the Supreme Court, and perhaps one of the single greatest mistakes of his presidency.

President Eisenhower and his point man on judicial appointments, Brownell, first met Whittaker three years earlier, in 1954, when they considered him for a

\[212\] Yalof 61.

vacancy on the United States District Court for the Western District of Missouri.\textsuperscript{214} The vacancy arose when Chief Judge Albert Reeves, who was eighty years old at the time and had served on the court for over thirty years, decided to retire. As F.D.R. and Truman selected Democrats for four out of every five federal nominations, Reeves, a Harding appointee, was waiting for a Republican president to replace him with a fellow Republican judge.\textsuperscript{215} In fact, Eisenhower had made it a goal of restoring numerical parity between the two parties to the federal bench. Prior to his election, over eighty percent of federal judges had been appointed by Democratic administrations, and Eisenhower hoped to achieve a better balance by appointing more Republican judges.\textsuperscript{216} According to Brownell’s deputy, William Rogers, for Eisenhower, “getting the best men meant for all practical purposes, getting the best Republicans.”\textsuperscript{217} While this philosophy seems to fly in the face of his earlier critiques of past administrations’ policies of awarding judgeships on the basis of “patronage” and “partisanship,” Eisenhower strongly felt that he needed to return balance to the federal judiciary. It is important to note, though, that at the time, there was no definitive political philosophy that was associated with the Republican Party, and that Eisenhower’s preference for Republican judges did not necessarily translate into them having certain views. After all, Warren had been a Republican governor,

but certainly his views on the Court were anything but conservative or Republican, for that matter.

Whittaker, a successful corporate lawyer working for a large firm in Missouri that served many clients in the Kansas City area, had a reputation of being an outstanding trial and appellate attorney, a real “lawyer’s lawyer.”\(^\text{218}\) He came highly recommended by Eisenhower’s brother, Arthur, a Kansas City banker and close friend of Whittaker’s, Roy Roberts, Republican publisher of the *Kansas City Star*, and Senators Harry Darby and Frank Carlson, both Republicans from Kansas.\(^\text{219}\) Since Whitaker had never held public office before, Brownell had Justice Department officials contact Whittaker’s law firm to confirm that he was, indeed, a Republican. The only political contribution his colleagues could point to was a two hundred dollar contribution Whittaker had made to the Republican Party in 1952, and evidently, that satisfied the Justice Department and Eisenhower.\(^\text{220}\) Largely based on his party affiliation and on the recommendations, Whittaker was nominated and swiftly confirmed by the Senate on July 6, 1954.\(^\text{221}\)

Much in the way that Eisenhower and Brownell could have expected, Whittaker was a great addition to the federal bench. He quickly cleared the dockets of the case backlog that had developed prior to his appointment, he had forty-seven of his opinions published, and he worked long hours, six days a week, and never

\(^\text{218}\) Christensen.
\(^\text{219}\) Abraham 266.
\(^\text{220}\) C. A. Smith 47.
took a vacation. Whittaker was passionate about his new position and his passion drove him to excel, working hard, without rest, much to the exclusion of other activities. While Whittaker generally enjoyed his time on the district court, calling it a “perfect delight,” one criminal case that he presided over left an indelible mark on his conscience and psyche.

The high profile trial of Arthur Ross Brown, a thirty-year-old crane operator from California accused of kidnapping and murdering Wilma Allen, wife of William Allen, Jr., president of the Allen Chevrolet Company in Kansas City, presented Whittaker with his first opportunity to sentence another man to death. Brown had confessed to the crimes and the facts of the case were uncomplicated, yet it was by far Whittaker’s most difficult criminal case as a district court judge. Upon sentencing the man to death, Whittaker became noticeable morose. Clyde Rayburn, his clerk at the time recalled, “[w]hen the man was executed, you could tell it bothered Judge Whittaker...[h]e was different in the office after that.” This case sheds some light on the difficulties Whittaker may have encountered on the Supreme Court, where he was forced to make similar decisions when another person’s life hung in the balance.

Nevertheless, Whittaker did a fine job on the bench and as a sign of Eisenhower’s approval, Whittaker was elevated within just two years to a vacancy that arose on the United States Court of Appeals for the Eighth Circuit, in June,

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222 C.A. Smith 54.
223 Ibid. 57.
224 Ibid. 63.
225 Ibid.
1956.\textsuperscript{227} Whittaker was very content with his seat on the district court, and was reluctant to accept the job but felt compelled to accept out of a strong sense of duty. “I am moving up to the court of appeals with mixed emotions,” he told reporters, “I will miss the more active role of a district judge.”\textsuperscript{228} The Eighth Circuit Court of Appeals operated at a much slower pace, and the nature of the three-judge panel was conducive to long delays, which frustrated Whittaker. He felt isolated working from his chambers in Kansas City, where he spent most of his time doing research.\textsuperscript{229}

As an appellate judge, though, Whittaker continued to impress his colleagues with his diligence and efficiency; he managed to produce eleven opinions and one dissenting opinion in his eight months on the court.\textsuperscript{230} Of the total sixty-three lower court opinions he wrote, few were appealed, and none reversed. Moreover, some of Whittaker’s lower court opinions influenced the direction of later appeals court decisions, and altered the Federal Rules of Criminal Procedure.\textsuperscript{231} It is thus no wonder than Eisenhower and Brownell felt comfortable nominating Whittaker to the Supreme Court, when Justice Reed’s intention to retire became known.

Fresh off his inauguration, Eisenhower no longer felt compelled to use his Supreme Court appointments to return favors, as some say he had in the case of Warren, or to satisfy core constituencies, as he had done in the case of Brennan. Nor did he have to make any further grand displays of bipartisanship by nominating a

\begin{footnotes}
\footnotetext[227]{Christensen.}
\footnotetext[228]{Quoted in \textit{Kansas City Star}, March 2, 1957}
\footnotetext[229]{C. A. Smith 80.}
\footnotetext[230]{Christensen.}
\footnotetext[231]{C. A. Smith 46.}
\end{footnotes}
Democrat. The Warren Court had since handed down several controversial decisions regarding school desegregation, criminal law, and labor relations that sparked widespread criticism and backlash against Eisenhower.\textsuperscript{232} Having experienced such a bevy of liberal and progressive decisions coming from the Court after his first three appointments, Eisenhower was determined to select a moderate conservative as his next appointment. In a way, his approach to judicial appointments had changed, undoubtedly stemming from his prior experiences with nominating justices Warren and Brennan to the Court.

Whittaker was a conservative Republican, which appealed to both Eisenhower and Brownell, and he seemed to meet nearly every criterion that Eisenhower wanted in a nominee.\textsuperscript{233} He had judicial experience as a federal judge, albeit only for a relatively short time. At fifty-six years old, he fit well within Eisenhower’s requirement that all prospective nominees be younger than sixty-two. Demographically, he was from the Midwest, an area significantly underrepresented on the Court.\textsuperscript{234} He also told a remarkable rags-to-riches, Horatio Alger-type story that Eisenhower and Brownell both admired.

As a young boy growing up in a rural town on the border of Kansas, Eisenhower’s home state, and Missouri, Whittaker attended school until his mother died, when he was only sixteen years old. He dropped out of high school to work on his father’s farm, in order to save money to continue his education. He applied to the Kansas City School of Law and was accepted, despite his failure to complete high

\textsuperscript{232} Yalof 61.
\textsuperscript{233} Abraham 266.
\textsuperscript{234} Brownell 181.
school, and worked during the days as an office boy for a big law firm, attending classes by night. He graduated at the top of his class, passing the Missouri state bar examination before he even finished law school, and went on to become a senior partner at the firm he had once worked for as a mere office boy.\textsuperscript{235}

Eisenhower had met with Whittaker personally when he was considering him for the nomination to the U.S. Court of Appeals. He was impressed by his credentials, and noted that his legal philosophy was more conservative than any of his prior judicial appointees.\textsuperscript{236} Whittaker’s exceptional record aside, his nomination might never have occurred if not for the tenacious effort on the part of Roy Roberts of the \textit{Kansas City Star}.\textsuperscript{237} Roberts, who played an equally pivotal role in Whittaker’s prior appointments to the federal bench, had grown fond of Whittaker during his successful representation of the \textit{Star}. Roberts enjoyed direct channels to Brownell and Eisenhower, and his newspaper had been a loyal supporter of the Eisenhower administration and the Republican Party. While some consideration was given to others, such as Judge Elbert Tuttle of the Fifth Circuit, according to interviews given by Brownell, with no obvious frontrunner emerging from the pack, Roberts’ sponsorship of Whittaker was critical to his ultimate nomination (Eisenhower feared the political ramifications of nominating Tuttle, a Southern moderate, who had loyally enforced the recent desegregation decision).\textsuperscript{238}

On March 2, 1957, Eisenhower formally nominated Charles Evans Whittaker as an Associate Justice, just a little over a month after Justice Reed had informed the

\textsuperscript{235} Christensen.
\textsuperscript{236} Brownell 181.
\textsuperscript{237} Yalof 63.
\textsuperscript{238} Ibid. 62.
president of his wishes to retire.\textsuperscript{239} Confirmation hearings began on March 18 with only one witness opposed, Fyke Farmer.\textsuperscript{240} Farmer, a Tennessee attorney famous for his last-ditch effort to stay the executions of Julius and Ethel Rosenberg, who had been accused and convicted of being Communist spies during the mid-twentieth century, took issue with a decision rendered by Whittaker as a federal district court judge. Farmer was representing a client, Horace B. Davis, a professor at the University of Kansas City, who was fired for his refusal to answer questions posed to him by the Senate Internal Security Subcommittee and university trustees concerning his possible affiliation with the Communist Party. Davis had brought suit claiming he had tenure and could only be fired for “adequate cause,” which he maintained did not include a refusal to answer questions concerning his alleged Communist ties. Whittaker dismissed the complaint, finding that Davis’s refusal to answer constituted “adequate cause.”\textsuperscript{241} Although Brownell remained moderate-to-liberal on civil rights issues, he took a hard line on communism, and publicly challenged some of the Warren Court’s decisions on law enforcement that, in his view, unduly protected communists.\textsuperscript{242}

Certainly, Brownell was not bothered by Whittaker’s decision in the Davis \textit{v. University of Kansas City} case, and apparently, neither was the Senate Judiciary Committee, who went on to unanimously recommend Whittaker for confirmation.\textsuperscript{243}

Shortly thereafter, on March 25, 1957, Whittaker was confirmed by the Senate and

\textsuperscript{239} Christensen.
\textsuperscript{240} Ibid.
\textsuperscript{241} Davis \textit{v. University of Kansas City}, 129 F. Supp. 716 (W.D. Mo. 1955)
\textsuperscript{242} \textit{Washington Evening Star}, 2 May 1956 (“Brownell Says Court Slows Fight on Reds”)
\textsuperscript{243} Christensen.
was set to take his seat as an Associate Justice of the Supreme Court, promising to be a successful and impactful justice. Over the past three years, it had already confirmed Whittaker twice and to question him now would be the equivalent of admitting they had made a mistake. Furthermore, he had no real blemishes on his relatively brief record as a judge. Beyond that, the Senate had become very passive in its confirmation of justices during this time. Prior to 1957, every Supreme Court nominee since 1930 had been confirmed; the Senate approved every one of the seventeen appointments, including every justice then sitting on the Court.244

Much in the way that Whittaker was reluctant to accept the Court of Appeals nomination, he was similarly conflicted about going to the Supreme Court. With each promotion up the judicial ladder, he found himself further removed from his home and the pleasures that made him want to become a lawyer in the first place. He was suddenly thrust into the national spotlight, certainly an unnerving experience for anyone, but he felt unprepared, as his nomination came completely unexpectedly to him. Remarking to a reporter at the press conference announcing his selection, he said, “I am almost rendered numb…I was just stunned. I had no indication. I had heard rumors that I might be appointed, but I had no reason to take them seriously.” 246 After all, the only other time a Supreme Court justice had sat previously as both a district court and later appeals court judge, it had taken fifteen

244 C. A. Smith 91.
245 Ibid. 81.
246 Quoted in Kansas City Star, March 2, 1957
years and three presidents to move him through all three levels. Whittaker had completed the process in less than three years.247

Whittaker joined the Court in the midst of its 1956 session, with Justice Reed’s retirement occurring during the mid-winter break in 1957. The Supreme Court had come under considerable scrutiny in the wake of some highly controversial decisions concerning school desegregation and the politics of the Red Scare. Whittaker felt keenly the awesome power of this new responsibility, he was immediately overwhelmed by it, and he did not want it. Shortly after his ascendance to the High Court, he told an audience in his hometown, “To make a mistake in a court whose decision is ultimately the law of the land is to make a mistake that will haunt the court member forever after.” It was this added element of finality to his work that made Whittaker so uneasy.

Furthermore, he did not want to leave his home and his family and all that he knew behind.248 Whittaker had deep roots in Kansas City, both personally and professionally, and he was forced to move to Washington, D.C., where he felt supremely out of place. Throughout his five-year stint on the Court, he returned to the Kansas City area as often as he could, as a way of replenishing his spirits. The visits provided him with an opportunity to relax and just be himself, something he apparently had a hard time doing in Washington. There, he felt that he never measured up to the other justices, whereas in Kansas City, he was the measure against which all the other lawyers were judged—the proverbial big fish in a small

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247 C.A. Smith 88.
248 Ibid. 93.
According to one of his former law associates, “The situation was not what he (Whittaker) expected. He did not realize the difference between his background and society in the East. He was not cultured in the eastern sense. He was shocked by what he found.” During the first three months in Washington, while the Court concluded its 1956 term, Whittaker lived “the lonesome life of a bachelor in a little apartment.” His wife, Winifred, remained in Kansas City and when his youngest son, Gary, graduated from high school in early June, he could not attend. According to a Kansas City Star reporter, “Only Whittaker, his wife, and perhaps a few trusted friends [were] aware of the frustrations and disappointment, the sense of loneliness and homesickness that beset him at times after he took his seat on the bench.”

As a member of the Supreme Court, Whittaker was also thrust into a lifestyle to which he was clearly unaccustomed. He was now a member of Washington’s politically privileged elite and feeling outclassed, Whittaker remained a perennial outsider, choosing to decline offers to countless parties, dinners, and events. Whereas some of his colleagues had been regulars on the Beltway scene and had worked closely in presidential administrations and within Congress, Whittaker was a complete stranger from the Midwest. According to one of Justice Frankfurter’s clerks, Whittaker “labored under serious feelings of inferiority.” He would soon

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249 C.A. Smith 97.
250 Ibid. 94.
251 Ibid.
252 Ibid.
253 Ibid. 99.
254 Ibid. 106.
confide in one of his own clerks, Alan Kohn, that he felt as if he had “sold himself
down the river for a pot of porridge.”

In his work on the Court, he felt dwarfed by the robust personalities of his
colleagues, who possessed far greater experience in state and national politics than
he. The range of experience, education, and depth of knowledge that his colleagues
brought to the Court left Whittaker overawed. With the lone exception of Justice
Black, all had university diplomas in addition to their law degrees. Three of his
colleagues, Frankfurter, Burton, and Brennan, had graduated from Harvard Law
School, considered one of the best in the nation. Frankfurter had also taught
classes at Harvard Law, and Douglas had taught at Yale and Columbia Law School,
his alma mater. In comparison, Whittaker felt almost embarrassed by his legal
education. Once, Justice Douglas, who was notorious for being insensitive and cruel
to colleagues, was overheard during a heated conference discussion as saying in
reference to Whittaker, “What do you expect from a hick lawyer born in Troy,
Kansas, and coming from the Kansas City School of Law?” Serving in the shadow
of colleagues who had proven themselves as fine jurists, scholars, and statesmen, he
felt like he was undeserving of his promotion to the Court. When he first arrived at
the Court, Justice Black asked him how he felt about being a justice, to which
Whittaker replied, “I am scared to death.”

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255 C.A. Smith 96.
256 Ibid. 105.
257 Ibid.
258 Judith Cole, Mr. Justice Charles Evans Whittaker: A Case Study in Judicial Recruitment and
Behavior (Colombia: University of Missouri-Kansas City, 1972) 115 n.
remarked to two of Warren’s clerks, “I have never felt so inadequate in my life.” In short, Whittaker suffered from an extraordinary inferiority complex that left him with profound feelings of inadequacy.

For Whittaker, one of the most troubling aspects of his new job was having to adjust to the daunting prospect that his decisions would have profound impacts on people’s lives. Twice during the first three months on the Court, his vote contributed to five to four majorities, leaving him to believe that his vote had been the only one that mattered. Additionally, on four separate cases during his first three months on the Court, the justices had split four to four, resigning Whittaker to become the tiebreaker. Whittaker, who felt utterly unable to bring himself to cast his tie-breaking vote, asked that the cases be held over until the following term to give himself more time to weigh the arguments – the same arguments that his colleagues had no trouble deciding. One of these cases, Green v. United States, involved upholding a lower court’s conviction, and Whittaker found himself unwilling, or mentally unable, to send another man to the electric chair, as he had regrettably done as a district court judge.

At the conclusion of his first few months on the Court, the pressures of his new job started to take a toll on Whittaker’s health. Whittaker became highly agitated, and he suffered from severe bouts of anxiety, even depression. It had become apparent to his colleagues that something was terribly wrong with the new justice, leading Justice Burton to record in his diary, “Justice Whittaker has been on

\[259\] C. A. Smith 106.
\[260\] Ibid. 99.
\[261\] Ibid. 100.
the edge of a nervous breakdown but hopes to finish the term and then recuperate."262 One of Burton’s clerks, Roger Cramton, had communicated to a friend at the end of the 1956 term that Whittaker was so overawed and insecure after his first three months on the Court that it was unlikely he would last another year.263

By the fall of 1957, Whittaker was under the care of a Kansas City physician to help him cope with acute anxiety and depression. When he returned to Washington for the 1957 term, he had also been taking sedatives to treat hypertension and insomnia.264 The drugs he was taking to help him cope with his health problems had severe side effects, which caused him to lose a lot of weight, and for the first time give the appearance that he was simply not well. Whittaker was also taking tranquilizers to help calm his nerves, and his correspondence with his physician seems to indicate that he was being overmedicated, which caused detrimental, even addictive effects.265 Whittaker was not himself, and his behavior became noticeably erratic. One of Whittaker’s former colleagues recalled how on a visit to Washington, Whittaker’s wife used to have to keep her hand on the steering wheel as Whittaker drove his car, evidence of his having difficulty concentrating.266 Separately, one of his family members was at a local bar association meeting in Kansas City, when some in the audience had begun commenting on how Whittaker seemed to be drunk, although his appearance was more likely the result of his heavy

262 Justice Harold Burton’s Diary, June 18, 1957, quoted in David N. Atkinson, Retirement and Death on the U.S. Supreme Court, University of Missouri-Kansas City Law Review 45 (Fall, 1976) 17n.
263 C. A. Smith 102.
264 Ibid. 104.
265 Ibid.
266 Ibid.
dependence on tranquilizers than being indicative of a drinking problem. Evidently, Whittaker’s feelings of inferiority started to impact his physical appearance and his mental health.

About halfway through his time on the Court, though, Whittaker’s condition started to improve. Justice Potter Stewart’s arrival in October, 1958, meant that Whittaker was no longer the most junior associate justice. Although he personally, had conservative views, he belonged to neither the conservative nor liberal bloc on the Court, instead waver ing between both sides, leaving him troubled about his undefined role on the Court. Like Whittaker, though, Stewart was neither a fixed member of either the liberal or conservative wings of the Court, and Whittaker no longer felt like the odd man out. Additionally, Whittaker started to feel comfortable with writing his own separate opinions, and began to see that his opinions could sway the views of his colleagues. However, whereas other justices relied on their clerks to help draft opinions, Whittaker preferred to write his own opinions, which inevitably took its toll on the justice. He often labored intensely over his opinions, frequently causing delays for the Court, which frustrated his colleagues. Whittaker also habitually changed his mind and switched his votes, leading some of his colleagues to believe he was weak or indecisive.

On March 6, 1962, within five years of his elevation to the Supreme Court, Whittaker checked himself into the Walter Reed Army Hospital in Washington, citing “physical and mental exhaustion.” Subsequently, Whittaker notified Chief

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267 C.A. Smith 127.
268 Ibid. 140.
269 Hutchinson.
Justice Warren of his intent to retire from his post, as his doctors had made clear to him that his return to the Court “would unduly jeopardize [his] future health.”

Perhaps, what is most bizarre about Whittaker’s tragic story is that once he returned to the private sector, where he took up employment with General Motors, he regained his complete health and spirits.

The story of Whittaker’s nomination and his time on the Court begs the question of how Brownell and Eisenhower could not have predicted Whittaker’s legacy as a failed justice. In their defense, there was little in Whittaker’s record that would suggest he would not be able to cope with the stress of being on the High Court. In Whittaker’s own view, it seems as though his move to the Supreme Court was premature, and he was ill prepared, physically and mentally, for the rigors of being a Supreme Court justice. Upon his retirement, he recounted the following baseball analogy, to an audience about his swift accession to the Court:

I was enabled to touch three bases in three years. I went to first on a walk, to second on a fielder’s choice, and on the second pitch thereafter, I was sacrificed to third. First base, the district court, being close to the dugout of the home team and its fans, was a perfect delight; second base, the United States Court of Appeals – particularly the Eighth Circuit – while a little more removed from the people, was a very quiet and comfortable position. But third base, I found truly to be, as the fans say, ‘the hot corner.’ Then came the most solemn quest for light that can proceed from the broodings of a human soul.

Certainly, Whittaker would have preferred to remain a district court judge his whole life, but unfortunately for him, Eisenhower and Brownell, and apparently his friend,

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271 Abraham 267.

Roy Roberts, had other plans for him\textsuperscript{273}. Whittaker is widely regarded among scholars of the Court as a mistake, and his legacy as a failed Supreme Court justice will remain a blemish on Eisenhower’s presidency.

President Eisenhower went on to make his fifth, and final, appointment to the Court in October 1958, when Justice Harold H. Burton retired. In the fall of 1957, Brownell returned to his private practice and was replaced by Deputy Attorney General William Rogers, who would lead the search for the fifth nominee. On two separate occasions in early 1958, Whittaker had called Rogers complaining that he was too overwhelmed by his new position and that he wanted to quit.\textsuperscript{274} Rogers knew right away that Whittaker had been a mistake and would be certain to avoid any additional mistakes with the sole appointment he bore primary responsibility for. With the selection of Potter Stewart, whom Eisenhower had nominated just four years earlier to the U.S. Court of Appeals for the Sixth Circuit, a repeat mistake was surely avoided.\textsuperscript{275} Stewart went on to serve as a progressive-conservative, much in the mold of his nominator, and voted against his more liberal colleagues in important decisions, such as Griswold v. Connecticut and Miranda v. Arizona.\textsuperscript{276} Although Stewart reversed this course and sided with the majority in Roe v. Wade, Eisenhower would have certainly been pleased with his fifth appointment.

In surveying Eisenhower’s five appointments to the Supreme Court between 1953 and 1958, it is clear that he relied on a multitude of factors when looking for prospective nominees: he valued judicial experience, relative youthfulness,

\textsuperscript{273} C.A. Smith 89.
\textsuperscript{274} Yalof 64.
\textsuperscript{275} Abraham 267.
\textsuperscript{276} Ibid.
somewhat of a shared legal and political philosophy, and a focus on electoral politics and demographics, such as the religious and geographical representativeness of the Court. Nevertheless, Eisenhower and his Attorney General, Herbert Brownell, clearly viewed three of the five appointments as mistakes. Were they really mistakes, though? Is Eisenhower’s assessment of his appointees accurate? Was he blindsided by the actions and decisions of the justices he himself had appointed, or could he have had reason to predict the future behaviors of the men he presumably selected with great care? The concluding section of this paper will delve into these questions to analyze, whether, in fact, Eisenhower’s “three greatest mistakes” were truly mistakes at all.
Mistakes and Consequences

I. Conclusion

Chief Justice Earl Warren had been at the helm of the Supreme Court for sixteen years when he resigned in June 1969. At the conclusion of his tenure on the Court, it was apparent to all that he had left an indelible mark on American constitutional law, the likes of which had not been seen, perhaps, since Chief Justice John Marshall. The Warren Court forever changed the face of American politics and society by banning segregation in public schools, striking down prayer in the public schools, and securing greater rights and liberties for defendants in criminal proceedings, among a whole host of additional far-reaching decisions.

One of the most reliable members on the Warren-led liberal bloc was Justice William Brennan, who sat on the Court for thirty-four years, only to step down in 1990. Brennan was responsible for effecting widespread judicial and social change through his decisions on matters pertaining to legislative reapportionment, libel, obscenity, and affirmative action. Justice Whittaker served on the Court for a mere five years before he resigned in April 1962, in the wake of deteriorating health and after nearly suffering a complete mental breakdown. Together, these three justices comprise what some, including myself, have regarded as major blunders of the Eisenhower presidency. However, there seems to be little agreement among scholars as to whether the appointments were mistakes at all.

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277 Abraham 296.
278 Ibid. 273.
For the sake of clarity, it is worthwhile to mention that Whittaker has been regarded as a wholly different sort of “mistake” than his fellow Eisenhower nominees. It has been deemed by history that Whittaker was a failed justice because of his brief time on the Court, and because of his inability to make any significant contributions to constitutional law. When Eisenhower allegedly spoke of the “biggest damned fool mistake” he ever made, he was apparently referring to his appointment of Warren and Brennan, and not Whittaker. Therefore, the ensuing discussion will focus on those two nominations and the two primary approaches that have been used in evaluating their appointments.

The most popular view is that Warren and Brennan somehow “changed” in their time on the Court and that their judicial behaviors, as embodied in their decisions and opinions, could not have been anticipated by Eisenhower and his Attorney General. This approach points to Warren’s stint as a district attorney and attorney general in California, during which he engaged in and endorsed the very prosecutorial practices that his Court would go on to so strongly condemn: extorting confessions, though not by physical violence; depriving indigents of counsel, though not at trial; bugging homes and offices and conducting illegal searches and seizures, although it has been offered that the unlawfully secured evidence was not used in trial. As attorney general, Warren was credited with leading the racist attack that resulted in Japanese-Americans being interned on the West Coast during World War II, and he often engaged in the kind of Red-baiting that characterized the McCarthy

era, which he would later go on to eschew. As governor, he successfully fought legislative reapportionment that would have brought his state closer to the “one man-one vote” formula that as Chief Justice, he believed should be imposed on all states. Some, such as Philip Kurland, have held that Warren the Chief Justice, unquestionably exhibited a very different set of values than did Warren the district attorney, or Warren the state attorney general, or even Warren the governor of California. Kurland posits that Warren was transformed by the experiences he encountered on the Court, and that he underwent some changes in his worldview and his sense of jurisprudence.

Although Brennan’s views on national issues were not quite as clear prior to his appointment, Brownell and his subordinates believed, albeit mistakenly, that he would take a tougher stand on matters of national security, and that he would not allow procedural problems to slow the fight against communism at home. According to Thomas Dewey, Brennan had been investigated “backwards and forwards” by the Eisenhower administration. Brownell similarly claims to have read “all his published opinions” before submitting Brennan’s name to the president. However, as we shall see, Brennan’s liberal views were clear and unambiguous, and it is doubtful that Brownell would have been truly surprised with his Supreme Court decisions, had he actually bothered to read the earlier opinions. For understanding the Brennan appointment, we must therefore turn to an alternative explanation.

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281 Kurland.
282 Eisler 95.
283 Brownell 180.
The second contrasting viewpoint posits that Brennan had not changed at all, and that any mistake in his appointment was the consequence of poor vetting on the part of Brownell. Supporting this theory is the wealth of evidence that suggests that the decisions handed down by Brennan were direct extensions of the type of man that he was prior to his appointment. At the time that Brennan’s appointment was announced, a *New York Times* profile referred to him as “a sound liberal of the highest personal character.”\(^{284}\) The same article cited then-Governor Robert Meyner of New Jersey, who offered, “I suspect his (Brennan’s) opinions will not be quite as ‘middle-of-the-road’ as some Republicans seem to think.”\(^ {285}\) Similarly, a *U.S. News and World Report* article quoted a government official familiar with the nominee who referred to Brennan as a man “with a lot of progressive ideas.”\(^ {286}\)

Perhaps no prediction of Brennan’s judicial record on the Court was more on point than that of J.L. Bernstein’s, published in the *New Jersey Law Journal* at the time the notice of appointment was made public. Bernstein, a prominent New Jersey lawyer, wrote, “We have a notion that Justice Brennan, son of a former labor leader, will become a valuable assistant to Chief Justice Warren, son of a former railroad mechanic...Judged by ability and industry and by the qualitative and quantitative estimate of his work in New Jersey, Brennan seems destined to join the libertarian group on the U.S. Supreme Court of Warren, Black, and Douglas.”\(^ {287}\) Two questions immediately emerge. Firstly, if a New Jersey lawyer was able to ascertain this truth regarding Brennan’s likelihood to be a liberal justice, how can it be that Eisenhower


\(^{285}\) Ibid.

\(^{286}\) “An Experienced Judge for the Supreme Court,” *U.S. News and World Report*, Oct. 12, 1956, pg. 70

\(^{287}\) J. L. Bernstein, *The Philosophy of Mr. Justice Brennan*, *The Reporter*, Nov. 1956
and Brownell, with all the resources that were available to them, failed to foresee this eventuality? Secondly, given Bernstein’s confidence about Brennan’s liberal bent, is it plausible that he underwent some change on the Court, and that Eisenhower and Brownell were right to consider him deviant in his decisions? It is quite clear that Brennan was as liberal a justice on his last day on the Court as he was on his first day, and that in appointing him, Eisenhower and Brownell should have anticipated the type of justice that he would become.

With respect to Earl Warren, it has also been shown that his vetting was fairly nonexistent, Brownell only having had asked him his views on administrative issues pertaining to the federal judiciary. Perhaps, because of Warren’s prominence as a one-time presidential and vice-presidential candidate and popular and successful governor, they felt that a comprehensive vetting was unnecessary. It was likely assumed that for a figure like Warren to be in the public arena for such a long time and still to be well liked, though evidently not enough to move beyond the governorship, his views must be moderate and within the mainstream. Thus, Brownell and Eisenhower may have just assumed that Warren’s ideology and governing philosophy was acceptable enough as not to warrant a detailed vetting of his views, although as only time would tell, they were greatly mistaken.

According to Kim Isaac Eisler, preeminent biographer of Justice Brennan, there is a yet a third viewpoint – a hybrid of the other two – which helps to explain both the Warren and Brennan nominations concomitantly. Eisler interpreted Eisenhower’s “mistake” comment in a slightly different and more nuanced manner, which led him to conclude that the appointments of Warren and Brennan were
indeed failures, but not because the justices underwent some kind of metamorphosis on the bench or because Brownell had misread the men he was appointing. Instead, Eisler faults the nature of the appointment process and the very essence of the vetting process, however superficial it might have been.

According to Eisler, Eisenhower and Brownell may not have been entirely at fault. In those days, Supreme Court appointments did not have the partisan taint they later acquired, and it was not common practice for presidents to look into the political ideologies of their judicial nominees. Though F.D.R. had placed an emphasis on selecting judges who shared his progressive views, he had only done so after encountering an exceptionally activist Court, hell-bent on striking down his signature New Deal policies and programs. Since then, the Court had been relatively passive, it held somewhat of a lower profile, and was therefore deemed less political. Thus, Eisenhower did not think it vitally important to consider the views of his early appointments, and, historically, Eisenhower’s insistence that his prospective nominees only be good, upstanding, middle-of-the-road type men was by no means unusual.

But why should focusing on the character of prospective nominees have precluded the taking into account of their political ideologies? Perhaps Eisenhower had a more old-fashioned view of an apolitical judiciary, one in which he put the Court on a pedestal and the political views of prospective judges were thereby illegitimate considerations. At the outset of his presidency, he certainly believed judges ought to be independent, and their views, irrelevant, though this was

288 Eisler 96.
something he would later regret. Confiding in his diary upon the death of Chief Justice Vinson, he wrote that the “prestige of the Supreme Court had suffered severely in late years, and that the only way it could be restored was by the appointment of nationwide reputation, integrity, competence in the law, and statesmanship.”

Evidently, he believed the Court’s image had been badly bruised during its political skirmishes with F.D.R. in the 1930’s, and through the public feuding of Justices Black and Jackson, and he needed to restore prestige to the Supreme Court by returning it to its traditional nonpolitical and respected role. Thus, it would have been against his governing philosophy to look into the political views of the men he was interested in nominating to the Court.

Or perhaps, like so many other aspects of his presidency, his approach to judicial appointments was informed by his prior military experience. Coming from the armed forces, which was an entirely an apolitical environment, it was natural for him to select men whom he felt were honest and forthright individuals. His experience had prevented him from taking anything else account and he had grown accustomed to selecting subordinates solely on the basis of objective merit, meaning mostly character. Insofar as Eisenhower could look a man in the eye and get a sense that he was honest, forthright, and respectable, he was a suitable nominee. Even if he knew their views and did not necessarily agree with them, as the case may very well should have been with Brennan, Eisenhower would not have believed that this alone should disqualify them from serving on the Supreme Court.

289 Dwight D. Eisenhower, Diary entry of 8 October, 1953
Though many are familiar with the oft-quoted Eisenhower remark about his two biggest mistakes sitting on the Court, to date, there has been only one credible source attributing the quote to the President, found in the diaries of Justice Harold Burton. Justice Burton visited the White House in July, 1958, to inform Eisenhower of his intent to retire, citing his recent diagnosis of Parkinson’s disease. According to Burton’s handwritten diaries, a bewildered Eisenhower expressed disappointment at the decisions of Warren and Brennan. With respect to Brennan, he admitted that he had erred in appointing a man about whom he knew so little and that in naming a replacement for Burton, ideology would play an important part. Burton wrote, “The president said he wanted a conservative attitude.” This marked the first time Eisenhower ever emphasized that a prospective nominee ought to possess a certain preferred judicial philosophy, and therefore, according to Eisler, and I am compelled to conclude the same, when Eisenhower referred to Warren and Brennan as “mistakes,” he only meant that he was mistaken for not considering the ideologies of the men.

Worth mentioning is that Brownell, the so-called politically savvy operator, never seemed to correct Eisenhower’s approach to nominating justices to the Supreme Court. Why had he not educated Eisenhower on the need to consider the philosophies of his judges? Perhaps, he too, subscribed to this old-fashioned idea of the Court as a nonpolitical entity. Or perhaps, Brownell never quite had any problem with the political views of the men he suggested to begin with. After all, as attorney

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290 Eisler 158.
291 Ibid.
292 Kim Isaac Eisler, interview by the author, 7 February 2013.
general, he had a rather moderate to liberal record on race relations and civil rights, having orchestrated Eisenhower’s response to the Little Rock school crisis.\textsuperscript{293} To suggest that Brownell was somehow disappointed with the Court’s lurch to the left in terms of civil rights implies that he was more conservative than he really was.

Brownell had been a Dewey supporter all his life, and after his man had lost two presidential campaigns, he knew that he had to enlist Eisenhower to run in 1952 as a moderate Eastern Establishment alternative to the conservative Taft. As governor of New York, Dewey signed into law the first ban on race discrimination in employment.\textsuperscript{294} Surely, Dewey and, in turn, Brownell, both of whom were key figures in the “Draft Ike” movement, were more progressive on civil rights than perhaps they let on, and there is little reason to believe that they would have wanted to stop the trend towards racial integration. However, even if Brownell may have accepted the Court’s liberal shift on civil rights, it is likely that neither he nor Eisenhower would have been open to the more liberal and controversial decisions of the Warren Court on issues such as school prayer, Miranda warnings, and legislative reapportionment.

To return to the traditional factors that are considered in judicial appointments, we had looked at electoral and partisan goals, shared philosophical views, personal friendship, objective merit, and the desire to have the Court’s membership mirror or represent the general population, in terms of geography, religion, and sometimes race and gender. Eisenhower seems to have neglected one of the most important considerations when making appointments to the Supreme

\textsuperscript{293} Kim Isaac Eisler, interview by the author, 14 February 2013
\textsuperscript{294} Ibid.
Court. In appointing Warren, he assigned to him an exceptionally high objective merit. He greatly respected the governor and saw a lot of himself in the man. By appointing Brennan, he exaggerated the electoral value of the act, thinking that by selecting him, he was contributing to his reelection in 1956. In both instances, it was not necessarily the case that Eisenhower undervalued the significance attached to naming judges to the Supreme Court. Rather, it was his naiveté that prohibited him from allowing Brownell to take into account the philosophies of prospective nominees. He relied on certain criteria or factors at the expense of the most important one—philosophical affinities between the nominator and the nominee—and for this, he paid a heavy price.

With President Barack Obama’s recent inauguration, he appears poised to begin his second term, in which it is all but certain that he will be able to make his third appointment to the Supreme Court. Justice Ginsberg will soon be celebrating her eightieth birthday and the chances are good that she will choose to retire with a Democrat in the White House. Previously, Obama appointed two women to the Supreme Court, Justice Kagan, who had previously been his Solicitor General, and Justice Sotomayor, who was elevated to the U.S. Court of Appeals for the Second Circuit by President Clinton in 1997. Both have consistently counted themselves among the Court’s liberal wing, their views squarely in line with those of their nominator. Judging from his prior success with judicial appointments, which one would surmise is due, in large part, to the president’s legal background, we can expect that Obama will choose a replacement for Justice Ginsberg who shares his moderately progressive political philosophy.
As we have seen, President Eisenhower did not experience such successes with the men he nominated to serve on the Supreme Court, and as previously noted, the likely explanation is that neither of the justices were mistakes, but rather that Eisenhower’s entire approach to the appointment process was a mistake. Evidently, it was not that Eisenhower did not care enough about the Court. To the contrary, he cared so deeply about the Court that he refused to taint his appointments with the ideological partisanship that had come to be characteristic of his predecessors. He greatly valued an independent judiciary with renewed prestige that was comprised of honest men—men who reminded Eisenhower of himself. Though he may have been motivated by electoral goals, as was the case with Brennan, he felt comfortable offering him the job after a twenty minute meeting, in which he was able to get a sense of his character. Once he had that, everything else, he thought, would fall into place.

In hindsight, it seems foolish for Eisenhower to have taken the position that the political views of his nominees were irrelevant, and thus not worthy of proper investigation. Maybe, this is clear to us today only because history has proven what becomes of presidents who fail to take such considerations into account. Ever since the controversial decisions of the Warren Court, far greater attention has been given to the views of judicial nominees. The tumultuous confirmation hearings of Abe Fortas, Harrold Carswell, Robert Bork, and Clarence Thomas come to mind. Certainly, if it were not for the Warren and Brennan appointments, the records of these nominees might not have attracted the same level of scrutiny that they did in the post-Warren Court world.
Similarly, the vetting processes that are typically in place today for judicial nominees have undergone dramatic changes in the wake of some game-changing developments. Firstly, the Senate has become increasingly active in its advice and consent role in the past several decades, presumable stemming from the highly activist years of the Warren Court. Secondly, with the advent of mass media and twenty-four hour news cycles, the views of nominees have become magnified to a certain extent that it is no longer possible for presidents to ignore them when canvassing prospective nominees. Eisenhower certainly did not have these additional external incentives to investigate the views of his nominees, for as previously noted, the Senate had become passive on such matters, and the media did not enjoy as much influence as it does today. Therefore, to a certain degree, Eisenhower’s passive approach to investigating the political views of the men he appointed was a result of the political climate he presided over—one in which there was no great incentive for presidents to heavily vet prospective nominees.

In sum, it was not that the men he appointed to the Supreme Court were failures or mistakes, but rather it was his reliance on the character of his nominees and not their philosophies, that was the real mistake. Likewise, it was not necessarily the case that Eisenhower did not care about the Court or that he underestimated the significance; it was just the he cared about the wrong things. He overemphasized factors that were not as consequential as he may have thought, and he overlooked aspects of the decision that, today, are almost all we seem to focus on. Returning to the present day, one can be sure that when President Obama begins the search for a prospective judicial nominee, if he has not done so already, he will
make certain to ascertain the political views of whomever he decides to select. If there is anything that can be learned from the Eisenhower appointments, it just might be that. Thus, a warning to President Obama from the lessons of the Eisenhower presidency, "caveat emptor," buyer beware.


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Eisenhower, Dwight D. White House Central Files, Dwight D. Eisenhower Library, Abilene, Kansas.


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Eisler, Kim I. Phone interview with author. 14 February 2013.


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*U.S. Constitution.* Art. II, Sec. 2, Cl. 2

*U.S. Constitution.* Art. I, Sec. 5, Cl. 2


