Isaac Marks Memorial Lecture

JUDICIAL POLITICS UNDER PRESIDENT WASHINGTON

Richard S. Arnold*

Dean Seligman, Dean Sullivan, Mrs. Marks, and Friends:

I must begin by thanking you for your hospitality, and for giving me a platform, an opportunity I always enjoy. It is a special honor to be part of the Judge Isaac Marks Memorial Lecture Series. The Marks Family has a wonderful legal tradition, and I count myself fortunate to have become part of it. Particular thanks go to Selma Paul Marks, the sponsor of this lecture series and a distinguished member of the legal profession in her own right. Her hospitality and graciousness are unsurpassed.

The subject of this talk has been billed as "Judicial Politics Under President Washington." With such a title, I am surprised that anyone at all has decided to attend. (Maybe you are here because Washington's Birthday is being observed today.) When I told one of my friends, a few days ago, that I was coming to the University of Arizona to make a talk, he was delighted. "It's a wonderful institution," he said, "and you will have a wonderful time. Be sure and ask them to put you up at the Arizona Inn." Well, I didn't have to ask, because I am at the Arizona Inn, and enjoying it very much, thank you. My friend then asked me what I was going to speak about. I gave him the title, and then the additional information that I was going to concentrate on nominations of district judges, not Supreme Court Justices, by President Washington. My friend's response was, "What is that relevant to?" My immediate reply was, "Nothing." Then I repented of my flippancy and said, "The audience will just have to make up its own mind. I'm doing it because I think it's fun."

The question might well have been put more broadly: "What is the relevance of history?" Much of present-day political and governmental behavior would lead one to suspect that most people in this country think history has no relevance. They seem innocent of much knowledge of history, and most of our political news is devoted to who won and who lost on a particular day, or maybe even during an entire week. I'm going to let you make up your own mind as to whether the talk is relevant, as to what relevancy means, and as to whether it makes any difference. I believe you will perceive

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* Chief Judge, United States Court of Appeals for the Eighth Circuit. I wish to thank in particular the Federal Judicial Center, especially Russell Wheeler, its Deputy Director, and Peter Wonder of its History Office, for assistance and helpful comments on this article. The errors that remain are chargeable wholly to me.

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some interest in some of this, or at least some amusement, which is probably worth more than relevance, anyhow.

Our Constitution is regarded, and rightly so, with a kind of religious awe and reverence. If there is such a thing as a civil religion in America, it is worship of the Constitution, and there is good reason for this attitude. As Prime Minister Gladstone remarked in those familiar words, "the American Constitution is . . . the most wonderful work ever struck off at a given time by the brain and purpose of man."[1] We tend to forget, however, that the American government did not, like Minerva, spring full grown from the head of Zeus. When the President, part of his cabinet, and some members of both houses of Congress finally assembled, almost two months late, in New York at the end of April 1789, we did not have a government in the real, functioning sense. We had a Constitution, but it was only a piece of paper. It was up to President Washington and the other men who first held office in the government to make the Constitution a reality, and one of the things they had to do was to create a system of courts. The Constitution itself, you will recall, mentions only one court by name: the Supreme Court of the United States.[2] As to other federal courts, what the Framers were pleased to call "inferior courts," it was up to Congress whether to create them at all and whether, once having created them, to maintain them in existence. We sometimes forget that the lower federal courts are entirely creatures of statute. So far as the text of the Constitution itself is concerned, there do not even have to *be* any lower federal courts. That we have them at all is due solely to congressional sufferance.

So one of the first decisions that had to be made after a quorum of both houses of Congress finally assembled was whether there ought to be a system of lower federal courts and, if so, how extensive the system would be.[3] In the beginning, there were only twenty senators. North Carolina and Rhode Island had not yet ratified the Constitution, and New York had not gotten its act together sufficiently to elect members of the Senate. So only ten states had senators. A committee was appointed consisting of one senator from each state, with Oliver Ellsworth of Connecticut, later Chief Justice of the United States, as Chairman. This is the committee that drafted the bill that ultimately became the Judiciary Act of 1789,[4] an enactment comparable in its influence to Article III of the Constitution itself. Fittingly enough, the act that created the federal court system was S. 1, 1st Congress, 1st Session.

The Act created a three-tiered court system, but the tiers, though similar in name, looked a little different from our present organization. There were district courts, each staffed by one district judge. The district courts served mainly as courts of admiralty, to try petty federal crimes, and for certain civil cases. The Act created thirteen district courts, but there was not, as you might have thought, simply one district court for each of the thirteen original states. Remember that when the Act passed, only eleven states had ratified the Constitution. So there was a district court in each of these eleven states, plus a district court for the District of Kentucky, which was then part of Virginia, and

1. W.E. Gladstone, *Kin Beyond Sea*, 127 N. AM. REV. 179, 185 (1878).
2. U.S. CONST. art. II, § 2 & art. III, §§ 1–2.
3. For a review of the early years of the federal judiciary, see RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. Federal Judicial Center 1994).
4. Act of Sept. 24, 1789, 1 Stat. 73.

a district court for the District of Maine, which was then, and all the way until 1820, a part of Massachusetts. One of the interesting aspects of the first system was that the district judges received differing salaries. This was supposed to reflect the variation in workload. Imagine what a job Congress would have if it tried to institute such a system today. In the beginning, the judge of the District of Delaware received an annual salary of $800.00, but the judge in South Carolina, which had a longer coastline and therefore, presumably, a greater admiralty caseload, got $1,800.00 a year.[5]

There were also circuit courts. Each district, except for Kentucky and Maine, was placed in one of three circuits, the Eastern Circuit, the Middle Circuit, and the Southern Circuit. The Eastern Circuit was composed of New York, New Hampshire, Connecticut, and Massachusetts. The Middle Circuit was composed of Pennsylvania, New Jersey, Delaware, Maryland, and Virginia. And the Southern Circuit was assigned South Carolina and Georgia. A circuit court was to meet in each district, for example, the circuit court for the District of Georgia. There were circuit courts, but no circuit judges. The circuit courts were staffed by two Supreme Court justices and the district judge of the particular district in which the court was sitting.[6] These were the principal trial courts of general jurisdiction, including diversity cases and major federal crimes. There was, as you will recall, no general federal question jurisdiction in the lower federal courts. It took until 1875 for Congress to decide that such a jurisdiction was appropriate.

At the top, of course, was the Supreme Court, consisting of a Chief Justice and five Associate Justices.[7] Remember that the Constitution does not specify the number of Supreme Court justices. We have had, from time to time, as few as six and as many as ten. The salary of the Chief Justice was $4,000.00, more than twice that of the highest paid district judge,[8] a precedent that the present Chief Justice no doubt wishes were still being followed.

Probably the most important decision made by Congress in enacting this first Judiciary Act was to have only one district judge in each state, and to give that judge, sitting by himself, only specialized tasks far different from the general trial jurisdiction of today. The eighteenth-century equivalent of today's general jurisdiction resided in circuit court, consisting of three judges, and that court, in turn, depended upon the availability of two Supreme Court justices—after 1793, of one Supreme Court justice. So the Supreme Court justices had to ride circuit, a duty arduous and distasteful, and one about which they complained constantly. They did not get rid of this task completely until 1891, when the circuit courts of appeals were created by the Evarts Act.[9]

There is another important point to be made at the outset. We need to recall, difficult though it is from this perspective of time, that the adoption of the Constitution was a near thing. In the indispensable state of Virginia, the convention called for the purpose ratified the Constitution by a majority of only eight votes. The vote was eighty-eight to eighty. In New York, the vote was about as close, thirty to twenty-seven. There were a number of reasons for this

5. WHEELER & HARRISON, *supra* note 3, at 4.
6. *Id.*
7. *Id.*
8. *Id.*
9. The Circuit Court of Appeals Act, Act of Mar. 3, 1891, 26 Stat. 826.

closeness. In the first place, the very idea of government was not popular—the Revolution itself shows that, if it shows anything. There were about 3.25 million people in the whole country, and they "did not, for the most part, take kindly to government of any kind."[10] As Thomas Paine said, "Government, like dress, [is] the badge of lost innocence.... Society is produced by our wants, and government by our wickedness."[11]

Courts were especially unpopular. They were, after all, the organ of government that was farthest from direct control of the people. John Marshall himself remarked, referring to the period *after* the Revolution, that "the spirit of insurrection appeared to be organized into a regular system for the suppression of courts."[12] "Against lawyers and courts the strongest resentments were manifested; and to such a dangerous extent were these dispositions indulged, that, in many instances, tumultuous assemblages of people arrested the course of law, and restrained the judges from proceeding in the execution of their duty."[13]

I have mentioned that the Virginia Convention ratified the Constitution by a margin of only eight votes. Even this narrow margin was obtained only on the condition that the Convention also suggest a certain number of amendments. Twenty of these were suggested by the Virginia Convention, in addition to a Bill of Rights, which had twenty articles of its own. One of the amendments suggested "would have absolutely prevented the establishment of inferior National Courts, except those of Admiralty."[14]

At the same time, there were important reasons why the creation of national courts was essential, some of these reasons the reverse side of the coin, so to speak, of the popular opposition to courts. One of the Articles of the Treaty of Paris, which had concluded the Revolutionary War in 1783, required the payment of debts owed by Americans to British citizens.[15] At the time of the ratification of the Constitution, almost nothing had been done to comply with this promise. A system of national courts was necessary to provide an impartial forum for the collection of these debts. Until this and other provisions of the Treaty were complied with by the United States, Great Britain was refusing to comply with obligations of its own under the Treaty, notably the return to American jurisdiction of military posts in the Northwest Territory, still occupied by the British.

This problem of the collection of debts owed to British subjects was simply a subset of a larger problem—the collection of all debts. In the 1780s and 1790s, there were, as there always are, more debtors than creditors. The debtors were no more anxious to pay then than they are now. State legislatures, ever responsive to the people, were passing laws making the collection of debts difficult, in some cases impossible. This, by the way, is the reason for the inclusion in the Constitution of Article I, Section 10, forbidding any state to enact laws impairing the obligation of contracts. Those who opposed the

10. I ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 284 (1916).
11. Thomas Paine, *Common Sense*, *in* I WRITINGS 61 (Conway ed. 1894–96), *quoted in* BEVERIDGE, *supra* note 10, at 289.
12. II JOHN MARSHALL, LIFE OF WASHINGTON 117 (2d ed. 1840), *quoted in* BEVERIDGE, *supra* note 10, at 299.
13. BEVERIDGE, *supra* note 10, at 299 (giving a description of Shay's Rebellion).
14. *Id.* at 477.
15. Treaty of Paris, Sept. 3, 1783, art. IV, 8 Stat. 80, 82.

Constitution feared, and rightly so, that the new national courts would be used to enforce the rights of creditors. This was not popular with many people, but it was essential to the creation of a stable national economy. It was for this reason, among others, that the principal head of business conferred by Congress on the new federal courts was diversity jurisdiction. Many debts were owed by persons in one state to creditors in other states.

So one of the President's first tasks, upon the enactment of the Judiciary Act of 1789, was to nominate justices and judges. Obviously the President had given this a lot of thought, because the nominations of six Supreme Court Justices, eleven district judges, eleven United States Attorneys, and eleven United States Marshals were sent to the Senate on September 24, 1789, the same day that the Judiciary Act was signed. This was all done in a single message, handwritten by one of the President's secretaries, and signed by the President himself.[16] Two days later, on Saturday, September 26, each of these nominations was confirmed. Two more judges, United States Attorneys, and United States Marshals were nominated on September 25, and these nominations were also confirmed on the 26th.[17] Interestingly, the nominations of Thomas Jefferson to be Secretary of State and Edmund Randolph to be Attorney General were made on this same day, the 25th, and as part of the same written message in which judges for New York and New Jersey were nominated.

How did Washington go about selecting these people? For the answer to that, we should look first of all to his own words. Here is what President Washington said:

> Impressed with the conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of our political system. Hence the selection of the fittest characters to expound the laws and dispense justice has been an invariable subject of my anxious concern.[18]

Here I want to make what I think is an important point about language. Notice that Washington used the word "characters" in describing the persons he wanted for federal judgeships. He refers to "the selection of the fittest characters." To the modern ear, the meaning of the word "characters" is plain enough. We want people of good character, people who are moral, people who are upright, people who have "merit," whatever that means, as opposed to cronies, political hacks, or time-servers. This is indeed part of what the words meant in Washington's time. A couple of examples will illustrate the point. On one occasion an intimate friend of Washington's applied for a position, and everybody expected that he would get it. Surprisingly, the President appointed a political enemy. Washington said this about the appointment:

> My friend I receive with cordial welcome; he is welcome to my house and to my heart, but, with all his good qualities, he is not a man of business. His opponent is, with all his politics so hostile to me, a man of business; my private feelings have nothing to do with the case. I am not George Washington, but President of the United States. As George

16. Senate Executive Journal, Sept. 24, 1789, printed in II DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 44 (1974) (hereinafter DHFFC).

17. *Id.* at 49.

18. *Quoted in* I CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 31–32 (1926).

> Washington, I would do this man any kindness in my power; as President of the United States, I can do nothing.[19]

Another good example came when the President's nephew, Bushrod Washington, asked to be appointed United States Attorney for the District of Virginia. The President made the following reply:

> You cannot doubt my wishes to see you appointed to any office of honor or emolument in the new government, to the duties of which you are competent; but however deserving you may be of the one you have suggested, your standing at the bar would not justify my nomination of you as Attorney to the Federal district Court in preference of some of the oldest, and most esteemed general Court lawyers in your own State, who are desirous of this appointment. My political conduct in nominations, even if I was uninfluenced by principle, must be exceedingly circumspect and proof against just criticism, for the eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives.[20]

But back to the word "character." What did Washington mean by it? One of the few things that I have become convinced of in my own amateur study of history is that we should never assume that a word meant the same thing 200 years ago as it means now. In the 18th century, "character" meant something different, or at least something more, than it means now. It meant something akin to reputation. A person's character had to do with how he was regarded in his own community, his public standing, so to speak. The first or fittest characters of a given city or state were those in whom their fellow citizens had the most confidence.

I believe it would be difficult to overstate the importance of this point. In referring to "the fittest characters to expound the law," Washington is saying that he is looking for something more than "technical merit." Human beings, even judges, are not machines. Their qualities and qualifications cannot be infallibly measured in quantitative terms. They do not exist entirely unto themselves, as islands. They are part of communities. They have relationships with other citizens. The weight of their opinions on the law, the extent to which their opinions are accepted by their neighbors, will depend upon more than their résumés, more than their grades in law school, more than their character in the private, moral sense. They should be leaders, or at least people whom others are prepared to accept as leaders, if their judgments are to receive popular consent. And even in modern times, even under our sophisticated and well developed system of government, even with the insulation of federal judges from direct popular control, if their opinions and orders are not ultimately entitled to respect, they will, in the long run, not be obeyed, either because of open defiance or because of private evasion.

So in referring to characters, Washington was saying that he needed people who would be well respected in their communities, by the bar and by the public, and whose words would carry weight. It is perhaps an

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19. *Quoted in* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 37 (1953).

20. STANLEY M. ELKINS & ERIC L. MCKITRICK, THE AGE OF FEDERALISM 55 (1993) (quoting XXX THE WRITINGS OF GEORGE WASHINGTON 366 (John C. Fitzpatrick ed. 1931–1941) (letter of July 27, 1789)). The story had a happy ending, though, when President Adams appointed Bushrod Washington to the Supreme Court in 1798.

oversimplification to say that he was looking for lawyers or judges who were popular, and certainly he was not being political in any partisan sense, because there were no parties. He was, however, being political in the larger sense. He was recognizing that public officials do not function in a vacuum. Judges are not computers. If the law is to be respected, it is important for those who interpret and expound it to be respected, and one of the ways to ensure that this comes to pass is to pick people who are already well thought of in their communities.

All of this can be summed up, I think, in a quotation from John Jay, the first Chief Justice. In 1790, Jay said: "Next to doing right, the great object in the administration of justice should be to give public satisfaction."[21] He has his priorities right, doesn't he? The first thing is to do right. That is indispensable. If you don't do that, you can forget the rest of it. But doing right is not the only thing. One should also strive to give public satisfaction, to appear to be doing right, to do right in such a way as to command the public's respect. And one way of trying to do that is to pick people for judgeships who already have, in some measure, the public's respect.

Well, given all this, how did the judges actually get picked? At this distance of time, it is hard to answer the question in much detail. Indeed, it is impossible to answer it for all of the appointees. A few observations, however, we can safely make. In the first place, Washington let it be known pretty early that people who wanted federal office should ask for it in writing, and should also obtain whatever letters of recommendation they could.[22] The first district judge appointed in Georgia was Nathaniel Pendleton, who served until 1796. We have a number of letters written by Judge Pendleton, including one dated July 23, 1789, to the President, seeking the appointment. As I have noted, Pendleton got the job, and he got it in preference to George Walton, at that time Governor of Georgia, who had also written soliciting the place. As an example of the style of the time, I think you would be interested in hearing the letter by Judge Pendleton to the President, a letter which, we have to presume, was effective.

> Sir
>
> Having seen the Bill for establishing the judiciary department of the Government of the United States, by which a Judge is to be appointed to hold a district inferior Court in each State, I presume to trouble your highness with an Application for that appointment. As I have not had the happiness of any other opportunity to be personally known to your Highness, than what arose from one or two occasional instances of business, I must entreat your Highness' permission to mention a few circumstances, which induce me to hope for Success in this application.
>
> I am a native of Virginia, of a family well known to your Highness, and their Country. I went at an early age, as a Volunteer, with Captain Stephenson's company of Riflemen in 1775 to Boston where I obtained a Commission in the Army, and continued in it til it was disbanded in 1783—At the unfortunate affair of Fort Washington I was made prisoner of War, and remained so from November 1776 til October 1780, when I

21. Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 153–54.

22. Warren Grice, *Georgia Appointments by President Washington*, 7 GA. HIST. Q. 181 (1923).

was exchanged. Finding General Greene at Philadelphia on his way to take command of the Southern Army, I obtained the appointment of one of his Aids de Camp, where I continued as long as he continued his command.

Previous to my going into the Army I had begun my Studies under a Gentleman, who was afterwards one of your Aids de Camp, and died in your family, Colo. Johnson. I resumed them during my leisure on Long Island, and after the Peace, concluded them under the direction of General Pinckney of Charleston. In 1785, I came to this State where I entered into the practice of the Law, and where I have made an establishment. I have had the happiness to make myself so agreeable to the people of this State, that in the four Years I have lived here I have successively received the appointments of Attorney General, member of Congress, and of the Convention which framed the present plan of the federal Government, and Chief Justice, an office I now have the honor to hold, after being appointed to it a second time.

Having trespassed, perhaps too much already, on your Highness' time and patience, I beg leave to refer you to the Delegates of both Houses of Congress, from South Carolina and Georgia, for the particulars of my Character—and to Mr. Justice Burke, Mr. Baldwin, Mr. Few, Mr. William Houstoun, General Jackson, General Pinckney, and Mr. Edward Rutledge for my professional Talents. I have not named my Uncle, the Chancellor of Virga. in this last number, because I have not resided in that State since 1775, and I have not seen him since my admission to the Bar, consequently he can have no particular knowledge of my professional acquirements, tho I have constantly corresponded with him on general subjects of policy and Legislation.

If I should have mistaken the proper stile of address in this Letter, I flatter myself your Highness will excuse it—The two Houses of Congress, being of different sentiments on this Subject, I hope it will not be thought improper for an individual to use the one most agreeable to his Opinion and feelings.—

I have the Honor to be with the
highest respect and Veneration
Your Highness'
Most obedient and
most Humble servt.
Nathl. Pendleton[23]

A number of things are remarkable about this letter. In the first place, Judge Pendleton (at the time he was Chief Justice of the Superior Court of Georgia) is a little hesitant about how to address the President. He does not say, "Dear Mr. President," as we would today. You may know that one of the chief controversies of the first year of government under the Constitution was how to address the President. At the insistence of the House of Representatives over the more aristocratic Senate, presided over by John Adams, who was keen on the subject, the dispute was finally settled in favor of the simple "Mr. President," but for quite some time many people thought the President should be called "Your Highness." That is, indeed, how Judge Pendleton refers to the President in this letter, but he is a little hesitant about it, and attempts to protect himself, if he has made the wrong choice, by referring to the disagreement between the

23. *Id.* at 192–94 (footnote omitted).

two Houses of Congress on the subject. He mentions his war record, of course, refers to members of Congress whom he knows, and drops the name of his uncle, Edmund Pendleton, Chancellor of Virginia, whom the President knows very well to have been a leading supporter of the Constitution in Virginia.

An interesting sidelight on Judge Pendleton is that when John Rutledge resigned as Associate Justice of the Supreme Court in 1791 to accept an appointment as Chief Justice of South Carolina, Judge Pendleton applied for a position on the Supreme Court. One reason he gives is that he thought the salary of a district judge was going to be higher than it turned out to be when he first applied for the job. (Note, however, that until 1812 it was lawful for federal district judges to engage in the private practice of law.) Judge Pendleton mentions that he is in the same circuit, the Southern, as the judge who had retired, and that he was the senior district judge in that circuit. He mentions his war record again. This time, though, he was less successful. The President named instead Thomas Johnson, a former Governor of Maryland who had been an original nominee for the district court in that state in 1789, but had declined the post.

Possibly the most interesting letter, and a model of what such letters ought to be, is the following, written by Joshua Clay, Jr., to the President on July 25, 1796, after Judge Pendleton had resigned. I read this letter to you also in its entirety. Like the first one, it was successful. Here is what it said: "Sir: Having been informed that Judge Pendleton has forwarded to you the resignation of his office as Judge of the district of Georgia, I take the liberty of proposing myself to your Excellency as a candidate for that office."[24]

It is hard to tell from this record whether long letters or short letters are best. All we can say for sure is that one good way of getting a job was to ask for it.

An important clue to Washington's criteria for making appointments is contained in a letter from Abraham Baldwin suggesting (successfully) the appointment of Joshua Clay, Jr., as district judge.[25] Baldwin refers to Clay as "a steady friend of the present form of government."[26] Again, the point can be made that law, and judging, are not mechanical processes. If judges were not human beings, if their personal feelings did not matter, presumably it would make no difference whether someone had supported the Constitution during the ratification debates or not. So long as that person had decided, after ratification, to support the Constitution, he could be depended upon to apply and interpret the Constitution and laws properly. Indeed, there is much to be said for this attitude, and judges are bound to strive constantly, and, I believe, do strive constantly, to lay aside their personal feelings. As a matter of fact, late in his administration, Washington even seriously considered appointing Patrick Henry to the Supreme Court. Henry had been the leading, and almost successful, opponent of ratification of the Constitution in the Virginia Convention. Still, Presidents somehow seem to feel more comfortable with people they suspect will agree with them, and Washington was no exception in that regard. Especially at the very beginning, he seems to have been reluctant to appoint

24. *Id.* at 208.
25. *Id.* at 210–11.
26. *Id.* at 211.

anyone whose entire devotion to the new system of government could be questioned.

One instance, which perhaps proves both the rule and an exception to it, is the appointment of William Paca to be judge for the District of Maryland.[27] Paca was actually the third person nominated by the President for this position, the first two, Thomas Johnson and Alexander Contee Hanson, having declined.[28] So far as a record of public service was concerned, Paca's qualifications were superb. He was a graduate of the College of Philadelphia, now called the University of Pennsylvania, and completed his legal training at the Inner Temple in London.[29] He became one of the leading legal lights of the colony of Maryland and was a close friend of Thomas Johnson, who has already been mentioned.[30] He was a delegate to the Continental Congress and signed the Declaration of Independence.[31] He was three times elected Governor of Maryland and, in that capacity, entertained General Washington in his home.[32] But, like Jefferson, he did not attend the Constitutional Convention, and he viewed the Constitution with mixed feelings.[33]

Although Paca voted finally, in the state ratifying convention, to ratify the instrument, "he fought strenuously for amendments which would set up safeguards against possible federal aggression in the realm of state and individual rights."[34] This political history made Washington hesitate. Paca's judicial qualifications, on paper, could hardly be better: he had been Chief Judge of the Maryland General Court and the chief judge of the Court of Appeals in Cases of Capture, a court set up by Congress under the Articles of Confederation. But when it came time to pick a federal district judge, Washington temporized. The President had a hard time persuading himself to be enthusiastic about the appointment. After Thomas Johnson had declined the post, the President wrote the following letter to James McHenry, who later became Secretary of War, and whose name is preserved in the title of Fort McHenry in Baltimore:

> Should it be found that the office of district judge would not be acceptable to Mr. [Alexander Contee] Hanson, Mr. Paca has been mentioned for that appointment; and, although his sentiments have not been altogether in favor of the general government, and a little adverse on the score of paper emissions, I do not know but his appointment on some other accounts might be a proper thing. However, this will come more fully under consideration if Mr. Hanson should not wish to be brought forward; and, in that case, I will thank you to give me information relative to Mr. Paca....[35]

The answer came back as follows:

> I have had a long conversation with Mr. Paca. I have every reason to say, that he will make every exertion in his power to execute the trust in

27. For a discussion of Paca's career see Albert Silverman, *William Paca, Signer, Governor, Jurist*, 37 MD. HIST. MAG. 1 (1942).
28. *Id.* at 19.
29. *Id.* at 1–2.
30. *Id.* at 2.
31. *Id.* at 7.
32. *Id.* at 9, 12.
33. *Id.* at 3.
34. *Id.*
35. *Id.* at 19.

the most unexceptionable manner. I believe, also, that the appointment will be gratifying to him, and I think it may have political good consequences.[36]

A letter written a couple of weeks later by the President throws further light on his mental processes in selecting nominees for judgeships:

[To William Fitzhugh]

Mr. [Thomas] Johnson has, as you supposed, declined the appointment of judge to the district of Maryland, and I have lately appointed Mr. Paca to fill that office. Mr. Thomas, whom you recommend for that place, undoubtedly possesses all those qualifications, which you have ascribed to him; and, so far as my own knowledge of that gentleman extends, he is justly entitled to the reputation which he sustains. But in appointing persons to office, and more especially in the judicial department, my views have been much guided to those characters, who have been conspicuous in their country; not only from an impression of their services, but upon a consideration, that they have been tried, and that a readier confidence would be placed in them by the public than in others perhaps of equal merit, who had never been proved. Upon this principle Mr. Paca certainly stands prior to Mr. Thomas, although the latter may possess in as high a degree every qualification requisite in a judge.

Geo. Washington[37]

On the same day the President wrote to notify Mr. Paca of his appointment. The letter is rather cold and formal, as has been remarked.

Sir,

The office of Judge of the District Court in and for the District of Maryland having become vacant; I have appointed you to fill the same, and your Commission therefore is enclosed.

You will observe that the Commission which is now transmitted to you is limited to the end of the next Session of the Senate of the United States. This is rendered necessary by the Constitution, which authorizes the President of the United States to fill up such vacancies as may happen during the recess of the Senate—and appointments so made shall expire at the end of the ensuing Session unless confirmed by the Senate. However, there cannot be the smallest doubt but the Senate will readily ratify and confirm this appointment, when your Commission in the usual form shall be forwarded to you.

I presume, Sir, it is unnecessary for me to advance any arguments to shew the high importance of the judicial System to our National Government, and of course the necessity of having reputable and influential characters placed in the important offices of it. And as I have not a doubt but you are desirous of doing everything in your power to promote the happiness and welfare of your Country, I flatter myself you will accept this appointment.

I am, Sir,

Your most Obedient Serv't

George Washington[38]

True to his word, the President gave Paca a recess appointment, and, on February 9, 1790, when the Senate had reconvened, he sent Paca's name to the

36. *Id.*
37. *Id.* at 19–21.
38. *Id.* at 21 (footnote omitted).

Senate as a permanent holder of the judgeship.[39] The nomination was confirmed on the next day, February 10.[40] Some of the amendments to the Constitution which Paca wanted to offer at the Maryland ratifying convention are interesting in the present context. He suggested, for example, that no "matter or Question already determined in the State Courts, be revived or agitated in the Federal Courts,"[41] a proposition that of course is well accepted at the present time.

It would be interesting to know what the conversation between Mr. McHenry and Judge Paca was like. The letters appear to be written in code. They are full of what present-day commentators would refer to as winks and nods. Judge Paca had given the President the secret grip, so to speak. He was a man to be depended upon, despite having previously been soft on Anti-Federalism. One can be confident, I think, that particular cases were not discussed during this interview, and that neither the President nor the prospective judge would have thought such discussion proper. One can be equally confident, I suggest, that general principles were discussed, and that the aspiring nominee said at least enough to allay any fears that the President might have entertained that he would behave on the bench as a wild Anti-Federalist.

Perhaps the strangest of the appointments, or at least the most remarkable, was that of William Drayton to be the first United States District Judge for the District of South Carolina.[42] It seems that Judge Drayton was actually (or at least had at one time been) a Tory! William Drayton was born in South Carolina and called to the bar in England in 1755, at the age of twenty-three.[43] Ten years later, in 1765, he was appointed Chief Justice of British East Florida by the Governor of that colony.[44] The capital of the colony was in St. Augustine. Drayton did not get along with the colonial governors, but apparently he stayed loyal to the Crown during much of the Revolutionary War. He believed that a colonial legislative assembly should be created, but one governor after another steadfastly resisted the suggestion. As late as 1778, Drayton described himself as a "Member of the British Empire, anxious for the general welfare of the whole...."[45] Early in 1776, the governor of the colony had his Council suspend Drayton as Chief Justice.[46] Drayton traveled to England and made his defense before the Board of Trade, which recommended that he be restored to office with full salary from the date of suspension.[47] The British government accepted this recommendation, and by September 3, 1776, Drayton was back in East Florida. He continued to make himself obnoxious to the colonial governor, however. A case came before him involving certain American prisoners from Virginia, sent to East Florida for safe-keeping. Drayton ordered their release on a writ of habeas corpus.[48]

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39. DHFFC, *supra* note 16, at 58–59.
40. *Id.* at 61.
41. *See* Grice, *supra* note 22, at 24.
42. *See* Charles L. Mowat, *The Enigma of William Drayton*, 22 FLA. HIST. Q. 1 (1943).
43. *Id.* at 5.
44. *Id.* at 5–6.
45. *Id.* at 14.
46. *Id.* at 23–24.
47. *Id.* at 26.
48. *Id.* at 19.

Late the next year, in December of 1777, the governor's Council again suspended Drayton from office.[49] He returned to England to defend himself, but before the Board of Trade could reach a decision, in June 1778, he resigned as Chief Justice.[50] The reasons for the resignation are unclear. Perhaps he knew he would lose, or perhaps he expected to receive another appointment. In any case, he did not return to St. Augustine. He went back to Charleston instead. It would be interesting to know when he arrived there. The town was captured by the British on May 12, 1780. We do know, in any event, that Drayton remained in Charleston after the British had been expelled and continued to live there for the rest of his life.

In 1789 Drayton was made a judge of the Admiralty Court of the State of South Carolina and an Associate Justice of the Supreme Court of that state.[51] After Thomas Pinckney, the original appointee as United States District Judge for the District of South Carolina, had declined the office, President Washington gave Drayton a recess appointment. This was followed by a regular nomination sent to the Senate on February 9, 1790. The nomination was confirmed the next day. Unhappily, Judge Drayton did not live long. On June 11, 1790, the Senate was notified that he had died, and Thomas Bee was appointed to replace him. Drayton was fifty-eight years old. Bee, also educated in England, served until he died twenty-two years later.

We know almost nothing of the reasons that led President Washington to select William Drayton, but it is interesting to speculate. Obviously he was of high standing in his own state, having been appointed to two state judgeships in 1789, shortly before his selection as a federal judge. He was a native of South Carolina and a member of a leading family, so he could hardly have been a stranger to the establishment of that state. He had been, at least ostensibly, loyal to the Crown during part of the War, but perhaps his conduct as a British judge was actually regarded as a qualification for public office under the new government. He had, after all, faithfully applied the law even when it favored enemies of the Crown. He was the sort of man, one supposes, who could be depended upon to make unpopular rulings, even rulings placing his own position in jeopardy, when the law required. I believe it is greatly to President Washington's credit to have selected such a person for judicial appointment. Obviously Drayton was much more than a mere time-server. He was a man of the law and could be relied upon to apply it, come what may.

Many others among President Washington's appointees deserve more than passing mention. Take, for example, Harry Innes of Kentucky, who was only thirty-seven years old when he was appointed judge for the District of Kentucky in 1789.[52] He was unique among Washington's appointees in actually having opposed the Constitution.[53] He was a Republican who feared the broad commerce power, and, of all things, the federal judicial establishment contemplated by Article III. He disliked the diversity jurisdiction, fearing that suits would be brought against Kentuckians in some distant federal forum. It is important to recall here that Kentucky was the center of opposition to the new

49. *Id.* at 30.
50. *Id.* at 31.
51. *Id.* at 32.
52. *See* MARY K. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789–1816, at 31–53 (1978) (discussing the contributions of Innes as a jurist).
53. *Id.* at 34–35.

Constitution. Fourteen delegates from Kentucky attended the Virginia ratifying convention. Only three of them voted in favor of the Constitution. One of these three votes, incidentally, was James Innes, Harry Innes's brother. Perhaps the fact that his brother was on the right side helped him.

In any case, although opposed by the Marshall Family, headed by Colonel Thomas Marshall, John Marshall's father, who had moved to Kentucky, Innes was appointed judge by the President.[54] He was recommended by John Brown, a Representative from Kentucky, later (1792–1805) a United States Senator. Congressman Brown wrote an interesting letter to Innes notifying him of his appointment. The letter was sent on September 28, 1789, two days after the nomination was confirmed. Innes, of course, knew nothing of his appointment until he received the letter. Brown apologized for the low salary, $1,000. "I could not at present get it raised beyond that sum as an opinion prevailed that the Business in [your] Court would be inconsiderable."[55] Brown reminded Innes, however, that he could still engage in the private practice of law. (This was true until 1812 for federal judges.[56]) The President did not send Judge Innes's commission to him directly. Instead, he gave the commission to Congressman Brown, in the belief that the congressman would have means, presumably other than the United States mail, better suited for communication with the wilds of Kentucky. In any case, Innes "promptly took the oath of office and...conscientiously interpreted the Constitution whose ratification he had opposed."[57] As far as I know, no other person who opposed the adoption of the Constitution was appointed to a judgeship by President Washington.

Just as in the case of Drayton of South Carolina, though in a different way, the appointment of Innes of Kentucky carries a message of encouragement. Lawyers and judges are trained to set aside personal opinions and to adjust themselves conscientiously to the law. There is no doubt that Harry Innes did just that. He served on the federal bench for twenty-seven years, until his death in 1816. The fact that he had initially opposed the adoption of the Constitution, even to the extent of expressing doubts about some aspects of Article III, seems not to have affected in the least the quality of service he rendered as a federal judge. Sometimes, it seems, faith in the integrity and conduct of judicial appointees really is justified.

Cyrus Griffin of Virginia also deserves special mention.[58] Washington's first choice had been Edmund Pendleton, Chief Judge of the Virginia Supreme Court of Appeals. Pendleton, though identified later politically as a Republican, had been President of the Virginia ratifying convention and had strongly supported the new Constitution. Several of his addresses were influential in securing the narrow victory that the proposed Constitution achieved in Virginia, which was probably the most important of the original states. He was well known to President Washington for many reasons, as the letter, already quoted, from his nephew Nathaniel shows. Edmund Pendleton was sixty-eight years old in 1789, and, if he had accepted the appointment, would have been the oldest person appointed by President Washington to the bench. He declined the

54. *Id.* at 35–37.
55. *Id.* at 37.
56. *See* 2 Stat. 788.
57. TACHAU, *supra* note 52, at 37.
58. For a brief discussion of Griffin's life, see Henry S. Rorer, *Cyrus Griffin: Virginia's First Federal Judge*, 21 WASH. & LEE L. REV. 201 (1964).

nomination, but not, as one might have thought, for reasons of age or infirmity. Instead, he seems to have preferred to remain on the state bench, perhaps believing that the state courts were, at that time, much busier and more important. In any event, Edmund Pendleton lived another fourteen years, serving all that time as Virginia's highest judge.

In Edmund Pendleton's place the President chose Cyrus Griffin, aged forty-two.[59] He had been educated at the Middle Temple and had served in the Continental Congress. He had, in fact, been President of the United States immediately before George Washington. Griffin was elected its President by the Continental Congress in 1788. His title was "President of the United States in Congress Assembled." He had been a judge of the Admiralty Court of Virginia (1780–87), and also a judge of a federal court, the Court of Appeals in Cases of Capture, created under the Articles of Confederation.

Many distinguished "characters" were recommended to the President for this Virginia judgeship, including George Wythe and John Tyler, Jr., who was Jefferson's candidate. Jefferson, in fact, cordially disliked Cyrus Griffin and strongly opposed his appointment.[60] The President selected Griffin nonetheless, perhaps in the thought that the Griffin appointment provided a sort of balance to the choice of Harry Innes for the District of Kentucky. Griffin served for twenty-one years, until he died in 1810. There is perhaps some justice in the fact that upon Griffin's death President Madison appointed John Tyler, Jr., whom Jefferson continued to support.[61]

What can we say about this first group of appointees in general? If we limit this inquiry to the sixteen persons who were President Washington's initial appointees as federal district judges in the first fourteen states (the original thirteen plus Vermont) and the districts of Maine and Kentucky, the following facts emerge. Of these sixteen, twelve served for the rest of their lives, anywhere from less than one year, in the case of William Drayton, to twenty-nine years, in the case of David Sewall of the District of Maine. One of the appointees, Gunning Bedford, Jr., of Delaware, was a "Framer," having attended the Constitutional Convention in Philadelphia and signed the proposed document. (William R. Davie of North Carolina, who declined appointment, was also a Framer.) Another appointee, William Paca, whom I have mentioned at some length, was a Signer of the Declaration of Independence.[62] The ages of the persons appointed at the time of their selection ranged from thirty-three to fifty-seven.

Ten of this original group of sixteen judges had been members of the Continental Congress. Seven had served as members of their states' ratifying convention, one of them, David Brearly of New Jersey, as President of the convention. Not surprisingly, of these seven ratifying-convention members, all voted in favor of the new Constitution. Five of the original group of sixteen were veterans of the Revolutionary War, including a Major General, John Sullivan of New Hampshire, a Lieutenant Colonel, Brearly of New Jersey, and two Lieutenants, John Sitgreaves of North Carolina and Nathaniel Chipman of

59. *Id.* at 207.
60. *Id.* at 208–10.
61. *Id.* at 209–10.
62. *See* Silverman, *supra* note 27, at 7.

Vermont. At least two, Chipman and Richard Law of Connecticut, were professedly close friends of Alexander Hamilton.

As for prior judicial experience, eleven of the original sixteen had, at least for some time, been a judge of some court, state or federal. In the educational department, Yale College claimed two, the College of New Jersey, now called Princeton, one, Harvard College two, and William & Mary one. The College of Philadelphia, now called the University of Pennsylvania, was the champion among American institutions of higher learning, claiming three appointees as alumni. It also has to be noted that three appointees received their legal education at one of the Inns of Court in London.

The criteria used by President Washington for appointments to the Supreme Court have been summarized as follows:

(1) support and advocacy of the Constitution;

(2) distinguished service in the Revolution;

(3) active participation in the political life of state or nation;

(4) prior judicial experience on lower tribunals;

(5) either a "favorable reputation with his fellows" or personal ties with Washington himself; and

(6) geographic "suitability."[63]

With some changes and some notable exceptions, these criteria, I believe, hold good for the lower-court appointments as well. Obviously geographic suitability was not a problem for the lower courts, because each of the federal district judges was a resident of the state or district for which he was appointed. It is also probably true, in the nature of things, that the President tended to be personally acquainted with fewer of the lower-court nominees. And of course there are always exceptions: Harry Innes, as we have seen, was an open opponent of the Constitution,[64] and William Paca, though he voted for it, had expressed serious reservations.[65] On the whole, though, the themes of support of the Constitution, service in the Revolution, political experience, and judicial experience are consistent ones. And through the whole process there runs the need to select "the fittest characters," those with the best reputation, those whose opinions were most likely to command public assent.

* * *

No doubt a great deal more could be said on this subject. James Duane of New York, for example, is worth a whole book on his own, and, in fact, there is such a book.[66] Further research into the lives of the others would, I suspect, be richly repaid. But I hope I have said enough to indicate that the task faced by the President when it came time to staff the lower federal courts was both delicate and well executed. If the new nation was to succeed, both internationally and within its own borders, a strong and reliable system of federal justice had to be created. It was vitally important to select the right people at the beginning. If, as is often said, we have a government of laws and

63. *See* HENRY ABRAHAM, JUSTICES AND PRESIDENTS 72 (3d ed. 1992), *cited in* WILLIAM CASTO, THE SUPREME COURT AND THE EARLY REPUBLIC 56 n.5 (1995).

64. *See* TACHAU, *supra* note 52, at 34.

65. *See* Silverman, *supra* note 27, at 3.

66. EDWARD P. ALEXANDER, A REVOLUTIONARY CONSERVATIVE, JAMES DUANE (1733–1797) OF NEW YORK (1938).

not of men, or, as one would say today, a government of laws and not of people, it is still crucial to select appropriate people to make, execute, and interpret the laws. Without such people, the laws will amount to nothing or, worse still, they will work for evil ends. Those of us who now serve on the federal bench, and those of us who practice before it, are all standing on the shoulders of the giants initially selected for the purpose by President Washington.

Many of these names, probably most of them, I dare say, you have never heard before. It is entirely possible that you will never hear of them again. Not one person in 10,000, I suppose, could tell you today who Cyrus Griffin was, or William Drayton, or William Paca. Yet they made a tremendous contribution to the welfare of this country. Almost everything they did, was done for the first time. We are still benefiting from their work and example.

I would like to conclude by reading the names of those persons whom President Washington appointed to the federal bench.

From Connecticut, Richard Law.

From Delaware, Gunning Bedford, Jr.

From Georgia, Nathaniel Pendleton and Joshua Clay, Jr.

From Kentucky, Harry Innes.

From Maine, Daniel Sewall.

From Maryland, William Paca.

From Massachusetts, John Lowell.

From New Hampshire, John Sullivan and John Pickering (the latter, as you may recall, was impeached and removed from office).

From New Jersey, David Brearly.

From New York, James Duane, John Laurance, and Robert Troup.

From North Carolina, John Sitgreaves.

From Pennsylvania, Francis Hopkinson, William Lewis, and Richard Peters.

From Rhode Island, Henry Marchant.

From South Carolina, William Drayton and Thomas Bee.

From Vermont, Nathaniel Chipman.

And from Virginia, Cyrus Griffin.

I return to the question posed at the beginning of this lecture. Why pay any attention to this subject? You will all have your own answers to that question. I propose for your consideration two answers: first, because the subject is fun. It is intrinsically interesting and contains its own sources of humor and amusement. Secondly, I think we owe some attention to these judges who laid the foundations of the edifice of justice in which we all now work. I think of that famous passage from the forty-fourth chapter of the Book of Ecclesiasticus, also known as Sirach, beginning at the ninth verse:

9 And some of them there are who have no memorial,
So that there was an end of them when they came to their end;
10 They were as though they had not been,

And their children after them.

11 Nevertheless these were men of piety,

* * *

13 Their memory abideth for ever,
And their righteousness shall not be forgotten;

14 Their bodies were buried in peace,
But their name liveth unto all generations.[67]

Dean, I yield the floor.

67. THE APOCRYPHA AND PSEUDEPIGRAPHA OF THE OLD TESTAMENT 481–82 (R. H. Charles ed. 1913).