

**WOODROW WILSON'S JUDICIAL NOMINEES:
PATRONAGE OR PROGRESSIVISM?**

THESIS

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INTRODUCTION

“I never know whether to describe myself as a liberal or as a conservative.”¹

Woodrow Wilson

Woodrow Wilson was one of this nation’s most pivotal and yet most enigmatic presidents. Numerous aspects of his personality, policies, and philosophy remain contested, and his public career and private life have been the subjects of intense investigation. While Wilson’s foreign policies are foremost among those areas in which scholars have failed to reach consensus, the nature of his political philosophy also has produced a wide variety of competing interpretations. Prior to his career in politics, Wilson was a political science professor and university president. During his career, both academic and political, he produced a vast body of speeches, academic treatises, and general works of history and politics from which scholars have drawn many different conclusions. He has been variously characterized by historians and political scientists as a “Jeffersonian,” a “Hamiltonian,” an “antebellum Whig,” an early formulator of “modern

liberalism,” a “conservative,” his age’s “supreme political centrist,” and finally, a “progressive.”²

The facts of Wilson’s public career are less subject to debate. He entered political life aligned with the conservative elements in the Democratic Party who opposed the “radicalism” of William Jennings Bryan. At some point in 1910, either during his campaign for the governorship of New Jersey or soon after his election, Wilson made a definitive conversion to the progressive wing of the party. After running and winning the presidency as a “progressive” Democrat in 1912, however, the depth of Wilson’s commitment to the progressive cause was frequently questioned by more advanced progressives.

President Wilson’s ambivalent political orientation is reflected in his first two appointments to the United States Supreme Court. In 1914, he appointed Attorney General James C. McReynolds to the United States Supreme Court. Justice McReynolds, Wilson’s first appointment to the Supreme Court, proved to be the Court’s most reactionary justice, and is primarily remembered as being one of the “Four Horsemen” who voted repeatedly to strike down President Franklin D.

¹ Woodrow Wilson, “An Address to the New York City High School Teachers Association,” Jan. 9, 1909, *Papers of Woodrow Wilson*, (hereinafter cited as *PWW*), 69 vols., ed. Arthur S. Link (Princeton: Princeton University Press, 1966 - 1993), 18: 593.

² See e.g., Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 1- 25; Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Alfred Knopf, Inc. 1948, reprint 1973), 308 – 367.

Roosevelt's New Deal legislation in the 1930's. Justice McReynolds is also notorious for being the most conspicuous anti-Semite and racist to serve on the United States Supreme Court. In the words of one commentator, "the first representative of the New Freedom was to be the last apostle of the Old Deal on the Supreme Court."³

Louis D. Brandeis, the first Jewish justice of the Supreme Court and one of the nation's leading progressives, was Wilson's second appointment made in 1916. Brandeis is remembered as one of the Court's leading liberals who championed civil liberties, including the right to privacy, and often dissented, along with Justice Oliver Wendell Holmes, from the rulings of the generally conservative William Taft Court.

How did President Wilson manage to appoint such ideologically disparate men as Justices McReynolds and Brandeis? These two appointments naturally raise questions concerning the criterion by which President Wilson judged nominations for the federal judiciary. Did Wilson consciously seek to place progressives on the federal bench? The nominations of McReynolds and Brandeis also raise questions about the process employed by Wilson in making judicial nominations. Was Wilson deeply involved in a personal way, or did he

³ John P. Frank, "The Appointment of Supreme Court Justices: III," *Wisconsin Law Review* (July 1941): 461.

rely on advisors and his Attorney Generals? Finally, what role did politics and patronage play in Wilson's judicial nominations? This study will attempt to answer these questions.

The first chapter will briefly examine the progressive movement and its impact on the American legal system, as well as summarize Woodrow Wilson's career, election as president, and the influences and personalities that shaped his decisions regarding judicial nominations as president. The second chapter will discuss Wilson's three nominations to the United States Supreme Court, and the third chapter will explore his first term nominations to both the circuit court and district court benches. The study is confined to Wilson's first term because it was during that term that he pursued and accomplished his extensive reform agenda, made all three of his Supreme Court nominations, and ran for election in 1916. Wilson's second term was overwhelmed by participation in World War I, the Versailles peace conference in 1919, the bitter struggle over the ratification of the peace treaty, and the President's stroke and incapacitation. Furthermore, he made no more Supreme Court nominations during his second term.

Focusing on President Wilson's nominees to various federal judgeships will help shed light on whether Wilson was a committed progressive or merely a conservative political opportunist. The United States Supreme Court has the final word on whether particular

legislative enactments are constitutional, thus, any president who pursues a program of reform must be vitally concerned with appointments to the Court. A progressive president who has successfully enacted laws effecting serious reforms in the nation's economic relationships would not want a conservative judge wedded to notions of the sanctity of contracts and private property passing on the constitutionality of these newly achieved reforms.

Nominations to the Supreme Court have historically received a great deal of public attention, but lower court nominations are arguably a better indicator of a president's true agenda. Supreme Court appointments are some of the most significant that a president makes and he is keenly aware of the political repercussions of these nominations. The lower federal courts, however, traditionally have received a great deal less public attention. The political philosophies of individuals nominated to the lower courts, outside the glare of publicity, are probably better reflectors of a president's true values and agenda than even Supreme Court nominations. For example, Wilson's nomination of Brandeis in early 1916 involved substantial political considerations concerning the upcoming presidential election. However, filling a federal district court bench from Alabama did not carry such weighty implications, nor were people outside the district usually aware that a bench needed to be filled. What sort of men did

Wilson choose for those positions? Hopefully, the answer to that question will shed light on the larger question concerning the depth of Wilson's progressivism.

CHAPTER I

WILSON AND PROGRESSIVISM

Most historians have regarded the Presidency of Woodrow Wilson as the apex of the progressive movement, but they are divided on how to define Wilson's politics and progressivism more generally. In the typical narrative, the progressive movement achieved its full strength in the election of 1912 when two progressives, Democrat Woodrow Wilson and the Progressive Party nominee, Theodore Roosevelt, squared off against each other and left the conservative Republican President, William Howard Taft, trailing a poor third. Wilson won that election and then passed numerous "progressive" reforms during his first term. However, the "progressive movement" came to an abrupt halt with America's entry into World War I. Numerous historians have noted difficulties with this narrative, not the least of which is the nature of the figure at its very center, Woodrow Wilson. Many have seriously questioned whether Wilson actually was a progressive. A second difficulty explored by historians is the very definition of "progressive" and the nature of the "progressive movement."

Generally speaking, the progressive movement of the early twentieth century was a reaction against the rapidly industrializing economy that produced great extremes in wealth in the United States after the Civil War; however, the definition of the term, “progressive movement,” is fraught with controversy among historians.⁴ Early historians of the era assumed that progressivism was simply an early-twentieth century movement that evolved into New Deal liberalism.⁵ This linear view of progressivism is no longer accepted by most historians. Richard Hofstadter characterized progressives as middle-class and urban elites whose protest was more psychological than economic. According to Hofstadter, the progressive movement was largely a reactionary movement led by nineteenth century Americans seeking to return to a mythical pre-industrial past.⁶ For Hofstadter and other historians working in the 1950’s, progressivism was an attempt to restore individualism back to its dominant position in the face of rising corporate power. Arthur S. Link, Woodrow Wilson’s pre-eminent biographer, agreed with this view of progressivism. Link tended to portray Wilson as a moralistic leader who wanted to bust trusts, reduce

⁴ William G. Anderson, “Progressivism: An Historical Essay,” *The History Teacher*, 6 (May 1973), 427 – 452.

⁵ John D. Hicks, *The Populist Revolt: A History of the Farmer’s Alliance and the People’s Party* (Minneapolis, 1931), 404 – 25; Harold U. Faulkner, *The Quest for Social Justice, 1898-1914* (New York, 1931).

⁶ Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.*, (New York, Alfred Knopf, Inc., 1955), 216.

tariffs, and rely on state rights. According to Link, Wilson's progressivism was only superficial at the time of his election.⁷

In the 1960's, radical historians argued that progressivism was actually a political front behind which the corporate interests consolidated power.⁸ The New Left historians tended to agree with the consensus historians of the 1950's that the progressives were conservative and backward looking. However, where they differed was in their arguments that the progressives' programs were really the deliberate result of big business's efforts to consolidate its power.⁹ Some modern historians believe that the New Left revisionists overstated their case.¹⁰

In 1970, historian Peter G. Filene declared that "the progressive movement never existed,"¹¹ but this was not the last word on the matter. He claimed that the notion of a progressive movement was a semantic muddle that lacked any unifying themes, goals, political program, or social description. Filene argued that the whole concept was moribund and should be left for dead. Yet, the historical construct of a

⁷ Arthur S. Link, *Woodrow Wilson and the Progressive Era: 1910 – 1917* (New York: Harper & Row, 1954), 80.

⁸ Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900 – 1916* (New York: Free Press, 1963).

⁹ *Ibid.*, 2.

¹⁰ Geoffrey Hodgson, *Wilson's Right Hand: The Life of Colonel House*, (New Haven: Yale University Press, 2007), 33.

¹¹ Peter G. Filene, "An Obituary for the Progressive Movement" *American Quarterly*, 22 (Spring, 1970), 20 -34.

progressive movement refused to die.¹² In the 1970's and 1980's historians produced a great number of works addressing the progressive era in the context of particular regions, states, and cities.¹³ One of the best summaries of progressivism was made by Prof. Dewey Grantham, who described southern progressivism as "A wide-ranging but loosely coordinated attempt to modernize the South and to humanize its institutions without abandoning its more desirable values and traditions."¹⁴ Although this definition refers specifically to the South, it applies equally to the progressive movement as a whole.

The argument over the nature of progressivism seems to have come full circle. In a recent treatment of the era, Michael McGerr declares that "progressivism was a radical movement, though not by common measures of economic and political radicalism."¹⁵ According to McGerr, far from never having existed or being a conservative movement, progressivism was instead the creed of a crusading middle class that was radical in its conviction that other social classes should be remade in its own image.¹⁶

¹² Daniel T. Rodgers, "In Search of Progressivism," *Reviews in American History*, 10 (Dec. 1982), 113–132.

¹³ Lewis L. Gould, *Progressives and Prohibitionists: Texas Democrats in the Wilson Era* (Austin: University of Texas Press, 1973, reprint 1992); Dewey Grantham, "The Contours of Southern Progressivism," *The American Historical Review*, 86 (Dec. 1981), 1035 – 1059.

¹⁴ Dewey Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville: University of Tennessee Press, 1983), xvi.

¹⁵ Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870 – 1920* (New York: Free Press, 2003), xv.

¹⁶ *Ibid.*, xiv – xv.

Perhaps the best reconciliation of the various conflicting groups that are considered “progressive” lies in a linguistic approach. Daniel Rogers has argued that what held the progressive movement together was three distinct clusters of ideas, or social languages, that progressives could draw upon. Those three “languages of discontent” are identified as the rhetoric of anti-monopolism, the language of social bonds, and the language of social efficiency.¹⁷

Rodgers identified the language of anti-monopolism as the strongest, the oldest, and the most uniquely American of the three. Attacks on “privilege” and excessive concentrations of wealth can be traced back through the Populists to Andrew Jackson. What was new in the progressive era was that what was once an “outsiders” critique of society was adopted by insiders such as middle-class professionals and Republicans.¹⁸ The second set of progressive ideas was the language of social bonds that arose during the progressive era and was not limited to America. The “rhetoric of social cohesion” was a revolt against earlier ideas that explained all political, economic, and social phenomena in terms of the individual. Rodgers also notes a fissure within this specific cluster of ideas between those whose ideas of social connection always ran toward the nation and state, and others whose

¹⁷Rodgers, “In Search of Progressivism,” 123.

¹⁸ Ibid.

emphasis was on the family, community, and neighborhood. The language of social bonds was ultimately the “rhetoric of socialized Protestantism.”¹⁹ The third cluster of ideas animating the progressive movement was connected to efficiency, rationalization, and social engineering. The language of social efficiency had its roots in “the merger of prestige science with the prestige of the well-organized business firm.”²⁰ These three clusters or sets of ideas were full of mutual contradictions but they also overlapped. As a group, they formed three sets of available ideas and rhetoric but were not an ideology.

This study cannot answer the seemingly insoluble riddle concerning the essence of progressivism, but it can shed some light on the nature of that riddle. The important point is that there was a group of people who self-identified and were identified by others as “progressives.” The issue that this study will tackle is whether Woodrow Wilson consciously and deliberately attempted to fill the federal judiciary with “progressives.”

An important aspect of the progressive movement was its impact on the American legal system. The progressives and the courts enjoyed an ambiguous relationship. The traditional view among progressives

¹⁹ Ibid., 126.

²⁰ Ibid., 126 – 7.

has been that during the Progressive Era the courts were generally obstacles to reform. According to this view, judges during this period read their own Social Darwinian philosophy into the law in order to justify nullifying numerous economic reforms.²¹ Certainly Louis D. Brandeis shared this view. Writing on the eve of his nomination to the Supreme Court, Brandeis accused judges of being blind to the great social and economic changes of the last fifty years and enshrining their personal notions into law in order to thwart reform.²² Theodore Roosevelt repeatedly criticized the courts for their reactionary attitudes toward social legislation.²³

There are many examples supporting this view. The courts during this period were particularly hostile to the emerging trade union movement. In the early 1900's, judges around the nation issued rulings overturning closed-shop laws and bans on yellow dog-contracts in the railroad business. Courts also frequently issued injunctions to stop workers' collective actions, were hostile to union boycotts and willing to suppress the free speech of union organizers.²⁴

More recent scholarship has tended to emphasize the fact that Progressive Era courts generally were more receptive to worker

²¹ Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *The Journal of American History*, 72 (June 1985): 63.

²² Louis D. Brandeis, "The Living Law," *Illinois Law Review*, 10 (Feb. 1916), 463 – 64.

²³ Theodore Roosevelt, "Criticism of the Courts," *Outlook*, Sept. 24, 1910, 149 – 53.

²⁴ McGerr, *A Fierce Discontent*, 143–4.

protective legislation. The basic elements of the progressive program to protect workers were laws regulating child labor; maximum working hours for women and children (and eventually for men working in dangerous occupations); safety standards for factories and mines; the establishment of a minimum wage, initially for women and children, and later for men; the creation of a workmen's compensation system to financially protect families against the effects of injury and death occurring on the job; and laws protecting workers' rights to organize unions. The reformers secured most, but not all, of this program working through state legislatures during the first two decades of the twentieth century. Although there were some set-backs, it is now clear that the nation's courts deferred to legislative judgment and eventually allowed the reforms to stand. This was generally true except, as previously noted, for laws that attempted to support unions.²⁵

Progressives also achieved a major reform of the court system itself with the creation of the modern system of specialized juvenile courts.²⁶ The establishment of juvenile courts is a reform that had its roots in Jane Addams' Hull House, as several of its residents successfully lobbied the Illinois Legislature for the creation of specialized courts for the youthful offender in 1899. The reform spread

²⁵ Urofsky, "State Courts and Protective Legislation During the Progressive Era," 64.

²⁶ McGerr, *A Fierce Discontent*, 113.

quickly and by 1909 twenty-three states had created juvenile court systems.²⁷

Another feature of the Progressive Era legal landscape was “trust busting.” The post-Civil War era had seen the rise of immensely large business organizations and combinations known as trusts. These trusts seemed poised to monopolize entire industries. Examples included John D. Rockefeller’s Standard Oil, J.P. Morgan’s banking interests, and Andrew Carnegie’s United States Steel. In 1890, Congress passed the Sherman Anti-Trust Act, which prohibited “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. . . .”²⁸ Although Theodore Roosevelt was not *per se* opposed to corporate bigness, he repeatedly fulminated against the wickedness of so-called “bad trusts.” Roosevelt’s administration prosecuted several high profile anti-trust cases and won a major victory in the Northern Securities case, which involved many leading Wall Street financiers.²⁹ Roosevelt’s administration also initiated an anti-trust suit to dissolve John D. Rockefeller’s Standard Oil Company of New Jersey in 1906. In 1911, the Supreme Court upheld a lower court ruling ordering the break-up of the Standard Oil Company.³⁰

²⁷ Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (New York: Cambridge University Press, 2003), 212 – 217.

²⁸ 15 USCA § 1 (West 1997).

²⁹ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

³⁰ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

Ironically, President William Howard Taft, the “conservative,” actually initiated twice as many antitrust suits than the famous “trustbuster” Roosevelt.³¹ Taft was certainly a conservative in economic matters, but his extraordinary record of initiating anti-trust suits appears to have been motivated by a desire to pursue what he believed to be Roosevelt’s wishes. Taft’s Attorney General, George W. Wickersham, even prosecuted the United States Steel Corporation, an action Roosevelt refused to undertake.³² Overall, the results of Taft’s vigorous antitrust prosecutions were disappointing and never seriously challenged the nation’s corporate structure. The trend toward ever larger enterprises and monopolized industries continued.

In 1912, a new figure appeared on the national stage carrying the progressive banner, the former college professor, President of Princeton, and Governor of New Jersey, Woodrow Wilson. During the first fifty years of his life Woodrow Wilson was, by birth, education, and temperament, a conservative. His conversion to progressivism came late and even his most important biographer has admitted that it may have been motivated to a large degree by political ambition.³³

³¹ Paolo E. Colletta, *The Presidency of William Howard Taft* (Lawrence, KS: University of Kansas Press, 1973), 153 – 164.

³² McGerr, *A Fierce Discontent*, 159.

³³ Arthur S. Link, *Wilson: The Road to the White House* (Princeton, NJ: Princeton University Press, 1947), 123.

Therefore, it is legitimate to pose questions concerning the depth of Wilson's commitment to progressive reform.

Woodrow Wilson, the son and grandson of Presbyterian ministers, was born on December 29, 1856, in Staunton, Virginia.³⁴ The greatest influence on Wilson's life while he was growing up was religion. His father, Joseph Ruggles Wilson, was a leading figure in the Southern Presbyterian Church and a supporter of the Confederacy. In 1870, he became professor of theology and rhetoric at the Columbia Theological Seminary in South Carolina, while also holding the pastorate of the First Presbyterian Church of Columbia. This was the pinnacle of the profession for a Southern Presbyterian minister at the time.³⁵ The influence of Joseph Wilson on young Woodrow cannot be overstated. According to one of Wilson's biographers, "Nearly everyone who has written about him has commented on how the pulpit and the manse left unmistakable marks on the style, direction, and content of his political career."³⁶

Wilson's mother, Janet (Jessie) Woodrow, was also extremely influential in his development. From his mother Wilson derived a

³⁴ Traditionally, Wilson's birth date has been given as December 28, 1856, but an entry in the Wilson family bible states that he was born on December 28th at 12 and ¾ o'clock at night. See "Wilson Family Bible," *PWW* 1: 3, and "Letter from Janet Woodrow Wilson to WW, Dec. 29, 1877," *PWW*, 1: 332.

³⁵ *Ibid.*, 16.

³⁶ John Milton Cooper, Jr. *The Warrior and the Priest: Woodrow Wilson & Theodore Roosevelt* (Cambridge, MA: Harvard University Press, 1983), 15.

supreme confidence in his own abilities and future prospects. But Wilson also derived from his mother a brooding introspective nature that often dwelt upon imagined slights and obsession with poor health. He was most comfortable in the presence of family members, especially female relatives, and old friends.

Wilson's childhood was unusual due to the clerical and intellectual background, but he also had to overcome a childhood disability that essentially went unrecognized. Wilson did not learn his letters until he was nine and did not learn to read until he was eleven. He was a slow reader his entire life. Much of the family appears to have dismissed the boy as not too bright. Dr. Edwin A. Weinstein, M.D., a Wilson biographer, has speculated that he suffered from a form of dyslexia that was probably the result of a congenital brain defect.³⁷ Dyslexia remains a difficult condition to treat, yet Wilson essentially cured himself by developing a fierce concentration and a near photographic memory. He also had difficulty in writing and conquered that by teaching himself shorthand at age sixteen.³⁸

Beginning relatively early in life, around the age of sixteen and throughout his college years, Wilson had his heart set on a career in politics. While still a teenager, he put a picture of William Gladstone,

³⁷ Edwin A. Weinstein, *Woodrow Wilson: A Medical and Psychological Biography* (Princeton, NJ: Princeton University Press, 1981), 15 - 19.

³⁸ *Ibid.*, 19 - 20.

the Prime Minister of Great Britain, above his desk.³⁹ He first attended Davidson College in North Carolina and then transferred to Princeton after two years. At Princeton, Wilson blossomed as a student. He immersed himself in college life and focused his activities on public speaking and debate. During his junior year Wilson discovered the writings of English publisher and critic Walter Bagehot, who was to have a powerful influence on his thinking and literary style. By the time he graduated from Princeton in 1879, Wilson had decided upon a career in politics and entered the University of Virginia law school because he believed that law would serve as a gateway into the political career he ardently desired. However, he was bored by the study of law and unhappy during his brief law practice in Atlanta in 1882.

Wilson decided that lack of a fortune or independent means precluded a career in politics. In lieu of politics, he decided to pursue an academic career from which he could write and lecture on political subjects.⁴⁰ He entered Johns Hopkins University for graduate study in 1883. One of the factors likely motivating Wilson was that he had fallen in love with Ellen Louise Axson, the daughter of a Presbyterian minister from Rome, Georgia. Wilson and Ellen Axson became engaged in September, 1883, just prior to his departure for graduate

³⁹ Link, *Road to the White House*, 5. Coincidentally, Wilson also shared a birthday with Gladstone, December 29th, although Gladstone was born in 1809. See Roy Jenkins, *Gladstone: A Biography* (New York: Random House, 1995), 3.

school. The couple was married in June, 1885 immediately upon Wilson's completion of his graduate studies. Woodrow and Ellen eventually had three daughters together.

While working on his graduate degree at Johns Hopkins, Wilson wrote and completed *Congressional Government*, which was published in 1885. His first book attracted "widespread immediate interest and lasting acclaim as a classic of American political analysis."⁴¹ He embarked on an academic career first at Bryn Mawr, then at Wesleyan University, and finally at Princeton, where he lectured in government and wrote several more books.

When Wilson was first hired at Princeton in 1890, he was extremely eager to start a law school there. In fact, he erroneously believed that starting a law school was one of President Patton's first priorities. However, Patton never started a law school despite Wilson's strenuous efforts to promote the project in addresses before numerous alumni groups from 1891 thru 1893. Wilson also lectured at the New York Law School while he was a professor at Princeton.⁴²

While still in academia, Wilson also gave some indication of his later progressive sympathies. In 1894, he addressed the annual meeting of the American Bar Association and spoke on the topic of legal

⁴⁰ WW to Robert Bridges, May 13, 1883, *PWW*, 2: 358.

⁴¹ Cooper, *The Warrior and the Priest*, 48.

⁴² Weinstein, *Woodrow Wilson: A Medical and Psychological Biography*, 114 – 116.

education.⁴³ As part of his address, Wilson discussed the national scene, including the recent strikes that had shaken the nation. It is significant that Wilson blamed “reactionary judges and lawyers” in addition to agitators and called for necessary legal reforms. Wilson’s singling out reactionary judges and call for legal reform seems at variance with the widely held belief that he was a “conservative” during the 1890’s.

Wilson’s most extensive treatment of the proper role of courts is in his last book, *Constitutional Government*.⁴⁴ This book is most often remembered for its emphasis on the power inherent in the office of president. Often overlooked is that Wilson devoted an entire chapter to the courts.⁴⁵ He repeatedly emphasized that the courts were the governmental institution that mattered most to the citizen’s daily lives. His high regard for the value of courts is evident in his statement, “Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled.”⁴⁶

Wilson strongly endorsed the notion of judicial review of the Constitution and the concomitant idea of a “living constitution.”

⁴³ Editorial Note, “Wilson’s Address on Legal Education”; “Legal Education of Undergraduates,” address before the American Bar Association, August 23, 1894, *PWW*, 8: 646-47, 647 – 57.

⁴⁴ Woodrow Wilson, *Constitutional Government* (1907) at *PWW*, 18: 162 - 182.

⁴⁵ Niels Aage Thorsen, *The Political Thought of Woodrow Wilson 1875 – 1910* (Princeton, NJ: Princeton University Press, 1988), 199 – 200.

⁴⁶ *Ibid.*, 162.

According to Ronald J. Pestritto, Wilson believed that “the judiciary’s reading of the Constitution . . . must be based on the evolving historical spirit; it is essential for judges to reflect what it is that each generation wants out of government, and not to be stuck in an outdated understanding of the purpose and role of government.”⁴⁷ Wilson makes clear his belief in a living constitution near the end of the chapter wherein he poses the question, “What relation, then, are the courts to bear upon opinion? The only answer that can be made is this: judges of necessity belong to their own generation. The atmosphere of opinion cannot be shut out of their courtrooms.”⁴⁸

Wilson believed that it was of utmost importance that the right kind of men be made judges. He noted, “Good laws were desirable, but good men were indispensable, and could make even bad laws yield pure and righteous government.”⁴⁹ Moreover, Wilson continued, “Every government is a government of men, not laws, and of course the courts of the United States are no wiser or better than the judges who constitute them. A series of bad appointments might easily make them inferior to every other branch of the government in their comprehension of constitutional principles, their perception of constitutional values.”⁵⁰ Wilson’s desire to appoint “good men” to the judiciary was made

⁴⁷ Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism*, 117.

⁴⁸ Wilson, *Constitutional Government*, at *PWW*, 18:182.

⁴⁹ *Ibid.*, 177.

manifest upon taking office as president when he informed his cabinet that “a very different sort of men” were needed to fill the federal courts in his administration.⁵¹ Wilson instructed his cabinet that he wanted men “who have no strings tied to them and who are not so in sympathy with large corporations or trusts...”⁵²

It seems clear that even at this stage in his life Wilson believed in “advanced” notions concerning the role of the courts and the constitution. He believed in a living constitution that should not be interpreted restrictively according to the strict letter of the law, but instead should be interpreted in a way that was responsive to the needs of the people at that moment. Wilson singled out Chief Justice John Marshall, who established the rule of judicial review despite its absence from the text of the Constitution, as his ideal judge. He admired Marshall because the Chief Justice had interpreted the Constitution according to the spirit of the times. Wilson’s desire for good men who were not tainted by excessive sympathies for big corporations and trusts and who would interpret the law to reflect the spirit of the times, which was first expressed in his earlier academic works, became a guiding principle in selecting his nominations to the federal judiciary.

⁵⁰ Ibid.

⁵¹ From the Diary of Josephus Daniels, March 18, 1913, *PWW*, 27: 194.

⁵² Ibid.

In June, 1902, Wilson was selected President of Princeton University, which provided him with the platform he needed to enter national politics. His tenure foreshadowed his subsequent record as President of the United States and was marked by both major educational reforms and acrimonious struggles that severely divided the university.⁵³ Perhaps in an attempt to escape the bitter battles he was provoking at the university, Wilson spent much of his Princeton presidency making speeches to various alumni and other organizations. In fact, his extensive schedule of speaking engagements established him as one of the nation's leading spokesmen for educational reform.⁵⁴

In November, 1904, following a third straight Democratic defeat, Woodrow Wilson entered into national politics as a standard-bearer for the conservative wing of the party. He addressed the Virginia Society of New York and urged them to help revive the Democratic Party by rejecting populists and radical theorists and returning to the party's traditional belief in state's rights and limited government.⁵⁵ This speech launched Wilson as a leader of the Democratic Party's anti-Bryan wing. He embraced this role and began speaking regularly about non-educational issues. He eventually came to the attention of Wall

⁵³ John M. Mulder, *Woodrow Wilson: The Years of Preparation*, (Princeton, NJ: Princeton University Press, 1978).

⁵⁴ Cooper, *The Warrior and The Priest*, 93.

⁵⁵ Wilson Speech in New York before the Virginia Society, Nov. 30, 1904, *PWW*, 15: 547 – 48.

Street financiers, conservative Democratic politicians, and several newspaper editors. The most important of the editors was Colonel George M. Harvey of *Harper's Weekly*. Harvey began working tirelessly, both publicly with his newspaper and privately through machine politicians, to make Wilson President.⁵⁶ In 1910, he persuaded the New Jersey Democratic bosses to nominate Wilson for governor. As historian Milton Cooper noted, "By playing the anti-Bryan card, Wilson had come up with the winning hand."⁵⁷

Wilson, however, jettisoned his conservative views with remarkable alacrity once he obtained the Democratic nomination for governor of New Jersey. The bosses who arranged Wilson's nomination were shocked when he directly challenged their control of the New Jersey Democratic Party. Wilson publicly opposed the campaign of Jim Smith, a leading New Jersey boss, to be United States Senator from New Jersey. Smith thought he had a deal with Wilson, but as historian Richard Hofstadter stated, the boss had not taken into account "the ruthlessness of the pure in heart."⁵⁸ Wilson went on to enact a large number of reform measures, including reform of the electoral system, a bill establishing a public utilities commission, a workman's compensation law, and laws regulating child labor. These

⁵⁶ "Editorial Note: Colonel Harvey's Plan for Wilson's entry into Politics," *PWW*, 20: 146 – 48.

⁵⁷ Cooper, *The Warrior and the Priest*, 121.

and other reforms immediately catapulted him to prominence as a leading progressive contender for the Democratic nomination for President in 1912.

The electoral winds favored the Democrats in 1912 due to the rupture between President William Howard Taft and former president Theodore Roosevelt. The competition in the Democratic Party was fierce among several strong candidates and Wilson did not prevail until the 46th ballot at the Democratic convention in Baltimore.⁵⁹ The Republican Party split definitively at their convention in Chicago that summer when Theodore Roosevelt was denied the nomination by President Taft and the Republican establishment even though he had won most of the primaries. Roosevelt bolted from the Republican Party and accepted the nomination of the Progressive Party, also known as the Bull Moose Party, and ran the most successful third-party campaign in United States history.

After his nomination Wilson searched for ideas that would separate him from Roosevelt, whom he correctly identified as his real competition. On August 28, 1912, at Sea Girt, New Jersey, Wilson had a fateful meeting with Louis D. Brandeis, the leading progressive lawyer of that era. Brandeis came for lunch and wound up staying for

⁵⁸ Hofstadter, *The American Political Tradition*, 327.

⁵⁹ Link, *The Road to the White House*, 461 – 2.

three hours.⁶⁰ Brandeis persuaded Wilson that the point of attack in the upcoming election should be Roosevelt's plan to accept trusts and monopolies but to regulate them. Brandeis argued that Roosevelt's plan could not prevent monopolies from doing evil and instead he should seek to restore competition by destroying monopolies. After the luncheon Wilson spoke to reporters with new fervor about the need to destroy the conditions that lead to the creation of monopolies. The meeting at Sea Girt led to the creation of Wilson's program, called "the New Freedom."

Wilson did not receive the "New Freedom" program from Brandeis at Sea Girt like Moses received the Ten Commandments at Mt. Sinai; rather, Brandeis influenced him by refining and clarifying thoughts and positions towards which Wilson already was moving.⁶¹ Brandeis assisted Wilson by helping him to frame the overriding issue of the 1912 campaign in such a manner as to draw a sharp distinction between himself and Roosevelt. By distinguishing himself on the issue of big business, Wilson portrayed Roosevelt as an elitist under whom the economy would be run by a small group of self-proclaimed "experts" while Wilson supported competition and freedom for the ordinary "man on the make."

⁶⁰ James D. Chace, *1912: Wilson, Roosevelt, Taft and Debs: The Election That Changed the Country*, (New York: Simon & Schuster, 2004), 192.

⁶¹ Cooper, *The Warrior and the Priest*, 194.

On November 5, 1912, Woodrow Wilson received 6,293,019 votes and carried forty states to sweep the Electoral College. Theodore Roosevelt and the Progressive Party placed second with 4,119,507 popular votes and pluralities in six states, and President Taft and the Republicans placed a poor third winning 3,484,980 votes and carried only Utah and Vermont.⁶² Eugene V. Debs, running as the candidate of the Socialist Party received 901,873 votes, which was the all-time high for a Socialist candidate. Woodrow Wilson, the first Democrat to be elected president since Grover Cleveland in 1892, now faced the task of forming a cabinet, staffing the federal government, and securing passage of legislation designed to achieve the goals of the New Freedom.

Wilson surrounded himself with able and distinguished advisors, but none were more important than Edward M. House. Little did Wilson suspect the significance of the occasion when he met Colonel House at the latter's New York Fifth Avenue apartment in November of 1911. This was the first time the two men had ever met. The meeting went extremely well and House later stated, "We found ourselves in such complete sympathy in so many ways, that we soon learned to know what each other was thinking without either having to

⁶² Chace, 1912, 238.

express himself.”⁶³ Thus began what has been termed “the strangest friendship in history.”⁶⁴ House quickly became Wilson’s virtual alter ego, and his influence in forming Wilson’s cabinet cannot be overstated.

The man who wielded so much influence in the Wilson administration got his start in Texas politics. Edward M. House was born in 1858 to Thomas House, a prosperous Houston merchant, plantation owner, and land speculator who had made a fortune during the Civil War from blockade running. Following his father’s death, House inherited the family business, eventually moving to Austin to be closer to the political scene. He volunteered to aide progressive Governor Stephen Hogg in his 1892 re-election campaign, and his work in Hogg’s campaign established his reputation as a savvy political operator. Hogg was so pleased with House’s work that he rewarded him with the honorary title “Colonel.” With his reputation established, House subsequently became a political advisor to the next four Texas governors. House was not a political “boss,” but rather was the manager of one faction within the multi-factional framework of Texas Democratic politics.⁶⁵

⁶³ Charles Seymour, ed. *The Intimate Papers of Colonel House*, 4 vols. (Boston: 1926 – 28), 1, 45.

⁶⁴ George S. Viereck, *The Strangest Friendship in History: Woodrow Wilson and Colonel House* (London: Duckworth, 1933).

⁶⁵ Gould, *Progressives and Prohibitionists*, 11 – 16.

House influenced all of Wilson's choices for Attorney General and thereby played an indirect role in the choice of men who eventually received federal judicial appointments. His influence with Wilson has prompted a debate regarding his political philosophy. He has been called both a progressive and a conservative with some justification.⁶⁶ Although he gained prominence due to his management of Hogg's re-election campaign, House's favorite companions were conservative railroad attorneys, large planters, and town merchants. Within the fractured context of Texas politics at that time, House and his political network were in the philosophical center. The truth is that he probably did not have firm ideological convictions, but was a political technician who was more interested in the process than the policy outcomes.

The Attorney General of the United States has played a crucial role in nomination process for federal judges throughout this nation's history, and Wilson's administration was no different. Wilson's attorney general played a very important role in suggesting and screening candidates for the federal judiciary. Although President Wilson made the final decision, he was often detached from the process and related details with one important exception, which will be discussed later in regards to Louis Brandeis' nomination to the

⁶⁶ Evan Anders, *Boss Rule in South Texas: The Progressive Era* (Austin: University of Texas Press, 1982), 68 – 9; Rupert N. Richardson, *Colonel House: The Texas Years* (Abilene, TX: Hardin-Simmons University, 1964), 170 - 1; Gould, *Progressives and Prohibitionists*, 15.

Supreme Court. Wilson's first Attorney General was James C. McReynolds, who served the administration in that capacity from March 1913 until September 1914, when he was elevated to the United States Supreme Court. House was instrumental in getting McReynolds appointed Attorney General and may have been responsible for his subsequent nomination to the Supreme Court. Wilson had originally wanted Louis Brandeis as his attorney general, but that proposal met with significant opposition. House's favored candidate was McReynolds, on whose behalf he repeatedly lobbied the president.

The attorney general who wielded the most influence in the Wilson administration was Thomas Watt Gregory, who served from 1914 thru 1919. Gregory was a close political associate of House from Texas. Gregory was born in Crawfordsville, Mississippi on November 6, 1861. His father was a physician who served in the Confederate Army and was killed early in the Civil War. In 1885, Gregory received a law degree from the University of Texas and later that year opened a law office in Austin, Texas.⁶⁷ Gregory's successful Austin law practice naturally led to his involvement in Texas Democratic politics.

During this period Gregory became a leading progressive in Texas and publicly attacked Senator Joseph Weldon Bailey, who was viewed by progressives as a symbol of corruption. He successfully

represented the state as special prosecutor in a highly publicized antitrust case against the Waters-Pierce Oil Company, a subsidiary of Standard Oil of New York.⁶⁸ Gregory also was a member of House's political faction.

Gregory's path to the Attorney Generalship began in 1912, when he joined other Texas progressives to promote the candidacy of Woodrow Wilson for the Democratic presidential nomination. Gregory and Texas Congressman Albert S. Burleson worked as floor managers for Wilson at the 1912 Democratic National Convention in Baltimore. Gregory was appointed special assistant to the United States attorney general to conduct litigation against the New York, New Haven and Hartford Railroad in the new administration, which ended in a successful settlement.⁶⁹

Gregory's commitment to progressive reform has never been in doubt, although his record as attorney general was uneven.⁷⁰ With the passage of the Clayton Anti-trust Act in 1914 and the establishment of a Federal Trade Commission, anti-trust litigation under Gregory was limited. The Wilson administration essentially suspended anti-trust

⁶⁷ Gould, *Progressives and Prohibitionists*, 78 -9, 102.

⁶⁸ See *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

⁶⁹ Evan Anders, "Gregory, Thomas Watt," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/GG/fgr53.html> (accessed September 17, 2008); <http://law.jrank.org/pages/7225/Gregory-Thomas-Watt.html>. Thomas.

⁷⁰ Evan Anders, "Thomas Watt Gregory and the Survival of His Progressive Faith," *Southwestern Historical Quarterly*, Vol. 93 (July 1989): 1 – 24.

prosecutions after the United States' entry into World War I. Gregory became extensively involved in the repression of critics of America's involvement in World War I, which he justified on the basis that he was in the middle, battling extremists on both ends of the political spectrum.

What is clear is that Gregory was actively involved in screening and investigating prospective judicial nominees. He probably was the first person to suggest to President Wilson that he appoint Louis D. Brandeis to the Supreme Court when an opening arose in early January 1916. He also worked tirelessly to shepherd the controversial nomination thru the Senate confirmation process. There is no question that Gregory actively sought to fill judicial vacancies with perceived progressives, although he bowed to political realities on occasion. He was offered the third vacancy on the Supreme Court that arose during Wilson's administration, but turned it down on the basis of a hearing impairment that he believed would prevent him from performing the duties of an associate justice in an acceptable manner.

Wilson's last Attorney General was A. Mitchell Palmer, who served from 1919 through the end of the administration in 1921, and also was a progressive. Palmer was born in Moosehead, Pennsylvania, in 1872, into a family of prosperous Quakers.⁷¹ In 1908, he was elected

⁷¹ Stanley Coben, *A. Mitchell Palmer: Politician* (New York: Columbia University Press, 1963), 1 – 2.

to the U.S. House of Representatives, where he earned the reputation of being a progressive reformer who supported worker protection legislation. He was a Wilson delegate to the Democratic National Convention in 1912 and played an important role in Wilson's victory at the Baltimore convention.⁷²

In forming his cabinet, Wilson initially offered Palmer the post of Secretary of War. Palmer declined, citing his Quakerism, but the real reason may have been his desire to become Attorney General.

Eventually, Palmer realized his ambition and became Wilson's third Attorney General. He is best known to history for the infamous Palmer Raids, a series of police round-ups and widespread arrests, directed against violent anarchists, communists and other suspected radicals.

Woodrow Wilson's legislative accomplishments during his first term were dramatic and had long lasting effects on the government and economy. Upon taking office, he pursued a specific program of economic reform. The first issue that Wilson tackled was tariff reduction.⁷³ He believed that protective tariffs had been "a method of fostering special privilege" that rendered it possible "to establish monopoly in our domestic markets."⁷⁴ Prior to the special session that President Wilson dramatically called, he met repeatedly with his former

⁷² Ibid., 48 – 54.

⁷³ Kendrick A. Clements, *The Presidency of Woodrow Wilson* (Lawrence, KS: University of Kansas Press, 1992), 35.

Democratic presidential opponent, Congressman Oscar Underwood of Alabama, to work out the details of a bill that lowered or abolished tariffs. The most important part of the Underwood Tariff reduction bill was its enactment of the income tax. The recently passed Sixteenth Amendment allowed the nation to impose an income tax and the Underwood bill incorporated an income tax provision in order to make up for lost revenue from reduced duties on imported goods.⁷⁵

Another long lasting accomplishment of Wilson's first term was the establishment of the Federal Reserve. He entered office with a desire to reform the currency and banking system in order to prevent the types of panics that periodically had plagued the economy. The Bryan wing of the Democratic Party strongly supported a banking system under tight governmental control, while bankers preferred a system that was completely private. The final passage of the Federal Reserve Act essentially was a compromise, including elements of both governmental regulation, governmental control through appointments of the board of directors, and private ownership. According to historian Kendrick Clements, "the evolution and passage of the Federal Reserve Act typified the efforts of the Wilson administration to maintain a

⁷⁴ Ibid.

⁷⁵ Ibid., 39.

balance between the interests of corporate capitalism and the need of ordinary Americans to have their opportunities protected.”⁷⁶

The third major legislative achievement of Wilson’s first term was the passage of the Federal Trade Commission bill and the Clayton Anti-trust Act in 1914. The Clayton bill was introduced into the House in April 1914 and outlawed a laundry list of unfair trade practices.⁷⁷ The House of Representative approved the Clayton bill on June 5, 1914 marking the “high tide of the New Freedom philosophy of antitrust reform.”⁷⁸ However, Wilson had begun to doubt the efficacy of his original approach to antitrust reform and instead endorsed Roosevelt’s idea of a strong federal regulatory body.

The Wilson administration soon changed its anti-trust focus and decided to establish a regulatory body known as the Federal Trade Commission. The Federal Trade Commission bill established a nonpartisan, five-member commission with broad powers to investigate and order corporations to halt unfair trade practices.⁷⁹ This bill resulted from a meeting between Wilson, Brandeis, and Congressional leaders at the White House on June 10, 1914.⁸⁰ The Federal Trade Commission Act won approval from both houses of congress during the

⁷⁶ Ibid., 43.

⁷⁷ Link, *Wilson: The New Freedom*, 425.

⁷⁸ Ibid., 433.

⁷⁹ Clements, *The Presidency of Woodrow Wilson*, 49 – 50.

⁸⁰ Ibid. 49.

summer of 1914 and Wilson signed the bill into law on September 26, 1914.⁸¹ Meanwhile, the Clayton bill eventually passed both houses of Congress in a much weakened version that was signed by the president without a ceremony on October 15, 1914.⁸²

Despite Wilson's multiple progressive legislative achievements, it appeared that his reforming impulses had come to an end mid-way through his first term, and advanced progressives began to have second thoughts about his commitment to their goals. Wilson's approval of the segregation of African-Americans in the federal service demonstrated his lack of passion for social justice.⁸³ Wilson had been raised in an upper middle-class southern family where the attitude toward African-Americans had been paternalistic and condescending, but he was not a vicious racist in the manner of "Pitchfork" Ben Tillman.⁸⁴ During the election of 1912, Wilson made a limited appeal to black voters but in August 1913 he told a black leader that due to the sensitive political situation in the Senate he was unable to do anything to assist African Americans.⁸⁵ He then permitted cabinet members such as William Gibbs McAdoo and Albert S. Burleson to downgrade, discharge and

⁸¹ Ibid., 50.

⁸² Link, *The New Freedom*, 442-4.

⁸³ Ibid., 243 – 254.

⁸⁴ Clements, *The Presidency of Woodrow Wilson*, 45.

⁸⁵ Ibid.

segregate black federal employees.⁸⁶ His treatment of African-Americans drew bitter denunciations from a wide array of advanced progressives and is a serious blemish upon his record as president.

Between 1913 and 1916 the President either obstructed or refused to encourage a large portion of the progressive agenda, especially labor reforms. For example, organized labor had repeatedly sought protection from the Sherman anti-trust law. When a bill was actually passed in 1913 exempting labor from the Sherman Act, Wilson signed it but then stated that it was only an expression of Congressional opinion and not binding on his administration.⁸⁷ In early 1914, organized labor began an all-out push to obtain an exemption from the Sherman Anti-trust Act, but Wilson decided to stand firm against them on that issue.⁸⁸ Wilson even threatened to veto the Clayton bill if it exempted labor from its anti-trust provisions. He offered a compromise that Congress accepted in order to save the Clayton bill. Wilson approved the labor provision in the 1914 Clayton Anti-trust Act only because it denied labor's demand for exemption from the Sherman Act.⁸⁹

Wilson failed to support the most momentous measure passed by Congress during the Progressive Era, the Palmer bill, which prohibited

⁸⁶ Ibid.

⁸⁷ Link, *The New Freedom*, 268.

⁸⁸ Ibid., 429.

the transportation in interstate commerce of goods manufactured with child labor.⁹⁰ The National Child Labor Committee prepared a model bill that was introduced and passed in the House of Representatives by A. Mitchell Palmer in 1914. Wilson never publicly supported the bill, and when it ran into opposition in the Senate, his lack of public support was tantamount to opposition. He was personally opposed to the Palmer bill because he believed it was an unconstitutional use of the Commerce Clause to regulate the nation's economy. Wilson still believed in limited government and state-rights.⁹¹

Wilson also failed to support the Women's Suffrage movement. While he did not actively oppose voting rights for women, he refused to actively fight for it primarily due to strong opposition from the Southern members of the Democratic Party. Without Wilson's support, the national suffrage amendment could not get the necessary two-thirds votes.⁹²

Wilson did sign the Seaman's Bill, which provided for much needed regulation of hours and working conditions for seaman. The measure initially passed in 1913 and was sponsored in the Senate by Robert M. La Follette. But it ran into opposition from the Secretary of State due to unforeseen international ramifications. The Seaman's Bill

⁸⁹ Ibid., 430 – 33.

⁹⁰ Ibid., 256.

⁹¹ Ibid., 256 – 7.

was finally signed by Wilson in March 1915 following a personal appeal from Andrew Furuseth, president of the International Seaman's Union, who had endured much personal hardship in his efforts to obtain protections for American seamen.⁹³

As these brief examples show, Wilson's record from 1914 through 1916 was checkered at best when it came to supporting progressive reforms. Certainly, Wilson's attitude toward race relations, women's suffrage, and state's rights can be best explained by the influence of his southern roots. In other instances, his seeming lack of commitment to the progressive cause can be explained by tactical political decisions designed to protect the passage of major portions of his legislative program. No such excuse is possible for his Supreme Court nominations. Again, Wilson's record in that regard is decidedly mixed.

⁹² Ibid., 257 -8.

⁹³ Ibid., 273.

CHAPTER II

WILSON'S NOMINATIONS TO THE SUPREME COURT

Among the most significant appointments that a president can make are those to the Supreme Court of the United States. Wilson certainly recognized this fact, stating, "There is probably no more important duty imposed upon the President in connection with the general administration of the Government than that of naming members of the Supreme Court . . ." ⁹⁴ Justices can remain on the high court exerting their immense influence decades after the president who appointed them has exited office. Consequently, there is perhaps no more efficacious means of leaving a lasting imprint on the nation's government and history than through the appointments a president makes to the Supreme Court. During his eight years as president, Woodrow Wilson was afforded the opportunity to make three appointments to the Court. In contrast, his predecessor, William H.

⁹⁴ WW to C.A. Culberson, May 5, 1916, as published in the *New York Times*, May 9, 1916, in Arthur S. Link, *Wilson: Confusions and Crises, 1915 – 1916* (Princeton, NJ: Princeton University Press, 1964), 358.

Taft, appointed six men to the Supreme Court during his single term in the White House.⁹⁵

If Wilson's goal was to appoint progressives to the Court, the results were decidedly mixed. His first appointment to the Court was James Clark McReynolds, who is now recognized as one of the most reactionary and unpleasant men ever to sit on that body.⁹⁶ Wilson's second nominee was Louis D. Brandeis, a leading progressive lawyer who became one of the most influential Supreme Court Justices in this nation's history. Wilson's third nominee was John H. Clarke, who was considered a progressive but didn't serve on the court long enough to make a real difference. This chapter will briefly examine the careers of these three men and Wilson's decision-making process that led to their nominations in an effort to discern why these nominees were so different.

Wilson's first Supreme Court appointment was James Clark McReynolds, who was born at Elkton, Kentucky, in 1862 to a doctor in the Confederate army. While still young, McReynolds moved to Tennessee, where he became a successful lawyer. For a short time, he was secretary to Sen. Howell Jackson.⁹⁷ In 1896, he ran for Congress as an anti-Bryan Gold Democrat but lost.

⁹⁵ Peter Irons, *A People's History of the Supreme Court*. (New York: Viking, 1999), 260.

⁹⁶ Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 388.

⁹⁷ Frank, "The Appointment of Supreme Court Justices," 461.

McReynolds first came to Wilson's attention as a prominent trustbuster. In 1903, McReynolds was appointed Assistant Attorney General by President Theodore Roosevelt and served in his administration until 1907. He gained a reputation as a noted trustbuster, serving as a special prosecutor in the *American Tobacco* antitrust case. McReynolds resigned from the Taft Administration in 1911, when his chief signed a dissolution decree that left the tobacco industry in the hands of its former owners, the "Tobacco Trust."⁹⁸ During this period McReynolds made the acquaintance of House and expressed his strong support of Wilson during the campaign in 1912. While forming his cabinet, Wilson initially wanted Louis D. Brandeis as his Attorney General. When word of his proposed nomination leaked out, however, violent opposition formed to Brandeis. House repeatedly urged Wilson to choose McReynolds for Attorney General instead. Wilson reluctantly gave up on his desire to make Brandeis Attorney General and turned instead to McReynolds.⁹⁹

Although he was a trustbuster, on all other issues McReynolds was inflexibly conservative. In many ways McReynolds was representative of a certain strain of progressivism that could be found in the Democratic Party. This type of progressive favored the destruction

⁹⁸ Link, *The New Freedom*, 116.

of industrial and financial monopolies and was fervidly in favor of anti-trust prosecutions. However, such progressive Democrats also were in favor of a limited role for government in all other areas and had a states-rights view of the Constitution. Therefore, they tended to oppose any intervention of the federal government in programs of social amelioration.¹⁰⁰

McReynolds' views changed little from the time he ran for Congress in 1896 as a Gold Democrat through the end of his career. Alexander Bickel writes: "[McReynolds] seethed with contempt for grasping newly rich businessmen . . . and he entertained an equal contempt for legislators."¹⁰¹ In addition to this, McReynolds was both racist towards African Americans and anti-Semitic. His basic views in 1913 and 1914 could have been discovered if administration officials had cared to inquire. Louis D. Brandeis, although he only had known McReynolds a brief time prior to service on the Supreme Court, remarked to his wife in 1913 that McReynolds was a "standpatter."¹⁰² But Wilson thought otherwise and believed that McReynolds was "formidable, dangerously formidable, to the men who wish to act

⁹⁹ Alexander M. Bickel and Benno C. Schmidt, Jr., *The History of the Supreme Court of the United States: Volume IX The Judiciary and Responsible Government, 1910 – 21* (New York: MacMillan Publishing Co., 1984): 343.

¹⁰⁰ Link, *The New Freedom*, 10 – 15, 116.

¹⁰¹ Bickel and Schmidt, *History of the Supreme Court*, 345.

¹⁰² Urofsky, *Louis D. Brandeis*, 388.

without sanction of law.”¹⁰³ It is likely that Wilson’s southern background, which he shared with McReynolds, made him more tolerant of his racism.

Although he was personally the least liked member of the cabinet, McReynolds performed well as Attorney General. He set out the policy that the administration would follow in antitrust prosecutions, and he remained a trustbuster.¹⁰⁴ He vigorously pressed prosecutions against Unites States Steel and International Harvester and obtained consent decrees from both American Telephone and Telegraph Company and the New Haven Railroad. In the New Haven Railroad case, McReynolds obtained a criminal indictment against the company.¹⁰⁵

The impetus for promoting McReynolds to the Supreme Court is not clear from the record. His poor handling of a serious scandal may have contributed to his cabinet-colleagues’ desire to be rid of him by “kicking him upstairs.” Drew Caminetti and Maury I. Diggs, of California, were indicted in March 1913 for violating the Mann Act. The Mann Act prohibited the transportation of women across state lines for immoral purposes. Caminetti’s father was Anthony Caminetti, a Democratic leader from San Francisco and head of the Immigration

¹⁰³ WW to W.J. Bryan, September 5, 1913, quoted in Link, *The New Freedom*, 119.

¹⁰⁴ Link, *The New Freedom*, 117; Bickel and Schmidt, *History of the Supreme Court*, 346.

¹⁰⁵ Ibid.

Service in the newly formed Labor Department. McReynolds sent a telegram to the Republican hold-over U.S. Attorney in San Francisco, John L. McNab, asking him to send a full report on the cases and take no further action until advised. On May 27, 1913, after reading McNab's report, McReynolds directed him to proceed with the cases.¹⁰⁶

In June 1913, the elder Caminetti asked the Secretary of Labor, William B. Wilson, for a leave absence so that he could travel to California for his son's trial. Wilson felt that Caminetti's absence would seriously impair the work of the Immigration Department at that time and asked the Attorney General to post-pone the Caminetti-Diggs trial until the autumn. Secretary Wilson later stated that he had asked for the postponement himself and was not requested to do so by Caminetti.

McReynolds telegraphed McNab on June 18, 1913, ordering him to postpone the trials until autumn. McNab resigned by sending a public telegram to President Wilson, charging corruption and accusing McReynolds of surrendering to influence. Republicans began demanding an investigation. The President publicly supported his Attorney General but ordered him to press the Caminetti-Diggs trial with the utmost diligence and vigor. The scandal quickly subsided.¹⁰⁷

¹⁰⁶ Link, *The New Freedom*, 117.

¹⁰⁷ Ibid., 118.

Many years later Navy Secretary Josephus Daniels claimed that he and McReynolds had sharply disagreed over the latter's cavalier attitude toward the scandal.¹⁰⁸

When Justice Lurton died in July, 1914, it was widely believed that McReynolds would be his successor.¹⁰⁹ It is unclear from the written record who first proposed McReynolds for the nomination. Josephus Daniels wrote that Wilson "kicked McReynolds upstairs."¹¹⁰ According to Daniels, Secretary of the Interior Franklin K. Lane was also an aspirant to the vacancy but that Postmaster Burleson had "blocked" him. Daniels relates that many years later Burleson had told him that he "was responsible for the appointment of McReynolds."¹¹¹ Undoubtedly, Colonel House must have put in a good word for McReynolds, and he was certainly pleased with the nomination.¹¹²

McReynolds' nomination was sent to the Senate on August 19, 1914, and he was considered by the Judiciary Committee on August 24th. The only serious opposition to McReynolds came from Senator George Norris, who complained that McReynolds had failed to enforce

¹⁰⁸ Josephus Daniels, *The Wilson Era: Years of Peace, 1910 - 1917* (Westport, Conn.: Greenwood Press, 1974, orig. pub. University of North Carolina Press, 1944), 115, 141 – 142.

¹⁰⁹ Frank, "The Appointment of Supreme Court Justices," 463.

¹¹⁰ Daniels, *The Wilson Era*, 540.

¹¹¹ *Ibid.*, 541.

¹¹² Edward M. House to WW, July 14, 1914, *PWW*, 30: 280; Diary of Colonel House, Aug. 30, 1914, *PWW*, 30: 464.

the Standard Oil dissolution decree. McReynolds' appointment was confirmed on August 29, by a vote of 44 to 6.¹¹³

Wilson came to regret his decision to appoint McReynolds, who became one of the most reactionary Justices to sit on the Court, and many have wondered how Wilson could have so badly misjudged him. The best explanation for Wilson's failure to thoroughly investigate and consider McReynolds' elevation is timing.¹¹⁴ Justice Lurton died on July 12, 1914. The Supreme Court was in recess but Congress was still in session, so if the nomination was confirmed quickly the new Justice could join the Court when it reconvened in October.

In addition, Wilson's attention was focused elsewhere during what was a dark period for him. Between July 28 and August 1, 1914, World War I broke out in Europe and Wilson also was immersed in the problems of the Mexican Revolution. On August 6, 1914, Ellen Axson Wilson, the President's beloved wife, died, and he clearly became incapacitated due to depression from the loss of his wife.¹¹⁵ Four months after Ellen's death, Wilson told House that he was unfit to be president because he couldn't think straight, and he also expressed a wish that someone would kill him.¹¹⁶ Mrs. Wilson was buried in Rome

¹¹³ Frank, "The Appointment of Supreme Court Justices," 464.

¹¹⁴ Bickel and Schmidt, *History of the Supreme Court*, 349 – 50.

¹¹⁵ Weinstein, *Woodrow Wilson: A Medical and Psychological Biography*, 259.

¹¹⁶ House diary, November 6, 1914, *PWW*, 30: 357; House diary, November 14, 1914, *PWW*, 31:274.

Georgia on August 11.¹¹⁷ A week after the funeral, Wilson nominated McReynolds.

Thus began the long career of Justice James Clark McReynolds, the “most difficult man ever to serve there.”¹¹⁸ According to historian Alexander Bickel, “McReynolds was crotchety, he was prickly, he was picky, he was full of phobias. He hated smoking, he hated women lawyers, he hated Jews. He took violent dislikes to people and was brutally rude to them when he did.”¹¹⁹ McReynolds, who refused to speak to Justice Brandies for several years, even read a newspaper while Justice Benjamin Cardozo took the oath of office in 1932. He sorely tried the patience of Chief Justice Taft, who stated that he was “selfish to the last degree, . . . fuller of prejudice than any man I have ever known, . . . one who delights in making others uncomfortable. He has no sense of duty. He is a continual grouch; and . . . really seems to have less of a loyal spirit to the Court than anybody.”¹²⁰ McReynolds even refused to sit next to Justice Brandeis for the Court photograph. He not only hated Brandeis, he also hated Justice John H. Clarke.

¹¹⁷ Link, *The New Freedom*, 460 – 5.

¹¹⁸ Bickel and Schmidt, 352.

¹¹⁹ Bickel and Schmidt, *History of the Supreme Court*, 352. Ironically, McReynolds appointed a female Assistant U.S. Attorney. Wilson asked McReynolds to hire Mrs. Annette Abbott Adams as an assistant federal attorney for the Northern District of California and he complied with the President’s request. Mrs. Adams went on to become the first woman U.S. Attorney in 1918 and in 1921 the first female Assistant Attorney General of the U.S. See WW to McReynolds, June 12, 1914, *PWW*, 30:172 n. 1.

Justice McReynolds' pettiness was in clear evidence when he refused to sign the joint letter sent to Justice Clarke upon his resignation.¹²¹

McReynolds' legacy of jurisprudence on the Supreme Court was decidedly conservative and even reactionary. His conservative leanings were in evidence in the years prior to the New Deal when he nearly always sided with those on the Court who championed private property interests. McReynolds also was often opposed to governmental regulation of business even though he had been a leading trustbuster.

But it was during Franklin Roosevelt's administration that McReynolds gained his reputation as the Court's most reactionary member. He was usually aligned with conservative Justices Pierce Butler, Willis Van Devanter, and George Sutherland in opposition to nearly all of Roosevelt's New Deal legislation and became known as one of the "Four Horsemen." By 1937, the Supreme Court shifted left and McReynolds found a new role as the "great dissenter." The tone of his dissents was often caustic and insulting. In his opinions he repeatedly warned about the gradual erosion of the sanctity of contracts. He often decried the Court's failure to stop the confiscation of property rights. McReynolds also believed that it was the Court's

¹²⁰ William H. Taft to Helen Taft Manning, June 11, 1923, quoted in Alphaeus Thomas Mason, *William Howard Taft, Chief Justice*, (New York: Simon and Schuster, 1964), 215 – 16.

¹²¹ *Ibid.*, 217.

solemn duty to strike down any legislative enactments that encroached upon the “liberty of contract.”¹²²

Wilson’s first nominee to the nation’s highest bench was a failure if the President was attempting to appoint progressives. McReynolds was also Wilson’s longest serving appointee, remaining on the Court until 1941, making the damage worse. At the time of his appointment, the Supreme Court was not especially conservative and was open to some progressive change. But McReynolds became the solid anchor of a very conservative court in the twenties and thirties. Wilson’s mistake in appointing McReynolds was further compounded when his sour personality drove Wilson’s third appointee, the progressive John H. Clarke, to resign from the Court in 1922.

Woodrow Wilson redeemed himself with his second nomination to the Supreme Court when he named Louis D. Brandeis, the nation’s leading progressive lawyer to fill the vacancy created by the death of Associate Justice Joseph Lamar.¹²³ Although Attorney General Gregory may have been the first person to suggest to the President that he nominate Brandeis for the Supreme Court, it seems that Wilson had been thinking about making the nomination for some time.¹²⁴ Prior to

¹²² Michael Allen Wolf, “James Clark McReynolds,” *The Supreme Court Justices: A Biographical Dictionary*, ed. Melvin I. Urofsky (New York: Garland Publishing Inc. 1994), 297 – 299.

¹²³ Link, *Confusions and Crises*, 323.

¹²⁴ *Ibid.*, 324.

the nomination, Wilson asked Senator La Follette whether progressive Republicans in the Senate would vote for Brandeis.¹²⁵ In 1913, Wilson had wanted Brandeis in his cabinet but failed to appoint him for political reasons. However, since that time Wilson repeatedly sought Brandeis' advice on domestic legislation, particularly concerning the Federal Reserve Bill and anti-trust legislation.¹²⁶

Brandeis was known throughout the nation as a crusading progressive, a "People's Lawyer" who repeatedly had challenged big business in high profile cases. In fact, Brandeis was believed to be a "radical" by many leading businessmen. The press reported that that the Senate "simply gasped" at the nomination. Wilson sent Brandeis' name to the Senate without following the traditional practice of asking Massachusetts Senators Henry Cabot Lodge and John W. Weeks whether the nomination was acceptable, because he knew they would be opposed.¹²⁷ Conservatives were stunned and furious with the nomination, while progressives were ecstatic. Congratulatory letters and telegrams from leading progressives poured into the White House. In addition to being the nation's foremost progressive lawyer, Brandeis

¹²⁵ Phillippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, MA: Harvard University Press, 1984), 291.

¹²⁶ Link, *Confusions and Crisis*, 324.

¹²⁷ *Ibid.*, 325.

was also a leading Zionist and became the first Jew nominated to the Supreme Court.¹²⁸

The nomination of Louis Brandeis to the Supreme Court was one of the boldest decisions Wilson made during his presidency. It also produced the first great public battle over a Supreme Court nominee in U.S. history. Bickel characterizes the Brandeis nomination battle as “no mere partisan engagement,” but “a fight for the soul of the Supreme Court.”¹²⁹ Furthermore, the Brandeis nomination signaled the start of what Link has termed the second phase of the New Freedom, when Wilson turned dramatically toward the progressive cause.

Brandeis’s nomination also was the opening battle in Wilson’s campaign to get re-elected in 1916. The political situation in early 1916 was extremely confused. Theodore Roosevelt was back in the Republican Party, but it was anybody’s guess whether the Progressive Party voters of 1912 would return to the G.O.P. in 1916.¹³⁰ Wilson’s preparedness program had alienated many progressives, and former Secretary of State William Jennings Bryan, who had resigned, was in open rebellion against the President.¹³¹ Many astute political observers believed that the only hope for Wilson’s re-election in 1916 lay in winning over the large independent progressive bloc, including a

¹²⁸ Ibid., 325 – 327.

¹²⁹ Bickel and Schmidt, 367.

¹³⁰ Link, *Confusions and Crisis*, 319.

significant minority of Progressives who voted for Roosevelt in 1912. If the country reverted to the normal voting patterns the Democrats would lose.¹³²

Although some of the opposition to Brandeis was due to anti-Semitism, Brandeis himself believed that his opposition was due primarily to his history of crusading against Wall Street and related interests. As his biographer, Phillippa Strum, stated, “the nomination became a confrontation of interests and ideologies rather than a display of prejudice.”¹³³ Arrayed against Brandeis were numerous Boston Brahmins, such as Harvard President A. Lawrence Lowell, Harvard historian Charles Francis Adams, Wall Street lawyers such as Austen George Fox and ex-U.S. President and former federal judge William Howard Taft, and sixteen living former presidents of the American Bar Association.¹³⁴

Brandeis’s supporters comprised a veritable who’s who of the progressive movement. Writing to the Senate committee or testifying before it were such progressive luminaries as Newton D. Baker (reform mayor of Cleveland, president of the National Consumers’ League and future Secretary of War), Frances Perkins (future Secretary of Labor for Franklin Roosevelt), Henry Moskowitz, Norman Hapgood, Charles

¹³¹ *Ibid.*, 321.

¹³² *Ibid.*, 322.

¹³³ Strum, *Louis D. Brandeis*, 294.

Crane, Rabbi Stephen Wise, Amos Pinchot, and Walter Lippman.¹³⁵

Numerous Harvard law professors supported Brandeis, along with Dean of Harvard Law School Roscoe Pound and Harvard President Emeritus Elliot. The Senate subcommittee hearings lasted for over forty days with hardly a significant aspect of Brandeis's career escaping its scrutiny. The Brandeis confirmation hearings dragged on throughout the spring and many supporters feared that his nomination would die without a vote. On April 3, 1916, the subcommittee finally reported in favor of the nomination 3 – 2 along strict party lines.¹³⁶

Democratic leaders on the full judiciary committee refused to press for a vote because at least four Democrats on the committee were wavering and Brandeis did not have a majority.¹³⁷

Wilson adopted a brilliant strategy to maximize his influence on Brandeis's behalf. Throughout the confirmation hearings Wilson was conspicuously silent. Many Democrats had become convinced that he did not want the Brandeis nomination to succeed. In reality, he was only waiting for the most opportune moment to intervene. In early May, Wilson and Gregory secretly arranged for Senator Charles A. Culberson of Texas to ask the President to explain his reasons for

¹³⁴ Ibid.

¹³⁵ Ibid., 295.

¹³⁶ Bickel and Schmidt, 387.

¹³⁷ Link, *Confusions and Crisis*, 357.

nominating Brandeis. Culberson would then read the President's letter to the judiciary committee and give it to the press.¹³⁸

Wilson's letter to the judiciary committee was not only a brilliant political tactic; it is also direct evidence that he wanted progressives on the Supreme Court. Wilson wrote as follows:

I am very much obliged to you for giving me an opportunity to make clear to the Judiciary Committee my reasons for nominating Mr. Louis D. Brandeis to fill the vacancy in the Supreme Court of the United States created by the death of Mr. Justice Lamar, for I am profoundly interested in the confirmation of the appointment by the Senate.

There is probably no more important duty imposed upon the President in connection with the general administration of the Government than that of naming members of the Supreme Court, and I need hardly tell you that I named Mr. Brandeis as a member of that great tribunal only because I know him to be singularly qualified by learning, by gifts, and by character for the position.

Many charges have been made against Mr. Brandeis. The report of your sub-committee has already made it plain to you and to the country at large how unfounded those charges were. They threw a great deal more light upon the character and motives of those with whom they originated than upon the qualifications of Mr. Brandeis. I myself looked into them three years ago, when I desired to make Mr. Brandeis a member of my Cabinet, and found that they proceeded for the most part from those who hated Mr. Brandeis because he had refused to be serviceable to them in the promotion of their own selfish interests, and from those whom they had prejudiced and misled. The propaganda in this matter has been very extraordinary and very distressing to those who love fairness and value the dignity of the great professions.

I perceived from the first that the charges were intrinsically incredible by anyone who had really known Mr. Brandeis. I have known him, I have tested him by seeking his advice upon some of the most difficult and perplexing public questions about which it was necessary for me to form a

¹³⁸ Ibid., 358.

judgment. I have dealt with him in matters where nice questions of honor and fair play, as well as large questions of justice and public benefit, were involved.

In every matter in which I have made test of his judgment and point of view I have received from him counsel singularly enlightening, singularly clear-sighted and judicial, and above all, full of moral stimulation. He is a friend of all just men and a lover of the right; and he knows more than how to talk about the right – he knows how to set it forward in the face of its enemies. I knew from direct personal knowledge of the man, what I was doing when I named him for the highest and most responsible tribunal of the nation.¹³⁹

Wilson's letter was a full embrace of Brandeis and his crusading progressive spirit. He endorsed Brandeis's battles with big business and charged his opposition with selfish vindictive motives. This letter was not only a personal endorsement of Brandeis but also an endorsement of progressive judges.

Wilson's letter, along with added pressure from McAdoo, Burleson, and Gregory, custodians of administration patronage, brought the wavering Democratic Senators into line, enabling Brandeis' appointment. On May 24, the judiciary committee recommended confirmation, voting ten to eight along strict party lines.¹⁴⁰ The full Senate approved Brandeis's appointment without debate on June 1, 47 to 22. One Democrat voted against Brandeis and three progressive Republicans, including both La Follette and Norris, voted in favor of the appointment. Brandeis took the oath of office on June 5, 1916 and

served as an Associate Justice of the Supreme Court for twenty-three years until 1939. During this period he truly altered the nation's legal landscape. Melvin Urofsky states that, "it is fair to say that no justice of the twentieth century had a greater impact on American constitutional jurisprudence."¹⁴¹

Brandeis's biggest contributions came in the field of civil liberties. He is considered the father of the "right to privacy," since he was the first to argue that the Framers of the Constitution intended to protect the right to be left alone. Today, the constitutional dispute is not whether the right to privacy exists but rather what its limits are. Brandeis was also the first Justice to assert that the Due Process Clause implicated rights other than property rights, thus paving the way for the doctrine of incorporation by which the states became bound by many provisions of the Bill of Rights. Brandeis also had a huge impact on the law of search and seizure. His dissent in *Olmstead v. United States* reinvented Fourth Amendment jurisprudence.¹⁴² Brandeis's most important contribution, however, may well have been in the area of free speech in his concurring opinion in *Whitney v. California*. The legal reasoning Brandeis provided in his opinion was eventually adopted by

¹³⁹ WW to C.A. Culberson, May 5, 1916, as published in the *New York Times*, May 9, 1916, quoted in Link, *Confusions and Crisis*, 358 – 360.

¹⁴⁰ *Ibid.*, 361.

¹⁴¹ Urofsky, *Louis D. Brandeis*, 640.

¹⁴² *Ibid.*, 631.

the Court and laid the bias for the powerful First Amendment opinions later written by Hugo Black, William O. Douglas, and William Brennan.¹⁴³

Brandeis also contributed to the current legal landscape by pioneering a fact-oriented jurisprudence, first as an advocate in the famous “Brandeis brief” and later in his fact-intensive judicial opinions. Brandeis saw his judicial opinions as mini-lessons in democratic governance and this conception has been adopted by many subsequent justices.¹⁴⁴ His innovation of citing law review articles in Supreme Court opinions has today become routine.¹⁴⁵ He also helped to pioneer the practice of hiring the best recent graduates of Harvard Law School as law clerks. Harvard law professor and close Brandeis associate Felix Frankfurter chose the clerks for Brandeis as he had done for Oliver Wendell Holmes. Brandeis’s clerks, who became leaders of the legal profession, included future Secretary of State Dean Acheson.¹⁴⁶

When viewed from the perspective of a progressive judiciary, Wilson’s first nomination was a strike, but his second nominee, Brandeis, was an out-of-the-park home run. The fact that Wilson turned to Brandeis to help formulate his 1912 campaign, consulted him on numerous issues of public policy, earnestly desired him to be his

¹⁴³ Ibid., 638.

¹⁴⁴ Ibid., 476 -7.

¹⁴⁵ Ibid., 474.

Attorney General, and ultimately appointed him in face of strong opposition to the Supreme Court, is the strongest evidence available that Wilson truly desired to place progressives on the bench. Despite the foregoing, Wilson's record was still split on this issue when he was presented with a third opportunity to appoint a Supreme Court justice.

Wilson's third and final nominee to the Supreme Court, John H. Clarke, also was a progressive but has been largely ignored by historians due to the brevity of his tenure. His opportunity for service came in June 1916 when Associate Justice Charles Evans Hughes resigned from the court in order to seek the Republican presidential nomination. John H. Clarke was an Ohio lawyer and active in Democratic Party politics. Although he represented railroads in his law practice, Clarke advocated for various progressive political causes such as civil service reform and free public libraries. In 1903, he ran for the U.S. Senate as the Democratic candidate on a platform advocating radical reform, including municipal ownership of street railways, a workers' compensation program, direct election of U.S. senators, and campaign finance disclosure. Clarke lost the election to the conservative Republican incumbent, Mark Hanna.¹⁴⁷

¹⁴⁶ Ibid., 464 – 5.

¹⁴⁷ Bickel and Schmidt, 408 – 409.

Clarke first came to the attention of the Wilson administration in 1914 when he once again ran for the Senate, this time with the backing of the progressive mayor of Cleveland, Newton D. Baker. The race was going badly for Clarke when Wilson nominated him to be judge for the United States District Court for the Northern District of Ohio. It appears that Attorney General James McReynolds had gained a favorable opinion of Clarke and was responsible for his nomination to the district court.¹⁴⁸

At first it was not clear that Clarke would be chosen for appointment to the Supreme Court. After Hughes resigned, the *New York Times* and other newspapers again called on President Wilson to appoint William Howard Taft. There was little chance that Wilson would comply. His new Secretary of War, Newton D. Baker of Cleveland, was friends with Clarke and recommended him for the vacancy. Wilson apparently had some concerns about Clarke's antitrust views, but Secretary Baker reassured the president that his views were sound.¹⁴⁹ Wilson subsequently appointed Clarke to the Supreme Court and he was confirmed by the Senate on July 24, 1916. When Colonel House was apparently somewhat perturbed by the fact

¹⁴⁸ Ibid.

¹⁴⁹ Newton D. Baker to WW, July 10, 1916, *PWW*, 37: 397 – 8.

that he was not consulted on the choice, Wilson wrote him in order to sooth his ruffled feathers:

I dare say you were surprised by the nomination of Clarke for the Supreme Court, because I suppose you did not know him, but I am confident you will approve when you know all about him. He is a close friend of Newton Baker's and Gregory (whom I love and trust more than ever) picked him out.¹⁵⁰

House responded that he was glad Wilson had chosen a Northern man and was sure he would “justify his appointment.”¹⁵¹

Clarke proved to be just as progressive on the Court as he had been in politics during his pre-judicial career. In some respects, he compiled a more “progressive” record than Brandeis.¹⁵² He was a firm supporter of the rights of labor and women. Justice Clarke dissented in cases where the Court struck down federal laws regulating child labor, and he voted to uphold the eight-hour day for railway workers. Clarke rejected the doctrine of substantive due process and voted to uphold Oregon's minimum wage laws. He also rejected the use of injunctions to enforce anti-union contracts and supported the rights of employees to picket.¹⁵³

Clarke's career as a progressive jurist was cut short when he resigned from the Court in 1922, purportedly to promote American participation in the League of Nations. Woodrow Wilson, living in

¹⁵⁰ WW to Edward M. House, July 23, 1916, *PWW*, 37: 467.

¹⁵¹ Edward M. House to WW, July 25, 1916, *PWW*, 37: 475.

¹⁵² Irons, *A People's History of the Supreme Court*, 262 – 3.

seclusion, found news of Clarke's sudden retirement deeply disappointing. Wilson wrote the following letter to Justice Clarke on September 5, 1922:

MY DEAR FRIEND,

It has deeply grieved me to learn of your retirement from the Supreme Court. I have not the least inclination to criticize the action, because I know that you would have taken it from none but the highest motives. I am only sorry, -- deeply sorry. Like thousands of other liberals throughout the country, I have been counting on the influence of you and Justice Brandeis to restrain the Court in some measure from the extreme reactionary course which it seems inclined to follow.

In my few dealings with Mr. Justice Sutherland [appointed Clarke's successor] I have seen no reason to suspect him of either principles or brains, and the substitution is most deplorable.

The most obvious and immediate danger to which we are exposed is that the courts will more and more outrage the common people's sense of justice and cause a revulsion against judicial authority which may seriously disturb the equilibrium of our institutions, and I can see nothing which can save us from this danger if the Supreme Court is to repudiate liberal courses of thought and action...¹⁵⁴

In reply, Justice Clarke suggested that Justice McReynolds' behavior and attitudes may well have played a large role in his decision to retire. Clarke wrote the ex-president that "McReynolds as you know is the most reactionary judge on the Court. There are many other things which had better not be set down in black and white which made the situation to me deplorable and harassing to such a degree that I thought myself not called on to sacrifice what of health and strength I may have

¹⁵³ Barry Cushman, "John Hessin Clarke," *The Supreme Court Justices*, 121 – 2.

¹⁵⁴ WW to John H. Clarke, Sept. 5, 1922, quoted in Mason, *William Howard Taft*, 165.

left in a futile struggle against constantly increasing odds.”¹⁵⁵ Clarke lived until 1945, and had he not left the bench to be replaced by a very conservative judge the constitutional history of the 1920’s and 1930’s may have been different.¹⁵⁶

Perhaps the best summation of conservatives’ concerns regarding Wilson’s nominees to the Supreme Court was made by William Howard Taft, although it was not meant as a compliment. Taft campaigned actively for Warren Harding in fall of 1920 and was certainly angling to be appointed Chief Justice when he wrote the following:

[Woodrow Wilson] has made three appointments to the Supreme Court. He is understood to be greatly disappointed with the attitude of the first . . . The other two represent a new school of constitutional construction, which if allowed to prevail will greatly impair our fundamental law.”¹⁵⁷

Conservatives were clearly troubled by the direction being taken by the majority of Wilson’s Supreme Court nominees. Certainly, Wilson had hoped that at least Brandeis and Clarke would have a moderating effect on an otherwise conservative Supreme Court. However, Clarke’s premature resignation, ironically caused by Wilson’s first mistaken appointment of McReynolds, frustrated his ultimate goals.

¹⁵⁵ John H. Clarke to WW, September 9, 1922, quoted in Mason, *William Howard Taft*, 167.

¹⁵⁶ Urofsky, *Louis D. Brandeis*, 462.

¹⁵⁷ W.H. Taft, “Mr. Wilson and the Campaign,” *Yale Review*, Oct. 1920, 19.

In conclusion, Wilson's mixed record of Supreme Court appointments does not provide a clear indication of his progressive commitment. His first appointment was a reactionary, but he then appointed one of the nation's leading progressives in Louis Brandeis and followed up with a second progressive, John H. Clarke. Both appointments were made in 1916, however, which was a presidential election year. Political considerations, including the desire to win progressive votes and the Midwest, were part of both nominations. Two military interventions in Mexico and the threat of all-out war with Mexico in the summer of 1916; along with the military preparedness campaign, made those political considerations even more pressing. Perhaps a more accurate determination of Wilson's commitment to progressivism can be ascertained by examining his record of appointing progressives to the lower federal judiciary.

CHAPTER III

WILSON'S NOMINATIONS TO THE LOWER FEDERAL JUDICIARY

The identity and process used in selecting lower court judges can reveal a great deal about the values that actually guided individual administrations. Specifically, the numerous individual decisions made concerning the lower court judicial nominees of the Wilson administration shed light on the question of whether Wilson was genuinely a progressive or merely a conservative attempting to win progressive votes. None of these lower court nominations generated widespread public attention and were of concern only to professional politicians in the affected jurisdictions. Therefore, decisions made by the Wilson administration on a consistent basis over a long period of time and outside the public spotlight reveal a great deal about the values that actuated the Wilson presidency.

One researcher, Rayman L. Solomon, has reviewed the selection of courts of appeals judges from Theodore Roosevelt through Franklin Roosevelt and specifically attempted to delineate what factors guided the selections of lower federal court judges in each of the

administrations.¹⁵⁸ Solomon concluded that the selection of courts of appeals judges reflected the beliefs of the president about the importance of patronage, the role of the federal government in regulating the economy, and the proper influence of the courts of appeals in shaping the role of the government with respect to the economy.¹⁵⁹

At the beginning of the twentieth century, attitudes regarding all three of these considerations began to change. In politics, divisions between the major parties sharpened on economic issues, and views about the role of government in regulating the economy and social activities began changing. The executive branch grew both in size and in ability to formulate and implement policies and programs. Concomitantly with the growth of the federal government in regulating the economy, the federal courts were called upon to decide the contours and limits of the federal government's newfound regulatory powers.¹⁶⁰

In his review of the lower court judicial appointments, Solomon noted three basic patterns. First, when an administration was not concerned with the policy-making potential of lower federal courts, patronage considerations dominated. This was best illustrated by the

¹⁵⁸Rayman L. Solomon, "The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R." *American Bar Foundation Research Journal*, Vol. 9, (Spring 1984), 285 – 343 (hereinafter referred to as Solomon).

¹⁵⁹ *Ibid.*, 287.

Warren Harding, Calvin Coolidge, early Theodore Roosevelt, and early Franklin Roosevelt administrations. Second, Solomon found that concern with professionalism predominated in the Taft and Hoover administrations. Third, policy considerations dominated the Wilson administration and the later years of both Roosevelt administrations.¹⁶¹

The word “dominate” is used repeatedly because all three considerations are present to some degree in almost all appointments in every administration.

According to Solomon, Woodrow Wilson, as one of the most astute politicians ever to serve as president, always understood the patronage value of appointments, but nonetheless, his administration’s appointments were dominated by policy concerns.¹⁶² Woodrow Wilson’s presidency was a prime example of one in which a judicial candidate’s views or orientations on the major issues were investigated. Wilson did not conduct these investigations himself and did not personally interview the candidates, but instead he relied upon his attorney general and staff. As previously discussed, Thomas W. Gregory was the attorney general for most of his administration. Gregory had been an early leader of the Wilson movement in Texas and was a well-known progressive who also was part of Colonel House’s

¹⁶⁰ Ibid., 297- 301.

¹⁶¹ Ibid., 303.

¹⁶² Ibid., 294.

political network. Samuel J. Graham and William C. Fitts were the assistant attorneys general responsible for screening judicial appointments for the Justice Department, and both men were Wilsonian progressives on economic issues.¹⁶³

In reviewing the Justice Department records and the letters and papers of President Wilson, a clear pattern emerges: during his first term Woodrow Wilson nominated progressives to be federal judges. Although his nominations were overwhelmingly Democrats, and all were white men, they were regarded by their contemporaries as “progressives.” Furthermore, the fact of their “progressivism” often was a decisive consideration. Even in situations where the prospective nominee’s progressivism was not explicitly mentioned, it often lurked just below the surface in references to individuals supported or positions taken in previous years.

In the early days of his administration, Wilson set forth the qualities he was looking for in judicial appointments. According to Secretary of the Navy Josephus Daniels, President Wilson made the following statement to his cabinet on March 18, 1913:

The President, speaking of the fact that a dozen new Federal judges were to be appointed, outlined his idea of the sort of men who should be appointed to the bench. It was illuminating. He said a very different sort of men were needed from those who had too often been appointed. He is in favor of

¹⁶³ Ibid., 314.

finding able lawyers who have no strings tied to them and who are not so in sympathy with large corporations or trusts as to bias them in favor of the Big interests rather than the superior rights of all the public. He expressed his difficulty in knowing exactly how to find the best man in every state, but he urged all the cabinet to assist the Attorney General in finding lawyers of the highest type who would hold the scales of justice equally.¹⁶⁴

Wilson's directive to his cabinet to find "very different sort of men" to fill the federal judiciary echoes the observations he made in *Constitutional Government*, in which he emphasized the need for good men. Wilson wrote, "Every government is a government of men, not of laws, and of course the courts of the United States are no wiser or better than the judges who constitute them. A series of bad appointments might easily make them inferior to every other branch of the government in their comprehension of constitutional principles, their perception of constitutional values."¹⁶⁵ Wilson went on to emphasize the importance of electing "the right men" to the presidency and the Senate. He always believed the only real safeguard of the constitutional system lay in the selection of good men as public servants.¹⁶⁶

Wilson's reliance on his cabinet in general and his attorney general in particular to find the "right kind of men" who were not beholden to big business was also in keeping with his usual method of

¹⁶⁴ From the Diary of Josephus Daniels, March 18, 1913, *PWW*, 27: 194.

¹⁶⁵ Woodrow Wilson, *Constitutional Government* (1907) in *PWW*, 18: 177.

¹⁶⁶ *Ibid.*, 178.

administration. According to Arthur Link, Wilson gave “complete freedom to his Cabinet members in all routine matters and in the formulation of many important policies, so long as those policies did not conflict with his broad objectives or imperil the administration’s standing before Congress and the country.”¹⁶⁷

The Wilson administration’s policy to place as many progressives as possible on the bench and its method of selecting nominees can be seen in two appointments to the Seventh Circuit Court of Appeals. When Wilson entered office, there had been a vacancy on that court for over a year. The vacancy was the result of the efforts of Democratic senators who had defeated Taft’s nomination of a federal district judge for the position. The Democratic boss of Chicago, Roger Sullivan, and the Democratic senator of Illinois, James Lewis, each supported different candidates for the court of appeals. The vacancy went unfilled until August 1915 due to this political impasse. Attorney General Gregory sent his assistant William Fitts to Chicago to make a personal investigation and report back to him.

Fitts reported back to Gregory and evaluated the two politically sponsored candidates for the seat in a long memo in which he concluded that they were not men the Justice Department wanted to recommend. One of the candidates was George T. Page, an Illinois

¹⁶⁷ Link, *The New Freedom*, 76 – 7.

lawyer active in state and local bar associations. Fitts noted in his memo to Gregory that Page had represented distilling and brewing interests. Perhaps more importantly, Fitts commented that “Mr. Page does not seem to have put himself into the public life of the State, and, therefore, has not left earmarks from which it can be accurately ascertained as to whether he is a forward looking or a backward looking man.”¹⁶⁸ Fitts concluded that while both politically sponsored candidates were acceptable, there was a better choice.¹⁶⁹ He recommended Samuel Alschuler, a legislator and recently unsuccessful Democratic nominee for Governor of Illinois. Alschuler was a leading progressive known for his fights against corruption in Chicago. Fitts concluded that although both Senator Lewis and boss Sullivan preferred other candidates, they would accept Alschuler. When Gregory recommended Alschuler to Wilson, one of the first things he mentioned was that he recently had served as counsel for the striking workers during a streetcar employees’ strike in Chicago.¹⁷⁰

A second vacancy arose on the Seventh Circuit six months after Alschuler’s nomination. A bitter intra-party political battle erupted in Wisconsin between Senator Paul Husting and Federal Trade

¹⁶⁸ Memo, William Fitts to Att’y Gen. Gregory, July 1, 1915, Dept. of Justice files, (quoted in Solomon, “The Politics of Appointments of Court of Appeals Judges,” 315 - 6).

¹⁶⁹ Ibid.

¹⁷⁰ Memo, Att’y Gen. Gregory to WW, n.d., Wilson Papers, Library of Congress, Washington, D.C., (quoted in Solomon, *supra*).

Commissioner Joseph Davies and others over the vacancy.¹⁷¹ Fitts again went to Wisconsin to personally investigate the situation. He reported back to Gregory in a lengthy memo in which he repeatedly evaluated the candidates based on their views regarding antitrust and other regulatory issues.¹⁷² Defeated senatorial candidate John Aylward was supported by Davies and had been loyal to both Wilson and the progressive cause. Senator Husting supported Martin Lueck, whom Fitts stated was “a country lawyer, and never can be anything else, no matter where you may put him. He was not a progressive until after Wilson’s nomination.”¹⁷³ Fitts also evaluated candidate B.R. Goggins and concluded that he would be unacceptable to both the administration and senator Husting because he was “not progressive.”¹⁷⁴

Fitts evaluated and dismissed several other candidates for their lack of progressivism. Eventually he suggested as one possibility Evan A. Evans, who had lost the 1912 election for attorney general of Wisconsin. Fitts described Evans as a “progressive of the progressives . . . This man has the vision of a statesman. . . He is looked up to by the

¹⁷¹ WW to Joseph E. Davies, March 1916; WW to Davies, April 14, 1916; Letter from Davies to WW, April 17, 1916; WW to Davies, April 19, 1916, in *PWW*, 36: 315 -16, 482, 500-01, 510-11.

¹⁷² Memo William C. Fitts to Gregory, February 1, 1916, Dept. of Justice files (quoted in Solomon, 316 – 17, *supra*).

¹⁷³ Memo William C. Fitts to Gregory, Feb. 1, 1916, Dept. of Justice files, (quoted in Solomon, 317).

¹⁷⁴ *Ibid.*

progressives of every school.”¹⁷⁵ Gregory eventually recommended Evans to President Wilson, even though Fitts had recommended Davies’ candidate, Aylward, for the position.¹⁷⁶

Davies bedeviled Wilson with numerous letters concerning the nomination. Wilson finally lost his patience and wrote:

[Joseph] Tumulty has handed me your note of March sixth to him about the judgeship in Wisconsin. I have sweat blood over this case and feel that in all the circumstances it is really out of the question that we should turn the Senator down with regard to it. The Attorney General and I have discussed it with him repeatedly, at least the Attorney General has discussed it with him repeatedly, and I have more than once, and it is perfectly plain that he can never be reconciled to the appointment of Aylward. This is a personal distress to me, as you know, and I have done everything I could, directly and indirectly, to bring him to another view, but since I cannot and have already had an opportunity of showing my confidence in Aylward, the way seems blocked.¹⁷⁷

It is interesting to note that Wilson, in his response to Davies, blames Senator Husting for blocking Davies’s candidate, yet Husting’s preferred candidate, Lueck, was not chosen either. Although it could be argued that Evans was a compromise candidate, it seems clear that Davies was never reconciled to his nomination.

The fact that Wilson chose Evans, and rejected Davies’ candidate, based on his superior progressive credentials, is significant. Wilson was particularly indebted to Davies for his nomination in 1912.

¹⁷⁵ Fitts memo of February 1, 1916, (quoted in Solomon, 318).

¹⁷⁶ Solomon, pp. 318 – 19.

¹⁷⁷ WW to Joseph Edward Davies, 1916, in *PWW*, 36: 315 -6.

In the spring of 1912 Wilson's campaign to secure the Democratic presidential nomination appeared to be in serious jeopardy. Wilson badly needed to win Wisconsin, which was the political pivot point of the Midwest. Wisconsin was the most progressive state in the union and it would have been embarrassing for Wilson, the leader of the progressive wing of the Democratic Party, to fail to receive that state's endorsement. Joseph E. Davies, Democratic national committeeman, was the leader of the progressive faction in Wisconsin and had publicly endorsed Wilson in the fall of 1911. Davies worked tirelessly for Wilson, and as a result on April 2 the Wilson faction succeeded in electing twenty of the state's twenty-four delegates to the Baltimore convention.¹⁷⁸ Davies was also one of Wilson's most important managers at the Baltimore convention and vice-chairman of his 1912 national campaign.¹⁷⁹ Wilson's rejection of Davies' candidate for the vacancy is telling because he chose a more progressive candidate despite the fact that Davies had a substantial claim on his gratitude.

On occasion Wilson would rely on the recommendations of progressive supporters instead of members of his administration. For example, in 1914 Wilson relied on a close friend, Frank Glass, who was a progressive newspaper editor, to recommend Judge Richard W.

¹⁷⁸ Link, *The Road to the White House*, 407 – 8.

¹⁷⁹ *Ibid.*, 481.

Walker for a vacancy on the Fifth Circuit.¹⁸⁰ Eventually, senators White and Bankhead supported the nominee, but the idea for the nomination originated with a progressive editor. Senator John Bankhead, who was not known for his progressive views, had fought Wilson's nomination by supporting the more conservative Representative Oscar Underwood in 1912.¹⁸¹

In another instance, patronage came into play, yet the eventual nominee shared the Wilson administration's basic progressivism. A vacancy on the Second Circuit caused the Wilson administration multiple headaches due to New York's divided Democracy. The New York political machine known as Tammany Hall had long dominated Democratic politics, but it was increasingly opposed by reformers within the Democratic Party led by William McAdoo, Wilson's Secretary of the Treasury and son-in-law. The Wilson administration was continually vexed by the difficulties of working out a patronage plan that would keep both factions happy.¹⁸² These headaches were further aggravated by the fact that New York's Democratic Senator, James A. O'Gorman, was personally antagonistic towards Wilson. Gregory worked diligently to find a candidate acceptable to both factions of the party. He believed he had succeeded in satisfying both

¹⁸⁰ Frank Glass to WW, August 25, 1914; WW to Glass, August 26, 1914, Glass to WW, August 28, 1914; R.W. Walker to WW, October 5, 1914, *PWW*, 27: 342, n.4.

¹⁸¹ Link, *The New Freedom*, 162.

sides when he recommended Abraham Elkus, who was a friend of Brandeis, for the vacancy, but Elkus accepted the post of ambassador to Turkey instead.¹⁸³

Eventually, Gregory settled upon U.S. District Judge Charles Hough, a progressive Republican appointed by Theodore Roosevelt to the bench in 1906. Hough's nomination had been specifically promoted by United States Attorney Henry L. Stimson in order to facilitate anti-trust prosecutions in the Southern District.¹⁸⁴ In exchange for accepting Hough's elevation to the Circuit court, Gregory recommended nominating a Tammany approved candidate, Martin Manton, to the vacant district court bench.¹⁸⁵ In 1918, Wilson elevated Manton to the Second Circuit, where he served until he was forced to resign in 1939 due to a corruption investigation by Manhattan District Attorney Thomas E. Dewey.¹⁸⁶

An exception to the usual emphasis on progressivism was Wilson's earliest judicial nomination, Charles A. Woods, but this exception can be explained by the fact that Woods was a close personal friend of the President. Wilson met Woods on the *Ethiopia* during a transatlantic crossing in 1896 on his first trip to Scotland to recover

¹⁸² *Ibid.*, 164.

¹⁸³ Solomon, "The Politics of Appointment," 285.

¹⁸⁴ *Ibid.*, 284 -5.

¹⁸⁵ *Ibid.*, 285.

¹⁸⁶ *Time*, Feb. 6, 1939 (<http://www.time.com/time/printout/0,8816,771417,00.html>).

from an apparent stroke. They struck up a long-lasting friendship thereafter.

The idea to nominate Justice Woods for the Fourth Circuit vacancy originated with President Wilson. On March 13, 1913, Wilson wrote to Attorney General McReynolds a personal letter recommending Woods as “an old and . . . intimate friend of mine” who had been “engaged on the right side in every great matter.”¹⁸⁷ In this letter, Wilson claimed that Woods’s name was recommended by South Carolina’s Senators; however, he directly contradicted this statement in a letter to Justice Woods in which he admitted that he had not yet consulted with South Carolina’s Senators. He added, “but I hope and believe that I shall get their willing assent.”¹⁸⁸

Woods’s nomination resulted from his personal friendship with Wilson, yet his supporters still felt it necessary to stress his progressive credentials. The President of the University of South Carolina wrote a letter published in the *New York Times*, praising Justice Woods for his numerous achievements, including his “progressive thought.” The internal Justice Department memo concerning Woods made no mention

¹⁸⁷ WW to James C. McReynolds, March 13, 1913, Dept. of Justice files.

¹⁸⁸ WW to Charles A. Woods, April 19, 1913, *PWW*, 27: 335.

of his alleged “progressivism” and instead concentrated on his legal career and endorsements.¹⁸⁹

There were protests filed against his nomination. Most significantly, Governor Cole Blease of South Carolina sent Attorney General McReynolds a letter stating that he had no objection to the appointment of Justice Woods to the Fourth Circuit bench, but suggesting that he be investigated for his many years as an attorney for railroad companies and other large corporations.¹⁹⁰ Perhaps this is why even though the nominee was a close friend of Wilson’s, the president felt compelled to justify his choice by stating that he was convinced Woods was on the “right side” of every major issue.¹⁹¹

There was only one nomination to the Court of Appeals during Wilson’s first term in which obvious patronage considerations prevailed. In 1916, Wilson nominated Kimbrough Stone to the Eighth Circuit. Stone received the nomination because his father was the Democratic senator from Missouri and was supported by Speaker of the House Champ Clark. Senator William J. Stone, of Missouri, was a conservative Democrat who supported Wilson out of party loyalty.¹⁹² The Department of Justice memo from Graham to Attorney General

¹⁸⁹ Dept. of Justice Memorandum for the President concerning Charles Woods, April 18, 1913, Dept. of Justice files.

¹⁹⁰ Gov. Blease to James C. McReynolds, March 24, 1913, Dept. of Justice files.

¹⁹¹ WW to James C. McReynolds, March 13, 1913, Dept. of Justice Files.

Gregory completely omitted any reference to Judge Stone's policy views and simply stated that Missouri deserved the seat and it should go to Judge Stone.¹⁹³ Compared to the department's lengthy memos concerning candidates' policy views and reputations for progressivism regarding other vacancies, the omission seems significant.

The preference for progressives, though less pronounced, also can be seen in Wilson's district court nominations. In California, he repeatedly nominated progressives for district court judgeships. For example, in the spring of 1913, Wilson inherited a vacancy in the United States District Court for the Northern District of California. Wilson's appointee, Judge Maurice T. Dooling, was supported by leading California progressive Democrats such as future Senator James D. Phelan, Secretary of the Interior Franklin K. Lane, and Congressman William M. Kent.¹⁹⁴ Dooling had broad support from Democrats, progressive Republicans, and the leading organs of the Progressive Party.¹⁹⁵ He had presided over a portion of the Abraham Reuff-

¹⁹² Arthur S. Link, *Woodrow Wilson and the Progressive Era: 1910–1917* (New York: Harper & Row, 1954), 35.

¹⁹³ Memo, Samuel Graham to Gregory, Nov. 24, 1916, Dept. of Justice files (quoted in Solomon, *supra*, 323).

¹⁹⁴ Department of Justice Memorandum, June 24, 1913, Dept. of Justice files.

¹⁹⁵ See, e.g., *The Vallejo News* (Republican), editorial, June 22, 1913; *The San Francisco Call* (Republican), editorial June 28, 1913; John P. Coghlan to James C. McReynolds, July 26, 1913, Dept. of Justice files.

Schmitz corruption trials that launched the career of Progressive Party vice-presidential nominee Governor Hiram Johnson of California.¹⁹⁶

Another California progressive nominated to the federal bench was Benjamin Franklin Bledsoe. Wilson nominated Bledsoe to be United States District Judge for the Southern District of California on September 30, 1914. Bledsoe, an active Democrat and state district court judge in San Bernadino County, was supported by many leading figures in California politics who repeatedly emphasized that he was a “progressive Democrat.”¹⁹⁷ The editor of the *El Centro Progress*, a leading Progressive Party paper, was particularly lavish in his praise of Judge Bledsoe.¹⁹⁸

Another prominent progressive nominated for a federal bench by Wilson was Henry D. Clayton, U.S. Representative from Alabama. Clayton, an early and passionate supporter of Woodrow Wilson, supported almost all aspects of the New Freedom. In 1913, Clayton was chairman of the House Judiciary Committee and in position to expedite passage of Wilson’s anti-trust legislation. He assisted the administration in drafting, and then introduced the anti-trust bill which eventually bore his name. The bill was designed to exempt labor

¹⁹⁶ George E. Mowry, *The California Progressives* (Berkeley: University of California Press, 1951), 23 – 31.

¹⁹⁷ James D. Phelan to Asst Attorney General Graham, July 1, 1914; T.E. Gibbon to Franklin K. Lane, July 24, 1914; Congressman William Kent to Joseph P. Tumulty, August 3, 1914; Mrs. D.D. Lane to William Jennings Bryan, July 8, 1914; Dept. of Justice files.

unions from anti-trust prosecution, but ultimately was unable to accomplish that goal. Clayton resigned from Congress to accept an appointment as U.S. District Judge for the Middle and Northern Districts of Alabama.¹⁹⁹ He resigned his seat in Congress because he was temperamentally unsuited to handling the fierce patronage disputes that broke out in Alabama upon Wilson's election in 1912.²⁰⁰

Wilson's nominee to the western district of Pennsylvania, W.H.S. Thomson, was a prominent member of the "Progressive Democracy."²⁰¹ In fact, in his letter supplying biographical details to the Department of Justice, he highlights that he was a member of the "Bryan League of Western Pennsylvania."²⁰² The pattern repeated itself in Georgia when Congress created a new federal district court for the southern district of that state. The Justice Department received numerous letters attesting the "advanced" progressivism of the nominee, William W. Lambdin.²⁰³

In some cases the suggestion of conservatism could cause problems for a nominee, even if he had close personal ties to the Attorney General and previously had served the President. In the fall

¹⁹⁸ D.C. Bitler to WW, September 12, 1914, Dept. of Justice files.

¹⁹⁹ Richard Polenberg, "Progressivism and Anarchism: Judge Henry D. Clayton and the Abrams Trial." *Law and History Review* 3 (1985): 400 – 401.

²⁰⁰ Ibid.

²⁰¹ M.J. Laton to William J. Bryan, March 2, 1914, Dept. of Justice files.

²⁰² W.H.S. Thomson to James McReynolds, March 10, 1914, Dept. of Justice files.

of 1916, the U.S. District Court for the Western District of Texas became vacant and Attorney General Gregory recommended an old friend, Duval West, of San Antonio, for the opening. In 1915, President Wilson appointed West as an Executive Agent empowered to investigate the civil war in Mexico and report personally to the President.²⁰⁴ West was a San Antonio attorney who had the reputation of being knowledgeable about Mexican affairs. As a teenager, he had been a professional hunter and supplied meat for the Southern Pacific Railroad expedition survey. In 1888, as a deputy U.S. Marshall, West engaged in a shootout with a gang of train robbers. He eventually became a lawyer and was appointed by Grover Cleveland as U.S. Attorney for the Western District of Texas.²⁰⁵

Yet in spite of this background and the President's personal familiarity with West, when allegations surfaced that he had supported conservative Democratic candidate Judson Harmon for President in the spring of 1912, Gregory felt compelled to ask him to clarify the matter.²⁰⁶ West, in a spirited reply, declared his pre-Baltimore Convention fealty to Wilson and attributed the rumor to a personal

²⁰³ C.J. Simmons to Hon. Thomas W. Hardwick, Oct. 6, 1914; Looper Alexander to Marvin Underwood, Dec. 9, 1914; G.P. Folks to Sen. Thomas Hardwick, Dec. 11, 1914; E.P. Lochridge to Sen. Hoke Smith, Dec. 14, 1914; Dept. of Justice files.

²⁰⁴ WW to Duval West, February 9, 1915, *PWW*, 32: 383 – 391.

²⁰⁵ Larry D. Hill, *Emissaries to a Revolution: Woodrow Wilson's Executive Agents in Mexico* (Baton Rouge, LA: Louisiana State University Press, 1973), 309 – 310.

²⁰⁶ Thomas W. Gregory to Duval West, October 17, 1916, Dept. of Justice files.

enemy with an ax to grind.²⁰⁷ West was confirmed, but even the hint of conservatism appears to have been sufficient to jeopardize the nomination.

One of the most controversial nominations that Wilson made to the federal judiciary was Martin J. Wade, a Democratic national committeeman, to the U.S. District Court for the Southern District of Iowa. Although Wade was an early Wilson supporter, he was also a Roman Catholic and a “wet” with a history of representing liquor interests. Not surprisingly, his nomination to the federal bench drew strong opposition from the American Protective Association and the Iowa Anti-Saloon League.²⁰⁸ One protester accused the administration of engaging in a conspiracy to appoint Catholics and called Wade “a stand patter a whiskey and monopoly democrat.”²⁰⁹ Joseph P. Tumulty, the president’s personal secretary and a Roman Catholic, was caught in the crossfire over this nomination. The American Protective Association unjustifiably accused Tumulty of favoring a co-religionist.²¹⁰ Wade’s faithful support of Wilson and his support by the

²⁰⁷ Duval West to Thomas W. Gregory, October 20, 1916, Dept. of Justice files.

²⁰⁸ Charles Keyes to William Wallace, Jr., Feb. 24, 1915; Iowa Anti-Saloon League to William Wallace, Jr., Feb. 24, 1915; Dept. of Justice files.

²⁰⁹ Horace D. Ballard to WW, Feb. 10, 1915; Dept. of Justice files.

²¹⁰ John Morton Blum, *Joe Tumulty and the Wilson Era* (Boston: Houghton Mifflin Co. 1951), 89.

regular party faithful saved his nomination.²¹¹ It is unclear from the available sources whether Wade was considered a progressive.

In a small minority of nominations, patronage considerations trumped progressivism. For example, the appointment of Congressman Joseph T. Johnson as United States District Judge for the Western District of South Carolina involved no issue of political orientation, but was instead the result of a complicated patronage scheme engineered by Senator “Pitchfork” Ben Tillman. Senator Tillman was a very active spoilsman. When Wilson became President, Tillman sought to have his political friend and personal lawyer, William Thurmond, appointed United States Attorney for South Carolina. However, earlier in his life Thurmond had killed a man in an argument over “Tillmanism.”²¹² President Wilson simply could not make Thurmond, a man who had killed a fellow citizen, the U.S. Attorney for South Carolina. Tillman, deeply hurt, threatened to never speak to the President again.

However, Tillman recovered and came up with a new plan to divide South Carolina into two federal judicial districts with two United States Attorneys. This plan meant a new judgeship and clerk in addition to a new U.S. Attorney. Tillman’s plan was not easy to accomplish because South Carolina did not need a new federal court.

²¹¹ Ibid.

²¹² Francis Butler Simkins, *Pitchfork Ben Tillman: South Carolinian* (Baton Rouge, LA: Louisiana State University Press, 1964), 531 – 534.

Neither the current federal Judge nor U.S. Attorney believed that a new federal district court was necessary. Tillman prevailed upon Congress to create the new judgeship and the South Carolina congressional delegation decided that the bench should go to their fellow Congressman, Joseph T. Johnson.

Tillman had more difficulty achieving his goal of getting Thurmond appointed U.S. Attorney. The Wilson administration again objected to Thurmond as a killer. Tillman pursued the appointment as hard as he could, and argued that Thurmond, the father of future Senator Strom Thurmond, had merely killed in self-defense. However, he was unsuccessful.²¹³

Perhaps most surprisingly of all, Wilson appointed a southern progressive who apparently had “advanced” ideas concerning African-Americans. Judge Rhydon M. Call was nominated to be the federal district judge for the southern district of Florida in March 1913. The seat had been vacant for some time, and President Taft had attempted to nominate a different candidate who had been rejected in the summer of 1912.²¹⁴ Judge Call’s nomination was widely and enthusiastically

²¹³ Stephen Kantrowitz, *Ben Tillman and the Reconstruction of White Supremacy* (Chapel Hill, NC: University of North Carolina Press, 2000), 224; Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (New York: Simon & Schuster, 1993), 28 – 9.

²¹⁴ E.J. Engle to G. Carroll Todd, March 24, 1913, Dept. of Justice files.

supported by the Florida bar, with many of the letter writers noting Judge Call's progressivism.²¹⁵

The most heartfelt endorsement of Judge Call, the son of a Confederate soldier killed at the Battle of Seven Pines, came from an African-American attorney living in New York.²¹⁶ Douglas Wetmore related that he had practiced law in Florida for many years and had appeared many times before Judge Call. Wetmore wrote that "Ryden Call has had the moral courage to act as few white men in the North or the South would have acted under the circumstances...I know of two cases in which it seemed like suicide for him to decide as he did."²¹⁷ He went on to say that he knew of a number of instances wherein it was only fear of a brave judge that prevented "lynch law" from coming into play.²¹⁸

²¹⁵ Alston Cockrell to WW, March 4, 1913; P.A. Holt to WW, Feb. 18, 1913; Engle to Todd, March 24, 1913; Dept. of Justice files.

²¹⁶ J. Douglas Wetmore to William H. Taft, July 19, 1909, Dept. of Justice files.

²¹⁷ Ibid.

²¹⁸ Ibid.

CHAPTER IV

CONCLUSION

The preceding study demonstrates that Woodrow Wilson deliberately attempted to fill all levels of the federal judiciary with progressives during his first term. Although he first entered national politics as a spokesman for the conservative anti-Bryan wing of the Democratic Party, upon election as Governor of New Jersey he became a prominent leader of the progressive wing of the party. During his first administration Wilson pushed several progressive measures, including tariff reduction, creation of the Federal Reserve, and creation of the Federal Trade Commission. However, he also blocked or failed to support several progressive measures and approved the segregation of African Americans in the federal civil service. Wilson was undoubtedly influenced by his southern background sharing the racial attitudes of the South, and he also needed to maintain the support of the southern Democrats in Congress in order to achieve his legislative program.

Wilson's first appointment to the Supreme Court, James C. McReynolds, quickly became notorious for his extremely reactionary

views and his difficult personality. Wilson's appointment of McReynolds was probably due to neglect on his part resulting from the pressure of external events such as the outbreak of World War I and the death of his wife. It seems that Wilson may have been unaware of McReynolds's conservative views and only considered his record of antitrust prosecutions.

The President redeemed himself with his second appointment to the Supreme Court, Louis D. Brandeis. The Brandeis appointment was made for several reasons, but one of the most important was the fact that he was a nationally recognized leader of the progressive movement. Brandeis's appointment created a furor and led to one of the great Supreme Court confirmation battles in U.S. history. Brandeis met stiff opposition from conservative bankers, industrialists, leaders of the bar, and ex-President William H. Taft. Brandeis was heartily supported by all progressives. Brandeis's appointment to the Supreme Court was one of Wilson's most sterling achievements as president. Wilson's third appointment to the Supreme Court went to another, lesser known progressive, John H. Clarke, of Ohio.

After examining Wilson's appointments to the lower federal judiciary, it is clear that he sought to appoint progressives to these courts, too. At the beginning of his administration, Wilson informed his cabinet that he wanted "a very different sort of men" for the federal

judiciary. He relied heavily upon his Attorney General, Thomas Gregory in selecting his judicial nominees. But Wilson laid down the broad policy of favoring progressives for the federal bench early in his administration. This was in keeping with his typical management style of setting broad policies and allowing his subordinates wide latitude in implementation. The Attorney General and his assistants repeatedly recommended progressives over politically sponsored candidates whose progressive credentials were lacking. Undoubtedly, the Justice Department officials believed that they were fulfilling the president's objectives. Although he did bow to political reality on a number of occasions, the record reflects that the vast majority of Wilson's federal judicial appointees during his first term were progressives.

Wilson's record of intentionally preferring progressives for federal court appointments provides evidence that, at least where the legal system was concerned, he was a progressive. Furthermore, his record in appointing progressives is consistent with his pre-presidential views concerning the American legal system set forth in his lectures, speeches, and his last scholarly book, *Constitutional Government*. The pre-presidential Wilson was a believer in the "living constitution" and the need for some judicial reform, and his record as president was consistent with his views as an academician. Wilson's progressivism,

at least in regard to reforming the judicial system, was long-standing and consistent.

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