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Supreme Court Nominees and the Fourth Circuit Curse

By **Adam M. Gershowitz of Covington & Burling LLP**

It has been over eight years since a Supreme Court justice has retired, and with the 2002 Republican electoral gains there is speculation that Chief Justice Rehnquist or one of his colleagues will step down from the high court. The majority of pundits expect that White House Counsel Alberto Gonzalez will be President Bush's first Supreme Court nominee. It is widely known, however, that the President's conservative base favors a nominee more in the mold of Justices Antonin Scalia and Clarence Thomas. In this regard, the names of two conservative heavyweights surface repeatedly: J. Harvie Wilkinson, and J. Michael Luttig. Wilkinson and Luttig, both of whom have served long tenures on the Fourth Circuit Court of Appeals (approximately twenty and ten years respectively), are regarded as exceptional intellects, and unabashed conservatives. Indeed, Wilkinson and Luttig have transformed the Fourth Circuit into the most conservative appeals court in the nation, and (after the Supreme Court and the D.C. Circuit) into perhaps the third most influential court in the land. All told, Wilkinson and Luttig appear to be exactly what President Bush and his conservative base are looking for in a Supreme Court justice. The big question, however, is whether President Bush is superstitious, because Fourth Circuit judges have an abysmal track record in reaching the high court -- some might even say a curse.

A total of twenty-four federal appellate judges have advanced to the Supreme Court. The D.C. Circuit is the feeder circuit, having sent six judges to the high court, all during the last seventy years. The Sixth and Eighth Circuit follow closely behind, each having sent four of their members to the Court. The Second Circuit has produced three Supreme Court justices, and the First, Seventh, and Ninth Circuits have made a respectable showing of two each. The Fifth Circuit elevated the little-known Justice William B. Woods of Georgia. That leaves us with four sorry souls, the Third, Fourth, Tenth, and Eleventh Circuits, none of whom has produced a Supreme Court justice. The plight of the Tenth and Eleventh Circuits is less embarrassing considering that they were not established until 1929 and 1981, respectively. Thus, the battle for last place is really between the Third and the Fourth Circuits. Although no judge of the Third Circuit has even been nominated for the high court, the title for least successful circuit undoubtedly goes to the Fourth Circuit.

Two judges of the Fourth Circuit have been nominated to the Court, and both were rejected by the full Senate. In 1930, President Hoover nominated Judge John J. Parker of North Carolina, who had served on the Fourth Circuit for nearly five years. It appeared that Parker would win easy confirmation by the Senate, and Chief Justice Charles Evans Hughes even went so far as to write him a congratulatory letter on his new job. Parker's confirmation ran into trouble with powerful interest groups however. Labor unions came out against him because he had voted in a Fourth Circuit case to uphold an injunction preventing mine workers from joining a union. Even more damaging, the NAACP opposed Parker on the ground that he had made racist remarks during his 1920 campaign to be governor of North Carolina. Despite the fact the President's party controlled the Senate by a margin of 56 to 39, Judge Parker's bid for a seat on the Supreme Court failed by a vote of 41 to 39.

conflict of interest charges. President Nixon came into office in 1969 seeking to put "strict constructionists" on the Court, and he nominated Clement Furman Haynsworth, Jr. of South Carolina to fill Fortas's seat. At the time of his nomination, Haynsworth was the Chief Judge of the Fourth Circuit, having served on the bench for twelve years. Haynsworth was a respected judge and, like Parker, he was expected to win easy confirmation. Also like Parker, however, Haynsworth ran into trouble with labor and civil rights groups. The latter attacked him for approving school desegregation plans that were actually designed to avoid integration. Labor unions expressed outrage at a Haynsworth opinion that allowed a textile mill embroiled in a labor dispute to close its facility. However, it was not labor or civil rights that sunk Haynsworth's nomination, but rather ethics concerns. After his appointment to the Fourth Circuit, Judge Haynsworth retained an ownership interest in Carolina Vend-A-Matic Company, and subsequently ruled in favor of a company that had a business relationship with Carolina Vend-A-Matic. In light of Justice Fortas's ethical improprieties and the Senate's role in pushing him toward resignation, the Democratic-controlled Senate could not ignore Haynsworth's perceived ethics problems and it rejected his nomination by a vote of 55-45.

Unfortunately for Judges Wilkinson and Luttig, some comparisons can be drawn from the failed nominations of their Fourth Circuit compatriots. First, and most obvious, Wilkinson or Luttig would be nominated by a Republican president. Republican nominees have not fared particularly well in final votes on the Senate floor however. Every Supreme Court nomination to fail on a Senate vote during this Century --Parker, Haynsworth, G. Harold Carswell of the Fifth Circuit, and Robert Bork of the D.C. Circuit --was of a circuit court judge nominated by a Republican president. Indeed, half of the failed nominations were Fourth Circuit judges. Further, the fact that Republicans currently control the Senate does not necessarily ameliorate matters. Judge Parker's nomination was rejected by a 41-39 vote in spite of the fact that Republicans controlled the chamber by a margin of 56 to 39.

Second, historians agree that Parker and Haynsworth were not rejected because their qualifications were lacking. Rather, both defeats were largely the result of politics. While Haynsworth did face conflict of interest allegations, the failure of his nomination is better ascribed to simple political revenge over the treatment of Justice Fortas. Similarly, any opposition to Wilkinson or Luttig will not be based on their resume qualifications. Both are former Supreme Court clerks, and they are considered to be among the ablest judges in the federal judiciary. Rather, opposition to Luttig and Wilkinson would be of a political or ideological variety. Democrats are angry about the shabby treatment of President Clinton's nominees to the federal judiciary, and more than one prominent Democrat has vowed that a far-right nominee to the Court will not be confirmed. Wilkinson and Luttig, both of whom are considered to be highly conservative, might be subject to the same political tit-for-tat that sunk Judge Haynsworth's nomination.

Third, just like Parker and Haynsworth, the newer generation of Fourth Circuit nominees might attract the ire of civil rights groups. Wilkinson and Luttig have voted in school desegregation decisions similar to the one that haunted Judge Haynsworth. For example, in a deeply divided en banc decision of the Fourth Circuit, Judges Wilkinson and Luttig voted with the majority to hold that the Charlotte-Mecklenburg school system had achieved unitary status and that court supervision was no longer justified.

Finally, it is noteworthy that labor unions had a hand in defeating both the Parker and Haynsworth nominations. Although the power of unions has waned in recent years, their hostility toward Fourth Circuit judges can be expected to continue. The Fourth Circuit has a reputation as the most anti-union

numerous cases.

In the over 130-year history of the federal circuit courts, the Fourth Circuit has not managed to place a single one of its judges on the Supreme Court. The Fourth Circuit now has two of the leading Supreme Court candidates and the chance to improve its poor record. Judge Wilkinson and Judge Luttig, however, are hampered by the ghosts of Parker and Haynsworth and any potential similarities to those failed nominations. Nevertheless, given Wilkinson and Luttig's exceptional resumes, perhaps the third time will be the charm for the Fourth Circuit. As long as President Bush is not superstitious, we may find out soon.