

Waldorf is undergoing a massive renovation, and for now is out of the banquet business – it seemed salutary in any case. The council’s newly-installed executive director, Anna Stowe DeNicola, got a baptism by fire, managing this major event barely two months into her new post. She reported considerable positive feedback from the change to the Grand Hyatt, and sees the change as an opportunity to refresh how the Council does its business in this respect.

## **Legal History**

### **Filling Justice Baldwin’s Seat**

**By C. Evan Stewart**



We have all recently witnessed two bruising nominations to the U.S. Supreme Court: first came President Obama’s 2016 nomination of Judge Merrick Garland, upon which the Senate never took action; and next up was President Trump’s nomination of Judge Neil Gorsuch, who was confirmed (after the “nuclear

option” was invoked) by a 54-45 vote in the Senate on April 7, 2017 (he is now the 101st Associate Justice of the Court). There have been lots of other contentious nominations, of course (*see, e.g.*, “The Legal Battle Over Brandeis,” *Federal Bar Council News* (December 1997)). One such battle – about which little is known – concerns the seat of Justice Henry Baldwin.

Baldwin was nominated to the Court by President Andrew Jackson and confirmed by the Senate on January 6, 1830. Previously, he had been a prominent Philadelphia lawyer, a congressman, and a trusted political ally of Jackson. As for his jurisprudential legacy, Professors G. Edward White and Gerald Gunther have labeled Baldwin an “incoheren[t] ... jurist.” With his death on April 21, 1844, a vacancy on the Court needed to be filled.

Because Baldwin’s seat was considered a “Pennsylvania” seat, President John Tyler sought to replace Baldwin with another Keystoner. Tyler, the first vice president to succeed to the presidency after the death of his predecessor (William Henry Harrison), was wildly unpopular with both the Whig and Democratic parties. So how did “his Accidenty” do in getting someone through the Senate? Not so well. Tyler first offered the seat to Pennsylvania’s senator, James Buchanan, who declined. Tyler then nominated Edward King, the presiding judge of the Philadelphia Court of Common Pleas, on June 5, 1844. After the Senate postponed

considering King’s nomination (for, among other reasons, deference to Buchanan, who a number of senators thought wanted a seat on the Court), King withdrew his name. Undeterred, Tyler nominated King again on December 4; after the Senate once again postponed consideration of King’s nomination, Tyler pulled the plug on February 7, 1845.

In the weeks remaining in the Tyler Administration, the lame duck president put forward a second candidate: John M. Read, yet another prominent Philadelphia lawyer. Perhaps this would get through because Read was a friend of Buchanan (and Buchanan was widely viewed as a likely cabinet member of the next president). Since nothing happened by the end of Tyler’s term, however, the nomination was still-born when James Polk (“Young Hickory” – so named as Andrew Jackson’s protégé) took the presidential office on March 4, 1845.

Buchanan became Polk’s secretary of state, but the vacant seat just sat there, as the president took no action (with Congress not meeting in session until December of that year). In September 1845, Thomas Ritchie, editor of the *Washington Union* (the Democratic Party’s national organ), informed Polk that Buchanan wanted to go on the Court. Shortly thereafter, Buchanan met with the president to discuss the vacant seat. Buchanan played political Cassandra with Polk, acknowledging that he had long been interested in being on the Court, while at the same time em-

phasizing his importance to the new administration in overseeing the nation's foreign affairs. Two months later, he opted to stay in the Cabinet, which suited Polk just fine. That left the issue of what to do with the vacant seat. Buchanan "was most anxious" to have Read appointed to the Court, and urged his nomination on Polk. But Polk was not buying. Why? Although Polk told another colleague that the reason was because he was "determined to have a *first rate man* there," the real reason was that Read, at an earlier point in his political career, had been a Federalist (the predecessor party to the Whigs). As Polk confided in his Diary:

I have never known an instance of a Federalist who after arriving at the age of 30 professed to change his opinions, who was to be relied on in his constitutional opinions. All of them who have been appointed to the Supreme Court Bench, after having secured a place for life [.] became very soon broadly Federal and latitudinarian in all their decisions involving questions of Constitutional power.... I resolved to appoint no man who was not an original Democrat & strict constructionist, and who would be less likely to relapse into the Broad Federal doctrines of Judge Marshall & Judge Story.

Instead, based upon the advice of Buchanan's rival Pennsylvania Democrats (including Vice

President George Dallas, Andrew Beaumont ("with whom I served in Congress and in whom I have great confidence"), and Congressman David Wilmot (author of the famous "Wilmot Proviso" in 1846)), Polk sent George Woodward's name to the Senate on December 23, 1845. Woodward, who had been a Wilkes-Barre lawyer before becoming a judge on the Fourth Judicial District Court of Pennsylvania, was (in Polk's words) "a sound, original, & consistent democrat, of the strict construction school...[and] a man of fine talents & well qualified." But that was not really the complete story.

### **The Complexities of Pennsylvania's Democratic Party**

Polk's public announcement that he would serve only one presidential term was intended to free him to unite the Democratic Party; it had the opposite result, as likely and unlikely competitors for the 1848 nomination proliferated and caused no shortage of headaches. This was particularly true when it came to making patronage decisions – with fractured groups under the party's tent, any decision favoring one would upset the other(s). As Polk confided to one party leader, the process cost him so much "labor and trouble" that "I sincerely wish I had no office to bestow." And of all the states, Pennsylvania was most problematic in this regard.

On the one hand, Polk's vice president, George Dallas, was a

Keystoner, and he was an obvious contender for 1848, who wanted as many friends taken care of as possible. On the other hand was Buchanan, who now held the premier cabinet position, but who also eyed the presidency and was ever vigilant about his Pennsylvania power-base. There was also a third "hand" who needed to be factored in as well: Simon Cameron.

Cameron had been a very successful businessman in Pennsylvania for over two decades and, prior to 1845, he had also been very active in the Pennsylvania Democratic party. When Buchanan vacated his Senate seat on February 17, 1845 (in anticipation of becoming Polk's Secretary of State), Cameron threw his hat into the ring to succeed him. Cameron's opponent? None other than George Woodward. Woodward, in fact, was the party establishment's candidate. But he lost out to Cameron when the state legislature voted: 16 Democrats, together with 44 Whigs and seven Native Americans (the nativist party), supported Cameron, who defeated Woodward 67 to 55.

Woodward, Dallas, and Polk (and many other party elders) were very upset with the result. Polk (and Dallas) were thus determined not to be helpful to Cameron on patronage matters, in which the new senator was a skilled operator (he once observed that patronage served either of two objectives: "love or fear"). Buchanan played a somewhat more cagey patronage game with the new senator,

who in frustration blurted out to Buchanan in September 1845: “I wish you would tell me whether there is to be peace or war.” To the president, Cameron professed to be eager to work with the administration on its priorities; in reality, however, he was lying in wait to deliver a body-blow to Young Hickory.

Dallas was obviously pleased with the Woodward selection. Buchanan was not, and made clear his views to Polk on Christmas Day. Visibly agitated, Buchanan told Polk he had not slept the two nights since the nomination. His complaints were (i) that Polk “had not informed him of [Polk’s] intention to nominate” Woodward; and (ii) “his friends in Pennsylvania” believed that Polk was wielding patronage to his disfavor (one politician opined that “Dallas . . . [had] prevail[ed] over ‘Pennsylvania’s favorite son,’ yet the ass bears his burden & still shakes his ears, & is Secy of State!”; another wrote that “We hear that the Secretary of State was not advised of the nomination of Woodward until after it was sent to the Senate! Modern politicians are like spaniels; the more they are beaten, the more they love their masters.”). Polk was rather dismissive of Buchanan’s concerns, stating it was his prerogative to make such a nomination, that he had heard Buchanan out on his preference (Read), but he – the president – preferred Woodward. As for patronage matters generally, Polk went on to review his other Pennsylvania appointments, a review

which (according to Polk) “entirely satisfied” the Secretary of State.

Not surprisingly, that was not the case; and to make matters worse, a fuming Cameron was waiting to meet with Buchanan to discuss how to block Woodward’s elevation to the Court. Buchanan, however, took the position that he would take no part in the nomination, pro or con. At the same time, Buchanan did nothing to dissuade Cameron from using every tool in his political tool box to hurt the Dallas wing of the party (and obviously Polk, as well).

The local media in Pennsylvania was mobilized to dredge up Woodward’s nativist remarks from his formative political days; also highlighted was Woodward’s wobbly tariff record – Woodward had vacillated between tariff support (a very important state issue) and espousing free trade (a position widely viewed as pro-South). More troubling for the nomination was the fact that he had no senatorial rabbi. Without a Pennsylvania Democratic senator to lead the charge, Woodward tried to get Massachusetts Whig, Daniel Webster, to help out; but that did not work. Indeed, the entire Whig senatorial caucus was determined to vote en masse against the nominee; that would not be a problem, however, assuming the Democratic majority held steady for the president’s nominee.

Polk knew that Cameron was “active in his exertions to have Mr. Woodward’s nomination . . . rejected.” And he suspected

that Buchanan was also working to that end: “It will be deeply painful to me, if I ascertain that my suspicions are correct, but if I do so ascertain, I will act with promptness and energy towards Mr. Buchanan, whatever the consequences to myself or my administration may be.”

### **The Senate’s Advice and Consent on Woodward’s Nomination**

On January 20, 1846, the Senate (in closed session) began debate on Woodward’s nomination. Two days later, Woodward was rejected by a vote of 29 to 20 – six Democrats defected to join 23 Whigs in denying Woodward a seat on the Court. That night, Polk was told the bad news, and he reflected on what had gone wrong in his diary. His first focus was on Buchanan – perhaps Buchanan had helped deep-six the nomination because he wanted the seat for himself: “This I hope is a mistaken impression.”

Then, together with Dallas and other political intimates, Polk reviewed how they had lost the six Democratic Senators. Polk dismissed Senator James Wescott of Florida with his ultimate put-down – he was “a Whig in disguise.” Senator David Yulee (Florida) was a “pseudo Democrat,” and he termed Cameron “at heart a Whig”. Polk also thought that because Buchanan was “intimate” friends with Cameron, Ambrose Sevier (Arkansas) (he “almost lived at Buchanan’s”), and Wescott, the

Secretary of State, could have prevented those senators (and Thomas Hart Benton (Missouri) as well) from voting against Woodward. The president continued to suspect Buchanan's hand was behind Cameron's open and notorious activities; and if he could prove it he "would instantly dismiss him." Buchanan subsequently sent on an emissary (John Mason, the attorney general) to Polk (i) to deny that he had played any role in the rejection of Woodward, and (ii) to re-change his mind about wanting to be appointed to the Court. This last bit of news only confirmed Polk's worst suspicions of Buchanan's motivations and behind the scenes actions. Polk told his Attorney General that "Mr. Buchanan had brought all his troubles on himself; that I would take my own time, and receive further developments before I made another nomination." Polk also told Mason that if "any member of my cabinet" is found to be working with the Whigs to reject his nominations, he would find "a lion in his path." Polk's "further developments" mainly related to the president's nomination of his friend and former congressman Henry Horn to be the Collector of the Port of Philadelphia. Were Horn to receive a similar fate, the president told Ritchie that "the chain would be snapped."

And if the president were not angry enough at his Secretary of State and the defection of the six Democratic senators, Congressman Wilmot visited him at the

White House on January 28 to report on hearsay from one of his congressional colleagues. According to Wilmot's colleague, Cameron had quoted Wescott as saying – vis-à-vis Polk's nomination of Woodward: "the only way to treat an ugly Negro who was unruly, was to give him a d\_\_\_n drubbing at the start and he would learn to behave himself." It was further reported to Polk that Wescott had not only subsequently affirmed he made this "low and vulgar" remark, but he also repeated it. The next day, Wilmot wrote the president to correct his hearsay report: Wescott had made the remark *only* in the context of "dealing with obstinate negroes" generally; it was Cameron who had appropriated the remark as to how to deal with presidential nominations. Polk's ultimate verdict? "I consider both [Cameron and Wescott]...guilty of gross rudeness & vulgarity."

### **The Immediate Aftermath of Woodward's Defeat**

While Buchanan moped around in a "melancholy and dissatisfied manner," Cameron was actively plotting to humiliate the president again – this time on Horn's nomination. The Keystone senator decided to make no pretense at playing possum. Instead, Cameron called on Polk and told the president he would withdraw his opposition to Horn if Polk would tell Horn to play patronage ball with him. An obstinate Polk refused. Rebuffed,

Cameron chose to bide his time until seven Democratic senators were absent from the Capital attending a funeral on May 25, 1846; he then called up Horn's nomination and, with a unanimous Whig voting bloc and a handful of Democrats, it went down to defeat.

A furious Polk resubmitted Horn's nomination to the Senate. Cameron, however, was able to peel away a larger number of Democrats and the Senate rejected Horn for a second time on June 24, 1846. Polk cussed out Cameron in his diary as "a managing tricky man, in whom no reliance is to be placed,.... I consider him little better than a Whig."

### **Yet Another Nominee, Eventually**

Having seen how effective Cameron had been in cobbling together a handful of Democrats with a unified Whig bloc in the Senate, Polk decided that he would not do anything vis-à-vis the open seat for a while. Then, upon concluding that Buchanan had *not* in fact "taken affirmative action" against Woodward's nomination, the president on June 10, 1846 offered the seat (once more) to his Secretary of State (having been told that Buchanan really did want a seat on the Court). Two and one half weeks later, Buchanan accepted. But he wanted to be nominated immediately, fearing that his political foes (e.g., Dallas & Cameron) would be able to generate sufficient opposition if given enough

time. Polk, however, wanted to wait until just before Congress adjourned. After weeks of fretting, Buchanan went to the president on August 1, 1846 and said (once again) he would pass on the Court, wishing instead to “remain in the Cabinet” until the end of Polk’s term.

Polk now turned to yet another Pennsylvania state court judge, one who had been considered (and passed over) during the run-up to Woodward’s nomination: Robert C. Grier, a Jacksonian Democrat who wore judicial robes in Allegheny County. Perhaps out of fatigue, but more likely due to the fact that Grier had not chosen sides in fractious/tribal state politics, both Cameron and Buchanan blessed the president’s nominee. On August 3, 1846, the president submitted Judge Grier’s name to the Senate, and the next day a unanimous Senate approved Grier as an Associate Justice of the Supreme Court. The 28 month odyssey to find a replacement for Henry Baldwin was over.

### Postscripts

- Grier’s tenure on the Court (1846-70) is mainly known for his infamous concurrence in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (agreeing with Chief Justice Taney’s ruling that, because the Missouri Compromise of 1820 violated fundamental property rights “found” in the Fifth Amendment, the statute was unconstitutional – thus, creating the doctrine

of substantive due process). Grier had perhaps foreshadowed his sympathies with his Southern judicial brethren when he co-presided over a trial in 1851 (with U.S. District Court Judge John K. Kane) that dealt with criminally enforcing the terms of the Fugitive Slave Law: *United States v. Hanway*. Because of Grier’s charge to the jury regarding the legal definition of “treason,” the jury (after 15 minutes) acquitted the defendant. Nonetheless, during the proceeding Grier had also referred to abolitionists as “infuriated fanatics and unprincipled demagogues” who “denounced the constitution, the laws, and the Bible.” See also *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852) (upholding Illinois law that made it a crime to hide runaway slaves). More importantly and problematic (as readers of the *Federal Bar Council Quarterly* know (see “*The Worst Supreme Court Decision, Ever!*” May 2016), Grier engaged in *ex parte* communications with President-Elect James Buchanan prior to the release of the *Dred Scott* decision; not only did Grier accede to Buchanan’s lobbying for Grier to concur in Taney’s odious opinion, but Grier also tipped off Buchanan as to the decision itself, which enabled Buchanan to reference the “likely” outcome in his inaugural address on March 4,

1857 (*Dred Scott* was handed down on March 6, 1857).

Interestingly, Grier later upheld the constitutionality of President Lincoln’s naval blockade of Southern ports in the *Prize Cases*, 67 U.S. 635 (1863). Notwithstanding the fact that Congress had never declared war on the states that seceded, Grier wrote that “[a] civil war is never solemnly declared,” and held that Lincoln’s power(s) as commander-in-chief allowed him to use the army and navy as he saw fit to ensure the survivability of the Union.

- Polk’s criticism of Cameron’s fealty to the Democratic Party was spot-on. When he ran for re-election to the Senate, Cameron sought the nomination of the Know-Nothing Party (which he did not secure). Thereafter, he joined Pennsylvania’s People’s Party, which morphed into the Republican Party. With that party’s backing, Cameron was returned to the Senate in 1857. Three years later, he was a favorite son candidate for the Republican presidential nomination (one of my ancestors, William M. Stewart, was pledged to him on the first ballot, and (as instructed) switched to support Abe Lincoln on the second and third ballots). In exchange for Cameron’s support for Lincoln on those later ballots, the Keystone senator was nominated to serve as Secretary of War in the new presi-

dent's cabinet. Cameron was a poor choice, however, and in 1862 he was moved out of the cabinet and shipped off to Russia as the American minister. His tenure in Russia was also short-lived. After the Civil War, Cameron was once more sent to the Senate in 1867, where he served for another 10 years (he was succeeded by his son).

- The starting point for those who want to understand the Polk presidency is his four volume presidential diary: Milo Quaife, ed., *Diary of James K. Polk* (Chicago, 1910). Probably the best (but limited) biography of Polk is Charles Sellers' *James K. Polk Continentalist, 1843-1846* (Princeton, 1966); and the best biography of Buchanan (our *worst* president) is Philip Klein's *President James Buchanan: A Biography* (Pennsylvania, 1962). The starting point for understanding more about the Senate's rejection of Woodward's nomination is Daniel Curran's "Polk, Politics, and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court," *The Pennsylvania Magazine of History and Biography* (July, 1997). Finally, the best compendium of current, scholarly work on this era of American history can be found in Joel Silbey's *A Companion to the Antebellum Presidents 1837-1861* (Wiley, 2014).

## Legal History

### Nixon the Lawyer

By Joseph Marutollo



This year marks the 45th anniversary of the Watergate burglary. At the time, few would have imagined that the five men arrested for the botched break-in at the headquarters of the Democratic National Committee would create a sequence of events culminating in the resignation of the sitting American president, Richard M. Nixon. Today, Watergate remains a watershed moment in American politics, and Nixon remains one of the most analyzed leaders in American history. Indeed, decades after he left office, best-selling books continue to be written about Nixon, his psyche, and the Shakespearian tragedy of his career.

Often overlooked in the study of Nixon, however, is Nixon's role as a lawyer. As discussed below, three distinct periods in

Nixon's legal career – his education at Duke Law School, his time as a young attorney not yet involved in politics, and his work as a law firm partner here in New York City – played critical roles in shaping Nixon as president. These periods laid the foundation for the best characteristics of President Nixon, *i.e.*, the brilliant and hard-working leader devoted to peace, as well as the worst characteristics of President Nixon, *i.e.*, the cynical and paranoid man bent on destroying his enemies.

One recent book – Evan Thomas's single-volume biography, *Being Nixon* – takes a close and evenhanded look at Nixon's life, including his legal career. Thomas, a reporter, writer, and editor at *Newsweek* for 24 years, graciously agreed to an interview for this article.

#### **“Old Iron Butt” Nixon at Duke Law School**

Born in 1913, Nixon grew up in Yorba Linda, California. Nixon would later say that his family was “poor, but the glory of it was we didn't know it.” Nixon, the second of five children, had a challenging upbringing. His father, Frank, operated a failed lemon farm in Yorba Linda. Nixon's father later ran – with the help of his wife and sons – a combination grocery store and gas station. Nixon experienced tragedy twice in his early life: his younger brother, Arthur, died in 1925 after a short illness, and his older brother, Harold, died of tu-