

HIST 135J: The Age of Hamilton and Jefferson
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By submitting this essay, I attest that it is my own work, completed in accordance with University regulations.—Ryan Jacobs

Mr. Madison Meets His Party:
The Appointment of a Judge and The Education of a President

by Ryan Jacobs

Introduction: A Circumstance of Congratulation?

DAWN ON SEPTEMBER 13, 1810 BROUGHT “A CIRCUMSTANCE OF CONGRATULATION” WITH IT.¹ Judge William Cushing, age 78, was dead at last. Surrounded by his Federalist family in his Federalist hometown of Scituate located in the historically Federalist state of Massachusetts, this Federalist justice of the Supreme Court serving under and allied to its Federalist chief, John Marshall, finally took his final breath. And the word spread. It spread up and down countless column inches of his friends’ political newspapers—where he was “revered and beloved” and eulogized like Christ.² And it spread to obituary sections of more independent publications too—where he wasn’t eulogized at all, but dismissed with a single line: “DIED... William Cushing, Esq. Judge of the Supreme Judicial Court.”³ That message spread into the homes of judgeship seekers, giddy at the prospect of a vacancy on the bench. It spread to the Washington offices of U.S. senators, wondering what name they might have to confirm or reject. And that message spread down into Albemarle County, Virginia, and up a big hill to a big house and into the hands of a former president. Upon reading it, he may have let loose a sinister smile and then picked up his pen to write his successor. “Another circumstance of congratulation is the death of Cushing,” Thomas Jefferson wrote James Madison,

¹ Thomas Jefferson to James Madison, October 15, 1810, in *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826*, James Morton Smith, ed., 3 vols. (New York: W.W. Norton & Company, 1995) 3:1646-1647.

² *The New-England Palladium*, September 18, 1810.

³ *The Merrimack Intelligencer*, September 15, 1810.

“[his] death...gives us opportunity of closing the reformation by [appointing a] successor of unquestionable republican principles.”⁴

That “reformation” had begun ten years earlier when Jefferson, the first Republican president, was sworn in alongside the first Republican Congress. By 1810, of the federal government’s three branches, the Supreme Court was the only Federalist holdout.⁵ For Jefferson and Madison, now was the time to appoint a judge of “unquestionable republican principles,” swing the balance of the court, and strip their political enemy, Chief Justice John Marshall, of his power. And judging from the numbers, it looked like they would do it. These were the numbers:

- Seven seats on the Supreme Court.⁶
- Three controlled by Republicans.
- Three controlled by Federalists.
- And *one* open slot where a Republican nominee could decisively tilt the partisan balance.⁷
- *One* James Madison—a Republican president to appoint that Republican nominee.
- And 27 Republican senators, well over the majority required, to confirm him.⁸

Yet the man Madison nominated and the Senate approved—the man who would wear the robe and sit in Cushing’s seat—was neither Jefferson’s friend, nor Marshall’s enemy. He was a 32-year old state legislator from Massachusetts. A self-declared Republican, he, nevertheless, often voted Federalist⁹ and worshipped the Chief Justice. His name was Joseph Story. And for the next quarter century, he would be John Marshall’s closest “confidant and most effective ally” on the Supreme Court.¹⁰

⁴ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647

⁵ Gordon Wood, *Empire of Liberty: A History of the Early Republic, 1780-1815* (New York: Oxford University Press, 2009), 420.

⁶ Charles Warren, *The Supreme Court in United States History*, 3 vols. (Washington: Little Brown & Company 1922), 1:422.

⁷ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647

⁸ “Party Division in the Senate, 1789-Present,” The United States Senate Historical Office, accessed December 3, 2010, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm. The Senate Historical Office has compiled a breakdown of party affiliation for each congress in U.S. History.

⁹ R. Kent Newmyer, *Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: The University of North Carolina Press, 1985), 52-64.

¹⁰ R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, (Baton Rouge: University of Louisiana Press, 2001), 407-408.

Not surprisingly, historians let out a collective “*Huh?*” on the subject of Story’s appointment. Why did Madison nominate someone without those “unquestionable republican principles” and dash his chances of shifting the court’s ideology? Some argue he was naïve. Some argue he was desperate. Others argue nothing at all. Joseph Story’s three chief biographers—taken together—only devote about six pages to his nomination.¹¹ And only one legal historian, Morgan D. Dowd, has attempted an extended analysis of Story’s path to the bench, concluding that Madison did not share Jefferson’s desire to ‘close out the’ Republican ‘reformation.’ Dowd’s conclusion, however, is just like his colleagues’—ungrounded, oversimplified, and dead wrong.¹²

No one has accurately told the story of the fourteen months between Cushing’s death and Story’s appointment, and no one can understand why Madison made the decisions he did without that story. It’s a trilogy, in fact. And it begins with a Madison who was almost as much a Marshall-hater as Jefferson and who was fittingly searching for someone with “unquestionable republican principles” to fill Cushing’s seat. But the Republican Senate would not—could not—confirm such a Republican candidate. Why? Because the Republican Party of 1810 was not the Republican Party of the late eighteenth century. As Madison soon discovered, it was more fractious, more nonpartisan, and would more willingly work across the aisle with Federalists than be bullied into voting the old Republican Party line. And so the second chapter gives way to a third, where Madison must forsake his ardent Jeffersonian friends and inevitably appoint a member of the new Republican generation—a man by the name of Joseph Story. That is the general narrative. There are political complications and

¹¹ Newmyer, *Supreme Court Justice Joseph Story*, 71; McClellan, *Joseph Story and the American Constitution: A Study in Legal and Political Thought*, 38; Gerald T. Dunne, “Joseph Story: The Germinal Years,” *Harvard Law Review* 75 (February, 1962): 750-753.

¹² Morgan D. Dowd has conducted the most comprehensive analysis of Story’s nomination. However, his thesis that Madison and Jefferson did not use the same criteria in selecting judges—that Madison was more always moderate than his predecessor—is a faulty conclusion. Morgan D. Dowd, “The Politics of Court Appointment,” *The American Journal of Legal History* 9 (October, 1965): 276. Richard E. Ellis reaches a similar conclusion without nearly as much analysis as Dowd. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), 241-242. Two of Story’s chief biographers also briefly present different rationales for his appointment. R. Kent Newmyer argues, “Story finally got the nod because he was a Republican, even if a ‘doubtful’ one.” R. Kent Newmyer, *Supreme Court Justice Joseph Story*, 71. James McClellan’s argues Story’s middling “legislative experience in Massachusetts” earned him the nomination. James McClellan, *Joseph Story and the American Constitution: A Study in Legal and Political Thought*, (Norman: University of Oklahoma Press, 1971), 38. These arguments are too simplistic.

caveats along the way to be sure. But the point is clear: the nomination of Joseph Story was the final lesson in the education of James Madison, the education of what it meant to be a Republican in the second decade of the 1800s. Madison was a member of the Old Guard marginalized by a new generation of more independent Republicans. And he learned to adapt.

Dawn on September 13, 1810 may have brought a “circumstance of congratulation” with it. But, over fourteen months later, when the Senate finally confirmed Madison’s fourth and last nominee to the bench, no cheers rang out in the White House. It was probably a relatively quiet night. And Madison perhaps sat alone in his study, thinking back to the Republican Party he had helped found years before, about the one that existed at that very moment, and how, in a gaffe-ridden nomination process, he had come to realize the difference between the two.

Chapter 1. Our Friends: Nominating the Republican Old Guard

“REPEAT AFTER ME: I DO SOLEMNLY SWEAR THAT I WILL FAITHFULLY EXECUTE THE OFFICE OF President of the United States.” It was a cold day outside the Capitol, but inside John Marshall’s eyes glared colder. Newspapermen reported that, as he administered the oath, the Chief Justice stared down the incoming President Madison “with scorn, indignation, and disgust.”¹³ The two men disliked one another—of that we can be sure. While they both held tight to similar judicial philosophies rooted in nationalism and a strong Supreme Court, the early years of Madison’s presidency were highly partisan ones for him. And, during them, politics not only trumped philosophical considerations, it eclipsed them altogether. Madison agreed with Jefferson that Marshall’s court had become a Federalist institution, preoccupied with almost a political vendetta against Republicans. Marshall’s partisanship needed to be checked, and the men Madison initially nominated to the bench in the winter of 1810-11 were proof that he believed it. His candidates were the oldest of the Republican Old Guard. In the first weeks after Cushing’s death, then, Madison’s aim

¹³ Descriptions of Madison’s first inauguration can be found in Andrew Burstein and Nancy Isenberg, *Madison and Jefferson* (New York: Random House, 2010), 466-46; and in Ralph Louis Ketcham, *James Madison: A Biography* (New York: Macmillan, 1971), 555-556.

was aligned with Jefferson's: to 'reform' the Supreme Court by appointing a man of "unquestionable republican principles."

By mid-1810, Madison was no longer that author of the *Federalist Papers* theorizing about Supreme Court decisions "to be impartially made, according to the rules of the constitution."¹⁴ The Supreme Court was no longer just a theory; it was a political body. And James Madison, now leader of the Republican Party, saw it as a partisan threat. Throughout the vast majority of his life, Madison championed an authoritative federal judiciary so that state governments and the national one could resolve their conflicts in the courtroom rather than on the battlefield.¹⁵ On this, he and John Marshall generally agreed.¹⁶ But, the key word is *generally*. The months and years leading up to Judge Cushing's death were the exception. Controversies surrounding judicial politics had reached a fever pitch in Washington D.C, drowning out the debate over judicial philosophy.¹⁷ "I am not unaware that the Judiciary career has not corresponded with what was anticipated," Madison wrote Jefferson after leaving office, "At one period the Judges perverted the Bench of Justice into a rostrum for partizan harangues."¹⁸

For Madison, that "one period" was the era of the Marshall Court. In his eyes, "partizan harangues" had filled its docket and colored its rulings. In 1803, Marshall handed down his famous *Marbury vs. Madison* decision, which established the principle of judicial review and slapped Madison on the wrist in the process. In the spring of 1810, the court "dropped a bombshell" with *Fletcher v. Peck*, opposing the Republican stance on the Yazoo land scandal in an opinion that appeared to "laymen as a travesty of justice."¹⁹ And that same spring, Republicans expected Marshall to intercede on behalf of a schemer named Edward Livingston in his specious lawsuit against Thomas Jefferson. Livingston claimed that Jefferson, during his presidency, had unjustly seized

¹⁴ James Madison, "The Federalist No. 39," in *James Madison: Writings*, ed. Jack N. Rakove (Washington: The Library of America, 1999), 216.

¹⁵ James Madison, "The Federalist No. 39," 211-217.

¹⁶ Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 348-349.

¹⁷ Wood, *Empire of Liberty*, 418-425.

¹⁸ James Madison to Thomas Jefferson, June 27, 1823 *The Republic of Letters*, 3:1869-1670.

¹⁹ Robert Allen Rutland, *The Presidency of James Madison* (Lawrence, University of Kansas Press, 1990), 55-56.

“batture,” a tract of land in Louisiana.²⁰ These “partisan harangues” set the stage for Supreme Court nomination that would be nothing less than a political dogfight. Indeed, in all the correspondence Madison sent and received in the wake of Cushing’s death, never once was a potential nominee’s judicial philosophy considered. High-minded debate was absent in those letters. Words like “Yazooism,” “treachery,” and “tory” instead filled those pages—the language of nineteenth century partisan politics.²¹

The belief that the Supreme Court functioned as a center of political opposition was a mark of the nation’s most stalwart Republicans. And Madison’s view placed him squarely within the rank and file. The party of Jefferson had long held that the Federalist-controlled court system was fundamentally flawed. Blind justice wasn’t its objective. Partisan victory was.²² Jefferson himself was almost paranoid of Marshall and his court. “Marshall bears” a “rancorous hatred” to the “government [Republican administration] of this country,” he wrote Madison in May of 1810:

his twistifications in the case of Marbury, in that of Burr²³, & in the late Yazoo case, shew how dexterously he can reconcile the law to his personal biasses: and no body seems to doubt that he is ready prepared to decide [Edward] Livingston[’s] right to the batture [a]s unquestionable...²⁴

In Jefferson’s mind, he and his Republican friends were locked in a personal score against Marshall and his Federalist allies. And it was a score they could not win. After all, as Marshall was leader of the Federalist majority on the bench, his rulings were the final ones and the ones that counted. Jefferson’s only chance to strip Marshall of that power was to push his Federalist majority into the minority. On this, staunch Republicans found consensus: “[It would be] a great blessing to have a majority,” declared Attorney General Caesar Rodney.²⁵ “[T]he feelings of the judge are too deeply engraven,” wrote Jefferson in the wake of the batture snafu, “the death of Cushing is therefore

²⁰ Thomas Jefferson to James Madison, May 25, 1810, *The Republic of Letters*, 3:1631-1632.

²¹ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647.

²² Ellis, *The Jeffersonian Crisis*, 194.

²³ Marshall acquitted Vice President Aaron Burr of treason in 1807. Jefferson clearly wasn’t pleased with the ruling. Wood, *Empire of Liberty*, 439-440.

²⁴ Thomas Jefferson to James Madison, May 25, 1810, *The Republic of Letters*, 3:1631-1632.

²⁵ Thomas Jefferson to Caesar A. Rodney, September 25, 1810 in *The Papers of Thomas Jefferson: Retirement Series*, J. Jefferson Looney, ed., 6 vols. (Princeton: Princeton University Press, 2006) 3:117-118.

opportune as it gives an opening on the supreme bench.”²⁶ Madison agreed with them both, though in somewhat more cryptic and stilted language. If the court continued with its Federalist partisanship, Madison declared, “it cannot fail I think, to draw down on itself the unbounded indignation of the Nation...In a Government whose vital principle is responsibility, it never will be allowed that the Legislative and Executive Departments should be completely subjected to the Judiciary...”²⁷ Marshall needed to submit to Republican authority on his own court.

But who would be that Republican to fill Cushing’s seat? Jefferson and his allies didn’t all agree on a specific nominee. But they did concur that the nominee needed to meet three core criteria. First, as Jefferson told Madison, “he must be a New Englander.”²⁸ In 1810, no serious politician thought the President could replace Cushing, a Massachusetts man, with someone from outside the region. It would have been a vote of no confidence in both northern Republicans and northern jurists. And the political backlash would have whipped from the White House to Monticello and back again. There was a practical consideration too. In the early nineteenth century, Supreme Court justices rode circuit, hearing cases in states and towns near their homes. Cushing’s successor would need to make the long trek north each year to sit in New England courtrooms, gavel-in-hand. The nominee, then, would have to be adept in traversing the peculiarities of New England’s law.²⁹ And it was *peculiar*. As Jefferson observed, “their system of Jurisprudence, made up from the Jewish law, a little dash of Common law, & a great mass of original notions of their own, is a thing of *sui generis*.”³⁰ As they wanted a New England man like Cushing, they, second, wanted a domineering man like Marshall. They needed one in fact—a man with “preeminent talents, Virtues, & tried services” to wrangle the indomitable Marshall in from the Federalist fringe.³¹ As Madison said, “a successor...of equal

²⁶ Caesar A. Rodney to Thomas Jefferson, October 6, 1810, *The Papers of Thomas Jefferson: Retirement Series*, 3:151.

²⁷ James Madison to Thomas Jefferson, June 4, 1810, *The Republic of Letters*, 3:1634.

²⁸ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647.

²⁹ Dunne, “Joseph Story: The Germinal Years,” 750.

³⁰ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647.

³¹ Levi Lincoln to James Madison, October 6, 1810 in *The Papers of James Madison: Presidential Series*, Jean Kerr Cross et al, eds., 6 vols. (Charlottesville: University of Virginia Press, 1996) 3:30.

force.”³² As Jefferson said better, “[someone who wasn’t] a milk and water character.”³³ The third requirement for a nominee was probably the most vital and least negotiable for the Old Guard. As has been stated, they wanted a man with “unquestionable republican principles; “an enlightened, decided, devoted republican,” as Jefferson’s old Attorney General told Madison.³⁴ Only Jefferson himself really hinted at what it meant to be such a party stalwart. The candidates he rejected had strayed from the party line during the vote on his Embargo Act of 1807—an act that restricted foreign trade.³⁵ So here Jefferson revealed some vanity. “[E]nlightened, decided, devoted republicans” always agreed with him, even in his most controversial moments.

A strict Jeffersonian with a forceful personality and a New England pedigree was a tall order for Madison. But at the outset of the nomination process, it seems the President took his cues from his predecessor.³⁶ And so, that was exactly the kind of candidate he selected: a member of the Republican Old Guard from Massachusetts. Born twenty miles south of Boston, Jefferson’s Attorney General and close friend Levi Lincoln was no “milk and water character.” An unwavering supporter of Jefferson’s trade embargo who happened to reside near one of the nation’s trade hubs, Lincoln probably needed a drink from time to time. More importantly, he had tangoed with the legal genius of John Marshall before; in 1801, he paced the well of the Supreme Court, fiercely arguing Jefferson’s case in *Marbury*.³⁷ “I know you think lightly of [Lincoln] as a lawyer,” Jefferson wrote Madison after Cushing’s death, “...[but he is] as much so as anyone which ever came or ever can come from the Eastern states...Lincoln’s firm republicanism, and known integrity, will give

³² James Madison to Thomas Jefferson, October 19, 1810, *The Republic of Letters*, 3:1648.

³³ Thomas Jefferson to James Madison, May 25, 1810, *The Republic of Letters*, 3:1631-1632.

³⁴ Levi Lincoln to James Madison, October 6, 1810, *The Papers of James Madison: Presidential Series*, 3:29-30.

³⁵ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647.

³⁶ Dowd contends, “The political considerations that prompted Madison to appoint Story were different in kind and principle to Jefferson’s prejudices” He treats Madison’s “political considerations” as static throughout the fourteen months from September 1810 to January 1811. Dowd, “The Politics of Appointment,” 267. So, what he fails to realize then is that, at the outset of the nomination process, Madison’s “political considerations” matched “Jefferson’s prejudices” exactly. After all, Madison first chose Jefferson’s hand-selected nominee!

³⁷ Burstein and Isenberg, *Madison and Jefferson*, 408; see also Levi Lincoln’s profile in the *American National Biography* online database for further description of his support for Jefferson’s policies.

complete confidence to the public in the long desired reformation of their judiciary.”³⁸ Though Lincoln was blind and Madison expected him to be “inflexible in declining” the nomination,³⁹ Madison nonetheless asked him to accept it. When Lincoln officially refused,⁴⁰ Madison nominated him anyway, “hoping he [might] serve for a time.”⁴¹ Such was Madison’s desire to appoint Jefferson’s handpicked Republican lion to the bench. “I was induced to [nominate you against your will]...by [the wishes] of others between whom and yourself exists all the reciprocal respect that can add weight to them,” Madison wrote Lincoln on the day the Senate confirmed his appointment.⁴² Lincoln declined again.⁴³ Madison’s hint that both he and Jefferson desperately wanted him on the bench—the less than subtle mention of that respectful ‘other’—didn’t change Lincoln’s mind. All it signaled was that Madison had committed himself to appointing a member of the Republican Old Guard.

It was a commitment that he didn’t soon abandon. Two weeks after Lincoln declined the nomination for a second time, Madison sent the Senate an unexpected message: “In the room of William Cushing, deceased, I nominate Alexander Wolcott, of Connecticut, to fill the vacancy.”⁴⁴ Though political handicappers had considered Wolcott the darkest of the dark horse candidates,⁴⁵ anyone who had closely scrutinized Madison’s selection of Levi Lincoln shouldn’t have been surprised. True, Wolcott, unlike Lincoln, was not a renowned legal scholar. But what he lacked in judicial experience, he more than compensated for with partisan fervor. An early convert to the Jeffersonian cause, Wolcott was arguably the most efficient Republican administrator in the Northeast. Dubbed “the State Manager,” he had begun organizing the Republican base in Connecticut sometime before 1805. From his headquarters in Middletown, he dispatched his lieutenants to canvass and mobilize Jeffersonians statewide. “Federalism cannot be talked down or

³⁸ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647.

³⁹ James Madison to Thomas Jefferson, October 19, 1810, *The Republic of Letters*, 3:1648.

⁴⁰ Levi Lincoln to James Madison, November 27, 1810, *The Papers of James Madison: Presidential Series*, 3:39-30.

⁴¹ James Madison to Thomas Jefferson, December 7, 1810, *The Republic of Letters*, 3:1659.

⁴² James Madison to Levi Lincoln, January 2, 1811, *The Papers of James Madison: Presidential Series*, 3:91.

⁴³ Levi Lincoln to James Madison, January 20, 1811, *The Papers of James Madison: Presidential Series*, 3:126-127.

⁴⁴ *Senate Executive Journal*, 11th Cong., 3rd sess., 165.

⁴⁵ New-York Spectator, February 20, 1811.

flattered down; IT MUST BE VOTED DOWN,” read his marching orders, “Let it be shewn that plain men, without titles or hope of offices, can do better than the mercenary troops of federalism.”⁴⁶ Levi Lincoln endorsed Wolcott wholeheartedly, intimating that his wily Republicanism would serve as an effective counter to Marshall’s entrenched Federalism. “His...firmness & patriotism, in being thus a valuab[le ac]quisition to the Bench, will, I conceive be peculiarly useful & satisfact[ory] to the National Administration...”⁴⁷ Wolcott, like Lincoln before him, was a friend of Jefferson and Madison—a true member of the Old Guard.

When that unexpected nomination echoed through the Senate on February 4, 1811, Madison must have felt like he had all but sent a giant-slayer up to Marshall’s court. He had done as Jefferson advised and nominated a man with “unquestionable republican principles.” All he needed now was the “Yea” vote from the Senate. But those “Yeas” would never come. And in the succeeding weeks and months, Madison would be left to wonder why the giant, Marshall, still survived and why he, the President, felt slain instead.

Chapter 2. Seventeen Republicans, Seven Federalists: Madison’s Partisanship and The Independent New Guard

“ANDERSON, BAYARD, BRADLEY, CAMPBELL, CHAMPLAIN, CLAY...” MADISON READ THE LIST of senators in his White House study. On February 13, 1811, twenty-four of them had voted “Nay,” decisively rejecting Alexander Wolcott’s nomination. The list went on: “Dunn, Franklin, Gaillard, German, Giles, Gilman...”⁴⁸ Madison’s “weather-beaten” and whitened face—a face that so many said looked like “parchment”—must have reddened with embarrassment and rage.⁴⁹ “Goodrich, Gregg, Horsey, Leib, Lloyd, Pickering.” Seventeen of these men were Republicans.⁵⁰ Madison was the leader of their party! “Reed, Smith, Tait, Turner, Whiteside, and Worthington.” The backlash against Madison had literally shut the Supreme Court down. For the first time in its history, the

⁴⁶ Alexander Wolcott, *162-vs-14* (Middletown: n.p., 1805), 3-8.

⁴⁷ Levi Lincoln to James Madison, February 15, 1811, *The Papers of James Madison: Presidential Series*, 3:165-166.

⁴⁸ *Senate Executive Journal*, 11th Cong., 3rd sess., vol. 2, February 13, 1811, 167.

⁴⁹ Burstein and Isenberg, *Madison and Jefferson*, 470.

⁵⁰ Information on the political affiliations of the senators was taken from the online database of *American National Biography*.

bench, deprived of its new member, lacked the four justices necessary for a quorum. Their session postponed until the next year, Judges Marshall, Livingston, and Washington were sent home—their carriages rambling away on the streets of the capital.⁵¹ In those same streets, rumors flew that “the president felt great mortification.” John Randolph, a Virginia congressman, thought the moment spelt the death knell of Madison’s presidency. “The truth seems to be that he is President de jure only,” Randolph wrote his friend. “Who exercises the office de facto I know not.”⁵²

How did a phalanx of Federalists and Republicans manage to so utterly blindsides Madison on the Senate floor? The answer: because Madison was about as blind as Levi Lincoln—blind to how the Republican Party functioned in 1811. Though Republicans were plagued by infighting, Madison still believed a fear of Federalists would force them to unite and hold the party line. But, that party unity and that party line no longer existed. The party itself wasn’t such a Federalist-fearing group anymore. In fact, if the Republican New Guard shared a common principle, it was this: their hatred for other Republicans often trumped their fear Federalists. In sending Wolcott’s name to the Senate, Madison was operating as an Old Guard partisan at a time when a new generation of Republicans was fractured and nonpartisan—so much so that many formed cross-party coalitions.

“[R]epublicans are the nation,” Jefferson declared in 1811.⁵³ If that was true, anarchy reigned in the United States. The Old Guard that had weathered years as a unified minority had now given way to a new party cut into dozens of rival blocs.⁵⁴ The schism had begun at the state level, largely in the North, and almost immediately after Republicans had stormed Washington in 1800. In 1802, attacks leveled against Vice President Burr in New York divided the state party, “setting good Republicans by the ears.”⁵⁵ In 1804, the Republican Party in Pennsylvania was deadlocked at the ballot box, “hopelessly split” between the warring factions of Governor Thomas McKean and the

⁵¹ Warren, *The Supreme Court in United States History*, 1:422.

⁵² John Randolph quoted in Henry Adams, *History of the United States during the Administration of James Madison*, 9 vols., (Cambridge: University Press, 1890), 5:249

⁵³ Thomas Jefferson to William Duane, March 28, 1811, *The Papers of Thomas Jefferson: Retirement Series*, 3:508.

⁵⁴ Wood, *Empire of Liberty*, 313-314.

⁵⁵ Noble Cunningham, *The Jeffersonian Republicans in Power: Party Operations, 1801-1809* (Chapel Hill: North Carolina, 1963), 204-213.

radical upstart Simon Snider.⁵⁶ In 1806, fissures in the party cracked their way up to the national stage when Congressman John Randolph announced that Jefferson was a “phony” Republican.⁵⁷ And in 1808, Madison could provoke even juicier criticism. According to allies of his rival for the presidency, George Clinton, Madison was a “doubtful” republican,⁵⁸ who “opened all the sluices of calumny” and was “pregnant with the greatest evils.”⁵⁹ By the start of Madison’s first term, then, the united Old Guard was a small, marginalized group in Congress.⁶⁰ Across the country, infighting Republicans embraced the Old Guard’s demise, took up their pens against one another, and sometimes answered to the new names of new factions.⁶¹ There were the “Burrrites” and the “Clintonians,” “the Malcontents” and “the War Hawks.” There were “The Principles of ’98,” the “Invisibles,” and the “*Tertium Quids*.”⁶² “I had always expected,” Jefferson wrote at the end of his presidency, “that when the [R]epublicans⁶³ should have put down all things under their feet, they would schismatize among themselves.”⁶⁴

⁵⁶ Ibid., 216-218.

⁵⁷ Burstein and Isenberg, *Madison and Jefferson*, 435-436.

⁵⁸ Nearly all factions that evolved and split off from the Old Guard claimed to be the heirs of true Republicanism. Though their actions often belied the pledge, most claimed allegiance to Jefferson too. Madison, then, may have been unaware that “unquestionable republican principles” meant different things to some New Guard Republicans and nothing at all to others. So, his ineptitude in believing that Wolcott could be confirmed was potentially due to the ambiguity of language as well. Wood, *Empire of Liberty*, 313-314, Cunningham, *The Jeffersonian Republicans in Power*, 218-219, 231.

⁵⁹ Saunders Cragg, *George Clinton, Next president, and Our Republican Institutions Rescued from Destruction* (New York: Henry Southwick, 1808), 19-20.

⁶⁰ Cunningham, *Jeffersonian Republicans in Power*, 222.

⁶¹ It is important not to think of these factions as traditional third parties for two reasons. First, these factions were mostly issue-specific and did not reveal some over-arching ideology (e.g. the “Clintonites” wanted Clinton as the presidential nominee). Second, many parties overlapped and membership constantly shifted. The Pennsylvania newspaper editor, William Duane, went from being anti-Quid in 1804, to pro-Quid in 1806, to anti-Madisonian by 1811. Noble Cunningham, *The Jeffersonian Republicans in Power*, 204-235; Thomas Jefferson to William Duane, March 28, 1811, *The Papers of Thomas Jefferson: Retirement Series*, 3:508.

⁶² Wood, *Empire of Liberty*, 313.

⁶³ Thomas Jefferson to Thomas Cooper, July 9, 1807, from Library of Congress, *The Thomas Jefferson Papers Series 1. General Correspondence. 1651-1827*, http://memory.loc.gov/cgi-bin/query/P?mtj:5:./temp/~ammem_OXB1: (accessed December 3, 2010).

⁶⁴ Ibid.

Of course, Jefferson, with Madison's backing, publically urged party dissidents that "no schism should be indulged on any ground."⁶⁵ But when in the privacy of their studies, those old Republican leaders suffered little anxiety over men like Clinton and Randolph—over divisions like "the Malcontents" and "the *Quids*"; Republican factionalism, as Madison and Jefferson saw it, wasn't a threat to Republican ascendancy. Jefferson, in fact, had tacked on a caveat to his expectation that Republicans would "schismatize." "I always expected, too, that whatever names the parties might bear, the real division would be into moderate and ardent republicanism," he added. "In this division there is no great evil...because this gives us one shade only, instead of another, of republicanism."⁶⁶ Under Jefferson's theory, factions could slow or temper progress towards a pure—"an ardent"—Republican society, but they could never decant the principles of his party from American government altogether. Jefferson and Madison had led the Republican Revolution of 1800. Even when members of their party deserted them, they never truly imagined that that Revolution could be reversed. "[A]ltho it may give some pain, no injury of consequence is to be apprehended," Jefferson wrote his successor when the influential newspaper editor, William Duane broke with the administration. "[It], may, a little while tho, throw confusion into our ranks...But, after a moment to reflect and rally and to see where [Duane] is, we shall stand our ground with firmness...it is better that all this should happen..."⁶⁷ Jefferson and Madison were optimistic about the state of their party almost to the point of being naïve. As President, Madison admitted, "Republicans as usual are either not decided, or have different leanings." Yet, he somehow believed the "tide" was still "setting so strongly" in a Republican direction.⁶⁸

⁶⁵ Thomas Jefferson to William Duane, March 28, 1811, *The Papers of Thomas Jefferson: Retirement Series*, 3:508; More guarded than Jefferson, Madison was often loath to candidly comment on the state of politics. In the case of William Duane, the Pennsylvania newspaper who had turned his printing press against the administration, Madison agreed with Jefferson that he should be checked. "He gives proofs of a want of candor, as well as of temperance," Madison wrote to his predecessor. Bunstein and Isenberg, *Madison and Jefferson*, 497.

⁶⁶ Thomas Jefferson to Thomas Cooper, July 9, 1807, *The Thomas Jefferson Papers, Series 1*.

⁶⁷ Thomas Jefferson to James Madison, April 24, 1811, *The Republic of Letters*, 3:1667

⁶⁸ James Madison to Thomas Jefferson, December 11, 1809. *The Republic of Letters*, 3:1623.

It was a hope borne out of fear. Madison and Jefferson trusted that the New Guard still feared Federalists enough to unite their factions in opposition and return to the Old Guard party line. Jefferson had struggled pull Duane back into the administration's fold by writing him, "if we break into squads, every one pursuing the path he thinks most direct, we become an easy conquest to those who can now barely hold us in check."⁶⁹ Even the reserved Madison argued that the Federalists were "lying in wait to spring on any opportunity" allowing for resurgence.⁷⁰ They overstressed the out-party threat to promote in-party unity. It was a tactic that had worked for the Republican minority in the late 1790s.⁷¹ Madison and Jefferson seemed to think it would work again for a Republican majority a decade later. After all, hadn't Madison sent the names of Republican stalwarts—Wolcott and Lincoln—to the Senate while citing a fear of the John Marshall? Hadn't the Old Guard's preoccupation with Federalist judges bordered on paranoia? Indeed, the President couldn't conceive of a Republican showing anything but enmity toward a Federalist. During his struggle to fill Cushing's seat, Madison received at least two letters explicitly stating, "the Federalists have had the address to unite with [a] Fraction of the Republican party in this State [to recommend a single candidate for the judgeship]."⁷² Madison never replied to, forwarded, or mentioned the letters again. All signs indicated he believed the union of Federalists and Republicans to be nonsense. On principle, and specifically in the case of Wolcott's nomination, Madison presumed his party would unite against the Federalists and vote like Republican partisans.

But, the New Guard couldn't be scared back into the partisanship of the old one. The rising generation of Republicans neither feared Federalists nor glared at them with such hostility. They really never had. All seventeen Republicans who broke ranks over Wolcott's nomination were younger than Madison. Thirteen of them had been boys, babies, or still unborn during the Revolutionary War. And nine had entered national politics only after the Republicans had seized the

⁶⁹ Thomas Jefferson to William Duane, March 28, 1811, *The Papers of Thomas Jefferson: Retirement Series*, 3:508.

⁷⁰ James Madison to Thomas Jefferson, December 11, 1809. *The Republic of Letters*, 3:1623.

⁷¹ Wood, *Empire of Liberty*, 313; Ellis, *Jeffersonian Crisis*, 234.

⁷² David Howell to James Madison, November 26, 1810, *The Papers of James Madison: Presidential Series*, 3:27-28; James Fenner to James Madison, December 3, 1810, *The Papers of James Madison: Presidential Series*, 3:43-35.

White House and Congress in 1800.⁷³ If they had known the Federalists as the majority party led by the scheming “monarchist,” Alexander Hamilton, they hadn’t known it for long.⁷⁴ The Hamilton they knew was dead. And his party seemed to be following in his footsteps. “[The opposition party] have dwindled to a number so inconsiderable that they are altogether silent,” declared one Ohio Republican.⁷⁵ The hush even crossed the Alleghenies and the Berkshires towards the old Federalist stronghold of Massachusetts. There, in 1806, Republicans won a majority of congressional races and then returned and capture the statehouse in 1810.⁷⁶ Federalists weren’t strong enough to merit the fear of the Republican New Guard, so Madisonian style partisanship had no place in their politics. That was how the new speaker of the Massachusetts legislature saw it. “Though I was a decided member of what was called the republican party, and of course a supporter of the administration of Mr. Jefferson and Mr. Madison,” he wrote, “you are not to imagine that I was a mere slave to the opinions of either.”⁷⁷ Speaker Joseph Story, 32-years old in 1811, counted Federalists as his business partners, statehouse colleagues, and close friends.⁷⁸ His Republican Party “embraced men of very different views”—men who “exercise[d] an independent judgment upon public affairs.”⁷⁹

The independence of the New Guard could not be overstated. Amidst their infighting, some Republicans actually allied with Federalists to battle other Republicans. It was a situation Jefferson would call “apostasy.”⁸⁰ It was a situation Madison could not believe. But as early as 1805, the Pennsylvania *Quids* had rallied Federalists at the polling places to reelect a Republican, Governor McKean.⁸¹ The next year, in Boston, the gulf between “moderate” and “radical” Republicans widened as Joseph Story and his “moderate” faction crossed party lines on the issue of judicial

⁷³ Biographical information of the senators was taken from the online database of *American National Biography*.

⁷⁴ Thomas Jefferson, “The Anas—Selections” in *Thomas Jefferson: Writings*, Merrill D. Peterson, ed., (Washington: Library of America 1984), 670,

⁷⁵ “Ohio Republican” in Wood, *Empire of Liberty*, 313.

⁷⁶ Wood, *Empire of Liberty*, 312-313; Henry Dearborn to Thomas Jefferson, May 31, 1810, *The Papers of Thomas Jefferson: Retirement Series*, 2:439-430.

⁷⁷ Joseph Story, “Autobiography,” *Life and Letters of Joseph Story*, William W. Story, ed., 2 vols. (London: John Chapman, 1851), 1:129; Story had written a previously unpublished biography which his son included in this volume of letters.

⁷⁸ Dunne, “Joseph Story: The Germinal Years,” 715-736.

⁷⁹ Joseph Story, “Autobiography,” *Life and Letters of Joseph Story*, 1:129.

⁸⁰ Thomas Jefferson to Thomas Cooper, July 9, 1807, *The Thomas Jefferson Papers, Series 1*.

⁸¹ Cunningham, *Jeffersonian Republicans in Power*, 218; Isenberg and Burnstein, *Madison and Jefferson*, 440.

reform. Massachusetts Federalists could not but “felicitate” themselves.⁸² By 1808, even Jefferson could peer down from his hilltop at Monticello and see a region where members of the two parties met with consensus. “We [the Federalists of Virginia] submit this address,” read the *Alexandria Gazette* two weeks before the 1808 presidential election. “The violence of a [Republican] MAJORITY...in the pursuit of power; has never hesitated to sacrifice its pretended republican principles...[and has] deprived us of all influence.” “Mr. Monroe,” they concluded, “would pursue a different course...”⁸³ Virginia Federalists were actually backing a Republican for the presidency! By the time of Madison’s inauguration, then, cross-party coalitions had weaved themselves into the fabric of national politics. “Federalism...having been defeated, has gained a new footing by being taken into partnership with republicanism,” wrote the staunch Jeffersonian, Senator John Taylor. “It was this project,” he contended in 1810, “[that had transformed] the Republican party from real to nominal.”⁸⁴ In other words, the “real” dyed-in-the-wool Jeffersonians had surrendered to those who claimed they belonged to Jefferson’s party but who refused to vote as he wished. These were the maverick men of the New Guard.

So, on October 13, 1811, when those seventeen Republicans joined those seven Federalists in rejecting Alexander Wolcott, they were also notifying Madison about the new state of his party. They refused to confirm an Old Guard hack.⁸⁵ They wanted someone “independent & untainted with [Wolcott’s] objections.”⁸⁶ And they would work across the aisle to get him on the bench. In so many columns of newsprint, men of every political stripe agreed: the Republican hardliner, Wolcott could not—should not—be confirmed. Said one Federalist newspaper, “He is the State Manager of

⁸² Ellis, *Jeffersonian Crisis*, 215-218.

⁸³ *Alexandria Gazette*, October 21, 1808.

⁸⁴ John Taylor in Ellis, *Jeffersonian Crisis*, 235.

⁸⁵ It is true that New Guard Republicans confirmed Levi Lincoln, who was just as much a member of the Old Guard as Alexander Wolcott. The New Guard, nonetheless, detested Lincoln’s partisanship, and may have only confirmed him because they knew their votes were meaningless. Read one newspaper editorial, “The Senate have confirmed the nomination of Mr. Lincoln, as Judge of the Supreme Court.—When asked how this strange thing could have happened...the democratic Senators shrug their shoulders, and say, it is understood—importing thereby, that the said Lincoln has agreed to be used as a warming pan; to keep the Judge-place warm until J.Q.A. returns from Russia to fill it permanently.” *Columbia Sentinel*, January 12, 1811.

⁸⁶ James Madison to Thomas Jefferson, December 7, 1810, *The Republic of Letters*, 3:1659.

Jacobinism in Connecticut...a state of degeneracy [has] arrived!”⁸⁷ Said another with greater Republican sympathies, “Wolcott is said to be more fit by far to be arraigned at the bar than to sit as a judge.”⁸⁸ If Madison needed any further clarification of the Senate’s wishes, they came to his doorstep about a week after the vote. “In questions merely political, parties will prefer those of their own sect.”⁸⁹ This was a letter from a Federalist—the *Federalist*, in fact. In three years time, Senator Timothy Pickering of Massachusetts would “scheme” for New England’s secession as a separate, Federalist nation.⁹⁰ But at the moment, he was instructing Madison to abandon Old Guard politics and begin building a cross-party coalition. “The two nominations of an associate justice of the supreme court...[have] failed; will you permit me to bring to your recollection [some other nominees].”⁹¹ The rumors of Madison’s “mortification” had to be true. A Federalist was lecturing him on how to appoint a Supreme Court justice.

Chapter 3. An Appointment “Is Of Course To Be Made” Madison’s New Strategy and The Desperate Search for A Suitable Nominee

THAT “BLUSTERY,” OVERLY CRITICAL NEW ENGLANDER WITH HIS LOUD MOUTH—THAT MOUTH, which could so unpleasantly sliver out into a smirk. Madison surely hated Pickering.⁹² And after that letter, he wanted to attract “particular notice in degrading him.”⁹³ But, the President also knew that Pickering had been right. The Senate would never confirm a nominee from the Old Guard. Madison needed a candidate that a coalition of Republicans—and maybe even a few Federalists—could unite behind. So, about four days after receiving Pickering’s letter, Madison, still reeling, changed strategy in his search for a justice. For the third time, he sent a nominee’s name the mile east from the White

⁸⁷ *Cooperstown Federalist*, February 16, 1811.

⁸⁸ *New-York Spectator*, February 20, 1811.

⁸⁹ Timothy Pickering to James Madison, February 16, 1811, *The Papers of James Madison: Presidential Series*, 3:167-168.

⁹⁰ James M. Banner, Jr., *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815*, (New York: Alfred A. Knopf, 1970), vii.

⁹¹ Timothy Pickering to James Madison, February 16, 1811, *The Papers of James Madison: Presidential Series*, 3:167-168.

⁹² Isenberg and Burnstein, *Madison and Jefferson*, 298; For a description of the hostile relationship between Pickering and Madison see also = Rutland, *The Presidency of James Madison*, 4. For a physical description of Pickering see portraits in front pages of Octavius Pickering and Charles Wentworth Upham, *The Life of Timothy Pickering*, (Boston: Little Brown, 1867).

⁹³ James Madison to Thomas Jefferson, June 7, 1811, *The Republic of Letters*, 3:1669-70.

House up to the Capitol. But, this time was different. And the news of it spread from South Carolinian plantations to Boston workshops to remote outposts near Ontario.⁹⁴ The news made its way on to a ship that would journey across the Atlantic, shoot the gap between Denmark and Scandinavia, and dock as near as it could to St. Petersburg. There, the nominee himself resided. He was no ardent Jeffersonian, but a man “independent & untainted with [partisan] objections.”⁹⁵ Madison wanted John Quincy Adams—needed John Quincy Adams—to accept the appointment. But, he declined. And after, Madison was desperate to find another candidate just like him.

If anyone could rally a cross-party alliance, it was America’s minister to the Court of Czar Alexander I, a politician who had actually crossed from one party to the other. John Quincy Adams was a member of the Republican New Guard just by virtue of being new.⁹⁶ Deserting the Federalist Party in 1807, Adams, then a Senator from Massachusetts, began to caucus with the Republicans. He, however, never ceded the right to vote his conscience.⁹⁷ And Federalist hardliners along with the Republican Old Guard never ceased to criticize him for it. “Thus it is proved, that the apostates from Federalism, stand on much higher ground...than the very best of the old democrats,” read one Republican screed after Adams’ nomination.⁹⁸ Pickering, probably to Madison’s chagrin, detested Adams’ independence too. “[He was] once [a] federalist, & [has] apostatized in order to acquire popularity, influence, power & office,” Pickering alleged. “[A]ll such men are clearly dishonest and entitled to no credit whatever may be their professions.”⁹⁹ But the hatred of old partisans only endeared Adams more to the new generation of Republicans and their potential Federalist allies. “I have expected that the Hon. J Q Adams,...[a] Gentleman in whose character & good attachments of

⁹⁴ [Boston] Columbian Centinel, March 2, 1811; Charleston Courier, March 8, 1811; Ontario Messenger, March 19, 1811.

⁹⁵ James Madison to Thomas Jefferson, December 7, 1810, *The Republic of Letters*, 3:1659.

⁹⁶ Morgan Dowd contends that Madison nominated Adams to “kick him upstairs”—to eliminate him as a presidential rival. Dowd, “The Politics of Appointment,” 276. This is a specious claim. In no way was Madison on the political offensive at this point. He had just lost two nomination battles and been lectured by a Federalist. If anything, he was on the defensive.

⁹⁷ Marie B. Hecht, *John Quincy Adams: A Personal History of An Independent Man*, (New York: Macmillan, 1972), 172-185.

⁹⁸ New Bedford Mercury, March 29, 1811, 276.

⁹⁹ Pickering in James Banner, *To The Hartford Convention*, 79.

confidence could be placed, would be called to succeed Mr Cushing,” one of the New Guard told Madison.¹⁰⁰ In the ranks of both parties, support stirred for the nominee. And, on February 22, 1811, the Senate officially confirmed Adams, an Associate Justice of the United States Supreme Court.¹⁰¹ Madison thought he had put a man on the bench at last.

But, he thought wrong. For months, the White House and the State Department had known Adams was unhappy with his post in Russia. Adams’ mother, Abigail, had written the President, “communicating [her son’s] anxiety to leave [the] situation.”¹⁰² So, assuming his ambassador would willingly trade the Czar’s court for the Supreme Court, Madison sent his name to the Senate. Adams was confirmed as a justice before he was ever asked if he wanted the job!¹⁰³ He didn’t. And due to slow pace of the transatlantic post, Madison didn’t know he didn’t until seven months later. In early October 1811, the President may have expected John Quincy himself to walk off a ship, ready to assume the judgeship. Instead, only a letter came. “[I] regret my incapacity to meet [the appointment] with a return most agreeable to you,” Adams wrote the President. “I must then intreat you, Sir, to confer upon some other Person the Office as a Judge of the Supreme Court...”¹⁰⁴ For a fourth time, then, Madison would need to give the Senate a nominee.

Over the ensuing short weeks, he would scramble to find one as confirmable as Adams. On October 6, Madison apprised his brother-in-law, Richard Cutts of the situation, “Mr. J.Q. Adams declines his Judiciary appt. Another is of course to be made as soon as the Senate are in session.”

¹⁰⁰ David Howell to James Madison, November 26, 1810, *The Papers of James Madison: Presidential Series*, 3:27-28

¹⁰¹ Dowd, “The Politics of Appointment,” 276.

¹⁰² James Madison to John Quincy Adams, October 16, 1810, *The Papers of James Madison: Presidential Series*, 2:582-583.

¹⁰³ Adams was confirmed February 22, 1811. He wasn’t apprised of his nomination until May 29, 1811. *Senate Executive Journal*, 11th Congr., 3rd sess., 168; John Quincy Adams to James Madison, June 3, 1811, *The Papers of James Madison: Presidential Series*, 3:324.

¹⁰⁴ John Quincy Adams to James Madison, June 3, 1811, *The Papers of James Madison: Presidential Series*, 3:324; Dowd claims, “Adams letter of refusal did not arrive in Washington until early June.” Since Madison didn’t choose another nominee until mid-November, Dowd also contends that, for the President, “the storm over the Supreme Court subsided.” But, Adams letter of refusal didn’t arrive in Washington in early June. Dowd fails to take into account the time it would need to travel across the Atlantic: about three months. Madison most likely received the letter the first week of October 1811. As he nominated Joseph Story about six weeks later, the “storm” hadn’t subsided. Madison was rather in the midst of it still, feeling desperate and rushed. Dowd, “The Politics of Appointment,” 277.

Then Madison made an odd request: “Be so good as to give me without delay on the state of Mr. Lincoln’s eyes.”¹⁰⁵ In desperation, Madison’s thoughts turned back to his first nominee—a nominee the Senate had already confirmed—the blind Levi Lincoln. He wanted his brother-in-law to gallop fast towards Lincoln’s home in Boston to check, if somehow, the former Attorney General could see again. But, both had to know that would require nothing less than a miracle. “You will oblige me also by any other information which may aid me in a fit choice,” Madison told Cutts.¹⁰⁶ He was asking for help. And, Cutts obliged. He gave him the name of one of the “only [viable] candidates” left.¹⁰⁷

His name was Joseph Story, that thirty-two-year-old state legislator from Massachusetts who had championed bipartisan judicial reform.¹⁰⁸ Able to rally men of both parties behind him, he had John Quincy Adams’ New Guard credentials. The Federalist leader George Cabot praised Story. “Though he is a man whom the Democrats support,” Cabot wrote, “I have seldom met one with a sounder mind... He is well worthy the civil attention of the most respectable Federalists.”¹⁰⁹ On the other side of the aisle, Republican mavericks certainly appreciated that Story wasn’t a “mere slave to [Jeffersonian] opinions.” Jefferson, in fact, had warned Madison not to appoint the young New Englander; he called Story a “pseudo-republican” and a “tory.”¹¹⁰ But, he had called him those things four months before Wolcott’s hyper-partisan nomination proved a disaster—a year before Adams’ letter refusing the judgeship reached American shores. Madison could no longer heed Jefferson’s Old Guard objections. Story would be confirmed. He would unite the Congress. Madison had seen him do it in his own house. At the a President’s New Year’s Party in 1809, Story hid in an empty

¹⁰⁵ James Madison to Richard Cutts, October 6, 1811, *The Papers of James Madison: Presidential Series*, 3:475-76.

¹⁰⁶ Ibid.

¹⁰⁷ Richard Cutts to James Madison, October 19, 1811, *The Papers of James Madison: Presidential Series*, 3:492.

¹⁰⁸ Cutts also recommended Congressman Ezekial Bacon. Ibid. But, Bacon had been lobbying for Story’s appointment. He wasn’t a candidate. Dowd, “The Politics of Appointment,” 283.

¹⁰⁹ George Cabot to Timothy Pickering, January 28, 1808, *Life and Letters of George Cabot*, ed. Henry Cabot Lodge, (Boston: Little, Brown, & Company, 1877), 377.

¹¹⁰ Thomas Jefferson to James Madison, October 15, 1810, *The Republic of Letters*, 3:1646-1647; Thomas Jefferson to Henry Dearborn, August 15, 1810, *The Papers of Thomas Jefferson: Retirement Series*, 3:27-28.

corridor, dressed himself in a ridiculous costume, then reemerged at the celebration, prompting Federalists and Republicans to laugh and cheer together.¹¹¹

On November 18, 1811, the Senate put Madison's candidate to a voice vote: "The President nominates Joseph Story, of Massachusetts to fill the vacancy." And, once again Federalists and Republicans cheered for Story together. A mighty chorus of "Yeas" rang out in the chamber.¹¹² After fourteen months, James Madison finally had his judge.

Conclusion: Another Circumstance of Congratulation?

MADISON STOOD ON THE BOW OF A STEAMBOAT CHURNING SOUTH ALONG POTOMAC. IT WAS April 1817. His presidency had ended, and he was going home for good.¹¹³ "I sincerely congratulate you on your release from your incessant labors, corroding anxieties, [and] active enemies..." Jefferson wrote his closest friend.¹¹⁴ And, across the nation, others congratulated the outgoing president on handling those labors, anxieties, and enemies so well. On his inauguration day, James Monroe went before the Washington masses and thanked his "immediate predecessor" for his "exalted talents and the most faithful and meritorious service."¹¹⁵ In newspapers, Americans read, "Never had a grateful people had more reason to call down the benedictions of heaven on a retiring patriot."¹¹⁶ It was a message the country would read for years to come in the history books: "No thinking person questions Madison's greatness."¹¹⁷

But, standing on the bow of that steamboat, the old politician put little stock in such past and future praise. "[Men] themselves would often be puzzled to account for their own actions, [let alone those of my administration]," Madison would tell his travelling companion.¹¹⁸ After all, if he thought

¹¹¹ McClellan, *Joseph Story and the American Constitution*, 36-37..

¹¹² *Senate Executive Journal*, 12th Cong., 1st sess., November 18, 1811, 190.

¹¹³ Burstein and Isenberg, *Madison and Jefferson*, 567-568.

¹¹⁴ Thomas Jefferson to James Madison, April 15, 1817, *The Republic of Letters*, 3:1785.

¹¹⁵ James Monroe, "First Inaugural Address," in *Inaugural Addresses of the Presidents of the United States*, 2 vols., (Bedford: Applewood Books, 2000), 2 vols., 1:31.

¹¹⁶ [Maine] *American Advocate*, April 26, 1817.

¹¹⁷ Rutland, *The Presidency of James Madison*, xi.

¹¹⁸ James Madison to James K. Paulding, July 24, 1818, from Library of Congress, *The James Madison Papers*, http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=18/mjm18.db&recNum=1092&itemLink=D?mjm:6:/temp/~ammem_4H7d:: (accessed December 3, 2010).

back to 1810 and 1811—to that fourteen-month-long appointment process—he could not say he had always conducted his presidency with “greatness” or “meritorious service.” His actions had inflamed the ranks of both parties. His first three nominees had denied him, been rejected, and denied him again; Lincoln, Wolcott, and Adams accounted for sixty percent of failed nominations up to that point in Supreme Court history.¹¹⁹ And worst of all, Madison had been unsuccessful in completing the government’s Republican “reformation.”¹²⁰ John Marshall still sat on bench as influential as ever.

The disastrous struggle to find William Cushing’s replacement wasn’t without its silver lining however. At the outset, Madison suspected that “the Vacancy” was “not without a puzzle in supplying it.”¹²¹ And as he fit together the pieces, he was surprised by what he saw: a new order of politics where Republican and Federalist coalitions whipped in, shifted, and died like the wind out on the Potomac. After Lincoln and Wolcott’s botched nominations, Madison could have easily stayed stuck in his Old Guard ways and let the gridlock continue. But, instead, he did something unusual for a president and a founder of a party. He changed his politics. Adams and Story weren’t the men he originally wanted. They were just the men the politics of the time would allow.

So, as Madison sailed home and into history, Americans could not congratulate him for unwavering “greatness” or constant “meritorious service.” Madison hadn’t been a perfect president. But, he had been a pragmatic one. In that long nomination process, he was wise enough to recognize his mistake, learn from it, and adapt. Americans could congratulate him for that. And one did. “Mr. Madison [had] comprehensive and statesman-like views...in wisdom I have long been accustomed to place him before Jefferson.”¹²² Justice Joseph Story appreciated the man who had put him on the bench.

¹¹⁹ “US Supreme Court Nominations, 1789-present,” The Senate Historical Office, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>, (accessed December 3, 2010); The Senate Historical Office has compiled a list of all Supreme Court nominations failed and otherwise. The statistic includes only nominees who were rejected by the Senate or decline appointment.

¹²⁰ Burstein and Isenberg, *Madison and Jefferson*, 567-568.

¹²¹ James Madison to Thomas Jefferson, October 19, 1810, *The Republic of Letters*, 3:1648-1649.

¹²² Joseph Story to Ezekiel Bacon, April 30, 1842, in *Life and Letters of Joseph Story*, 2:420.

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