

THOMAS E. CARNEY

## The Political Judge: Justice John McLean's Pursuit of the Presidency

### *Introduction*

John McLean stands out as a singular figure in American legal history. He was appointed to the United States Supreme Court by President Andrew Jackson in 1829 and served until his death in 1861, as the Union, which he loved so dearly, collapsed into the Civil War. He was the third man from west of the Appalachian Mountains appointed to the high court, and he authored one of the two dissenting opinions in the infamous *Dred Scott* case. But none of these accomplishments accounts for his singularity. It was McLean's open and aggressive political involvement which differentiates him from his peers. No other Supreme Court Justice has been similarly involved in the pursuit of the office of president of the United States.<sup>1</sup> This work focuses upon the last episode in McLean's persistent pursuit of the presidency and the role such issues as slavery and immigration played in this effort.

John McLean was born in Morris County, New Jersey, in 1785, the

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1. Alexander M. Bickel referred to Justice McLean as "The most notoriously politically minded" individual ever to sit on the U.S. Supreme Court. Alexander M. Bickel, *Politics and the Warren Court* (New York, 1973), 135.

first child of Fergus and Sophia McLean. In 1789, the family began an eight-year journey through Virginia and Kentucky before arriving in southeastern Ohio; Ohio would be Justice McLean's home for the remainder of his life. The family settled for periods of time in the areas of Morgantown, [West] Virginia, Lexington, Kentucky, and Maystock County, Kentucky. During this time, the McLean family grew to include three sons: John, Nathaniel, and William, and one daughter, Mary.<sup>2</sup>

McLean received no formal education before his family's arrival in Ohio, where he then attended a neighborhood school in Warren County. Thereafter, in addition to his chores on the family farm, he also earned money assisting his neighbors to clear their land. He used these proceeds to pay for two more years of education, first with the Reverend Matthew Wallace of Cincinnati and later in Kentucky with Robert Stubbs.<sup>3</sup>

At the age of nineteen, he was apprenticed to John Stites Grano, Clerk of Courts of Hamilton County, and while maintaining this apprenticeship, he also began to read law at the offices of Arthur St. Clair, Jr. Barely three years later, McLean left both positions and married Rebecca Edwards of Newport, Kentucky, after which he began publication of the *Western Star* in Lebanon, Ohio. As publisher, he also became involved in politics, and in 1811 he was appointed an examiner of the United States Land Office in Cincinnati. One year later he was elected to the United States House of Representatives as a western War Hawk. He was reelected in 1814 but resigned his seat in 1816 to take a seat on the Ohio State Supreme Court.<sup>4</sup>

Before leaving Congress, however, McLean attended the Republican Congressional caucus in the spring of 1816 to select the

2. The biographical material found in the "Introduction" of this paper comes from Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (New York, 1971), in this instance 1–3. See also Reginald C. McGrane, ed., "John McLean," *Dictionary of American Biography*, Dumas Malone, ed., (New York, 1933), XII, 127.

3. Weisenburger, *The Life of John McLean*, 4–5.

4. Weisenburger, *The Life of John McLean*, 5, 6–7, 9–18. The War Hawks were Republican members of the Twelfth Congress (1811) who under the leadership of Henry Clay, John C. Calhoun, Langdon Cheves and Williams Lowndes advocated war with Great Britain. For a discussion of this group see Donald R. Hickey, *The War of 1812: A Forgotten Conflict* (Urbana, Ill., 1989), 334, n. 8.

party's presidential candidate. He worked hard to secure the nomination of James Monroe, an effort which would later help to advance his own political career.<sup>5</sup>

In the early nineteenth century, the justices of the Supreme Court of Ohio were selected by the Legislature, and in 1816 McLean was a near unanimous choice. The supreme court in this early period of its history had both appellate and original jurisdiction. The bench was composed of four judges, who alternated riding in tandem and visited each county annually. Such traveling caused them problems: it was harmful to their health, and it caused the continuance of cases until two judges could combine to rule. Little is known of the actual work of the supreme court at this time because no official record was maintained, but we do know that McLean was responsible for the acceptance of English Common Law principles in Ohio law.<sup>6</sup>

McLean's political involvement did not end with his election to the Supreme Court of Ohio. He was a candidate for United States Senator from Ohio in January 1822 but was defeated by the very popular Governor Ethan Brown on the ninth ballot. Later, in 1822, McLean left the supreme court bench to accept an appointment as Commissioner of the Public Land Office in Washington, D.C. This move was prompted by McLean's growing family and his need to provide for them. The appointment was the result of the combined influence of the then Secretary of War John C. Calhoun and President James Monroe. McLean was a supporter of Calhoun, who, in turn, exercised his influence to reward his supporters. A great deal of influence was not necessary, as President Monroe remembered the efforts which McLean had made on his behalf in 1816.<sup>7</sup> In fact, President Monroe again remembered McLean less than a year later when he appointed him postmaster general. His tenure as postmaster general was a high point in his career as he completely reorganized the post office, streamlined its operations, reduced costs and expanded service while serving in both the Monroe and Adams administrations.

Although McLean was only a member of the Monroe administration for two years, he spent this time developing his political maturity. His experience in Monroe's presidency was the basis for and,

5. Weisenburger, *The Life of John McLean*, 21.

6. *Ibid.*, 22–30.

7. *Ibid.*, 31–34.



John McLean (SC 3565 OHIO HISTORICAL SOCIETY COLLECTIONS).

indeed, shaped the political philosophy that he would expound for the remainder of his life, especially his aversion to political parties. Monroe's presidency is historically identified as the "Era of Good Feelings." This experience has been defined in terms of the demise of the Federalist party and the end of the first political party system. The election of 1816 reconstituted a congress of 142 Republicans and a mere forty Federalists.<sup>8</sup> Such a change brought some to the conclusion that party politics had become a problem of the past. In early 1817, Samuel Dickens, a North Carolina

representative, wrote that "party split is so far extinct, that the time seems to have passed away, and I fondly hope will never again occur."<sup>9</sup> A year later the future president, John Tyler, reflecting on the experience of the first congress under President Monroe, surmised that "party distinctions have entirely been forgotten."<sup>10</sup> These sentiments were clearly overstatements.<sup>11</sup> Nevertheless, this was the political atmosphere that dominated when John McLean arrived in Washington, D. C. in 1822.

A year later, McLean summarized his position on political appointments and partisan politics in a letter to a congressman: "I have adopted a rule to remove no postmaster without substantial cause, and then not until he shall have had an opportunity to meet the charges against him. This will make a removal of the highest consequence to the office. As it will be understood that the ground on which a removal

8. Noble E. Cunningham, *The Presidency of James Monroe* (Lawrence, Kans., 1996), 50–51.

9. Samuel Dickens to his constituents, 4 March 1817, Noble E. Cunningham, Jr., ed. *Circular Letters of Congressmen to Their Constituents, 1789–1829* (Chapel Hill, N.C., 1978), 2: 1007.

10. John Tyler to his constituents, 14 April 1818, *Circular Letters*, 3: 1035.

11. Cunningham, *Presidency of James Monroe*, 51.

is made, is that he is not entitled to public confidence. . . . a removal without substantial objection against the individual must be productive of pernicious consequences to the public, as the fear of it cannot stimulate to a careful discharge of duty."<sup>12</sup>

This aversion to party politics and dedication to efficient public service became the central tenets in McLean's political belief system. Soon these principles would become quite problematic for him as a new political party system began to form.

As a result of McLean's efficiency and President John Quincy Adams' hope to establish political peace by carrying over President Monroe's cabinet, McLean maintained his position under the new president.<sup>13</sup> His efficiency, however, did not make him a respected member of the new administration. Henry Clay's appointment as secretary of state infused a new sense of politics into the new government, which had not been present under Monroe. The key to this new politics was the survival of the administration. Clay viewed the public interest and the political survival of the Adams administration (which included Clay's all-consuming desire for the presidency) as the same. In furtherance of this policy, he advised President Adams to root out those in the administration who did not unquestionably support the administration. The president, however, was reluctant to establish such a policy.<sup>14</sup>

Nevertheless, as the election of 1828 approached, Clay complained to President Adams that McLean's use of patronage in the post office was not furthering the interest of the administration. McLean was "using perfidiously the influence and patronage of his office, which is very great, against the administration."<sup>15</sup> Secretary of War James Barbour joined Clay in his attacks on McLean, but neither man was able to produce any evidence to support their accusations of disloyalty.<sup>16</sup> These unfounded charges against McLean have been restated by modern historians, but they too have failed to bring forth

12. McLean to L. Sawyer, 13 August 1823, Letterbooks, Postmaster General, quoted in Weisenberger, *Life of John McLean*, 43.

13. Robert V. Remini, *Henry Clay: Statesman for the Union* (New York, 1991), 273.

14. *Ibid.*, 289.

15. Charles F. Adams, ed., *Memoirs of John Quincy Adams* (Philadelphia, 1847–1877), VI: 349, 364, 163–64; Remini, *Henry Clay*, 316.

16. Remini, *Henry Clay*, 316.

any evidence to support the charges.<sup>17</sup> A review of the facts shows that McLean refused to appoint or remove individuals for purely political reasons. He also awarded contracts strictly for the purpose of bettering the operations of the post office, disregarding the fact that the contract was going to a political enemy of the administration. That he was successful at improving the post office was even admitted by President Adams who, although suspicious of McLean's allegiance and not being fond of him, stated that he was probably "the most efficient officer" who ever served as postmaster general.<sup>18</sup>

Andrew Jackson's victory over President Adams in 1828 did not end McLean's involvement in national politics. Conversely, on 6 March 1829, President Jackson nominated the Ohioan to the United States Supreme Court. Some may argue that this is evidence of a low political deal between Jackson and McLean. More likely, Jackson was realistically recognizing McLean's political assets. McLean had been particularly successful as postmaster general, which, in part, explained his popularity in the West. He was also quite well-respected by his fellow Methodists.<sup>19</sup> For all these reasons, Jackson would find it difficult simply to omit McLean's name from his cabinet. On the other hand, Jackson could not feel comfortable with McLean. In 1827, prior to Jackson's election, McLean had written to him: "I am the servant of the people, not the administration. The patronage placed in my hands is to be used for the public benefit."<sup>20</sup> Jackson would certainly have viewed such a man, who did not identify party interests with national interests and who might indeed put national interests before party interests, as dangerous and unreliable. So if Jackson was unable to rid himself of McLean, but could not accept him, what was he to do? The obvious answer was to promote him to the United States Supreme Court. This was the perfect solution for Jackson, who viewed the Court as the least powerful branch of government.<sup>21</sup>

McLean's service on the Supreme Court, from 1829 to 1861, marks

17. Robert V. Remini, *The Election of Andrew Jackson* (Philadelphia, 1963), 45.

18. Adams, ed., *Memoirs of J. Q. Adams*, VII:343.

19. Remini, *Election of Jackson*, 45.

20. McLean to Jackson, 22 September 1827, Jackson Papers, Library of Congress, quoted in Remini, *Election of Jackson*, 124.

21. See similar discussion in Henry Abraham, *Justices, President and Senators: A History of the U. S. Supreme Court Appointments from Washington to Clinton*, rev'd. ed. (Lanham, Md, 1999), 72-73.

the high point in his political activities. During this period McLean became a perennial presidential candidate, with his name being mentioned at more than five different nominating conventions; on at least two occasions he withdrew his name from consideration.

In 1831 McLean was mentioned for the presidency for the first time at the Anti-Masonic Convention in Baltimore, Maryland. Then in 1833, several Ohio newspapers again began to press for McLean.<sup>22</sup> It was at this point that he abandoned any connection with Jackson and the Democrats and joined the anti-Jacksonists, the Whigs. In these early years, he was supported by such up-and-coming politicians as Thomas Hart Benton and Joshua Giddings; and by 1835 a group of Ohio Whigs, including Salmon P. Chase, Elisha Whittlesey, Thomas Corwin, and Lewis D. Campbell, formed a state correspondence committee to advance McLean's presidential aspirations.<sup>23</sup> Ultimately McLean withdrew from the 1836 campaign, as he did again in 1844 when Reverdy Johnson read his letter withdrawing his name from consideration at the Whig Convention, when he refused to accept the vice-presidency in lieu of the presidential nomination.<sup>24</sup>

In 1845, McLean and Thomas Corwin (both sons of Ohio), with their respective supporters, expended their energies confronting one another, and neither succeeded. Anticipating the decline of the Whigs, McLean gravitated to the Free Soil Movement, and yet he still received two votes at the Whig Convention in June 1848. In a repeat performance in August 1848, he once again withdrew his name from consideration at the Free Soil Convention in Buffalo, New York.

### *The Early Campaign of 1856*

In the 1850s a dynamic new (the "third") party system evolved and gained momentum in the United States. The election of 1848 had proved the viability of the Free Soil party which had announced a more conservative approach to the slavery question: containment of slavery to the then existing slave states. The Whig party suffered a disastrous defeat in 1852, winning a mere four states and their accompanying

22. Weisenburger, *The Life of John McLean*, 82–83.

23. *Ibid.*, 85–86, 91.

24. *Ibid.*, 99, 105.



forty-two electoral votes.<sup>25</sup> Thereafter, the divisiveness of the slavery question and the attractiveness of nativist doctrine advanced the cause of the Know Nothings, or as the party was known, the American party. The Know Nothings' avowed purpose was to save the republic from the threat posed by the increased number of immigrants, in particular Catholic immigrants.<sup>26</sup> This anti-Catholic emphasis and a youthful leadership, unassociated with the old politics, initially proved very attractive to many Americans who felt they had suffered at the hands of conniving politicians.<sup>27</sup>

In this period of political unrest, a call for unity based on the fusion of common interests was often heard. However, each of the many forces—the Democrats, Whigs, Know Nothings and Free Soilers—sought to control the fusion, and the success of any possible fusion was obstructed by the hate and suspicion with which each party viewed all others. Amidst this social and political context of turmoil John McLean began his quest for the presidential nomination of 1856.<sup>28</sup>

McLean's belief that he was qualified to serve as president and that the country needed him was not without foundation. In early 1853, Orville Hickman Browning, a prominent conservative Whig politician from Quincy, Illinois, had written McLean, telling him that the Illinois Whigs were searching for a candidate who could unite "all the elements of the Whig party," and that the growing opinion was that he was such a candidate.<sup>29</sup> This letter indicated that although the Whig

25. For comments on the demise of the Whig party and the election of 1852, see Michael F. Holt, *The Rise and Fall of the American Whig Party* (New York, 1999), 956–58.

26. *Ibid.*, 854–50; Michael F. Holt, *Political Parties and American Political Development from the Age of Jackson to the Age of Lincoln* (Baton Rouge, La, 1992), 116–19.

27. For further discussion of the Know Nothings of this period, see Michael F. Holt, *The Political Crisis of the 1850s* (New York, 1978), 156–81.

28. For a complete description of the developing politics of this period, see William E. Gienapp, *The Origins of the Republican Party, 1852–1856* (New York, 1987); and Michael F. Holt, "The Politics of Impatience," *The Journal of American History*, 60 (September, 1973) 309–31.

29. O. H. Browning to John McLean, 4 January 1853, McLean Mss, Library of Congress (hereafter cited as McLean MSS, LC). Although Browning, like Lincoln, was slow to move to the newly formed Republican party, it would be Browning who, in 1856, drafted the state Republican platform that brought the Old Whigs into the new party. See *Dictionary of American Biography*, ed. Allen Johnson (New York, 1928), III: 175.



party was still viable in Illinois, it was encountering difficulties and needed some strong personage to rally the several factions back to the party; Browning believed, along with others, that McLean was that person.

Later, in 1855, McLean responded to an earlier inquiry by John Teesdale, the former editor of the *Ohio State Journal* with whom McLean had developed a strong friendship, telling him that he was not interested in running for the presidency.<sup>30</sup> But Teesdale was not discouraged, perhaps suspecting his friend's desire for the presidency, for he wrote to the Judge again on this matter. Again McLean responded: "I thank you for your kind letter. Feeling no desire to change my position, I shall remain passive and await popular action."<sup>31</sup>

By this time there was a movement to get McLean to run, for the day after McLean wrote to Teesdale, Leonidas Jewitt wrote to McLean.<sup>32</sup> Jewitt, a local politician from Athens, Ohio, who also served on the Ohio University Board of Trustees, had just returned to Athens after a lengthy stay in Columbus where he had received the news that he now passed on to McLean. "The Republican members of Congress," he wrote, "were in favor of yourself for the *Candidate* for the *Presidency*." In addition, he believed that "a large Majority" of the state legislature also favored his candidacy.<sup>33</sup> Such news had to encourage McLean, for he now had information that his candidacy was supported by his political cohorts in the Ohio State Legislature, the Whigs in Illinois, and the Republican leaders in Washington.

In late 1854, McLean had received a letter from Dr. James Prettyman of Philadelphia, who placed a new political possibility before him: Americanism. He told the Judge that Americanism, or Know Nothingism, had swept the Nation "like a tornado," and now the search was on for a presidential candidate. According to Prettyman, many of the American party "are instinctively turned towards the great west, indeed toward you my dear sir."<sup>34</sup> Before McLean could

30. McLean to John Teesdale, 1 November 1855, McLean Papers, Ohio Historical Society (hereafter cited as McLean Papers, OHS).

31. McLean to Teesdale, 5 March 1856, McLean Papers, OHS.

32. Weisenburger, *The Life of John McLean*, 21.

33. Leonidas Jewitt to McLean, 6 March 1856, McLean MSS., LC.

34. Dr. James Prettyman to McLean, 21 November 1854, McLean MSS., LC.

respond, another American party supporter, Hector Orr, a Philadelphia printer by trade, wrote to him that the country was in need of “a President thoroughly American in his practice,” and that “such a man we believe you to be.”<sup>35</sup> He concluded promising to do all that he could on behalf of McLean’s nomination.

But the offer of support by the Know Nothings had to be met with a measure of caution. On the surface it appeared to open the door to a nomination for the presidency, but there were serious problems. In 1847 McLean had decided to remain in the Whig party and attempted to convince the Know Nothings to support his nomination by the Whigs, a strategy that failed not only because the Whigs did not nominate him but also because the Know Nothings, as a political force, declined. Now in 1854, the ebb and flow of power had once more changed the political landscape. The crushing defeat of the Whigs’ nominee, General Winfield Scott, in 1852, left many wondering if there would be a Whig party in 1856.<sup>36</sup> Furthermore, the Know Nothings were quickly moving to replace the Whigs and would win significant victories in Massachusetts, New York, New Jersey and Pennsylvania by 1855.<sup>37</sup> So it is not surprising that McLean sought to build another political base.<sup>38</sup> In his response to Prettyman, he said what the nativist physician wanted to hear: “I see the movement now that I had long desired to see. A movement which will make this government a government of the people.”<sup>39</sup> Responding to Orr, the Judge again praised the Know Nothing movement as a “people” movement and unequivocally accepted the principles of nativism.<sup>40</sup>

The Know Nothings continued to press themselves upon him. Donald MacLeod, a local nativist, wrote to McLean expressing further

35. Hector Orr to McLean, 23 November 1854, McLean MSS, LC.

36. See Gienapp, *Origins of the Republican Party*, 160–66, for a concise statement of the Whig defeat of 1854.

37. Holt, *Rise and Fall of the American Whig Party*, 835.

38. McLean’s interest in the Know Nothings was not unique. Many politicians, such as Simon Cameron of Pennsylvania and former President Millard Fillmore, who had not achieved the political success they felt they deserved, moved into the American party. In fact, Michael Holt believes that this influx of opportunistic politicians is one of the causes of the demise of the American Party. Holt, *Political Crisis of the 1850s*, 174.

39. McLean to Dr. James Prettyman, 25 November 1854, McLean MSS, LC.

40. McLean to Hector Orr, 25 November 1854, McLean MSS, LC; Holt, *Political Crisis of the 1850s*, 168.

support for his nomination: "Should the choice of the K N fall on you (and why should it not) all Americans would rejoice at the prospect of National Administration being restored."<sup>41</sup> Then early in 1855, MacLeod wrote again to the Judge and assured him that his views were acceptable to the majority of the nativist party members.<sup>42</sup> Even some fellow jurists encouraged his nativist aspirations: Judge Ross Wilkens of Detroit wrote approvingly to McLean that his name was prominently mentioned "among the Know Nothings as their candidate for the Presidency."<sup>43</sup>

But McLean could not forget the rapid decline of the nativist movement in the late 1840s, and although the Know Nothings were now clearly a rising political force, they were not yet fully established. His letters to his Know Nothing supporters reveal his reluctance to being too closely associated with their movement. In concluding his letter to Dr. Prettyman, he admonished the doctor: "I therefore write this letter to you in confidence, that it shall not be published."<sup>44</sup> And writing to Hector Orr, he repeated himself: "But I cannot consent to the publication of this letter."<sup>45</sup> The perennial candidate—the politician—wanted the support of the Know Nothings, but he also wanted to maintain the support of the Free Soilers. This was a serious problem since many antislavery advocates both hated and feared the Know Nothings. George Julian, the 1852 Free Soil vice-presidential nominee, described nativism as a "heresy . . . which skulked into our camp to divide our friends and break the force of our movement."<sup>46</sup> So now McLean sought to bind his correspondents to secrecy and hopefully maintain the support of both opposing political organizations.

Between the devastating defeat of the Whigs in 1852 and 1855, a new party—the Republican—emerged in several states.<sup>47</sup> As 1856 approached, several questions arose: could the fledgling state

41. Donald MacLeod to McLean, 6 December 1854, McLean MSS, LC.

42. Donald MacLeod to McLean, 3 February 1855, McLean MSS, LC.

43. Robert Wilkens to McLean, 30 December 1854, McLean MSS, LC; Holt, *Political Crisis of the 1850s*, 164; Holt, *Political Parties and Political Development*, 124.

44. McLean to Dr. Prettyman, 25 November 1855, McLean MSS, LC.

45. McLean to Orr, 25 November 1855, McLean MSS, LC.

46. George Julian to Joshua Giddings, 12 January 1855, Giddings MSS, Library of Congress (hereafter cited as Giddings MSS, LC).

47. For a complete examination of the early development of the state Republican parties, see Gienapp, *Origins of the Republican Party*.

organizations unite in a national party? What other interests would be involved? Could the youthful national party engage in a national contest? And, if so, how should the party choose its candidates? In an attempt to resolve these questions, the leaders of the state Republican parties in Maine, Massachusetts, New York, Pennsylvania, Ohio, Michigan, Indiana and Wisconsin published a notice in papers throughout the country inviting Republicans and other interested parties to come to Pittsburgh on 22 February 1856 “for the purpose of perfecting the National Organization, and providing for a National Delegate Convention of the Republican party, at some subsequent day, to nominate candidates for the Presidency and Vice-Presidency. . . .”<sup>48</sup>

The Pittsburgh convention was, indeed, “informal.”<sup>49</sup> There was no limitation as to the number of delegates each state could send, and, as a result, numerous representatives from various states attended the meeting. Although the attendees determined that the party would hold a national convention in Philadelphia and established a national executive committee, they did not agree on all issues. George Reemlin, a Democratic state senator from Cincinnati, voiced his opposition to the use of the convention to select the party’s candidates: “It looks too much like following in the footsteps of the old parties. . . . Jefferson didn’t come from a convention; Jackson nor Washington didn’t come from conventions. The Republican movement would obtain more success by going out among the people.”<sup>50</sup> Other delegates, including Horace Greeley from New York and George W. Julian of Indiana, opposed the involvement of the Know-Nothings in the new party because of the nativists’ opposition to immigrants.<sup>51</sup>

McLean was well represented at this first meeting of a national Republican party. Although he did not personally attend the Pittsburgh meeting, others did who were sensitive to his interest. One such person was John Teesdale, McLean’s close friend, who wrote encouragingly of the news from the meeting: “your name is quite prominently mentioned by the delegates of the strong Free Soil proclivities.”<sup>52</sup> As

48. New York *Tribune*, 17 January 1856; Gienapp, *Origins of the Republican Party*, 251–53.

49. Gienapp, *Origins of the Republican Party*, 248–59.

50. New York *Evening Post*, 25 February 1856.

51. New York *Evening Post*, 22 February 1856; 23 February 1856.

52. John Teesdale to McLean, 25 February 1856, McLean MSS, LC.

1856 began, then McLean must have felt that this time he had a solid shot at the presidency, as his support ran the whole spectrum of politics from Whigs and Republicans to Know Nothings and Free Soilers.

### *Issues of 1856*

Not everyone supported McLean. The New York *Tribune* in an 1856 editorial opposing his candidacy focused upon the appearance of impropriety that arose from McLean's political activity while he remained on the high court: "He is a Justice of the Supreme Court, and the Judges of the Court ought to be lifted above even the suspicion of looking to the Presidency, or any other public trust than that they already hold. That Court has palpably sunk in the public confidence for the last twenty years; if it gets to be a nursery of Presidential aspirations, it will soon divest itself of the little public respect yet left it."<sup>53</sup> A justice, therefore, if he is to fulfill his duties, must remain outside the partisan political arena. And this was not the first time such a complaint had surfaced. During the 1848 campaign for the presidency, John M. Clayton had predicted McLean's loss for several reasons including that "He is a Judge, with drawn, or who, it will be thought, ought to have been entirely with drawn from the political Arena."<sup>54</sup>

The fiercest such attack upon McLean on these grounds had come from Senator Henry S. Foote of Mississippi in early 1849. In this instance, Senator Foote charged that Justice McLean had abused his franking privilege by engaging in politics from the Supreme Court bench. He argued that McLean, in his 1848 letter withdrawing his name from consideration at the Free Soil Convention, had adjudicated the slavery question "before it had been yet submitted to him for decision in the court where he sits with others, for discharge of high judicial duties."<sup>55</sup> The senator further argued that McLean had declared for the North and against the South, "thus unfitting himself wholly to sit hereafter for the adjudication of the matter in

53. New York *Tribune*, 6 June 1856.

54. John M. Clayton to Henry Clay, 16 April 1847, Robert Seager II, ed., *Papers of Henry Clay*, (Lexington, Ky, 1988), 10: 322–23.

55. *National Intelligencer*, 18 January 1849.

controversy, . . .<sup>56</sup> Foote, however, did not come to this question with clean hands, as his primary underlying purpose was to defend the institution of slavery. Nevertheless, his criticism of McLean for engaging in politics while still sitting on the bench was valid, and the attack did have an effect. In 1856, McLean had completed his opinion on the infamous *Dred Scott* case, but for reasons that certainly included political considerations, the case was set for re-hearing after the presidential election. Surely McLean must have thought about publishing his completed opinion as a means of engendering further support for his political aspirations. Just as certain, he must have remembered Foote's accusations and decided that such action was, indeed, contrary to the ethics of this office.

Immediately prior to the Republican convention, the *New York Tribune* restated this objection to justices running for the presidency, saying "we differ as to the fitness of a statesman being at the same time a Judge of the Supreme Court and a candidate for President."<sup>57</sup> It is important to note that the *Tribune's* criticism of McLean probably had as much to do with the fact that Horace Greeley, its editor, was a supporter of William H. Seward for president and viewed McLean as a threat to the political influence of the New Yorkers.<sup>58</sup>

Whereas the *Tribune's* concern concentrated on the judicial impropriety of a sitting judge being involved in politics, others thought that McLean's years on the bench had left him unfeeling and incapable of performing the duties of the president. W. C. Howells, editor of the *Ashtabula Sentinel*, wrote the harshest criticism of McLean on these grounds: "Of all men, who could be named in this connexion, he has the least claim upon the hearts of free men. Iced up in his judicial position, for thirty years, he has been chilled off from all sympathy with the warm hearted masses; and his nomination would be but the starting of some glacier from a mountain-side, to slip, and grind, and crush its way, cooling, and freezing by its presence all the *living* forms that stand in its path."<sup>59</sup> Lest one conclude that such strident criticism was limited to McLean, in a letter to Joshua Giddings, not long after this editorial, Howells provides a glimpse of how he viewed judges in

56. *Ibid.*

57. *New York Tribune*, 12 June 1856.

58. Weisenburger, *The Life of John McLean*, 146-48.

59. *Ashtabula Sentinel*, 17 April 1856.

general: "I think our U. S. Judges are the worst men we have and the last to whom we should entrust our liberties; and he (McLean) is a particularly obnoxious specimen."<sup>60</sup>

Judges of this period were obviously not held in high esteem. This lack of respect for the judiciary most often resulted from the decisions they issued, and during this period it was their decisions on questions related to slavery which most aroused hostility.<sup>61</sup> Even worse, this animus did not necessarily arise from a reasonable and considered review of any of the opinions, for the parties on both sides of the slavery question were little inclined to give them a fair hearing, no matter how well reasoned and legally logical they might be.

Slavery, for McLean and other judges, was not a simple, single-dimensional issue; rather it incorporated two separate but related questions: first, the establishment of the institution of slavery, and, second, the expansion of slavery. The first issue, the establishment of slavery, was the more obvious of the two. To the legal mind, this issue was settled by the U.S. Constitution which clearly recognized the establishment of slavery in such provisions as the three-fifths clause in Article I and the Fugitive Slave provision of Article IV.<sup>62</sup> Some abolitionist lawyers, led by William Seward, argued that the judges could overrule the implicit constitutional recognition of slavery based upon a "higher law." The judges, however, refused to take such action. Under the rule of law concept, it was not the function of the court to make law. In a personal letter, McLean set forth his understanding of this principle of the rule of law and the Constitution: "It is known to everyone that Judges are sworn to support the Constitution and laws. They cannot consider slavery in the abstract. If they disregard what they conscientiously believe to be the written law in any case, they act corruptly and are traitors to their country. The Constitution and Acts of

60. W. C. Howells to Joshua Giddings, 29 April 1856, Giddings Mss, LC.

61. The most obvious example of this was Chief Justice Taney's decision in the *Dred Scott* case, which was denounced violently in the North but heralded as brilliant in the South.

62. The numerous judges who upheld the constitutionality of the Fugitive Slave laws of 1793 and 1850 based upon Article IV, Section 2, Paragraph 3, of the U.S. Constitution, included "Massachusetts Chief Justice Lemuel Shaw, United States Supreme Court Justices Joseph Story, Levi Woodbury, John McLean, and Chief Justice Roger B. Taney." David Herbert Donald, *Charles Sumner and the Coming of the Civil War*, (New York, 1960), 233.



Congress give to the master of the slave a right to reclaim him in a free state. So plain are the provisions on this subject that no one can mistake them. How is it expected or desired that a Judge shall substitute his own notions of positive law? While this shall become the rule of judicial action, there will be no security for character, property, or life.”<sup>63</sup> This is a strict judicial viewpoint which properly emphasizes the limits of judicial interpretation and its relationship to the rule of law. The court’s function is to determine the constitutionality of a given state law, not what the policy of a state or the nation *should* be. McLean repeated this view in his instructions in *Giltner v Gorham*, (1848): “However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity have adopted it. And you are sworn to decide this case according to law—the law of Kentucky as to slavery, and the provisions of the Constitution and the act of Congress in regard to the reclamation of fugitives from labor.”<sup>64</sup>

Thus McLean clearly stated his case: his job was to enforce the law, not make it. If the rule of law was not followed, McLean had previously said in *Jones v. Van Zandt*, (1843): “[I]f convictions . . . of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and protection.”<sup>65</sup> But McLean did not merely recite proper words. In *Prigg v Pennsylvania*, (1842), he had voted to uphold the constitutionality of the Fugitive Slave Act of 1793.<sup>66</sup> This action, although clearly proper and correct, earned him the condemnation of the antislavery advocates that would follow him even to the 1856 campaign.

McLean’s attachment to the rule of law provoked reaction because he often applied it to cases dealing with slavery. The magnitude of the importance slavery played in American politics during the 1850s cannot be overestimated. Hard lines were drawn between those who opposed and supported slavery, with neither side having any appreciation for the gray in the middle—the subtle but important legal issues which McLean raised. Instead McLean’s dedication to the law

63. McLean to Mr. Matthews, undated letter, McLean MSS, LC.

64. *Giltner v. Gorham*, 10 Fed Cas. 424, at 432, (No. 5,453), (C. C. D. Mich., 1848), quoted in *National Intelligencer*, 22 January 1849.

65. *Jones v. Van Zandt*, 13 Fed. Cas. 1047 at 1048, (No. 7,502, C. C. D. Ohio, 1843).

66. *Prigg v. Pennsylvania*, 16 Peters 539, (1842).

was misread by a public who incorrectly labelled him pro-slavery.

A major challenge to the constitutionality of the Fugitive Slave Act of 1850 arose in 1853 in *Miller v McQuerry*.<sup>67</sup> The case involved a slave, known as both George McQuerry and as "Washington," who had fled from his master, a Mr. Miller, who resided in Washington County, Kentucky. McQuerry eventually took up residence in Troy, Ohio, where he was arrested four years later. The matter came before Justice McLean, while he was on circuit in Ohio, on a petition for habeas corpus filed on behalf of McQuerry. The major issue in the proceedings was the constitutionality of the Fugitive Slave Law of 1850.<sup>68</sup> After reviewing the history of the Constitutional Convention of 1787 and the Fugitive Slave Act of 1793, McLean ruled that the Act of 1850 was constitutional. He concluded: "Upon the whole, no doubt can exist on the evidence, that the fugitive owes service to the claimant; and under the law, I am bound to remand him to the custody of his master, with authority to take him to the state of Kentucky, the place from whence he fled."<sup>69</sup> Predictably, antislavery advocates were dismayed. Charles Sumner, for example, wrote to fellow Republican Salmon P. Chase: "I have just read under the telegraphic head a brief abstract of Judge McLean's decision. My soul is sad & sick."<sup>70</sup>

Based in part upon the *McQuerry* decision, in 1855 antislavery newspapers began to assault McLean's record on the slavery issue. The New York *Tribune* painted the Judge as a southern extremist.<sup>71</sup> But this criticism was not limited to the east. *The Anti-Slavery Bugle* of Salem, Ohio, printed another exaggerated criticism: "He extends Slavery and Kentucky Slave-laws over Ohio Sovereignty—affirms the supremacy of the slave rendition and the slave catching law over the law and Constitution of the State; and for the support of Slavery on Ohio soil, puts slave Commissioner Pendery above Judge Parker and the whole State Judiciary."<sup>72</sup>

Such criticism, of course, had no basis in law. Antislavery supporters tended to view every decision in favor of slavery as being

67. 17 Fed Cas. 335, (No. 9,583, C. C. D. Ohio, 1853).

68. 17 Fed Cas. 337.

69. 17 Fed. Cas. 341.

70. Charles Sumner to Salmon P. Chase, 21 August 1853, *The Letters of Charles Sumner*, ed. Beverly Wilson Palmer (Boston, Mass, 1990), 2: 391.

71. New York *Tribune*, 18 April 1855.

72. *The Anti-Slavery Bugle*, 26 April 1856.

morally repugnant and in violation of a higher law, and therefore legally wrong. Everything immoral, however, is not illegal, and as McLean pointed out, the rule of law cannot be maintained if the law becomes a matter of personal convictions.

But as the slavery question turned to the issue of the expansion of slavery into the territories, McLean found the opportunity to express his personal views of slavery. In December 1847, McLean had written to a correspondent that Congress did not have the constitutional authority to authorize slavery in the territories.<sup>73</sup> Just prior to the 1856 Republican convention, McLean published this letter in the *National Intelligencer* as an article entitled, “Has Congress Power to Institute Slavery,” in order to respond to the negative criticism which he received in 1855 and 1856. McLean forcefully argued that the Constitution granted the Congress no power to institute slavery in the territories, and thus by logical extension, Congress could grant no such power to the territorial governments. Therefore, slavery could not legally exist in the territories.<sup>74</sup> This argument was classic McLean—an argument which he maintained from the mid-1840s to his death.<sup>75</sup>

On the heels of this article came a letter the very next day to the editor of the *National Intelligencer* which reinforced McLean’s contention that Congress lacked the power to institute slavery in the territories. This writer supported McLean’s position that “Congress has no power to institute slavery in the Territories, and, a fortiori, cannot delegate that power to a Territory, and that a Territorial Government cannot exercise that power.” The conclusion was obvious: slavery could not exist in the territory.<sup>76</sup>

In a period of two days, then, the *National Intelligencer* had twice carried McLean’s argument that the expansion of slavery into the territories was unconstitutional. While such an argument did not satisfy those attuned to *The Anti-Slavery Bugle*, it was, in truth, not intended to placate or convert the abolitionists. It was specifically aimed at the Republicans of free soil persuasion, who since 1847 had opposed the extension of slavery into the territories but thought it should be

73. McLean to Mr. Matthews, undated letter, McLean MSS, LC.

74. *National Intelligencer*, 15 May 1856.

75. This was, again, the argument that McLean was to make in 1857 in his dissenting opinion in the *Dred Scott* case.

76. *National Intelligencer*, 16 May 1856.

allowed to exist in the existing slave states.

The early months of 1856 saw an increased activity in the presidential campaign, some of which focused on McLean's alleged judicial impropriety and his views on slavery. The New York *Tribune* and the Ashtabula *Sentinel* attacked McLean's alleged judicial impropriety, with the *Tribune* providing the best summary of McLean's political problem with the slavery question: "some of his decisions in Slave Questions—the Van Zant [sic] especially—leaned very hard against him in the canvass."<sup>77</sup> But McLean and his supporters struck back with repeated articles in the *National Intelligencer* that clearly placed him within the ranks of those of the budding Republican party who opposed the expansion of slavery into the territories. All that was left now was the first Republican convention.

### *The Republican Convention of 1856*

In late May and early June, as the convention approached, political activity among the supporters of the fledgling Republican party increased. The heated atmosphere was further intensified by the sacking of Lawrence, Kansas, by proslavery "border ruffians" on 21 May 1856 and the beating of Senator Charles Sumner by Congressman Preston Brooks of South Carolina in the Senate chamber on 22 May 1856. With these events in mind, Congressman John Allison of Beaver County, Pennsylvania, wrote to Judge McLean encouraging him to answer immediately the letter of Judge Joseph C. Hornblower, chairman of the New Jersey delegation to the convention, who had inquired about his views on the slavery issue. Allison was also greatly concerned that the Ohio delegates at large had split their votes between John C. Frémont and Salmon P. Chase.<sup>78</sup> In Illinois, however, former Whigs were taking action on McLean's behalf. Abraham Lincoln wrote to Senator Lyman Trumbull of Illinois that he was concerned that James Buchanan's nomination by the Democrats would draw conservative Whigs with "slight pro-slavery proclivities" away from the Republicans. Lincoln heralded McLean's possible nomination

77. New York *Tribune*, 6 June 1856.

78. John Allison to McLean, 2 June 1856, McLean MSS, LC.

saying that it “would save every Whig.”<sup>79</sup> Elihu Washburne, definitely optimistic, requested that McLean provide him with background on himself so that he could prepare an appropriate address “[I]n the event of your nomination for the Presidency by the approaching Philadelphia Convention.”<sup>80</sup>

During this time, McLean corresponded extensively with Judge Rufus P. Spalding of Cleveland, Ohio, a former justice of the Ohio Supreme Court who had become prominent because of his defense of fugitive slaves. His free soil proclivities made him an early member of the Ohio Republican party in which he assumed a leadership position in the Cuyahoga county organization.<sup>81</sup> Judge Spalding would head the McLean delegates at the convention. Writing to McLean from Cleveland, Spalding indicated that there was great sentiment for Frémont, but that “my best judgment informs us that your name will combine, more strongly than his, the essential elements of success.”<sup>82</sup>

The day before the convention, the Hornblower-McLean letters were published, and even the New York *Tribune*, which opposed McLean’s nomination, reveled in the agreement of the two distinguished jurists that the answer to the Kansas problem was federal intervention and the immediate admission of Kansas into the Union as a free state.<sup>83</sup> McLean had adeptly picked up the sentiments of the elderly Hornblower and had responded in terms that appealed to the antislavery Republicans, as he blamed Bloody Kansas on “that ill-advised and mischievous measure—the repeal of the Missouri Compromise.”<sup>84</sup> Such a response was geared to secure the votes of the New Jersey delegation for McLean.

As the delegates arrived in Philadelphia, McLean seemed the clear favorite of the Illinois, Indiana, and New Jersey delegations, as well as the favorite among many Republican members of the Congress.<sup>85</sup>

79. Abraham Lincoln to Lyman Trumbull, 7 June 1856, *Abraham Lincoln: Speeches and Writings, 1832–1858* (New York, 1989), 366.

80. Elihu Washburne to McLean, 10 June 1856, McLean MSS, LC.

81. William Ganson Rose, *Cleveland: The Making of a City* (Cleveland, Ohio, 1950), 247; *History of Trumbull and Mahoning Counties* (Cleveland, Ohio, 1882), I: 192.

82. Rufus P. Spalding to McLean, 9 June 1856, McLean MSS, LC.

83. New York *Tribune*, 16 June 1856.

84. *Ibid.*

85. *Ibid.*, 17 June 1856.

These Congressional leaders now went to work. The Washburn brothers, Elihu from Illinois and Israel from Maine, cajoled and exhorted their respective delegations.<sup>86</sup> But it was Thaddeus Stevens of Pennsylvania who proved to be McLean's real champion. On the evening of 17 June, Stevens, speaking to the Pennsylvania delegates, presented to and persuaded the delegation to pass a resolution stating that "Judge McLean was the most available man to secure the vote of Pennsylvania."<sup>87</sup>

McLean's supporters must have been further encouraged when Congressman Edwin D. Morgan, a prominent New York merchant-banker and Chairman of the National Executive Committee of the Republican party, opened the convention with these words: "You are here today to give direction to a movement which is to decide whether the people of these United States are to be hereafter and forever chained to the present national policy of the extension of human slavery."<sup>88</sup> Encouragement, however, quickly turned to surprise, then anger and frustration. Opening the nominations, Judge Spalding mounted the podium and announced the withdrawal of Justice John McLean's name from consideration for the nomination for the presidency. Thaddeus Stevens immediately asked for time to consider this matter, and the convention recessed.<sup>89</sup> One can only imagine the fervor and frustration with which Stevens, Ohio Congressmen Noah Swayne and Robert Schenck, and others worked as they attempted to save the nomination for McLean. But it was fruitless. When the convention reconvened, Frémont was nominated on an informal ballot and a subsequent nearly unanimous formal ballot.<sup>90</sup>

Before withdrawing McLean's name, Spalding had sent a telegram to McLean telling him that the nomination could not be won, and after consultation with Stevens, Swayne, and others, he was withdrawing his name.<sup>91</sup> But the facts do not support Spalding. Stevens' actions, obtaining the approval of the Pennsylvania delegation and his request

86. *Ibid.*, 18 June 1856.

87. *Ibid.*

88. *National Intelligencer*, 21 June 1856.

89. Gienapp, *Origins of the Republican Party*, 340.

90. *New York Tribune*, 19 June 1856. In the preliminary "informal vote" Frémont received 359 votes to McLean's 190; but in the formal ballot, Frémont received 520 to McLean's 37. Gienapp, *Origins of the Republican Party*, 340.

91. Western Union Telegram, received at Detroit, 19 June 1856, McLean Mss.

for a recess after Spalding withdrew McLean's name, indicate that he had been unaware of any possible withdrawal of McLean's name. Moreover, subsequent to the convention, John Allison, a Pennsylvania delegate, wrote to McLean that "Judge Spalding never spoke to me after I discussed his conduct on the platform. . . . his course was exceedingly ill advised, and I do not believe that he was at heart your friend. I cannot believe it."<sup>92</sup> Soon after, Allison wrote again. But this time, it was a full scale indictment of Spalding: "Judge Spalding did not consult me or any of the Ohio delegation but Mr. Swayne, who would not advise the withdrawal of your name at that time. Our delegation [Pennsylvania] was greatly surprised and very indignant and some of us denounced the act in very emphatic language. Upon consultation with friends from Ohio, Indiana, Illinois and Maine we concluded that it was best to vote for you although your name had been withdrawn. I would not like to charge Judge Spalding with treachery, but I think his conduct was unpardonable. I believe that he had become a Frémont man, and at heart wished for his success."<sup>93</sup>

The words and actions of such supporters of McLean as Thaddeus Stevens and John Allison clearly raise the question of Judge Spalding's allegiance to McLean.

### *Conclusion*

The more important question, however, is what effect Spalding's action had on the convention and ensuing nomination of John C. Frémont. Professor William Gienapp, in his exemplary study of the early years of the Republican party, believes that Spalding's action was based upon a good faith belief that McLean could not defeat Frémont. Professor Gienapp states unequivocally that "[T]he Supreme Court justice [John McLean] did not lose the nomination because of Spalding's precipitate action."<sup>94</sup> He argues that, indeed, Frémont's nomination was guaranteed by Governor Salmon P. Chase who also sought the nomination and had split the Ohio delegation, thus depriving McLean of essential support. More importantly, he writes,

92. John Allison to McLean, 14 July 1856, McLean MSS, LC.

93. Allison to McLean, 20 July 1856, McLean MSS, LC.

94. Gienapp, *Origins of the Republican Party*, 340.



the failure to place Congressman William Seward's name in nomination resulted in nearly the entire New York delegation—the largest at the convention—casting their votes for Fremont.<sup>95</sup>

It is, of course, impossible to know what might have happened but for Spalding's action. And we do know that few New York delegates voted for McLean in the end. Nevertheless, it does appear that Professor Gienapp has overstated his case. First, there can be no doubt that Governor Chase's action had split the Ohio delegation, but Chase was not the overwhelming choice of the Ohio delegation. McLean continued to be the candidate of the Old Whig arm of the new Republican party and was supported by William Schoeler, the retiring editor of the Cincinnati *Gazette*, and such leading Ohio political figures as Congressman Thomas Ewing.<sup>96</sup> At the convention itself, McLean's leading advocates would include Ohio Congressmen Robert Schenk and Noah Swayne (who would succeed McLean on the Supreme Court bench). Second, by the opening of the convention, McLean's support had spread throughout the United States. In addition to his support in Ohio, he had become the early favorite in Illinois and Iowa as the result of the efforts of such local congressmen and other local politicians as Caleb B. Smith, Orrville H. Browning, Elihu Washburne and Abraham Lincoln.<sup>97</sup> Additionally, Israel Washburn worked hard to deliver Maine into the McLean camp, while immediately prior to the convention, New Jersey under the leadership of Judge Joseph Hornblower joined the McLean supporters.<sup>98</sup> Finally, even after Spalding's withdrawal, Senator Thaddeus Stevens convinced the Pennsylvania delegation to pass a formal resolution in support of McLean.<sup>99</sup> All of these facts taken together would seem to indicate that Justice McLean was clearly positioned to make a very strong bid for the nomination, if not win it. So what happened?

To provide a possible answer, one must consider the psychological effect Spalding's action might have had upon those many delegates who were inclined to vote for McLean's nomination. Certainly, not every delegate who was inclined to vote for McLean was over-

95. Gienapp, *Origins of the Republican Party*, 338–41.

96. Weisenburger, *The Life of John McLean*, 146.

97. Weisenburger, *The Life of John McLean*, 146–47.

98. Gienapp, *Origins of the Republican Party*, 314, 338.

99. *Ibid.*, 340.

whelmingly dedicated to his nomination, and surely there were those who were aware of his history of removing his name from nomination at previous conventions. To these delegates, Spalding's action, presumptively ordered by McLean, would have appeared as another example of Justice McLean's fickleness. Thus Judge Spalding's action could not have enkindled enthusiasm in the heart of any delegate who was unsure of McLean. Spalding's action, therefore, might have driven wavering or weakly committed delegates out of Judge McLean's camp. Moreover, delegates committed to McLean influenced by Spalding's announcement might have fallen victim to the bandwagon effect and switched their support to Frémont. In any event, Spalding's sudden removal of his name destroyed whatever chance McLean had for the nomination.

Justice John McLean's quest for the nomination for the presidency covered a thirty-year period. When that prize seemed to be at hand, he was denied a real chance at that prize. McLean might have been able to survive his personal baggage of thirty years in politics—his position on the United States Supreme Court, his decisions on the Fugitive Slave Law, and his inconsistent movement from one party organization to another—but Judge Spalding's premature and unsupported decision to withdraw his name from nomination guaranteed the nomination of John C. Frémont.