Mr. REHNQUIST. I was aksed to appear as the hard-line type because, you know, they had four people on the forum——

Senator KENNEDY. Do you often get asked to appear as a hard-line type? [Laughter.]

The Chairman. Let us have order.

Mr. REHNQUIST. Everybody from the Justice Department does, I think. And you know, they do not want some either/or type of presentation. They want a justification of the Department position. and that is what I attempted to give them.

Senator KENNEDY. Do you think if you had had concerns about wiretapping, the pervasive use of wiretapping, that they would not have sent you to London?

Mr. REHNQUIST. Well, I will say this much, Senator, that certainly if I had felt from an advocate's point of view that the Department's position was indefensible, or personally obnoxious to me, I would have resigned.

Senator KENNEDY. Let me go to a couple of final areas, Mr. Rehnquist.

In the civil rights area, as I understand, in February 1970, you wrote a letter to the Washington Post about the Carswell case?

Mr. REHNQUIST. I did.

Senator KENNEDY. In it you suggested that those who disagreed with Judge Carswell's opinions in civil rights cases, and thought them to be anti-Negro, and anticivil rights, were missing the message of those cases, and you argued that the truth was that anyone that you called a constitutional conservative, or judicial conservative, would have reached the same judgment as Judge Carswell solely on judicial philosophy without racial animus.

Mr. REHNQUIST. You are characterizing my letter, Senator.

Senator KENNEDY. Well, could you?

Mr. REHNQUIST. I do not have it in front of me. I am sure the text is available to everybody.

Senator KENNEDY. I will ask that the whole letter be put in the record, Mr. Chairman.

The CHAIRMAN. It will be admitted.

(The letter referred to follows.)

[From the Washington Post, Feb. 14, 1970]

LETTER TO THE EDITOR—A REPLY TO TWO EDITORIALS ON THE CARSWELL NOMINATION

Having read the first two of your proposed three-part editorial on Judge Carswell, and strongly doubting that the concluding part will have an O. Henry type ending, I wish to register my protest on two counts: first, that there are substantial misimpressions created by your editorial, and, second, that your fight against the confirmation of Judge Carswell is being waged under something less than your true colors.

The discussion in the editorial of Feb. 12 of the Supreme Court's decision in the Atlanta case, for example, is seriously misleading. The editorial states that "the Supreme Court heard arguments on Atlanta's plan, then in its fourth year, amid speculation that the Justices thought the plan was too slow. Indeed, in May 1964 the Justices said *just that.*" (Emphasis added.) In fact, the Justices did not say that the Atlanta grade-a-year plan was too slow. What actually happened was that the Supreme Court remanded the case to the District Court for an evidentiary hearing on a new proposal submitted by the board which had not been passed on by the lower courts. *Calhoun* v. *Latimer,* 377 U.S. 263 (1964). By implication, if not by express language, the passage cited earlier says that the Supreme Court had

pronounced grade-a-year plans, such as Atlanta's, unconstitutional across the board. Examination of the court's opinion will show the error of this implication.

In the same paragraph of the editorial the following appears:

"That same month the Supreme Court upheld a Fifth Circuit order telling Jacksonville, Florida, to stop assigning teachers to schools on the basis of race."

The thrust of this statement is two-fold: (1) that the Fifth Circuit had held earlier that the assignment of teachers on the basis of race is unconstitutional and to be enjoined in all future cases arising in the circuit; and (2) that the Supreme Court had approved this ruling as a correct statement of constitutional law to be applied nationwide.

Neither of these assertions has the slightest basis in fact. In the case in question, *Board of Public Instruction of Duval County, Florida* v. *Braxton*, 326 F. 2d 616 (1964), a two-to-one decision, the issue was not whether school plans *must* contain a prohibition of teacher assignments on the basis of race. The issue instead was whether a District Judge exceeded his discretion in including such a prohibition. The Fifth Circuit answered this question in the negative and upheld the lower court's order. There is nothing in the appellate court's opinion suggesting that all future court orders in school cases must contain similar prohibitions.

The Supreme Court action in the case, referred to as "upholding" the Fifth Circuit, is a denial of certiorari, 377 U.S. 924. It is elementary that such an order is not an "'upholding" of the lower court decision and indeed it represents a refusal by the Supreme Court to review the case on the merits. The reference to the Supreme Court's action as a "ruling" later in the editorial merely aggravates the initial misimpression created.

My criticism of your editorial, however, goes beyond these misimpressions. The Post is apparently dedicated to the notion that a Supreme Court nominee's subscription to a rather detailed catechism of civil rights decisions is the equivalent of subscription to the Nicene Creed for the early Christians—adherence to every word is a prerequisite to confirmation in the one case, just as it was to salvation in the other. Your editorial clearly implies that to the extent the judge falls short of your civil rights standards, he does so because of an anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result both in civil rights cases and in other areas of the law. I do not believe that this implication is borne out.

Judge Carswell in his testimony before the Judiciary Committee stated that he did not believe the Supreme Court was a "continuing Constitutional Convention."

Such a philosophy necessarily affects a judge's decision in every area of constitutional adjudication. These areas include civil rights, of course. But they also include, for example, cases involving the right of society to punish criminals, the right of legislatures and local governing bodies to deal with obscenity and pornography, and the right of all levels of government to regulate protest demonstrations.

A reading of Judge Carswell's decisions in the field of criminal law—particularly the notation of his dissent from the denial of a rehearing en banc by the Fifth Circuit of the *Agius* decision (which broadened the *Miranda* rule)—indicates that in this area too, he is not as willing as some to see read into the Constitution new rights of criminal defendants which they may assert against society. Thus the extent to which his judicial decisions in civil rights cases fail to measure up to the standards of The Post are traceable to an over-all constitutional conservatism, rather than to any animus directed only at civil rights cases or civil rights litigants.

Quite obviously The Post or any other newspaper has a perfect right to urge the Senate not to confirm a judge who has decided cases in the manner in which Judge Carswell has. But in fairness to your reading public, you ought to make it clear that what you are really fighting for is something far broader than just "civil rights," it is the restoration of the Warren Court's liberal majority after the departure of the Chief Justice and Justice Fortas and the inauguration of President Nixon. In fairness you ought to state all of the consequences that your position logically brings in its train: not merely further expansion of constitutional recognition of civil rights, but further expansion of the constitutional rights of criminal defendants, of pornographers, and of demonstrators. Such a declaration would make up in candor what it lacks in marketability.

WILLIAM H. REHNQUIST,
Assistant Attorney General, Office of Legal Counsel.

Senator KENNEDY. I do not know whether you can read either parts of it, or whether you want to take a look at it?