United Cerebral Palsy Association during which time Dr. Marrs pioneered development of schools or clinics for handicapped children in 30 cities.

In the area of industrial medicine and aerospace medicine he has served as consultant to numerous aerospace corporations; vice president and one of the founders of Spacelabs, Inc.; completed courses in occupational health, aviation medicine, space operations, medical aspects of missile operations, and aviation medicine and written papers on aviation and industrial medicine subjects.

In the area of military medical administration Dr. Marrs has served successively as flight surgeon, tactical hospital commander, chief of outpatient clinic, base hospital commander, member of the Medical Reserve Advisory Council, and special assistant to the Surgeon General of the Air Force.

As special assistant to the Surgeon General he was a principal in reorganizing the Medical Reserve program in accord with current Air Force needs.

He has worked with CIA in paramilitary and other areas.

Dr. Marrs has been on the Governor's Committee for the Handicapped under five Alabama Governors and on the President's Committee for the Handicapped under three Presidents.

He is a member of the American Board of Pediatrics, the Royal Society of Health, the Association of Military Surgeons, the Aerospace Medical Association, and the Society of U.S. Flight Surgeons.

He has been cited on numerous occasions for his contributions in intelligence areas and medical areas. He has consistently received outstanding performance ratings in his present civil service assignment, and he has been awarded the decoration for exceptional civilian service. The Air Force Association, National Guard Association, Reserve Officers Training Corps, Arnold Air Society, the Polio Foundation, the Nicaraguan Medical Service, the Guatamalan Health Association, the American Association on Mental Deficiency, the American Physicians Art Association, the Mental Health Association, the National Society for Crippled Children and Adults, and other organizations have cited him for his contributions in this area.

Dr. Marrs also has an outstanding career as an Air Force reservist. His various duty assignments included a tour, beginning October 1, 1961, as commander of the 117th Tactical Hospital, Dreaux Airbase, France. On October 1, 1963, he was named assistant to the Surgeon General of the Air Force for Reserve Affairs and in 1964 became a colonel in the Air Force Standby Reserve. On February 16, 1968, he was promoted to brigadier general in the USAFR and on December 21, 1968, he was designated as a mobilization assistant to the Surgeon General of the Air Force.

Mr. President, the Armed Services Committee was unanimous in its approval of Dr. Marrs and it is believed he will render our Nation an outstanding service in this high post.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Theodore C. Marrs, of Alabama, to be Deputy Assistant Secretary of Defense for Reserve Affairs?

The nomination was confirmed.

FEDERAL DEPOSIT INSURANCE CORPORATION

The bill clerk read the nomination of Frank Wille, of New York, to be a member of the Board of Directors of the Federal Deposit Insurance Corporation for a term of 6 years.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

THE DEPARTMENT OF TRANSPORTATION

The bill clerk read the name of Robert H. Cannon, Jr., of California, to be an Assistant Secretary of Transportation.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

U.S. COAST GUARD

The bill clerk proceeded to read sundry nominations in the U.S. Coast Guard.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the nominations be considered en bloc.

The PRESIDING OFFICER. Without objection, the nominations are considered and confirmed en bloc.

PUBLIC PRINTER

The bill clerk read the nomination of Adolphus Nichols Spence II, of Virginia, to be the Public Printer.

The PRESIDING OFFICER. Without objection, the nomination is considered and confirmed.

U.S. AIR FORCE—U.S. ARMY—U.S. NAVY

The bill clerk proceeded to read sundry nominations in the U.S. Air Force, the U.S. Army, and the U.S. Navy.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that these nominations be considered en bloc.

The PRESIDING OFFICER. Without objection, the nominations are considered and confirmed en bloc.

NOMINATIONS PLACED ON THE SECRETARY'S DESK IN THE ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION, IN THE ARMY, IN THE NAVY, AND IN THE MARINE CORPS

The bill clerk proceeded to read sundry nominations in the Environmental Science Services Administration, in the Army, in the Navy, and in the Marine Corps, which had been placed on the Secretary's desk.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the nominations be considered en bloc.

The PRESIDING OFFICER. Without objection, the nominations are considered and confirmed en bloc.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of these nominations.

The PRESIDING OFFICER. Without objection, it is so ordered.

WITHDRAWAL OF UNITED STATES-MEXICAN BROADCASTING PROTOCOL

Mr. MANSFIELD. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Montana will state it.

Mr. MANSFIELD. Do I correctly understand that Senate Executive Resolution No. 1, 91st Congress, second session, on the withdrawal of a United States-Mexican broadcasting protocol, reported by the Committee on Foreign Relations favorably, is subject to consideration only on the basis of a majority vote?

The PRESIDING OFFICER. The Chair would inform the Senator from Montana that he is correct.

Mr. MANSFIELD. Mr. President, I thank the Chair. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Senate Executive Resolution No. 1, 91st Congress, second session, withdrawal of United States-Mexican broadcasting protocol.

The PRESIDING OFFICER. Is there objection?

There being no objection, the Senate proceeded to consider Senate Executive Resolution No. 1, 91st Congress, second session, withdrawal of United States-Mexican broadcasting procotol.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution was agreed to.

SUPREME COURT OF THE UNITED STATES

Mr. MANSFIELD. Now, Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the nomination of George Harrold Carswell, of Florida, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The clerk will state the nomination.

The bill clerk read the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Is there objection to the consideration of this nomination?

There being no objection, the Senate proceeded to consider the nomination.

Mr. SCOTT. Mr. President, may I be recognized?

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SCOTT. Mr. President, the Senate of the United States is asked to decide whether it will advise and consent to the nomination of Judge George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

The majority and minority views of the Senate Judiciary Committee have been printed and we have been treated to a variety of statements, both by Sen-

ators and by those outside the Senate, as to why they oppose Judge Carswell's confirmation. These arguments have seemed to me to boil down to basically two: first, that Judge Carswell, during his tenure as a judge of the Federal district and circuit courts has not been sufficiently "pro-civil rights" in his decisions; and, second, that Judge Carswell is not sufficiently "distinguished" to be an Associate Justice of the Supreme Court of the United States.

Let me first address myself to this question of "distinction" in judicial nominees. I find it a very difficult notion either to define or to explain. I take it that no one seriously questions Judge Carswell's integrity, judicial temperament, or professional competence. The American Bar Association's standing committee on the Federal judiciary has spoken rather emphatically on that subject, in discharging its obligation to determine whether or not a man nominated to be a Justice of the Supreme Court is or is not qualified for that position.

That committee unanimously found Judge Carswell to be qualified and so advised the chairman of the Senate Judiciary Committee on January 26; asked by opponents of the nominee, after the conclusion of the hearings before the Senate Judiciary Committee, to reconsider its position, the committee unanimously reaffirmed its earlier determination.

The committee's communication to the chairman of the Senate Judiciary Committee points out the difference between the question of professional competence and other factors that the President or the Senate may wish to consider in evaluating a nominee. I quote from a paragraph of Judge Walsh's letter to Senator EASTLAND:

> With respect to nominations for the Supreme Court, the Committee has traditionally limited its investigation to the opinions of a cross-section of the best informed judges and lawyers as to the integrity, judicial temperament and professional competence of the proposed nominee. It has always recognized that the selection of a member to the Supreme Court involves many other factors of a broad political and ideological nature within the discretion of the President and the Senate but beyond the special competence of this Committee.

If 12 members of the American Bar Association, specially appointed by my good friend and fellow Pennsylvanian, Bernard G. Segal, president of the association, to discharge this important responsibility, have concluded that Judge Carswell is qualified as to "integrity, judicial temperament and professional competence" and have reached that conclusion on the basis of an investigation of "the opinions of a cross-section of the best informed judges and lawyers," that part of the inquiry is for me at an end.

I think the "lack of distinction" argument is really a make-weight for those whose real ground of objection is that the nominee is not sufficiently in accord with their views. He may not be in accord with many of my views, for that matter. But, to the extent that the lack-of-distinction argument suggests that Judge Carswell lacks either integrity, judicial temperament or professional competence, it is rebutted by the unanimous opinion of the American Bar Association's Standing Committee on the Federal Judiciary.

To the extent that it suggests disapproval of Judge Carswell's judicial philosophy, it is really not grounded on "distinction" at all, but on ideological considerations.

There has been, in the past, some disagreement among members of the Senate Judiciary Committee, and of the Senate as a whole, as to the extent to which an individual Senator ought to evaluate and take into account a nominee's judicial philosophy in deciding whether to vote in favor of confirmation or against it. One thing certainly is clear—each of the 100 Senators cannot insist that the nominee be a carbon copy of his own views on the various matters that come before the Supreme Court, since there are only nine Justices of that Court. I am sure that 100 will not go into nine, if I still remember my early math.

If the President's power to appoint is to mean anything, it must mean that the President is empowered to consider a nominee's judicial philosophy in naming him to the Court in the first instance. The role of the Senate must be, I believe, at most to insist that the nominee's public record be within a range of reasonableness on controversial judicial issues. Each individual Senator cannot insist that the nominee bear his own philosophical stamp, but must limit his consideration, as I must, to whether the nominee's record is within broad limits of reasonableness.

Testimony before the Senate Judiciary Committee has satisfied me that Judge Carswell is indeed a "middle of the roader" in this field of the law.

I repeat, this is not to say that I would necessarily approve of each of Judge Carswell's decisions in the field of civil rights. In fact, in several cases it seems to me that he was stricter than I would like to have seen a judge be, in holding against civil rights plaintiffs.

I am convinced, however, that his rulings—even in these cases—were motivated by his own understanding of the precedents, and his own judicial philosophy. Even though I might not have decided these cases the same way as he did, his overall approach in the area of civil rights is based on his construction of the Constitution, and certainly not in defiance of it.

When I turn to Judge Carswell's work in the field of criminal law, I find myself in accord with virtually everything he has done. He has established a good reputation for fairness as a trial judge in those criminal cases which he tried himself, as can be seen from the statistics regarding affirmance on appeal of these cases by the Fifth Circuit.

However, in several decisions on legal points in habeas corpus cases, he has indicated that where under the law he is free to do so, he would take a more restrictive view of the constitutional rights of criminal defendants than would some other sitting judges.

In a nation confronted with a rising tide of crime which has made the average citizen fearful of going about on the streets of his neighborhood, I do not believe it is wise to further expand concepts under which criminal defendants may be freed on technical points unrelated to their guilt or innocence of the crime of which they are charged.

As a matter of fact, within the last 48 hours, the wife of a former Representative has been an unwitting and unwilling witness to the aftermath of a robbery in a grocery store, and a Member of the U.S. Senate has had his clothing stolen from his car in a parking lot. Therefore, we are well aware that crime is with us in the United States.

I think the President, in short, indeed has nominated a "strict constructionist" to the Supreme Court. Judge Carswell's record is that of a judicial conservative; and, quite consistently with this record, his decisions tend to a less expansive reading of the constitutional rights of both civil rights' plaintiffs and of criminal defendants.

As I have said, my own personal preference, were I sitting on the bench, would probably be for a more liberal reading of the rights of civil rights plaintiffs, but for the same sort of more restrictive reading of the rights of criminal defendants as that found in Judge Carswell's decisions.

Only if I were to insist that a judge nominated to the Supreme Court mirror precisely my own views as to how Supreme Court Justices should decide particular cases, could I have serious doubts about voting to confirm Judge Carswell. Obviously, neither I nor any other Senator has the right to impose such a requirement.

Judge Carswell is within the realm of reason in the area of civil rights, and will bring to the area of constitutional rights of criminal defendants a somewhat more skeptical approach than has been followed by the Supreme Court in some of its decisions of the immediate past. I welcome this latter development.

Judge Carswell is an experienced, sitting judge. There are those who argue that he has not had sufficient time on the bench, and to them I point out that of the last four appointees to the Supreme Court, three never wore judicial robes before being confirmed here.

It strikes me as strange, moreover, that some of those now opposed, were prepared some years ago, to rush through a Supreme Court appointee simply because "this was the man the President wanted."

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. HOLLAND. Mr. President, the Senator knows that this nominee served 5 years as assistant district attorney in the Eisenhower administration. He was appointed in the closing part of the Eisenhower administration as a district judge and was appointed last year in the Nixon administration as a judge of the Circuit Court of Appeals for the Fifth Circuit.

I simply want the record to show on this point, first, that the Senator from Florida, not being of the same party as the Executive on any of these three occasions, did not make the nomination,

but that there was every chance for anyone who wished to complain to him of Judge Carswell personally, or later as an official, to do so.

The area over which he presided is predominantly Democratic. The bar over which he presided is predominantly Democratic. Not only did I have no complaint, but I had much encouragement to approve the appointment when he was named as district attorney. And he was unanimously approved by the Senate.

When the time came for his appointment as a district judge—and the situation was the same, as the nomination came from a Republican administration and was not upon my recommendation—there was ample opportunity for me to hear objections, if there were such, to the way he had treated defendants or lawyers in cases which he had handled as a prosecutor.

I had no such complaints, and to the contrary, even when the circuit court of appeals nomination was made last year, with the situation exactly the same—the nomination coming from a Republican President—with every opportunity for me to hear the complaint of any lawyers or others who might complain of his judicial conduct, I had none.

I want the record to show that I had many dozens of pleasant, approving, and recommending letters and other contacts last year. I did in 1958 when he was named as district judge. And I did in 1953 when he was named as an assistant district attorney. And through the course of the years, I have had many opportunities to hear from members of the bar, in particular in that part of the State, and I have yet to have the first complaint of mistreatment or poor judgment on the part of Judge Carswell, which I thought was quite a commendation for a man who has served in these three positions since 1953. And the Senate having acted unanimously to confirm him on each of these three occasions, we must have felt unanimously that he was well chosen and well regarded and that it was well understood that he was a man of integrity, a man with a knowledge of the law, and a man of judicial temperament.

Mr. SCOTT. Mr. President, I thank the Senator from Florida for his contribution to the information on the background of this appointee. He was, indeed, confirmed unanimously by the Senate and reported unanimously by the Senate Judiciary Committee on each occasion. And if there were any objections to him, they must have been at that time quite minimal.

One is, therefore, entitled to wonder why some of the things have been said which have been said later on this, the fourth time the name of Judge Carswell has been submitted to the Senate.

If we were right three times, one wonders how we could be so wrong the fourth time. This is another one of the reasons why I am supporting the nomination.

This nomination is not rushed through. Judge Carswell has been subjected to the closest scrutiny by the Senate and the public. And the fact remains that this is the man the President wants. This is the man the Judiciary Committee, by a heavy majority, favorably reported. This is the man on whose qualifications we in the Senate have passed on three times already.

Mr. KENNEDY. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. KENNEDY. Of course, in making the evaluation three previous times, neither the Judiciary Committee nor the Senate carried out any searching inquiry. I think that in all fairness it should be pointed out that on this occasion, with a nomination to the Highest Court in the land at stake, there were materials presented to the Committee on the Judiciary which had not been submitted to the Committee on the Judiciary before; and that this time there was an opportunity to review his work in greater detail. We had somewhat of a chance to look at his performance with a higher degree of care, particularly in terms of his interpretation of certain controlling cases and statutory and constitutional provisions, and his willingness to follow precedents. There was a much more complete—although not even yet a totally thorough—inspection of his general performance during his tenure on the court. I think that any examination of the record would indicate incontrovertibly that this was a much more thorough and far-reaching study than had been made before.

Would the Senator agree?

Mr. SCOTT. I agree there has been a great deal more discussion on the nomination of Judge Carswell this fourth time than there has been before. There have been witnesses and controversy; there have been different points of view. The distinguished Senator from Massachusetts knows I share his views generally on civil rights; and I believe I can say conversely that he shares mine. But I am pointing out that had this appointee's record been as unfortunately subject to criticism as it now is, that it did not occur in the previous three situations. But I do think the Senator has made an important contribution to the record and I could not dispute that these matters have since been brought out.

Mr. KENNEDY. I thank the Senator. I regret having interrupted the Senator in his formal presentation because I think it is only fair that he make his presentation. I think in fairness, when we are considering this matter we should realize that this has been perhaps the only extensive and intensive examination of this nominee's background, competence, and judicial temperament for this important position. There have been those who say it has been too expansive and exhaustive an examination, but I think there can be no doubt that we have a much more complete record on this nominee than at any time in the past.

When we consider the nominee on this occasion compared to the other times he was considered, we must realize that we are considering him for the highest kind of national responsibility, a position on the Supreme Court of the United States; as compared to the other occasions when he was being considered for the position as U.S. attorney and district or circuit court judge. Perhaps we should have considered his previous nominations more carefully. But that is certainly no reason not to consider his present nomination as carefully as we can.

I thank the Senator.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. HOLLAND. It was the Circuit Court of Appeals, the second highest court in our Nation, and a court that is the court of final appeal in the normal case. There was certainly an ample opportunity to investigate at that time.

I repeat that he was not my nominee. I nominated someone else, just as I have this time. But I must in fairness state that although I am a member of the bar in Florida of long standing and have served as Governor of my State, and lived in Tallahassee, the city where he lives, and know him and have been acquainted with practically all the lawyers who practice in practically the entire western and northern part of my State, I have yet to have any complaint of mistreatment or lack of judicial knowledge and handling by members of the Florida bar.

The Senator will remember, of course, that the president of the Florida Bar Association came to testify heartily in support of this nomination.

Mr. KENNEDY. Mr. President, would the Senator yield further?

Mr. SCOTT. If I may, I would like to finish two short paragraphs, and then I will be glad to yield.

In nominating Judge Carswell, President Nixon has taken into consideration notions of geographical and philosophical balance in the Supreme Court.

This is his prerogative and in the absence of ethical considerations, I support the nomination of Judge Carswell and I intend to vote for his confirmation.

Mr. President, I ask unanimous consent to have printed in the RECORD a biographical sketch of George Harrold Carswell.

There being no objection the biographical sketch was ordered to be printed in the RECORD, as follows:

BIOGRAPHICAL SKETCH OF GEORGE HARROLD CARSWELL

Judge Carswell was born on December 22, 1919, in Irwinton, Georgia. He graduated from Duke University in Durham, North Carolina, with a B.A. degree in 1941. He attended the University of Georgia Law School for one year prior to his entry into the armed forces in 1942. He was discharged as a Lieutenant in the Navy in 1945, after which he resumed his law studies at Mercer University Law School, at Macon, Georgia. He graduated from the Walter F. George Law School at Mercer in 1948, and engaged in the private practice of law in Tallahassee, Florida, until 1953.

He was appointed United States Attorney for the Northern District of Florida by President Eisenhower in July, 1953, and served in that position for five years. In 1958, he resigned as United States Attorney to accept appointment as United States district judge for the Northern District of Florida a post which he held until President Nixon appointed him to be a judge of the United States Court of Appeals for the Fifth Circuit in June, 1969. He is presently serving as a circuit judge.

Shortly after he was appointed a district judge, Chief Justice Warren appointed Judge Carswell to be a member of the Committee

on Statistics of the Judicial Conference of the United States. This Committee performs the essential function of evaluating the need for additional federal judges throughout the nation, on the basis of studies of current workload and backlog. The present Omnibus Judge bill already passed by the Senate and pending in the House of Representatives is based largely on the recommendation of the Committee on Statistics. In April, 1969, Judge Carswell was chosen by the other circuit and district judges to be the Fifth Circuit's district judge representative to the Judicial Conference of the United States. As such, he attended and participated in the meeting of the Conference held in June, 1969, dealing with the problems of judicial ethics arising from outside employment of federal judges. He voted with the majority of the Conference at that time to require disclosure of outside employment, and to regulate it in other ways.

Mr. SCOTT. Mr. President, I am glad to yield to the Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I want to comment on the statement of the distinguished Senator from Florida in regard to the question of whether any members of the bar in Florida did complain.

Mr. HOLLAND. To me.

Mr. KENNEDY. We are talking about the whole record in this matter. If the Senator is limiting complaints of the Florida bar to him, I would reserve any comment. If the Senator is talking about reservations expressed by lawyers who practiced in Florida in terms of their practice before Judge Carswell in numerous cases, I would suggest that the Senator review the record. There were a number of members of the bar that did complain and complain vociferously about the kind of treatment they received in the nominee's court. They used the words "intimidated," "hollering," and "scolding." One lawyer who supervised a large number of other lawyers throughout Florida during a 4-year period of the 1960's, said that he felt it necessary to train them for appearances before Judge Carswell by harassing them and interrupting them as Judge Carswell repeatedly did. And other lawyers who appeared in his court corroborated that complaint.

I would certainly hope the Senator, for whatever value he might place on it, would get a chance to review those comments, as well.

However, those are really the secondary questions when taken in isolation. I think the Senator from Pennsylvania has touched on the really important questions which will be discussed and debated. I had really not intended to have the opportunity to speak this afternoon on this question and I hope to do some time next week. But I do feel that the individual views expressed by four members of the Committee on the Judiciary, and those expressed in the more complete memorandum, which touch upon the question of the profes sional competency of Judge Carswell, that talk about his judicial temperament, about the question of whether his interpretations really follow the controlling cases or not, questions of his sensitivity to and understanding of human rights, really present a very responsive and complete expression of why many Members of this body will find there are sound grounds to believe that this nomination should not receive the Senate's endorsement.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. SCOTT. I yield.

Mr. GRIFFIN. Mr. President, I expect to have some further remarks at a later point in the debate on this nomination but I should like at this time to commend the distinguished minority leader for a very excellent statement and, in general, to associate myself with what he has said.

He has focused on what are supposed to be the issues, and I believe he has demolished the arguments of those who seek to build a case against the nominee.

Certainly any Senator who wishes to oppose a nominee for the Supreme Court simply because of disagreement with philosophy is within his rights as a Senator to do so; but I suggest that it breaks with the tradition and practice of the Senate over the years, as I understand the history of the Senate, Senators have been very tolerant with respect to differences of philosophy when nominations to the Supreme Court have been considered.

I would not try to characterize or categorize the philosophy of Judge Carswell. However, like the minority leader, I am quite sure that the philosophy of the nominee would not be completely in tune with mine. I know that there are decisions which have been handed down by the nominee which would not have been my decisions if I had been sitting in his place. But I am also conscious of the fact that any Senator would expect too much if he should expect or demands 100 percent agreement with any nominee so far as philosphy or ideology are concerned. I am not impressed with the arguments of those who try to portray this nominee as a "racist" or an extremist.

As a member of the Judiciary Committee, I have listened to the testimony and I have reviewed the record. On the whole, I believe the record indicates that the nominee has sought to apply the decisions of the Supreme Court as he, in good faith, has interpreted them.

Once again, I want to commend the distinguished minority leader.

Mr. KENNEDY. Mr. President, will the Senator permit me to respond on this point to the Senator from Michigan?

Mr. SCOTT. I yield. I understand the Senator wishes to respond to the Senator from Michigan. I can yield the floor at this time. Is the Senator seeking recognition?

Mr. KENNEDY. Yes.

Mr. SCOTT. Mr. President, I yield the floor.

Mr. KENNEDY. Mr. President, I would like to say, in terms of response to my good friend from Michigan, that I am sure that during the course of this debate it will be stated on the floor that there were members of the Judiciary Committee who expressed their reservations to this nominee solely on the basis of philosophy. I certainly did not, and I do not believe my colleagues who signed the minority views did so, either.

Realistically, I believe we would expect that during this administration, there might very well be nominees whose philosophy might be different from that of some of us who sit on the Judiciary Committee; we have had such nominees for every kind of position from U.S. marshal to Chief Justice of the United States, and we have not opposed their confirmation. But the point raised in the individual views, which is extremely basic with respect to this nominee, is whether the nominee's personal prejudice and predilections interferred with the decision-making process, in his court, and affected his judicial temperament, his objectivity, and his fairness. I think it is a legitimate area of pursuit for those of us on the Judiciary Committee, and for all Members of the Senate, because it is a basic question and must be resolved. There were suggestions, comments, and statements by witnesses that indicated strongly that this happened. We will have an opportunity to review that evidence and examine it in some detail during the course of the debate. Obviously it is a question that reaches the essence of the question of the suitability of the nominee, even apart from the overall and threshold question of whether his general qualifications are such as to merit a Supreme Court appointment.

This is a better portrayal of at least one of the areas of the reservations expressed by the Senators who signed the individual views. It is surely a truer express of their reservations than merely a bland expression that goes merely to the question of philosophy.

Mr. BAYH. Mr. President, I intend to deal with the whole matter of the nomination of Judge Carswell on Monday, following the presentation of the views of the distinguished chairman of the committee (Mr. EASTLAND); but inasmuch as the issue has been joined at this hour, I feel obliged to make at least one or two comments.

I listened with a considerable amount of interest to the views of the distinguished minority leader and his good right arm, the distinguished Senator from Michigan (Mr. GRIFFIN). This is another example of how Members of this body can have the greatest respect for their colleagues and still take issue with their interpretation of the problem before us.

I admired the courage—and I think it was tremendous courage—of both the Senator from Pennsylvania (Mr. SCOTT) and the Senator from Michigan (Mr. GRIFFIN) in the previous conflict over the nomination to the Supreme Court. None of us likes to go through that. Difficult as it was for the Senator from Indiana, I am sure it was more difficult for them.

I would not want one to intimate for a moment that it is a sign less than that of courage if one feels contrary to the way the Senator from Indiana feels on this issue; but I am hard pressed, looking at the record of the qualifications of the previous nominee and then look-

ing at the record of qualifications of the present nominee, to see how the issue is not more clearly drawn. It would be easier to vote in opposition to the President's nomination on the Carswell qualifications, demeanor, philosophy, or any of the points raised in the individual views coming from the Judiciary Committee.

The Senator from Michigan pointed out that the history of the Senate shows it has been tolerant of the philosophical views of judicial nominees, and I think perhaps history will show he is accurate in that statement. The Senator from Indiana was inclined to be most tolerant about the views of this nominee. Having just gone through the terrible struggle over the Haynsworth nomination. I must say, at the risk of sounding like a public confession, I was hoping that this whole thing would go away and that we could easily advise and consent to the nomination of just about any person whose name the President had sent to the Senate. But, as the record began to build up, it became more and more clear that I could not see my way clear to vote the easy way, I could be tolerant of the judge's philosophy to the place where it became greatly contrary to what appears to me to be in the best interests of the country. At that point I felt compelled to say, "Mr. President, it is your initial responsibility to send the name of your own nominee, but, indeed, if the advise and consent procedure means anything, this is a time when we have, in all respect, to say, 'Send us a man of bigger stature, who is more in tune with what the country needs at this time.' "

I agree that what the Senator from Michigan said is accurate. I think Judge Carswell did indeed apply the views of the Supreme Court to the various cases before him, as he saw fit, as he judged. But it seems to me it is a question that this body should consider when the issues involve the broad area of human rights, whether it be school segregation, utilization of public facilities by the public as a whole rather than a few, or the use of habeas corpus as an instrument for the protection of individuals who are incarcerated in a certain manner. Indeed, it is difficult to find any similarity between what the Supreme Court has said on these issues and the way they have been interpreted by Judge Carswell.

I do not want to prolong the debate at this particular moment, but I would like to put in the RECORD at this point a statement on the confirmation of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court of the United States, issued by a former judge of the Court of Appeals of the State of New York, Judge Bruce Bromley; president of the Association of the Bar of the City of New York, Francis T. P. Plimpton; former president of the Association of the Bar of the City of New York, Samuel I. Rosenman; former president of the Association of the Bar of the City of New York, Bethuel M. Webster.

I ask unanimous consent that the statement be printed in the RECORD at this point.

There being no objection the statement was ordered to be printed in the RECORD, as follows:

STATEMENT ON THE CONFIRMATION OF JUDGE G. HARROLD CARSWELL AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The undersigned members of the Bar, in various sections of the United States, and of differing political affiliations, are deeply concerned about the evidence in the hearings of the United States Senate Judiciary Committee on the confirmation of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court of the United States.

The testimony indicates quite clearly that the nominee possesses a mental attitude which would deny to the black citizens of the United States—and to their lawyers, black or white—the privileges and immunities which the Constitution guarantees. It has shown, also, that quite apart from any ideas of white supremacy and ugly racism, he does not have the legal or mental qualifications essential for service on the Supreme Court or on any high court in the land, including the one where he now sits.

The testimony has shown no express or implied repudiation of his 1948 campaign declarations in favor of "white supremacy" and of his expressed belief that "segregation of the races is proper and the only correct way of life in our State"—until his confirmation for the United States Supreme Court was put in jeopardy by their disclosure. On the contrary, it shows a continuing pattern of reassertion of his early prejudices.

That pattern is most clearly indicated by his activities in 1956 in connection with the leasing of a public golf course in his city to a private club, for the purpose of evading the Constitution of the United States and excluding blacks from its golf course.

We are most deeply concerned about this part of the testimony. He was then no longer the youthful, enthusiastic campaign orator of 1948 running on a platform of "white supremacy" and "segregation as a way of life." He was then a mature man, holding high Federal office.

Unfortunately, insufficient public attention has been paid by the media of public information and by the public in general to this episode.

The testimony as to the golf club is particularly devastating, not only because of the nominee's lack of candor and frankness before the Senate Committee in attempting to explain it, but because his explanation, if true, shows him to be lacking the intelligence of a reasonable man and to be utterly callous to the implications of the scheme to which he was lending himself.

The circumstances surrounding this golf club incident are extremely important, and should be made clear. By 1955, the Supreme Court of the United States had declared that it was unconstitutional for a city or state to segregate any of its public recreational facilities, such as golf courses. As a result of this decision, a common and well-publicized practice had grown up in the South, in order to keep blacks off municipal golf courses, by which the cities would transfer or lease the public facilities to a private corporation, which would then establish rules for exclusive use by whites. This was, of course, a palpable evasion—and universally understood so to be.

By 1956, many cases had already been filed in various cities of the South to invalidate these obvious subterfuges. Several lower United States Courts had already struck them down as unconstitutional. These cases were well publicized at the time when United States Attorney Carswell, who had been, of course, sworn as a United States Attorney to uphold the Constitution and laws of the United States, became involved in the matter of the municipal golf club in Tallahassee, Florida, where he lived.

By the date the Tallahassee incident occurred, five lawsuits had already been started in different cities in the State of Florida to desegregate municipal recreation facilities, including, among others, golf clubs; and it was clearly evident that Tallahassee and its municipal golf club would soon be the target of such a suit.

Therefore, to circumvent the results of such a suit, some white citizens of Tallahassee incorporated a private club, to which the municipal golf course was thereupon leased for a nominal consideration. Affidavits, dated in February 1970, were submitted and read to the Senate Committee, signed by both blacks and whites who were residents of Tallahassee at the time, showing that it was generally understood that this transfer was being made solely for the purpose of keeping black citizens off the course.

One of these affidavits (TR 610)[1] was by a Negro lady, a public high school teacher for ten years, the business manager of Tallahassee's A & M Hospital for one-half year, and presently an Educational Specialist at the Federal Correctional Institution in Tallahassee. It said in part:

". . . Tallahassee was in a racial uproar over the bus boycott and other protests—bringing a reaction of fear to the white community. The word 'private' had increasingly become a code name for segregation.

"The Capital City Country Club incorporation proceedings were well-publicized and the racial overtones were necessarily clear to every knowledgeable citizen in the area, and it would have been surprising to me if an intelligent man, particularly an incorporator was not aware of the repeatedly emphasized racial aspects of this case.

"We did discuss this corporation widely at the time; had we not been so preoccupied with other protests, we would have undoubtedly moved against the Corporation in civil suit."

Another affidavit (TR 611) was signed by a white lady, "a life-long resident of Tallahassee whose family has been domiciled in city for several generations," "the wife of the chairman of Florida's oldest bank, the Lewis State Bank of Tallahassee." It stated that: (1) the golf course had been developed and improved by a grant of $35,000 of WPA funds; (2) she refused to join in the new club "because we wanted no part in converting public property to private use without just compensation to the public, and because of the obvious racial subterfuge which was evident to the general public"; (3) that she had discussions at the time of the lease "with a variety of parties during that period on the subject of a golf course, the issue being of wide civic concern." She stated:

"I would have been surprised if there was any knowledgeable member of the community who was unaware of the racial aspect of the golf course transaction. The controversy appeared in the local newspaper of the time and a city commissioner was known to have raised questions about the racial implications involved."

There was then received in evidence (TR 613) a clipping from page 1 of the local newspaper, referred to, the Tallahassee Democrat, for February 15, 1956. This contemporaneous clipping corroborated the affidavits in showing the community discussion of the racial purpose of the lease. Reporting the fact that the lease had been entered into by the City Commission with the private club, it stated:

"The action came after a two-month cooling off period following the proposal's first

[1] References are to the transcript of the hearings on the nomination before the Senate Committee on the Judiciary.

introduction. At that time former City Commissioner H. G. Easterwood, now a county commissioner, blasted the lease agreement.

"He said racial factors were hinted as the reason for his move.

"Under the arrangement, the country club group would take over the operation of the course September 1. The lease is for 99 years, running through 2055, and calls for a $1.00 a year payment.

The then United States Attorney, now seeking to become an Associate Justice of the Supreme Court of the United States, became an incorporator and director of that private club to which the golf club was to be leased. Here was a high Federal public official, thoroughly cognizant of the decisions of the Federal courts, participating in a scheme to evade the Constitution.

The answer of Judge Carswell to the disclosure of this was that: (1) he thought that the papers he signed (with a subscription of $100) were for the purpose of fixing up the old golf club house; (2) that he at no time discussed the matter with anyone; and (3) that he never believed that the purpose of this transaction had anything to do with racial discrimination or keeping blacks off the course.

Some of the Senators at the hearings were as incredulous as we are. We think that a few short extracts of the Judge's testimony on this matter will give a clearer picture of the man who now seeks a seat on the Supreme Court of the United States—the final guardian of the individual rights of all of us:

Judge Carswell (in answer to a question by Senator Kennedy as to whether the Judge was testifying that the transaction was principally an effort to build a club house): "That is my sole connection with that. I have never had any discussion or never heard anyone discuss anything that this might be an effort to take public lands and turn them into private lands for a discriminatory purpose. I have not been privy to it in any manner whatsoever." (TR 65)

Senator Kennedy (TR 149): Mr. Nominee, I think the document speaks for itself in terms of the incorporation of a club, a private club . . . I think, given the set of circumstances, the fact that they were closing down all recreational facilities in that community at that time because of various integration orders, I suppose the point that Senator Bayh is getting to and some of us asked you about yesterday is whether the formation of this club had it in its own purpose to be a private club which would, in fact, exclude blacks. The point that I think he was mentioning and driving at, and Senator Hart talked to, and I did in terms of questions, is whether, in fact, you were just contributing some $100 to repair of a wooden house, club house, or whether, in fact, this was an incorporation of a private club, the purpose of which was to avoid the various court orders which had required integration of municipal facilities. . . .

"Now, I think this is really what, I suppose is one of the basic questions which is of some interest to some of the members and that we are looking for some response on."

Judge Carswell: "Yes sir, and I hope I have responded, Senator Kennedy. I state again unequivocally and as flatly as I can, that I have never had any discussions with anyone, I never heard any discussions about this."

Senator Bayh: "You had no personal knowledge that some of the incorporators might have had an intention to use this for that purpose?" (TR 150)

Judge Carswell: "I certainly could not speak for what anybody might have thought, Senator. I know that I positively didn't have any discussions about it at all. It was never mentioned to me. I didn't have it in my mind, that is for sure. I can speak for that." (TR 150)

Senator Bayh then asked whether there were then any problems in Florida relating to the use of public facilities and having them moved into private corporations. Judge Carswell answered:

"As far as I know, there were none there and then in this particular property."

Senator Bayh then asked whether Judge Carswell was not aware of other cases in Florida?

Judge Carswell: "Oh, certainly, certainly. There were cases all over the country at that time, everywhere. Certainly I was aware of the problems, yes. But I am telling you that I had no discussions about it, it was never mentioned to me in this context and the $100 I put in for that was not for any purpose of taking property for racial purposes or discriminatory purposes." (TR 151)

Senator Kennedy: "Did you have any idea that that private club was going to be opened or closed?"

Judge Carswell: "The matter was never discussed."

Senator Kennedy: "What did you assume?"

Judge Carswell: "I didn't assume anything. I assumed that they wanted the $100 to build a club house and related facilities if we could do it. . . ." (TR 153)

Senator Kennedy: "When you sent this and you put up the money, and you became a subscriber, did you think it was possible for blacks to use that club or become a member?"

Judge Carswell: "Sir, the matter was never discussed at all."

Senator Kennedy: "What did you assume, not what was discussed?"

Judge Carswell: "I didn't assume anything. I didn't assume anything at all. It was never mentioned."

Senator Kennedy: "Did you in fact sign the letter of incorporation?"

Judge Carswell: "Yes, sir. I recall that. . . ."

Senator Kennedy: "Did you generally read the nature of your business or incorporation before you signed the notes of incorporation?"

Judge Carswell: "Certainly I read it, Senator. I'm sure I must have. I would read anything before I put my signature on it, I think [sic]."

We cannot escape the conclusion that a man, in the context of what was publicly happening in Florida and in many parts of the South—which the nominee says he knew—and what was being discussed locally about this very golf club, would have to be rather dull not to recognize this evasion at once; and also fundamentally callous not to appreciate and reject the implications of becoming a moving factor in it. Certainly it shows more clearly than anything else the pattern of the Judge's thinking from his early avowal of "white supremacy" down to the present.

Particularly telling—as showing the continuing pattern of his mind which by the time of the golf club incident, if not before, had become clearly frozen—are the testimony and discussion of fifteen specific decisions in civil and individual rights cases by the nominee as a United States District Judge (TR 629, et seq.). These fifteen were, of course, only a few of the decisions by the nominee. A study of a much fuller record of his opinions led two eminent legal scholars and law professors to testify before the Senate Committee that they could find therein no indication that the nominee was qualified—by standards of pure legal capacity and scholarship, as distinguished from any consideration of racial prejudices—to be a Supreme Court Justice.

These specific fifteen cases are all of similar pattern: they involved eight strictly civil rights cases on behalf of blacks which were *all* decided by him against the blacks and all *unanimously* reversed by the appellate courts; and seven proceedings based on alleged violations of other legal rights of defendants which were all decided by him against the defendants and all *unanimously* reversed by the appellate court. Five of these fifteen occurred in one year—1968.

These fifteen cases indicate to us a closed mind on the subject—a mind impervious to repeated appellate rebuke. In some of the fifteen he was reversed more than once. In many of them he was reversed because he decided the cases without even granting a hearing, although judicial precedents clearly required a hearing.

We do not dispute the Constitutional power or right of any President to nominate, if he chooses, a racist or segregationist to the Supreme Court—or anyone else who fills the bare legal requirements. All that we urge is that the nominee reveal himself, or be revealed by others, for what he actually is. Only in this way can the Senate fulfill its own Constitutional power to confirm or reject; only in this way can the people of the United States—the ultimate authority—exercise an informed judgment. That is the basic reason for our signing this statement, as lawyers, who have a somewhat special duty to inform the community of the facts.

We agree with Judge Carswell that a nominee for the Court should not ordinarily be compelled to impair his judicial independence by explaining his decisions to a Senate Committee. But this was no ordinary situation. It involved a consistent and persistent course of judicial conduct in the face of continual reversals, showing a well-defined and deeply ingrained pattern of thought.

We believe that—at the very least—the hearings should be reopened so that an official investigation can be made by independent counsel for the Committee, empowered as it is to subpoena all pertinent records, including the files of the Department of Justice and the records of Judge Carswell's court. So far, the evidence in opposition—compelling as it is—has been dug up solely by the energy and efforts of private citizens or groups, without power of subpoena. For example, the episodes of the 1948 pledge to "white supremacy" and the country club lease were both dug up by independent reporters.

Are there any other incidents like the golf club, or other public or private statements about "white supremacy"? Are there additional, but unreported, decisions in the files of Judge Carswell's court, not readily available to lawyers who can search only through the law books for cases which have been formally reported and printed? What information can be found in the files of the Department of Justice, unavailable, of course, to the opposition but readily subject to a Committee subpoena?

One vote out of nine on the Supreme Court is too important to rely on a volunteer investigation, on the efforts of private, public-spirited lawyers and reporters, although they have already uncovered evidence clearly indicating, in the absence of a more credible explanation, rejection of the nomination.

The future decisions of the Supreme Court will affect the lives, welfare and happiness of every man, woman and child in the United States, the effectiveness of every institution of education or health or research, the prosperity of every trade, profession and industry. Those decisions will continue to be a decisive factor in determining whether or not ours will, in the days to come, truly be "a more perfect Union," where we can "establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

We urge that the present record clearly calls for a refusal to confirm by the Senate of the United States.

Signed: [2]

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[2] Mention of an organization is purely for descriptive purposes, and not to indicate an expression of the views of the organization.

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William L. Marbury, Former President, Maryland State Bar Association, Baltimore, Maryland.

Community Action for Legal Services, Inc., New York, New York: Joshua H. Brooks, Jr., Oscar G. Chase, Lawrence J. Fox, John C. Gray, Jr., Manuel Herman, Marcia Lowry, Cornelia McDougald, Gerald Rivera, Robert Roberts, Richard A. Seid, Alfred L. Toombs, Napoleon B. Williams.

Arthur J. Harvey, Former President, Board of Directors, Legal Aid Society, Albany, New York.

Alfred A. Benesch, Partner, Benesch, Friedlander, Mendelson & Coplan, Cleveland, Ohio.

Frank T. Read, Assistant Dean, Duke University School of Law, Durham, North Carolina.

Francis H. Anderson, Professor, Albany Law School, Union University, Albany, New York.

Dean Russell N. Fairbanks, Rutgers University School of Law, Camden, New Jersey.

David L. Cole, Former President, The National Academy of Arbitrators, Paterson, New Jersey.

Asa D. Sokolow, Partner, Rosenman Colin Kaye Petschek Freund & Emil, New York, New York.

Archie Katcher, President, Detroit Bar Association, Detroit, Michigan.

Vincent R. FitzPatrick, Partner, Willkie Farr & Gallagher, New York, New York.

Joseph L. Rauh, Jr., Partner, Rauh and Silard, Washington, D.C.

Michael V. Forrestal, New York, New York: Boris Kostelanetz, Former Special Assistant to the Attorney General of the United States, New York, New York; Charles Denby, Partner, Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania; Hugh A. Burns, Partner, Dawson, Nagel, Sherman & Howard, Denver, Colorado.

Faculty, College of Law, Willamette University, Salem, Oregon: Courtney Arthur, Edwin Butler, Edwin Hood, Dallas Isom, John Paulus, John Reuling, Ross Runkel, Robert Stoyles.

Wayne B. Wright, Former President, Bar Association of Metropolitan St. Louis, St. Louis, Missouri.

Ross, Stevens, Pick & Spohn (all eleven partners), Madison, Wisconsin.

Melvin G. Shimm, Professor, Duke University, School of Law, Durham, North Carolina.

Leonard M. Nelson, Chairman, Judiciary Committee, Maine State Bar Associataion, Portland, Maine.

Lloyd N. Cutler, Washington, D.C.

Lyman M. Tondel, Jr., Former President, New York State Bar Association, New York, New York.

Dean and Faculty, University of Kansas School of Law, Lawrence, Kansas: Lawrence E. Blades, Dean; Jonathan M. Landers; John F. Murphy; Arthur H. Travers.

Dean and Faculty, Harvard University Law School, Cambridge, Massachusetts (Subscribe to the conclusions expressed herein concerning the qualifications of Judge Carswell for appointment to the Supreme Court.): Derek C. Bok, Dean; Paul M. Bator; Stephen G. Breyer; Abram Chayes; Jerome A. Cohen; Charles Fried; Livingston Hall; Louis L. Jaffe; Benjamin Kaplan; Robert E. Keeton; Louis Loss; Frank I. Michelman; Albert M. Sacks; Frank E. Sander; David L. Shapiro; Henry J. Steiner; Donald T. Trautman; Adam Yarmolinsky.

Carroll J. Donohue, Former President, Bar Association of St. Louis, Former Member, Board of Governors of Missouri Bar Association, St. Louis, Missouri.

James W. Lamberton, Partner, Cleary, Gottlieb, Steen & Hamilton, New York, New York.

Joseph A. Califano, Jr., Washington, D.C.

Edwin B. Mishkin, Partner, Clearly, Gottlieb, Steen & Hamilton, New York, New York.

R. Walston Chubb, Partner, Lewis, Rice, Tucker, Allen and Chubb, St. Louis, Missouri.

Shedd, Gladstone & Kronenberg (all three partners), Hackensack, New Jersey.

Mr. BAYH. Mr. President, I notice two names that are not unfamiliar to those of us who have had the responsibility of sitting on the Judiciary Committee during the whole ordeal of trying to fill the vacancy which presently exists. One of those names is familiar to all of us, Judge John Frank, who testified before our committee in support of the Haynsworth nomination. Judge Frank has spoken rather eloquently in opposition to the qualifications of this nominee, and feels that the Senate should not advise and consent to this nomination.

I notice also that Prof. William Van Alystyne, who testified before the Judiciary Committee when we were consider-

ing the qualification of Judge Haynsworth, and who thought Judge Haynsworth was qualified, takes issue rather eloquently in this report, as he did before the committee itself. He feels the qualifications of the present nominee, Judge Carswell, are far less than were those of Judge Haynsworth.

So, Mr. President, I think it is important that, as the Senate debates this issue, we look at the issue involved.

We are not only filling a vacancy on the highest judiciary tribunal in the land, but the most compelling thing to me is that we are filling this vacancy, exercising this responsibility, at a time of great tension and turmoil in this country, at a time when disadvantaged people have been told, again and again and again, that there is a place for them in the system. I know I have told large numbers of my constituents that it is our responsibility, in this system, to work through it, to strengthen it, to make it respond in every way possible, to see that every citizen can be heard, that their grievances can be reconciled, that they may indeed have a full opportunity for themselves and their families by working through the system.

I have come to the conclusion that it would be completely inconsistent, feeling as I do that the system is the best way, and that this is not a time when we can be indifferent to discussing revolution and tearing down the system—it would be totally inconsistent, feeling as strongly as I do that in spite of its imperfections there has not been a better system devised by mankind—to now stand mute and let a man be appointed at the very top of our judicial system who has exhibited such a degree of insensitivity relative to the problems of large numbers of our people.

For that reason, I respectfully take issue with the distinguished assistant Republican leader, the Senator from Michigan (Mr. GRIFFIN) and his colleague from Pennsylvania, after having said earlier, as I think I did when indulging in a colloquy with his colleague, that I had the greatest respect for his integrity.

That is true. I have seen him in action when the going was rough, and my disagreement with him on this issue in no way lessens my respect for his qualities and ability.

Mr. GRIFFIN. Mr. President, will the distinguished Senator from Indiana yield?

Mr. BAYH. I am glad to yield.

Mr. GRIFFIN. I appreciate the Senator's remarks. Since this early stage of the discussion and debate seems to be a time for framing and identifying issues, I might make a comment at this point.

The Senator referred earlier to a list of distinguished lawyers who signed a statement which has been inserted in the RECORD. The Senator from Indiana referred to several lawyers who had supported the Haynsworth nomination. I daresay that if the Senator looked again at that list, he would find a number of others, in addition, who supported, to the bitter end, the Fortas nomination as well.

The point that I wish to make, at this stage of the discussion—and I think that the Senator from Indiana would agree with me—even though we did not agree completely on the two previous nominations—is that in those instances the Senate was primarily concerned with questions relating to ethics. Justice Fortas was a liberal Democrat, as I viewed his philosophy, and Judge Haynsworth was a conservative Republican, as I viewed his philosophy. But the junior Senator from Michigan did not oppose either of those nominations on the basis of the philosophy of the nominees.

In each of those situations, I could have found differences of philosophy with either of the nominees. But my position had nothing to do with the views or philosophy of either of those nominees.

Like the Senator from Indiana, with whom I agreed concerning the Haynsworth nomination, I was troubled and disturbed by what I considered were substantial questions relating to ethics.

Now then, so far as the nomination of Judge Carswell is concerned, I find no significant challenge or substantial question raised in the record involving ethical considerations. I find only arguments which focus primarily on the nominee's philosophy; arguments based on the way he decided particular cases. I wonder if the Senator from Indiana would agree with me that we are confronted with a different question and a different issue with respect to this nomination.

Mr. BAYH. The Senator from Indiana would concur that, to his knowledge, there has not been the ethical question raised which concerned the Senator from Michigan and the Senator from Indiana in connection with the other nominations.

I remember very well sitting here in the Chamber and listening to the eloquent remarks in opposition to Judge Haynsworth of the Senator from Michigan. If he recalls, at that time I rose to compliment him on the very difficult decision—which it indeed was—for him to decide to oppose the nominee of his President, which he based on the ethical ground, suggesting then as he does now that the philosophical question was not one that he felt it was appropriate to consider.

I must say at the time I expressed, I do not remember the exact terms, but I said I thought there was great leeway in the area of philosophy, that I thought, the way our system worked, that if you get a President with President Nixon's philosophy you are going to have a little different philosophy expressed by the Court than if you get a President like Hubert Humphrey, for example, or someone else.

I do not wish, in responding to the Senator's question, to make a speech; but the thing that concerns me is that if you look at the difference in philosophy—at least speaking for myself, and I think it is fair to say that the petition that has been made by a large number of judges and legal scholars, deans of law schools, and eminent lawyers reflects a similar concern—you can begin to see a difference in degree as far as the philosophy is concerned. In other words, I think the President is within his rights to appoint a strict constructionist, however that term might be defined. I think we might define the strict constructionist on a case such as U.S. against Miranda or U.S. against Escobedo a little differently than on a matter such as Brown versus Board of Education, where the situation is a little different, and all of us have our own individual standards.

The fact that the Senator from Michigan might disagree with the Senator from Indiana on such matters is not so important, it seems to me, as the fact that we have gone clear over to the other side of the spectrum, where I think we are getting into dangerous ground relative to a situation in this country which I have heretofore described. I think it is not only wrong, but dangerous, thus to give the back of our hand, so to speak, to people who are seeking for redress of their grievances within the system.

I am about to do what I said I would not do—make a speech in response to the Senator's question.

As the Senator from Michigan knows, there were also Members of this body who were deeply concerned about the philosophy of Judge Haynsworth. The Senator from Massachusetts (Mr. BROOKE), was concerned about philosophy, and as I recall the senior Senator from Massachusetts was also concerned about philosophy.

Mr. KENNEDY. Mr. President, will the Senator yield at that point?

Mr. BAYH. I am yielding on the Senator from Michigan's time.

Mr. GRIFFIN. Mr. President, if I have the floor, I will add the name of another Senator, the Senator from New York (Mr. JAVITS).

Mr. BAYH. That is right and the Senator from Michigan also. Perhaps I do have the floor. If so, I yield to the Senator from Massachusetts.

Mr. KENNEDY. As I remember, at least from our discussions—and I think it is explicitly clear in the minority views—those who expressed their opinions in the minority views did not do so on the basis of philosophy, but did so, as I mentioned very briefly earlier, on a much more serious and troublesome question. Since there had been significant evidence introduced during the course of the hearings about the judge's personal views on racial questions, we felt that was certainly appropriate for the members of the committee to make some determination and some finding as to whether those personal views had carried over into his decisions as a judge affecting vital constitutional and statutory questions in the field of equal rights, and had infected his courtroom temperament, his respect for precedent, his adherence to the purpose and spirit of even his own orders.

I think that the Members of this body should take the opportunity to read the complete record, and especially to read the discussion and hear about the various evidence regarding the nominee's statements on race relations, his association and involvement while U.S. attorney in the development of the golf

course, the land transaction, and other matters regarding human rights. I think we have a responsibility to review that evidence and to make a determination as to whether we feel that his personal views did in fact dictate the outcome of his cases and interfere with the fair and impartial running of his court. This, for me, was one of the principal reasons for expressing reservations about the nominee, rather than just a broad kind of philosophical disagreement with him.

Second—and as the Senator from Michigan pointed out, we are just getting into the initial stages of this discussion and debate and trying to frame what these questions are—is the question of competency in all its implications, both in terms of the same issues of temperament and his handling of the lawyers who appeared before his court and the general decorum there, and perhaps, more importantly, the separate question of his own personal competency as measured by the quality of his work, the level of respect for him among the bar in the Nation, whether he shows an insight and learning and skill in the law, whether he has demonstrated leadership of any sort or any other qualities which should place him above, or even among, the outstanding members of the legal profession. When a man is being considered for the Supreme Court it is not enough to say that we cannot find anything seriously wrong with him—although in this case we easily can. We must be able to find something professionally right with him which leads us to believe that he should be selected for elevation to our Highest Court. If we cannot find some such evidence of eminence or merit, then we are doing a disservice to the Court, the bar, and the Nation.

This, as I understand it, was one of the foremost reasons why leading law professors and bar leaders of outstanding reputation from all over the country have opposed this nomination. I know that we can all balance law professors versus law professors and lawyers versus lawyers, but I think the particular distinction of the group which has questioned Judge Carswell's qualifications should be given very special weight.

These two levels, I feel, would be the basis for my reservations and should be the basis of inquiry by the Members of this body.

I thank the Senator from Indiana.

Mr. BAYH. I am always glad to yield to my friend the Senator from Massachusetts.

As I said earlier in responding to the question of the Senator from Michigan, I think the whole question of where a philosophy enters into our judgment and how this can be interpreted in other ways is a matter of individual interpretation.

I think that perhaps it would be helpful to put in the RECORD at this time, inasmuch as we are trying to begin to show the matters of concern, the individual views in the report of the Committee on the Judiciary, with the memorandum on the qualifications of the nominee. I ask unanimous consent to have this material printed at this point in the RECORD.

There being no objection the material was ordered to be printed in the RECORD, as follows:

INDIVIDUAL VIEWS OF MR. BURDICK

The Constitution invests with the President the responsibility to nominate Justices of the Supreme Court. I do not believe the Senate should withhold its advice and consent in the absence of clear evidence that the nominee is not qualified.

I cannot agree with all the observations and conclusions of the majority report and respectfully decline to join therein. However, after careful consideration of the hearing record, I have concluded that Judge Carswell's qualifications are sufficient to report the nomination to the Senate.

INDIVIDUAL VIEWS OF MR. MATHIAS

The Carswell nomination has engendered some strong opposition and the objections advanced demand thoughtful evaluation. They are indeed troubling, and cannot be dismissed as trivial.

But the argument made against the confirmation of Judge Carswell is based on a significantly different character of evidence than that adduced in opposition to the prior nomination of Judge Clement F. Haynsworth. The case against confirmation of Judge Haynsworth was made on objective evidence: the judge's ownership of certain stock, the judge's participation in certain cases and the existence of statutory guidelines and clearly defined codes of judicial ethics. These are factual matters that are easily sustained on the record. The code and the statute had been violated and, in my judgment, the Senate properly rejected the nomination.

In the case of the Carswell nomination the evidence is largely subjective. The issue arises from the fact that witnesses before the committee have disagreed with his judicial views, that a considerable body of citizens disagree with some of his expressed views and that I myself am in disagreement with some of Judge Carswell's past and present views. Whatever objective evidence may have existed was largely verbal and is now obscured by the passage of time and the rhetoric of renunciation.

This distinction raises two separate considerations. The first is the difference between the act of nomination and the act of confirmation. The appointive power is positive, plenary and broad as the human race. The power to accept or reject is essentially negative, restricted and limited to judgment of a single man. It may well be that a President's choice does not generate grounds for condemnation so as to justify rejection without debate even though it is not a nomination of the character and quality that any single member of the Senate would wish to make if he were President. So it is with the Carswell nomination, and I would not have chosen him.

Second, and more significantly, is the proper role of the Senate in review of a judicial career. Every aspect of a nominee's record should, of course, be considered by the Senate. But, in the case of sitting judges nominated for other office there must be some regard for the principle of judicial independence. In the Haynsworth case I expressed concern that we came close to placing the principle in jeopardy. In this instance, I find it an even more serious concern.

I disagree, and the superior courts have disagreed, with a number of Judge Carswell's judicial decisions. Other Carswell decisions were unexceptional. In the absence of objective or material evidence of personal or judicial bias, the decision of a judge in a specific case should be accorded great respect. The record made in the Judiciary Committee did not go so far as to be conclusive in establishing such bias. The concept of judicial independence is not a natural or inherent human quality. It is a political principle that was hard won by courageous men in England and preserved by brave men in America. The freedom of a judge to determine a case on its merits, subject only to other judges' opinions on appeal, and not to suffer any retribution from any external authority such as the Crown or the Parliament, has become a fundamental principle. In the United States, we have traditionally protected judges—even unpopular judges—from non-judicial retribution.

Yet, the Senate could become a kind of jurists' tribunal or appellate bench if we scrutinize individual decisions of judges nominated to posts of judicial preferment. Without this kind of case by case scrutiny, Judge Carswell's record, albeit undistinguished, is not fatally flawed.

Under the circumstances, I find the situation such that the President and his nominee, Judge Carswell, ought not to be denied their day in court. There is no absolute bar to confirmation such as existed in the Haynsworth nomination and the issue of personal competency or qualification becomes, therefore, one for the judgment of the Senate. In this instance that means submission of the nomination to the full Senate for debate and decision. On this basis and for this purpose I have voted in the Judiciary Committee to report the nomination to the Senate.

INDIVIDUAL VIEWS OF MESSRS. BAYH, HART, KENNEDY, AND TYDINGS

The President's nomination of George Harrold Carswell as Associate Justice of the Supreme Court presents to the Senate a candidate whose credentials are too meager to justify confirmation. The distinguished Dean of the Yale Law School, for example, could rightly describe the nominee as having "more slender credentials than any other nominee for the Supreme Court put forth in this century."

Judge Carswell has been a practicing attorney, a federal prosecutor, and a lower federal court judge. For Supreme Court nominees, however, length and variety of service is no substitute for professional distinction. Having carefully reviewed the hearing record, we can reach no other conclusion but that Judge Carswell has failed to distinguish himself in each of these capacities.

Our opposition to Judge Carswell is not based on geography or philosophy.

In his campaign speeches, President Nixon pledged appointees to the Court who were both "strict constructionists" and men of distinction. There are many such men throughout the country—including eminent jurists, lawyers, and legal scholars in the South. Judge Carswell, unfortunately, is not among them. Professor William Van Alstyne one of the most eminent legal scholars in the South and a supporter of Judge Haynsworth's nomination, testified that Judge Carswell shows no promise of ability or judicial capacity "to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States." We believe it is reasonable to require that expectation of a nominee.

Our concern is not with academic degrees or scholarly publications. It is simply that we believe appointments to the Court should evidence some degree of achievement and eminence in the law. To demand less is a disservice to the cherished place of the Supreme Court in our national life. Nominations to the Supreme Court should serve to enhance respect for the Court. The Carswell nomination, in contrast, demeans it.

Beyond Judge Carswell's competence, there is a further disturbing aspect of his candidacy. Judge Carswell's record indicates that he is insensitive to human rights and

has allowed his personal views and biases to invade the judicial process. His decisions and his courtroom demeanor have been openly hostile to the black, the poor, and the unpopular. This record raises serious questions about his judicial temperament and his ability to provide a fair hearing on many of the great issues that will come before the Supreme Court.

Confirmation of this nomination would discredit the Senate and the Court. Most important, it would be a disservice to the finest ideals of the American people.

While each of us places different emphasis on the various points raised in the hearings, we feel it would be helpful to bring together, in one place, the mass of information calling into question Judge Carswell's qualifications. The following memorandum summarizes all of the information offered in opposition to the nomination.

MEMORANDUM ON THE QUALIFICATIONS OF G. HARROLD CARSWELL FOR THE SUPREME COURT OF THE UNITED STATES

I. INTRODUCTION

The role of the Supreme Court in our national life is too vital to be endangered by the appointment of men whose qualifications are subject to serious doubt.

Judge G. Harrold Carswell has not demonstrated that he meets the high standard of excellence that must be demanded of those chosen to serve on the nation's highest court.

He has exhibited no legal distinction, no judicial leadership, no outstanding qualities that would place him among the first rank of American judges and lawyers. Our concern is not with academic degrees or scholarly publications. It is simply that we believe appointments to the Court should contain some degree of achievement and eminence in the law.

Moreover, we are concerned that Judge Carswell's record indicates that he is insensitive to human rights and has allowed this insensitivity to invade the judicial process. This record raises serious questions about Judge Carswell's judicial temperament and his ability to provide a fair hearing on many of the great issues that come before the Supreme Court.

It has been suggested that since the Senate rejected the first candidate for this vacancy, the Senate must now acquiesce in the President's choice, no matter how inferior the selection.

Obviously, reason presses in precisely the opposite direction. If this nominee, as is universally conceded, is inferior to the prior nominee, whom the Senate rejected 55–45, then he certainly ought to be rejected by at least as great a margin.

The Senate's duty to render "Advice and Consent" to the President's Supreme Court appointments is a Constitutional responsibility of the first magnitude. That duty persists in full measure even when it has been met by rejecting a prior nominee. The Senate's duty is to assure the nation that the nominee who is accepted will be *better* qualified, not less qualified, than the previously rejected nominee or nominees.

Moreover the question of the nominees qualifications is too serious to be brushed aside by the suggestions that opposition to him is based on the fact that he is a southerner or a "judicial conservative".

All of those who voted against reporting the Carswell nomination favored the confirmation of the present Chief Justice, notwithstanding his reputation as a "judicial conservative." His eminence, his leadership and his integrity in every sense of the word, led to the conclusion that he well met the criteria for Supreme Court service.

There are, in fact, an array of candidates of all parties and philosophies including many from the South whom Carswell's opponents would be not only obligated, but pleased to confirm. Unfortunately, Judge Carswell is not among them.

II. JUDGE CARSWELL'S LACK OF PROFESSIONAL COMPETENCY

Despite the many questions about Judge Carswell's suitability, which will be discussed below, there might still be some basis for supporting his confirmation to the Supreme Court if he were a man of great intellectual and professional distinction. At least then there would be hope that once on the Supreme Court, he would display a capacity for growth that would enable him to deal capably and objectively with the matters of vast importance that come before the Court.

He is, however—at best—an undistinguished lawyer, a mediocre judge, and an unimpressive thinker. He has demonstrated neither the depth of intellect nor of understanding that would indicate that he might fill with honor and insight the seat once held by Felix Frankfurter and Benjamin Cardozo. He is, instead, in the opinion of the Deans of two or our most respected law schools, a man who is personally unqualified to sit on the Supreme Court. Dean Louis Pollak of Yale testified that Judge Carswell—

"Has not demonstrated the professional skills and the larger constitutional wisdom which fits a lawyer for elevation to our highest court . . . With all deference, I am impelled to conclude that the nominee presents more slender credentials than any nominee for the Supreme Court put forth this century."

Dean Derek Bok of Harvard has written that Judge Carswell has—

"A level of competence well below the high standards that one would presumably consider appropriate and necessary for service on the Court."

Twenty members of the University of Pennsylvania Law School examined his opinions in various areas of the law and concluded "that he is an undistinguished member of his profession, lacking claim to intellectual stature." Charles L. Black, Jr., Luce Professor of Jurisprudence at the Yale Law School and one of the most respected members of the academic legal community stated in a letter to the Chairman "(T)here can hardly be any pretense that he (Carswell) possesses any outstanding talent at all. On the contrary, all the evidence I have seen would lead to the conclusion that mediocrity is an independent valid objection to his appointment."

Professor Guido Calabresi of Yale reviewed Judge Carswell's opinions in Tort cases, an area that Professor Calabresi has taught for eleven years and concluded "there is nothing in them to suggest any special distinction or qualification for the United States Supreme Court." Interestingly, Professor Calabresi also noted that Judge Carswell's opinions in the field of Torts "do not show that universal a dedication to precedent and strict construction which it is said the President desires."

In a letter to Senator Eastland, John Griffiths, a teacher and scholar in criminal law at the Yale Law School, well expressed the thoughts of many lawyers who have written to members of the Senate:

"Surely there can be no doubt but that only the most distinguished and technically qualified members of the legal profession ought even to be considered for the highest court in the nation. Surely, also, it is part of the Senate's duty to exercise its responsibility in confirmation so as to maintain the highest standard, in proficiency as well as in integrity, as a *minimum* qualification for elevation to the Supreme Court. But while the subject has not been intensively discussed, there is certainly widespread belief in the profession, and beyond, that Judge Carswell falls far short of any reasonable minimum standard and ought therefore not to be confirmed."

After examining the nominee's criminal law decisions, Professor Griffiths concluded:

"We found no sign whatever of special ability. Judge Carswell's opinions are characterized, at best, by unimaginative, mechanical mediocrity. This is not a matter of judicial ideology: one did not expect to find a future Justice Black or Brennan, but no potentially solid (let alone great) judicial conservative—no Justice Harlan, no Judge Friendly—is revealed in these opinions either. We found nothing that, by anyone's lights, could conceivably justify confirming Judge Carswell to the Supreme Court. In addition, we found some troublesome indications of a lack of proper judicial temperament in the Judge."

Professor Griffiths also cited "lack of technical ability" and "serious questions of craftsmanship" at least, if not "judicial integrity" in habeas corpus cases; see infra.

These views have been mirrored in the statement of Samuel I. Rosenman, Bruce Bromley, Francis T. P. Plimpton, and Bethuel M. Webster, all recognized leaders of the bar. Judge Carswell, they believe, "has none of the legal or mental qualifications essential for service on the Supreme Court or on any high court in the land, including the one where he now sits."

The Chicago Council of Lawyers reached a similar conclusion:

"Looking solely at Judge Harrold Carswell's judicial record and judicial accomplishments, one finds no evidences of that special merit that should be a sine qua non for appointment to the Supreme Court. His record is totally devoid of any special attributes of learning, experience, or statesmanship, which should be the hallmarks of a Supreme Court Justice."

Perhaps most telling was the testimony of Professor William Van Alstyne of the Duke University Law School, one of the most distinguished legal scholars in the South. Professor Van Alstyne had testified before the Senate Judiciary Committee in support of Judge Haynsworth, but testifying in opposition to Judge Carswell, Professor Van Alstyne concluded that Judge Carswell's decisions reflected "a lack of reasoning, care, or judicial sensitivity overall."

The outpouring of professional dismay over this nomination has reached a level unequaled in recent history. Lawyers and law professors from all over the country, despite their preference for maintaining cordial relationships with members of the Court, have forcefully expressed the view that the Carswell nomination will demean the Court and dilute its stature. Other lawyers, professors, bar officials and judges, have been constrained from expressing themselves because of their positions or affiliations, or because they have cases pending in the Supreme Court. But they, like most lawyers, would, in the words of a law professor and former U.S. Assistant Attorney General, "put a high premium on the capacity for perceptive legal thinking, for judicial decision-making that commands respect whether one agrees with the results or not . . . It is right for the Senate to insist that a nominee, if not among the 'best', at least have qualities sufficiently distinguished that he promises to make a material contribution to the intellectual work of the Court." And they would agree that "Nothing that has appeared would lead me to believe that Judge Carswell is so qualified."

III. JUDGE CARSWELL'S LACK OF JUDICIAL TEMPERAMENT

Our judicial system must accord litigants a fair hearing. Justice is not dispensed when a judge's personal views and biases invade the judicial process. In Judge Carswell's court, the poor, the unpopular and the black were all too frequently denied the basic right to be treated fairly and equitably.

Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices. His hostility towards particular causes, lawyers, and litigants was manifest not only in his decisions but in his demeanor in the courtroom.

Professor Leroy Clark of New York University, who supervised the NAACP Legal Defense Fund litigation in Florida between 1962 and 1968, called Judge Carswell—

"(T)he most hostile federal district court judge I have ever appeared before with respect to civil rights matters . . . Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.

"It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel."

And Mr. Clark provided a piece of evidence not at all dependent on his present recollection of the nominee's behavior but reflecting a contemporaneous assessment and reasoned response that is at once startling and devastating:

"(W)henever I took a young lawyer into the state, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day."

Professor John Lowenthal of Rutgers University Law School recalled attending a session in Judge Carswell's chambers in 1964 in which he "can only describe his (Judge Carswell's) attitude as being extremely hostile."

"He expressed dislike at Northern lawyers . . . appearing in Florida, because . . . (they) were not members of the Florida bar."

The choice, as the court well knew, was between "Northern lawyers or no lawyers", for Professor Lowenthal's clients had been arrested for trespass while attempting to assist sharecroppers to register to vote.

Norman Knopf, a Justice Department Attorney, testifying under subpoena, who had worked with Professor Lowenthal as a volunteer in 1964, corroborated Professor Lowenthal's recollections:

"Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on . . . It was a long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people, and he in effect didn't want any part of this, and he made quite clear that he was going to deny all relief that we requested."

Judge Carswell's manifest intention to deny all relief did not represent an idle threat. Professor Lowenthal's clients had been tried in a state court and imprisoned in a county jail when a local judge had refused to recognize the removal jurisdiction of Judge Carswell's court. As Professor Lowenthal pointed out, "it was evident to all those with experience in Northern Florida that it was not safe for voter registration people to be in local jails." Nevertheless, Judge Carswell's attitude and actions were ones of delay and harassment.

Indeed, when Professor Lowenthal's predecessor in the case, Ernst H. Rosenberger, had initially sought to remove it from the state court, he had been required to pay a filing fee in Judge Carswell's court, despite the clearly controlling decision of the Fifth Circuit in *Lefton* v. *Hattiesburg*, 333 F. 2d 280, that no such fee could be demanded.[1] Subsequently, when Professor Lowenthal and Mr. Knopf attempted to file a habeas corpus petition for their clients, Judge Carswell did not permit them to do so until they had wasted valuable time attempting to obtain the signatures of the imprisoned civil rights workers, despite the fact that Rule 11 of the Federal Rules of Civil Procedure indicates that the attorney's signatures are sufficient.

Moreover, Judge Carswell would not accept the habeas corpus petition that Mr. Knopf had painstakingly drawn up until it was redone on special forms provided by the court, although the forms had no applicability to habeas corpus petitions arising out of the refusal of a state court to honor the jurisdiction of the federal courts in a removal proceeding.

Despite the barriers that Judge Carswell placed before them, Professor Lowenthal and Mr. Knopf were finally able to file habeas corpus petitions and to demonstrate to Judge Carswell that he had no choice under the law but to grant the petitions. Judge Carswell, however, still managed in a series of actions to thwart their efforts to keep the improperly detained civil rights workers out of jail. The normal process would have been to grant the petitions, take custody of the petitioners, hold a hearing on the appropriateness of removal if local authorities challenged it, and if the decision was adverse to petitioners, stay the removal pending appeal. However, as described by Professor Lowenthal, at the same time that Judge Carswell granted the habeas corpus petitions—

"(O)n his own motion, because the Gadsden County officials were not there to ask for it, and without notice to the defendants, the habeas corpus petitioners, and without a hearing or any opportunity to present testimony or argument, he remanded the cases right back to the Gadsden County courts.

"I at that point moved before Judge Carswell directly for a stay of the remand so that I could have time to file a notice of appeal to the Fifth Circuit. He denied my request for a stay, pending filing notice of appeal."

Judge Carswell also refused to have the marshall serve the habeas corpus order on the Gadsden County sheriff despite the requirement of 28 U.S.C. Sec. 1446(f) that—

"If the defendant or defendants are in actual custody on process issued by the state court, the District court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such state court."

When Professor Lowenthal served the writ of habeas corpus himself the sheriff first released but then immediately rearrested the civil rights workers pursuant to the unrequested remand. It is not clear how he learned of his authority to do so. Professor Lowenthal testified as follows:

"The sheriff produced the jailed voting registration workers, at once rearrested them because *Judge Carswell had had his marshal telephone the sheriff to advise the sheriff that Judge Carswell had on his own motion remanded the cases right back to the Gadsden County court* . . .

"I was in Judge Carswell's chambers and office, and I do not remember whether I overheard the conversation between Judge Carswell and his marshal or whether somebody reported this to me. I do not know. What I do know is that when I got to the sheriff with the habeas corpus order to release the man, the sheriff already knew of the remand, and therefore on the spot produced the defendants and rearrested them and put them back in jail."

The experience of Ernst Rosenberger who preceded Professor Lowenthal as a representative of the American Civil Liberties union in Northern Florida were indicative of Judge Carswell's willingness to go beyond the courtroom to deny litigants their basic rights.

Mr. Rosenberger represented nine clergymen freedom riders arrested in a Tallahassee airport restaurant in 1961. There had been numerous appeals in the case and as a result of a filing date having been missed the appeals were terminated. At the time Mr. Rosenberger entered the case the only recourse open to the clergymen was a writ of habeas corpus. Judge Carswell denied the writ without a hearing on the merits, and the case was immediately appealed to the Fifth Circuit which modified Judge Carswell's order so that it provided for an immediate hearing by Judge Carswell if the state court did not grant such a hearing.

On the same day that the judges of the Fifth Circuit rewrote Judge Carswell's order, Mr. Rosenberger met with Judge Carswell and Mr. Rhoads, the City Attorney of Tallahassee. On his own initiative Judge Carswell then suggested to Mr. Rhoads "that this whole case could be ended by reducing the sentences of the clergymen to the time already served," although the petitioners had requested no such reduction and in fact wished to have their claims decided on the merits so that their records could be cleared. As Mr. Rosenberger pointed out, Judge Carswell's advice "could have no other effect except to moot the entire question, to leave . . . (the clergymen) with no way for vindication, to insure them a permanent criminal record. This was a matter where the judge advised the City Attorney in a state court proceeding actually of how to circumvent an order which had been put in by the U.S. Circuit Court." The City Attorney and the state judge thereupon followed Judge Carswell's advice despite the objections of Mr. Rosenberger, and totally preempted the legitimate efforts of the clergymen to obtain a judicial ruling.

The impressions and experiences of Professor Clark, Professor Lowenthal, Mr. Knopf and Mr. Rosenberger paint a picture of blatant hostility and aggressive unfairness that casts serious doubts upon Judge Carswell's judicial temperament to sit even on the District Court much less on the Supreme Court of the United States. Judge Carswell did not take the stand to rebut these charges. His general statement that there has never been "any suggestion of any act or word of discourtesy or hostility on . . . his (part)" certainly does not dispel the doubts they raised. None of them have anything to gain by misleading the Committee or the Senate. In particular, it is worth remembering that Mr. Knopf is an employee of the Justice Department of the United States, who testified pursuant to a subpoena.

IV. JUDGE CARSWELL'S REFUSAL TO ADHERE TO CONTROLLING LAW IN EQUAL RIGHTS CASES

The Majority report of the Committee on the Judiciary concludes that Judge Carswell's judicial record in the field of civil rights cases is "one of balance and even-handedness." In fact it was one of obstruction and delay, amounting too often to an improper refusal to follow the mandates of the Constitution and the clear guidelines of the higher courts.

Judge Carswell handled extensive litigation involved in desegregating three northern Florida school districts—Escambia County, containing Pensacola, Leon County containing Tallahassee, and Bay County.

[1] "Filing fees are not to be collected in connection with criminal removal petitions. Such fees are regulated by statute, and a comparison of the present statute with its predecessor shows that there is now no authority for the clerk to charge fees in such proceedings." 333 F. 2d at 285.

The Pensacola case, *Augustus* v. *Board of Public Education of Escambia County*, 185 F. Supp. 450 (1960), *reversed* 306 F. 2d 862 (1962) first came before Judge Carswell in 1960. It was still in court last year.

In the initial complaint students asked Judge Carswell to end faculty segregation as an essential step in making school integration work. The question of faculty segregation was unsettled at the time, but, Judge Carswell refused to even hold a hearing on the issue and struck the whole issue from the complaint, asserting that students had no standing to sue for desegregated faculties any more than they "can bring action to enjoin the assignment to the school of teachers who were too strict or too lenient."

Moreover, Judge Carswell did not even obtain a student desegregation plan from local authorities for a year and a half. Then he approved a plan that allowed another year before even token desegregation would begin. And that plan provided for only vague notification of rights to parents, allowed only 5 days a year for Negro students to request transfer to white schools, and authorized the school board to reject such transfer applications on a variety of general grounds contained in the Florida Pupil Assignment Act.

Because of the danger that such plans could be used to maintain segregation, the Fifth Circuit had previously held in 1959 that a school board's adoption of the Florida Pupil Assignment Law did not meet the requirements of a plan of desegregation or constitute a "reasonable start toward full compliance" with the Supreme Court's 1954 decision in *Brown*. *Gibson* v. *Board of Public Instruction of Dade County, Florida*, 272 F. 2d 763 (1959). The Fifth Circuit had reaffirmed this decision in 1960. *Mannings* v. *Board of Public Instruction of Hillsborough County, Florida*, 227 F. 2d 370 (1960).

In *Gibson* the Fifth Circuit also held that the Pupil Assignment Law, even if administered nonracially, was not enough to satisfy a school board's duty to desegregate; it had to be desegregating its schools simultaneously with the application of the Pupil Assignment Law.

Despite the clarity of the law on this point, and despite Judge Carswell's obligation to follow the decisions of the Fifth Circuit, the desegregation order he entered against Escambia County in 1961, provided, in effect, only that the Board should continue using the Pupil Assignment Law which, up to that time, had resulted in the continuation of a fully segregated school system. No meaningful additional steps were required.

The 5th Circuit had no trouble reversing both of Judge Carswell's action.

As to Judge Carswell's striking of the reference to faculty segregation, the 5th Circuit ordered a hearing on the allegation that students are injured by the policy of faculty segregation saying:

"Whether as a question of law or of fact, we do not think that as a matter of such importance should be decided on a motion to strike . . ."

As to the desegregation plan the court said "It has not gone far enough . . . ," and proceeded to instruct Judge Carswell as to the minimum that should be required.

In the discussion of Judge Carswell's handling of desegregation in Escambia County the 5th Circuit made clear that a school board could not constitutionally adopt a plan of desegregation under which all pupils would be given a blanket reassignment to the segregated schools they were presently attending and black students desiring to attend an integrated school would be required to go through the procedures of the Florida Pupil Assignment Law before they would be assigned to a white school. Yet, the plan subsequently presented to Judge Carswell in the Leon County case proposed to do just that. Moreover, the plan provided for the desegregation of schools at the rate of only one grade per year, despite the direction of the 5th Circuit in the Escambia County case that at least two years should be desegregated the first year if, as provided for under the Leon County plan, desegregation did not begin until 1963. Nevertheless Judge Carswell approved the plan, *Steele* v. *Board of Public Instruction of Leon County*, 8 Race Rel. L. Rep 932 (1963), disregarding the guidelines set for him by the 5th Circuit in the previous case.

The children of Bay County fared no better in Judge Carswell's court. In *Youngblood* v. *Board of Public Instruction of Bay County, Florida*, 230 F. Supp. 74 (1964), Judge Carswell again disregarded the guidelines set for him in the Escambia County case as well as the intervening Supreme Court decision in *Griffin* v. *County School Board of Prince Edward County*, 337 U.S. 218 (1964) in which the Court held that "there has been entirely too much deliberation and not enough speed in enforcing * * * constitutional rights * * *." In Bay County Judge Carswell once more approved a plan that placed the barriers inherent in the Florida Pupil Assignment Law before black students wishing to transfer to white schools. Moreover, the plan did not provide for any transfers whatsoever until the 1965–66 school year.

A review of the desegregation schedules approved by Judge Carswell in Escambia, Leon and Bay Counties indicate clearly that a decade after *Brown*, he was unwilling to accept the dictates of the Constitution even when they had been specifically defined by courts superior to his own.

After the Fifth Circuit had reversed his earlier order in *Augustus* v. *Board of Public Instruction of Escambia County*, Judge Carswell ordered the elimination of dual school attendance zones, drawn up by race, at the rate of a grade a year. 8 Race Rel. L. Rep. 58 (1962). On April 20, 1965, Judge Carswell denied plaintiffs' motion for changes in the plan ordered in 1962. 11 Race Rel. L. Rep. 148 (1965). A further order denying relief to plaintiffs was entered by Judge Carswell on October 6, 1965. *Id.* Thus, grade-a-year desegregation remained in force.

On April 22, 1963, Judge Carswell ordered grade-a-year elimination of such dual attendance zones in *Steele* v. *Board of Public Instruction of Leon County*. 8 Race Rel. L. Rep. 934 (1963). On January 20, April 17, and April 19, 1965, Judge Carswell denied plaintiffs' motions for changes in the plan ordered in 1963. 10 Race Rel. L. Rep. 607 (1965). Thus, grade-a-year desegreation remained in force.

On July 20, 1964, Judge Carswell ordered a grade-a-year elimination of such dual attendance zones in *Youngblood* v. *Board of Public Instruction of Bay County*. 9 Race Rel. L. Rep. 1206 (1964).

At the desegregation rate ordered by Judge Carswell, dual attendance zones based on race would not have been completely eliminated in the Escambia County school case until the start of the 1973–74 school year. Desegregation would have been completed in the Leon County school case at the start of the 1974–75 school year. In the Bay County school case, it would have taken until the start of the 1975–76 school year, or 21 years after *Brown*.

The Third, Fourth, Fifth and Eighth Circuits, however, had all held that such slow rates of desegregation were constitutionally unacceptable *before* Judge Carswell made the first of his 1964 and 1965 rulings upholding this rate.

Ruling on July 19, 1960, the Third Circuit in *Evans* v. *Ennis*, 281 F. 2d 385, cert. den. 364 U.S. 933 (1961) rejected a grade-a-year plan beginning in the Fall of 1959. It ruled that, as a matter of law, all grades had to be desegregated by the Fall of 1961.

The Sixth Circuit was the next to rule. In *Goss* v. *Board of Education of the City of Knoxville, Tennessee*, 301 F. 2d 164 (April 3, 1962) *reversed in other respects* (discriminatory pupil transfer plans which had been approved by the Sixth Circuit), 373 U.S. 683 (June 3, 1963), the court of appeals rejected a grade-a-year plan and ordered a faster rate of desegregation. It reaffirmed this position in *Northcross* v. *Board of Education of the City of Memphis*, 333 F. 2d 661 (June 12, 1964).

On June 29, 1963, the Fourth Circuit took the identical position in *Jackson* v. *School Board of the City of Lynchburg, Virginia*, 321 F. 2d 230.

On June 18, 1964—a month before Judge Carswell ordered a grade-a-year plan in the Bay County case—the Fifth Circuit held that a grade-a-year plan was impermissible in the case before it because, even though a large metropolitan school system was involved, there was no reason that would justify such a slow rate of desegregation. The court said:

"Plans providing for the integration of only one grade a year are now rare; and the possibility of judicial approval of such a grade-a-year plan has become increasingly remote due to the passage of time since the Brown decisions."

Armstrong v. *Board of Education of the City of Birmingham, Alabama*, 333 F. 2d 47, 51.

The Fifth Circuit's position was made unmistakably clear on February 24, 1965, months before Judge Carswell denied motions to change the grade-a-year plan in the Escambia County and Leon County school cases. On that date, the court of appeals decided *Lockett* v. *Board of Education of Muscogee County School District, Georgia*, 342 F. 2d 225, which outlawed any use of grade-a-year plans. Discussing its own decisions on grade-a-year plans and the clarity of the law on this point, the court of appeals stated:

"The grade a year plan came into rather wide use but, with the passage of years, fell into judicial disfavor mainly because of the inability to offer proof sufficient to sustain the burden, which was on the school boards, that such delay was necessary. We sent up a warning flag in *Davis* v. *Board of School Commissioners of Mobile County*, 5 Cir., 1963, 318 F. 2d 63, that the day was near at hand when grade a year plans would no longer pass muster. In *Watson* v. *City of Memphis*, 1963, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529; *Goss* v. *Board of Education of the City of Knoxville, Tennessee*, 1963, 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632; and *Griffin* v. *County School Board of Prince Edward County*, 1963, 375 U.S. 391, 84 S. Ct. 400, 11 L. Ed. 2d 409, the Supreme Court, in rather rapid fire order, made the point, in language understandable by all, that the doctrine of "all deliberate speed" could no longer be viewed, due to the passage of years, in the same context as when announced. Following these cases, the court in *Calhoun* v. *Latimer*, 1964, 377 U.S. 263, 84 S. Ct. 1235, 12 L. Ed. 2d 288, where we had approved Atlanta's grade a year plan, see 321 F. 2d 302, remanded the case to the District Court for reappraisal of the speed of the plan in light of Watson, Goss, and Griffin. It was then beyond peradventure that shortening of the transition period was mandatory."

342 F. 2d at 227. The court of appeals then noted that, in five cases it had decided the previous summer, it had decided that all grades in those school systems had to be desegregated by Sepetmber 1969, "or earlier, as we pointed out, if the school boards are unable to justify the delay on a future complaint." 342 F. 2d at 228. The court stated that these decisions had laid out "minimal standards to be applied in other cases. *Id.* at 229. In the face of this decision, however, Judge Carswell still refused to review the grade a year plans that he had approved several years earlier.

Judge Carswell also managed to delay desegregtion of the Florida state reform schools. *Singleton* v. *Board of Commissioners of State Institutions*. 11 Race Rel. L. Rep. 903, reversed 356 F. 2d 771 (5th Cir. 1966).

The plaintiffs in this case were inmates at the time the suit was brought, but had been released on conditional probation while the suit was pending in the district court. The plaintiffs were still juveniles and, under Florida statutes, would be subject to the jurisdiction of the juvenile court until their twenty-first birthday. The plaintiffs were subject to recommitment if they violated the terms of the probation.

Judge Carswell dismissed the complaint on the ground that the plaintiffs lacked standing, even though they could be re-committed in the future and were still subject to the jurisdiction of the juvenile court.

In the opinion reversing Judge Carswell's decision, the 5th Circuit pointed out that Judge Carswell's approach would preclude any effective effort to desegregate the facilities since the average stay in the reform school was less than the time necessary to file an action and obtain a court order.

Judge Carswell's record in equal rights cases other than these involving school desegregation is no less discouraging. His highly questionable actions in *Wechsler* v. *Gadsden County* have already been discussed at length in the section of this memorandum on *Judicial* Temperament. Two other cases, *Dawkins* v. *Green*, 285 F. Supp. 772 (1968) and *Due* v. *Tallahassee Theatres, Inc.*, 9 Race Rel. L. Rep. 904 (1963), are also particularly indicative of Judge Carswell's unwillingness to follow the dictates of the 5th Circuit and the Supreme Court when they conflicted with his basic predilections. The suit involved in *Due* was brought by black residents of Tallahassee against city officials, the sheriff of Leon County and local theatre corporations and their owners. The suit charged that the defendants were conspiring to deprive the black residents of Tallahassee of their civil rights. The Court of Appeals summarized the thrust of the complaint:

"We take the following statement from the brief of the appellee Joyce, which brief has been accepted in full by the other appellees:

"The substance of this conspiracy is said to be that the Appellees, under color of law, pursue and enforce a policy of requiring white persons in Tallahassee to conduct their private business establishments on a segregated basis, which object is accomplished by requiring peace officers to disperse or arrest and jail any negroes attempting to secure services on a non-segregated basis. The Appellants allege that all of the previously enumerated acts [specific allegations dealing with the refusal of the Theatres to permit Negroes to enter the theatres even after, on one occasion, purchasing tickets] were done in pursuance of the conspiracy, and that the said actions of the Appellees constitute State action prohibited by the Fourteenth Amendment."

Judge Carswell dismissed the first three of five claims in the complaint described above, for failure to allege a claim on which relief could be granted. 9 Race Rel. L. Rep. 904. Chief Judge Tuttle, speaking for a unanimous panel, treated this ruling unusually sharply:

"The orders of the trial court dismissing the complaint for failure to allege a claim on which relief could be granted can be quickly disposed of. These orders were clearly in error."

* * * * *

"It appears, in fact, to be a classical allegation of a civil rights cause of action."

* * * * *

"There is no doubt about the fact that the allegations here stated a claim on which relief could be granted, if the facts were proved."

333 F. 2d at 631.

On May 20, 1963—five months before Judge Carswell's decision—the Supreme Court had ruled that local officials in New Orleans had violated the Constitution by pressuring white businessmen to maintain segregated restaurant operations and by causing the arrest of black citizens seeking desegregated services. *Lombard* v. *Louisiana*, 373 U.S. 267. Although this decision involved the reversal of criminal convictions, the principle of law discussed was identical to that involved in the *Tallahassee Theatres* case.

Furthermore, when the sheriff of Leon County filed a motion for summary judgment in the *Due* case, Judge Carswell granted the motion on the ground that "there is no genuine issue as to any material fact." 9 Race L. Rep. 904, 905. The opinion of the Fifth Circuit states, however, that the sheriff had filed only a conclusionary affidavit denying only some of the violations of law charged against him. The Circuit Court said the affidavit showed only that "conflicting evidence exists," 333 F. 2d at 633. Nevertheless Judge Carswell chose to give complete effect to the sheriff's unsubstantiated affidavit, and no effect to the plaintiffs' depositions, and denied the plaintiffs an opportunity for any factual hearing and cross-examination. This action, too, was reversed by the Fifth Circuit:

"There clearly remained issues of fact to be determined on a full trial of the case. . . ."

333 F. 2d at 633.

Judge Carswell learned no lesson from *Due*, however. In *Dawkins* v. *Green*, plaintiffs sued several officials of the City of Gainesville and of Alachua County, Florida, charging that the defendants had initiated bad faith prosecutions against the plaintiffs in an attempt to retaliate against them for engaging in civil rights activities in the past and to intimidate them from doing so in the future. The defendants filed a motion for summary judgment in their favor, and filed affidavits in support of their motion.

Again, Judge Carswell accepted all of the allegations of the defendants' affidavits as true, coupled that with "the presumption that the State's motive was law enforcement and not interference with speech or assembly" (quoting from the dissenting opinion in *Cameron* v. *Johnson*, 390 U.S. 611, 623 (1968)), and stated his findings in broad terms:

"From the proofs here it is clear that there was no harassment, intimidation or oppression of these complainants in their efforts to exercise their Constitutional rights, but some were arrested and they are being prosecuted in good faith under Constitutionally valid criminal laws of the State of Florida."

285 F. Supp. 772, 774. He then granted the motions for summary judgment in favor of all of the defendants, and dismissed the case.

In reversing Judge Carswell, the court of appeals described the affidavits filed by the defendants:

"However, the affidavits filed by the defendants are simply a restatement of the denials contained in their answer and add no new information. Moreover, they set forth only ultimate facts or conclusions in that their contents are statements by the county and city officials involved to the effect that they did not enforce the laws against plaintiffs in bad faith. No facts were present so that the trial Court could arrive at its own conclusions."

412 F. 2d 644 (June 2, 1969).

Previously, the Fifth Circuit had ruled that the affidavits containing only "mere conclusions of fact" have no probative value. *Woods* v. *Allied Concord Financial Corporation*, 373 F. 2d 733, 734 (1967). In *Dawkins*, the court of appeals stated in a footnote: "This rule is well founded in the law." 412 F. 2d at 646 note 4. The court concluded:

"Since the affidavits that were before the trial Court were of no probative value, this is not a case in which summary judgment was 'appropriate.'"

The point of law was the same used in reversing Judge Carswell previously in *Due*.

The aforegoing examination of Judge Carswell's decisions touching upon civil rights issues reveals that he is not, in fact, a "strict constructionist" in any sense of that vague term. Indeed, he has displayed little, if any, regard for the principle of "stare decisis" when its application has directly required him to follow the holdings of the 5th Circuit and the Supreme Court in civil rights cases. His decisions in this area merely reinforce the picture of a judge who was unable to divorce his personal prejudices from his judicial functions.

V. JUDGE CARSWELL'S DISDAIN FOR THE WRIT OF HABEAS CORPUS

Historically, the writ of habeas corpus—the Great Writ—might well represent the most precious safeguard possessed by a free people against abusive and improper governmental confinement. Indeed, in Art. I, Section 9, the writ of habeas corpus has been constitutionally enshrined. Because the writ often stands as the final judicial guarantee against the tragedy of erroneous imprisonment, each application demands scrupulous attention.

An examination of Judge Carswell's habeas corpus decisions evidences a judge who does not take seriously the importance of this vital Constitutional provision. It reveals a judge who has developed with regard to the writ a pattern of inattentiveness—inattentiveness which could deprive our Constitution of any real meaning. It reveals a judge who is inclined to look the other way.

The record reveals that in at least nine cases, Judge Carswell has been unanimously reversed *for refusing even to grant a hearing* in habeas corpus proceedings or similar proceedings under 28 U.S.C. § 2255. Whether this unseemly record is the product of simple callousness, obliviousness to constitutional standards, or pure ignorance of the law, one might only surmise.

In *Meadows* v. *United States of America*, 282 F. 2d 942 (1960) the petitioner moved under 28 U.S.C. § 2255 to set aside his sentence on the ground of a prior determination of mental illness which made it impossible for him to make intelligent waivers and pleas. Judge Carswell denied the motion without hearing. The court of appeals reversed most preemptorily, saying this was an adequate petition and obviously should have a hearing.

In *Dickey* v. *United States*, 345 F. 2d 508 (1965), the petitioner moved to vacate judgment on the ground that he was mentally incompetent at the time he waived counsel. Judge Carswell denied the motion without an evidentiary hearing. Again he was reversed unanimously and instructed to give the man a hearing.

In *Baker* v. *Wainwright*, 391 F. 2d 248 (1968), petitioner alleged that he was denied the right to counsel on appeal from his conviction. After conviction, petitioner had filed an affidavit of insolvency and per se notice of appeal. The State court did not apprise him of his right to have counsel appointed.

Judge Carswell denied habeas corpus without evidentiary hearing and again he was reversed.

In *Dawkins* v. *Crevasse*, 391 F. 2d 921 (1968), the Fifth Circuit unanimously reversed Judge Carswell when he denied bail to a habeas corpus petitioner without a hearing. The Circuit Court directed him to enter an order granting bail.

In *Brown* v. *Wainwright*, 394 F. 2d 153, (1968), petitioner alleged that his incriminating statements used against him were involuntary and requested habeas corpus.

Judge Carswell denied the petition without holding an evidentiary hearing and again was reversed unanimously and directed to give the hearing.

In *Harris* v. *Wainwright*, 399 F. 2d 142 (1968), at the hearing of the petitioner's post-conviction attack in a State court, petitioner was not represented by counsel. The State court held that petitioner was represented by "able counsel" and the conviction was not illegal.

Judge Carswell denied a request for a hearing summarily. He was reversed unanimously.

In *Barnes* v. *Florida*, 402 F. 2d 63 (1968), petitioner alleged coercion of guilty plea and ineffective assistance of counsel. He alleged that he saw court-appointed counsel for only a few minutes four days before trial and a few minutes prior to trial. He claimed that the attorney coerced him into pleading guilty and submitted portions of a certified letter from the lawyer as proof.

Judge Carswell denied this habeas corpus petition without a hearing. The case was unanimously reversed and remanded for evidentiary hearing.

Similarly Judge Carswell refused hearings and was reversed in *Rowe* v. *U.S.*, 345 F. 2d 795 (1965) and *Cole* v. *Wainwright*, 397 F. 2d 810 (1968).

Judge Carswell's insensitivity to the need for careful study of charges that basic constitutional rights have been denied indicates once again his lack of concern for human rights.

A study of Judge Carswell's record in the area of habeas corpus by Professor John Griffiths of Yale Law School and others concluded by stating that in the area that they investigated, "Judge Carswell's judicial performance does not qualify him for elevation to the Supreme Court." It is a difficult conclusion to dispute.

VI. JUDGE CARSWELL'S INSENSITIVITY TO HUMAN RIGHTS

Shortly after Judge Carswell's nomination was sent to the Senate, a reporter discovered and brought to the nation's attention a speech given by the nominee when he was a candidate for the Georgia State Senate in 1948, and then reprinted by him in the weekly newspaper which he edited.

The full text of the speech is set forth in the Hearing Record at pages 21–23, but the passages which have attracted most attention are these:

"I am a Southerner by ancestry, birth, training, inclination, belief and practice. I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed, and I shall always so act. I shall be the last to submit to any attempt on the part of anyone to break down and to weaken this firmly established policy of our people.

"If my own brother were to advocate such a program, I would be compelled to take issue with and to oppose him to the limits of my ability.

"I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed."

The nominee was a 28 year old attorney at the time, and the time was 21½ years ago. Surely, no reasonable person would contend that *merely* because he uttered those words in 1948, he necessarily believes them in 1970. And we are concerned about what he is in 1970, what kind of man, what kind of judge.

The nominee himself stated the point of inquiry:

"There is nothing in my private life, nor is there anything in my public record of some 17 years, which could possibly indicate that I harbor racist sentiments or the insulting suggestion of racial superiority. I do not so do, and my record so shows."

Judge Carswell's official and unofficial conduct must be scrutinized with this standard in mind, as well as for its implications regarding his professional qualifications. Some of the evidence has already been discussed such as his attitudes toward civil rights lawyers, his resistance to granting civil rights relief in the face of a clear responsibility to do so, the record of repeated reversals on civil rights cases and his aiding local officials to deprive civil rights workers due process of law.

Other pieces of evidence may be less dispositive, and even minor, taken separately, but taken together they confirm a clear pattern. On July 11, 1953, George Harrold Carswell became United States Attorney for the Northern District of Florida. On December 16, 1953, the Florida Circuit Court for Leon County approved the Charter of the Seminole Boosters, Inc., a non-profit corporation. The charter was typed on legal paper bearing the name "Carswell, Cotton and Shivers—Attorneys at Law—Tallahassee, Florida." The 11 incorporating subscribers and charter members included Harrold Carswell, Tallahassee, Florida, and his signature is the first to appear. He was also the affiant on the notarized affidavit in which the facts of the charter were sworn to. Taken together these facts indicate that he was the one who drafted and filed the charter. Indeed an article in the February 27th *New York Times* has confirmed that conclusion. Article III of the Charter reads: "The qualificaion and members shall be any white person interested in the purposes and objects for which this corporation is created."

In November of 1955, the Supreme Court held in Holmes v. Atlanta that the constitution required municipal golf courses to desegregate, and later that year a suit was filed in the United States District Court for the Northern District of Florida to enforce that holding with respect to the municipal golf course in Pensacola. George Harrold Carswell, having taken an oath to "support and defend the Constitution of the United States . . . without any mental reservation . . . ," was then United States Attorney for the Northern District of Florida. In his home town of Tallahassee, there was a white municipal golf club, which, it became clear in 1955, would have to be desegregated and opened to black citizens if it remained under city control. Since the club had once, many years before, been privately owned, and had been deeded to the city with a right of first refusal in the prior owners upon any future disposition, the prior owners sought to exercise that right to obtaining a long-term lease from the city so that control of the golf course could be placed in private hands. Under the state of the law at that time, it could reasonably be expected that the obligation to desegregate would thereby be avoided.

According to a front-page article in Tallahassee's only daily paper,[2] when the question was raised at the City Commission meeting in December of 1955, one of the commissioners objected on the grounds that the proposed transfer was racially motivated, and the proposal was temporarily shelved. Two months later, in February, 1956, after the objecting commissioner had left the commission, another attempt was made to transfer the white golf course to private hands. The commission was clearly conscious of the fact that there were racial implications to the transfer, for it felt obligated "to make the same deal on a Negro golf course" then being constructed by the city. And asked if the white course would be open to the public after the transfer, the private group's representative said it would be available to "any acceptable person," a euphemism which could only mean one thing in Tallahassee in 1956. These facts are related in detail because the newspaper record shows they were well known to the citizens of Tallahassee, as is confirmed by numerous personal recollections and affidavits of black and white citizens. The transfer was in fact completed, and the club did in fact become a facility open at daily, monthly, or yearly rates to any white person. Until very recently, Negroes were not permitted to attend even public functions there.

Despite the universal knowledge that the transfer of the golf course to private control would allow that municipal facility to remain segregated, U.S. Attorney Carswell, when asked to subscribe $100 and lend his name as one of 21 incorporators and directors of the new corporation which would actually hold the lease and run the club, could think of no reason not to do so, even though he was not a golfer and had no special interest in using the club, according to his testimony. Since the incorporation was central to a large fund-raising effort, it was clear that the incorporators' names would be used to solicit others, and the list of incorporators included high state officials and legislators, in addition to the U.S. Attorney.

In 1963, the nominee's brother-in-law and next-door neighbor, Jack Simmons, Jr., exchanged some swamp land he had purchased for shore property owned by the federal government. In its first private transfer, a parcel of that property was conveyed to and accepted by Mrs. Carswell with newly imposed covenants including one preventing transfer to any Negro, but permitting Negro servants to live with white owners. The transfer was handled by the Judge's former law associate and close friend who of course knew that Mr. Carswell was a federal judge. The expectation was that a white-only vacation community would be developed as the Carswells, other Simmons' friends, and other purchasers built second homes there. The Carswells, however, sold their plot in 1966. The Judge personally signed the deed, which included a specific provision enforcing all of the restrictive convenants. Since we know from his testimony that the Judge, like any lawyer, reads what he signs, we can conclude that he saw that provision, and declined to do anything about it, despite the fact that racially restrictive covenants had been unenforceable since 1948 and that this one had been attached only three years previously by his own brother-in-law.

Late in 1969 Circuit Judge Carswell appeared before a meeting of members of the bar in Atlanta, Georgia. There is some dispute about the exact words of his opening joke, but it is agreed that it included a story about a Negro in Southeast Asia, and played upon his pronunciation of the word "door." Nor is there any douht that it was considered racially insulting by some in the audience and by many who read about it thereafter.

Again these items are not necessarily earth-shaking taken separately, but together they betray a continuing insensitivity to human rights and to his status as a federal official and judge. And thus they, with Judge Carswell's bench activities, bring 1948 up to 1953, 1956, 1966, and 1969.

Clearly, there are many Americans who have overcome previous records of resistance and reticence and have developed affirmative records on civil rights. President Nixon mentioned Ralph McGill, who some thirty years ago favored school segregation, and then became one of the leading crusaders in the South for equality and freedom. The Committee had as a witness former Governor LeRoy Collins of Florida, who, as Governor, overcame his earlier record with a clearly expressed commitment to equal access to public accommodations and who then served with distinction as director of the U.S. Community Relations Service.

In contrast, the nominee's supporters can find no such statements or activities to show his change of heart and his commitment to equal rights.

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[2] Tallahassee *Democrat*, Feb. 15, 1956, p Reprinted at p. 261 of hearing.

His supporters do say that he once ruled that his own barber would have to cut the hair of Negroes, and that this proves he is pro-equal rights. As the testimony before the Committee clearly demonstrated there were only two issues in that case—was the barber shop in a place covered by the 1964 civil rights act and did it hold itself out as serving patrons of that place? Facts providing affirmative answers to both questions *were* stipulated by the parties, and thus there was really nothing for the judge to decide.

The only other activity cited is the institution by Judge Carswell of a random jury selection system *in one division* of his court "shortly before the passage" of legislation requiring such a system to be instituted. As Judge Carswell himself pointed out to the Committee, at the time he instituted the plan it had already "become perfectly clear that this was going to have to be done . . . " under the pending legislation. The legislation was signed into law on March 27, 1968. All districts were required to institute it by December 22, 1968. Judge Carswell did not institute a *district-wide jury* selection plan until September 12, 1968.

Nor can that plan stand as a tribute to his fairmindedness. The plan utilized only the voter registration lists as a source of names. As the Judiciary Committee's report, Rept. No. 891, 90th Congress, 1st Session, on the Federal Jury Selection and Service Act pointed out, such voter lists are to be "supplemented by other sources whenever they do not adequately reflect a cross section of the community." No supplementary sources were provided for in Judge Carswell's plan despite the fact that a much smaller percentage of black citizens than white were registered to vote in his district. Even when the responses to a questionnaire required to be sent out by the court clerk indicated that the system was working in a discriminatory manner, Judge Carleswell took no remedial action.

In short there is nothing in Judge Carswell's record to challenge the conclusion that his insensitivity to human rights has persisted to the present.

CONCLUSION

Judge Carswell has not displayed the qualifications requisite for service on the Supreme Court of the United States.

INDIVIDUAL VIEWS OF MR. TYDINGS

I have concluded that Judge G. Harrold Carswell has demonstrated neither the judicial temperament and fairness nor the professional competence commensurate with the high standard of excellence that must be demanded of a Justice of the Supreme Court. Therefore, I must oppose confirmation of the appointment.

As Chairman of the Senate Subcommittee on Improvements in Judicial Machinery, I have been very much concerned with improving the operation of our Federal judicial system. I have chaired innumerable hearings and moved a substantial legislative program dealing with the administration, practices and procedures of that system, including creation of the Federal Judicial Center and the Federal Magistrate system, revision of the Federal jury selection system and development of an effective approach to multidistrict litigation.

Because of this legislative background, as well as by personal inclination, I feel a deep responsibility to my colleagues and to the nation to delve deeply into issues touching upon the effectiveness of the federal judiciary. Nothing, of course, is more relevant to that effectiveness than the process of assuring that the federal bench, and in particular, the Supreme Court are manned by appointees of the highest quality.

Men appointed to the Supreme Court have for practical purposes life tenure with no effective means for discipline or removal. Their influence on our national life may well transcend that of the President who appointed them. The role of the Supreme Court in our society is too vital to be endangered by the appointment of men whose judicial temperament or professional qualifications are subject to serious doubt.

In considering those named by the President for the vacancies on the Federal district and circuit courts over the past 5 years, and in considering previous nominees for the Supreme Court, I have consistently adhered to the position that, barring some unusual situation, a man selected by the President for the Federal bench should be confirmed by the Senate if he has demonstrated a character beyond reproach, professional competency equal to the task set for him, and a proper judicial temperament.

By proper judicial temperament, I mean at least the ability to put aside one's own prejudices and biases so as to be able to approach every case with a fair and open mind.

These criteria are not always easy to apply. But I have made every effort to apply them in a consistent manner to those nominees whose names have been placed before the Senate.

I opposed the appointment to the District Court of Massachusetts of Francis X. Morrissey, a man sponsored by two of my closest personal friends in the Senate, because I believed that his record did not demonstrate the legal ability requisite for a federal judge. When the Governor of Mississippi, James P. Coleman, was appointed to the Fifth Circuit, I spoke in his favor on the floor of the Senate and voted to confirm, despite the firm opposition of many civil rights groups. My examination of his record convinced me that he would make a fair and objective judge. Although I had supported the initial appointment of Mr. Justice Fortas, I took the lead in calling for his resignation when the unanswered questions surrounding his nonjudicial activities cast a cloud over the reputation of the Supreme Court. I also supported President Nixon's choice of Judge Warren Burger for Chief Justice, although I have not always agreed with him on substantial issues.

Now the Senate is asked to advise and consent to the appointment of Judge G. Harrold Carswell to be an Associate Justice of the Supreme Court.

I approached the hearings on Judge Carswell's appointment seeking to learn not what he was when he delivered his infamous racial supremacy speech in 1948, but what he is in 1970, what kind of judge—what kind of man.

Unfortunately, some of the most revealing testimony was presented to the Judiciary Committee after Judge Carswell testified and the members of the Committee were not able to review it with him. A request that he be recalled was rejected. Moreover, the short, general rebuttal letter that he submitted for the record was unresponsive and unenlightening. On the whole, however, the hearings were enlightening, indeed shocking, but hardly reassuring.

I will not dwell on Judge Carswell's willingness in 1956 to lend his name and the prestige of his office as United States Attorney to an effort to circumvent the mandate of the Constitution by converting a public golf course into a private one. Nor will I attempt to analyze similar events that have come to light, such as his attempt, in 1969, to amuse the members of the Georgia Bar Association with a racial joke. These are serious matters, but not, I believe, the keys to the case against Judge Carswell.

JUDGE CARSWELL'S LACK OF JUDICIAL TEMPERAMENT

Our judicial system must accord litigants fair hearing. Justice is not dispensed when a judge's personal views and biases invade the judicial process. In Judge Carswell's court, the poor, the unpopular and the black were all too frequently denied their basic right to be treated fairly and equitably.

Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices. His hostility toward particular causes, lawyers and litigants was manifest not only in his decisions but in his demeanor in the courtroom.

Professor Leroy Clark of New York University, who supervised the NAACP legal defense fund litigation in Florida between 1962 and 1968, called Judge Carswell—

"[T]he most hostile federal district court judge I have ever appeared before with respect to civil rights matters. . . ."

• • • • •

"Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.

"It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel. . . ."

• • • • •

"*[W]henever I took a young lawyer into the State, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.*"

Professor John Lowenthal of Rutgers Law School recalled attending a session in Judge Carswell's chambers in 1964 in which he "can only describe his [Judge Carswell's] attitude as being extremely hostile":

"He expressed dislike at Northern lawyers . . . appearing in Florida because . . . [they] were not members of the Florida bar."

The choice, however, was between "Northern lawyers or no lawyers" for Professor Lowenthal's clients who had been arrested for trespass while attempting to assist sharecroppers to register to vote.

Norman Knopf, a Justice Department attorney, testifying under subpoena, who had worked with Professor Lowenthal as a volunteer in 1964, corroborated Professor Lowenthal's recollections:

"Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on . . . It was a very long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people, and he in effect didn't want any part of this, and *he made it clear that he was going to to deny all relief that we requested.*"

Judge Carswell's manifest intention to deny all relief did not represent an idle threat. Professor Lowenthal's clients had been tried in a state court and imprisoned in a county jail when a local judge had refused to recognize the removal jurisdiction of Judge Carswell's court. As Professor Lowenthal pointed out:

"[I]t was evident to all those with experience in Northern Florida that it was not safe for voter registration people to be in local jails."

Nevertheless, Judge Carswell's attitude and actions were ones of delay and harassment.

Indeed, when Professor Lowenthal's predecessor in the case, Ernst H. Rosenberger, had initially sought to remove it from the state court, he had been required to pay a filing fee in Judge Carswell's court despite the governing decision of the Fifth Circuit in *Lefton* v. *Hattiesburg*, 333 F. 2d 280, that no such fee could be demanded. Subse-

quently when Professor Lowenthal and Mr. Knopf attempted to file a habeas corpus petition for their clients, Judge Carswell did not permit them to do so until they had wasted precious time attempting to obtain the signatures of the imprisoned civil rights workers, despite the fact that Rule 11 of the Federal Rules of Civil Procedure indicates that the attorney's signatures are sufficient.

Moreover, Judge Carswell would not accept the habeas corpus petition that Mr. Knopf had painstakingly drawn up until it was redone on special forms provided by the court, although the forms were not designed to cover habeas corpus petitions arising out of the refusal of a state court to honor the jurisdiction of the federal courts.

Despite the barriers that Judge Carswell placed before them, Professor Lowenthal and Mr. Knopf were finally able to file habeas corpus petitions and to demonstrate to Judge Carswell that he had no choice under the law but to grant the petitions. Judge Carswell, however, still managed to thwart their efforts to keep the civil rights workers out of jail. As stated by Professor Lowenthal, at the same time that Judge Carswell granted the habeas corpus petitions—

"[O]n his own motion, because the Gadsden County officials were not there to ask for it, and without notice to the defendants, the habeas corpus petitioners, and without a hearing or any opportunity to present testimony or argument, he remanded the cases right back to the Gadsden County courts.

"I at that point moved before Judge Carswell directly for a stay of his remand so that I could have time to file a notice of appeal to the fifth circuit. He denied my request for a stay, pending filing notice of appeal."

Judge Carswell also refused to have the marshal serve the habeas corpus order on the Gadsden County sheriff despite the following provisions of 28 U.S.C. § 1446(f) that—

"If the defendant or defendants are in actual custody on process issued by the state court, the District court shall issue its writ of habeas corpus, and the marshal shall thereupon, take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such state court."

When Professor Lowenthal served the writ of habeas corpus himself the sheriff first released but then immediately rearrested the civil rights workers pursuant to the remand. It is not clear how he learned of his authority to do so. Professor Lowenthal testified as follows:

"The sheriff produced the jailed voting registration workers, and at once rearrested them because *Judge Carswell had had his marshal telephone the sheriff to advise the sheriff that Judge Carswell had on his own motion remanded the cases right back to the Gadsden County court.*"

* * * * *

" I was in Judge Carswell's chambers and office, and I do not remember whether I overheard the conversation between Judge Carswell and his marshal or whether somebody reported this to me. I do not know. What I do know is that when I got out to the sheriff with the habeas corpus order to release the men, the sheriff already knew of the remand, and therefore on the spot produced the defendants and rearrested them and put them back in jail."

The experiences of Ernst Rosenberger who preceded Professor Lowenthal as a representative of the American Civil Liberties Union in Northern Florida were indicative of Judge Carswell's willingness to go beyond the courtroom to deny litigants their basic rights.

Mr. Rosenberger represented nine clergymen freedom riders arrested in a Tallahassee airport restaurant in 1961. There had been numerous appeals in the case and as a result of a filing date having been missed the appeals were terminated. At the time Mr. Rosenberger entered the case the only recourse open to the clergymen was a writ of habeas corpus. Judge Carswell denied the writ and the case was immediately appealed to the Fifth Circuit which modified Judge Carswell's order so that it provided for an immediate hearing by Judge Carswell if the state court did not grant such a hearing. On the same day that the judges of the Fifth Circuit rewrote Judge Carswell's order, Mr. Rosenberger met with Judge Carswell and Mr. Rhoads, the City Attorney of Tallahassee. Judge Carswell told Mr. Rhoads "that this whole case could be ended by reducing the sentences of the clergymen to the time already served." As Mr. Rosenberger pointed out, Judge Carswell's advice—

"Could have no other effect except to moot the entire question, to leave . . . [the clergymen] with no way for vindication, to insure them a permanent criminal record. This was a matter where the judge advised the City Attorney in a state court proceeding actually of how to circumvent an order which had been put in by the U.S. Circuit Court."

The City Attorney and the state judge followed Judge Carswell's advice despite the objections of Mr. Rosenberger.

The impressions and experiences of Professor Clark, Professor Lowenthal, Mr. Knopf and Mr. Rosenberger paint a picture of blatant hostility and aggressive unfairness that casts serious doubt upon Judge Carswell's judicial temperament to sit even on a federal District Court much less on the Supreme Court of the United States. Judge Carswell did not take the stand to rebut these charges. His general statement that there has never been "any suggestion of any act or word of discourtesy or hostility on . . . [his] part," does not dispel the doubts created by their testimony. None of them have anything to gain by misleading the Committee or the Senate. In particular, it is worth remembering that Mr. Knopf is an employee of the Justice Department of the United States, who testified pursuant to a subpoena. As was forcefully pointed out during the hearings Mr. Knopf has other things to occupy his days now—"earning a paycheck."

JUDGE CARSWELL'S LACK OF PROFESSIONAL COMPETENCY

Despite the problems of temperament that Judge Carswell displayed on the lower courts, there might still be some basis for supporting his confirmation to the Supreme Court if he were a man of great intellectual and professional distinction. At least then there would be hope that once on the Supreme Court he would display a capacity for growth that would enable him to deal capably and objectively with the matters of vast importance that come before the Court.

He is, however, a mediocre man. He has demonstrated neither the depth of intellect nor of understanding that would indicate that he might fill with distinction the seat once held by Felix Frankfurter and Benjamin Cardozo. He is, instead, in the opinion of the Deans of two of our most respected law schools, a man who is professionally unqualified to sit on the Supreme Court. Dean Pollak of Yale testified that Judge Carswell—

"Has not demonstrated the professional skills and the larger constitutional wisdom which fits a lawyer for elevation to our highest court.

"I am impelled to conclude, with all deference, I am impelled to conclude that the nominee presents more elender credentials than any nominee for the Supreme Court put forth in this century."

Dean Bok of Harvard has written that Judge Carswell has "a level of competence well below the high standards that one would presumably consider appropriate and necessary for service on the court."

Twenty members of the University of Pennsylvania Law School examined his opinions in various areas of the law and concluded "that he is an undistinguished member of his profession, lacking claim to intellectual stature." Charles L. Black, Jr., Luce Professor of Jurisprudence at the Yale Law School and one of the most respected members of the academic legal community stated in a letter to the Chairman.

"[T]here can hardly be any pretense that he [Carswell] possesses any outstanding talent at all. On the contrary, all the evidence I have seen would lead to the conclusion that mediocrity is an independent valid objection to his appointment."

Perhaps most telling was the testimony of Professor William Van Alstyne of the Duke University Law School one of the most distinguished legal scholars of the South. Professor Van Alstyne had testified before the Senate Judiciary Committee in support of Judge Haynsworth, but testifying in opposition to Judge Carswell, Professor Van Alstyne concluded that Judge Carswell's decisions reflected "a lack of reasoning, care, or judicial sensitivity overall."

Despite his failure to follow the opinions of the higher courts in a number of areas of the law, Judge Carswell has been referred to by his supporters as a strict constructionist or a judicial conservative. Such terms, properly applicable to men with highly developed judicial philosophies such as Mr. Justice Felix Frankfurter and Mr. Justice John Harlan have no relevance to a man such as Judge Carswell who at best is mediocre and, at worst, has allowed his biases to permeate his courtroom.

There are many great southern judges and lawyers to whom the adjective "strict constructionist" is properly applicable and whom I would willingly support if they were nominated for the Supreme Court—men such as Sam Ervin of North Carolina, Judge Walter E. Hoffman of Virginia, Judge William F. Miller of Tennessee and Stephen O'Connell of Florida, President of the University of Florida. These are men with whose philosophies I might differ, but whom I would support because they are fair men and men of legal distinction. As Dean Bok pointed out, "The problem [with Judge Carswell] is one that has much less to do with judicial philosophy than with judicial competence; for extremely competent judges can be found with widely varying attitudes concerning the judicial function, let alone political or social questions."

CONCLUSION

I must conclude that Judge Carswell has displayed neither a proper judicial temperament nor a professional competency equal to the task set for him. I oppose the confirmation.

Mr. BAYH. I find that these have been broken down into five different areas about which we are concerned—lack of professional competency, lack of judicial temperament, refusal to adhere to controlling precedent, disdain for the writ of habeas corpus, and insensitivity to human rights.

I was about to make one last comment to the Senator from Michigan relative to the degree of concern which the Senator from Indiana has over interpretation of the judge's beliefs in the area of human rights, with the same concern that had been expressed in the previous debate relative to Judge Haynsworth. Many of the Haynsworth decisions were split decisions, 3 to 2 decisions. Those who opposed Judge Haynsworth's position felt he was wrong. But next week the Senator from Indiana intends to discuss in some detail 17 cases in which the present

nominee was reversed 3 to 0 by a unanimous panel of the Fifth Circuit Court of Appeals, which is a panel of illustrious judges. The Fifth Circuit Court of Appeals is hardly what one would call a bastion of liberalism. If that court unanimously says this nominee is out of step with the issues of habeas corpus and the various other cases that the Senator from Indiana will discuss in some detail, then I think he is out of step with what we need on the Supreme Court right now.

I am looking forward to the opportunity to pursue these thoughts in greater detail.

Mr. STENNIS. Mr. President, since I may have to be away from the floor of the Senate on Monday, I wish to say a few words now, although I would not seek the floor if a member of the Judiciary Committee wanted to speak at this time.

Mr. President, this debate will cover many points, but I think the Senator from Pennsylvania in his opening remarks pointed out a few basic facts and a few basic principles that will be and should be controlling, to which the Senator from Michigan added, in his very fine way, the question of judging one on his philosophy and judging him on his principles of character, and qualifications of that kind.

Mr. President, I expect to be heard later, and I shall be quite brief at this time.

I wish to emphasize that the office of Supreme Court Justice is one of the highest offices in the land, and is of particular importance because, subject to good behavior, a Justice of the Supreme Court may serve for life. For this and other reasons, the question of the confirmation of Judge G. Harrold Carswell which is now before us is of particular importance. A Supreme Court Justice can have a lasting impact since he usually participates in the shaping of the law over a period of many years without being accountable to any authority except his expertise, learning, judicial integrity, and judgment.

Having made extensive inquiry into this matter with persons known to me who have personally known him for many years, I am satisfied that Judge Carswell measures up to the requirements of the office in every respect and that he has the legal experience, learning, integrity, judicial philosophy, and other attributes which will enable him to serve on the Supreme Court with great distinction. This experience includes years of active practice in the courts, service as a U.S. district attorney, service as a U.S. district judge, and membership on the Fifth Circuit of the U.S. Court of Appeals. I believe we should give our consent to his confirmation, and I will vote to do so.

There are some in the country, including some Members of the Senate, who regret and oppose the nomination of Judge Carswell from an ideological point of view and they, I assume, would prefer someone they would consider less conservative. While I do not impugn the motive of any Senator who opposes Judge Carswell, I am compelled to believe that many are influenced by widely disparate views and personal, judicial, political, and philosophical ideology. With many of these, perhaps without conscious realization of the fact, the charges against Judge Carswell become an excuse and not a valid reason for opposition.

The logic of the situation, however, suggests that we should agree that all Supreme Court Justices should not be cast from the same mold or the same geographical location. Judge Carswell should not be opposed simply because of the thought that he may exercise judicial restraint rather than being a judicial activist in the tradition of some of the Justices who have sat on the Supreme Court in the last decade or so.

The basic proposition is that we should recognize the fact that much of the opposition to Judge Carswell is motivated by disagreement with some of his decisions and with his personal and political philosophy rather than by any question of his ability, ethics, or integrity.

When we speak of these thngs, I think it is highly important to remember that this gentleman is already an experienced judge. He is experienced, first, as a practicing lawyer, and for 5 years he had the responsibility of representing the Federal Government as a U.S. district attorney. But, more than that, he spent 8 or 10 years as a trial judge, a U.S. district judge, who carried all the responsibility of a court of unlimited jurisdiction, in both civil and criminal cases. In the area he was then serving, that is a test, in these modern times, that is very severe and very exacting. It is the training in the courtroom and in the trial courtroom from which real lawyers and jurists are made. Then, on top of that, he served almost a year as a member of the U.S. court of appeals where he is well along on his way to becoming a highly valuable member of that court.

Mr. President, Judge Carswell is not a personal friend of mine. I do know others, however, who strongly vouch for his ability, honesty, and integrity. These include some of my high school associates who now live in Florida and have known this man for a great number of years.

My close inquiry into this matter has convinced me that he is fully qualified for the office for which he has been nominated and will discharge his duty with distinction if he is confirmed, as I hope and expect that he will be.

I say again, that this is one of the most crucial and important matters that has come before the Senate at any time. To give or withhold consent to the nomination of a Supreme Court Justice is one of the most solemn, delicate, sensitive, and important functions of the Senate. While I believe very strongly that we should not act from an ideological or geographic standpoint, I think it is important to realize that the confirmation of Judge Carswell and his ascendancy to the bench will bring needed judicial and geographical balance to the Court—a balance which has been sorely lacking in recent years.

In closing, Mr. President, let me say that the record indicates Judge Carswell has been an outstanding lawyer and a judge with exceptional ability. I think that he would be a great credit to the Supreme Court, where he will gain rapid seasoning there. There is no support in the public or private records for any of the charges that have been hurled at him, of charges that are in any way controlling that would detract from his very fine record and his solid character.

Thus, I feel sure that all Members of the Senate will consider this man on the merits. When that has been fully appreciated, I am strongly of the opinion that Judge Carswell will be confirmed by a substantial majority of the Members of this body, and that he will go on to render valuable and serviceable years to the court and the country with a most creditable record as a member of the Highest Court in the land.

Mr. President, I yield the floor.

ADJOURNMENT UNTIL MONDAY, MARCH 16, 1970

Mr. KENNEDY. Mr. President, if there is no further business to come before the Senate, I move, in accordance with the order previously entered, that the Senate stand in adjournment until 12 noon on Monday next.

The motion was agreed to; and (at 5 o'clock and 3 minutes p.m.), the Senate in executive session adjourned until Monday, March 16, 1970, at 12 noon.

NOMINATIONS

Executive nominations received by the Senate March 13, 1970:

IN THE ARMY

The following-named person for appointment in the Regular Army, by transfer in the grade specified, under the provisions of title 10, United States Code, sections 3283 through 3294:

To be second lieutenant

Kreb, Charles A., Jr., 228–58–4648.

The following-named persons for appointment in the Regular Army of the United States, in the grades specified, under the provisions of title 10, United States Code, sections 3283 through 3294 and 3311:

To be lieutenant colonel

Hanson, Chester A., Jr., 301–16–7251.

To be major

Bertrand, Robert J., 016–22–7373.
Bridges, James T., 427–56–7110.
Butler, Douthard R., 456–52–5991.
Crandall, Bruce P., 533–28–7264.
Herman, David E., 466 28–3603.
Holtom, Stanley E , 198–28–2262.
Hyland, Eugene P., 080–18–6012.
Larson, Gerald W., 505–36–3646.
Lennon, James J., 131–20–0092.
Nixon, John L., Jr., 006 22 9679.
Rushkowski, Edward C., 211 24–7816.
Soriano, Franklin M., 346–32 5657.
Young, Ray A., 519–24–3632.

To be captain

Alexander, Lawrence N., 227–48–7628.
Alsop, Jack R., 405–40–4808.
Beckley, Leander K., 576–24–3039.
Bell, John O., 450–68–3450.
Blair, Willis A., 337–26–7261.
Bowen, Harold L., 238–50–2364.
Boyd, Barclay A., 207–26–1451.
Brynildsen, Gordon A., 518–46 5663.
Burt, Joe M., 462–48–0899.
Cade, Ernest W., 314–32–8684.
Collins, James L., Sr., 579–52–5896.
Cox, Troy D., 263–56–6567.
Deck, Howard R., 415–62–0326.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business as in legislative session? If not, morning business is concluded.

ORDER FOR ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment, as in legislative session, until 11 o'clock tomorrow morning.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SUPREME COURT OF THE UNITED STATES

The ACTING PRESIDENT pro tempore (Mr. ALLEN). The question is, Will the Senate advise and consent to the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States in lieu of Abe Fortas, resigned?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HRUSKA. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

THE CARSWELL NOMINATION SHOULD BE CONFIRMED

Mr. HRUSKA. Mr. President, the business before this body is the confirmation of the nomination of Judge Harrold Carswell to be an Associate Justice of the U.S. Supreme Court. This nomination should be confirmed. Judge Carswell's nomination is sound, logical, and desirable.

He is well qualified and well suited for the post.

He is learned in the law.

He is experienced.

He is a man of integrity.

He is possessed of proper judicial demeanor which he has displayed and exercised during his years of public service.

He enjoys the approbation and the respect of bench, bar, and community.

All of these attributes appear affirmatively in his personal, professional, and judicial acts and doings.

His elevation to the Supreme Court will serve to better balance the Court philosophically.

He should be confirmed.

KNOWLEDGE AND EXPERIENCE IN JUDICIAL SYSTEM

A Supreme Court Justice can perform his duty more effectively if he has a thorough, varied, and active practical experience, and understanding of the judicial system in all its aspects.

He should have more than an academic knowledge or appreciation of the law. He must be able to visually picture the trial court scene and all that transpires there. It would be well that he, himself, participated at the outset of the litigation—to initiate it or to defend it, as the case may be, thus acquiring experience in all stages of its preparation.

Certainly one is better qualified to sit on the bench if he has helped select a jury, has presented an opening statement before it, has asked for ruling on admissibility of evidence, has cross-examined witnesses, has prepared and submitted jury instructions, and has made a jury argument.

Likewise, a nominee is better qualified for a justiceship if he goes through the anguish of sentencing a man to prison, if he encounters and deals with the many efforts to delay, and to obstruct, the scheduling of a trial, and if he appreciates the complexities of presiding over trials.

And finally, he is much better qualified if he has some appellate experience, and if he has participated in measures to improve the quality of the judicial machinery.

Mr. President, the nominee for the Supreme Court, whose confirmation we are considering at the present time, has lived a career in the past 20 years which has resulted in the thorough, varied, and active practical experience and understanding of the judicial system as that which I have just described.

Judge Carswell spent 16 years in an active official role in the Federal District Court, Northern District of Florida, 5 of those years as district attorney, and 11 years as judge. Since June 1969, he has been a circuit judge.

Those were busy, arduous years, Mr. President. But they were also fruitful years. This is proved, first, by the type and volume of work involved, and, second, by the high esteem and reputation earned by the nominee with bench, bar, and the general public.

TYPE AND VOLUME OF WORK

When asked as to the general nature of the litigation in the northern district, Judge Carswell testified:

> Virtually everything across the board that comes into the Federal Court in the way of criminal law and the civil law—contract cases, antitrust cases. We have had a whole range of cases. It has a rather heavy criminal docket for an area of that size. I have sentenced, unfortunately. The worst aspect of the district judges' job is sentencing. I have had the unfortunate responsibility of sentencing no less than 2,000, perhaps as high as 3,000, individuals. These involve criminal trials ranging across the board, most of them involving young people, most of them involving—not crimes of violence necessarily, but all the multiple problems that come up in the Federal criminal law—Dyer Act cases, some narcotics recently. We have not had any until recently, but we have had a good many of those in the last few years.

Until 1968, there was only one judge in the Northern District and Judge Carswell carried the burdens alone.

The Northern District has four divisions. During his years as district court judge, he handled about 2,000 civil cases and about 2,500 criminal cases, according to a letter from Clerk of the Court Marvin Waits, who was one of the witnesses appearing before the committee. Many of them required multiple orders, memorandum decisions, and hearings. It was estimated that there were at least 7,000 to 8,000 orders and decisions.

It should be clear that both as district attorney and as judge, the nominee was required to work diligently to keep up with the schedule.

But he did not limit his work to the court proceedings alone. He was also very active in the field of judicial administration.

By appointment of Chief Justice Warren, he served on two committees. One was the Committee on Statistics of the Federal Judicial Conference. It concerned itself with all the data compiled by the Administrative Office of the U.S. Courts. It evaluates caseloads, backlogs, and other factors bearing on the needs of judicial manpower.

The second committee was that on supporting personnel, which deals with problems relating to administrative help for the Judiciary.

In April 1969, Judge Carswell was chosen by the other district and circuit judges of the Fifth Circuit, as there representative to the Judicial Conference in Washington in June 1969, which concerned itself with the problems of judicial ethics arising from outside employment of Federal judges. He voted with the majority of the committee at that time to require disclosure of outside employment and activities.

From time to time, while on the district court bench, he responded to invitations to sit on the circuit court in its deliberation and disposition of cases. One witness before the Judiciary Committee recalled a circuit court opinion written by Judge Carswell as early as 1961.

His work to improve judicial machinery included the field of jury selection. A year and a half before Congress enacted the Jury Selection and Service Act of 1968, Judge Carswell took affirmative steps to get jurors—in the heaviest populated area in the Northern District—selected from the voter registration rolls—not from a list of those actually voting, but from the total of the registration rolls, to be sure there was a fair cross-section of jurors. This new arrangement was in operation before the new Federal law—Public Law 90-274—became effective, after it was enacted. To comply with the law, minor modifications were needed, but it was already in operation before the law was effective.

Because of this advance division plan, Judge Carswell was then able to draw a districtwide plan and secure its approval by the fifth circuit reviewing panel 3 full months before the deadline date prescribed by the act.

Critics seek to downgrade this jury selection activity by saying it was instituted when it became "perfectly clear that this was going to have to be done."

The fact is, there was advance action long before enactment of the act. There was accelerated action under the law in the remaining divisions of the district because of the preliminary work he had performed.

Critics also seek to deprive Judge Carswell of fairmindedness and a desire to improve judicial machinery by attempting to show that the plan is defective and not working properly.

It is submitted that the fifth circuit

reviewing panel's judgment of approval is much more to be relied on than any opinion voiced by anyone not directly involved, and particularly when that lack of direct involvement is accompanied by a bias against the candidate and is being voiced for the purpose of trying to advance that bias into the thinking of our colleagues in the Senate.

Judge Carswell was a very active member of a group of lawyers, jurists, and educators, who effected establishment of a law school at Florida State University at Tallahassee.

James William Moore, sterling professor of law at Yale University, has been a student of the Federal judicial system for 35 years and is an eminent author in this field. He served as consultant, without compensation, for the law school founders group approximately 5 years ago.

Professor Moore appeared before our Judiciary Committee at his own request, to testify on Judge Carswell's behalf and on the basis of both personal and professional knowledge. Part of his testimony reads:

> I was impressed with his views on legal education and the type of school that he desired to establish; a school free of all racial discrimination—he was very clear about that; one offering both basic and higher legal theoretical training; and one that would attract students of all races and creed and from all walks of life and sections of the country. Judge Carswell and his group succeeded admirably . . .

It is noteworthy that not a single critic of Judge Carswell has seen fit to put into proper perspective this constructive, progressive, and sustained achievement of the nominee. There seems to have been a greater propensity instead for a brief, inactive exposure to incorporation of a golf cart or cosigning with his wife a deed of land "subject to" restrictive—white only—covenants that were contained in a previous deed in the chain of title. Such covenants have been obsolete for a long time. They are unconstitutional and legally unenforceable.

A lurid flurry of criticism arose briefly on this incident, Mr. President (Mr. HART). It was a short-lived flurry. Because it was discovered that such restrictive covenants are found in many deeds, as a remnant of an earlier state of the law.

Even Members and former Members of this august body are among those so afflicted. It became generally known that a Member of the Senate, shortly after being nominated as vice presidential candidate of his party was grantee in a deed similarly subject to such convenants.

Needless to say—the original criticism against Judge Carswell on this ground has been muted. But even a recollection of its being expressed at one time strains somewhat at the minds of the fair-minded.

Judge Carswell has had a thorough, wide, varied, and practical experience, constructive in the fields of judicial administration and legal education.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. HRUSKA. I am happy to yield to the chairman of the Judiciary Committee.

Mr. EASTLAND. Mr. President, the Senator speaks of a restrictive covenant. Is the Senator aware that Franklin Delano Roosevelt signed a restrictive covenant?

Mr. HRUSKA. That is my information.

Mr. EASTLAND. Mr. President, I will put a certified copy of that document in the RECORD during the debate on this matter.

Mr. HRUSKA. Mr. President, the chairman of the Judiciary Committee can be assured that if a poll and a little research were performed, the number of high officials in Government over the years who have signed such deeds would be almost legion. Why, except for a feeling of bias, the issue should be brought up in respect to Judge Carswell is difficult to understand.

Mr. EASTLAND. Mr. President, if the Senator will yield further, as I recall it, I have not done so. However, I am not about to call out the name of anyone who has signed such documents because I know that there are many.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

Mr. BYRD of West Virginia. Mr. President, what Senators have not engaged in land transactions in which the deeds have contained such racial covenants?

Mr. HRUSKA. Mr. President, I would venture a guess that virtually all Members of the Senate have. I should not say all, but a substantial number of them certainly have been involved in restrictive covenants in the deeds they have executed.

Mr. BYRD of West Virginia. Mr. President, is it not true that it was a pretty general thing in years past to include such provisions in deeds of conveyance?

Mr. HRUSKA. The Senator is correct.

Mr. BYRD of West Virginia. I, as one Senator, have bought lands with such covenants in the deed. I think it was a pretty general thing. I imagine that if most people will go back and look at the old deeds by means of which they have purchased lands or transmitted those lands to other people, they will find that those deeds carried the same racial covenants.

That was before the courts ruled such covenants to be unenforceable. I think if we are to judge a nominee to the Court by that standard, then we ought to go back and open up our cedar chests and trunks and desks and look at some of the old deeds by which we ourselves have sold or transferred lands.

It was once thought that such covenants were enforceable. In the old days, people who bought and sold land were often probably unaware of the presence in the deeds of such provisions. Nevertheless, the covenants were there.

I think the important point is that these covenants have long since been adjudged to be unenforceable.

Mr. HRUSKA. Mr. President, I thank the Senator from West Virginia for his comment.

I might point out that for a quarter of a century I engaged in the general practice of law in Nebraska. I did quite a little real estate and abstract work. Restrictive covenants like those we are discussing are not to be considered unique to the deeds coming from the southern part of the Nation. They are to be found in the chain of title to property in the prairie States in the Middle West.

Mr. EASTLAND. Mr. President, the charge has been made that Judge Carswell is not big enough to be a Justice of the Supreme Court. Judging from the advertisements I see in the newspapers, that is the principal argument used against him.

Judge Parker was one of the greatest judges this country ever had.

Mr. HRUSKA. He was one of the most brilliant legal minds and one of the best jurists this country ever had.

Mr. EASTLAND. Judge Parker was nominated by President Hoover to be a Justice of the Supreme Court. The Senator knows that that same argument was made against Judge Parker in the newspapers at that time. The New York newspapers said that he was not big enough to be on the Supreme Court.

Mr. HRUSKA. I am aware of that. I read the account in the New York newspapers to which the Senator refers.

I might point out that the covenant was not even in the document that Judge Carswell and Mrs. Carswell signed. It was in the chain of title, and the deed he did sign, of course, referred to the covenant as being of record.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

Mr. BAYH. Mr. President, I appreciate it that the Senator has yielded to me. I will be very brief. I shall try to keep this matter in the proper perspective. Inasmuch as our committee chairman has specifically alluded to the covenant, I have asked a staff man to get the deed so that we can examine it.

It is my opinion that that piece of property was purchased by Judge Carswell's brother-in-law from the Federal Government in 1963 and that it did not have a restrictive covenant in it at that particular time. That covenant was added only when the property was later given to Judge Carswell's wife.

It seems to me that the particular sequence of events puts this whole business of a restrictive covenant in a much different perspective.

If this were a covenant dating from either the Revolutionary or the Civil War, I concede that it would be a different matter. However, this covenant was of recent date and 15 years after the Supreme Court had held such covenants unenforceable. That is why I am very concerned that this incident is but another in a long sequence of events that shows that Judge Carswell was not as sensitive to these matters as I personally feel a Supreme Court Justice should be.

Mr. HRUSKA. That is wonderful. But I do believe, Mr. President, that, when a vice presidential candidate and Member of the Senate had such a similar covenant in the deed to his home, no greater effort was made to blackball him from the office of Vice President. I venture to say there was a great deal of support for

his candidacy for Vice President. And he was successful.

We know that this provision is unenforceable and that it had not come to the attention of the nominee. Now we want to read into it something dastardly.

I think the commonsense of Members of this body will assert itself, and they will put it in proper perspective.

Mr. BAYH. Mr. President, will the Senator yield further?

Mr. HRUSKA. I yield.

Mr. BAYH. Does the Senator from Nebraska know when this covenant relating to a former Member of this body, who was nominated to be Vice President, was first placed in the deed?

Mr. HRUSKA. I did not make any search for it. I did not consider it that important. It was unconstitutional.

Mr. BAYH. The Senator from Nebraska, who is a patently fair man, apparently sees nothing to be concerned about, when this covenant, the very matter we are discussing, was added at the time the judge's family received title to the property. That does not concern the Senator at all and the fact that the judge himself signed the deed transferring the property?

Mr. HRUSKA. No; it does not. It has no relationship, whatsoever, to the qualifications of this nominee. As I understand, it was the deed from Mrs. Carswell's brother to her, and it is customary, under State law—and, certainly, it is the requirement in Florida—that the husband of a married woman must join with her even when she conveys her property.

I venture to say that Judge Carswell had that deed placed on the desk in front of him and he signed it; that he was asked to sign it by the lawyer for his wife; that he was not aware of the covenant; and that he made no conscious effort to put it in there or to perpetuate it.

Of course, it does not concern the Senator from Nebraska, not one bit.

I would think if anyone wishes to place any significance on it, they will be impugning the integrity, honesty, and truthfulness of Judge Carswell. If that is the position of the Senator, we would like to hear it.

Mr. BAYH. The Senator has raised an entirely different matter. I think each Senator should make that determination for himself. But it seems to me strange that a piece of property bought as late as 1963, long after this had been outlawed by the Supreme Court and such covenants held unenforceable, that even then, after the property was conveyed to the judge's wife, that this covenant was retained in the deed.

As I said a while ago, I have asked one of the staff men to get a copy of the deed which we will place in the RECORD. I do not want to specify anything that is not accurate, but it is my understanding, from reading this deed during the hearings we held, that when the Carswells together, man and wife, sold this property in 1966, the judge not only signed the deed but that the deed at that particular time included another provision calling for enforcement of this restriction.

I do not wish to interrupt the Senator because each Member can put his own interpretation on the acts of the nominee.

Mr. HRUSKA. The Senator from Nebraska only refers to it because it is being asserted as a ground for disqualification of the nominee. I suggest he had nothing to do by way of placing it in there. The deed was actually signed by Judge Carswell in 1966. It was prepared by an attorney in Tallahassee who actually represented the buyers of the property. In keeping with the general practice he included a "subject to" clause to exclude from the Carswell's warranty any restrictive covenants already on the property. The only time the judge saw this deed was on the day he and Mrs. Carswell executed it. They were simply executing a document which had been prepared in a conventional form, with the appropriate language in it, to protect them, based on restrictions which had been placed on the property by the previous owner. That is the simple story on it. If anyone wants to read black implications in that, they are straining beyond a reasonable degree.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

Mr. DOLE. I think the Senator has made it clear. As I understand the situation, this covenant was not placed in the deed in the first instance by Judge Carswell; that it appears, if anything, guilt by association because of what may have been on the deed at that time. I think the Senator has covered the point I wanted to raise.

Mr. HRUSKA. In signing the deed as they did, they neither adopted, approved, nor signified any agreement with any restrictions on the property.

It is further pointed out that from 1959 to the present they sold off several parcels of property they had in Tallahassee. In none of the deeds they executed conveying portions of the parcels they owned did they impose any racial restriction on that property.

Mr. BAYH. Mr. President, will the Senator yield further? Then, I will let the Senator finish his remarks in peace.

Mr. HRUSKA. I yield.

Mr. BAYH. I just think I should explain, as I shall later on this afternoon, that the Senator from Indiana is not raising the question of the convenant in a vacuum, totally removed from any other matters which concern him, relative to the judge's pattern of conduct, activity, and judicial decorum. But this is just one matter which concerns the Senator from Indiana and does not concern the Senator from Nebraska. I think, in all good conscience, the Senator from Nebraska and I look at the matter differently.

I appreciate the courtesy of the Senator in yielding.

Mr. HRUSKA. The Senator from Indiana says again this was placed in the deed by one other than the nominee. It is the same answer in the other case concerning Vice President Humphrey.

Mr. BAYH. The Senator from Indiana——

Mr. BYRD of West Virginia. Mr. President, I ask for the regular order. The Senator from Nebraska is supposed to be yielding only for a question.

Mr. BAYH. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Does the Senator yield?

Mr. HRUSKA. Mr. President, I yield for a question.

Mr. BAYH. Did the Senator understand that the Senator from Indiana was referring to a covenant that had been placed in the deed at the time the Judge's wife received this property from the judge's brother-in-law?

Mr. HRUSKA. It was my understanding that what he represented the fact to be was that Mrs. Carswell's brother inserted the restrictive covenant in the deed before it was conveyed to Mrs. Carswell. But that had nothing to do with the deed signed by Mrs. Carswell who by law had to be joined by her husband to convey a property title. When she transferred the property to a third person.

If my recollection of the facts and statement of the matter are at fault I would be happy to defer to the Senator from Indiana for a correction.

Mr. BAYH. The Senator from Indiana does not wish to infer anything incorrect; and I defer to the request of the Senator from West Virginia.

Mr. HRUSKA. Judge Carswell has had a thorough, wide, varied, and practical experience, constructive in the fields of judicial administration and legal education.

Few members of the Supreme Court have served in all these capacities and in such fruitful a fashion. He has had extensive, firsthand acquaintance with the endless variety of litigation that is brought to our Federal courts. His experience has made him conversant with the atmosphere and practicalities of the courtroom as can come only from experience in the actual combat of that forum.

Judge Carswell's experience will serve him well on the Supreme Court; and the Court will be well served by such experience.

BASES FOR EVALUATING A JURIST'S RECORD

Several principles and requirements must be kept in mind when reviewing and appraising a judge's official act.

It should be assumed that the object of such review is to determine whether he possesses the qualities expected of a Justice of the U.S. Supreme Court, to wit: That he is learned and experienced in the law; that he will be fair and just in his consideration of cases; that he will decide cases on the law and evidence without bias or prejudice; that he is a man of integrity, and possesses a judicial temperament.

Any evaluation should be cast according to some relatively neutral, objective standard. Bias and prejudice have no place here either.

To declare opposition to a candidate because "he has failed to heed and to promote the civil rights revolution of the past decade, as was urged by one of our colleagues, is to deny any pretense of fairness and objectivity. Moreover, it is presumptive that such a standard totally ignores the essential qualification for a Supreme Court Justice. After all, a Justice should not be an advocate. In fact, he would more normally be rejected if he were an advocate. He is expected to

be an arbiter, a judge—one who will decide controversies and disputes. To seat one as a Justice, as some suggest, because he advances and promotes as preconceived point of view is to ask for one who is biased and prejudiced. Such a man cannot properly judge on the law and on the facts.

Here are four simple rules which I think ought to be considered in evaluating a judge's record.

First. In the process of evaluating a judge's record, a substantial number of typical cases should be considered. These cases should not be cited out of context, nor on a selected basis to support an already arrived-at conclusion.

Second. A single case should not be criticized on the basis of the ultimate decision alone. Long before final disposition of a case, a judge makes many rulings and decisions, writes many memorandum decisions and legal instructions. A judge issues many orders, both interim and interlocutory.

Most cases in our complex society have these features and many are prolonged and of continuing jurisdiction. This is especially true of civil rights school desegregation and integration cases. All of the circumstances in any given case being analyzed should be considered, and statements or sentences must not be taken out of context.

Third. A judge's decisions also must be considered in light of the law as it exists when the decision is rendered; and not on what the law develops to be at a later time, or even what the law should have been, or what some people think it should be.

Again, this is especially applicable to civil rights cases because this field is so dynamic, fluid, and quickly changing.

In fact, it was not until October 29, 1969, that we had the latest decision by the Supreme Court that turned on and developed another facet of Brown against Board of Education. Of course, that was a landmark decision, to which reference will be made after a while.

This point is well stated by a highly qualified witness in an earlier confirmation hearing held last September—G. W. Foster, Jr., of the University of Wisconsin Law School. Here is a man who is now associate dean of the law school. He had served as administrative aide to Secretary of State Dean Acheson, and legislative assistant to Senator Francis Myers, Democrat, of Pennsylvania. He has been a consultant on problems of school segregation to the U.S. Commission on Civil Rights and to the U.S. Office of Education. He says:

> Any description of judicial implementation of *Brown* v. *Board of Education* involves a moving picture. Every judge worth his salt who has devoted any substantial time to wrestling with problems of school desegregation has changed views he earlier held. The reasons are straightforward: Remedies thought workable when ordered by the court turned out in practice to be partially, sometimes entirely, unworkable either because they were circumvented by school authorities or had encountered obstacels not foreseen. Again, there remain to this day questions not resolved as to the final scope of the Brown mandate: even now I know no one bold enough to attempt a final definition of what constitutes a "racially nondiscriminatory" public school system.

Mr. President, that is the testimony of a person who is highly in sympathy with and who has been an advocate of the expanding role of the desegregation of schools and the integration of our system of schools by the courts, or by statutes, or whatever; and he recognizes, as do all of us, that we should sit back and wait for a moment for our decisions to catch up with our overeager thoughts. We know it is a moving picture and we know it is a picture which has been changed not only by legislation but by intervening judicial decisions.

Fourth. A Federal district judge is not a policymaker. It is not for him to make "landmark" decisions. His duty is to apply the rules and interpretation of law as declared by his superior courts—the Supreme Court and his circuit court.

That is what he is expected to do. When he does not do it, of course, he is overruled by the circuit court to which appeal is taken.

DISREGARD OF ABOVE PRINCIPLES BY CARSWELL OPPONENTS

There has been a disregard of these principles and simple tests and rules by many of the opponents of Judge Carswell's nomination.

Charges against Judge Carswell's judicial record are based on disregard and violation of these standards and requirements. Fairness demands more.

A lack of objectivity is clearly evident in such cases.

The list of cases considered is very selective and not representative; often intervening decisions of a superior court are not mentioned.

The same is true as to subsequently enacted legislation which imposes need for a different decision.

Instead of a freedom from prejudice and bias, a nominee is demanded who will heed and promote the civil rights revolution.

First. In assessing Judge Carswell's judicial record, critics considered a limited number of typical cases. Their list of decisions was very incomplete, selective, and some cited out of context.

As I mentioned above, Judge Carswell has considered 2,000 civil cases and about 2,500 criminal cases. There were cases with multiple rulings, which means that he formally ruled on at least 7,000 to 8,000 different occasions. Only about 100 of his decisions found their way into the published reports.

Of these, one witness selected a list of 15 cases. The balance of the judge's record is not included. Many of the 15 "selected" cases were set out and discussed out of context and without laying a proper foundation as to what preceded that case and what intervened between the decision in the district court and the time the appeal was decided, either by the Circuit Court of Appeals for the Fifth Circuit or by the Supreme Court.

Another critical witness said he read published cases over a 5-year period of Judge Carswell's 11 years of tenure as judge and based his testimony on this limited knowledge, and there are other indications of scant reference and scant basis for appraisal of the judge's record on a judicial basis.

Second. Many charges against Judge Carswell's decisions are too often based on the ultimate or final decision alone. They refuse to consider or even recognize the many preliminary and interlocutory decisions, rulings, and orders which precede final judgment and are the true mark of a judge to a large extent.

Third. Many, in fact most, of the cases on which criticism is based fail to take into consideration the state of the law as it existed at the time such case was decided.

Fourth. Criticism of cases by his opponents often fails to recognize and give weight to the rule that a district judge is bound by the law as it exists when he renders a decision. That law is determined by his superior courts.

Judge Carswell should not be blamed when the superior court changes the rules after original judgment is entered.

The result of disregard for common sense principles and requirements of appraising a jurist's record is a misleading, distorted, and unfair presentation.

Let us consider some examples:

EXAMPLE OF LATER SUPREME COURT RULING CAUSING REVERSAL

Much is made of the fifth circuit court reversal of two decisions by Judge Carswell when he was on the district bench: First, Youngblood against Board of Bay County, and second, Wright against Board of Alachua County. They are cited as unanimous reversals and as proof of Judge Carswell's "hostility on the racial issue," as proof of his refusal to allow the law of the land to apply to the schools of the district in which he sat.

The fact is the Youngblood and Wright cases were but two of 13 similar school desegregation cases decided by district courts in the fifth circuit. All of them were consistent with fifth circuit court law. I venture to say, in fact we know, that there were in other circuits similar situations to that which is now being described.

In October 1969, after Judge Carswell had been elevated from the district bench to the circuit court, the Supreme Court decided Alexander against Holmes County Board.

This decision requires reversal of all 13 of the cases pending in the fifth circuit to which I have referred. The entire fifth circuit court, including Judge Carswell, reversed and remanded to their respective district courts, 11 of those cases. The circuit court, with Judge Carswell abstaining because he had written and rendered the decisions in the Youngblood and Wright cases, also reversed and remanded the Youngblood and Wright cases which had been decided by Judge Carswell while he was district judge.

Technically, it can be truthfully said that Judge Carswell had been reversed by the circuit court in those two cases. But if he is to be so charged with these two cases, he should also, by the same line of reasoning and the same approach, be given credit for having voted in 11 cases in favor of civil rights group contentions when he voted to reverse and remand those 11 cases.

These facts were not brought out by the witness who presented the testimony

before us. His testimony was a simple statement, as though Judge Carswell had, in defiance of the law of the land, made decisions in the Youngblood and Wright cases that were unanimously reversed and rejected by the Court of Appeals for the Fifth Circuit.

Any fairminded man would know that neither the charging of the two cases against Judge Carswell nor glving him credit for thinking favorable to the civil rights group in the 11 other cases makes much sense.

The fact is that the Supreme Court had made a new rule. The circuit and district courts applied that new rule. This is their duty and responsibility.

The noteworthy item is that Carswell opponents in their testimony did not cite the entire record. Their failure to do so resulted in a misleading and distorted picture. This omission may have been due to carelessness or design—but that was the result, nevertheless, whatever the cause may have been.

It is not true that Judge Carswell refused to follow the law of the land as applied to the schools of his district in the Youngblood and Wright cases. His holdings were the law of the land as applicable in the fifth circuit when he rendered his decision.

Those holdings were changed by the Supreme Court speaking out to the contrary at a later time.

If Judge Carswell is to be charged with failing to anticipate that change by the Supreme Court, then every Federal judge who heard civil rights cases from 1865 to 1954 should have been charged with failure to foresee the judgment in Brown against Board of Education.

Let us recall the testimony of G. W. Foster, Jr., of the University of Wisconsin, quoted earlier in my remarks. When he appeared, in addition to testifying as I have already quoted him, he also stated:

> Thus an assessment of a judge's view on school segregation must be made in the context of the time in which he spoke. Said another way, he must be judged by comparison with other judges facing the same problems with respect to the particular forthcoming school year to which the answers were to be applied. The reason is simply that from school year to school year the picture changed—and rules and priorities applied for one year were modified or abandoned for the next.

Judge Carswell made his decision in these cases consistent with his judicial contemporaries and in the context of the law of the times in which he spoke.

STILL ANOTHER EXAMPLE: WECHSLER AGAINST GADSDEN

Much has been attempted by way of discredit to Judge Carswell on the basis of his handling of *Wechsler* v. *Gadsden* found at 311 Fed. 2d 311 (1965). In this situation, which involved a removal case in a State prosecution. Judge Carswell, citing the fifth circuit decision in the Dresner case, remanded to the State court a criminal prosecution originally brought in the State court but removed to the Federal court by the defendant. The fifth circuit vacated Judge Carswell's order on the authority of two cases which had been handed down by the fifth circuit itself subsequent to Judge Carswell's initial order. These two other cases were later appealed to the Supreme Court: *Georgia* v. *Rachel,* 384 U.S. 780 (1966), and *Greenwood* v. *Peacock,* 384 Fed. 808 (1966).

The fifth circuit's decision in the Peacock case was reversed. Based upon statements of the Wechsler case counsel found in the Carswell hearing record, it is clear that the doctrine enunciated by the court in the Peacock case is applicable to the facts presented to Judge Carswell in the Wechsler case.

Thus, by reversing the fifth circuit's decision in Peacock, the Supreme Court made clear that Judge Carswell was correct in holding that the Wechsler case was not properly removable to the Federal court and should have been remanded, as Judge Carswell ordered.

Witnesses testifying in the Carswell hearings on the Wechsler case conveniently pointed out the fifth circuit reversal, but they did not mention, until challenged, in the hearings themselves, the later appeal to the Supreme Court which vindicated Judge Carswell.

Either the witnesses were not aware of the Supreme Court ruling in the Peacock appeal, or they did know about it and failed to disclose it to the committee.

Neither of those alternatives would reflect creditably upon the witnesses.

In any event, Judge Carswell applied the law of the fifth circuit as it existed when he remanded the Wechsler case to the State court.

It was the fifth circuit court which strayed from the law of the land in reversing Carswell, but the Supreme Court later confirmed the correctness of the Carswell ruling by its decision in the Peacock case.

Yet Judge Carswell's critics ask us to believe that Judge Carswell was racially motivated when he sent the Wechsler case back to the State court. The simple truth is that they are disgruntled litigants with animus toward the judge because he did not see the law as they did.

ANOTHER EXAMPLE OF MISLEADING AND UNFAIRNESS

Steele against Board of Leon County is cited by opponents as another example of Judge Carswell being reversed in a school desegregation case on January 18, 1967.

The fifth circuit court did remand this case for further consideration on January 18, 1967. That part is true. But tne reason for remand lay in the fact that 20 days before, on December 29, 1966, the circuit court had handed down a landmark case, United States against Jefferson County Board.

The basis for the Leon County school plan was totally and radically changed by two legal events:

First, the Jefferson case, embracing seven school plans, decided December 29, 1966, and

Second, the passage of the Civil Rights Act of 1964, which was subsequently applied in Jefferson.

But that act did not even exist when Judge Carswell had made his decision in the case of Steele against Board of Leon County.

The school plan in Steele had been adopted in 1963. Judge Carswell had no way of anticipating future events, such as a congressional act and a landmark case—Jefferson—based on the new law.

Mr. President, to indicate how important the Jefferson case is, let us consider that the opinion is approximately 75 printed pages long in the Federal Reporter, including a decree and a plan and a letter to be sent to parents regarding the plan. The opinion has 125 footnotes. The Federal Reporter sets out 114 syllabus points.

It is quite clear that no preexistent school plan could have been written to comply with such a vast ocean of detall and particularity created some years later.

Yet, opponents criticize Judge Carswell for not doing the impossible. They suggest that in 1963 Judge Carswell should have anticipated what Congress and the fifth circuit were going to do some 3 or 3½ years later. This is wrong.

THE FILING FEE

A belabored but misguided effort is made to make it appear that Judge Carswell was racially prejudiced because he collected a filing fee in a criminal case petitioning for removal from State to Federal court.

I can just envision, as one who practiced law for many years, a Federal judge collecting a fee. It just does not happen. It is charged that the fifth circuit had in Lefton against Hattiesburg, decided at an earlier time, eliminated filing fees for such cases.

First and foremost, filing fees are charged and collected by the clerk of the court—not by a judge.

Second, the clerk of the court, Mr. Marvin Waits, testified that in the charging of fees, the clerk is guided and bound by the clerk's manual. That manual is formulated and is distributed by the Administrative Office of the U.S. Courts. The manual at the time of the removal case had been in effect from about 1952 to April 1, 1966. It provides a filing fee of $15 for removal cases.

If the clerk had not collected the $15 in such cases, he testified, upon audit of accounts by the administrative office, he, himself, would have been called upon to make the payment personally.

He testified further that in 1966 the clerk's office received a new manual from the Administrative Office of the U.S. Courts, which contained section C, 1001.5 reading:

> Note. New language effective April 1, 1966: A. Criminal cases removed from state courts; filing fees are not chargeable for filing of petitions to remove criminal prosecutions from state courts. (*Lefton* v. *City of Hattiesburg*).

From that day on, no fee was charged or collected.

If anyone wants to complain about tardiness of a new, revised clerk's manual on this point, he should direct his efforts to the Administrative Office of the U.S. Courts, but not against the clerk. And, in any event, not against the judge. This Senator would be the last one to criticize blindly the Administrative Office of the U.S. Courts. I have no information as to why there was a delay in the amendment of the clerk's manual.

But, at any rate, it is by that manual that a clerk of the court is bound.

Further, the clerk testified that Judge Carswell always waived payment of a fee upon an affidavit in forma pauperis.

The clerk was asked whether he knew of any case in Judge Carswell's court where such affidavit was filed, where it had been refused by Judge Carswell.

The clerk replied:

No, sir; not any case accompanied by any affidavit *in forma pauperis*.

So that the matter of the filing fee showing racial bias and prejudice is but another attempt to discredit Judge Carswell based upon distorted facts.

HIGH RESPECT AND COMMENDATION FOR JUDGE CARSWELL'S COMPETENCE AND DEMEANOR

I come now to the subject of the high respect and commendation for Judge Carswell's conduct and demeanor as a public official.

The 17 years of Judge Carswell's public life have earned for him solid approval by bar, bench, and the public.

In this regard it is best to turn for information and counsel to those who have known him well, who have had opportunity to work with him as an official, with or against him as a lawyer, and to observe him in his actions and to know his record.

We commend those who pore over all or even a part of the official records, and then seek to render judgment upon the quality and character of the judge and his works. It is sought to vest such ventures with authority and with an aura of some high standing and quality.

But it is earnestly submitted that they are but superficial, even if pursued in an objective, scholarly, competent, and balanced fashion. I have already pointed out that such an ideal, or even satisfactory quality, is definitely wanting in the surveys and reports on the judge's record. In fact, such ventures are a sterile, narrow-based intellectual exercise rather than a balanced appraisal.

I might make a brief reference at this point to a full-page advertisement published in one of the local newspapers. At breakfast time I read the one concerning a statement made and published in New York, signed by some 350 law school and faculty members opposed to Judge Carswell's nomination. The signers of that statement—considering only the contents of that statement itself, self-serving as it is, erroneous, and sketchy as it is, and highly selective as it is, without having read the hearing record of the nomination—blindly accepted the judgment of the man who drafted that report as to the facts in the case. This is all part of a slick Madison Avenue type game being played against Judge Carswell. It is confirmed, interestingly enough, by a phony deluge of postcards, apparently originating in California but postmarked from the various States, in an attempt to make it appear there is broad, national opposition to Judge Carswell's nomination. It is an effort to show there is a great ground swell of opposition to confirmation of the nomination.

But, Mr. President, in due time, this statement as contained in the New York newspaper and the mail campaign will be commented upon more fully as this debate proceeds.

Let us consider instead some of the better qualified witnesses on the subject:

First. Florida State Bar Association: Testimony came from its president, Mark Hulsey, Jr. In preparation for his appearance, he polled the 41-member elective board of governors, who unanimously endorsed Judge Carswell's nomination. During his testimony, President Hulsey stated:

I might also say to the committee that it has been my pleasure to know Judge Carswell personally for over 17 years. Based on my observation of him . . . it is my opinion that Judge Carswell possesses the integrity, the judicial temperament, as well as, of course, the professional competence required to hold the high office of Associate Justice of the Supreme Court of the United States. And I hope that this committee will unanimously recommend his confirmation to the Senate.

Second. Judge Carswell's colleagues of the Fifth Circuit Court of the United States have endorsed him.

Third. American Bar Association: Its committee on judicial selection concluded unanimously that Judge Carswell is qualified for the appointment. Hon. Lawrence Welsh, a former Federal judge, is chairman of the committee. He was at one time Federal district judge, and is considered one of the leaders of the American bar. This standing committee does not engage in routine and nominal acts to reach its decision. It is based upon the views of a cross section of the best informed lawyers and judges in the area served by the nominee. Many of the interviews are personal; others by phone. Inquiry is made in depth into factors bearing upon the integrity, judicial temperament and professional competence of the nominee. The committee's report is always welcomed by the Judiciary Committee since it has the capability to, and has a record of rendering a fair and impartial judgment. Certainly, this Senator's membership on the Judiciary Committee has never considered that the American Bar Association would hold a veto necessarily on the actions of the committee. It is certainly evidence of the highest grade and of the highest quality in the proceedings that might evolve on the nomination of anyone for any position to the Federal bench.

Fourth. The Honorable LeRoy Collins, a former Governor of Florida and a longtime acquaintance, active in professional and civic affairs with Judge Carswell, testified in part that he knew the nominee "as a man of untarnished integrity, a man with an extraordinary keen mind, and very importantly, a man who works prodigiously."

At another point in his testimony, Governor Collins said:

I feel strongly that Judge Carswell's appointment deserves confirmation. I feel this way on the basis of my personal knowledge of the man, first of all, but more importantly on the basis of the overwhelming judgment of the bar of my state, on the basis of the judgment of his peers on the bench, and, I think this is most important, on the basis of the judgment of the Senate and of this distinguished committee based upon your prior hearings and investigations.

Fifth. Hon. James William Moore, to whom I have already referred earlier in my remarks, sterling professor of Yale University Law School, with a career of 35 years in teaching as well as in practice at special capacities, also testified on this particular point. He got to know Judge Carswell personally and also his works by reason of close association over several years. This was in connection with Professor Moore's consultation work, without compensation, for the founders' group at Florida State University at Tallahassee Law School.

In regard to professional and other qualifications of the nominee, Professor Moore stated:

From those and subsequent contacts I have formed the personal opinion that Judge Carswell is a vigorous young man of great sincerity and scholarly attainments, a good listener who wants to hear all sides, moderate but forward-looking, and one of great potential.

I have a firm and abiding conviction that Judge Carswell is not a racist, but a Judge who has and will deal fairly with all races, creeds, and classes. If I had any doubts, I would not be testifying in support, for during all my teaching life over 34 years on the faculty of the Yale Law School I have championed and still champion the rights of all minorities.

From the contacts I have had with Judge Carswell, and the general familiarity with the federal judicial literature, I conclude that he is both a good lawyer and a fine jurist.

Mr. President, these are men and organizations highly respected and regarded in the legal community. Their opinions and judgments must be given great weight. The opinions expressed are unbiased and objective.

They are but a few of the many fellow jurists and fellow trial practitioners who contacted the committee and who offered their support for Carswell. These are the people who know him as a man, lawyer, and judge. They rely on personal knowledge and not a superficial review of a number of legal opinions not even closely approaching the total work product of this man's 17 years in public service.

CONCLUSION

The individual isolated acts referred to by the opponents of this nomination must be viewed as part of the total record. Then you will see a picture which shows that Judge Carswell is a man with a thorough knowledge of the judicial processes. It shows a man who is respected by his peers and has a reputation as a diligent hard-working judge. It shows a man who has applied the law of the superior courts as he knew it and to the best of his ability. It reveals that Judge Carswell is a man devoted to the law and its institutions and is one who by training and aptitude is qualified to sit on the Supreme Court.

Mr. President, I urge every Member of the Senate to give this nomination serious thought. When studying the nomination, I urge that the total record be inspected. If done, I am confident that each Senator will indep ndently decide to support the President's choice and vote to confirm the nomination of G. Harrold Carswell as an Associate Justice of the U.S. Supreme Court.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

What is the will of the Senate?

Mr. BAYH. Mr. President, I rise in opposition to the confirmation of the nomination of Judge G. Harrold Carswell as Associate Justice of the Supreme Court. I must say, at the outset, that opposing presidential nominees is hardly ever a welcome or pleasant task. I did not welcome nor was it pleasant for me personally to oppose the nomination of Judge Haynsworth. As we recall, this was perhaps the hardest fought nomination in over a generation, and it was made doubly difficult because the matter that concerned us centered on the very sensitive issue of judicial ethics. It was a matter in which many of us felt obliged to object, not because we in any way felt that the judge had become involved personally through calculated design to take advantage of his high office, but because we felt he had exhibited a high degree of insensitivity to the very area where increasingly large numbers of our people are calling for a higher standard of conduct; namely, the area of ethical propriety.

The Carswell nomination, in contrast, does not involve the ethical questions present in the Haynsworth nomination, but involves, instead, the question of judicial competence and professional distinction. The President's nomination of Judge Carswell presents to the Senate, for its advice and consent, a nominee whose legal credentials are too threadbare to justify appointment to the highest court in the land.

The Supreme Court is not just another court, Mr. President. Many observers have long regarded it as a unique American contribution to democratic government, insuring progress with stability. No court in any other political democracy has its awesome responsibilities and powers.

As the late Chief Justice White once remarked:

> The glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of government within the walls of the governmental fabric which our fathers built for our protection.

And Winston Churchill, from what can accurately be called his unparalleled perspective on history, could say of the Supreme Court that it is "the most esteemed judicial tribunal in the world."

That is quite a compliment and quite a tribute paid to the Supreme Court of the United States—a compliment that I personally feel is more than justified.

Surely, then, only the most distinguished and qualified members of the legal profession ought even to be considered for appointment to the Court. Surely, too, it is part of the Senate's responsibility, in exercising its power to advise and consent, to require a standard of professional excellence as the minimum qualification for elevation to the Supreme Court. To demand less of a nominee is a disservice to this esteemed tribunal and its unique place in our national life.

Mr. President, because of my position on the Judiciary Committee and because I have been in the midst of both of these confrontations over Supreme Court nominees, perhaps I have become overly sensitive to some suggestions made by distinguished officials in the administration, as well as certain other voices around the land, that the Presidential prerogative is absolute and all inclusive when it comes to Supreme Court nominations. The President's power is great, and he does have much leeway, true, and everything else being equal, certainly he should be sustained.

But the Senate does, in fact, have a responsibility under the advice and consent authority written into the Constitution by our forefathers, and it seems to me we must take very seriously the responsibility and the gravity of it when considering nominations of this magnitude. In my judgment, I do not believe the Members of this body want simply to serve as a rubberstamp agent for the President of the United States.

I do not believe it is a matter of disrespect—certainly the Senator from Indiana does not rise in opposition to this nomination in any way intending to be disrespectful—to our Chief Executive. Rather, it is the position of the Senator from Indiana, and I believe the position of many other Members of this body, that we should actually advise, before consenting.

In Judge Carswell, rather than having a man of excellence, the President has, unfortunately, confronted the Senate with a nominee who is incredibly indistinguished as an attorney and as a jurist. That is, itself, an affront to the Supreme Court.

Mr. LONG. Mr. President, will the Senator yield?

Mr. BAYH. I am glad to yield.

Mr. LONG. Did not some of these same professors upon whom the Senator relies object to nominees who interpreted laws in ways that reversed previous laws and resulted in a 100-percent increase in crime? Did not those same legal authorities recommend, for example, Judge Fortas?

Mr. BAYH. I do not know to whom the Senator is referring. If he cares to enumerate who they are and whom they recommended, I would be willing to take his statement as accurate, because I know he makes accurate statements. If he would care to name them, I will be glad to have them in the record.

Mr. LONG. The Senator is telling us about these great lawyers. Were they not pretty unanimously for Justice Fortas? Did not most of these same great people themselves favor a judge who participated in the Miranda decision, which reversed previous decisions and led to a 100-percent increase in rapes and murders in this country?

Mr. BAYH. I do not know what great legal minds the Senator is referring to. I wish he would mention one or two of them so we could have them in the record. The Senator from Indiana has not mentioned any names. Yet my good friend from Louisiana is mentioning some. I will be glad to have the names of those he has in mind, so we will have them in the record.

Mr. LONG. I assume the Senator is going to refer to some of them. Is the Senator aware, for example, of some of the professors and lawyers who signed the letter in the Washington Post such as Mr. Plimpton, of the New York Bar? Did some of these people object to the nomination of Justice Fortas to be a member of the Court?

Mr. BAYH. I do not know what Mr. Plimpton wrote or whether he took any advertisements in favor of Judge Fortas. Did Mr. Plimpton take out any advertisements?

Mr. LONG. Mr. Plimpton and members of the Yale Law School faculty have opposed the nomination of Judge Carswell. Is the Senator aware of any of them from that Yale Law School group who supported the nomination of Judge Fortas?

Mr. BAYH. I was not aware of letters or petitions in support of Judge Fortas from the Yale Law School. I would suppose that perhaps only on occasions of extreme concern would as large a number of legal minds, as we now see exorcised, become exorcised over appointments to the Supreme Court.

Mr. LONG. When the appointment of Judge Fortas was before the Senate, much was made of the point that he was a brilliant student. My reaction was, "Look at those decisions on law and order. Look at that Miranda case, and the other cases that have made it virtually impossible to punish criminals in this country."

The Senator from Arkansas (Mr. MCCLELLAN) stood here and mustered the support of a majority of the Senate for the proposition that those decisions were responsible for much of the 100-percent increase in crime in this country. We voted, by a majority vote, to do something about that. I do not think we mustered the vote of the Senator from Indiana, but we did muster the votes of a majority of the Senate.

May I say to the Senator that all this ability to think in corkscrew fashion, to stand on one's head and make it sound logical, did not particularly appeal to this Senator, if the result was wrong, leading to an increase in murder, rape, burglary, and major crime across this country, and making law enforcement authorities powerless to act.

Does it not seem to the Senator that we have had enough of those upside down, corkscrew thinkers? Would it not appear that it might be well to take a B student or a C student who was able to think straight, compared to one of those A students who are capable of the kind of thinking that winds up getting us a 100-percent increase in crime in this country?

Mr. BAYH. I do not know what my friend from Louisiana calls corkscrew thinking. I think if he will look at the record, however, he will find that the Senator from Indiana joined him in voting for passage of the crime bill,

which I think was the bill he referred to.

The man whose nomination is presently before us has been woefully lacking in ability to interpret what the law of the land is and apply it to the situation before him.

Mr. LONG. My friend says he has no credentials. I do have a few credentials. At least they have my name on the building where I graduated. I was associate editor of the law review. As one who was associate editor of the law review, I recall that we never picked out for a case note or comment some decision where the judge said, "Look, it is just perfectly plain; the statute says black is black and white is white, and since this happens to be black, I have to hold that it is black; and since, on the other hand, this happens to be white, I have to hold that it is white."

If you want to be written up, however, you take something that is white and try to reason it to be black or some shade of yellow; or take something over here that is square and reason it to be circular. You will perhaps get yourself written up in the Harvard Law Review, especially if you can get some court to uphold that kind of reasoning.

Such a case is the Miranda decision. Nothing in the Constitution says that when you apprehend a criminal, you have to tell him he does not have to answer questions, and that he is entitled to have a lawyer, and if he does not feel like hiring a lawyer, the State will hire one and have him advised as to the law; and then you can ask him the question, "What are you doing with that blood on your hands?" That was a contrivance of Judge Fortas, the sort that gets a judge the kind of notoriety that is written up in law reviews.

I assume the Senator would have voted for Judge Fortas, would he not, had he had the opportunity? Decisions of that sort would get you in the Harvard Law Review. However, but if you say, "Look, there has been no decision like that, but we have 50 cases that say you are entitled to ask the question," that would not be picked up for comment or any note. You do not pick up all that notoriety if, as a straightforward person you decide the cases on the law and the precedents.

Mr. BAYH. Mr. President, the Senator from Louisiana makes the Senator from Indiana feel less ashamed of his legal accomplishments, if being the editor of the Law Review automatically makes him an expert in the law. The Senator from Indiana was a member of the Indiana Law Journal, and on the board of review there. I am sure he did not make as illustrious a record as the Senator from Louisiana did, and he surely does not have a building named for him.

Mr. LONG. I did not say there was a building named for him on the LSU campus. I said my name was on the building where I graduated. It is on a plaque they put up for people in a moot court competition.

I assume, since the Senator has some ability as a lawyer, then, he is not simply relying on what someone has said. It has been my impression that if one has some ability to think about these things, and he has credentials, he ought to state them. The Senator started out by disqualifying himself; I am pleased that now he does qualify himself as a lawyer.

Mr. BAYH. The Senator from Indiana, with all due respect to my distinguished colleague and friend, for whom I have a great deal of respect, does not need the help of the Senator from Louisiana to interpret the cases for him. He will make that determination for himself. But he is broadminded enough to hear what various legal scholars have to say about a man's qualification to sit on the Highest Court in the land, before he makes his decision.

Does the Senator from Louisiana know of any dean of any law school who recommends the confirmation of the nomination of G. Harrold Carswell?

Mr. LONG. I have not looked for any, but I am sure I can find plenty of them.

Mr. BAYH. I thought, since we are trying to fight a battle of experts here, that surely the Senator could name some.

Mr. LONG. Well, I will make the assertion, without the slightest fear of successful contradiction, that I will find quite a few who recommend the man's confirmation. I assume that those who signed the petition to which the Senator refers did not have the support of 50 law school deans, because they are the only ones who signed it. I assume if you have 500 lawyers on an advertisement, it is because you did not have a thousand who wanted to sign it.

So far as I know, I do not know of anyone who happens to hail from my State who would not agree that the nomination of Judge Carswell should be confirmed.

Mr. BAYH. I am sure that the Senator from Louisiana speaks with authority relative to what the people of his State think. I know of no one who has ever represented his State more ably, and I compliment him for it, and have just a touch of envy and hope in my voice, that I will have a chance to serve my State as well and as long as the Senator from Louisiana has served his; and I know his period of service has just begun.

Mr. LONG. Mr. President, permit me to return the compliment. I think the Senator from Indiana is doing a great job for his State. While I regret that he may be in error in this particular case, I have the highest regard for the Senator, and I hope nothing that I have said implied anything to the contrary.

Mr. BAYH. I think the Senator from Louisiana and the Senator from Indiana understand each other perfectly, and each knows what the other is after.

In the final analysis, I think the Senator from Louisiana and the Senator from Indiana, as well as their 98 colleagues, for whom we have the greatest respect, are not going to make their determination on what is said in an advertisement or what is said by law school deans or a list of lawyers pro or con, but on the facts as they see them. I know that the Senator from Louisiana would be the first to say that it is possible for reasonable men, and good friends, as far as that is concerned, to look at the same facts and perhaps come to somewhat different interpretations.

Mr. LONG. Mr. President, if the Senator will be so kind as to yield further——

Mr. BAYH. I am happy to yield.

Mr. LONG. When President Johnson was considering possible nominees for Chief Justice, this Senator made a television presentation which appeared in his State, and was broadcast on a large number of radio stations as well. We were discussing the crime bill. At that particular time, I made the statement that there were about four decisions of that Supreme Court for which I would blame a major part of the 100-percent increase in murder, rape, armed robbery, and other major crimes in this country.

I discussed those decisions, and I pointed out that there were certain Judges on that Court that I could not vote to confirm, if I knew they were going to vote that way, and that, looking at their records, I could not vote to promote any of them. I mentioned Justice Fortas as one of them.

That was not putting myself against all nine of them; that was just saying that the five who had constantly voted to help the criminal enthrone himself above society would never attain my vote, if I had anything to say about it, because I thought those decisions were destroying this country.

When Justice Fortas' name came down, I was one of the Democratic leaders in the Senate at that time, the assistant majority leader, notwithstanding which I told the President, who was a very dear friend of mine, that I could not support his nomination and I could not vote for him.

I told my people how I felt about it, and that I felt that if a man stood for anything, he ought to be consistent. I said if it were up to me, I could not support his even being on the Court, considering what I knew about him then.

That was not a matter having anything to do with ethical sensibilities. That was just a fact that men are responsible for decisions that, in my view, might have been erudite. They might have marked him as a legal scholar, as one who can reason around from the decisions to reach a conclusion different from his predecessors. Nevertheless, it seems to me that that was not the kind of man we need for Chief Justice or who even should be a member of the Supreme Court—not that I do not admire him as a brilliant lawyer. He had no business being a Chief Justice because of the kind of reasoning and the decisions of the Court that were destroying this country. They were part of the 100-percent increase in crime that this country has sustained.

I heard President Nixon say, on the issue of law and order, that if he became President, he was going to appoint someone who would vote with the three who had tried to uphold the cop against the criminal, rather than the five who had voted to uphold the criminal against the cop.

When he submitted Judge Carswell's nomination to the Senate, it was my impression that that is the kind of man he had nominated.

A man does not have to have such brilliance as to be able to reason as nobody ever reasoned before in order to satisfy me. All he has to do is to read where it says it is a crime to kill somebody, and if you did it you are guilty and have to go to jail, and perhaps face the death penalty for it. If the law says that the penalty is death, he would say, "It says that you suffer death if you do that." That is how it has been since this Nation was founded. He would not try to find some way to say, "You do not have to face the death penalty," to a man who had killed many people and who deserved to be put to death, if that was the judgment of the State and the law passed by the State.

We would not need all that sort of brilliance to say that capital punishment had been outlawed, when Congress did not see fit to outlaw it.

I would think that that sort of straightforward thinking might not merit a comment in the Harvard Law Review or the Yale Law Review, but I think it would help to get on with the business of saving this great country of ours and arresting the increase in crime.

It seems to me that that is the kind of man we ought to be looking for. The ability to come up with some brilliant new legal thought which nobody ever thought about before would seem to me to be something we have had too much of already. That is half of our trouble.

I thank the Senator.

Mr. BAYH. I appreciate the Senator's comments. I certainly would be the first to suggest that the President was within his right, totally and completely, to suggest that if he were elected President of the United States he would appoint men of certain qualifications. I think he referred to strict constructionists. I think he referred to a balance that was necessary on the Court. I think he also referred to boyhood idols, such men as Holmes, Brandeis, and Cardozo. Does the Senator from Louisiana feel that G. Harrold Carswell fits into the same category as these three men whom the President admires?

Mr. LONG. Brandeis, Holmes, and Cardozo could very well qualify as dissenters, and that is fine. They were great dissenters of their day. Once in a while, though, someone should be nominated who is something of a conformist, and I would take it that that is apparently what the Senator is complaining about with regard to Judge Carswell.

Mr. BAYH. I want to know if the Senator from Louisiana feels that Mr. Carswell fits in the same caliber and is of the same quality of judicial competence as the three men to whom the President alluded.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. LONG. I have no particular objection to those Judges. So far as the decisions they handed down, I see no particular mischief that they reflected at that particular time. I think that some of those decisions were very well taken, for which those men were very famous.

But I am frank to say that what we need at this time more than anything else is some conformists on the Court, someone who would conform to what the law always has been, rather than some of those who try to upset what the Constitution says and what the law has always been regarded as being, particularly that which has been pretty well established in the field of law and order. We need them.

Mr. BAYH. I note that the Senator is deeply concerned about reversing the increase in crime. I am concerned about that, too. I wish it were possible to say that the presence or absence of one man on the Supreme Court is automatically going to reverse this increase in crime. Judge Fortas has been off the bench for more than a year now. Has the Senator from Louisiana paid any attention to the direction in which the crime rate has been headed during the absence of former Justice Fortas?

Mr. LONG. In the District of Columbia, we are told, it is going down, which is fine. Of course, I do not know of any of Mr. Fortas' decisions that have been changed.

Incidentally, on that subject, the Senator said he voted for the crime bill. Only one Senator voted against it. How did the Senator vote on the McClellan amendments?

Mr. BAYH. There were several.

Mr. LONG. How about the one that had to do with the Miranda warning?

Mr. BAYH. I do not remember. I would be glad to check it out and see.

Mr. LONG. May I say that that particular case has to do——

Mr. BAYH. My assistant advises me that I voted against an amendment that would have struck the McClellan amendment from the bill.

I think the Senator referred to some supposed statistics relative to the District of Columbia. I think I recall seeing an FBI report to the effect that last year crime went up nationwide 17 percent, even without Judge Fortas on the Supreme Court. I wonder how that happened.

Mr. LONG. The scene had been set. We still have not done what needs to be done to apprehend and punish those who have been committing all these crimes in this country.

Mr. BAYH. With all due respect to the Senator from Louisiana, I think we have gotten a bit far afield. I do not want my last question to suggest in any way that the Senator from Indiana feels that Judge Fortas was responsible for any increase in the rate of crime. I think we have a number of factors that have to be dealt with, only one of which is certain decisions that the Court might hand down.

If the Senator is concerned about getting men on the Court who will think or vote a certain way, the Senator from Indiana has been of the opinion that the President has the primary prerogative of making this choice.

I wonder if it would not be possible to find a man who fits the stereotype that the Senator from Louisiana is searching for, whether it is a strict constructionist or a Southern conservative, or whatever it might be that he is searching for, to reverse this trend we are talking about but that such a man also be one of great professional competence and distinction.

When I was in Louisiana a few years ago, I had the good fortune to meet a learned judge from the Senator's home State, Judge Wisdom. I wonder how the Senator from Louisiana would weigh the Carswell nomination, and Judge Carswell's qualifications against the learned judge from Louisiana, Judge Wisdom.

Mr. LONG. Mr. President, Judge Wisdom's name is not before us.

Mr. BAYH. Neither is Judge Fortas', let me suggest, but we are trying to assess the relative qualifications of men who might be nominated.

Mr. LONG. Judge Fortas' name was here, and I took a position on Judge Fortas, and I do not regret it for a moment. I think the position I took was right.

Mr. HART. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. HART. Judge Fortas' nomination was not before us. We were never permitted to get Judge Fortas' name out here. Now is the time to remind those who are sensitive about how long a debate is going to take——

Mr. LONG. Perhaps it happened in a dream. I thought the Senator from Michigan sat right there, in that chair, with Judge Fortas' name.

Mr. HART. And pleaded with the Senator from Louisiana to permit us to bring it up.

Mr. LONG. I had nothing to do with bringing it up.

Mr. BYRD of West Virginia. Mr. President, I ask for the regular order.

Mr. BAYH. I would be glad to yield to my friend from Louisiana if he wants to ask any more questions.

Mr. LONG. I have asked the questions I had in mind.

Mr. BAYH. I would be glad to hear any more comments from the Senator from Louisiana. The Senator from Louisiana has been favorably impressed with the qualifications of Judge Wisdom. I believe that he is the kind of man that would not be confronted with any opposition on an intellectual basis or on the basis of judicial demeanor basis. If the Senator from Louisiana does not agree, I would be glad to have his thoughts.

Mr. LONG. The Senator has asked me a question. Would he yield to permit me to respond to that question?

Mr. BAYH. I would be very glad to yield to the Senator.

Mr. LONG. Frankly, I would say that Judge Wisdom impresses me as one of those fellows who sometimes seeks to wander out into the wide blue yonder and make new law and rule in areas where rulings have not been made before. He may be just exactly what the Senator is looking for, because he will rule that something is the law even though the question has never been brought up before, and he is seeking to make new law and to make a name for himself. I would assume that such decisions would meet with the Senator's praise. Personally, that does not particularly impress me. I hold to the old-

fashioned view that any time we take something out of the Constitution we have violated our oath to uphold and defend the Constitution.

If we rule on something against the Constitution which was put in there by our Founding Fathers or amended later by constitutional amendments by Congress and the country, we have violated our oath. So far as I am concerned, we should amend the Constitution only when a man deliberately does differ, and I think that when a man does differ with the Constitution, that man should be subject to being voted off the Court or to have his term expire, so that we can decline to put him back on.

The other day we voted on something and I was in the minority on it, about the 18-year-old matter. So far as I am concerned, that was clearly an unconstitutional procedure. It concerned something that can be done, in my judgment, only by a constitutional amendment. In my judgment, had I voted for that, I would have violated my oath. That is just one of those cases. That is how I feel about it. If I think a man takes an oath to uphold the Constitution and then votes to destroy some of it, he is violating his oath. Does that answer the Senator's question?

Mr. BAYH. I think the Senator spoke rather eloquently there as to his lack of faith in Judge Wisdom. I disagree with the Senator's assessment. I think we need to be careful, with all due respect to my friend from Louisiana, that we do not adhere to the mistaken notion that a judge must decide every case as we would decide it, as the Senator from Louisiana or the Senator from Indiana would decide it. For that reason I am very reluctant to put myself in a position where I would say that Judge X or Judge Y should be recalled or voted down because he is rewriting the Constitution.

The Senator from Indiana would be the last to suggest that if Judges find contrary to the way I would decide things, that they should be kicked off the Court.

Mr. LONG. Mr. President, will the Senator from Indiana yield?

Mr. BAYH. I yield.

Mr. LONG. I would suggest to the Senator that what we need on the Court is a man who simply keeps his oath of office and upholds the Constitution and the laws of the country, construing them to mean exactly what Congress intended them to mean and not one who wants to "innovate," try to make new law, which is not his job. That man is not supposed to be making new law, he is supposed to be upholding the law that was passed on to him, to uphold the Constitution, which is our fundamental law. It was my understanding that President Nixon indicated that he wanted to appoint someone who would do that. My impression is that there is much disappointment with some people over Judge Carswell since he appears to be that kind of man, the kind of man who does not have all this sort of sophistication in order to come up with a forthright decision.

It seems to me that Judge Carswell has all the qualifications we need, contrary to some of those—let us face it, those who were deliberately appointed in years gone by, based on the probability that they would differ with their predecessors. I feel that if one does not like the basic law put in the Constitution, they should not do so by usurpation. Those who like the other school, for one reason or another, might not like Judge Carswell, might like Judge Fortas a lot better, but there are quite a few others who would find some way to destroy that Constitution and engage in some brilliant reasoning to show that they had not done what they clearly had. My impression is that Judge Carswell is not in this thing to bring that about and I applaud that. He is not being appointed as being that kind of judge.

Mr. BAYH. I do not want to belabor the point, but I think perhaps the Senator and I have different interpretations as to how to rate a judge's characteristics and competence relative to interpreting the Constitution. The Senator from Louisiana, of course, is, I am sure, proud of the fact that his State of Louisiana is in the fifth circuit. Is that not accurate?

Mr. LONG. We are in the fifth circuit, yes.

Mr. BAYH. Louisiana is in the fifth circuit. I suppose the Senator from Louisiana has a certain degree of pride for the overall competence of the judges that sit in the fifth circuit relative to their interpretation of the Constitution?

Mr. LONG. I have never been heard to say that the judges of the fifth circuit were the greatest judges in the land. Did the Senator ever hear me say that?

Mr. BAYH. I never heard the Senator say that.

Mr. LONG. So be it.

The Senator asked me what I thought of the fifth circuit. I did not have occasion to cast a vote for judges on the fifth circuit because those judges were appointed without consulting me, with the exception of one, Judge Ainsworth, who I think is a fine man—while I may differ with him from time to time, I take no particular issue in that. I think he is a fine judge.

Now, Mr. President, I would be glad to give the Senator my assessment of the judges that I did have something to say about who were on the Federal judiciary, men who came from Louisiana. They are all fine judges. I have in mind both those appointed by President Eisenhower, with regard to whom I was not consulted, those appointed by John Kennedy and those who were appointed by Lyndon Johnson. Every last one of them are very fine men.

The Senator asked me about the fifth circuit, and I should like to make the Senator a sporting proposition here, to pick out any of those, any three, I will call them, the judges that the Senator thinks are men who have had more cases before them than before Judge Carswell. Those are judges I know. I went to law school with some of them.

Mr. BAYH. Relative to the interpretation of the Constitution and how the judges on the fifth circuit might interpret the Constitution, is it fair to say that the Senator from Louisiana has not objected to the appointment of any of these men on the fifth circuit on the basis that they could not adequately interpret the Constitution?

Mr. LONG. Mr. President, I do not know of any of these judges on the fifth circuit that I have opposed. I know of one that I supported, and I am not complaining. As far as I am concerned, he is all right.

Mr. BAYH. Mr. President, I do not want to belabor the question. However, it seems to me that I have been listening to the Senator from Louisiana express the great concern he has over certain decisions made by certain Judges of the Supreme Court.

What concerns me relative to the ability of the present nominee, Judge Carswell, on interpreting constitutional questions is not related to what the Supreme Court has said on Carswell cases. But it is related to the fact that on 17 occasions, by a unanimous vote of the fifth circuit, the judge has been overruled on matters involving civil rights, human rights, and habeas corpus petitions.

It seems to me that should be of some concern to the Senator if he is consistent, because he would have to suggest that the judges—whom he did not object to and who knew how to interpret the Constitution in the fifth circuit, have said that Carswell was wrong on 17 occasions.

Mr. LONG. Mr. President, would the Senator from Indiana tell me how many cases Judge Carswell decided that the court affirmed and the vote on those cases?

Mr. BAYH. I think, since the Senator from Louisiana is asking the question, he could supply the information.

Mr. LONG. Mr. President, I would not ask the question if I were going to answer it. I am not on the committee. The Senator brought up the matter for the record. He seems to be very well aware of the number of times he was reversed.

Is the Senator here just trying to give one side of the matter?

Mr. BAYH. I am here to show what I think is his very unbalanced picture on civil rights.

Mr. LONG. Mr. President, I do not know whether it is an unbalanced picture, but I think it is an unbalanced presentation.

Does the Senator have the information?

Mr. BAYH. Mr. President, the Fifth Circuit Court agreed with Judge Carswell's decisions so well that they reversed him 59 percent of the time when written opinions were handed down on appeals.

If the Senator would like to do so, he could ask to have one of the members of the staff of the committee go through them case by case.

I am informed that this is three times the rate of reversal for a district judge. And I am particularly concerned because of the insensitivity that the judge shows with respect to the areas of civil rights, human rights, and habeas corpus.

I point out that we are talking about circuit court reversals, and not about the Supreme Court of the United States that some people say is out of balance. We are talking about the fifth circuit which is a little more conservative than other circuits. It is not a flaming bastion of liberalism.

The fifth circuit has overruled the judge, unanimously, on 17 occasions involving civil rights, human rights, and habeas corpus. That is a matter of some concern to me.

Mr. LONG. Mr. President, I am well aware of the fact that the fifth circuit has sought to be out in front of the Supreme Court of the United States and in many instances has sought to make new law, even going beyond the Brown case. And I would assume that when a court is trying to make new law, it is going to have to reverse a judge who holds in accordance with the old law. And I would have to say that the judge is right and that the fifth circuit is wrong.

Mr. BAYH. Seventeen to nothing?

Mr. LONG. Mr. President, I am not here to say that the fifth circuit is always right. I am trying to say that there are a lot of occasions when I have felt that the fifth circuit was wrong.

Is the Senator aware that the fifth circuit has been reversed by the Supreme Court? I do not say that they are always right.

Mr. BAYH. Mr. President, I am sure that few of us would say that any circuit has escaped being reversed by the Supreme Court.

I must say that this is an interesting description of the fifth circuit given by the distinguished Senator from Louisiana, that it is trying to establish new law and is out in front of the U.S. Supreme Court.

I am sure that would be of some interest to the Senate and to the country, but I do not think it is correct.

ORDER OF BUSINESS

Mr. RANDOLPH. Mr. President, will the Senator from Indiana yield to me as in legislative session.

Mr. BAYH. Mr. President, I yield.

THE RIGHT TO VOTE

Mr. RANDOLPH. Mr. President, as in legislative session, I point out that in the aftermath of the recent Senate action to lower the voting age to 18 by statute, there have been editorials of varying opinions on the method of achieving this desired objective.

I particularly call the attention of my colleagues to the editorial published in the Washington Post on Saturday, March 14, 1970, in which the editor strongly recommends that a constitutional amendment be pursued.

I believe that our 18-, 19-, and 20-year-old citizens are vital to the American system of selecting public officials. They will add the vibrancy of youth and new insight in the determination of national policies du_ing these trying and challenging times.

Mr. President, I ask unanimous consent that the editorial to which I have referred, as well as an editorial which was published on Saturday, March 14, 1970, in the Washington Daily News, be printed at this point in the RECORD.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

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

THE 18-YEAR-OLD VOTE: STATUTE OR AMENDMENT?

The Senate's 64–17 vote to lower the voting age to 18 reflects a widespread demand for greater youth participation in the processes of government. It is a salutary trend. This newspaper is fully sympathetic with the objective, but the attempt to attain it by means of a statute instead of a constitutional amendment seems to us highly dubious.

The reasoning that a statute alone will suffice is based largely on the Supreme Court's opinion in *Katzenbach* v. *Morgan* and the subsequent projection of the reasoning in that opinion to voting-age requirements by former Solicitor General Archibald Cox. The court, in that case, upset a New York law which made ability to read English prerequisite for voting. The state requirement was in conflict with the Voting Rights Act of 1965 which provided that no person may be denied the right to vote because of inability to read or write English if he had successfully completed the sixth grade in a Puerto Rican school where the instruction was in Spanish. The Supreme Court gave preference to the federal statute because it could "perceive a basis" on which Congress might view the denial of the vote to Spanish-speaking Puerto Ricans "an invidious discrimination in violation of the equal protection clause" of the Fourteenth Amendment.

Mr. Cox and some other constitutional authorities have concluded that Congress is now free to say that the denial of the vote to citizens between 18 and 21, on the ground that they lack the maturity to vote, is also invidious discrimination. It is a long leap, however, from striking down a discriminatory language requirement to fixing an age limit at which voting may begin. In the New York case there was actual discrimination against Puerto Ricans seeking to vote in that state despite the seeming general applicability of the statutory language. But where is the denial of equal protection in a voting-age requirement that is applied without discrimination to citizens of all nationalities, races and so forth? If it is invidious discrimination to deny the vote to 18- 19- and 20-year-olds, would it not be equally unconstitutional to deny it to 17-year-olds?

The founding fathers unquestionably intended to leave voting age requirements to the states. This is evident in the provision that voters in congressional elections "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." The effect of the Senate's 18-year-old voting amendment to the voting rights bill would be to transfer to Congress this authority to fix requirements, in state as well as federal elections. We agree that the voting age should be lowered, but there are powerful arguments on grounds of policy as well as constitutional law for using the amendment process.

Sponsors of the change by statute, Senators Mansfield, Kennedy and Magnuson, think they have adequately guarded against inconclusive elections under the bill by expediting a test of its constitutionality. Certainly that is a wise precaution. But when basic changes of this kind are to be made (46 states now impose the 21-year-old voting requirement) the proper procedure is a constitutional amendment. Now that senators have had an opportunity to vote for a popular measure, they could logically agree to rest the reform on more secure ground.

[From the Washington Daily News, Mar. 14, 1970]

LET'S VOTE AT 18 IN 1971

The U. S. Senate's decision by a vote of 64 to 17 to lower the voting age to 18 next year indicates the nation finally may be ready to do something about the fact that millions of Americans have been unfairly excluded from the political process.

The chief argument in the Senate against lowering the voting age to 18 by an act of Congress was that it might be unconstitutional.

But the Constitution does not explicitly speak to the matter one way or another. This would seem to mean that Congress is free to act.

If there is any question about lowering the voting age by act of Congress rather than by constitutional amendment, the lower voting age proposed by the Senate would not take effect until Jan. 1, 1971, allowing plenty of time for a Supreme Court ruling.

Highly significant was the fact that Senate debate ignored almost entirely the outworn argument that persons 18-to-21 are too young to be trusted with the responsibilities of citizenship.

As the situation stands, more than 10 million Americans between the ages of 18 and 21—some of our brightest and most concerned citizens—are denied the right to vote in local, state and national elections.

Waiting for the states to lower the voting age (only four have done so) would be an admission that the nation simply doesn't care enough to correct an obvious injustice.

Unfortunately, the Senate bill has a long way to go before it becomes law.

The vote-at-18 proposal was attached as a rider to the bill extending the protection of Negro voting rights in the South.

This means the youth issue could become entwined with the race issue when the differences between the Senate bill and a bill passed by the House of Representatives last year are worked out.

Another obstacle is the opposition of the Nixon Administration to a lowering of the voting age without constitutional amendment.

But if the Senate action is any measure of the new mood in Congress, there is good reason to believe that voting at 18 is an idea whose time has finally come.

Mr. RANDOLPH. Mr. President, additionally, a New York Times editorial of Saturday, entitled "Protecting the Right To Vote," states:

The proposal to lower the voting age from 21 to 18, though highly desirable, is too important to be slipped through as a rider. Indeed, it is far from certain that the change in voting age can be made by simple act of Congress without formal amendment of the Constitution. The whole question deserves consideration—and approval—on its merits.

ADDITIONAL COSPONSOR

SENATE JOINT RESOLUTION 147

Mr. RANDOLPH. Mr. President, as in legislative session, I ask unanimous consent that, at the next printing, the name of the Senator from California (Mr. MURPHY) be added as a cosponsor of Senate Joint Resolution 147, proposing an amendment to the Constitution of the United States extending the right to vote to citizens 18 years of age or older.

The PRESIDING OFFICER (Mr. DOLE). Without objection, it is so ordered.

Mr. GRIFFIN. Mr. President, with the addition of the senior Senator from California (Mr. MURPHY), would the Senator inform the Senate how many Senators are cosponsors of his resolution.

Mr. RANDOLPH. Mr. President, I am grateful for the inquiry of the able as-

sistant minority leader. There are now 72 Senators who have joined me in the cosponsorship, making a total of 73 Senators on Senate Joint Resolution 147.

As the Senator knows, Senate Joint Resolution 147 is now pending in the Subcommittee on Constitutional Amendments chaired by the Senator from Indiana.

I am sure it is the hope of the Senator from Michigan (Mr. GRIFFIN) and also of my colleague, the Senator from West Virginia (Mr. BYRD), who is in the Chamber at this time, as well as other Senators, that we will have a prompt reporting of that resolution from the subcommittee to the full Judiciary Committee and then to the Senate, so that we will be prepared to act immediately on the constitutional amendment approach.

As I stated last week, it is my belief that the lower voting age would best be accomplished through the constitutional route by an affirmative vote of two-thirds of the Members of the two Houses present and voting and the subsequent ratification by three-fourths of the States. This would bring the matter to finality by writing this change into the language of the Constitution of the United States.

COMMISSION ON GOVERNMENT PROCUREMENT—APPOINTMENTS BY THE VICE PRESIDENT

The PRESIDING OFFICER (Mr. DOLE). The Chair, on behalf of the Vice President, pursuant to Public Law 91-129, appoints the Senator from Washington (Mr. JACKSON), the Senator from Florida (Mr. GURNEY), and Mr. Richard E. Horner to the Commission on Government Procurement.

MESSAGE FROM THE HOUSE—ENROLLED BILLS SIGNED

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the Speaker had affixed his signature to the following enrolled bills, and they were signed by the Acting President pro tempore (Mr. ALLEN):

S. 495. An act for the relief of Marie-Louise (Mary Louise) Pierce.

H.R. 1497. An act to permit the vessel *Marpole* to be documented for use in the coastwise trade.

SUPREME COURT OF THE UNITED STATES

The Senate, in executive session, resumed the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HART. Mr. President, a few moments ago I had the privilege of hearing the exchange between the Senator from Indiana (Mr. BAYH) and the Senator from Louisiana (Mr. LONG). It was interesting and informative in several respects. I rise to make comments not on the qualifications of the nominee now pending, nor on the fact that the Senate was not permitted to consider the name of Justice Fortas who had been nominated to be Chief Justice, nor on the performance record of the fifth circuit. I just wish to express my hope that this debate will not contribute to the foolish notion that crimes of violence—such as murder, rape, and robbery, which the distinguished Senator from Louisiana mentioned—can be eliminated or substantially reduced by changing the men on the Supreme Court. Indeed, I suggest it would serve the country poorly in this debate to advance the proposition that it is because of the Supreme Court that there has been this shocking increase in crimes of violence.

Every American realizes that if he is fearful to go out of his home at night, his liberty is less; if he is afraid to attend a parents meeting at school at night, his freedom is impinged—and not as the result of anything Mao Tse-tung or Moscow is doing.

But to suggest that these conditions result from three or four decisions of the Supreme Court and can be changed by adding new personnel until there is a reversal of those decisions does not promote the security of this country.

It is suggested once again that there is an easy and cheap answer. Only when we realize there is no cheap answer, but only an expensive one; and not a quick answer but only a long term answer, will we begin to fight crime intelligently.

What I have said echoes cautions that have been voiced for years. Congress can get into a great lather when some hoodlum commits a crime that outrages a community; and agree to do a great deal about that fellow. Why do we not react as vigorously to the documentation of the unmet human need as it relates to the incidence of crime. Let us go back to the Wickersham Commission. I think I was still in school when that group told us we should put up money, incorporate systems of jurisprudence, and improve the institutions to which criminals are sent.

What are our needs today? This is where too many people today turn off their listening devices. There is assurance of equality of opportunity which begins with decent, healthy bodies in childhood; in this way, malnutrition has its affect on crime. There are the needs for a decent home in which to grow up and a school system where there is excellence. It involves whether one comes from a home of darkness to begin with or not; it involves all of this.

Let us stop encouraging the dangerous mood in this country which suggests that if we just get tough and double or triple jail sentences, everything would be great.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. BAYH. Mr. President, I do not wish to interrupt the Senator's thought, but I could not concur more than I do with what the Senator said very adequately when he pointed out the fallacy and the mistaken reasoning of some that to stop the increase in crime is a 2-plus-2-equals-4 problem; that it is, indeed, a complicated algebraic problem; and he made reference to the locking up of suspects. Of course, all of us feel that anyone who transgresses against his neighbor and is convicted should be subject to punishment under the law. But it seems to me totally inconsistent for those who are really concerned in a meaningful way about doing something to increase the safety on our streets and in our neighborhoods to suggest that we lock up more people and put them in the same snake pits they were taken from.

Seventy percent of those who are turned out of the prisons are going to be right back on the streets, preying on the men and women in this country. They are going to be back in the prisons. Once that happens they become professional criminals and we are not doing anything to solve the problem.

I am glad the Senator from Michigan brings it out so clearly.

Mr. HART. I thank the Senator. I had better be careful as I go on because I do not want to forget one point I intended to make when I rose. I did not intend to make it at any great length. I just hope that not alone in connection with this debate but in the conduct of all of our business we will resist the temptation to suggest to ourselves, much less to the country, that there is some shortcut, easy answer to reverse the prevalence of crime in this country.

I intend to make the point that national commission after national commission has told us the things that must be done if we want to make America secure internally from the threat of violent crime. There was the Wickersham Commission of some 30 or 40 years ago. No attention was paid to that in terms of delivering on the basic recommendations. There is in our own recent past the report of the President's Commission on Crime, which is about 3 years old. They told us what had to be done.

There is the Kerner Commission of 2 years ago, and there is the Commission on Causes and Prevention of Violence, on which I was permitted to sit. Let me read two sentences from a section of our report on violence and law enforcement:

> Too little attention has been paid to the Crime Commission's finding that the entire criminal justice system—federal, state and local, including all police, all courts and all corections—is underfinanced, receiving less than two percent of all government expenditures. On this entire system—

May I repeat—Federal, State, and local—

> we spend less each year than we do on federal agricultural programs and little more than we do on the space program.
>
> *In this Commission's judgment, we should give concrete expression to our concern about crime by a solemn national commitment to double our investment in the administration of justice and the prevention of crime, as rapidly as such an investment can be wisely planned and utilized.*
>
> When the doubling point is reached, this investment would cost the nation an additional five billion dollars per year—less than three-quarters of one percent of our national income and less than two percent of our tax revenues. Our total expenditure would still be less than 15 percent of what we spend on our armed forces. Surely this is a modest price to pay to "establish justice" and "insure domestic tranquility" in this complex and volatile age.

Mr. President, this has attracted very little attention, but assume the conclusion of the Commission is sound. Think

of all the things that have to be done at each level of our government before anybody can get up here and say he is engaged in fighting crime. And let nobody get up here and say he is engaged in fighting crime by picking off some seat on the Supreme Court.

I do hope that those who feel so deeply that certain decisions of the Supreme Court have contributed in substantial fashion to the increase in crime—and when a man does feel that he has every reason to seek to turn the Court around—will join those of us who say there is much more to be done, including this massive infusion of resources.

The suggestion the Senator from Indiana has made is one that I hope he will now continue to develop. Is the nominee before us possessed of such distinction, academically and professionally, as a judge to persuade us to consent to the nomination? If he is a strict constructionist, none of us can quarrel with that. That was one-half of the President's pledge when he was campaigning for the Presidency. But is he a man of eminence in his profession? That was the second part of his pledge. That is what the Senator from Indiana addresses himself to. I welcome the opportunity to hear him further on it.

Mr. BAYH. Mr. President, I am reluctant ever to take issue with the Senator from Michigan because he is such a student of anything he speaks on, but, in the judgment of the Senator from Indiana, when one examines carefully the record of the case law established by G. Harrold Carswell, it seems to me he really does not meet the standard of a strict constructionist at all.

Mr. HART. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. HART. I sense that the Senator is going to develop a point that has been overlooked, and I am prepared to stand corrected. When I said I have no doubt that he is a strict constructionist, I used the term "strict constructionist" in the shorthand message that is intended to be conveyed by someone in an election when he is campaigning for President; but in terms of whether he in fact understands the flow of history that produced the Constitution and the forces that operated then and that operate now with respect to that interpretation, I would like to see that developed to see whether Judge Carswell meets the test of whether he understands the meaning of construing the Constitution constructively and conservatively.

Mr. BAYH. I appreciate the comments of the Senator from Michigan. The Senator from Indiana is going to follow the effort of developing what is and what is not a strict constructionist. That is why I was so anxious to get the thoughts of our colleague, the Senator from Louisiana, into the RECORD, to see what test one must meet to be a strict constructionist. I suppose there are 100 opinions in this body with respect to what a strict constructionist means, but if by "strict constructionist" we mean one who applies given facts to a situation and the law involved to the Constitution and what has been said prior to that time on the Constitution, not only by the Supreme Court but the various circuit courts, then it seems to me we have an abundance of opinion which leads us to the conclusion that, rather than being a strict constructionist, this nominee has been launching on a sea of new law, trying to establish a record of "Carswell on the Constitution." I frankly do not see how that is related in any way to the now famous term of "strict constructionist."

The Senator from Indiana was about to discuss what some eminent legal scholars throughout the country had determined was the legal competence of the nominee, when he became involved in a very enlightening colloquy with our distinguished colleague from Louisiana. I will return to that part of my remarks, but before doing so, inasmuch as the Senator from Louisiana and the Senator from Indiana had been discussing the number of times in which the nominee had been reversed by the fifth circuit, and trying to analyze his ability to interpret the Constitution as it had been interpreted by the fifth circuit, and other courts as well, I ask unanimous consent to have printed in the RECORD perhaps the most thorough analysis of the judge's various holdings in a number of cases, which was compiled by the Ripon Society, and then let the Senate decide for itself the validity of the assessment made by that body.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

THE CASE AGAINST CARSWELL: A RIPON SOCIETY PAPER

The Ripon Society urges Republican Senators to uphold their party's best traditions by rejecting confirmation of the nomination of Judge G. Harrold Carswell to the United States Supreme Court. While very damning evidence concerning Judge Carswell's judicial impartiality has already come to light, the most manifest reason for refusing confirmation to this nomination is the undeniable legal inadequacy of Judge Carswell.

Virtually all legal historians and scholars who have examined G. Harrold Carswell's record have found him to be one of the least qualified, if not the least qualified, nominee to the United States Supreme Court in the twentieth century. Exhaustive studies which have been performed jointly in the last month by a large number of lawyers and law students and which are being released for the first time in this Ripon Society paper give extremely strong statistical corroboration to the contention of judicial scholars that G. Harrold Carswell is seriously deficient in the legal skills necessary to be even a minimally competent Supreme Court Justice.

IN THE LEGAL INADEQUACY OF JUDGE CARSWELL

Legal scholars who have examined G. Harrold Carswell's judicial opinions (Carswell has written no scholarly articles) or who have studied his record have concluded that Carswell lacks any legal distinction whatever.

Duke University Law School Professor William Van Alstyne, who testified in favor of the Haynsworth nomination, testified of Carswell: "There is in candor, nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States."

Yale University Law School's Luce Professor of Jurisprudence, Charles L. Black, Jr., himself a native of Texas, has stated of Carswell, "There can hardly be any pretense that he possesses any talent at all."

Twenty professors at the University of Pennsylvania Law School have announced concerning Carswell: "Our examination of his opinions in various areas of the law compels the conclusion that he is an undistinguished member of his profession, lacking claim to intellectual stature."

After thoroughly examining Judge Carswell's opinions of recent years, Louis Pollak, Dean of the Yale University Law School, testified to the Senate Judiciary Committee: "I am impelled to conclude that the nominee presents more slender credentials than any nominee for the Supreme Court put forth in this century, and this century began as I remind this committee with the elevation to the Supreme Court of the United States of the Chief Justice of Massachusetts Oliver Wendell Holmes."

An exhaustive statistical study recently completed by a number of lawyers and law students organized by Law Students Concerned for the Court reveals some very damaging information concerning Judge Carswell's judicial record. After a careful examination of the statistics yielded by the study and of the soundness of the methodology used in obtaining them, the Ripon Society concludes that these statistics strongly corroborate the contentions of legal scholars that Judge Carswell is an exceptionally inadequate federal judge besides being a poorly qualified Supreme Court nominee. This study yielded the following results:

1. *Reversals on Appeal.* During the eleven years (1958–1969) in which Judge Carswell sat on the federal district court in Tallahassee, 58.8% of all of those cases where he wrote printed opinions (as reported by West) and which were appealed resulted ultimately in reversals by higher courts. By contrast in a random sample of 400 district court opinions the average rate of reversals among all federal district judges during the same time period was 20.2% of all printed opinions on appeal. In a random sample of 100 district court cases from the Fifth Circuit during the 1958–1969 time period the average rate of reversals was 24.0% of all printed opinions on appeal.[1]

2. *Reversals in General.* Carswell's rate of reversals for all of his printed cases was 11.9% as compared to a rate of 5.3% for all federal district cases and 6% for all district cases within the Fifth Circuit during the same time period.

The majority of cases before any federal district judge ordinarily do not result in appeals, hence precluding the possibility of reversals in those cases. It is significant however, that Carswell's overall reversal record for his printed cases is more than twice the average for federal district judges. When additional unprinted opinions revealed by the testimony of Joseph L. Rauh, Jr. before the Senate Judiciary Committee and by the memorandum of Senator Hruska are included, Carswell is found to have an overall reversal rate of 21.6%. [For further discussion refer to the statistical summary in the appendix to this paper.]

3. *Citation by Others.* Carswell's 84 printed opinions while he was serving as a district court judge were cited significantly less often by all other U.S. judges than is the average for the opinions of federal district judges. Carswell's first 42 opinions during his first five years on the federal judiciary (1958–1963) have been cited an average of 1.8 times per opinion. Two hundred opinions of other district judges randomly chosen from district court cases spanning this same time period have been cited an average of 3.75 times per opinion. The 42 most recent of Carswell's printed district court opinions have been cited an average of 0.77 times per

Footnotes at end of article.

opinion. Two hundred opinions of other district judges randomly chosen from cases spanning the same 1964–1969 time period have been cited an average of 1.57 times per opinion.

4. *Elaboration of Opinions.* Carswell's printed district court opinions average 2.0 pages. The average length of printed opinions for all federal district judges during the time period in which Carswell sat on the district bench was 4.2 pages.[2]

5. *Use of Authority.* In the 84 above-mentioned printed Carswell opinions the average number of citations of cases is 4.07 per opinion, and the average number of citations of secondary source material is 0.49 per opinion.[3] The average for all district judges during the 1958–1968 time period was 9.93 case citations per opinion and 1.56 citations of secondary source material per opinion.

When these results are analyzed cumulatively they form a most impressive indictment of Judge Carswell's judicial competence. The incredibly high rate of reversals (59%) which Carswell has incurred on appeals in those cases in which he has written printed opinions brings into serious doubt the nominee's ability to understand and apply established law.

The shortness of a particular opinion and the relative paucity within it of case citations and citations of secondary materials do not necessarily indicate deficiency. Short opinions which are succinct and logical display great legal virtuosity, as Justice Holmes demonstrated. Yet not even Carswell's strongest supporters could argue seriously that the nominee's opinions have shown any unusual conciseness, perceptiveness, or skill. The very fact that Judge Carswell was so rarely cited by other federal judges who as a group are best equipped to evaluate the weight to be given to a judge's opinion underscores the generally low quality of Carswell's opinions. We are led inevitably to the conclusion that the shortness and slim documentation of most of Carswell's opinions is evidence of either Carswell's lack of diligence or his lack of ability.

The Senate Judiciary Committee record shows the Fifth Circuit Court of Appeals' reversing Judge Carswell again and again for failing to follow established legal procedures. Of particular concern was Carswell's failure to grant adequate hearings to individual petitioners in civil rights and criminal cases. [Attached to this paper is an appendix summarizing a number of these cases.]

Judge Carswell is said to have boasted that he almost never held an evidentiary hearing in the federal equivalent of a *habeas corpus* case. This cavalier attitude on Carswell's part is yet another example of his insensitivity to essential individual rights dating at least as far back as the Magna Carta. Judge Carswell's attitude in *habeas corpus* cases, as well as in the civil rights area, suggests that his constructionism has been more "selective" than "strict."

The analysis of Judge Carswell's record during his eleven years on the federal district court would suggest that the nominee was significantly below the level of the average federal district courts judge. There is no evidence to suggest that Carswell possesses any unusual talent to raise him above other federal judges. G. Harrold Carswell's performance in the short time since he was appointed to the Fifth Circuit Court of Appeals has shown no signs of a late-blooming virtuosity.

Whatever their legal philosophies, young lawyers, law students, and law professors have reacted with overwhelming dismay to the appointment of such a mediocre lawyer to the Supreme Court. These individuals who form a major portion of the Ripon Society's constituency are fully aware of the enduring character of a Supreme Court appointment, especially that of a man as young as Carswell.

This dismay is felt generally throughout the legal profession. The vote of the Standing Committee on the Judiciary of the American Bar Association finding Carswell qualified is unrepresentative of membership sentiment within either the overall bar or the American Bar Association. Significantly the Chairman of this Standing Committee is the same man who as Deputy Attorney General of the United States played a major role in 1958 in the selection of Carswell to the federal bench in the first instance.

II. CARSWELL FALLS FAR SHORT OF REPUBLICAN STANDARDS FOR JUDICIAL DISTINCTION

During the twentieth century Republican Presidents have maintained a remarkable standard in choosing judicial statesmen for the Court. Oliver Wendell Holmes, Charles Evans Hughes, William Howard Taft, Harlan Fiske Stone, Owen J. Roberts, Benjamin Cardozo, Earl Warren, John Marshall Harlan, William Brennan and Potter Stewart have all made significant contributions to American jurisprudence. The Ripon Society welcomed Mr. Nixon's campaign pledge to appoint to our nation's highest court persons of the caliber of Holmes, Brendeis, and Cardozo. Yet the members of the Ripon Society and many other concerned Americans find themselves deeply disappointed with the quality of recent nominations to the Supreme Court made by the present administration.

The Haynsworth nomination was inadequate to the national need to restore public confidence in the integrity of the judiciary in the wake of the Fortas resignation. Yet far more important than the possible vulnerability of Judge Haynsworth to conflict of interest charges was his limited sensitivity to the rights of blacks and labor. Judge Haynsworth, although a decent man, did not meet either in judicial insight or craftsmanship the standards of greatness which a nation demanded.

The duty which Republican Senators deliberating on the Carswell nomination owe to the Court and to the best traditions of the Republican Party transcends any duty to support a President of their own party on his Court nominee. They do the President no disservice by preventing a mistake which is likely to endure long after the President's tenure in the White House. In fact, by opening this seat once more to a Presidential nomination Senators could enable the President to put on the Supreme Court a person of greatness.

Legal inadequacy of a Court appointee has historically been a principal ground for the rejection of a number of Supreme Court nominees. President Grant withdrew the nominations of George H. Williams of Oregon and Caleb Cushing of Massachusetts after public outcries based largely on their mediocrity. Two of President Cleveland's nominees, William B. Hornblower and Wheeler H. Peckham, were rejected by the Senate largely because they were felt to lack either the impartiality or the stature necessary for the judiciary.

III. CARSWELL'S LACK OF JUDICIAL IMPARTIALITY

Although it may be true that most people including judges have biases of one sort or another, it is incumbent on a judge in fulfilling his judicial function that he rise above these biases and adopt a neutral posture as an adjudicator of the law. Yet Judge Carswell through his decisions and his other uses of judicial power has seemed to eschew the role of impartiality demanded of a judge.

When he was serving as a federal district judge, Judge Carswell achieved the astonishing record of reversal in a tremendous number of civil rights decisions. Fifteen times Carswell was unanimously reversed on civil rights cases by the Fifth Circuit Court of Appeals.

Carswell's 1948 election speech declaring undying allegiance to the principles of white supremacy is deplorable, but we fully recognize that such ill-spoken words can be surmounted by men with a potential for growth. The example of Justice Hugo Black comes readily to mind. Judge Carswell during his entire time of federal service, however, has shown no growth either in legal ability or in sensitivity to the rights of black Americans.

In 1956 when he was serving as a United States attorney responsible for upholding the rights of members of all races, G. Harrold Carswell acted as an incorporator of a private club set up to take over the municipal golf course to prevent its integration. Judge Carswell's recent denials that he knew the private club was set up to maintain segregation seem disingenuous in the extreme.

More disturbing than the golf course incident, however, has been the blatantly anti-Negro, anti-civil rights character of Judge Carswell's conduct on the federal bench. In his letter of reply to Senate Judiciary Committee members who had queried him concerning charges of activity on his part to stifle civil rights workers, Judge Carswell failed to make any denial of some severe charges of judicial misconduct. He left unrebutted the charge that while he served in Tallahassee as a federal district judge he arranged with a local sheriff to rejail some civil rights workers he had been ordered to free by the Fifth Circuit Court of Appeals.

The testimony before the Senate Judiciary Committee suggested that in one case Judge Carswell granted a writ of habeas corpus, required the prisoners' attorney to serve the writ on the sheriff at the jail, then notified the sheriff that he had remanded the case to local jurisdiction so the prisoners could be rearrested before they left the jail.

Other unrebutted testimony has alleged that Judge Carswell commuted sentences of civil rights workers for the purpose of preserving illegal local practices. Faced with a legal necessity to overturn the convictions of certain civil rights workers, Judge Carswell allegedly advised the city attorney that if he commuted their sentences to time already served the matter would become moot.

Judge Carswell's continuing involvement as a charterer of a segregated Florida State University Boosters Club, his passage of property in 1966 under a racially restrictive covenant, and his telling of a tasteless "darky" joke as speaker at a recent public gathering of the Georgia Bar Association are all indications that G. Harrold Carswell has not progressed appreciably beyond the views expressed in his 1948 campaign speech.

IV. THE CARSWELL NOMINATION IS AN INSULT TO SOUTHERN JURISPAUDENCE

Our opposition to the Carswell appointment in no way derives from the nominee's Southern origin. A number of great towers of our nation's judiciary are Southerners. Such men as Judge John R. Brown of Texas, Elbert Tuttle of Georgia, John Minor Wisdom of Louisiana and Frank Johnson of Alabama all have displayed an unflinching devotion to the Constitution of the United States and have exhibited a moral courage of high degree. Justice Hugo Black of Alabama has established himself as one of the great jurists of American history.

Both today and throughout our nation's history the South has produced first-rate legal minds. A Virginian, John Marshall, has had as great an influence as any American judge on the development of our legal institutions. The first Justice John M. Harlan from Kentucky and Justice L. Q. C. Lamar from Mississippi both demonstrated the high potential of Southern legal scholarship.

In passing over so many well qualified Southern lawyers and jurists, the choice of Carswell seems an insult to Southern jurisprudence. Unhappily a man lacking in both intellectual distinction and in judicial fairness is presented to the nation as representative of Southern jurisprudence

Conclusion:

Persuaded that G. Harrold Carswell lacks either the intellectual stature or the judicial

impartiality to qualify for a place on our nation's highest court, we urge the Republican members of the Senate to uphold their party's best tradition by denying confirmation to G. Harrold Carswell's nomination thus allowing President Nixon to submit the name of a person who can command national respect both for his or her fairness and legal stature.

BRIEF SUMMARY OF REVERSALS OF JUDGE CARSWELL

Judge Carswell has been reversed by the Fifth Circuit Court of Appeals and by the United States Supreme Court at least 33 times. A brief description of some of those cases follows.

Augustus v. *Board of Pub. Instr. of Escambria County, Fla.*, 185 F. Supp 450 (1960). Judge Carswell was unanimously reversed by the Fifth Circuit, 306 F. 2d 862 (1962) for striking portions of Negro children's complaint asking integration of school faculties. He held they had no standing to enjoin teacher assignments based on race, which he said was like enjoining "teachers who were too strict or too lenient." (p. 453). The Fifth Circuit criticized Carswell's ruling: "Whether as a question of law or one of fact, we do not think that a matter of such importance should be decided on a motion to strike. As well said by the Sixth Circuit: '. . . it is well established that the action of striking a pleading should be sparingly used by the courts. . . . It is a drastic remedy to be resorted to only when required for the purposes of justice.'" (p. 868)

In the same opinion, the Fifth Circuit also unanimously reversed Judge Carswell's school desegregation plan order of 1961, 6 Race Rel. L. Rep. 689, which was merely to permit continued assignment of pupils under Florida's Pupil Assignment Law, which the Fifth Circuit has twice held, in both 1959 and 1960, to be inadequate to meet the *Brown* requirement, because it was "administered . . . in a manner to maintain complete segregation in fact." (p. 869) After being reversed Carswell waited four months to implement the Fifth Circuit's decision, then postponed the effective date of the plan for 10 months or more.

Steele v. Board of Pub. Instr. of Leon County, Fla., 8 Race Rel.L.Rep. 934 (1963), decided by Judge Carswell 10 months after the *Augustus* reversal, found him again approving assignments under the Pupil Assignment Law, then thrice held inadequate by the Fifth Circuit Court of Appeals, and making token desegregation of only one grade per year beginning in 1963 despite the Fifth Circuit's statement in *Augustus:* "[If it is too late to integrate for the 1962 year] then the plan should provide for such elimination as to the first *two* grades for the 1963 fall term." (p. 869, emphasis added) Two years after Carswell's 1963 order the Negro children moved to have him speed up the plan in compliance with subsequent Supreme Court ruings, and Carswell refused to reorganize the plan, telling their attorney, "it would just be an idle gesture regardless of the nature of the testimony." The Fifth Circuit unanimously reversed both of Carswell's orders, 371 F.2d 395, instructing him to follow its subsequent definitive *Jefferson* ruling extending the earlier precedents.

Youngblood v. Board of Pub. Instr. of Bay County, Fla., 230 F.Supp 74 (1964), two years after the reversal in *Augustus*, was another Carswell decision unanimously reversed by the Fifth Circuit (No. 27683, Dec. 1, 1969), in which he had permitted token desegregation under the disapproved Pupil Assignment Law, and even that delayed for 16 months. Carswell's plan allowed only for so-called "freedom of choice" transfers during a five-day registration period and parents would have to come to the superintendent's office during working hours. His plan was again a grade-a-year plan, violating the Fifth Circuit's then one-month-old decision in *Armstrong*, 333 F.2d 47 (1964).

Subsequent motions in *Youngblood* denied by Carswell also violated precedents unmistakably clear at the time of denial. For example, in 1965, when Carswell refused to speed up his grade-a-year plan, such plans had already been clearly held unconstitutional by the Third Circuit (*Evans*, 281 F.2d 385 (1960)), Fourth Circuit (*Jackson*, 321 F.2d 230 (1963), Haynsworth, J., concurring), Sixth Circuit (*Goss*, 301 F.2d 164 (1962), rev'd on other grounds 373 U.S. 683) and Eighth Circuit, and Carswell's own Fifth Circuit Court of Appeals had held months earlier, in *Lockett*, 342 F.2d 225 (1965): "It was then [after *Calhoun*, 377 U.S. 263 (1964)] beyond peradventure that shortening of the transition period was mandatory." (p. 277) Similarly, after the Justice Department intervened to support plaintiffs' motions to substitute effective methods in place of so-called "freedom of choice" transfers, Carswell on August 12, 1968 and April 3, 1969 approved "freedom of choice"—all of this after the U.S. Supreme Court on May 27, 1968 held: "The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system." ". . . experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness . . ." *Green*, 391 U.S. 430, 440, 441.

Wright v. Board of Pub. Instr. of Alachua County, Fla., unreported, unanimously reversed by the Fifth Circuit (No. 27983, 1969) repeats the story of *Youngblood.*

Singleton v. *Board of Comm'rs of State Institutions*, 11 Race Rel.L.Rep. 903 (1964) was another segregation decision by Carswell unanimously reversed by the Fifth Circuit, 356 F. 2d 771 (1966). In a 99-word opinion he held that inmates had no standing to seek desegregation of reform schools because before he had rendered judgment they had been released on conditional parole. The Court of Appeals decisively rejected that notion: "The plaintiffs' probationary status brings them well within the future-use requirement for standing." It relied on its own *Anderson* decision, 321 F. 2d 649, rendered a year before Carswell's order.

Due v. *Tallahassee Theatres, Inc.*, 9 Race Rel.L.Rep. (1963), still another segregation case in which Judge Carswell denied even an evidentiary hearing, also resulted in unanimous reversal by the Fifth Circuit, 333 F. 2d 630 (1964). In a suit seeking desegregation of theatres and alleging a conspiracy between the theatres, the city and the sheriff, Carswell dismissed the complaint as against the theatres and the city for failure to state a justiciable claim, and granted summary judgment on the sheriff's affidavit denying that there was any conspiracy. The Fifth Circuit held that both of his actions plainly violated clear pre-existing law: "This Court has repeatedly held that if the complaint alleges facts, which, under any theory of the law, would entitle the complainant to recover, the action may not be dismissed for failure to state a claim. *Arthur H. Richland Company* v. *Harper*, 5 Cir., 302 F. 2d 324 [1962]. There is no doubt about the fact that the allegations here stated a claim on which relief could be granted, if the facts were proved. See *Lombard* v. *Louisiana*, 373 U.S. 267 [May, 1963 (5 months before Carswell's decision)]." (p. 631) And on the issue of granting summary judgment without a trial: "There clearly remained issues of fact to be determined on a full trial of the case. . . ." (p. 633).

Dawkins v. *Green*, 285 F. Supp. 772 (1968) was, as the Fifth Circuit recognized in its unanimous reversal of Carswell's grant of summary judgment for the defendants, 412 F. 2d 644 (1969), a case similar to the well-known *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). The plaintiffs were Negro civil rights workers, suing public officials and alleging that the defendants had initiated prosecutions in bad faith to retaliate for and to chill their exercise of constitutional rights in civil rights activities. The public officials filed affidavits, described by the Fifth Circuit as "simply a restatement of the denials contained in their answer . . . they set forth only ultimate facts or conclusions . . . that they did not enforce the laws against plaintiffs in bad faith." (p. 646) Carswell held that, "From the proofs here it is clear that there was no harassment, intimidation or oppression . . . and they are being prosecuted in good faith. . . ." (p. 774) Once more, the Fifth Circuit cited its own clear pre-existing law on summary judgments in reversing Carswell: "No facts were present so that the trial Court could arrive at its own conclusions. As discussed in *Woods* v. *Allied Concord Financial Corporation*, (Del.), 373 F. 2d 733 (5 Cir. 1967), in summary judgment proceedings, affidavits containing mere conclusions have no probative value." (p. 646)

In at least 10 habeas corpus cases, Carswell was unanimously reversed by the Fifth Circuit for refusing to permit petitioners the opportunity to prove facts they alleged, which if proven would have clearly—under then-existing rulings—entitled them to relief, except perhaps in *Beufve*, below, where substantive law was clarified in the interim. The 10 cases are listed first, then discussed:

Meadows v. United States, 282 F.2d 942 (5th Cir. 1960);

Dickey v. United States, 345 F.2d 508 (5th Cir. 1965);

Rowe v. United States, 345 F.2d 795 (5th Cir. 1965);

Beufve v. United States, 344 F.2d 958 (5th Cir. 1965);

Baker v. Wainwright, 391 F.2d 248 (5th Cir. 1968);

Dawkins v. Crevasse, 391 F.2d 921 (5th Cir. 1968);

Brown v. Wainwright, 394 F.2d 153 (5th Cir. 1968);

Cole v. Wainwright, 397 F.2d. 810 (5th Cir. 1968);

Harris v. Wainwright, 399 F.2d 142 (5th 1968); and

Barnes v. State of Florida, 402 F.2d 63 (5th Cir. 1968).

Following is some of the Fifth Circuit's language in its peremptory reversals, citing Carswell to controlling precedent:

Meadows: "We think that the allegations of the motion, inartful though they be, are sufficient to set forth the contention [that mental illness voided effective waivers and guilty plea]. His statements of prior determination of a mental illness takes the motion out of the category of frivolous claims and requires a hearing. Bishop v. United States, 350 U.S. 961 [1956]."

Dickey: "the prisoner was entitled to an evidentiary hearing. Gregori v. United States, 5 Cir., 243 F.2d 48 [1957]."

Rowe: The *entire* Fifth Circuit opinion states: "The appellant sought relief under 28 U.S.C.A. § 2255 from a mail fraud conviction. The district court denied relief. Merrill v. United States, 5th Cir. 1964, 338 F.2d 763, requires a reversal." The Fifth Circuit's order then not only reversed and remanded, but added the unusual directions to vacate the conviction and sentence and dismiss the indictment.

Baker: "[Defendant] sought habeas corpus relief in the district court on the ground that he was denied the right to counsel on the appeal from this conviction. The court denied relief without a hearing. . . . In Entsminger v. Iowa, 1966, 386 U.S. 748 . . . the Supreme Court said: 'As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal' . . . [T]he cause is remanded for an evidentiary hearing. . . ."

Dawkins (the same Dawkins as in Carswell's summary judgment reversal): "we conclude that the Trial Judge erred in not granting a writ of habeas corpus at least to

the extent of ordering appellants' release on bail pending their appeal in the Florida courts. We . . . direct the District Judge to enter an order granting bail in the amount of $1000. . . ."

Cole: The entire Fifth Circuit reversal states: "The allegations of the petitioner are of such a nature as to require a hearing under 28 U.S.C.A. § 2243. It could not appear from the application and the file supplied by the state 'that the applicant . . . [was] not entitled' to the writ."

Barnes: "[Defendant] alleges coercion of a plea of guilty and ineffective assistance of counsel, contending that court-appointed counsel, whom he saw only for a few minutes four days before trial and a few minutes prior to trial, coerced him into pleading guilty, assuring him that a deal had been made for shorter sentences. . . . If appellant's allegations as to what occurred at his arraignment and sentence are found to be true, he is entitled to have the writ granted and his conviction set aside. Holloway v. Dutton, 5 Cir., 1968, 396 F. 2d 127 Roberts v. Dutton, 5 Cir. 1966, 368 F. 2d 465. . . ."

In addition to the Fifth Circuit's frequent unanimous reversals of Carswell for failing even to hear the claims of civil rights and habeas corpus petitioners, the appellate court sharply rebuked his judgment for a bank in a National Banking Act case, *Dickenson v. First National Bank,* 400 F. 2d 548 (1968). The issue was whether the bank's shopping center receptacle and armored car messenger service constituted illegal "branch banking" under Florida law. "The district court granted judgment for First National stating explicitly: 'Florida statute 659.06(1)(a) is not operative or controlling in this instance.' We conclude that in this instance Florida law is operative and controlling and reverse." Carswell held that the lacking of inclusion of the bank's activities in the words of the federal statute (Section 36(f)) ended the matter, and ignored the reference of another section to activities permissible under *state* law. Of his dubious reasoning, the Fifth Circuit stated: "Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36(f) Congress provided only that the term 'branch' 'shall be held to include'. . . . Such a provision is hardly adequate as a definition. . . . If we construed Section 36(f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. *Statutory construction has not fallen to such legalistic depths.* (p. 557, emphasis added)

FOOTNOTES

[1] A reversal is defined in this study to include an outright reversal, a vacation, a remand, and an affirmance with major modifications. An affirmance is defined to include an outright affirmance, an affirmance with minor modifications, a dismissal of an appeal, and a denial of a writ of certiorari. The ultimate disposition of the case rather than the action alone of an intermediate appellate court determined whether the result was to be classified as an affirmance or a reversal. It also should be noted that the Carswell figures are based on 84 of the nominee's reported decisions, believed to be all of his printed district court opinions. The completeness of this analysis might be confirmed if the Justice Department made public its entire file of Carswell opinions. Unfortunately the Justice Department has not yet seen fit to make available such a complete file.

[2] The 84 printed Carswell opinions were calculated to the nearest tenth of a page. Four hundred decisions of other district judges were drawn randomly from Federal Supplements spanning the years 1958 to 1969. These opinions were calculated also to the nearest tenth of a page. In making all page computations only the text of the opinion was counted. Headnotes were not counted as part of the opinion.

[3] These averages for all federal district judges were derived from another random sampling of 80 opinions drawn from Federal Supplements spanning the 1958–1969 period. Citations for any reason are included in these computations.

SUMMARY OF STATISTICAL STUDY OF PERFORMANCE OF JUDGE CARSWELL—JUDGES' DECISIONS CONSIDERED, SAMPLE

Index, number, type of data	Carswell, all 84 decisions 1958–69 printed in F. Supplement	All circuits: 400 decisions (1958–69 random selection) in district courts printed in F. Supplement	All circuits: 400 appeals (1959–69 random selection) to all C.A.'s printed in F. 2d.	5th circuit only: 100 decisions (1958–69 random selection) in district courts printed in F. Supplement	5th circuit only: 100 appeals (1959–69 random selection) to 5th Cir. C.A. printed in F. 2d.
I. Reversals:					
Number	10	21		6	
As percent of decisions	11.9	5.3		6	
Carswell's percent worse by		+123		+98	
IA. Reversals; including Rauh and Hruska cases[1] not printed:					
Number	33	21		6	
As percent of 152 decisions	21.6	5.3		6	
Carswell's percent worse by		+308		+260	
II. Reversals/appeals:					
Number	10/17	21/104	115/400	6/25	26/100
Percent	58.8	20.2	28.8	24.0	26.0
Carswell's percent worse by		+181	+104	+145	+126
IIA. Reversals/appeals including Rauh and Hruska cases[1] not printed:					
Number	33/85	21/104	115/400	6/25	26/100
Percent	38.8	20.2	28.8	24.0	26.0
Carswell's percent worse by		+81	+35	+62	+49
III. Authority value:					
Cite frequency/1958–63 cases	1.80	3.75		3.93	
Percent greater than Carswell		+108		+118	
Cite frequency/1964–69 cases	0.77	1.47		1.50	
Percent greater than Carswell		+91		+95	
IV. Use of authority:					
Case cites per opinion	4.07	[2]9.93			
Percent greater than Carswell		+144			
Secondary source cites/opinion	0.49	1.56			
Percent greater than Carswell		+218			
V. Elaboration of opinions:					
Page length per opinion	1.99	4.21			
Percent greater than Carswell		+112			

[1] 12 of the 15 reversals by the 5th Cir. C. A. in civil rights and habeas corpus which were mentioned in the testimony of Joseph L. Rauh, Jr., had no printed opinion below by Carswell; 44 additional appeals of criminal trials and 12 more habeas appeals were in Senator Hruska's memo.

[2] Sample was 80 random printed district court cases.

Mr. BAYH. I was impressed by the fact that Louis Pollak, distinguished dean of the Yale Law School, looked at the credentials of this nominee and said that, in his judgment, to quote Dean Pollak, he has more slender credentials than any other nominee for the Supreme Court put forth in this century.

It is true, as Judge Carswell's supporters have pointed out, that he has been a practicing attorney, a Federal prosecutor, and a Federal court judge. For appointment to the Supreme Court, however, mere length and variety of service is certinly not a substitute for distinction—and yet that is what President Nixon promised the country his "strict constructionists" would be—not only strict constructionists, but men of distinction.

There are many such men in the South if, as the President seems to believe, this appointment must be based on geography. I would note, for anyone who cares to pursue it, the list of these eminent jurisists in the individual views in the report from the Committee on the Judiciary. The Senator from Maryland (Mr. TYDINGS) lists several southern jurists and southern lawyers, the Senator from Maryland being a lawyer who practiced in the fourth circuit, and a member of the Judiciary Committee, who would be qualified not only as strict constructionists but as men of distinction.

Prof. William Van Alstyne, one of the most eminent legal scholars in the South and a supporter of Judge Haynsworth, testified, however, that there was nothing in Judge Carswell's record to "warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States." And more than one dozen members of the University of Virginia Law School faculty, after studying Judge Carswell's record, described his abilities and judicial service as "sadly wanting."

It seems to me that the general assessment is that in his truly second-rate career as a Federal district judge, it is obvious that Judge Carswell has failed to exhibit any of those qualities the late Justice Frankfurter described as essential for service on the Supreme Court. After 15 years of distinguished service on the Court, Frankfurter himself concluded that a judge "should be compounded of the faculties of the historian and the philosopher and the prophet." No one has yet been audacious enough to claim any of these qualities for Judge Carswell. In fact, even his most ardent supporters have been unable to point to one contribution he has made to the law; none have cited his opinions as worthy of recognition.

Even Professor Moore of Yale, in his statement supporting the Carswell nomination, failed to mention a single Carswell decision as worthy of note. For the leading student of Federal practice to omit any reference to Judge Carswell's judicial record is, to my mind, an omission of great significance. It tells us, in effect, that there is nothing in Judge Carswell's record worthy of mention, as far as the contributions he made while sitting on the Federal district bench are concerned.

Interestingly, a close look at Judge Carswell's decisions reveals him to be not a strict constructionist but an activist. As his 17 unanimous reversals in civil rights and habeas corpus cases indicate, Judge Carswell has not adhered to a strict construction of the law of the land in civil and human rights cases, but has used his judicial office to advance his own personal racial and social philosophy—and to deny to defendants in his court the basic constitutional rights of equal protection and due process.

Mr. President, this nomination is an affront to the Senate, to the Supreme Court, and to the finest ideals of the American people. I do not hesitate to call upon my colleagues, therefore, to deny confirmation. An examination of the record could lead them to no other conclusion.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. BAYH. I am happy to yield to my committee chairman.

Mr. EASTLAND. The Senator mentioned some cases in which he said that Judge Carswell was reversed by the fifth circuit. Does the Senator know that most of those cases were reversed on decisions of the fifth circuit decided after Judge Carswell had ruled?

Mr. BAYH. I think it is rather obvious that the circuit court could not decide to overrule a Federal district judge until after the district judge had made his decision.

Mr. EASTLAND. No; that is not what I am saying. In at least a majority of those cases, it is my understanding that after Judge Carswell's decision, the fifth circuit, in other cases, had decided the law was different.

What I am saying is that his ruling originally was in line with what the law was, as interpreted by the fifth circuit.

I know those are Ripon Society decisions that my distinguished friend has cited. One of the cases he decided, where he was overruled, was the Wechsler case, which went on to the Supreme Court of the United States, and the Supreme Court overruled the fifth circuit and decided Judge Carswell was right.

I say that in simple justice to Judge Carswell, and to keep the record clear.

Mr. BAYH. If the Senator will yield back to me——

Mr. EASTLAND. I cannot yield back.

Mr. BAYH. Then I might just interrupt long enough to make one observation. Inasmuch as the Senator is pointing out that in some of these cases the fifth circuit made new law, and that is why Judge Carswell was out of step, I might suggest that the Wechsler case was one where the fifth circuit made new law, and thus Judge Carswell was out of step with the fifth circuit at the time the fifth circuit decided it.

Mr. EASTLAND. Yes; but the Supreme Court upheld Judge Carswell's decision. It was the law at the time he ruled. He was reversed by the fifth circuit on the basis of new law, and the Supreme Court corrected it, and sustained Judge Carswell.

Just in simple, ordinary justice to him—and I think on the Senate floor every nominee should receive a straight deal—in a substantial number, even in most of those reversals, Judge Carswell's decisions were in line with the decisions of the fifth circuit at the time he made them. That decision had been changed, or the law had been changed, by the fifth circuit by the time the decision got from Judge Carswell to the fifth circuit.

Mr. BAYH. I appreciate our distinguished chairman, my friend the Senator from Mississippi, adding his thoughts to the statement of the Senator from Indiana. I would not want the Ripon Society held to account for the assessment that the Senator from Indiana is making of these cases. I put their interpretation into the RECORD so that everyone would have a chance to compare it with the statement the Senator from Indiana is about to make on his own.

Mr. EASTLAND. No; I asked the Senator a question. I asked him if his figures on Judge Carswell's reversals in the colloquy with the distinguished Senator from Louisiana were not compiled by the Ripon Society.

Mr. BAYH. The figures that I had were figures that were established long before the Ripon Society report was published.

I appreciate the fact that our chairman is adding his thoughts to the matter.

Mr. EASTLAND. Anyway, the figures given by the Senator were misleading.

Mr. BAYH. I respectfully suggest that I do not think they are misleading at all. What the figures were designed to do was to try to give us some feeling for Judge Carswell's ability to wrestle with the interpretation of the Constitution and the law of the land as compared to various cases that came before him.

The matter of the circuit court, and, indeed, the Supreme Court deciding new law is a matter that confronts all judges, but I think some rather interesting comparisons can be made.

The average rate of reversal for all judges throughout the country is 20 percent. In other words, the average Federal district judge is going to be reversed 20 percent of the time. In the fifth circuit, the average percentage of reversal is 24 percent of the time. But, interestingly enough, Judge Carswell was reversed by the fifth circuit 59 percent of the time—about 2.5 times the average reversal rate can be attributed to Judge Carswell, as compared to all of the other district judges in the fifth circuit.

Mr. EASTLAND. That is exactly what the Senator said, and that is exactly where my friend put his foot in it.

Mr. BAYH. I hope my chairman will help me pull my foot out of it, then.

Mr. EASTLAND. In a majority of those decisions, when they were made by Judge Carswell, he was applying what the fifth circuit had said the law was.

Mr. BAYH. Would my chairman——

Mr. EASTLAND. Wait just a minute, now. To the facts in the case; and when the case got to the fifth circuit for decision, they had changed the law.

Then the Wechsler case went on to the Supreme Court of the United States, and they overruled the fifth circuit and said Judge Carswell was right.

Mr. BAYH. Is my distinguished chairman, who is such an ardent student of the fifth circuit, suggesting that the fifth circuit is changing the law relative to just those cases in which Judge Carswell sits?

Mr. EASTLAND. The Attorney General of the United States told me one time that the fifth circuit was the most liberal circuit in the United States. I know some of the judges change the law as they desire.

Mr. BAYH. The question I was trying to develop was that I am not quite willing to accept the glowing plaudits that the Senator from Mississippi gives to the fifth circuit relative to their philosophy. But, given that case, does the Senator feel they are more liberal in dealing with Carswell cases than they are in dealing with cases of all the other judges in the district? Why is it, if that is the case, that they reverse Carswell twice as often as the average of any of the other judges in the fifth circuit?

Mr. EASTLAND. What is the basis of the figures?

Mr. BAYH. The basis is the total numbers of reversals in the fifth circuit.

Mr. EASTLAND. I say, what is the basis of those figures?

Mr. BAYH. Looking at the cases and the number of times his decisions were reversed.

Mr. EASTLAND. Who compiled them?

Mr. BAYH. The Library of Congress.

Mr. EASTLAND. I have just explained it in simple justice to Judge Carswell. In most of those cases, when he rendered a decision, his decision was in line with the way the fifth circuit had interpreted the law. They had decided otherwise when the case got to the fifth circuit.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. HRUSKA. Numerically, how many cases are involved? Does the Senator have that information?

Mr. BAYH. That will be in the RECORD with the entire Ripon Society paper. The Senator from Nebraska, inasmuch as he is a strong supporter of the distinguished nominee, perhaps has a better idea of how many cases he sat on than I do.

Mr. HRUSKA. The Senator from Nebraska has read the record and has his own conception of what the percentage is in which the nominee was sustained and reversed. Here comes a new figure, which I cannot identify. I presume that in due time the Senator from Indiana will put in the RECORD the basis for that statement.

But I should like to call the attention of the Senator from Indiana to this proposition: The judge, when he was district judge, sat in judgment upon and disposed of a total of some 4,500 cases—2 000 civil cases and 2,500 criminal cases. Approximately 100 of them are found in the printed reports of the West Publishing System and in the official reports. A small fraction of a district judge's opinions appear in the printed reports. The fact is that the ultimate decision of reversal or of being upheld does not necessarily indicate the nature of a judge's rulings.

The further fact is, as the Senator

from Mississippi pointed out, that in many of the cases—very likely in most of them—when they were rendered by Judge Carswell they were in keeping with the law of the land, as indicated either by the Supreme Court or by the fifth circuit or by the statutes that governed. There have been some Supreme Court decisions that reversed the Supreme Court itself. There have been cases in which the fifth circuit, which reversed Judge Carswell, was reversed by the Supreme Court.

So when we get into a numbers game, Mr. President, we all know the story, that figures can be used to prove a lot of things. It will be with interest that the Senator will await the production of that list of cases and the number of them.

Mr. BAYH. I think the Senator from Nebraska has helped to substantiate the adage that statistics can be used to prove a number of things, because he is looking at the same statistics the Senator from Indiana is looking at, and we are coming to entirely different conclusions. The figures the Senator from Indiana is referring to are the number of cases that have been appealed; and considering Judge Carswell's cases that have been appealed, the Senator from Indiana arrives at the statistics given in the discussion with our distinguished committee chairman.

Of course, I would be the first to suggest that any circuit court, or the Supreme Court itself, from time to time does change the law. But it seems to me that no court would change the law any more often for one judge than for another, and therefore equally qualified judges should in theory be reversed the same proportion of the time. Interestingly enough, this is not the case with the President's nominee.

Mr. HRUSKA. Mr. President, will the Senator yield further?

Mr. BAYH. I yield.

Mr. HRUSKA. Has the Senator given figures on the criminal cases decided by Judge Carswell that were appealed, and the record thereon?

Mr. BAYH. The Senator has not gotten into the area of criminal cases in detail, although these statistics include criminal cases. He would be glad if the Senator from Nebraska would supply more detail. Perhaps the Senator did that in his remarks today. Unfortunately, I did not hear the Senator's remarks.

Mr. HRUSKA. I had them in my remarks today. On page 319 of the hearings is the list of 36 affirmances in criminal cases decided by Judge Carswell, and only eight reversals. That is a pretty good record, Mr. President.

II. PERSONAL AND POLITICAL BACKGROUND

Mr. BAYH. In 1948, while a candidate for the Georgia State Senate, Judge Carswell delivered an undeniably racist speech. He spoke forcefully of his belief "that segregation of the races is proper and the only practical and correct way of life in our States."

He also said:

> I have always so believed and I shall always so act. I shall be the last to submit to any attempt on the part of anyone to break down and to weaken this firmly established policy of our people.
>
> If my own brother were to advocate such a program, I would be compelled to take issue with and to oppose him to the limits of my ability.
>
> I yield to no man as a fellow candidate, or as a fellow citizen in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.

That was 1948, only 22 years ago. I suppose all of us would be somewhat tolerant and hopeful that, with the passage of time, such thoughts and philosophies and ideals might change, hopefully for the better. But I think it is most interesting, in addition to pointing out that that was 22 years ago, to point out what was happening 22 years ago. It was at a time when the national leadership of Carswell's party was attempting to enact President Truman's civil rights program. That was 1948, 6 years before Brown, as Carswell has said in defense of the speech, but 60 years after Plessy against Ferguson had held separate but equal to be the law of the land.

Shortly after the President submitted Judge Carswell's name to the Senate, a reporter uncovered the 1948 speech. It was said, in defense of the judge, that the speech was made in the heat of a political campaign, and, therefore, should be discounted as political rhetoric. Others have advanced the so-called redemption theory, which holds that Judge Carswell indeed spoke of, and might even have believed in, white supremacy in 1948, but what has he said and done since? That is the standard his supporters seek to apply. That is the standard Judge Carswell himself has asked us to apply.

After espousing that standard, Judge Carswell stated unequivocally:

> There is nothing in my private life, nor is there anything in my public record of some 17 years, which could possibly indicate that I harbor racist sentiments or the insulting suggestion of racial superiority. I do not so do, and my record so shows.

I have sought to apply that very same standard, hoping that Judge Carswell's deeds would match his words. I certainly like to believe in the redemption theory. I like to believe that each and every one of us is a bit better today than he was yesterday, and that we will try to be even better tomorrow. But, unfortunately, I found nothing in Judge Carswell's subsequent personal and professional life that would indicate he ever renounced his belief in racial superiority. There is, in fact, throughout Judge Carswell's private and public career a not-too-subtle pattern of conduct that only confirms his 1948 views. He may not have been as eloquent or vociferous in later life, but his private actions, his judicial demeanor, and his incredible record of 17 unanimous reversals in civil rights and habeas corpus cases show him to be as completely and totally insensitive to human rights in the 1950's and 1960's as he was in 1948.

Mr. HRUSKA. Mr. President, will the Senator from Indiana yield for a question?

Mr. BAYH. I yield.

Mr. HRUSKA. Would the Senator consider that Judge Carswell's active participation with a group that founded a law school for Florida State in Tallahassee, in which there was insistence by Judge Carswell upon a completely open policy, that there would be open doors to members of all minorities of all races, colors, and creeds, not only from his State but from the country at large, would that be considered in any way an indication that he still believes as he spoke in 1948, or would it, in all fairness, considering the very high degree and high quality of evidence to the effect that he has repudiated that 1948 statement?

Mr. BAYH. If the Senator could be more specific as to where, when, and how, the Senator from Indiana could perhaps answer that question more intelligently.

Mr. HRUSKA. The remarks I made earlier this afternoon cover the testimony which is in the record, by Prof. James William Moore, sterling professor of law at Yale University, a man with 35 years' experience as a teacher and also of practice. He is a recognized authority. He appeared personally before the Judiciary Committee and testified in regard to his activities as a consultant to this group of founders of the law school at Florida State in Tallahassee, and it was over a sustained period of time that he did that work, free, gratis, in an effort to try to form that college.

He testified on the quality of work that was done and the activities in which Judge Carswell participated. The testimony is there. He did say this during the course of his testimony:

> I was impressed with his views on legal education and the type of school that he desired to establish; a school free of all racial discrimination—he was very clear about that; one offering both basic and higher legal theoretical training; and one that would attract students of all races and creed and from all walks of life and sections of the country. Judge Carswell and his group succeeded admirably.

Then the professor proceeded to describe some of the excellent academic results which flowed from the early years of the university and they have become increasingly successful since.

Mr. President, repeatedly we hear it said that there has been nothing in the record repudiating Judge Carswell's 1948 statement.

I submit that when he repudiated that statement, as he did in open committee hearing, and wrote it in a letter afterward, that this was supplementing a career as a judge and a lawyer in which he has repeatedly repudiated that 1948 speech, not only the law school being formed but his implementing of a jury selection system long before there was a Federal statute on the subject, in which there was an effort made to adopt the program later incorporated into the Federal statute of the 90th Congress for the selection of jurors in a way to get away from racial discrimination. Those two acts helped to put to rest the question of repudiation any of the words and spirit of that 1948 speech.

But some people are so intent upon remaining back in 1948 that they refuse

to open their minds to the high excellence and quality of evidence of this type. I suggest that for the consideration of the Senator from Indiana.

Mr. BAYH. Mr. President, I ask unanimous consent to have printed in the RECORD the document included on page 294 relative to the Washington Research Project Action Council's assessment of whether this jury system indeed was discriminatory or nondiscriminatory.

The PRESIDING OFFICER. Without objection, it is so ordered.

There being no objection the document was ordered to be printed in the RECORD, as follows:

WASHINGTON RESEARCH PROJECT ACTION COUNCIL MEMORANDUM—FEBRUARY 1, 1970

Re racial discrimination in Judge Carswell's system of selecting persons for jury service.

To: Marian W. Edelman.

From: Richard T. Seymour.

In 1968, Judge Carswell adopted a plan for the selection of persons for jury service in the Northern District of Florida which has resulted in gross racial discrimination in every one of the four Divisions of his district. Moreover, it is clear that this result could easily have been predicted from information available to him at the time. His failure to take action to correct this discrimination is in clear violation of a Federal statute passed several months before he adopted the plan.

On March 27, 1968, the Jury Selection and Service Act of 1968 was enacted.[1] It required a number of sweeping reforms in the methods used by Federal district courts for selecting jurors for grand juries and trial juries. One of the primary goals of the legislation was to ensure that black citizens and members of other minority groups would be fairly represented on grand juries and trial juries in the future.[2]

The Act provides that jury lists shall be compiled by selecting names on a random basis from either lists of actual voters or of registered voters of the political subdivision within the district. But where reliance on only these sources of names will result in the disproportionate exclusion of racial or other minorities, a district court is required by the Act to turn to other sources of names in order to achieve a reasonable cross-section of the community.[3]

The Act requires all Federal district courts to draw up plans showing the exact manner in which lists of potential jurors will be compiled and members of juries selected from the lists. Under the plan ordered into effect by Judge Carswell on September 12, 1968, a grossly disproportionate number of black citizens will, regardless of their qualifications, be excluded from consideration in drawing up the jury lists.[4]

Judge Carswell's plan provides for the selection of names on a random basis from lists of registered voters, and no provision has ever been made for using supplementary sources. In each of the four Divisions of the Northern District of Florida, statistics available to Judge Carswell at the time he adopted the plan show that, compared with the statistics for whites, relatively few black citizens of voting age are registered to vote. Considering the proximity of the coun ies in the Northern District to Alabama and Georgia, and the pervasive history of voting discrimination throughout this area, the statistics could scarcely have been surprising.

In accordance with the plan,[5] the Clerk of Judge Carswell's court sent out questionnaires to persons on the jury list late in 1968. When the completed questionnaires were tabulated, it was apparent that the system adopted was working in a grossly discriminatory fashion in each one of the four Divisions in the Northern District of Florida. Not even then, however, did Judge Carswell take any remedial action.

GAINESVILLE DIVISION

The Gainesville Division is composed of Alachua, Dixie, Gilchrist, Lafayette and Levy Counties. There were 40,225 white persons and 12,155 nonwhite persons in the voting-age population in 1960, and there were 36,455 registered white voters and 6,296 registered nonwhite voters in these counties in 1968. Assuming that the increases and decreases in voting-age population in these counties since 1960 has been roughly proportional between the two races, 90.6% of the white voting-age population is registered to vote and therefore eligible to serve on Federal juries, but only 58.8% of the nonwhite voting-age population is eligible.[6] More directly, Judge Carswell's plan disqualifies only 9.4% of the whites of voting age from consideration for jury service, but disqualifies 41.2% of the nonwhites.

The results of the official questionnaires sent out and returned to the Clerk of Court show that the racial disparity shown above actually affected the composition of the jury list. 1,468 whites and 199 blacks were selected under Judge Carswell's plan.[7] After deducting the names of those exempt or excused from jury service and the names of those who are unqualified, 1,044 qualified white persons and only 149 qualified black persons were placed on the jury list. If Judge Carswell's plan had used nondiscriminatory sources of names, 415 qualified black persons would have been placed on the jury list.

MARIANNA DIVISION

The Marianna Division is composed of Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties. There were 65,152 white persons and 13,344 nonwhite persons in the voting-age population in 1960, and there were 55,895 registered white voters and 8,361 registered nonwhite voters in these counties in 1968. Assuming that the increases and decreases in voting-age population in these counties since 1960 has been roughly proportional between the two races, 82.7% of the white voting age population is registered to vote and therefore eligible to serve on Federal juries, but only 62.7% of the nonwhite voting-age population is eligible. More directly, Judge Carswell's plan disqualifies only 17.3% of the whites of voting age from consideration for jury service, but disqualifies 37.3% of the nonwhites.

The results of the official questionnaires sent out and returned to the Clerk of Court show that the racial disparity shown above actually affected the composition of the jury list. 1,698 whites and 181 blacks were selected under Judge Carswell's plan. After deducting the names of those exempt or excused from jury service and the names of those who are unqualified, 1,214 qualified white persons and only 133 qualified black persons were placed on the jury list. If Judge Carswell's plan had used nondiscriminatory sources of names, 249 qualified black persons would have been placed on the jury list.

PENSACOLA DIVISION

The Pensacola Division is composed of Escambia, Okaloosa, Santa Rosa and Walton Counties. There were 130,172 white persons and 22,306 nonwhite persons in the voting-age population in 1960, and there were 104,105 registered white voters and 15,143 registered nonwhite voters in these counties in 1968. Assuming that the increases and decreases in voting-age population in these counties since 1960 has been roughly proportional between the two races, 80.0% of the white voting-age population is registered to vote and therefore eligible to serve on Federal juries, but only 67.9% of the nonwhite voting-age population is eligible. More directly, Judge Carswell's plan disqualifies only 20.0% of the whites voting age from consideration for jury service, but disqualifies 32.1% of the nonwhites.

The results of the official questionnaires sent out and returned to the Clerk of Court show that the racial disparity shown above actually affected the composition of the jury list. 2,256 whites and 262 blacks were selected under Judge Carswell's plan. After deducting the names of those exempt or excused from jury service and the names of those who are unqualified, 1,638 qualified white persons and only 215 qualified black persons were placed on the jury list. If Judge Carswell's plan had used nondiscriminatory sources of names, 315 qualified black persons would have been placed on the jury list.

TALLAHASSEE DIVISION

The Tallahassee Division is composed of Franklin, Gadsden, Jefferson, Leon, Liberty, Taylor and Wakulla Counties. There were 54,620 white persons and 30,679 nonwhite persons in the voting-age population in 1960, and there were 49,692 registered white voters and 15,532 registered nonwhite voters in these counties in 1968. Assuming that the increase and decreases in voting-age population in these counties since 1960 has been roughly proportional between the two races, 91.0% of the white voting-age population is registered to vote and therefore eligible to serve on Federal juries, but only 50.6% of the nonwhite voting-age population is eligible. More directly, Judge Carswell's plan disqualifies only 9% of the whites of voting age from consideration for jury service, but disqualifies 49.4% of the nonwhites.

The results of the official questionnaires sent out and returned to the Clerk of Court show that the racial disparity shown above actually affected the composition of the jury list. 1,643 whites and 413 blacks were selected under Judge Carswell's plan. After deducting the names of those exempt or excused from jury service and the names of those who are unqualified, 1,215 qualified white persons and only 301 qualified black persons were placed on the jury list. If Judge Carswell's plan had used nondiscriminatory sources of names, 682 qualified black persons would have been placed on the jury list.

FOOTNOTES

[1] Pub. L. 90–274, 82 Stat. 53.

[2] Sec. 101 of the Act, codified as 28 U.S.C. secs. 1861 and 1862 provides:

"Section 1861. *Declaration of policy.*

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

"Section 1862. *Discrimination prohibited:*

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

The House Report further confirms this purpose:

"More important, random selection eliminates the key man system and insures that jurors will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion."

H. Rept. No. 1076, 1968 U.S. Code Cong. & Adm. News 1972, 1974 (footnote omitted).

[3] This provision, codified as 28 U.S.C. sec. 1863 (b), provides in part:

"Section 1863. *Plan for random jury selection:*

"(b) Among other things, such plan shall—

"(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title * * *."

The House Report leaves no room for doubt that this provision is mandatory:

"The bill requires that the voter lists be supplemented by other sources whenever they do not adequately reflect a cross section of the community * * *.

"The voting list need not perfectly mirror the percentage structure of the community. But any substantial percentage deviations must be corrected by the use of supplemental sources * * *."

H. Rep. No. 1076, 1968 U.S. Code Cong. & Adm. News 1792, 1794.

[4] A copy of Judge Carswell's plan has been attached as Appendix A. There have never been any modifications of the plan attached. Although the Act was approved on March 27, 1968, it would be unfair to criticize the delay between that date and the adoption of this plan, since sec. 104 of the statute only required that a plan be in effect by December 22, 1968. The drawing of names for the jury list was actually carried out in November.

[5] See the plan, Appendix A, at pp. 4–5.

[6] These statistics are taken from Tables A and B below.

[7] The Clerk included in his tabulation only questionnaires returned by December 23, 1968. The vast majority had been returned by that time. The Clerk's office informed me that they considered the persons who failed to designate their race in the questionnaire as having the same racial proportion as those who did designate their race. Only those who did designate their race have been included in the figures used in this memorandum.

A tabulation of these results for each Division has been attached as Table C.

TABLE A.—1968 VOTER REGISTRATION STATISTICS FOR THE 22 COUNTIES IN THE NORTHERN DISTRICT OF FLORIDA[1]

County	1960 voting-age population		Registered voters, 1968		Percentage of the voting-age population who are registered voters	
	White	Nonwhite	White	Nonwhite	White	Nonwhite
Alachua	30,555	9,898	25,534	5,081	83.6	51.3
Bay	31,940	4,964	22,747	3,033	71.2	61.1
Calhoun	3,434	582	3,674	366	100+	62.9
Dixie	2,138	363	2,981	396	100+	100+
Escambia	76,688	18,041	59,511	12,593	77.6	69.8
Franklin	3,186	779	3,477	531	100+	68.2
Gadsden	11,711	12,261	6,655	4,610	56.8	37.6
Gilchrist	1,513	154	1,855	86	100+	55.8
Gulf	4,196	1,138	3,861	693	92.0	60.9
Holmes	6,131	249	6,465	179	100+	71.9
Jackson	14,087	5,390	11,349	3,207	80.6	59.5
Jefferson	2,383	2,600	2,410	1,494	100+	57.5
Lafayette	1,536	152	1,791	138	100+	90.8
Leon	28,241	12,322	36,599	6,902	94.2	56.0
Levy	4,483	1,568	1,294	595	95.8	37.9
Liberty	1,525	240	1,940	211	100+	87.9
Okaloosa	30,816	2,097	23,569	1,073	76.5	51.2
Santa Rosa	14,710	1,082	13,186	726	89.6	67.1
Taylor	5,454	1,724	5,961	1,090	100+	63.2
Wakulla	2,120	753	2,650	694	100+	92.2
Walton	7,958	1,086	7,839	751	98.5	69.2
Washington	5,364	1,021	5,799	883	100+	86.5
Total for northern district	290,169	78,464	244,147	45,332	84.1	57.8

[1] All figures in this table, except the totals, have been taken directly from Voter Registration in the South: Summer 1968, a publication of the voter education project of the Southern Regional Council. The pages from which this information has been taken, and the pages with explanatory notes, have been duplicated and attached. I have prepared the totals myself.

TABLE B.—1966 VOTER REGISTRATION STATISTICS FOR THE 22 COUNTIES IN THE NORTHERN DISTRICT OF FLORIDA[1]

County	1960 voting-age population		Registered voters (October 1966)		Percentage of the voting age population who are registered voters	
	White	Nonwhite	White	Nonwhite	White	Nonwhite
Alachua	30,555	9,898	25,595	6,216	83.8	62.8
Bay	31,940	4,964	23,587	3,345	73.8	67.4
Calhoun	3,434	582	4,007	390	100+	67.0
Dixie	2,138	363	2,778	370	100+	100+
Escambia	76,688	18,041	59,197	13,574	77.2	75.2
Franklin	3,186	779	3,423	533	100+	68.4
Gadsden	11,711	12,261	6,557	4,620	56.0	37.7
Gilchrist	1,513	154	1,833	88	100.0	57.1
Gulf	4,196	1,138	3,681	712	87.7	62.6
Holmes	6,131	249	6,406	196	100+	78.7
Jackson	14,087	5,390	11,485	3,525	81.5	65.4
Jefferson	2,383	2,600	2,470	1,628	100+	62.6
Lafayette	1,536	152	1,778	102	100+	67.1
Leon	28,241	12,322	25,856	7,331	91.6	59.5
Levy	4,483	1,568	3,910	613	87.2	39.1
Liberty	1,525	240	2,088	177	100+	73.8
Okaloosa	30,816	2,097	24,140	1,349	78.3	64.3
Santa Rosa	14,710	1,082	13,281	765	90.3	70.7
Taylor	5,454	1,724	5,393	974	98.9	56.5
Wakulla	2,120	753	2,684	602	100+	79.9
Walton	7,958	1,086	7,909	862	99.4	79.4
Washington	5,364	1,021	5,641	867	100+	84.9
Total for northern district	290,169	78,464	243,699	48,839	84.0	62.2

[1] All figures in this table, except the totals, are a matter of public record. The statistics showing the 1960 voting age population are taken from the 1960 census. The statistics showing the number to registered voters are as of Oct. 8, 1966, and are taken from the "Tabulation of Official Votes Cast in the General Election, Nov. 8, 1966," compiled by Tom Adams, Florida's Secretary of State. These figures and accompanying notes are reprinted in a May 1968 report of the U.S. Commission on Civil Rights, "Political Participation," at 230 233. Only persons registered as Democrats or as Republicans were included in Mr. Adams' compilation. I have prepared the totals myself.

TABLE C.—RESULTS OF QUESTIONNAIRES MAILED BY THE CLERK OF THE NORTHERN DISTRICT OF FLORIDA TO THE PERSONS ON THE JURY LISTS OF THE FOUR DIVISIONS OF COURT[1]

	White	Black	Failed to designate race
GAINESVILLE DIVISION			
Persons exempt from jury service	129	14	41
Persons excused from jury service at their request	83	18	15
Persons unqualified for jury service	212	18	62
Persons qualified for jury service	1,044	149	117
Total questionnaires returned	1,468	199	235
MARIANNA DIVISION			
Persons exempt from jury service	106	5	41
Persons excused from jury service at their request	129	16	29
Persons unqualified for jury service	249	27	55
Persons qualified for jury service	1,214	[2] 133	118
Total questionnaires returned	1,698	181	243
PENSACOLA DIVISION			
Persons exempt from jury service	153	6	45
Persons excused from jury service at their request	126	3	17
Persons unqualified for jury service	339	38	125
Persons qualified for jury service	1,638	215	125
Total questionnaires returned	2,256	262	312
TALLAHASSEE DIVISION			
Persons exempt from jury service	131	31	46
Persons excused from jury service at their request	106	31	17
Persons unqualified for jury service	191	50	65
Persons qualified for jury service	1,215	301	142
Total questionnaires returned	1,643	413	270

[1] This information was given to me by the office of the clerk of court for the Northern District of Florida, in a telephone conversation January 30, 1970.

[2] Includes 1 Indian.

Mr. BAYH. I appreciate the fact that the distinguished Senator from Nebraska has brought this matter of the law school into the record for the second time today. I think it bears on our deliberations. Perhaps it would be even more informative if the Senator could provide the same degree of description as to the judge's charter of the Florida State Boosters Club, which was a white-only organization supporting a public institution. Here we have a man who has been a Federal district attorney, a Federal district judge, and an appellate court judge, but I have yet to see one speech that this nominee made in public asserting that he did not believe what he said in 1948.

Now can the distinguished Senator from Nebraska give me one sentence disaffirming this terrible statement made back in 1948?

Mr. HRUSKA. The committee has taken the official view:

> Unless the committee were to adopt the proposition that all political candidates are to be forever held to every sentiment which they express during an election campaign, this speech delivered more than 20 years ago provides no basis for recommending against confirmation of Judge Carswell. The committee is satisfied, both by his own statement, and by his public career spanning the years from 1953 to the present time, that he has long since abandoned the notions which he expressed in his 1948 speech.

That language is found on page 3 of the committee report.

When a man makes a speech in 1948, Mr. President, and it could be in the campaign of 1958 as well, or at any time, and it is clearly wrong, does he have to get up at stated periods each week, or each month, and mount a soapbox or a stump, and proclaim to all the world that he made a speech back there in 1948, that he repudiates it and is no longer bound by it, and now has reason to hope that salvation will come his way?

Is that the way speeches are repudiated? Or is it by official act and career?

Former Gov. Leroy Collins testified:

> Judge Carswell, gentlemen, is no racist. He is no white supremist. He is no segregationist. I am convinced of this and I am sure that most if not all of you are.

Mr. President, what does Governor Collins base that statement on, and his estimate of this man that he testified he has known ever since he moved to Tallahassee? He reaches the deliberate conclusion that this man is no racist, then we have such programs as the founding of the law school and the initiation and implementation of the jury selection s stem long before there was the compulsion of a Federal statute. But those things are completely ignored. There is a grubbing around in the year 1948, when the temper of the times was completely different than it is now, a temper which has been completely rejected, orally and expressly, as well as by the life and the deeds of this man.

I say, let us put that down. Let us put that down as an argument. It is not fair. It does not even make sense. The official position taken by the committee is that unless we want to hold every politician to every statement that he makes forever and a day, regardless of what he says and does after that, this is going to be considered as a factor which will disqualify the nominee.

Mr. BAYH. I appreciate the position of my good friend from Nebraska. Of course, to quote the statement in the committee report as gospel completely ignores the fact that four members of the committee took strong issue with it. So, I think that the Senate itself will have to decide whether the basis on which the committee reached its determination is valid or not. But, Mr. President, as I said a moment ago, I believe in the theory of rehabilitation, or whatever we might call it. I believe that it is possible for someone to say something today that he regrets tomorrow or will change his mind on. The Senator from Indiana, when he was running for the legislature back in 1954—I do not remember everything I said—but I know that nothing I said ever approximated the type of statement that this nominee made back in 1948.

I will not read that statement again. But it is so contrary to everything that I believe in and to everything I think most Members of the Senate believe in that I cannot suggest in a cavalier manner that it should be ignored since it was 22 years ago. I have to look carefully.

I am glad to have the thoughts of my friend as to the establishment of the law school. But then I am faced with the establishment of the white only booster club and with the chartering of the white only golf club intentionally designed to avoid the Supreme Court holding.

I think the Senator from Nebraska and I can disagree. But I do not think it is unreasonable to suggest the impact of a statement such as this made back in 1948, never publicly repudiated by a man holding public office—a man who has made speeches over a large part of this country—and never refuted until the man is nominated for the Supreme Court.

I do not think it is totally unreasonable to suggest that this repudiation might be a little self-serving.

Mr. President, I yield to my friend, the Senator from Michigan.

Mr. HART. Mr. President, as the Senator from Indiana has pointed out, there are many reasons assigned by those who oppose the nomination as a basis for our opposition.

Some may be convinced that each alone is persuasive. Others may feel that some of the assigned reasons are not reasons at all.

Others who oppose the nomination do so on the basis that the accumulation of reasons forces us to the conclusion that the nominee is not the distinguished, gifted person whom we should seek for the Supreme Court.

On this one point concerning what force should be assigned to the white supremacy statement of 1948, I confess that I am troubled as to what conclusion we should draw and to what extent we should assign this one incident as the principal objection. Or should we go beyond that and say that a statement such as this estops any man in these times from Senate approval for any position? Or at the other extreme should we, as the Senator from Nebraska suggests, recognize that each of us in our day has said things that were either foolish or wrong and that each of us seeks to be given the opportunity of reparation and rehabilitation, through a change of mind and position?

We can debate that as white Americans. But what if one were a black American? We have a responsibility to evaluate the judgment of black Americans on our action and their future attitude toward this Court.

I do not know who it was, but some gifted mind in this country years ago wrote something that went something like this, and I regret that this is a paraphrase, "What we are today is a part of what we were; and what we will be is a part of what we are."

Part of this man was a public promise that he would always believe in white supremacy.

We must try to empathize with the feelings of black Americans. Let us assume that the man was being nominated to the office of justice of the peace. Let us assume that the Senator was a white lawyer who was interested in assuring the elimination of inequity and injustice in this community.

Let us assume that the Senator realized that it was more likely that injustice could be eliminated through the process of the law than by violence against the system. If a militant black in the community engaged the Senator to represent him, the Senator would try to persuade him to stay within the system, to go to court, and get this thing corrected.

The client would say, "Who is the judge?"

The Senator would tell him, and he would say, "That man told me what he thought of me 18 years ago." Nonetheless, the Senator would get the client to agree to go to court.

Suppose that the rules of law were applied with eminent professional precision and that, as far as the Senator could see, the verdict against him and his client was soundly based, does the Senator think that he could really convince that black cl ent that it was a decision made at the hands of a just man?

This is someth ng that I think troubles many of us. I do not say that I am yet prepared to assert that that statement should bar a man from high office per se, but the Senator from Indiana is perfectly correct in ai ing it early in the debate so that we can each answer it in our own light.

Is this the man in the year 1970 who should be on the Supreme Court to whom we will point as a symbol of the progress made under law?

This is a delicate kind of think to talk about And I am not comfortable about it. But it is something that everyone, when the roll is called, will have to include in his yea or nay vote.

Mr. HRUSKA. Mr. President, will the Senator yield to me so that I might ask a question of the Senator from Michigan?

Mr. BAYH. Mr. President, I will be glad to yield to the Senator from Nebraska in a moment. However, I first

want to respond to the Senator from Michigan.

I have tried to make it clear that I am willing to accept at face value the judge's feelings as of this moment. But I really feel an obligation to do a little double-checking as a result of that decision made back in 1948. It waves as a red flag and invites me to look closer and see if the judge really has evolved in his thinking on this very important matter.

That is why I got into the discussion with my friend, the Senator from Nebraska, over this matter of the covenant. It is the pattern of things that convinces me as of this moment—and perhaps the Senator from Nebraska can convince me that I am wrong—but the pattern of public and judicial conduct and association do not indicate to me that the nominee has changed.

Mr. President, I yield to the Senator from Nebraska.

Mr. HRUSKA. Mr. President, it was with interest that I listened to the question concerning how we could make the black man feel that he would be treated honestly and fairly as outlined by the Senator from Michigan.

Let me pose a question that entered the minds of millions of Americans when the Senate considered the nomination of Judge Thurgood Marshall to be a Justice of the Supreme Court, a man admittedly possessed of bias and prejudice and great advocacy for the cause of the black man.

He did it well as an advocate. He carried 31 cases to the Supreme Court and won 29 of them—a pretty good record.

There were grounds for many white people to say, "My goodness, how can we look to that Court for justice, if we have a problem before the Court with a man like that sitting in judgment on a problem involving the rights of white people as opposed to rights asserted by some members of the minority?"

We bridged that situation. This Senator voted to report out of committee the nomination of Thurgood Marshall; and this Senator voted to confirm the nomination of Thurgood Marshall. There were not any misgivings about it. I will tell the Senator why. Before that nominee went out of the room he was asked, "Judge Marshall, can you be fair in lawsuits brought before you as a member of the Supreme Court, fair to the point that you will be rendering decisions on the basis of the law and the evidence, regardless of the color of a man's skin, whether black or white, and whether he is from the North, the South, or any other place?"

The judge said, "Yes, I can and I will be fair." That is where the matter ended.

That is not the situation now. Now, there is a man accused but not proven to be possessed of bias and prejudice; the man's record is frankly good on matters involving civil rights law. But even if it were granted for argument that he had a bias the other way, what would be wrong with that? It is wrong in the one case but it is not wrong in the other case. That is a double standard.

If there is any doubt in the minds of people, I say there is no objection to bias and prejudice for a nominee to the Supreme Court for some people, provided it is in the right direction; provided there is advocacy for this great civil rights revolution of the last 10 years—that is what one Senator said; he said, "I object to him because he is not an advocate of the great civil rights revolution."

Mr. HART. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Does the Senator from Indiana yield to the Senator from Michigan?

Mr. BAYH. I yield.

Mr. HART. Mr. President, I think all of us appreciate the comment made by the Senator from Nebraska. I am not sure it is on all fours. Our population is 200 million people; the black population is 20 million people. I am not at all sure we can suggest an analogy, given the circumstance and history of this country, and I am not at all sure that there was ever assigned to Thurgood Marshall the statement that he would always be guided by black supremacy, but this man has said, "I yield to no man in the firm and vigorous belief of white supremacy," and he said, "I shall always be so governed."

I suggest that when the minority member goes to court to present a grievance to that man, that theoretical guardian, he might say, "He told me what he thought of me 18 years ago, and it is in black and white."

Another distinction between the nominee and Thurgood Marshall is in the record of the man as a lawyer. As the Senator from Nebraska said, Thurgood Marshall was, indeed, a distinguished member of the American bar. If my recollection serves me correctly, there were only two other men at the bar in America who had been so brilliantly successful in their arguments before the Supreme Court. Thurgood Marshall is a man of distinction. White lawyers can share in the pride at seeing this man and that record. We envy him. None of us has those litigating credentials. That is another distinction between the nominee and Thurgood Marshall.

That is what we should be in search of for the Supreme Court today. Surely, each of us can agree there should be some recognition that a nominee is among the most distinguished candidates available.

We do not seek to put on the Court nine men who, as a whole, represent the ratio of adequacies and inadequacies of our society. We should look at the qualifications of the nominee. Here again the Senator from Nebraska and I disagree.

I think the Senator from Indiana states it well in his second paragraph when he says:

> The Carswell nomination involves a question of judicial competence and professional distinction.

We are getting off the question as to how we should treat the pledge of 1948 that he shall always be governed by the principle of white supremacy. It was not all right to say that 18 years ago merely because the Supreme Court had not yet handed down the Brown against Board of Education case; the doctrine of white supremacy has been unconstitutional for 100 years. The 14th amendment settled that. That was as wrong in 1948 as it would be today.

Mr. HRUSKA. Mr. President, will the Senator yield?

The PRESIDING OFFICER. Does the Senator yield?

Mr. BAYH. I yield.

Mr. HRUSKA. If we are going to say we look at the quality of the man and we are going to do it here on the floor of the Senate, then we are invading the province of the man who appoints. The appointing power is different than advising and consenting. If the Senate is going to go into the business of saying that each one of us here, 100 strong, is going to have his own idea of quality, we would be engaging in the business of appointing. That is for the President to decide. The President is the appointing power. The Founding Fathers, and a reading of the Federalist Papers will show, considered whether the Senate should do the appointing. They came to the conclusion that a body of only 26 men could not do the appointing business and that that power should be fixed in the President. Now, we have four times as many Senators as 26. This body does not appoint. There must be someone to appoint, and that is the President. It is for this body to determine the capacity to be a judge, for being learned and experienced in the law, the experience in judging the law, and as a district attorney, and so forth, and decide whether to confirm or not.

But let us not get the business of appointment mixed up with advising and consenting.

Mr. BAYH. If the Senator will bear with us a moment, I must say after listening to the Senator's discussion of the advise and consent authority that I wonder what powers are delegated to this body. It is for the Senate to decide if a man can stand up to the strains of the Court. What does the Constitution mean when it says the Senate is going to advise and consent to the President's nomination? Of course, if one looks at what the Founding Fathers did in the early days, in connection with the Supreme Court nominations from the President, a good number of them were turned down by a Senate controlled by the same party as the President.

I am one Senator, and I trust I am not alone, who is not willing to totally abdicate any authority and responsibility I might have in looking at the qualifications of this man or any man. The Senator from Nebraska brought up the point that we were going beyond the realm of our authority. The Senator from Nebraska brought Thurgood Marshall into the discussion in dealing with the very appropriate reference made by the Senator from Michigan. I think the Senator from Michigan raised an excellent point and the Senator from Indiana would like to know if his friend from Nebraska is aware of any black supremacy statement that Thurgood Marshall made.

Mr. HART. May I interject at this point?

Mr. BAYH. I yield.

Mr. HART. In fairness to the record, to no one's surprise in the hearing on the

Thurgood Marshall nomination, there was put into the RECORD a speech that a professor of history made at a meeting of political scientists or historians. This was a professor who had assisted in the development of the case that culminated in the Brown decision. He was discussing many aspects of it—the formal, the procedural, the substantive, and the interesting anecdotal; and he stated that, a convivial dinner one night, as these men were associated in seeking to make the strongest possible case to present to the Supreme Court, Thurgood Marshall had jokingly said if he were in power, he would tax the white man for every breath he drew.

Mr. HRUSKA. Would the Senator want the exact words?

Mr. HART. Were they not almost verbatim?

Mr. HRUSKA. They were reasonably accurate. The exact words were:

> When we take over, the whites will have to pay a tax every time they take a breath.

Those are the words taken from the transcript.

Mr. HART. My memory is better than I would have guessed.

The committee then received from the professor in question a full description of the circumstances of that statement, and, not unanimously, but by solid majority, that white committee concluded it had indeed been in conversational jest.

I think when you look back on the history of those who were brought here in chains, down through the postwar experience of the 1870's, 1880's, and then into the early 1900's, that kind of remark is not surprising at all.

Again, I repeat, the difference, on the one issue that we have been discussing now, the pledge to the electorate that he would always be governed by the principle of white supremacy, voiced by a member of the majority group, is a rather serious element which we have to resolve in considering whether this man, at this moment in history, should be one of the nine symbols on the Supreme Court of the United States.

As I did when I interrupted the Senator from Indiana, I am not suggesting that any one of the reasons that are assigned by those of us who are opposing the nomination should be controlling. I am not suggesting to any colleague how he should resolve the question of what you do when you are presented with a nominee who has made that kind of pledge. But that is what it is. That was a pledge made by the judge: "I yield to no man in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed." I accepted Judge Carswell's statement. I remember asking him, "Did you believe it then or did you just say it?" It was in the heat of a polltical campaign in Georgia. As I recall it, I think he said, "Well, I think I meant it, but I do not mean it any more. It is repugnant to me."

I am willing to accept that as descriptive of his present attitude, but what do you say to the 20 million blacks? To what extent should we be concerned with their feelings on that kind of speech? We are all part of what we were. That pledge is a part of that nominee.

Mr. BAYH. Mr. President, as I said earlier in this enlightening discussion with the Senator from Nebraska and the Senator from Michigan, this part of the 1948 speech should not be damning from now until the end of time, but some attention should be paid to subsequent acts, interpreted in light of that statement, to see if indeed there has been a change of heart. When that is done, the Senator from Indiana is concerned that there has not been the necessary change of heart.

Judge Carswell has publicly repudiated his 1948 views, true. But that repudiation, coming as it did, only after the speech had been uncovered by a reporter, and obviously jeopardizing his nomination, surely was involuntary. How much significance should we attach to a repudiation 22 years too late, and dictated by circumstances, when the judge's behavior between 1948 and 1970 belie his words.

Four years after the Georgia speech, for example, Carswell was actively involved in the 1952 presidential primary in Florida. The Carswell forces centered their attack on the Fair Employment Practices Act and the campaign, by all accounts, was marked by racist overtones. As a study of the 1952 primary in northern Florida reported, the campaign was "against FEPC and for white supremacy." The extent to which Carswell was a leader in this effort remains undetermined, but the fact that he was an active participant is undeniable.

George Harrold Carswell was appointed U.S. attorney for the northern district of Florida on July 11, 1953. Some 5 months later, on December 16, 1953, a charter for the Seminole Booster, Inc., a nonprofit corporation, was approved by the Florida circuit court for Leon County. The Seminole Boosters charter was prepared in the law offices of "Carswell, Cotton and Shivers." George Harrold Carswell was not only one of 11 incorporated subscribers and charter members, his name appeared on the notarized affidavit—an affidavit in which the facts as stipulated in the charter were sworn to as being truthful. Article III of the Seminole Boosters charter holds that "the qualifications and members shall be any white person interested in the purposes and objects for which this corporation is created." George Harrold Carswell, according to the testimony of his former law partner, Douglas Shivers, personally drafted that charter.

On November 7, 1955, the U.S. Supreme Court ruled that the city of Atlanta's refusal to permit Negroes to use municipal golf facilities was in direct violation of the 14th amendment's guarantee of equal protection and ordered the city to desegregate the golf course by making it available to Negroes. *Holmes* v. *City of Atlanta*, 350 U.S. 879 per curiam. By Christmas of 1955, Negroes were playing golf on Atlanta's municipal course and a series of suits, throughout the South, were instituted to desegregate municipal recreational facilities. One such suit was Augustus against City of Pensacola, filed in the northern district of Florida—the same district in which Judge Carswell was then serving as U.S. attorney.

Ingenious local officials in Tallahassee who were seeking to avoid litigation and the necessary desegregation of municipal facilities, obviously, thought that by turning over such facilities to private groups they would be removed from the purview of the 14th amendment's guarantee of equal protection. In December 1955, for example, at a meeting of the Tallahassee City Commission the question was raised—and hotly debated—about leasing the municipal golf course to the Tallahassee Country Club, a private corporation. A front-page story in the Tallahassee Democrat, February 15, 1956, at the time the transfer was finally approved by the city commissioners, pointed out:

> The action came after a two-month cooling off period following the proposal's first introduction. At that time Former City Commissioner H. G. Easterwood, now a county commissioner, blasted the lease agreement.
>
> He said racial factors were hinted as the reason for the move.

In view of the Atlanta decision by the Supreme Court only a few months earlier and as reported by the only dally newspaper in Tallahassee, it should be obvious that the purpose of transferring the golf course—which was to circumvent the Supreme Court's ruling—was public knowledge. In a sworn affidavit to the Judiciary Committee, also contained in the record, one of Tallahassee's most prominent citizens, Mrs. Clifton Van Brunt Lewis, confirmed the racial implications of the proposed transfer. According to the affidavit, Mr. and Mrs. Lewis were invited to join the country club but—

> We refused the invitation because we wanted no part in converting public property to private use without just compensation to the public—and because of the obvious racial subterfuge which was evident to the general public.

On April 24, 1956, the Capital City Country Club was formed for the specific purpose of acquiring the municipal facilities and operating a golf club on the premises. The certificate of incorporation lists G. Harrold Carswell, who admittedly is not a golfer, as an original subscriber and as a director of the Capital City Country Club. It seems to me that, as the U.S. attorney for northern Florida, Judge Carswell certainly should have been aware of the litigation pending throughout the South in the wake of Holmes against Atlanta and of the efforts to avoid complying with the Supreme Court's ruling by converting public facilities into private property. Could the transfer of the Tallahassee municipal golf course to the Capital City Country Club, following immediately upon Holmes against Atlanta, and in view of the successful suit in nearby Pensacola to open that city's golf course, have been anything but a thinly disguised attempt to avoid desegregating? In my judgment, a contrary opinion would be difficult to comprehend.

The circumstances surrounding the formation of the Capital City Country Club are too obvious to belabor. It was formed to operate a segregated golf

course on what had been public property and which, under current law, would have had to have been desegregated. As Julian Smith, one of the original incorporators, said when asked about the pressure to desegregate the municipal course, "it was in the back of our minds at the time the transfer was contemplated." "I know I had it on my mind," Smith admitted.

The subsequent history of the Capital City Country Club surely confirms the view that the transfer was an end-run around the Supreme Court. The club was operated on a completely segregated basis—and continues to operate that way even today, though within the last 3 months the first nonwhite guest was admitted.

True, this elaborate scheme to avoid compliance with the Supreme Court's ruling was legal at the time. But I find it particularly disturbing that the U.S. attorney should have been in the forefront of such an effort. We have a right to expect more of our U.S. attorneys—and of Supreme Court nominees. Ingenuity in subverting the Constitution is no recommendation for appointment to the Supreme Court.

In 1963, Judge Carswell's brother-in-law and neighbor, Mr. Jack Simmons, exchanged a piece of swamp land he owned for some shore-front property owned by the Federal Government. Mr. Simmons, in turn, soon conveyed the property to Mrs. Carswell, but added to the deed a restrictive covenant that prohibited transfer of the land to Negroes. The Carswells sold the land in 1966, with the judge signing the deed—and the deed including not merely the covenant but a provision calling for the enforcement of the restriction.

This land transaction, I want to remind my colleagues, took place during Judge Carswell's tenure on the Federal bench. It occurred, moreover, more than a decade and a half after the U.S. Supreme Court in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), had specifically ruled that restrictive covenants could not be enforced because they represented a denial of equal protection. Surely, as a Federal district court judge, Carswell was familiar with the Shelley decision. Yet, he personally signed the deed anyway.

III. JUDICAL TEMPERAMENT

As Judge Carswell's personal and political activities give us an insight into his character, so his conduct over a period of 12 years as a Federal judge reveals his judicial temperament and suggests the level of his professional qualifications. On the basis of that record, and we intend to lay the record fully before this body, I believe the Senate will deny confirmation.

Perhaps the most shocking aspect of Judge Carswell's judicial record is his personal antagonism and hostility toward attorneys representing clients in civil rights litigation. Not only were Judge Carswell's decisions in these cases out of step with existing precedent—as I shall note in a moment—but Judge Carswell has been clearly hostile and antagonistic to these lawyers and their clients even in his courtroom conduct.

Prof. Leroy Clark of New York University, who spent 6 years supervising civil rights litigation in the South, called Judge Carswell "insulting and hostile" and "the most hostile Federal district court judge I have ever appeared before with respect to civil rights matters." He said that Judge Carswell had on at least one occasion turned his chair away in the middle of an argument. He and other witnesses told the Judiciary Committee of occasions on which Judge Carswell deliberately disrupted arguments while according every courtesy to opposing counsel, shouted at black lawyers, and harassed and attempted to intimidate young civil rights lawyers inexperienced in courtroom procedures.

One of the most surprising acts of judicial hostility involved nine clergymen arrested in the Tallahassee airport restaurant in 1961. They asked for a writ of habeas corpus from Judge Carswell's court, and the writ was denied. On appeal, the fifth circuit ordered the judge to hold a hearing on the case immediately, if the State court did not do so. Judge Carswell, in the presence of the attorney for the nine imprisoned clergymen, then told the city attorney prosecuting the case that "If you go ahead and reduce these sentences, then there will be no hearing. There will not be anything. It will be moot." On Judge Carswell's advice, this is precisely the action that was taken—over the objection of the clergymen, who wanted their claims decided on the merits so that their records could be cleared. As the State court judge told them, when he denied them the opportunity to vindicate themselves, "Now you have got what you came for. You have got a permanent criminal record."

The full range of Judge Carswell's judicial temperament is even more clearly revealed in the bizarre chain of events arising out of the arrest of a group of voting registration volunteers and their imprisonment in the Gadsden County jail. In this case:

First, contrary to controlling precedent in the fifth circuit, *Lefton* v. *Hattiesburg,* 333 F. 2d 280, an illegal filing fee was required by Judge Carswell court before a petition for removal to Federal court was accepted.

Second, when a petition for habeas corpus was filed, Judge Carswell delayed the proceeding by requiring the petition to be resubmitted on a special form, which had been designed for a different class of cases.

Third, the proceeding was delayed further by Judge Carswell's requirement that counsel attempt to secure the signatures of the prisoners, although the attorney's signature was all that could be required under rule 11 of the Federal Rules of Civil Procedure.

Fourth, Judge Carswell told the attorneys representing the civil rights workers that he would try, if at all possible, to deny the petition.

Fifth, when he finally granted the petition, as the law expressly required, he violated 28 U.S.C. 1446 by refusing to have his marshal serve the writ on the Gadsden County sheriff.

Sixth, despite the complexity of the questions posed, without any request from the State, and without affording the civil rights workers any hearing whatever, he remanded the case to the State on his own motion and made possible their immediate rearrest.

Seventh, notwithstanding the congressional grant of a special right of appeal from civil rights remands, he even refused to stay his remand order, a decision promptly reversed by a single judge of the fifth circuit.

When the fifth circuit subsequently considered this case on the merits, it unanimously reversed Judge Carswell. *Wechsler* v. *County of Gadsden,* 351 F. 2d 311 (1965).

Seldom has the Senate heard such a checkered record of judicial action on the part of a Federal judge.

IV. THE QUALITY OF DECISIONS

But, while the Wechsler case may be unusual, or even unique, in the degree of transparent antagonism, there is one way in which it is not the least bit unusual for Judge Carswell. For Wechsler is only one of 17 times when Judge Carswell was unanimously reversed by the fifth circuit in cases involving human rights.

Indeed, the Ripon Society—a group of progressive young Republicans—recently analyzed Judge Carswell's decisions and found that he had been reversed in 59 percent of the appeals in which he wrote published opinions, a rate nearly three times that of other Federal district court judges.

Before analyzing these 17 cases, I believe it is important to make several points about Judge Carswell's record on appeal. In the first place, all of these appeals were to the U.S. Court of Appeals for the Fifth Circuit. The fifth circuit includes the States of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The judges of this court can hardly be considered northerners or knee-jerk liberals. They are southern colleagues of Judge Carswell, most of them born and raised in these six States, and faced with the same difficult problems of racial integration arising out of the Supreme Court's decision 16 years ago in Brown against Board of Education. These able judges have come to an honorable reconciliation of these problems. They have by and large faithfully applied the law of the land and followed the precedents set before them—often by overruling the decisions of Judge Carswell. Moreover—and unlike the record of Judge Haynsworth, whose decisions were often overturned by split panels—we are talking about 17 reversals of Judge Carswell, each by a unanimous panel of three fifth circuit judges.

One of these 17 is the incredible Wechsler case, discussed above, in which the fifth circuit finally unanimously reversed Judge Carswell's failure to allow removal.

In a second case, *Augustus* v. *Board of Public Instruction of Escambria County,* 306 F. 2d 862 (1962), Judge Carswell earned reversals on each of two separate grounds. He had held that Negro schoolchildren had no standing to seek integration of school teaching staffs, saying that enjoining teacher assignments based on race was like enjoining teach-

ers who were too strict or too lenient. The effect of Judge Carswell's ruling was to deny these children even a hearing on the question of whether racially discriminatory teacher assignment was unlawful. The fifth circuit unanimously reversed.

In the same case, Judge Carswell had accepted a school desegregation plan in 1961 which merely permitted continued assignment of pupils under Florida's pupil assignment law. Yet the fifth circuit had previously held twice, in both 1959 and 1960, that this law was inadequate to meet the Brown requirement, because it was "administered—in a manner to maintain complete segregation in fact." The fifth circuit unanimously reversed.

After being reversed, Judge Carswell waited 4 months to implement the fifth circuit's decision, then postponed the effective date of the plan for 10 months more.

The third case, *Steele* v. *Board of Public Instruction of Leon County,* 8 Race Rel. L. Rep. 934 (1963), was decided by Judge Carswell 10 months after he was unanimously reversed in Augustus. Again, however, he approved assignments under the pupil assignment law, then three times held inadequate by the fifth circuit. Moreover, he required only token desegregation of one grade per year beginning in 1963, despite the fifth circuit's statement in Augustus that: "If it is too late to integrate for the 1962 year then the plan should provide for such elimination as to the first two grades for the 1963 fall term." Two years after Judge Carswell's 1963 order, the Negro children moved to have him speed up the plan in compliance with subsequent Supreme Court rulings, and he refused even to hold an evidentiary hearing, telling their attorney, "it would just be an idle gesture regardless of the nature of the testimony."

The fifth circuit unanimously reversed both of Judge Carswell's orders. 371 F. 2d 395 (1967).

The fourth case, *Youngblood* v. *Board of Public Instruction of Bay County,* 230 F. Supp. 74 (1964), came 2 years after the reversal in Augustus. Again, Judge Carswell permitted token desegregation under the three-times disapproved pupil assignment law, and even that was delayed for 16 months. Again, he approved a grade-a-year plan, violating the fifth circuit's then 1-month-old decision in *Armstrong* v. *Board of Education of the City of Birmingham,* 333 F. 2d 47 (1964). Moreover, the plan allowed only for so-called "freedom of choice" transfers and then only during a 5-day registration period and only if parents would come to the superintendent's office during working hours.

Judge Carswell's denials of subsequent motions in Youngblood also violated precedents unmistakably clear at the time of denial. For example, in 1965, when he refused to speed up the grade-a-year plan, such plans had already been clearly held unconstitutional by the third, fourth, sixth, and eighth circuits, and the fifth circuit had held months earlier, in Lockett, 342 F. 2d 225 (1965), that "It was—beyond peradventure that shortening of the transition period was mandatory."

Again, after the Justice Department intervened, seeking to substitute effective methods in place of so-called freedom of choice transfers. Judge Carswell on August 12, 1968, and April 3, 1969, approved "freedom of choice"—all of this contrary to and after the Supreme Court's decision on May 27, 1968, in *Green* v. *County School Board of New Kent County,* 391 U.S. 430. The fifth circuit unanimously reversed, No. 27683, December 1, 1969.

The fifth case, *Wright* v. *Board of Public Instruction of Alachua County,* repeats the story of Youngblood. Again, the fifth circuit unanimously reversed, No. 27983, 1969.

The sixth case, *Due* v. *Tallahassee Theaters, Inc.,* 9 Race Rel. L. Rep. (1963), was a suit seeking desegregation of theaters and alleging a conspiracy between the theaters, the City of Tallahassee, and the sheriff. Judge Carswell dismissed the complaint against the theaters and the city for failure to state a justiciable claim, and granted summary judgment on the sheriff's affidavit denying that there was any conspiracy, thus precluding any evidentiary hearing whatsoever.

The fifth circuit unanimously reversed both of Judge Carswell's actions, 333 F. 2d 630 (1964), stating that "There is no doubt about the fact that the allegations here stated a claim on which relief could be granted, if the facts were proved," and on the issue of granting summary judgment without a trial: "There clearly remained issues of fact to be determined on a full trial of the case."

In the seventh case, *Singleton* v. *Board of Commissioners of State Institutions,* 11 Race Rel. L. Rep. 903 (1964), Judge Carswell had held—in a 99-word opinion—that certain inmates had no "standing" to seek desegregation of reform schools because, before he had rendered judgment, they had been released on conditional parole.

The fifth circuit again unanimously reversed, 356 F. 2d 771 (1966), relying on its own Anderson decision, 321 F. 2d 649 (1963), rendered a year before Judge Carswell's order. The fifth circuit's opinion pointed out that Judge Carswell's approach would preclude any effective effort to desegregate the facilities since the average stay in the reform school was less than the time necessary to fill an action and obtain a court order.

The eighth case, *Dawkins* v. *Green,* 285 F. Supp. 772 (1968), involved Negro civil rights workers alleging that public officials had initiated prosecutions in bad faith to retaliate for civil rights activities and to "chill" their exercise of first amendment freedoms in continuing these activities. The public officials filed affidavits later described by the fifth circuit as "simply a restatement of the denials contained in their answer—they set forth only ultimate facts or conclusions—that they did not enforce the laws against plaintiffs in bad faith." Judge Carswell held that—

> From the *proofs* here, it is clear that there was no harassment, intimidation or oppression . . . and that they are being prosecuted in good faith. . . .

On this basis, he granted a summary judgment for the defendants.

Once more, the fifth circuit unanimously reversed, 412 F. 2d 644 (1969), citing its own preexisting law on summary judgments:

> In summary judgment proceedings, affidavits containing mere conclusions have no probative value.

And in addition to those eight unanimous reversals by the court of appeals, there is at least one other civil rights case in which Judge Carswell has shown himself unaware of the temper of the times—and the law of the land. In *Gaines* v. *Dougherty County Board of Education,* 334 F. 2d 983 (5th Cir. 1964), Judge Carswell was sitting by designation on the fifth circuit while still a district court judge. On appeal from a decision of a Georgia district court, Judges Tuttle and Wisdom ruled that the minimum school desegregation required—10 years after Brown—was the first two grades plus the 12th grade. Tuttle and Wisdom said that if the 12th grade were not desegregated, an entire generation of children would have graduated under Brown without any desegregation.

Judge Carswell, however, dissented, remarking angrily:

> In my view this simply violates the long-standing and wise view that no court should rain down injunctions unless there be some demonstrated factual necessity to insure compliance with the law. (334 F. 2d at 986.)

Surely, 10 years after Brown against Board of Education, this view cannot be sustained.

Each of these cases involves civil rights. But there is another, equally fundamental area of human rights in which Judge Carswell has been no less remiss—in denials of the writ of habeas corpus.

Historically, the writ of habeas corpus, the "Great Writ"—embodied in the Constitution itself—represents one of the most precious safeguards possessed by a free people against abusive and improper governmental confinement. Because the writ often stands as the final judicial guarantee against the tragedy of erroneous imprisonment, each application demands scrupulous attention.

Yet the record reveals that in at least nine cases, involving postconviction relief, Judge Carswell has been unanimously reversed, in almost every case for refusing even to grant a hearing in habeas corpus proceedings or similar proceedings under 28 U.S.C. 2255. In every one of these cases, had petitioners been able to prove what they alleged, they would clearly have been entitled to relief under then existing rulings. Whether this unseemly record is the product of simple callousness, obliviousness to constitutional standards, or pure ignorance of the law, one might only surmise.

I will not elaborate on these cases, because they are all set out in the memorandum attached to the Judiciary Committee report. Moreover, they have much in common—and with terrible consequences. Among the allegations which Judge Carswell would not grant a hearing were charges that a prisoner was unable to waive defenses and enter pleas rationally because of prior mental illness; suffering from mental incompe-

tence at the time counsel was waived; not told of the right to counsel an appeal; involuntarily forced to make self-incriminating statements; not represented by counsel at a crucial hearing; coerced into entering guilty pleas; and denied effective assistance of counsel. In all these cases, the fifth circuit unanimously reversed, ordering Judge Carswell, at least, to provide the minimal guarantee of a hearing before denying such fundamental pleas.

And these are only the habeas corpus cases that were appealed. *Edwards* v. *State of Florida,* N.D. Fla. Crim. Action No. 1271, is a district court case never appealed to the fifth circuit, and thus possibly representative of hundreds of Judge Carswell's unreported actions on habeas petitions. Edwards mistakenly placed the statement "coerced guilty plea" in the wrong blank on his handwritten petition, listing in the proper blank only "denial of appointment of counsel for appeal" and "denial of court records, et cetera, with which to appeal" as his grounds for the writ.

Without holding a hearing, Judge Carswell denied the petition, choosing to ignore entirely the allegation written in the wrong blank—an allegation which, if true, would clearly have entitled him to a writ. Then, incredibly, Judge Carswell denied Edwards a certificate of probable cause for appeal. How many more cases like this might there be?

V. CONCLUSION

Mr. President, all these cases can be interpreted by each Member of the Senate and related as important or insignificant. Of course, it is the right and responsibility of each of us to look at these cases as well as the cases cited by the distinguished Senator from Nebraska in his fine opening remarks. But I am concerned about the picture that all this activity paints of the nominee, Judge G. Harrold Carswell. His words and his deeds, from 1948 until the week of his nomination to be an Associate Justice of the Supreme Court, have been consistently out of step with the direction in which this country must go in providing equal opportunity for all Americans. As I said earlier, he is not a "strict constructionist" at all, in my judgment, but a man reaching out from the Federal bench to foster his segregationist views, both by personal hostility toward the advocates of racial justice and by repeated failure to follow precedent he finds distasteful. A man whose single most distinct judicial trait is an unseeming interest in preventing evidentiary hearings on the merits. What manner of Supreme Court Justice is this?

Some time ago—I think this conclusion is important, and it relates to the remarks of the Senator from Michigan a moment ago—a black militant commented on America in these words:

> For all these years whites have been taught to believe in the myth they preached, while Negroes have had to face the bitter reality of what America practices. It is remarkable how the system worked for so many years, how the majority of whites remained effectively unaware of any contradiction between their view of the world and the world itself.

I do not believe that violence is the way to resolve this contradiction; but all of us must recognize the truth in such a statement. The single most pressing issue of our time is the problem of eliminating the unconscionable gap between what we preach and what we practice.

A hundred years ago, in the 14th amendment, we embodied in the Constitution itself the concept that all Americans are entitled to equal protection of the laws. Only in the past 20 years have we begun to put flesh and bones on the 14th amendment—to turn its promise into reality. That task remains unfinished. Until it is finished, until the day every American has truly equal opportunity, we must continue the struggle.

Today a great many alienated Americans seriously question whether our system can and will deal effectively with this crucial problem. Some have decided that the institutions of our society cannot or will not respond. In their view, our institutions must be scorned and eventually pulled down, as the only course to meaningful reform. At the same time, we face the specter of institutional insensitivity, we feel the hand of officials grown disrespectful of the law and the tradition they represent. While the great majority of elected and appointed officials are in tune with these difficult times and are working for progress, a few still seek to undermine the ability of the system to respond effectively to the crisis of confidence we face.

From Selma and Birmingham to Detroit, from Berkeley to Chicago, we have learned the terrible consequences of violence breeding repression and repression breeding violence. We have learned that those masses who might follow the call to violence must be brought back into our society, even if their leaders cannot be.

Some cite the need to bring our alienated minorities into the system solely as a means of quelling revolution. This is not enough. We must bring all Americans into this great effort because America needs their talents, their energies and ideas to help make a great America an even better America. We cannot begin to make the progress we must, unless we can bring these forces fully into the institutional framework of American society. And we will not do that until we make it clear that those in positions of leadership have a deep moral commitment to the concept of social equality. Today, 100 years after the Civil War, we cannot support a policy which will guarantee anything less than full opportunity for all Americans to enjoy all of the rights of American citizenship.

The evidence is persuasive. Judge G. Harrold Carswell lacks such a deep moral commitment to the concept of racial equality. The elevation to the highest court of such a man would serve as an encouraging symbol to those violent extremists who are outside the mainstream of American life and lend credence to their argument that our system cannot, that it will not, act to make freedom and equallty for all Americans a reality. It would also serve as an encouraging symbol to all those at that opposite extreme, who would take comfort in this nomination and redouble their efforts to reverse two decades of slow but steady progress. For all of the millions and millions of Americans—black and white—who have worked as tirelessly to achieve that progress, the confirmation of G. Harrold Carswell, as Associate Justice of the Supreme Court would be a sign of retreat.

Mr. President, I do not think the Senate can withhold its advice and consent from a nominee merely because he is not of the stature of Holmes and Brandeis and Cardozo, men whom the President admires. It is not necessary that we should hold Supreme Court Justices to the high standards of other Republican nominees in this century, the standards of Charles Evans Hughes and William Howard Taft and Harlan Fiske Stone, the standards of Earl Warren and John Marshall Harlan and William Brennan and Potter Stewart. But I do not think we can let our standards fall to the low level suggested by the present nominee. Mr. President, the U.S. Senate, the American people, have a right to insist upon a better man—a man in tune with these difficult times, a man committed to justice for all Americans, a man of recognized stature within his profession, a man of measured sensitivity.

Mr. President, this appointment demeans the Court. It demeans the South. It demeans the Nation. It may be good politics, but it is bad government and bad conscience and it would assuredly give us bad law. At a time when millions of black and white Americans are questioning the American dream, and asking us for a clear sign of where we stand on the most crucial issue of the century, this appointment gives them the back of our hand. I hope the Senate will have the courage and wisdom to refuse to advise and consent to this nomination, and await an appointment by the President of a man more suited for the times in which we live.

Mr. HRUSKA. Mr. President, will the Senator from Indiana yield?

The PRESIDING OFFICER (Mr. HUGHES). Does the Senator from Indiana yield to the Senator from Nebraska?

Mr. BAYH. I yield.

Mr. HRUSKA. Am I correct in my recollection that the Senator asked that there be unanimous consent to include in the RECORD a report of the Washington Research Action Council on the jury selection plan?

Mr. BAYH. That is right.

Mr. HRUSKA. I thank the Senator.

Mr. President, I invite attention to the opening sentence of that memorandum which reads:

> In 1968, Judge Carswell adopted a plan for the selection of persons for jury service in the Northern District of Florida which has resulted in gross racial discrimination in every one of the four Divisions in his district. Moreover, it is clear that this result could easily have been predicted from information available to him at the time.

Then the following is a significant sentence:

> His failure to take action to correct this discrimination is in clear violation of a Federal statute passed several months before he adopted the plan.

Mr. President, I ask unanimous consent that there be printed in the RECORD, a copy of the plan. It commences on page

298 of the hearings after the words "Appendix A."

There being no objection, the plan was ordered to be printed in the RECORD, as follows:

PLAN OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, ALL DIVISIONS, FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Pursuant to the Jury Selection and Service Act of 1968 (Public Law 90-274), the following plan is hereby adopted by this court, subject to approval by a reviewing panel and to such rules and regulations as may be adopted from time to time by the Judicial Conference of the United States.

I. APPLICABILITY OF PLAN

This plan is applicable to the Northern District of Florida which consists, by divisions, of the counties of:

(1) The Pensacola Division: Escambia, Santa Rosa, Okaloosa and Walton.

(2) The Marianna Division: Jackson, Holmes, Washington, Bay, Calhoun and Gulf.

(3) The Tallahassee Division: Leon, Gadsden, Liberty, Franklin, Wakulla, Jefferson and Taylor.

(4) The Gainesville Division: Alachua, Lafayette, Dixie, Gilchrist and Levy.

The provisions of this plan apply to all divisions in the district.

II. POLICY

This plan is adopted pursuant to and in recognition of the Congressional policy declared in Title 28, United States Code, as follows:

"§ 1861. Declaration of policy

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

"§ 1862. Discrimination prohibited

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

III. MANAGEMENT AND SUPERVISION OF JURY SELECTION PROCESS

The clerk of the court shall manage the jury selection process under the supervision and control of the Chief Judge of the District and there shall be no jury commission. The use of the word "clerk" in this plan contemplates the clerk and any or all of his deputies. The phrase "Chief Judge of this district" wherever used in this plan shall mean the Chief Judge of this district, or in his absence, disability or inability to act, the active District Court Judge who is present in the district and has been in service the greatest length of time. Wherever the Jury Selection and Service Act of 1968 requires or authorizes the plan to designate a district court judge to act instead of the Chief Judge, the above definition shall apply and such active District Court Judge above mentioned is hereby designated to act.

IV. RANDOM SELECTION FROM VOTER LISTS AND MASTER JURY WHEELS

Voter registration lists represent a fair cross section of the community in each division of the Northern District of Florida. Accordingly, names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all of the counties in the relevant division.

The clerk shall maintain a master jury wheel or a master jury box, hereinafter referred to as master jury wheel, for each of the divisions within the district. The clerk shall make the random selection of names for the master jury wheels as follows. There shall he selected for the master jury wheel for each division as a minimum approximately the following number of names:

Pensacola division	3,200
Marianna division	2,450
Gainesville division	2,100
Tallahassee division	2,600

These numbers are as large as they are to allow for the possibility that some juror qualification forms, hereinafter mentioned, will not be returned, that some prospective jurors may be exempt by law or excused, and that some may not comply with the statutory qualifications. The court may order additional names to be placed in the master jury wheels from time to time as necessary.

If the above numbers are less than one-half of one percent of the total number of registered voters for the division, the court concludes that such percentage number of names is unnecessary and cumbersome.

The clerk shall ascertain the total number of registered voters for each division and divide that number by the number of names to be selected for the master jury wheel from that division. For example, if there are 42,751 registered voters in a division that number will be divided hy 2,100 producing the quotient of 20. Then he shall draw by lot a number not less than 1 and not greater than 20 and that name shall be selected from the voter registration list of each county in that division along with each 20th name thereafter. Thus, if the starting number is 19, the 39th, 59th, 79th, 99th, 119th, etc., names shall be picked from the registration list of each county of that division.

Each master jury wheel shall be emptied and refilled during the period June 1–November 30, 1971, and each fifth year thereafter.

This plan is based on the conclusion and judgment that the policy, purpose and intent of the Jury Selection and Service Act of 1968 will be fully accomplished and implemented by the use of voter registration lists, as supplemented hy the inclusion of subsequent registrants to the latest practicable date, as the source of an at random selection of prospective grand and petit jurors who represent a fair cross section of the community. This determination is supported by all the information this court has been able to obtain after diligent effort on ite part and after full consultation with the Fifth Circuit Jury Working Committee and the Judicial Council of the Fifth Circuit. In order to assure the continuous implementation of the policy, purpose and intent of the Jury Selection and Service Act, a report will be made to the Reviewing Panel on or before March 1, 1969, showing a tabulation by race and sex of all prospective jurors, qualified and unqualified, based upon returns of Juror Qualification Forms from a mailing of such forms to 20% of the total number of persons placed in the master jury wheel or 1,000 persons, whichever is greater.

V. DRAWING OF NAMES FROM THE MASTER JURY WHEEL; COMPLETION OF JURY QUALIFICATION FORM

This plan hereby incorporates the provisions of 28 U.S.C.A. § 1864, which reads as follows:

"(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk . . . shall prepare an alphabetical list of the names drawn, . . . The clerk . . . shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk . . . by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk . . . shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk . . . within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk . . . forthwith to appear before the clerk . . . to fill out a juror qualification form. . . .

At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of . . . the clerk or the court, as which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk . . . may be noted on the juror qualification form that transmitted to the chief judge or such district court judge as the plan may provide.

"(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both."

VI. EXCUSES ON INDIVIDUAL REQUEST

This court finds and hereby states that jury service by members of the following occupational classes or groups of persons would entail undue hardship and extreme inconvenience to the members thereof, and serious obstruction and delay in the fair and impartial administration of justice, and that their excuse will not be inconsistent with the Act and may be claimed, if desired, and shall be granted by the court upon individual request: (1) actively engaged members of the clergy; (2) all actively practicing attorneys, physicians and dentists, and registered nurses; (3) any person who has served as a grand or petit juror in a federal court during the past two years immediately preceding his call to serve; and (4) women who have legal custody of a child or children under the age of 10 years.

Additionally, the court may in its discretion excuse persons summoned for jury service upon a showing of undue hardship, extreme inconvenience, or other ground of exclusion as set forth in Section 1866 of the Act, for such period of time as the court may deem necessary and proper.

VII. EXEMPTION FROM JURY SERVICE

This court finds and hereby states that the exemption of the following occupational classes or groups of persons is in the public interest, not inconsistent with the Act, and shall be automatically granted: (1) members in active service of the armed forces of the United States; (2) members of the Fire or Police Departments of any State, District, Territory, Possession or subdivision thereof; (3) public officers in the executive, legislative, or judicial branches of the government of the United States, or any State, District, Territory, Possession or subdivision thereof who are actively engaged in the performance of official duties (public officer shall mean a person who is either elected to public office or who is an officer directly appointed by a person elected to public office), and (4) all persons over 70 years of age at the time of executing the jury qualification form.

VIII. DETERMINATIONS OF QUALIFICATIONS, EXCUSES, AND EXEMPTIONS

This plan hereby incorporates the provisions of 28 U.S.C.A. § 1865, which reads as follows:

"(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk . . . shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

"(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."

IX. QUALIFIED JURY WHEEL

The clerk shall also maintain separate qualified jury wheels or boxes, hereinafter referred to as qualified jury wheel, for each division in the district and shall place in such wheel the names of all persons drawn at random from the master jury wheels and not disqualified, exempt, or excused pursuant to this plan. Each qualification form as called for by section 1864, *supra*, shall bear the number which its addressee bears on the voter list. The clerk shall insure that at all times at least 300 names are continued in each such qualified jury wheel over and above and exclusive of the names of jurors previously drawn from such qualified jury wheel. The qualified jury wheel in each division shall be emptied and refilled with names when the master jury wheel for that division is emptied and refilled.

X. DRAWING OF AND ASSIGNMENT TO JURY PANELS

From time to time the court or the clerk, if so ordered by the court, shall publicly draw at random from the qualified jury wheel or wheels such number of names of persons as may be required for assignment to grand or petit jury panels, and the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel. These names may be disclosed by the clerk to parties and to the public after said list is prepared and the jurors have been summoned; provided, however, the court may at any time or from time to time order generally, or with respect to any particular term or terms of court, that these names be kept confidential in any case where in the court's judgment the interest of justice so require. (28 U.S.C. § 1863(b)(8)(9))

XI. GRAND JURIES

Two separate and distinct geographic areas of this district are hereby established for the calling of grand jurors, to wit:

(a) Matters within the jurisdiction of the Marianna, Tallahassee, and Gainesville Divisions shall be presented to grand jurors drawn from the qualified jury wheels of each of these three divisions only. A pro-rata, or approximately pro-rata, number of names shall be drawn at random from the qualified jury wheel of each of these three divisions only and those so drawn shall constitute grand juries for those three divisions. Unless otherwise specifically ordered by the supervising judge, as defined in paragraph III, the grand juries for the Marianna, Tallahassee and Gainesville Divisions shall sit at Tallahassee.

(b) Matters within the jurisdiction of the Pensacola Division shall be presented to grand jurors drawn from the qualified jury wheel of the Pensacola Division only.

Court personnel responsible shall proceed to take all action necessary for the implementation of this plan in order that it may be placed in operation on and after December 22, 1968, in accordance with the Jury Selection and Service Act of 1968.

So ordered, this 17th day of July, 1968.

G. HARROLD CARSWELL,
Chief Judge.

WINSTON E. ARNOW,
U.S. District Judge.

I hereby certify that this plan of the Northern District of Florida for random selection of jurors has been formally approved by the Reviewing Panel of the Fifth Judicial Circuit as of September 10, 1968, and that copies hereof have this date been transmitted by mail to The Attorney General of the United States and to the Director, Administrative Office of the United States Courts, respectively.

This 12th day of September 1968.

G. HARROLD CARSWELL,
Chief Judge.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT REVIEWING PANEL, JURY PLAN

The foregoing and attached plan of the United States District Court for the Northern District of Florida for the random selection of grand and petit jurors in accordance with the Jury Selection and Service Act of 1968, having been reviewed by the Reviewing Panel of this circuit is hereby approved.

Entered for the Reviewing Panel at Houston, Texas, this the 10th day of September, 1968.

JOHN R. BROWN,
Chief Judge.

The following Judges comprised and acted as the Reviewing Panel:

(a) *Fifth circuit judicial council*

John R. Brown, John Minor Wisdom, Walter P. Gewin, Griffin B. Bell, Homer Thornberry, James P. Coleman, Irving L. Goldberg, Robert A. Ainsworth, John C. Godbold, David W. Dyer, Bryan Simpson, Lewis R. Morgan.

(b) *Chief district judge*

G. HARROLD CARSWELL,
Chief District Judge.

Mr. HRUSKA. Mr. President, it strikes me that for any researcher to say that this plan is illegal and that there is a violation of the statute thereby, in the face of the eminent jurists who have studied that plan carefully and matched it up with the statute and who have certified it as complying with the statute, and to come out with a statement of that kind, is certainly effrontery to say the least.

Mr. BAYH. I appreciate the fact that the Senator from Nebraska put that entire plan into the record. It was the intention of the Senator from Indiana—I do not know whether the record will show it—to include from page 294 to page 303 of the hearings, so that both sides of this thing could be made part of the record and everyone can determine it for himself.

I think the Senator from Nebraska knows, and I certainly accord him the knowledge, that although we might differ on the ultimate conclusions, neither one of us would want to try to put something over on the other, or try to give only half the information.

Mr. HRUSKA. Mr. President, I should like to make this added observation. Of course we can differ as to conclusions but we should not differ as to facts. We should try to be fair. This Washington research project action council memorandum is dated February 1, 1970. Nowhere in it is there a word of reference to the fact that the reviewing panel of these eminent members of the fifth circuit court of appeals approved the plan and pronounced it to be, and certified it to be, in compliance with the statute. It seems to me—maybe I am mistaken—maybe I am asking a deg ee of fairness that is above the capacity of the researcher in the project action council—but in all fairness, attention should be called to the fact that it was so certified.

I am glad that the Senator from Indiana joins me in agreeing that the whole record should be placed in the CONGRESSIONAL RECORD on this debate at this point.

Mr. BAYH. Mr. President, inasmuch as the contention of the memorandum is that the jury selection system has a discriminatory impact, and the memorandum includes several tables and figures and an analysis of the plan, everyone can judge for himself whether the plan is in effect discriminatory.

Certainly I think, as I said a few minutes ago, that it is only fair that all of the information be printed in the RECORD. Then we can let each Senator make this determination for himself. I might also point out that the fifth circuit reviewing panel cited by the Senator approved the plan on September 12, 1968, while the memorandum itself is based on the results of questionnaires sent out by Judge Carswell's court late in 1968. As the memorandum says—at page 295 of the hearings:

When the completed questionnaires were tabulated, it was apparent that the system adopted was working in a grossly discriminatory fashion. . . ."

So the fifth circuit panel's review is hardly conclusive.

S. 3597—INTRODUCTION OF A BILL TO AMEND TITLE 28, UNITED STATES CODE

Mr. HRUSKA. Mr. President, as in legislative session, I ask unanimous consent to introduce a bill which seeks to amend title 28, United States Code, with respect to judicial review of Interstate Commerce Commission decisions. It is introduced at the request of the Attorney General.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. The bill would modernize the existing judicial machinery for review of decisions of the Interstate Commerce Commission, and is geared to relieve a significant burden on the Federal judiciary. At the same time, the proposal would not alter the Commission's own administrative procedure.

State	Drafted	Legislation enacted	Implemented	Nonlegislated programs	Number of rivers [1]	Governor's representative on scenic river programs	Scenic rivers [2]
South Carolina					11	John A. May, director, Division of Outdoor Recreation.	Yes.
South Dakota					None	Robert Hodgins, director, Game, Fish, and Parks.	No.
Tennessee		1968	Tennessee Scenic Rivers Act.		10	E. Boyd Garrett, commissioner of conservation.	Yes.
Texas	Yes				15	J. R. Singleton, executive director, Parks and Wildlife.	No.
Utah					None	No	Yes.
Vermont					None	Forrest Orr, Interagency Committee on Natural Resources.	Yes.
Virginia	Yes			University of Virginia School of Architecture, Division of Planning completed statewide survey and appraisal of streams as directed by General Assembly. Legislation is being drafted.	26	Elbert Cox, Commission of Outdoor Recreation.	Yes.
Washington	Yes			An ad hoc interagency committee to study scenic rivers.	None	Lewis A. Bell, chairman, Interagency Committee on Outdoor Recreation.	Yes.
West Virginia		1969	Natural streams preservation system.		3	Dr. B. L. Coffindaffer, director, Federal-State Relations.	Yes.
Wisconsin		1965	Wisconsin Wild and Scenic Rivers.		9	John Brasch, assistant director, Bureau of Fish and Management, Department of Natural Resources.	Yes.
Wyoming					None	Paul Westedt, acting director, Wyoming Recreation Commission.	Yes.

[1] Identified by States for potential inclusion in scenic river programs.

[2] Considered in Statewide Comprehensive Outdoor Recreation Plan.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HOLLAND. Mr. President, with reference to the confirmation of the nomination of Judge G. Harrold Carswell to be a Justice of the Supreme Court, I shall not attempt to make any speech today. But I do want other Senators to know something about how Judge Carswell is regarded by the bar of the State of Florida and by some of the leading elected officials of the State.

I, therefore, ask unanimous consent first that there be printed in the RECORD a resolution adopted by the Governor and cabinet of the State of Florida assembled at Tallahassee, Fla., on January 27, 1970, approving the nomination and urging the Senate to confirm Judge Carswell to be a Justice of the Supreme Court.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

RESOLUTION ADOPTED BY THE GOVERNOR AND CABINET OF FLORIDA ASSEMBLED AT TALLAHASSEE, FLA., JANUARY 27, 1970

Whereas G. Harrold Carswell, Judge for the U.S. Fifth Circuit Court of Appeals in New Orleans, has distinguished himself in the field of law for more than twenty years and

Whereas Judge Carswell received his law degree from the Walter F. George School of Law at Mercer University in 1948 after serving with the U.S. Navy during World War II and

Whereas Judge Carswell, after service as a U.S. Attorney for the Northern District of Florida became at the age of 38 the youngest federal judge in the history of this country and

Whereas Judge Carswell after his appointment to that position by President Dwight D. Eisenhower served with distinction on that court for more than twelve years and

Whereas Judge Carswell was appointed in 1969 to the U.S. Fifth Circuit Court of Appeals and

Whereas Judge Carswell has esteemed himself in the minds of his friends and neighbors, members of the Bench and Bar, and all with whom he has come in contact, because of his natural instinct for the law, his judicial temperament and his ability to quickly define legal issues and

Whereas Judge Carswell's recent appointment by President Richard M. Nixon to the U.S. Supreme Court brings honor not only to him and his family but indeed to Tallahassee and the State of Florida.

Now therefore be it resolved that the Governor and Cabinet of the State of Florida in a meeting assembled in Tallahassee, Florida, do go on record as commending him upon his appointment with all good wishes for a quick confirmation as the first Floridian ever to hold the title of U.S. Supreme Court Justice.

Adopted this 27th Day of January, 1970.

CLAUDE KIRK,
Governor.
TOM ADAMS,
Secretary of State.
EARL FAIRCLOTH,
Attorney General.
FRED O. DICKINSON, JR.,
State Comptroller.
BROWARD WILLIAMS,
State Treasurer.
FLOYD T. CHRISTIAN,
Commissioner of Education.
DOYLE CONNER,
Commissioner of Agriculture.

Mr. HOLLAND. Mr. President, I call attention to the fact that the Governor is a Republican and that the six members of the cabinet other than he, who are all elected statewide, are Democrats.

I ask unanimous consent that there be printed in the RECORD a wire I received today from Mr. Pat Thomas, the chairman of the Democratic Executive Committee of the State of Florida, completely approving and urging the confirmation of Judge Carswell and stating what he had to say in a press release recently given by him and carried statewide, and stating likewise that he had had nothing but approval from leading members of his party throughout the State.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

QUINCY, FLA.,
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
U.S. Senator,
Senate Office Building, Washington, D.C.

DEAR SENATOR HOLLAND: As active debate now approaches on the confirmation of Judge G. Harrold Carswell and in view of your probable role of leading the floor debate on behalf of his confirmation I thought I should apprise you of my response as chairman of the Democratic Party of Florida when asked by the Associated Press what posture did we of the official party take on this nomination. This inquiry was prompted pursuant to the appearance of our distinguished former Democratic Governor Leroy Collins, before the Senate Judiciary Committee; I related to the press that while no poll had been conducted and that I could not render an official endorsement of Judge Carswell, I felt that most Florida Democratic officials would favor the confirmation and heartily endorse the testimony rendered by Governor Collins. I did report that I knew of no party or public official in Florida opposing this confirmation and have observed that he had been an outstanding member of the judiciary, a credit to our State, and was at all times recognized as a jurist of great fairness to all who came before him. These comments were carried statewide February 5 by the AP. I also called attention to the assistance given this nomination by other Democrats in addition to that of Governor Collins, principally yourself, Congressmen Sikes and Fuqua and others from the delegation. I further mentioned Comptroller Fred Dickinson's offer to testify on behalf of the Florida cabinet. The interviewer quizzed me to ascertain if we were then not critical of the intense efforts of examinations by Senators KENNEDY and BAYH to which I responded in the negative and expressed belief that such a fine tooth investigation should be expected of those who would sit on the nation's high courts. These statements received healthy airing in Florida's press and I have been gratified at the positive response and approval which I have received from our Democrats throughout the State. As a matter of fact not one single protest or criticism have I received from any of the 7000 precinct workers as well as several thousand Democratic office holders. This would certainly indicate that this fine American is worthy of the very diligent stewardship you now render on his behalf, and is consistent with the leadership which you have always directed in the fashion that best serves your State and Nation; you exemplify great statesmanship as you champion issues such as this which should be far removed from the field of partisan battle.

Very sincerely,

PAT THOMAS.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed

at this point in the RECORD a wire which I received from Honorable W. May Walker, a circuit judge, who is the senior circuit judge of Florida, living now at Tallahassee.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.:

As a Florida Circuit judge and as the senior judge in point of service of all judges of Florida, appellate or otherwise and as a Democratic office holder, I strongly urge confirmation of Judge G. Harrold Carswell as Supreme Court Justice. Having known him for many years both socially and professionally, I deem him eminently qualified in every respect to capably and creditably discharge the duties of this high office.

W. MAY WALKER,
Circuit Judge.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed at this point in the RECORD, a wire I have received from the two presiding circuit court judges of the 19th Judicial Circuit of Florida, who were holding court today at Vero Beach, Fla.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

VERO BEACH, FLA.,
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
Hon. EDWARD J. GURNEY,
U.S. Senate, Capitol Building,
Washington, D.C.:

Judge G. Harrold Carswell is known to be an able jurist and a man of excellent character. If his nomination to the Supreme Court of the United States is confirmed, he will serve the Court and his country well.

D. C. SMITH,
WALLACE SAMPLE,
Circuit Judges, 19th Judicial Circuit of Florida.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed in the RECORD a wire which I received yesterday from Judge Tom Barkdull, of Coral Gables, Fla., who is a judge of the district court of appeals, which is next to the highest court we have in our State.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

MIAMI, FLA.
March 15, 1970.

Senator SPESSARD HOLLAND,
Senate Office Building,
Washington, D.C.:

As a member of the Florida bar for over twenty years I heartily endorse Judge Carswell for the Supreme Court.

JUDGE TOM BARKDULL,
Judge, District Court of Appeals.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed in the RECORD a wire from Circuit Judge B. C. Muszynski, of Orlando, Fla., urging that the nomination of Judge Carswell be confirmed.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

ORLANDO, FLA.,
March 16, 1970.

SPESSARD HOLLAND,
U.S. Senator,
Washington, D.C.:

Request your affirmative vote for Judge Carswell appointment to the Supreme Court, United States.

B. C. MUSZYNSKI,
Circuit Judge.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed in the RECORD a wire received from Judge Roger F. Dykes, of Cocoa, Fla., urging the confirmation of the Carswell nomination

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

COCOA, FLA.,
March 16, 1970.

Senator SPESSARD L. HOLLAND,
Senate Office Building,
Washington, D.C.:

Bench and bar together urge approval Carswell appointment.

Judge ROGER F. DYKES.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed in the RECORD a wire I have received from Judge Ben C. Willis, a circuit judge and a member of the Florida circuit court for 13 years, commenting favorably on the nomination of Judge Carswell and urging his confirmation.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.:

As a Florida Circuit judge for thirteen years who is a democratic office holder, I strongly urge confirmation of Judge G. Harrold Carswell as supreme court justice. I have known him well for many years both socially and professionally and I deem him fully qualified by temperament, integrity and scholarship to capably discharge the duties of that office.

BEN C. WILLIS.

Mr. HOLLAND. Mr. President, I ask unanimous consent that there be printed in the RECORD a wire I have received from all five of the sitting judges of the District Court of Appeals of the First Circuit, which covers all of west Florida and most of north Florida, extending from Pensacola to Jacksonville and down, which I say again is an appellate court and the second highest court in our State, unqualifiedly endorsing the nomination and urging confirmation of Judge Carswell.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
March 16, 1970.

Senator SPESSARD L. HOLLAND,
421 Senate Office Building,
Washington, D.C.:

We, the undersigned democratic judges of the first District Court of Appeals of Florida, individually know and have been personally acquainted with G. Harrold Carswell during his period of service both as United State Attorney and Judge of the United States District Court at Tallahassee; as a practitioner, adversary, and presiding judge we have found him to be fair and impartial in the discharge of his official duties which he has performed with a high degree of judicial competence and dispatch; we consider him eminently qualified in every respect for membership on the Supreme Court and unanimously recommend his confirmation.

JOHN T. WIGGINTON,
DONALD K. CARROLL,
DEWEY M. JOHNSON,
JOHN S. RAWLS,
SAM SPECTOR.

Mr. HOLLAND. Mr. President, I ask unanimous consent that a wire I have received from Guyte P. McCord, Jr., a circuit court judge, urging confirmation of the nomination of Judge Carswell be printed at this point in the RECORD.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.:

I have known Judge G. Harrold Carswell for many years and strongly recommend him for confirmation to the United States Supreme court. In my opinion he is well qualified for that office by integrity, ability, and temperament. As you know, I am serving my tenth year as a circuit judge of Florida and have been elected each term on the Democratic ticket.

GUYTE P. MCCORD, Jr.

Mr. HOLLAND. Mr. President, I ask unanimous consent to have printed in the RECORD a telegram which I have received from John A. H. Murphree, presiding judge, eighth judicial circuit of Florida, asking for the approval of Judge Carswell's nomination.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

GAINESVILLE, FLA.
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
Old Senate Office Building,
Washington D.C.:

I urge the confirmation of Judge Harrold Carswell as Justice of the Supreme Court. I have known him for many years. It is my considered judgment that he possesses the intellectual capacity, the moral fiber, and the innate sense of justice that would fit him for this high position.

JOHN A. H. MURPHREE,
Presiding Judge, Eighth Judicial Court of Florida.

Mr. HOLLAND. Mr. President, I ask unanimous consent to have printed in the RECORD a telegram I have received from George L. Patten, circuit judge, eighth judicial circuit at Gainesville, Fla., asking for the confirmation of Judge Carswell.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

GAINESVILLE, FLA.
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
Old Senate Office Building,
Washington, D.C.:

Judge Harrold Carswell nomination as Justice of the Supreme Court of the United States is coming up for Senate confirmation this week. I have personally known Judge Carswell since his appointment to the Federal District Bench Northern District of Florida. Have observed him in the discharge of his duties as such judge and have the highest respect for his ability, judgment and integrity. I feel that as a Justice of the Supreme Court he will bring great credit to that court and to the Nation. I respectfully urge the Senate to confirm his appointment.

GEORGE L. PATTEN,
Circuit Judge, Eighth Judicial Circuit.

Mr. HOLLAND. Mr. President, I wish to comment for the RECORD that most of the first district court of appeals lies within the same area in which the northern district of Florida lies, which was presided over for so many years—12 years, as I recall—by Judge Carswell as district judge. I ask unanimous consent that the RECORD show that the circuit court in Gainesville, Fla., which has jurisdiction over several counties that lie in the eastern part of the first Federal judicial district of Florida or the northern district of Florida, was presided over for so many years by Judge Carswell.

Mr. President, I ask unanimous consent to have printed in the RECORD a telegram from Hugh M. Taylor, circuit judge, who describes himself as having served for 30 years as a Democratic officeholder and for the last 25 years as a circuit judge. He recommends the confirmation of Judge Carswell.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
Senate Office Building,
Washington, D.C.:

I have been a Democratic officer holder over a span of more than thirty years and a Florida Circuit Judge for twenty-five years. I strongly urge confirmation of Judge Carswell to the U.S. Supreme Court. My observations are that he is fully qualified by maturity, judgment, discretion and knowledge of the law.

HUGH M. TAYLOR.

Mr. HOLLAND. Mr. President, I ask unanimous consent to have printed in the RECORD a telegram from John J. Crews, circuit judge, eighth judicial circuit of Florida, recommending the confirmation of Judge Carswell.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

GAINESVILLE, FLA.
March 16, 1970.

Hon. SPESSARD L. HOLLAND,
Senate Office Building,
Washington, D.C.:

I have been shocked at the nit-picking of otherwise prudent men in opposition to the nomination of Judge G. Harrold Carswell to the Supreme Court. As a prosecutor trial judge and now appellate judge the nominee has served ably, honestly and with distinction. Without reservation I endorse his nomination. Respectfully,

JOHN J. CREWS,
Circuit Judge, Eighth Judicial Circuit of Florida.

Mr. HOLLAND. Mr. President, in closing this brief appearance, and it is necessarily so because I am engaged in hearings and will be engaged in hearings tomorrow, my files show a very large number of other letters and resolutions to the same effect as these which I have just placed in the RECORD, and which I will have a chance to assemble and offer for the RECORD later, including strong letters from such distinguished Americans as a former Governor and an earlier Member of our House of Representatives, later a member of the supreme court of Florida, who lives in Tallahassee, and who has known Judge Carswell throughout his residence there. He strongly recommends the appointment and confirmation of Judge Carswell; as well as others too numerous to mention which I shall have placed in the RECORD at the appropriate time.

ADJOURNMENT TO 11 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment, as in legislative session, until 11 o'clock tomorrow morning.

The motion was agreed to; and (at 5 o'clock and 25 minutes p.m.) the Senate adjourned, as in legislative session, until tomorrow, Tuesday, March 17, 1970, at 11 a.m.

CONFIRMATIONS

Executive nominations confirmed by the Senate March 16, 1970:

AMBASSADORS

Stuart W. Rockwell, of Pennsylvania, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Kingdom of Morocco.

Findley Burns, Jr., of Florida, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Ecuador.

Albert W. Sherer, Jr., of Illinois, a Foreign Service officer of class 1, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Guinea.

Clarence Clyde Ferguson, Jr., of New Jersey, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Uganda.

OFFICE OF ECONOMIC OPPORTUNITY

Albert E. Abrahams, of Maryland, to be an Assistant Director of the Office of Economic Opportunity.

EXTENSIONS OF REMARKS

GOOD PLACE TO START: POLLUTION DRIVE

HON. CHESTER L. MIZE

OF KANSAS

IN THE HOUSE OF REPRESENTATIVES

Monday, March 16, 1970

Mr. MIZE. Mr. Speaker, even before his inauguration, many of us were convinced that Richard Nixon was a man—and would be a President—of action and not of words alone.

This belief has been borne out many times in the 14 months since the President has taken office, and we have seen his words of intent transformed into policy almost instantaneously.

One more example of this is the President's drive to end pollution. First he issued a strong statement of this problem, an important starting point—then immediately he set forth an order that the Federal Government would begin first, and a $359 million program would be undertaken to eliminate the pollution caused by Federal agencies or installations.

The President's decisive action toward alleviating this serious problem is praised in a February 6, 1970, editorial from the Kansas City Star. I insert this editorial in the RECORD at this point:

GOOD PLACE TO START THE POLLUTION DRIVE IS U.S. INSTALLATIONS

It occurred to President Nixon that before the federal government began exerting all-out pressure on the nation's cities and industries to clean up pollution, it should first "sweep its own doorstep clean." Hence Wednesday's sternly worded order to all government agencies and installations to get started on a 359-million-dollar program to abate their own air and water pollution, or at least have measures under way, by the end of 1972.

It is not that the government is a deliberate violator, any more than are most cities or industries. Most pollution is inadvertent, the inevitable product of disposing of wastes of various kinds in the ways in which this has always been done. In the case of the one worst single source of pollution, motor vehicle exhausts, it is not even a conscious act on the part of the individual.

Thus it is that Mr. Nixon could accurately refer to the federal government as "one of the worst polluters" without any particular recrimination. It is simply that the government, in the aggregate—military and civilian—has more vehicles, aircraft, sewers, incinerators and so on than possibly any other single entity in this country. And the man at the top of this enormous pyramid reasonably concluded that here was a good place to start to get some of the most early and effective results in the war on pollution.

The White House in this instance has only to pass the word—and the money—and in due course considerable headway can be achieved in pollution abatement just by cleaning up all federal installations, buildings, bases, vehicles, missiles and aircraft. The executive order extends even to public works projects such as flood reservoirs and barge canals, with especially stringent language ordering the secretary of the interior to review the possible pollution effects of any new project for which authorization or funding is being sought.

The Defense department, as might be supposed, was identified as the largest single source of pollution within the government, with West Point's need of more than 3 million dollars for improved treatment of sewage now damaging the Hudson river given as a major example.

Government stocks of fuels and chemicals of various types, with their danger potential in spillage accidents, also were cited for preventive action. There was a word too, on radioactive pollution from atomic materials.

This was not the first federal directive ever put out on the subject. But previous ones, said the Nixon statement, have been "ambiguously worded" and poorly enforced. The timing of the statement was fortuitous, on the eve of a major pollution meeting in Chi-

SUPREME COURT OF THE UNITED STATES

The ACTING PRESIDENT pro tempore (Mr. McGOVERN). The Chair lays before the Senate the pending question, which the clerk will state.

The ASSISTANT LEGISLATIVE CLERK. The question is, Will the Senate advise and consent to the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ALLOTT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. ALLOTT. Mr. President, the Senate has once again taken up the task of advising and consenting with regard to the President's nomination of an Associate Justice of the Supreme Court.

I am pleased to have this opportunity to outline some of the reasons why I support the nomination of G. Harrold Carswell, and why I am confident he deserves, and will receive, prompt confirmation.

Let me begin where the controversy surrounding this nomination began—with the facts about Judge Carswell's judicial philosophy.

Judge Carswell is a strict constructionist. That is one of the reasons the President has nominated him. That is entirely proper.

No one doubts that the President must consider the judicial philosophy of his nominees. Presidents have done so throughout our history.

President Lincoln did this when he appointed Salmon Chase as Chief Justice. President Theodore Roosevelt did when he appointed Oliver Wendell Holmes as Associate Justice. President Wilson did when he appointed Louis D. Brandeis as Associate Justice.

These are just a few examples from past generations. The list could be greatly expanded. In fact, it would be a strong indictment of any President to suggest that his examination of a prospective nominee was so cursory that it excluded a consideration of the nominee's judicial philosophy.

President Nixon has approached the nomination process in the same way Lincoln, Theodore Roosevelt, Wilson, and others approached it. He has considered the judicial philosophy of his nominees. Indeed, President Nixon has been uncommonly forthright about this.

Even before he was elected, President Nixon explained to the American people his thinking with regard to judicial philosophy. He explained that he favored the philosophy of "strict construction," a philosophy which translates into a policy of judicial restraint.

It is odd that the philosophy of strict construction should be an embattled philosophy today.

It is odd that it should require such patient and extensive defense in a century that has benefited from the thinking of such strict constructionists as Oliver Wendell Holmes and Felix Frankfurter.

Nevertheless, it seems that strict construction does need explaining and defending today. I welcome the task.

Strict construction, and the policy of judicial restraint, has two features.

On the one hand, it accepts the Court's responsibility to rule on the constitutionality of challenged laws and procedures. On the other hand, a judge who accepts the policy of judicial restraint will be very sensitive to the fact that every judicial determination of the unconstitutionality of a law nullifies an action taken by the duly constituted legislators who represent the people.

There is nothing inherently wrong with this. Americans have long believed that judicial review is not incompatible with a general commitment to majority rule. Indeed, judicial review of our laws is vital to the whole fabric of American constitutionalism.

But a "strict constructionist"—a constitutional conservative, if you will—is very sensitive to the responsibility to exercise such judicial review with the utmost respect for the principles of popular government.

A strict constructionist believes in a presumption of constitutionality that is, in judicial review, the equivalent of the presumption of innocence in criminal proceedings. He believes that laws passed by duly constituted legislators are constitutional until decided otherwise.

And he thinks that proof of unconstitutionality must be supported by the clear language of the Constitution, construed—to the fullest extent possible—in accordance with the intentions of the framers.

A strict constructionist is wary lest, in the guise of simply interpreting the words of the Constitution, he unconsciously reads personal predilections into the subtle language of the Constitution. He is wary lest his own principles lead him to artificially expand constitutional provisions until the will of the majority is frustrated, and the will of the judge is satisfied—and, I might add, until the will of the various legislative bodies also is frustrated.

A strict constructionist will be especially wary of attempts to allow current sociological hypotheses to determine the meaning of constitutional language. And he will be wary of all attempts to give constitutional standing to every notion of substantive due process.

In short, a strict constructionist believes that laws come before the courts with a momentum of respect, and that respect for the Constitution often requires the judge to respect views other than his own.

Mr. President, strict construction has always been an admirable persuasion with a respectable following. As a result of recent Court decisions, it may be national necessity, as well as a respectable option.

We can illustrate this point, and document Judge Carswell's qualifications, by examining just one facet of this constitutional process.

Many competent observers of the Court believe that some Court decisions recently handed down in the field of criminal law have greatly expanded the constitutional rights of criminal defendants beyond what the original drafters of the Constitution intended. I would go one step further, and say that some of these have gone beyond the realm of commonsense in light of the realties of the nature of law enforcement activities today.

Others, not necessarily close students of the Supreme Court's opinions, have felt that in the face of rising crime rates throughout the Nation, it was a serious mistake to push to their ultimate logic those legal doctrines which result in making it far more difficult for society to apprehend and punish the guilty, but which in no way reallstically added to the protection surrounding the innocent.

Again, it is a question of degree, and not of kind. Many of the doctrines adopted by the Warren court in the field of criminal law—such as the right to counsel in the case of felony prosecutions—are sufficiently sound in policy so that there is little disposition to argue as to their constitutional derivation. But others have not received the same wide approbation.

I confess that when I view the repeated reversal of criminal convictions because of matters entirely independent of the guilt or innocence of the defendant, I am occasionally reminded of Lincoln's famous, though perhaps aprocryphal, comment respecting the suspension of the writ of habeas corpus during the Civil War—"Shall all the laws go unenforced save one?"

I do not need to dwell upon the grim details of the Nation's soaring crime problem. The FBI statistics are readily available. Between 1960 and 1969, while the population was growing by 13 percent, violent crime increased by 131 percent; that is, during the last decade violent crime increased 10 times as fast as the population.

Murders were up 66 percent. Forcible rapes were up 115 percent. Robberies were up 180 percent. Aggravated assaults were up 103 percent. In 1960 there were 285,200 violent crimes. In 1969 there were approximately 660,000 violent crimes.

Senator MCCLELLAN has stated:

> The fact is that the chance of being apprehended, convicted and punished for a serious crime is less than one out of twenty.

Another statistic which dramatizes the situation is this: If you committed a burglary in Chicago in 1968, the odds were 23 to 1 that you would never go to jail. Those are better odds for success than a person faces when he opens a new business. Consider that fact. The odds against failing as a burglar are less intimidating than the odds against successfully launching a new business.

Mr. President, I know that there are often complex social causes of violent behavior. Thus I do not want to oversimplify the significance of these crime statistics. But four things are clear:

First, crime has reached epidemic proportions.

Second, there are enormous inadequa-

cies in the entire law enforcement system, from apprehension of suspects through the prison systems.

Third, recent Supreme Court decisions have had an influence on this system.

Fourth, a large body of learned opinion holds that it would be constructive to redress the balance in Court thinking on the matter of criminal defendants' rights.

Chief Justice Warren E. Burger offered this warning against imbalance in the criminal law:

> Our system of criminal justice was based on a strikingly fair balance between the needs of society and the rights of the individual. To maintain this ordered liberty requires a periodic examination of the balancing process, as an engineer checks the pressure gauges of his boilers.

Mr. President, crime is growing six times as fast as the population. Violent crime is growing 10 times as fast as the population. The administration of justice is intolerably delayed by court backlogs resulting from lengthening trials and soaring rates of appeal. These facts reveal a striking rise in crime and a disconcerting decline in society's ability to punish it. Thus, Mr. President, it is time, in the words of Justice Warren Burger, to re-examine the balancing process by which we maintain ordered liberty.

We had better reexamine this balance because we are in danger of losing the fight for ordered liberty.

We had better check the pressure gages on our society's boilers before there is an explosion. For surely an explosion is coming when the majority of Americans, white and black, and brown and red, are afraid to venture at night into the streets of their communities.

An explosion is coming when the downtown commercial areas of our great cities—and Washington, D.C., is a prime example—become deserted at sundown, when the citizens retreat to the relative safety of their homes.

To help prevent an explosion, and to help correct the imbalance between the rights of the individual and the rights of society, it will be useful to add some leavening thinking to the current Court.

The President, in nominating Judge Carswell, has expressed his concern that the Court not lose sight of the vital interest of society in convicting the guilty criminal, or keeping the peace in public places, at the expense of according hitherto unknown "rights" to criminal defendants.

Judge Carswell's record as a Federal judge shows that the President has picked an able and balanced proponent of such a view. Heedful of the plea of the indigent defendant, he is likewise heedful of the plea of the public prosecutor; the interests of neither one will be sacrificed to those of the other.

I suspect that a strict constructionist might feel that the time has come for a consideration as to whether an imbalance has not developed in the construction of the relevant constitutional language.

It is instructive to examine some details of Judge Carswell's record in the vitally important area of the criminal law.

Since a district judge is bound by the law as laid down by the court of appeals, whose jurisdiction he is subject to, and by the Supreme Court of the United States, he is generally not in a position to express his own legal preferences for one type of rule as opposed to another.

However, the decisions to which I will refer demonstrate that Judge Carswell, as a Federal district judge and as a circuit judge, faithfully followed precedent where he felt it was applicable, and when there was no applicable precedent, he refused to sacrifice the right of society to apprehend and punish the offender to still a further extension of the rights of defendants.

For example, in *United States* v. *Levy*, 232 F. Supp. 661 (1964), he rejected a defendant's double jeopardy claim. Analysis of the facts of that case indicate the soundness of his decision.

The defendant had been brought to trial. During his opening statement, defendant's counsel alleged that the defendant was incompetent to stand trial. Considering the gravity of this allegation, the trial judge declared a mistrial for the purpose of inquiring into its truth.

The defendant then moved to dismiss his indictment on the ground that a second trial was prohibited because it would place him in jeopardy again. The defendant placed principal reliance on the Supreme Court's decision in *Downum* v. *United States* 372 U.S. 734. In Downum, a mistrial had been declared at the request of the prosecutor, who had failed to secure the presence of a material witness at the trial.

Judge Carswell, in an opinion which I find eminently sensible, distinguished Downum as a case involving the "unexcused negligence" of the prosecutor while the case before him involved a mistrial which was dictated by the serious nature of the defense counsel's allegation that his client was incompetent to stand trial.

I think that every Senator would agree that the mistrial in the Levy case, decided by Judge Carswell, was fair and necessary. Surely Judge Carswell was correct in holding that that mistrial did not bar a second trial of the defendant.

There is other evidence of Judge Carswell's prudent concern that Supreme Court pronouncements not be extended to situations in which they were not intended to apply. Consider the matter of *Agius* v. *United States*, 413 F. 2d 915 (5th Cir., 1969).

In that case, a three-judge panel, which did not include Judge Carswell, held that a conviction for bank robbery would be reversed on the ground that proper Miranda warnings had not been given.

The Miranda case applies only in cases of "custodial interrogation." The issue before the fifth circuit was whether on-the-street interrogation at the defendant's home constituted custodial interrogation requiring application of the Miranda rules. The Government asked the fifth circuit to reconsider its position.

This request was denied, but Judge Carswell noted for the record that he would have granted a rehearing en banc to review the application of the Miranda principle to that case (417 F. 2d 635).

We see then that Judge Carswell has attempted to apply the Supreme Court's pronouncements in a manner consistent with the rights of society to punish those guilty of crime. At the same time, however, Judge Carswell's record is a balanced one. Recently, in *Bell* v. *Wainwright*, 299 F. Supp. 521 (1969), Judge Carswell was called upon to rule upon the contention of an indigent defendant that his poverty had worked to his disadvantage during the trial of his case.

The Supreme Court has stated many times, as we all know, that the Constitution recognizes no distinction between the poor and the rich. In Bell against Wainwright the defendant contended that the judge who had tried his case had denied him equal protection of the laws by refusing to authorize transcription by the court reporter of the closing arguments of counsel.

The defendant's theory was that he had been denied an effective appellate review by the trial judge's action. The State disputed this contention, arguing that the petitioner had not shown that prejudice resulted from the trial judge's refusal.

Judge Carswell flatly rejected the State's argument in these terms—and these are important words:

> To deny petitioner relief on the grounds that the record does not show prejudicial comments and objections, when it is necessary to have a full transcript of the argument in order to determine prejudice in the first place and that transcript does not exist due to the order of the trial court is a complete nonsequitur * * * the respondent's position places an undue burden upon the petitioner and his counsel to attempt to reconstruct an argument in order to show that what might otherwise be isolated remarks by the prosecution were prejudicial. This burden would not have been placed upon petitioner had he been able to purchase the reporter's time himself. Such a burden is in direct conflict with the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States as interpreted in *Griffin* v. *Illinois, supra.*

I applaud Judge Carswell for this decision. Judge Carswell applied a basic constitutional principle in enunciating his ruling. While upholding the right of society to punish the guilty, Judge Carswell recognizes that fundamental guarantees must also be upheld.

Clearly Judge Carswell's record in the area of the criminal law is one of balance. It evinces a learned and conscientious attempt to apply the pronouncements of higher courts in a sensible and constructive manner. Nothing could be more illustrative of that than the case I have just quoted from.

Mr. President, I am convinced that an examination of Judge Carswell's record confirms the wisdom of President Nixon's choice. Indeed, it is interesting that many of the objections to the choice have no basis in the record.

Mr. President, I think some of the objections voiced concerning this nomination do not require much confuting. But I do want to mention a few in passing.

It has been said that Judge Carswell has had too little experience. This is not a weighty objection.

G. Harrold Carswell served for 5 years

as a U.S. attorney in the northern district of Florida. After that he served for 11 years as a Federal district judge.

Last spring the President nominated him to be a judge of the court of appeals for the fifth circuit. Just a year ago those same Members of the Senate who now raise a hue and cry about his nomination—and some of them were members of the Judiciary Committee and reported and recommended him to the Senate—at that time had no qualms at all about confirming him to this sensitive and responsible position.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. ALLOTT. Mr. President, I yield.

Mr. BYRD of West Virginia. Mr. President, has not the name of Judge Carswell been before the Senate twice for confirmation to important office?

Mr. ALLOTT. I believe that his name has been before the Senate for confirmation three times prior to this occasion—once as U.S. attorney, once as a Federal district judge, and once as a judge of the court of appeals.

Mr. BYRD of West Virginia. Mr. President, has not the Senate upon each of those three occasions favorably acted upon the nomination of Judge Carswell?

Mr. ALLOTT. This is entirely true, and I will go further than that. In all three of those instances, I do not recall a single dissenting voice being raised against his confirmation, nor was there a dissenting vote.

Mr. BYRD of West Virginia. Has not the Senate three times unanimously confirmed Judge G. Harrold Carswell for important posts to which he was nominated by the President.

Mr. ALLOTT. The Senator is entirely correct. And I appreciate his reminding me of that fact.

I am about to get into the matter of reversals, and I cannot help indulging in a personal observation and experience at this point.

When I was a young man, I practiced law, and for obvious reasons I will not name the district or the judges that were involved. However, there were two judges in this district, both of whom were honorable men.

One was very seriously lacking in the law. The other was undoubtedly one of the most brilliant judges in the State of Colorado. The facts are that when a lawyer was discussing a point of law before one of the judges, the lawyer always had to draw pictures for him. However, when one was discussing a point of law before the other judge, the lawyer soon found that that judge already knew all there was to know about the law and was always on top of the question and on top of the argument and discussion.

Yet, the fact is that the brilliant jurist was reversed many times before the Supreme Court of Colorado, while the jurist who did not have the same eminent qualifications was reversed hardly at all by the Supreme Court of Colorado.

So, in my opinion, it does not make any difference. The argument about reversals actually carries no weight with me.

I am reminded of what one of my law professors said to me one day when I was answering a question. He said:

I agree with your analysis. And that is fine, but, according to the last guess of the Supreme Court, both you and I are wrong.

Many times those of us who have watched the Supreme Court over the years have felt it was the last guess of the Supreme Court.

Mr. President, one of the most confused and unconvincing complaints about Judge Carswell concerns the fact that a number of his decisions have been reversed by a higher court.

Without attempting to reopen and reevaluate each case, I would just point out one thing. It is not surprising or alarming that some decisions of a strict constructionist should be reversed in an age when the high Federal judiciary is practicing what might be called "loose construction" or "constitutional liberalism."

Thus there is nothing necessarily alarming about the fact that some of Judge Carswell's opinions have not coincided with the opinion prevailing on other courts.

It is curious to note the semantic gymnastics involved in discussions such as these. When someone whose views we favor is in a minority, we say that his views testify to his integrity, steadfastness and courage in the face of opposition.

But when someone whose views we do not share finds himself in a minority, we argue that he is recklessly out of step with the times.

Mr. President, I for one do not think the voice of the majority is always right. Nor do I think the voice of the higher court is necessarily the voice of inspired and correct jurisprudence.

It is worth recalling that one of the most revered justices in the history of the Supreme Court was known as the "Great Dissenter."

Of course I am referring to Mr. Justice Oliver Wendell Holmes. His nickname as "the Great Dissenter" was a token of the affection and respect of the legal profession and an admiring public.

The nickname—and the admiration it indicated—reflected the traditional American respect for a man who is not afraid to stand against a fashionable tide of opinion.

I do not think this traditional American respect has become a thing of the past. On the contrary, I think the American people are anxious to find men in public life who are not governed by the conventions of fashionable dogma.

There is something very odd about the protestations of some of Judge Carswell's critics.

On the one hand they claim that their opposition to the judge is not a reflection of any general prejudice against strict constructionists. But on the other hand, they link their opposition to the fact that a number of his opinions have been reversed by higher courts where the philosophy of loose construction is dominant.

Perhaps what these critics are saying is that they have nothing against a strict constructionist, so long as his strict construction is not strict enough to offend any loose constructionists who review his decisions.

This sort of thinking is small comfort to strict constructionists.

Mr. President, I would like to say one more thing in this regard.

I, and other Senators who share my views, have on more than one occasion voted to confirm nominees whose views were not congruent with our own.

I think it is time for some reciprocity in this matter of tolerance. I hope Senators who do not favor strict construction, and who have enjoyed nearly two decades of ascendant judicial liberalism, will be as tolerant of our preferences as we have been to theirs.

At any rate, Senators need not worry about this nomination resulting in any judicial earthquake. There may be a tempering of the prevailing philosophy. But that is hardly unprecedented.

The history of the Supreme Court is replete with examples of such temperings and shifts of philosophy.

These are not dramatic, 90° turns. They are lesser changes which preserve the best of a preceding era, but also contribute something of their own.

Chief Justice John Marshall presided over the Supreme Court for 34 years, and during his tenure the power of the Federal Government to act effectively was thoroughly established. He was then succeeded by Chief Justice Taney, who came from a States rights school of judicial thought.

However, the Court under Taney left standing virtually all of the constitutional structure which Marshall and his associates had bequeathed. The Taney court declined to further expand the Marshall federalism doctrines in most fields, and developed its own doctrine of State police power.

Similar transitions in the membership of the Court have taken place in more recent times, and resulted in some shifting of constitutional doctrine. These changes are not destructive revolutions in constitutional law. They are shifts in emphasis, different variations on the same basic theme.

Mr. President, allow me to sum up.

I believe Judge Carswell will and should be confirmed. The case for Judge Carswell rests on three powerful arguments.

First, Judge Carswell's 17-year record of public service is a record of his proven competence.

Second, the President has nominated Judge Carswell, and the Senate's thorough examination of his record has revealed nothing that would justify the Senate in withholding approval from this nomination.

Third, conditions on the Supreme Court, and in the country at large, are such that there is a clear and present need for a redress of judicial balance in the direction of the philosophy of strict construction.

Mr. President, this is the case for Judge Carswell. It is a strong case that has not been scathed or in any way jeopardized by the flurry of opposition.

The opposition to Judge Carswell has

been, from the start, an opposition in search of an argument.

The opposition has been given ample time to come up with such an argument. It has not succeeded.

The time has come to act with dispatch.

It is well-known that many important cases are pending before the Supreme Court. The Court is understandably and wisely reluctant to consider these important cases until it has a full complement of Justices.

It has been a long time since the Court was at full strength. In the intervening months the Senate has exercised its right to withhold consent from a nomination. While I regret the Senate's having made that decision, I am sure the Senate will not allow refusal to become a senseless habit.

I am confident the Senate will consider the needs of the Court, the interests of the Nation and the constitutional rights of the President. I am sure that these considerations will insure a prompt and overwhelming confirmation of Judge Carswell.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. ALLOTT. I would be very happy to yield to the distinguished Senator from Mississippi.

Mr. EASTLAND. Of course, the distinguished Senator has heard raised the question of mediocrity and that Judge Carswell does not measure up to the job. Does the Senator realize that Judge John J. Parker was one of the great judges in the history of this country?

Mr. ALLOTT. I do. I am well aware of that gentleman's name.

Mr. EASTLAND. He was appointed to the Supreme Court and Senate refused confirmation. I would like to read to the Senator what the newspapers at that time said about Judge Parker. He was one of the most distinguished judges in the country, as is Judge Carswell, when his name reached the Senate. The statement I am about to read was published in the New York World on April 23, 1930. They summed up the entire case against Judge Parker to be an Associate Justice of the Supreme Court and this is the way they summed it up:

It is Judge Parker's total lack of a distinguished record of public service and the total lack of proof that he has any distinction as a jurist which seems to us above all else to justify the Senate in saying that his nomination does not measure up to the standards which the American public rightly expects to see obtained in the nomination of a Supreme Court Justice.

They were totally wrong then and this cry now is totally wrong.

Mr. ALLOTT. The subsequent career of Judge Parker, as I recall it, of course, utterly belies the comments of that newspaper because he did have a brilliant and successful career after that.

Mr. EASTLAND. And he did before.

Mr. ALLOTT. And he did before, too. The Senator is correct.

I thank the distinguished Senator. I thank the distinguished Senator from West Virginia for his contributions to this discussion.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. ALLOTT. I am happy to yield to the distinguished Senator from West Virginia.

Mr. BYRD of West Virginia. The question of mediocrity has been injected into the discussion. I suppose one could look at the present Court and make a judgment that some of the sitting justices are perhaps mediocre justices, as compared with some of the great justices who have sat on that great Court in the past.

Mediocrity cuts across senatorial lines as well as judicial lines. I would assume that, depending on who is doing the judging, probably there are Members of the Senate now and there have been in the past and will be in the future who might not measure up well against the high standards of other Members of this body. So I think we should be careful about how we toss around this term mediocrity. I have not heard of any Senators turning back their paychecks because of mediocrity. I wonder if the Senator from Colorado knows of any.

Mr. ALLOTT. No. I must confess I am sure there are none.

With respect to the Senator's comments about the Supreme Court, I must say in some decisions that have come out in the last few years, in the last 10 to 15 years, I find many of them mediocre because they are expositions of sociological doctrines of the writer of the opinion rather than any exposition of the law interpreting the Constitution.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield further?

Mr. ALLOTT. I am happy to yield.

Mr. BYRD of West Virginia. Was there anything in the background of the previous Chief Justice of the United States which would have indicated that he would make more than a mediocre Chief Justice of the Court? He had had no previous judicial experience, had he, before being appointed to the Court?

Mr. ALLOTT. I do not recall all of his experience. He had, of course, been a district attorney, or the equivalent of that, in California.

Mr. BYRD of West Virginia. He was an outstanding politician.

Mr. ALLOTT. And an attorney general, but he had no judicial experience that I can recall at this time.

I may say this to my good friend, and I appreciate his intervention: I think in any instance such as this we have a situation in which people rise to their position; they exceed themselves. Many capable Members of this body, for example, could only be described as mediocre when they came here, and many whom nobody had tapped as being great Senators became great Senators.

I am not sure that when our late good friend, Everett Dirksen, first went to the House of Representatives anyone would ever have thought that Everett Dirksen would become the great parliamentarian and the literal treasure house of information about the Government that he became. In this reference, and leaving aside our friendship for him, he was fantastic.

As the Senator has said, it is strange that a man could be nominated three times by Presidents, go through a Judiciary Committee hearing, have his name submitted to the Senate, not have a voice raised even in question, be confirmed unanimously, and then, at this critical point, he suddenly becomes a bad guy with a black hat. I believe the people who knew him and who know him now are better judges of him than anyone else.

I thank the distinguished Senator for intervening, and I yield the floor.

Mr. EASTLAND. Mr. President, as chairman of the Senate Judiciary Committee, it is my distinct honor and privilege to address the Senate on the nomination of George Harrold Carswell to be Associate Justice of the U.S. Supreme Court and recommend his early confirmation. I would like to preface my remarks with a review of certain facts which will, I believe, place the consideration of this nomination in clearer prespective.

The seat we are being called upon to fill has been vacant since May 6 of last year, throughout the greater part of an entire term of the Supreme Court. This nomination has been before the Senate now since January 19 of this year. Opponents of the nomination, as is their right, have availed themselves of the time-honored rules of the committee and the Senate to win lengthy delays in bringing this nomination before the Senate.

But what effect has this long delay had upon the administration of justice, the rights of litigants, and the prestige of the Court?

Mr. President, I ask unanimous consent that the following compilation of postponed cases be inserted in the RECORD at this point.

There being no objection, the compilation was ordered to be printed in the RECORD, as follows:

COMPILATION OF POSTPONED CASES BEFORE U.S. SUPREME COURT

[Docket No., case, and subject matter]

4. Younger v. Harris (California): Criminal Law and Procedure, Constitutionality of California Syndicalism Statute.

6. Boyle v. Lanry (Illinois): Criminal Law and Procedure, Constitutionality of Illinois State Statute, Overbroadness.

7. Gunn v. University Committee To End War in Vietnam (Texas): Criminal Law and Procedure, Constitutionality of Texas Breach of Peace Status, Disorderly Conduct, Vagueness.

8. U.S. v. U.S. Coin & Currency in the Amount of $8,674.00: Criminal Law and Procedure, Federal Wagering Tax Prosecution, Fifth Amendment, Self Incrimination.

11. Samuels v. Mackell (New York): Criminal Law and Procedure, Constitutionality of New York State Anarchy Statute, Vagueness and Overbreadth.

13. Maxwell v. Bishop (Arkansas): Criminal Law and Procedure, Capital Punishment, Discrimination in Imposition of Sentences by Juries in Interracial Rape Cases.

20. Fernandez v. Mackell (New York): Criminal Law and Procedure, Constitutionality of New York State Anarchy Statute, Vagueness and Overbreadth.

46. U.S. v. White: Criminal Law and Procedure, Electronic Eavesdropping, Admissibility of Defendant's Conversation with Government Informer Wired for Sound.

53. Baird v. Arizona (Arizona): Civil Law and Procedure, Communism, Denial of Admittance to Bar because of Refusal to Answer Questions Concerning Membership in Subversive Organizations.

75. Matter of Stolar (Ohio): Civil Law and Procedure, Denial of Application to Take

State Bar Examination, Refusal to Answer Questions Concerning Membership in Subversive Organizations, Self Incrimination, Due Process.

267. Moon v. Maryland (Maryland): Criminal Law and Procedure, Double Jeopardy, Increased Punishment After Retrial.

269. Price v. Georgia (Georgia): Criminal Law and Procedure, Retrial for Murder After Conviction for Voluntary Manslaughter.

529. Mackey v. U.S.: Criminal Law and Procedure, Federal Income Tax Evasion, Self-Incrimination Privilege as Defense to Prosecution.

565. Batchelor v. Stein (Texas): Criminal Law and Procedure, Constitutionality of Texas Obscenity Statute, Possession of Obscene Materials, Overbreadth.

696. Law Students Civil Rights Council, Inc. v. Wadmond (New York): Civil Law and Procedure, Constitutionality of New York State Rules and Procedures for Admittance to Bar.

1142. Elkanich v. U.S.: Criminal Law and Procedure, Searches and Seizures, Narcotics, Arrest, Probable Cause, Nexus of Offense.

Mr. EASTLAND. It is astounding the number of cases which the Supreme Court cannot decide until another member is placed upon the Court.

Mr. President, I ask unanimous consent that the letter received from Prof. Charles Alan Wright of the University of Texas Law School on February 6, 1970, be inserted in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE UNIVERSITY OF TEXAS,
SCHOOL OF LAW,
Austin, Tex., February 6, 1970.

Hon. JAMES O. EASTLAND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: I support the nomination of Judge Carswell, as I did that of Judge Haynsworth. The purpose of this letter is to urge not only that the Senate confirm Judge Carswell but that it do so promptly.

Justice Fortas resigned on May 14th of last year. For nearly nine months there has been a vacancy on the Supreme Court. This is an extremely unfortunate situation that greatly handicaps the Court in its work.

There are seven cases that were argued last term that the Court set for reargument early this term. Reargument has had to be postponed until there is a full Court. The cases are:

No. 5, Younger v. Harris.
No. 6, Boyle v. Landry,.
No. 7, Gunn v. University Committee to End the War in Vietnam.
No. 8, U.S. v. United States Coin and Currency.
No. 11, Samuels v. Mackell.
No. 13, Maxwell v. Bishop.
No. 20, Fernandez v. Mackell.

These are either cases in which the Court, with only eight members, found itself equally divided on cases that the Court considered to be so important that they should be heard by a full bench. It is impossible to to say how many other cases there may be, never yet argued, in which argument has been postponed awaiting the confirmation of a ninth Justice.

It is important for the Court and for the country that the Senate act promptly in its constitutional role of giving advice and consent to presidential nominations so that an important branch of government is not left shorthanded.

Respectfully yours,
CHARLES ALAN WRIGHT,
McCormick Professor of Law.

Mr. EASTLAND. Mr. President, this is not, by any means, the first time the President has nominated and the Senate of the United States has been called upon to consider the qualifications of this nominee for service in our highest public offices.

As early as 1958, at the age of 34, having served his Nation in war as a deck officer with Admiral Halsey in the Pacific, having established an outstanding reputation in the private practice of law, George Harrold Carswell was nominated for the position of U.S. attorney for the northern district of Florida by President Eisenhower.

In addition to the consideration given to this nomination by the President of the United States, his nomination was approved by both Senators from the State of Florida, considered by the Senate Judiciary Committee, reported favorably to and confirmed by the Senate. Upon his appointment by the President the nominee became the youngest U.S. attorney in the country.

In 1959, having established a notable reputation as a trial attorney and prosecutor in the Federal courts, the nominee was again considered and nominated by President Eisenhower for the position of U.S. district judge for the northern district of Florida. His nomination to this office was again approved by both Senators from his native State.

His nomination was further considered by the American Bar Association's Standing Committee on the Federal Judiciary, which notified the committee that upon investigation and consideration, the nominee was "well qualified" for the position.

Once again his nomination was considered by the Senate Judiciary Committee, which, after public hearings and due consideration in executive session, reported the nomination to the Senate with the recommendation that it be confirmed. Once again Harrold Carswell was confirmed by the Senate. Upon appointment by the President, the nominee became the youngest U.S. district judge.

Last year another President and another administration, having considered the public record and qualifications of this nominee, elevated Harrold Carswell to the Fifth Circuit Court of Appeals. Once again the President's choice was ratified by the American Bar Association's Standing Committee on the Federal Judiciary, which, after investigation and consideration of his record as a district judge, found the nominee "well qualified."

That term "well quallfied" means something, Mr. President. Judges are rated in several ways. They gave him, not just a "qualified" rating, but a "well-qualified" rating.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. EASTLAND. For a question.

Mr. BAYH. I do not like to interrupt the Senator's remarks. I am listening with a great deal of interest, but is it not true that Judge Carswell received a rating of "well qualified" to the appellate court when "exceptionally well qualified" was the highest qualification he could have received?

Mr. EASTLAND. Prior to the nomination of Arthur J. Goldberg to be Associate Justice of the Supreme Court, the American Bar Association's Standing Committee on the Federal Judiciary had one system for rating all nominees to the district and circuit courts, as well as nominees to be Chief Justice of the United States and Associate Justice of the Supreme Court of the United States. All nominees for lifetime judicial positions were rated as follows:

First, "exceptionally well qualified."
Second, "well qualified."
Third, "qualified."
Fourth, "not qualified."

In 1962, with the nomination of Arthur Goldberg to be Associate Justice, the ABA decided to discontinue the use of this rating system as to nominations to the Supreme Court.

The reasons for this change are stated in a letter I received on September 7, 1962, from Robert W. Meserve, chairman of the ABA Standing Committee on the Federal Judiciary. The letter speaks for itself and states as follows:

AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY,
September 7, 1962.

Hon. JAMES O. EASTLAND,
Chairman, United States Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: Thank you for your telegram affording this committee an opportunity to express an opinion or recommendation on the nomination of Arthur J. Goldberg of Illinois to be an Associate Justice of the Supreme Court of the United States.

Our committee, as constituted at the time of the nomination, is of the view that Mr. Goldberg is highly acceptable from the viewpoint of professional qualification.

Since the form of this opinion differs from that previously used with regard to judicial nominations, a few words of explanation may be in order.

This committee has conceived its responsibility to be to express its opinion only on the question of professional qualification, which includes, of course, consideration of age and health, and of such matters as temperament, integrity, trial and other experience, education, and demonstrated legal ability. We intend to express no opinion at any time with regard to any other consideration, not related to such professional qualification, which may properly be considered by the appointing or confirming authority. This position is, of course, not in any way confined to Secretary Goldberg's case, or prompted by his nomination.

Furthermore, the committee is now of the opinion that, as to nominations for the office of Justice of the Supreme Court it would be unwise for the committee to continue to attempt to give comparative ratings such as "qualified," "well qualified," "exceptionally well qualified," which we use generally in our reports to your committee. As to nominations to this Court, we wish to confine ourselves to a statement that the candidate is, or is not, acceptable from the viewpoint of professional qualification without, in the future, the use of any adjective which might suggest a comparative rating. Once again, this is a matter which has been the subject of discussion in the committee for some time, and the decision to limit ourselves in this fashion is not related in any way to this particular nomination.

I trust that this explanation is adequate

and am gratified that your committee continues to ask for our opinion on such matters.

With kind regards.

Sincerely,

ROBERT W. MESERVE,
Chairman.

Thus, from the Goldberg nomination through the Haynsworth nomination the ABA had only two ratings for nominees to the Supreme Court: "highly acceptable from the viewpoint of professional qualification" or "not acceptable from the viewpoint of professional qualification."

During and following the Haynsworth nomination, but prior to the Carswell nomination, I understand there was some dissatisfaction among members of the Standing Committee on the Federal Judiciary as to the rating "highly acceptable from the viewpoint of professional qualification." It is my understanding that some members believed that rating to be too vague and meaningless.

Because of that dissatisfaction it was agreed that the committee would change its rating to "qualified" and "not qualified" as to nominees to the Supreme Court.

Following that decision the first nominee to the Supreme Court to be rated as such was Judge George Harrold Carswell to be Associate Justice of the Supreme Court, who was found to be "qualified" by letter to the committee of January 26, 1970, from Judge Lawrence E. Walsh, chairman, American Bar Association Standing Committee on the Federal Judiciary. I read that letter earlier in my remarks, and it appears on page 1–2 of the transcript.

Mr. BAYH. I appreciate the chairman's clarification of that point.

Mr. EASTLAND. At this time the Leadership Conference on Civil Rights notified the committee of its opposition to the nomination and requested to be heard. A public hearing was scheduled but no adverse witnesses appeared. At that time the committee extended to the Leadership Conference on Civil Rights additional time to file their objections. This was later done in the form of a letter accompanied by a memorandum concerning the nominee's civil rights decisions, prepared by Joe Rauh, and the so-called Curzan report, a doctoral dissertation prepared by a graduate student at Yale University which purported to show that the nominee was not pro-Negro or procivil rights.

The nomination was considered by the Judiciary Committee on June 18 and ordered favorably reported to and was subsequently confirmed by the Senate.

In January of this year, for the fourth time, this nominee was nominated by a President of the United States for a high position in our judicial system. The President, after due consideration, nominated George Harrold Carswell to be Associate Justice of the U.S. Supreme Court.

Notice of public hearings was placed in the CONGRESSIONAL RECORD on January 19 of this year notifying any interested citizen of the time, place, and date of the hearings and notifying the public that any witness desiring to be heard should notify the committee in writing prior to the opening of these hearings. Every citizen who gave timely notice, regardless of their standing or status in life, whether they spoke only for themselves or as representatives of a group or organization, was heard.

Other witnesses were called as the hearings progressed at the request of various Senators supporting and opposing the nomination.

Hearings were held on the 27th, 28th, and 29th of January and on the 2d and 3d of February. During this time 23 witnesses, including the nominee, were heard, and numerous letters, statements, and exhibits were admitted into the record.

Every courtesy and consideration was extended to each witness who testified. On a number of occasions committee rules requiring written statements of testimony were waived for witnesses opposing this nomination. No effort was made to limit the testimony of any witness no matter how irrelevant, immaterial, or disinteresting it might have been. Furthermore, the hearings were not closed until all members of the committee were satisfied that the record was complete and that all relevant and material testimony had been heard.

In addition to this, the committee afforded still another accommodation to those who still desired to express themselves for the record. In order to do so, the official transcript was left open for several days in order that additional statements and/or exhibits might be filed and printed in the body of the record. A number of statements, letters, and exhibits were accepted and printed during this extension of time.

Nor was this nomination taken up by the Judiciary Committee until the official printed record had been delivered to each Senator several days in advance, in addition to the fact that unofficial printed transcripts had been furnished to each member of the committee the morning following each day's testimony.

It should be noted here that prior to the opening of these hearings, Judge Carswell, without hesitation or complaint, submitted, in response to a request from the senior Senator from Indiana, joint income tax returns for himself and his wife for the entire period during which he has served in public office. In addition to that Judge Carswell filed with the committee a full financial statement as to his current assets and liabilities. With the nominee's consent these tax returns and financial records were made available for inspection by any Senator on the committee or his designated representative. A number of Senators availed themselves of this opportunity and obviously found nothing to the detriment of this nominee. I can say without fear of contradiction that the nominee completely cooperated with the committee in every way and promptly complied with every official request made of him.

In his testimony before the committee the nominee was subjected to a lengthy and gruelling interrogation. His response was open, forthright, and candid. His testimony was persuasive and articulate, making a favorable impression on the overwhelming majority of our Members. He was responsive to all questions put to him and his answers were clear, concise, and to the point.

Thus, Mr. President, this is the fourth time that George Harrold Carswell has been before the Senate of the United States. It is the fourth time that he has been nominated for high office by the President of the United States, and investigated and cleared by the FBI.

Let me emphasis that: Investigated and cleared by the FBI. Because when there is a full field investigation of any person who is about to be nominated, the FBI not only investigates the whole life of the man about to be nominated, but those of members of his family; and the investigation is full and complete. He was approved by the American Bar Association, approved by the Senators from his native State, approved by the Senate Judiciary Committee, and recommended for favorable consideration by the Senate.

It is not enough to say that this is the fourth time this nominee's public and private life has been scrutinized and his qualifications for high office considered by the Senate. This does not take into account the fact that this nominee, as was another recent nominee to the Court, has been faced from the day of his nomination with a hostile press.

This is not to say that the press viewed this nomination in an objective light and was turned hostile by subsequent revelations adverse to the nominee. Rather, he was faced with a press that started out with both the motive and intention "to get" this nominee. Immediately following the announcement of his nomination, scores of reporters were sent South to investigate with a vengeance every detail of his public and private life. They flooded the courthouse in Tallahassee and the record center in Atlanta, where every file of every case Judge Carswell sat on was studied for some evidence with which to discredit him.

Newspapers and records of real estate transactions were searched for some evidence to use against his confirmation. Every friend, associate, and casual acquaintance of the nominee was interviewed by professional hatchetmen whose only objective was to find some example of wrongdoing upon which to build a case of impropriety or insensitivity to the statutes or the American Bar Association's canons of judicial ethics.

They found nothing. Frustrated at this stratagem, they had no alternative but to look for other causes, other reasons upon which a case could be justified for rejecting this nomination. Thus the line was taken that the nominee was mediocre, as well as insensitive to the rights of minorities and convicted felons.

Now, Mr. President, this brings us to the question: Aside from the public clamor created by those determined to prevent the President from giving balance to the Supreme Court as he pledged to the American people in his campaign for the Presidency, what kind of man does the record show George Harrold Carswell to be?

First, let us inquire as to the opinion of the American Bar Association's Standing Committee on the Federal Judiciary and determine upon what criteria their recommendation is based. Judge Walsh's

letter to the committee of January 26 of this year, expressed to the chairman, speaks for itself. It states as follows:

DEAR SENATOR: Thank you for your telegram of January 21, 1970, inviting the comments of the American Bar Association Standing Committee on the Federal Judiciary with respect to Judge G. Harrold Carswell, who has been nominated for the office of Associate Justice of the Supreme Court of the United States. The Committee is unanimously of the opinion that Judge Carswell is qualified for this appointment.

This committee has previously investigated Judge Carswell for appointment to the District Court in 1958 and for appointment to the Court of Appeals for the Fifth Circuit in 1969. On each occasion Judge Carswell was reported favorably for these appointments.

The Committee has now supplemented these investigations within the time limits fixed by your telegram.

With respect to nominations for the Supreme Court, the Committee has traditionally limited its investigation to the opinions of a cross-section of the best informed judges and lawyers as to the integrity, judicial temperament and professional competence of the proposed nominee. It has always recognized that the selection of a member of the Supreme Court involves many other factors of a broad political and ideological nature within the discretion of the President and the Senate but beyond the special competence of this Committee. Accordingly, the opinion of this Committee is limited to the areas of its investigation.

In the present case the Committee has solicited the views of a substantial number of judges and lawyers who are familiar with Judge Carswell's work, and it has also surveyed his published opinions. On the basis of its investigation the Committee has concluded, unanimously, that Judge Carswell is qualified for appointment as Associate Justice of the Supreme Court of the United States.

Respectfully yours,

LAWRENCE E. WALSH,
Chairman.

Now, it is true that the opponents of the nomination have, by inference, questioned the integrity and sincerity of Judge Walsh and his distinguished colleagues who serve on the American Bar Association's standing committee on the Federal judiciary. For example, Stephen Schlossberg, general counsel for the UAW told the committee:

Predictably Judge Walsh and his blue ribbon panel have stamped their approval on this undistinguished nominee.

Mr. Schlossberg and others would have us believe that Judge Walsh and the members of the committee are no more than rubberstamps for the President. Yet Mr. Schlossberg, Mr. Rauh, and other spokesmen for organizations which make up the Leadership Conference on Civil Rights filed with, vouched for, and have quoted with approval the so-called Curzan report, a doctoral dissertation by a graduate student at Yale which on its face purports to be "A Case Study in the Selection of Federal Judges, the Fifth Circuit, 1953–63".

Certainly no objective reader of the Curzan report would question her credentials as a civil rights zealot. Any scholar who has reviewed the decisions of the district judges in the fifth circuit and ranks Frank Johnson of Alabama a "segregationist" can hardly be impeached by anyone as a rabid advocate of minority rights. Yet, even Miss Curzan pays tribute to Judge Walsh in her report. As stated by Miss Curzan:

Indeed, Judge Walsh, who replaced Rogers as Deputy Attorney General in 1958, had been a district judge in the Second Circuit when he was persuaded to leave the bench to come to the Department of Justice to oversee the recruitment of judges. He left the bench only because he felt that selecting competent federal judges was one of the few jobs more important than sitting on a federal court.

This is the same Judge Lawrence Walsh who was Deputy Attorney General when President Eisenhower nominated George Harrold Carswell to the district court of northern Florida and, might I add, the same Lawrence Walsh who was Deputy Attorney General when President Eisenhower nominated the most liberal judges, both district and appellate, in the fifth circuit today.

This is the same Judge Walsh whose standing committee on the Federal judiciary has within the past year found Judge Carswell "well qualified" for elevation to the Firth Circuit Court of Appeals, and in January of this year approved his nomination as Associate Justice of the U.S. Supreme Court.

We have considered the opinion of the American Bar Association's Standing Committee on the Federal Judiciary reached after obtaining "the opinions of a cross-section of the best informed judges and lawyers as to the integrity, judicial temperament, and professional competence of the proposed nominee" and "having solicited the views of a substantial number of judges and lawyers who are familiar with Judge Carswell's work" and having themselves surveyed "his published opinions."

Now, Mr. President, let us consider the views of those who know Judge Carswell best, his colleagues on the Fifth Circuit Court of Appeals. Perhaps they are in the best position of anyone to judge the nominee because they have reviewed his decisions during his tenure as a district judge and have served with him as a fellow member of the Fifth Circuit Court of Appeals.

These are independent men of different philosophies, with lifetime appointments to the second highest court in the land. They are financially secure for life and can expect no further elevation within our system of Federal courts other than elevation to the Supreme Court itself. They have no reason or motive to mislead us.

To the contrary, these are men who share a common respect and concern for the prestige of the Supreme Court of the United States. They have no ax to grind, no cause to advance, no reward to gain by any statement they might make for or against this nominee.

Now I call the Senate's attention to a speech delivered on the Senate floor on February 16 by the distinguished senior Senator from Maryland wherein he named a number of judges on the Fifth Circuit Court of Appeals, who are, in his own words, "imminent constitutional lawyers and who have demonstrated that they are judicious men, able to give any man a fair and impartial hearing."

Two of Judge Carswell's colleagues named by the distinguished senior Senator from Maryland were Judge Bryan Simpson and Judge Robert A. Ainsworth.

I agree with the senior Senator from Maryland when he describes these two eminent jurists, regardless of their legal philosophies, as "judicious men, able to give any man a fair and impartial hearing," and might I add that they are willing to give Judge Carswell "fair and impartial" consideration as nominee for Associate Justice of the Supreme Court.

Now what do these two judges say about George Harrold Carswell as a nominee for Associate Justice of the United States? Judge Bryan Simpson, in a letter to the committee of January 22, states as follows:

MY DEAR SENATOR EASTLAND: The purpose of this letter is to attest to you and the members of your committee, for whatever value it may have, my personal judgment of the qualifications of U.S. Circuit Judge G. Harrold Carswell to become an Associate Justice of the United States Supreme Court.

I have been closely associated with Judge Carswell as a brother Florida Federal judge since he became a district judge in the spring of 1958. We worked closely together over the years. In recent months that association has continued on the Court of Appeals. I knew him slightly, but mainly by reputation, in the early fifties when he was U.S. Attorney for the Northern District of Florida.

He possesses and uses well the requisite working tools of the judge's trade: industry, promptness, learning, attentiveness and writing skills. He is a competent and capable judicial craftsman, experienced in the diverse and complex areas of federal law as well as the almost limitless variety of cases coming to us under the diversity jurisdiction. In the six or seven months he has been a member of our Court and in extensive service thereon as a visiting judge over the prior years, he has shown a steady capacity for high productivity without the sacrifice of top quality in his work.

More important even than the fine skill as a judicial craftsman possessed by Judge Carswell are his qualities as a man: superior intelligence, patience, a warm and generous interest in his fellow man of all races and creeds, judgment and an open-minded disposition to hear, consider and decide important matters without preconceptions, predilections or prejudices. I have always found him to he completely objective and detached in his approach to his judicial duties.

"In every sense, Judge Carswell measures up to the rigorous demands of the high position for which he has been nominated. I hope that the Judiciary Committee will act promptly and favorably upon his nomination. It is a privilege to recommend him to you without reservation.

With kind personal regards, I am,

Sincerely,

BRYAN SIMPSON.

Mr. President (Mr. BYRD of West Virginia), let me say here that Judge Simpson, by those who judge the philosophy of a man, is considered to be a liberal judge.

Judge Robert A. Ainsworth, Jr., in a letter of January 23, says:

GENTLEMEN: I submit for your favorable consideration the recommendation for confirmation of Judge G. Harrold Carswell to be

a Justice of the Supreme Court of the United States. Judge Carswell is my colleague on the United States Fifth Circuit Court of Appeals. I have known him prior to this time as a Federal District Judge. He has served as a member of the Judiciary for more than eleven years. He is a person of the highest integrity, a capable and experienced judge, an excellent writer and scholar, of agreeable personality, excellent personal habits, fine family, a devoted wife and children, and relatively young, as judges go, for the position to which he has been nominated.

In my view, Judge Carswell is well deserving of the high position of Supreme Court Justice and will demean himself always in a manner that will reflect credit upon those who have favorably considered his qualifications. Undoubtedly he will be an outstanding Justice of the Supreme Court and will bring distinction, credit and honor to our highest court.

Those of us who have known him for so many years as a capable and efficient Federal Judge feel an obligation to inform you of the high opinion which we entertain of his ability and qualifications. I am very glad to give him the highest possible recommendation and sincerely trust that the Senate will look favorably upon him and grant him confirmation.

Sincerely,

ROBERT A. AINSWORTH, Jr.,
U.S. Circuit Judge.

The committee also heard from Judge Elbert B. Tuttle concerning this nomination. One could hardly name on one hand the most liberal judicial activists in our Federal system of courts without including Judge Tuttle.

Even Joe Rauh named Judge Tuttle, along with Wisdom and Brown, as men he considers "wonderful Southern judges . . . who would have been heroic additions to the Court" and judges "I could stand and cheer for."

Yet even Judge Tuttle, in a letter to the committee of January 22, said:

My purpose in writing is that I wish to make myself available to appear before the subcommittee at its hearing on the nomination of Judge Carswell, in support of his confirmation, if the committee would care to have me appear.

I have been intimately acquaintsd with Judge Carswell during the entire time of his service on the Federal bench, and am particularly aware of his valuable service as an appellate judge, during the many weeks he has sat on the Court of Appeals both before and after his appointment to our court last summer. I would like to express my great confidence in him as a person and as a judge.

My particular reason for writing you at this time is that I am fully convinced that the recent reporting of a speech he made in 1948 may give an erroneous impression of his personal and judicial philosophy, and I would be prepared to express this conviction of mine based upon my observation of him during the years I was privileged to serve as Chief Judge of the Court of Appeals for the Fifth Circuit.

The committee also received unsolicited endorsements for the nominee from Judges Dyer, Bell, Thornberry, and Jones, all colleagues of Judge Carswell on the Fifth Circuit Court of Appeals. These letters speak for themselves and I ask unanimous consent that they be printed in the RECORD at this point.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Miami, Fla., January 26, 1970.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR EASTLAND: I commend to you and to your Committee Judge G. Harrold Carswell for confirmation as an Associate Justice to the Supreme Court of the United States.

I have enjoyed the privilege of serving with Judge Carswell on the Court of Appeals for the Fifth Circuit since he was appointed to our Court last June. He has discharged his judicial responsibilities with dispatch but always with painstaking concern that his approach to a case was impartial and that the decision he reached was the result of exhaustive research, analytical reasoning, and a careful consideration of the precedents.

Judge Carswell has exemplified these outstanding judicial characteristics during his long career as a district judge. His many attributes as a judge and as an individual are too numerous to attempt to chronicle. Suffice it to say that his election by all of the judges in the Fifth Judicial Circuit as their representative to the Judicial Conference of the United States is evident of the high respect in which he is held.

While the Fifth Circuit will sorely miss Judge Carswell, the Supreme Court and the country will be the beneficiaries of his great judicial talent and vigor.

With my continued high esteem,

Sincerely,

DAVID W. DYER.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Jacksonville, Fla., January 23, 1970.

Hon. JAMES O. EASTLAND,
Chairman of the Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: I regard Harrold Carswell as eminently qualified in every way—personality, integrity, legal learning and judicial temperament—for the Supreme Court of the United States.

With regards, I am

Sincerely yours,

WARREN L. JONES.

U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT,
Austin, Tex., January 22, 1970.

Hon. JAMES O. EASTLAND,
Chairman, Committee on Judiciary,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: I trust that it is not presumptuous of me to express the hope that the Senate of the United States will advise and consent to the appointment of Honorable G. Harrold Carswell to be Associate Justice of the Supreme Court of the United States.

I have known Judge Carswell from the time I began to serve as United States District Judge. The first time I sat as Circuit Judge, Judge Carswell, as an invited District Judge, was a member of the same panel. Since he became a member of the Fifth Circuit Court of Appeals, he and I have been members of the same Administrative and Screening Panel of our Court. During these years, I have had an opportunity to observe and know him as a Judge and as a man.

Judge Carswell is a man of impeccable character. He is dedicated in his work and vigorous in its application. As a member of our Court, his volume and quality of opinions is extremely high. He has had an experience which adds to his numerous qualifications to be Associate Justice, as a lawyer, as United States Attorney, as United States District Judge and, now, as a Circuit Judge. As the record shows, he has had considerable experience on the Court of Appeals, having sat with our Court as an invited District Judge for eleven weeks before he was appointed to the Fifth Circuit. Judge Carswell has the compassion which is so important in a judge.

I believe Judge Carswell possesses the professional and judicial qualifications to be a distinguished Associate Justice of the Supreme Court of the United States.

Respectfully yours,

HOMER THORNBERRY,
U.S. Circuit Judge.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Atlanta, Ga., January 26, 1970.

Re Hon. G. Harrold Carswell.
COMMITTEE ON THE JUDICIARY,
U.S. Senate,
Washington, D.C.

DEAR SIRS: This statement is in support of Hon. G. Harrold Carswell whom you are now considering for confirmation as an Associate Justice of the Supreme Court.

I have known Judge Carswell for 24 years and have frequently visited in his home as he has in mine. I am familiar with his career as a lawyer and a judge, and with his personal life. His character and integrity including intellectual honesty, is of the highest order. His intellect and ability are also of the highest order.

Judge Carswell will take a standard of excellence to the Supreme Court, based on many years of experience as a trial judge and the equivalent of two years as a circuit judge (considering sittings with the Fifth Circuit as a district judge), which will substantially contribute from the inception to that court. His particular experience cannot be matched by anyone presently on the court and will fill a need now existing on that court.

I recommend Judge Carswell for confirmation without any hesitation or reservation whatever.

Yours sincerely,

GRIFFIN B. BELL

Mr. EASTLAND. Mr. President, might I ask, Mr. President, what finer endorsement could the nominee have received from his colleagues than his election in April 1969 by the circuit and district judges of the fifth circuit as their representative to the Judicial Conference of the United States. This group of distinguished lawyers and judges includes every shade of judicial philosophy, from the most conservative view of strict construction and judicial restraint to the most liberal judicial activist in the Federal system of courts.

Yet, when they were called upon to select a man to represent them at the very judicial conference which would consider new rules of judicial ethics, financial disclosure, and permissible income from off-the-bench employment, they chose Judge George Harrold Carswell. These are men, most of whom have known the nominee both personally and professionally, and have judged him on that basis.

The committee also heard from several distinguished members of the Florida Bar Association. Mr. Mark Hulsey addressed the committee on behalf of the Florida Bar Association and informed us that the nominee had been unanimously endorsed by a written poll of the 41 members of their board of governors. Not only did Mr. Hulsey testify as the president and official representative of the Florida Bar Association, but on the basis of having known Judge Carswell "per-

sonally for over 17 years—on my observations of him as U.S. attorney when I was an assistant U.S. attorney—as a trial lawyer, practicing before him in his court."

In addition to praising Judge Carswell's integrity and professional ability as a lawyer and judge, Mr. Hulsey directed the following remarks to the charge of racism which had been raised earlier in the hearings. As stated by Mr. Hulsey:

And, Mr. Chairman, may I make just one last comment. If this were not so serious, this charge of racism against Judge Carswell, it would almost be funny. By that I mean it is certainly ironic, because you know in Florida many people regard certain parts of the northern district of Florida as a little bit to the right of Louis the 14th, and I can tell this committee in all sincerity and honesty that Harrold Carswell has displayed unusual courage I think and faithfulness to the law that he serves in his civil rights rulings, in an altogether hostile climate.

I think he is a very strong man. I was shocked to read the speech, the young man's speech he made, because in all of my dealings with Harrold Carswell including the *Brooks* case I would have thought he was just the opposite, and I would think most lawyers and most people who had dealings with him in Tallahassee feel that he is indeed a fine judge. He believes in liberty and justice for all, and there is no two ways about it.

Mr. Hulsey also directed his attention to several other charges which have been raised against Judge Carswell and I will refer to those remarks at a later point.

The committee also heard from the Honorable Leroy Collins, distinguished Florida attorney, former Governor of Florida, and former Director of the Community Relations Service, and later Under Secretary of Commerce in the Kennedy administration. Governor Collins brought with him impeccable liberal credentials in the field of civil rights.

The senior Senator from Maryland introduced this witness with the following remarks:

The first witness I would like to make reference to is Gov. Leroy Collins of Florida, in my judgment one of the great public servants of this generation. I would like for the record to make that comment for my brother members of this committee, and to formally welcome him to testify before this committee.

It has been my privilege to know Governor Collins since I first worked for Senator Jack Kennedy in the Florida campaign for the Presidency in 1960. Since then, my every experience with Governor Collins has shown me that he is a man of the highest integrity and, a great American.

Senator Bayh noted:

Mr. Chairman, I would like to say for the record what I previously did not have the good fortune to say in this forum, that of all the public servants I have had the good fortune to become familiar with, I know of no man I respect more than the witness who is presently before us.

Governor Collins' appearance before the committee in support of the nominee was unsolicited and his testimony based upon a lifetime acquaintance with Judge Carswell both personally and professionally.

Governor Collins told the committee that he had hired the nominee right out of law school as an associate in his Tallahasee firm and of his early conviction that Harrold Carswell was destined to become an outstanding lawyer. Governor Collins' words speak best for themselves, and this is what he said:

I knew this man well as a lawyer, both while he was associated with our firm and also after he had organized this new firm of his own. I knew him then as I have continued to know him since, as a man of untarnished integrity, a man with an extraordinary keen mind, and very importantly, a man who works prodigiously. And on top of all that, he has one of the finest and keenest senses of humor of any man I have never known. He is a delightful man to be around in every sense. * * *

As you know from the record here, Judge Carswell moved through three Federal posts of duty in the succeeding 16 years after his private law practice and he stands now with this Presidential appointment you have under consideration. I feel strongly that Judge Carswell's appointment deserves confirmation. I feel this way on the basis of my personal knowledge of the man, first of all, but, more importantly, on the basis of the overwhelming judgment of the bar of my State, on the basis of the judgment of his peers on the bench, and I think this is most important, on the basis of the judgment of the Members of the Senate and of this distinguished committee based upon your prior hearings and investigations.

Now, I listened to most of the questions and the testimony yesterday, Mr. Chairman, and in precious little of it did I feel that there was any substantive challenge of Judge Carswell's actual fitness and competence to serve on our highest court.

Not only was the testimony of these two distinguished Florida attorneys unsolicited and based upon personal and professional association with the nominee, but it stands uncontradicted by any member of the Florida Bar Association or by any attorney who has regularly practiced in Judge Carswell's court.

The committee was obviously impressed by the foregoing testimony and endorsements from these distinguished Federal judges and lawyers. Not only do they know the nominee, but they are in a position to understand the criteria by which the ability of a trial judge should be measured.

Since most, if not all, of the criticism by Judge Carswell's opponents has been directed to his service as U.S. district judge, I am compelled to here interject a few remarks which might place the consideration of the nomination in clearer perspective and perhaps explain, in part, the different judgment passed upon his record by judges and lawyers on the one hand and certain law professors on the other.

Most of Judge Carswell's professional life has been spent as U.S. district judge for the northern district of Florida. His duties and responsibilities have been those of a trial judge.

As a trial judge the nominee has been called upon day after day, week after week, month after month, and year after year to preside over trial after trial. We have in this country an adversary system of law in which the trial judge bears the heavy burden and responsibility for seeing justice done.

Unlike appellate judges or professors of law, his work is done in open court, before adversary litigants who are usually supercharged emotionally, convinced of the justice of their cause and often hostile toward the court as well as toward each other. The conduct of the trial judge is open to careful scrutiny by lawyers professionally committed to exhaust every legal remedy and employ every legal stratagem to win for their clients. It is commonplace for disappointed litigants and even lawyers to place blame for failure upon the trial judge.

As we have seen clearly demonstrated in the hearings upon the nomination of Judge Carswell and as I have seen demonstrated in the consideration of hundreds of nominations where trial judges are elevated to the appellate courts, disappointed litigants and immature lawyers often leave the courtroom in a bitter and vengeful mood. It is easier to cover up professional incompetence or lack of merit in a case by blaming the judge.

The Judiciary Committee seldom considers the elevation of a trial judge to a higher court without receiving impassioned and embittered letters of protest from lawyers and parties who have lost cases before him.

It is irrelevant that the trial judge possess the scholarship to find the law; he must know the law applicable to the facts and case at hand. During the course of a trial he is called upon to rule instantly on countless motions and objections. Once a motion is granted, an objection sustained, a jury instruction given from the bench, he cannot erase or second guess. Any mistake or combination of misjudgments along the long and tortuous road from a suit filed to a verdict rendered may prove reversible error, aborting and delaying justice as well as increasing the expense to litigants.

Not only must the trial judge rule, he must preside as well. He must possess the character, impartiality, patience, and leadership to keep a trial moving along in order and on the track. He must be in control of his court. He must maintain the respect and attention of lawyers, litigants, jurors, and even spectators, all the while balancing the scales of justice in order to protect the rights of all parties concerned.

Judge Carswell, as a trial judge, could not share the heavy strain, burden, and responsibility with fellow members of a panel or en banc court.

Those who have known Judge Carswell best, the lawyers who practice in his court, the appellate judges who reviewed his trial records, have shown the nominee to be a lawyers' lawyer, a judges' judge, a man of the law who has labored tirelessly in the vineyards of our judicial system.

Judge Carswell's record reveals a clear and accurate mind, a well-reasoned, plain spoken approach to the law. His decisions reflect more concern for immediate relevance than coining a cliche, more concern for resolving the rights of the litigants at hand than turning a clever phrase, more concerned with seeing justice done and announcing his decisions in a manner clear, concise, and to the point than flights into literary elegance.

Mr. President, a review of Judge Carswell's record, far from reflecting a mediocre man, reveals a trial judge in the best tradition of our adversary system of litigation. If Judge Carswell's record on the trial bench reflects a reluctance to enunciate new and novel legal concepts, to break new constitutional ground, or to anticipate new directions which may be taken by the appellate courts or legislative bodies, it is to his credit.

Strict construction and judicial restraint are qualities which should be demanded of any trial judge, whatever his judicial philosophy. Judge Carswell's decisions reflect these qualities, they reveal a jurist more concerned with the law as a fact than phrase, more interested in substance than form or style or manner.

Disraeli once described Gladstone as a "sophisticated rhetorician, inebriated with the exuberance of his own verbosity, and gifted with an egotistical imagination" whose main purpose was "to glorify himself."

Judge Carswell is not that man.

And while his decisions are unappreciated by Dean Pollak, they are appreciated by learned lawyers, judges, and legal scholars who really understand the role of a trial judge in our system of justice.

While Judge Carswell has been dismissed as mediocre by Dean Pollak, who by his own testimony based his opinion upon newspaper accounts of the hearing and requested to testify against the nomineee before, not after, he thumbed through some of his printed opinions, other legal scholars who based their testimony on a personal and professional acquaintance with the nominee gave another view.

The committee heard, for instance, from a truly distinguised law professor from Yale, James William Moore. Professor Moore's testimony was also unsolicited and based upon personal as well as professional knowledge of the nominee. I ask unanimous consent that a short biography of Professor Moore be inserted in the RECORD at this point:

James William Moore. Born Condon, Oregon Sept. 22, 1905; grew up in Montana; higher degrees—J.D., University of Chicago, J.S.D., Yale University, L.L.D., Montana State University; taught at the law schools of Utah, Minnesota, Chicago, Texas, and Yale, and holds a named Chair, Sterling Professor of Law, at Yale.

First recipient of Learned Hand medal, 1962.

Presently a member of the Supreme Court's standing Committee on Practice and Procedure. Prior thereto was chief research assistant for the Supreme Court's original Advisory Committee on Civil Rules and then later a member of that Committee. From 1944–48 was consultant on the revision of the Judicial Code.

Co-reporter in 1937 on bankruptcy and reorganization to the International Academy of Comparative Law, The Hague.

Author of: Moore's Federal Practice; Moore's Commentary on the Judicial Code; Collier on Bankruptcy (14th edition); Moore's Bankruptcy Manual; and other treatises and casebooks in the federal field of judicial administration, bankruptcy, jurisdiction and practice.

Of counsel for the State of Texas in the Texas 'Tidelands' oil litigation; counsel for the reorganization Trustees (now a single Trustee) of The New York, New Haven & Hartford Rail Co. since mid-1961; legal consultant for public groups and private lawyers.

Member of the bars of: the State of Montana; Supreme Court of the United States; Court of Apepals for the Second Circuit; United States District Courts for the states of Montana, Connecticut, and Southern District of New York, Interstate Commerce Commission.

Professor Moore told the committee:

I testify on behalf of Judge Carswell on the basis of both personal and professional knowledge.

About 5 years ago a small group of jurists, educators, and lawyers consulted me, without compensation, in connection with the establishment of a law school at Florida State University at Tallahassee. Judge Carswell was a very active member of that group. I was impressed with his views on legal education and the type of school that he desired to establish: a law school free of all racial discrimination—he was very clear about that; one offering both basic and higher legal theoretical training; and one that would attract students of all races and creeds and from all walks of life and sections of the country. Judge Carswell and his group succeeded admirably. Taking a national approach they chose, as their first dean, Mason Ladd, who for a generation had been dean of the college of law at the University of Iowa and one of the most respected and successful deans in the field of American legal education. And from the vision and support of the Carswell group has emerged, within the span of a few years, an excellent, vigorous law school.

For example, every member of the first graduating class of Florida State University Law School of about 100 passed the bar examination on the first go round. That makes my law school look like a member of the bush league.

From those and subsequent contracts I have formed the personal opinion that Judge Carswell is a vigorous young man of great sincerity and scholarly attainments, a good listener who wants to hear all sides, moderate but forward looking, and one of growth potential.

I have a firm and abiding conviction that Judge Carswell is not a racist, but a judge who has and will deal fairly with all races, creeds, and classes. If I had doubts, I would not be testifying in support, for during all my teaching life over 34 years on the faculty of the Yale Law School I have championed and still champion the rights of all minorities.

From the contacts I have had with Judge Carswell, and the general familiarity with the Federal judicial literature, I conclude that he is both a good lawyer and a fine jurist. Called to the bar about 20 years ago he has the background of private practice, public practice as a U. S. district attorney, and that of both district and circuit judge.

And while Judge Carswell has not been a circuit judge for a long time, he has Federal appellate experience since he has sat on the court of appeals as a district judge by designation, that goes back long before he become circuit judge. In fact I recall an example of an opinion written by him as early as 1961.

Having been in each of the 50 States, and having taught in most sections of this country, I have long been impressed with this country's diversity—economic, social, moral, and ideological. In my opinion the Supreme Court should be representative of that great diversity. And I believe at this time it is highly desirable that the next Justice should come from the section where Judge Carswell was born and has lived; and that Judge Carswell should be that justice.

Professor Moore's evaluation of the nomination was endorsed by Mason Ladd, visiting professor and former dean, Florida State University, and dean emeritus, University of Iowa. As was the case of Professor Moore, Professor Ladd did not base his opinion upon newspaper clippings or a sampling of Judge Carswell's published opinions. As a matter of fact, I do not believe either of these gentlemen would have been so presumptuous. In a letter of January 21, Professor Ladd told the committee:

MY DEAR SENATOR EASTLAND: I was much pleased when I heard of the nomination of Judge G. Harrold Carswell to the position on the Supreme Court, and I wish to urge early confirmation by the Senate.

I hold Judge Carswell in the highest respect and regard him as well qualified in every way for this highest position in the law. In one sense no one is fully qualified to assume the great responsibilities of a member of the Supreme Court but I believe Harrold Carswell will come as close to filling the needs as any who will be found. The Judge is the right age to grow into this position and to become a truly great Supreme Court Justice. He has an innate sense of fairness and has an open mind in considering the problems presented to him. He is a good listener and does not approach issues with predetermined conclusions. He is a careful student of the law, is a very hard worker. He is both scholarly and practical minded. He sees issues quickly but carefully explores the authorities and legal materials involved in reaching a decision. I regard Judge Carswell as free from prejudice upon the current issues of the day and feel that he will search for the right solution based upon the law and the facts.

The experience which Judge Carswell has had upon the Federal District Court and the Circuit Court of Appeals will be invaluable background for the responsibilities upon the Supreme Court. His active interest in the work of the Judicial Conference of the United States is also important. The Judge has been much interested in legal education and had an important part in the establishment of tbe new College of Law at Florida State University.

Judge Carswell's interests have been primarily in the law and in his family. It is fortunate that his other activities are free from objectionable conflicts of interest.

Judge Carswell is a delightful person, he has an ideal home life, and he has a wonderful wife and family. They spend a great deal of time together. It is a pleasure to visit at their home because you both see and feel the fine quality of these people.

I have come to know Judge Carswell very well in the last four years. I had been Dean of the College of Law at the University of Iowa for twenty-seven years and upon retirement came to Florida State University to establish a new College of Law. This brought me into close contact with the Judge; I liked him and we became good friends. I hold him in the highest respect as do the members of the legal profession in the State of Florida and I think quite widely in the south. I am sure he will do well and grow in national respect as a member of the Supreme Court. I recommend his early confirmation.

Most respectfully yours,

MASON LADD,
Visiting Professor and Former Dean, Florida State University; Dean Emeritus of Iowa.

The committee further considered the statement filed by Prof. William Vandercreek of Southern Methodist University. In a letter of February 3 Professor Van-

dercreek gave this evaluation of Judge Carswell:

An examination of Judge Carswell's decisions in civil rights cases demonstrate a fair and reasoned approach in keeping with the highest standards of judicial integrity. This is a significant accomplishment particularly because, as the committee is well aware, emotionalism and fervor so pervade the sensitive area of civil rights that many well meaning persons become totally intolerant of any view other than their own. . . .

It is my firm belief that Judge Carswell's rulings are not based or influenced by race, creed, or color in any way. Judge Carswell merely rules upon the facts and issues of the cases before him.

His record unequivocally shows that he rules fairly and without regard to the fervor and emotion of those on either side. Judge Carswell's records of over 4,500 civil and criminal cases clearly demonstrates an unusual skill of addressing his ruling to the issues at hand. He emphasizes the total picture. It seems that those who criticize his rulings are merely disappointed litigants who cannot evaluate Judge Carswell fairly in the light of their zeal for their cause.

It is not important to Professor Vandercreek that Judge Carswell's record show a "zeal for civil rights" as required by Dean Pollak. What seems important to Professor Vandercreek is that "he rules fairly and without regard to the fervor and emotion of those on either side." I agree with Professor Vandercreek and I believe the Senate will likewise agree.

In every law suit, and that includes civil rights litigation there are at least two parties. It is improper for a judge to show zeal for civil rights litigants as demanded by Dean Pollak. It is proper for him to be fair and impartial to everyone regardless of what he considers to be the moral justification or legal standing of the respective parties.

I ask unanimous consent to have Professor Vandercreek's letter printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
February 3, 1970.

Re confirmation of G. Harrold Carswell.
Senator JAMES EASTLAND,
Chairman, Senate Judiciary Committee, U.S. Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: Judge Carswell should be confirmed as an associate Justice of the Supreme Court. I have been a law professor at Southern Methodist University since 1959 and have been a visiting professor at Florida State University since 1968. With deference to Lowenthal, Von Alystyne and Orfield, their statements as reported in the news media, do not present a rational basis for opposing or delaying Judge Carswell's confirmation.

An examination of Judge Carswell's decisions in civil rights cases demonstrate a fair and reasoned approach in keeping with the highest standards of judicial integrity. This is a significant accomplishment particularly because, as the committee is well aware, emotionalism and fervor so pervade the sensitive area of civil rights that many well meaning persons become totally intolerant of any view other than their own.

For example, on jurisdictional grounds Judge Carswell should be praised not condemned for his ruling in *Wescher* v. *Gadsden County*. The only issue therein properly before the court involved the construction of a removal statute. The 5th circuit remanded the case for further consideration because after the district court had ruled, the 5th circuit in two cases, *Rachel* v. *State of Georgia*, 347 F2 679, gave a broad interpretation of removal jurisdiction. Subsequently in line with Judge Carswell's earlier decision the Supreme Court reversed the 5th circuit in *Greenwood*, 384 U.S. 808, and on narrower grounds affirmed *Rachel*, 384 U.S. 780.

For the Supreme Court's decision in *Greenwood*, it would be absurd to say the Supreme Court justices are racial bigots and it would be equally absurd to apply the same type of fallacious reasoning to any other jurist.

It is my firm belief that Judge Carswell's rulings are not based or influenced by race, creed or color in any way. Judge Carswell merely rules upon the facts and issues of the cases before him.

His record unequivocally shows that he rules fairly and without regard to the fervor and emotion of those on either side. Judge Carswell's records of over 4,500 civil and criminal cases clearly demonstrates an unusual skill of addressing his ruling to the issues at hand. He emphasizes the total picture. It seems that those who criticize his rulings are merely disappointed litigants who cannot evaluate Judge Carswell fairly in the light of their zeal for their cause.

The civil rights of all men must be protected and I respectfully submit that Judge Carswell's record when properly viewed is highly commendable. I say this not only as legal educator but as an attorney who has appeared in cases before the 5th circuit and the Supreme Court. (For example see habeas corpus appeal in *Brooks* v. *Beto* 366 F2d, involving the issue of whether purposeful inclusion as distinguished from purposeful exclusion of blacks on a grand jury violated many clients constitutional rights.)

Judge Carswell would bring humility and skill, which coupled with his outstanding judicial experience will provide a basis for his making a significant contribution to our highest court.

I would be pleased to testify under oath in support of Judge Carswell if the committee would be so inclined.

Respectfully,
WILLIAM VANDERCREEK.

Mr. EASTLAND. Mr. President, the committee further received letters from Joshua M. Morse III, dean of Florida State University Law School, and Frank E. Maloney, dean of University of Florida Law School. I ask unanimous consent that these letters likewise be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

THE FLORIDA STATE UNIVERSITY,
Tallahassee, January 22, 1970.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: I write in support of the nomination of Judge G. Harrold Carswell to the position of Associate Justice of the Supreme Court of the United States.

While I have known Judge Carswell personally for only six months, I am impressed with his ability, energy, enthusiasm and dedication to duty. I feel that he approaches every case without pre-judgment, prejudice or bias. I would give him the highest recommendation for the position.

The experience as United States Attorney, United States District Judge, and United States Court of Appeals Judge will be invaluable in the duties of the new office.

I recommend highly his early confirmation.

Very truly yours,
JOSHUA M. MORSE III.

UNIVERSITY OF FLORIDA,
Gainesville, January 21, 1970.

Hon. JAMES O. EASTLAND,
U.S. Senator, Chairman, Committee on the Judiciary, New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: It was with extreme pleasure that I read of the nomination of Judge G. Harold Carswell to the Supreme Court. Judge Carswell is not a graduate of this school, however, it has been my pleasure to be acquainted with the Judge for about twenty years. During that time I have observed him distinguish himself in private practice and public duties in a manner which has always reflected credit on the entire bench and the Bar of this state.

Because of the high esteem I have for the Judge's personal and professional characteristics, as I know them, I would like to add my voice of support to the many others which I am sure you have already heard favoring this confirmation.

Sincerely yours,
FRANK E. MALONEY, *Dean.*

Mr. EASTLAND. Mr. President, we have now considered the opinion of the American Bar Association's Standing Committee on the Federal Judiciary which, might I add, was unanimously reconfirmed after all of the testimony was in and after each member of the committee had an opportunity to study the full printed record.

We have now reviewed the opinions of distinguished attorneys such as Mark Hulsey and Leroy Collins, as well as the studied opinions of legal scholars and law professors whose testimony was based on both personal and professional acquaintance with Judge Carswell.

We have considered the views of those men who are perhaps best suited to judge the nominee, his colleagues on the Fifth Circuit Court of Appeals who know him both as a lawyer and a judge.

I have made some observations of my own concerning Judge Carswell's record in light of his responsibilities and duties as a trial judge.

Having done so, I believe that any fair-minded man who considers the foregoing aspects of this nomination will be compelled to conclude that the charges that have been raised against Judge Carswell are no more than diversionary tactics which their authors hope will confuse the public and the Senate as to the real issue involved. But it is not my intention to dismiss these charges out of hand, but to analyze and thus reveal them for what they are.

Now this cannot be done without some difficulty. It is difficult to determine which of these charges should be given priority because Judge Carswell's opponents cannot even agree among themselves. It is difficult to determine which of these charges they are willing to stand by and vouch for since they are unable to do so themselves.

As a matter of fact, trying to come to grips with the case which has purportedly been made against Judge Carswell is somewhat like viewing a kaleidoscope. Every time you look at it—it appears in a different pattern.

According to Time magazine of March 2, 1970, having reviewed all of the testimony and charges which have been raised, the issue boils down to "the mediocrity factor," dismissing the charge of racism as acts which "only conform to

the unfortunate facts of life in the old South" and pointing out that "Earl Warren, after all, once helped put thousands of Japanese-Americans into detention camps." Time magazine sums up the issue this way:

> While much of the argument over Carswell's nomination has centered on his questionable civil rights record, an increasing number of legal scholars and Senators are asking whether he has the kind of legal mind that would enhance the nation's highest court.
>
> A more troublesome aspect of Carswell's career is his lack of distinction on the federal bench.

Time magazine proceeds to reinforce this view by referring to an often repeated quote of Dean Pollak of Yale Law School who told the committee:

> I don't begin to suggest that I have read the entire range of his work or indeed his opinions on the court of appeals, there is nothing in these opinions that suggests more than at very best a level of modest competence . . .

Dean Pollak further told the committee:

> I submit to the committee that in nothing that I have read of the judicial work of the nominee are there any signs, and I say this with great deliberation, aware of the importance of what I am saying, are there any signs of real professional distinction which would arise one iota out of the ordinary.
>
> On the basis of the nominee's public record, together with what I have read of his work product, I am forced to conclude that the nominee has not demonstrated the professional skills and the larger constitutional wisdom which fits a lawyer for elevation to our highest court.
>
> I am impelled to conclude, with all deference, I am impelled to conclude that the nominee presents more slender credentials than any nominee for the Supreme Court put forth in this century; and this century began, as I remind this committee, with the elevation to the Supreme Court of the United States of the Chief Justice of Massachusetts, Oliver Wendell Holmes.

This issue was also raised by Mr. Schlossberg, general counsel of the UAW, wherein he testified:

> I know he has written some very pedestrian court opinions, because I have read them. I know he helped to write an application for a club, for a country club which would subvert the bill of rights of the U.S. Constitution. He has not written a law review article. He has not written a book . . .
>
> This man, who graduated from the third best law school in Georgia, I believe there are four, has not grown. To read his opinions is not to read opinions by a scholar, by a jurist, or by one who loves the law and follows the law. It is to read the opinions of a pedestrian man . . .

This is testimony which has been widely repeated and referred to with approval by the New York Times and Washington Post.

Now let us discuss for a moment the testimony of Dean Louis H. Pollak. Let me preface my remarks by recalling that Dean Pollak apologetically began his testimony saying:

> Arrogant as perhaps this seems, I wanted to come before this Committee and express my deep concern.

And having reviewed Dean Pollak's testimony, I must agree that it does indeed seem arrogant and presumptuous.

To begin with let us determine the depth and scope of Dean Pollak's knowledge in regard to the nominee.

Unlike the other witnesses who testified in Judge Carswell's behalf, lawyers, professors, and distinguished judges, Dean Pollak's testimony was not based upon his personal or professional acquaintance with the nominee. Then upon what was his harsh denunciation based?

First of all, Dean Pollak says he decided to oppose the nomination after "reading press accounts of the testimony." At this point Dean Pollak felt compelled to notify the committee of his desire to testify against the nominee. It is interesting to note that Dean Pollak requested to testify prior to the time, according to his own testimony, that he had even made a summary review of any of Judge Carswell's opinions. According to his testimony he began reading Judge Carswell's opinions on the evening that he asked to testify. Even upon his appearance before the committee it is to his credit that he admitted:

> I don't begin to suggest that I have read the entire range of his work or indeed his opinions on the court of appeals . . .

So we start off with a witness who was opposed to the nomination prior to reading any of his opinions, who did not read any of his opinions on the court of appeals, and who admits he briefly reviewed some of his opinions on the district court which were published in the Federal Supplement.

Now I understand that Dean Pollak's colleagues and proteges at Yale University consider him to be a brilliant man and I would not quarrel with that for one moment. But his testimony reminds me of an observation made by Louis Nizer in the introduction to his book, "My Life in Court." Mr. Nizer, as I recall, observed, from his lifetime as a lawyer, that preparation makes the dull appear bright and the bright brilliant.

Dean Pollak has demonstrated to us that lack of preparation makes the brilliant appear ridiculous. So even though his testimony has little bearing upon the merits of this nomination, it does contain a lesson for students of the law which may be beneficial to them, and in that light perhaps his testimony has served some purpose.

Dean Pollak has also given us an interesting lesson, an insight into the workings of the news media. If Dean Pollak has shown himself to be a poor witness, he has revealed himself as a skillful propagandist. He understands not only how to use the prestige of his title, but also undertsands the headline value of a rash, though unsupported, accusation.

Thus the careful, deliberate, and considered judgment of other witnesses who testified on the basis of their personal and professional knowledge of the nominee, and even those who testified against the nominee on the basis of having studied his record, did not receive the same attention from the news media that was paid Dean Pollak.

It is an unfortnuate fact of life, I suppose, that the actions of a zealot and the words of a demagog are more newsworthy than those of other acknowledged men of worth.

Now I do not want to belabor the testimony of Dean Pollak. Even though it has been widely quoted, it can hardly bear upon the judgment of any fair-minded man who takes the time to carefully consider it. But Dean Pollak's testimony is interesting in that it gives us some insight into the mind and motive of an extremist—in this case a man with extreme or, to use Dean Pollak's term, zealous concern for the expansion of civil rights or, in Dean Pollak's case, minority rights and criminal rights.

His quick decision to oppose the nominee and testify against him before reading a single case gives us a clearer insight into the compulsive and emotional reaction of Dean Pollak and others like him to any man or issue that can be identified along liberal-conservative lines. He reveals to us a state of mind which is shared among those within the philosophical orbit of the Washington Post-New York Times axis.

I think it is revealing, for instance, to consider Dean Pollak's attitude when questioned by Senator HRUSKA concerning the nomination fight over Judge John Parker. In reply to Senator HRUSKA, Dean Pollak refers to, "the adjectives you use in referring to Judge Parker, the brilliance, the excellence, the ability that you properly ascribe to him." Dean Pollak admits that, in regard to Judge Parker, "I thought him indeed a very able judge." Again, in reference to Judge Parker, Dean Pollak says:

> He was a very able judge, of very considerable distinction.

It is interesting to note Dean Pollak's acknowledgment of Judge Parker as a great jurist, but not surprising. Even Chief Justice Earl Warren said, in 1958:

> No judge in the land was more truly distinguished or more sincerely loved. His contemporaries appreciated and honored this man's qualities, and in the judicial history of the Nation his great reputation will endure.

In view of those acknowledged tributes, one would obviously conclude that Dean Pollak, a self-styled historian of the Court, would view his rejection as a mistake. But even in view of all this, Dean Pollak will not admit that Judge Parker's rejection was a mistake. He will only begrudgingly acknowledge that, "it has been to my mind a very real question as to whether the Senate was not in error in declining to consent to his nomination."

Again when pressed upon this subject, Dean Pollak says:

> I have long entertained doubts whether it was not a great mistake to fail to confirm Judge Parker's nomination.

But Dean Pollak cannot bring himself to admit or acknowledge that it was, in fact, a mistake.

Why?

Dean Pollak gives us a clue when he says:

> He wrote a number of opinions with which I disagree.

That is the truth of the matter. Even in the case of an acknowledged jurist of true greatness like Judge Parker, Dean Pollak and those like him simply will not admit that they have a place on the Supreme Court of the United States.

And this is the heart of the matter with regard to this nominee, "he wrote a number of opinions with which I disagree," therefore there is "a real question in my mind" whether he should hold any office of authority within our system of government.

And to show that they learn nothing and never change, consider the editorial of April 23, 1930, wherein the New York World summed up the case against John J. Parker to be Associate Justice of the Supreme Court:

> It is Judge Parker's total lack of a distinguished record of public service and the total lack of proof that he has any distinction as a jurist which seems to us above all else to justify the Senate in saying that his nomination does not measure up to the standards which the American public rightly exepcts to see attained in the nomination of a Supreme Court justice.

Now they begrudgingly admit this man they called mediocre to be, along with Learned Hand and a handful of others, to be among the truly great jurists of our time.

And it is further revealing to note that Judge Carswell is not even the first nominee they have blamed with this charge of mediocrity within the past year. When the Haynsworth nomination was sent to the Senate, the Washington Post said the President "has not distinguished himself in his first two opportunities to name judges to the Supreme Court," and called for men who were "truly distinguished."

So now we have it laid out. According to the Washington Post, Chief Justice Warren Burger was not distinguished. According to the Washington Post Judge Clement Haynsworth was not distinguished. And now, we are told that Judge Carswell is not distinguished.

If only they had the courage and simple honesty to admit that they do not regard anyone distinguished until they have adopted their views.

Thus, District Judge Frank Johnson of Alabama becomes a "truly distinguished judge" on no other basis than the fact he has followed "the line," has not written any opinions with which Dean Pollak and his friends can disagree.

Of course, the charge of mediocrity is so transparent and absurd when viewed in the light of other testimony and in light of Judge Carswell's duties and responsibilities as a trial judge that any fairminded man without an ax to grind, cross to bear, or a cause to champion, will dismiss it out of hand.

Mr. President, I will speak again later in the debate on Judge Carswell.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SPONG). Without objection, it is so ordered.

Mr. BYRD of West Virginia. Mr. President, may I ask the distinguished Senator from Indiana if at this moment he has any other speakers in mind? We have had a quorum call that has been going on for 15 minutes. I wonder whether or not any Senator in opposition is ready to speak.

Mr. BAYH. Mr. President, we have a colleague who wishes to speak but who has had difficulty getting here from a luncheon appointment. I trust he will arrive in short order. In his absence, if I may seek recognition, I might make one or two observations with respect to the remarks made earlier by two of our colleagues.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. Mr. President, I listened with a considerable amount of interest to the comments made by our distinguished colleagues from Colorado (Mr. ALLOTT) and Mississippi (Mr. EASTLAND), the distinguished chairman of the Committee on the Judiciary, in support of the nominee. I must say those two colleagues of ours make worthy advocates and strong supporters of any nomination.

I thought perhaps, on behalf of some of us who are concerned about this nomination, it might be helpful to try to put some of the points that were raised in a little different perspective, at least from the standpoint of some of us who are not in complete agreement with the points raised by the two previous speakers this morning.

Our distinguished colleague from Colorado kept discussing the fact that during the presidential campaign the now President of the United States stressed repeatedly, the need to provide a strict constructionist, someone who would provide balance to the Court. In reviewing some of the Court's decisions, I suppose it is within the realm of reason to suggest that a bit of balance is needed.

I have not yet determined in my own mind how one defines the term "strict constructionist," but I think it would not do the President justice to let his campaign speeches, and indeed the pledge that he made upon being elected, stand with just the term "strict constructionist," because he went further, and I think accurately so, and suggested that he was going to nominate strict constructionists who were men of distinction.

I would hope that the boyhood ideals of the President to whom he referred repeatedly, men like Justice Cardozo, Justice Brandeis, and Justice Holmes, would be more in the stature of men of distinction than the nominee presently before us.

I personally do not quarrel with the President's right to choose a strict constructionist, but I think there must be strict constructionists who would not arouse the deep concern of literally hundreds of learned lawyers, law school deans and faculty members of our institutions of higher learning across the country. That has been the result of the present nomination—deep and dedicated concern that often has not been easy for those who have signed various letters and petitions, and indeed, some advertisements that have been brought to my attention.

In fact, it has been brought to the attention of the Senator from Indiana that some persons who have signed the various documents expressing concern have been personally threatened with punitive measures, and that even one or two institutions at which they taught had been threatened with certain punitive measures, if the names were not removed and a denial were not forthcoming from the professors who had expressed their concern.

I think it is important for us to recognize that we are choosing one of nine members of the Supreme Court of this country. I would hope it would be possible for the President of the United States to find a man who was a strict constructionist, who was a man of distinction, worthy to sit on this High Bench with eight of his colleagues.

As one looks at the record of the present nominee, I wonder in my own mind whether in fact he even fits the criterion ascribed to him by our distinguished colleague from Colorado as a strict constructionist. A strict constructionist is one who does indeed try to strictly apply the law and apply the constitutional provisions involved to the facts of each case. It seems that, instead of following that principle, the nominee has tried to set out on a course of his own, not to sit passively and determine what he feels the Constitution should be, but actively to pursue his own basic philosophy as applied to the cases in question. Why else would he have been reversed as many times by the Fifth Circuit Court of Appeals—two and one-half times the rate of other southern Federal district judges—as has been the case?

Very distinguished adversaries, if I may categorize them as that, the Senator from Colorado and the Senator from Mississippi, made much of the fact that this nominee had been before our Judiciary Committee and before the Senate on three previous occasions. I think that is accurate.

But I call attention to the fact that on the first occasion, when the nominee was nominated as a Federal district attorney, there were no hearings at all held by any committee. The second time, when the then district attorney was nominated to the post of district court judge, the record of the hearings, which I have before me, discloses that the committee met at 10:40 and adjourned at 10:55 the same day. In other words, there were 15 minutes of hearings held. The same is true of the record at the time the nominee was proposed for the circuit court of appeals.

I think it is fair to say that, rightly or wrongly, the only time the Senate of the United States has had the opportunity thoroughly to explore the quallfications of the present nominee is now. And when a man is nominated for a position on the Supreme Court, it is only fair to suggest that his record on the bench, his past life, and what he stands for should be subject to closer scrutiny than when he is nominated for a lower post. I think that, to be consistent, he should have been held to the same standards; and perhaps the Senate erred in not finding earlier some of the information which was disclosed only after the nomination to the High Court was made.

The Senator from Mississippi, the distinguished chairman of the Committee

on the Judiciary, has provided for the RECORD the number of cases which have been postponed as a result of one judgeship being vacant. Mr. President, this is also a matter that concerns the Senator from Indiana. But I wonder if the the Senate is the body totally responsible for that; because, indeed, if the President had sent down the name of a different nominee on the first occasion, or even this time, I think our experience with the confirmation of the nomination of present Chief Justice Burger would reasonably lead one to believe that another nomination might well have been confirmed a long time ago.

Although I am concerned about the number of cases that have been postponed, and the fact that it is incumbent upon us, as quickly as we can consistent with the responsibility we bear, to fill this vacancy, we must recognize that whom we appoint is at least as important as when we appoint him; and that the present nominee, if confirmed, will probably sit on that Court for 25 years, long after the man who nominates him leaves the White House, and long after those of us who support him or oppose him will no longer be privileged to serve in this body. If history has taught us anything over the past decade or so, it has certainly taught us that the decisions of the Supreme Court have had a more far reaching and lasting effect on the course of our history and on the lives of our people than perhaps all the activities of the other branches put together. For that reason, I think it is absolutely imperative, although it is important that we fill the vacancy as rapidly as we can consistent with our responsibility, that we do not overlook the fact that this is an appointment for life. It is important that we get the best man we can to put on that great bench.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. PROXMIRE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PROXMIRE. Mr. President, on January 27 of this year I announced in this Chamber that "I will vote against Judge Carswell for the Supreme Court, because Supreme Court appointees should meet a standard of excellence, and Carswell does not."

I pointed out then, Mr. President, that the Supreme Court is one of the three coequal branches of the Federal Government, enjoying enormous power, importance, and prestige. The Supreme Court is the final voice in the interpretation of the Constitution of the United States. As such, it has the power to invalidate acts of both Congress and the President.

The Supreme Court of the United States epitomizes the country's dedication to the concept of the "rule of law." In times of severe stress and upheaval, the court has stood for orderly change within the existing legal framework. The strength of the Supreme Court comes from its remarkable flexibility, which allows for expansion and development in the interpretation of the Constitution of the United States, as demanded by changing political, social, and economic values.

The Constitution of the United States has managed to serve as a framework for our form of government longer than any other similar document in the history of mankind. And why? Mr. President, I think in large part the answer is because of the role of the Supreme Court. The Court has served to accommodate the existing system to change—placing the emphasis on evolution rather than revolution.

The Supreme Court has been the mainstay of hope for those Americans who felt left out of American life but who, because of the very existence of the Court, decided to try to make the system more responsive to their needs; these people looked to the Court for protection; they turned to the Court to redress legitimate grievances against outmoded philosophies in all areas from the political sphere, to economic relationships, to social customs.

In recent times the Supreme Court as well as the entire legal structure has come under sharp attack from extremist elements on both the political right and left. For this reason alone, a new appointee to the Supreme Court of the United States must have within him a quality which inspires trust and confidence. His background should not be such as to make him unacceptable to significant segments of our society.

Mr. President, I regret that Judge G. Harrold Carswell is not such a man. As I said in January:

> In my view it is not enough for a Supreme Court Justice to have no strikes against him. He must have a positive record of distinction. He must be among the very top in the legal profession. He must have demonstrably high intellect and understanding.

While we may not necessarily agree with his judicial views in a particular case, when it comes to a Justice of the Supreme Court, we should at the very least be able to respect his judgment, integrity, and intellect. We must be able to respect his reasoning processes. Above all, we must have confidence in his legal ability.

In examining Judge Carswell's credentials I found them to be "distinguished by their mediocrity. They show the heights to which an average intellect can reach by riding the coattails of political favoritism." His blatantly racist political speech in 1948, together with his continued inability to overcome his racial beliefs in reaching judicial decisions, as well as his general lack of distinction, demonstrate a shallowness in the judicial temperament so necessary for a Justice of the Supreme Court if he is to interpret and refine the Constitution as demanded by the rapid evolution of political, social, and economic values.

As I stated previously, Mr. President:

> I have regretfully come to the conclusion that Judge Carswell does not have the means or the vision to serve effectively on the Supreme Court. . . . Supreme Court nominees should meet a standard of excellence, and Carswell does not.

Though no one has argued that Harrold Carswell's record as a judge indicates any particular legal competence or brilliance, it has been said that his record indicates Carswell has some technical understanding of the law. But to become an Associate Justice of the Supreme Court of the United States, mere technical competence in the law is not enough. It is not enough to be free from moral or ethical conflicts in one's business ventures. It is not even enough to share the President's view of constitutional construction. All of these may be important, but they are not enough. An Associate Justice of the Supreme Court must have something more.

I think all of us know that with the overwhelming majority of lawyers and judges, the greatest distinction they aspire to is to be a Justice of the Supreme Court. The number of people who would like to be on the Court is very great. There are scholars representing every kind of viewpoint—conservative, liberal. There are scholars in all parts of the country. There are able lawyers and judges who would be brilliantly qualified—and I mean hundreds of them. That is why this nomination by President Nixon—who, incidentally, has made some very distinguished appointments in other areas—is so disappointing.

The appointments which a President makes to the Supreme Court can and often do affect American life long after that President's term in office expires. Two of the present members of the Court were appointed by a President who died in office 25 years ago. In making his Supreme Court selections, then, a President must look beyond the immediate political battlefield and project his vision years, even decades, ahead. What is President Nixon's attitude with regard to the Court? What role does he expect it to play?

On the question of whether the Supreme Court should interpret or make law, President Nixon said:

> Now it is true that every decision to some extent makes law; however, under our Constitution the true responsibility for writing the law is with the Congress. The responsibility for executing the law is with the Executive and the responsibility for interpreting the law resides in the Supreme Court. I believe in a strict interpretation of the Supreme Court's functions. In essence this means I believe we need a Court which looks upon its function as being that of interpretation rather than of breaking through into new areas that are really the prerogative of the Congress of the United States.

In discussing appointments to the Court, the President made it clear that it is important to get extremely qualified men on the Court. He said:

> The President cannot and should not control the decisions of the Supreme Court. On the other hand, the President does have some effect on the future of the Court because of his prerogative to appoint its members. In addition to getting an extremely qualified man, there are two important things I would consider in selecting a replacement to the Court. First, since I believe in a strict interpretation of the Supreme Court's role, I would appoint a man of similar philosophical persuasion. Second, recent Court decisions

have tended to weaken the peace forces, as against the criminal forces, in this country. I would, therefore, want to select a man who was thoroughly experienced and versed in the criminal laws and its problems.

When running for Governor of California in 1962, Richard Nixon further expanded his views of judicial appointments saying:

I think judicial appointments first should be made on the basis of the qualifications of the potential appointee. I think the recommendations of the Bar Association should be given great weight. There should also be a thorough check on the part of the Governor's staff itself supplementing the Bar Association because lawyers are not, I find, the best judges in this instance. They are good judges on technical grounds and technical qualifications but they sometimes miss other factors that can have a great bearing on the judge's appointment.

The other point that I feel very strongly about is that judicial appointments, above all others, should be made on the basis of legal qualifications rather than on the basis of party. If I have two people that are equally qualified, I obviously would hope to appoint a Republican. But there will be Democrats as well as Republicans appointed.

And again in 1968 Richard Nixon the presidential candidate said:

But my general standard I will lay out for . . . the appointment of justices, and this is going to surprise you. I think Felix Frankfurter perhaps stated it best. Felix Frankfurter was a liberal in his thinking . . . during the 1930's, and yet in his last 10 years on the Court was a strict constructionist.

It was his view that the Congress had the right and responsibility to write the laws and it was the court's responsibility to interpret the laws . . . I believe in that kind of appointment.

I'm not so concerned about whether a man is a liberal or a conservative. I am more concerned about his attitude toward the Constitution.

When President Nixon selected Chief Justice Warren Burger in May 1969, the Washington Post complimented him for not naming a personal or political friend and for setting high judicial standards for his appointees. The Post commented editorially May 25, 1969:

Aside from its self-righteous overtones, President Nixon's explanation of his appointment of Judge Burger to the chief justiceship may have an important influence on executive-judicial relations in the years immediately ahead. The President appears to have committed himself to the principle of not naming close personal or political friends or associates to the Supreme Bench. It is clear that the avoidance of cronyism in the choice of a chief justice was directly related to the Fortas case. But Mr. Nixon also said that Attorney General Mitchell and other close personal and political friends are not under consideration for the Fortas seat.

All in all, the President has set high standards for his own appointments to the bench. These standards will have fresh currency every time he has an important judgeship to fill. But the proof of high qualifications—and the ultimate test of the President's intentions—will lie not in words but in the demonstrable experience, the proven integrity, the self-evident mental capacity and the actual judicial attitudes of the President's nominees.

In an off the record interview given to reporters after the Burger appointment was announced, President Nixon said he felt it was vitally important to nominate a man to the Court who, if possible, could be approved by the Senate without violent controversy—hopefully with a strong vote of approval. In the same interview the President went on to say that of all Supreme Court Justices he most admired Justices Holmes, Brandeis, Cardoza, and Frankfurter; and that he agreed most with the famous Holmes-Brandeis dissents.

On the basis of his statements we can conclude that President Nixon would appoint men to the Supreme Court who are "strict constructionists, thoroughly experienced and versed in criminal law, and extremely well qualified." He feels strongly that judicial appointments "should be made on the basis of legal qualifications rather than on the basis of party." He is "not so concerned whether a man is a liberal or a conservative" but he is concerned about his attitude toward the Constitution. The President also finds it desirable to nominate, if possible, someone whom the Senate can approve without violent controversy.

Now in the matter of G. Harrold Carswell it can possibly be said, if a reading of his opinions reveals any legal philosophy, that he tends to be a strict constructionist. But he is far from being well versed in criminal law and he is certainly not extremely well qualified. If anything can be said of Carswell, it is that he was chosen on the basis of party rather than on the basis of legal qualifications, thus inverting the President's prescription. Since the President does not care if his nominee is liberal or conservative, Carswell's conservative racist background is no disqualification. But, unfortunately, the President's nomination does not seem to have avoided violent Senate controversy.

I am puzzled though as to why a President of the United States who chooses as his judicial idols such giants as Justices Holmes, Brandeis, Cardozo, and Frankfurter should nominate a man of the caliber of G. Harrold Carswell to the Supreme Court. In suggesting Carswell as a Supreme Court nominee, clearly the President's chief political and legal advisors failed to consider the President's own views on judicial appointments.

In August 1948, Harrold Carswell as a candidate for political office delivered a speech. In his speech, Carswell said, in part:

In the midst of all this, we look to the land of the U.S., great, prosperous, the richest and most powerful nation on earth, and ask, 'America, are you ready to resume your leadership? Are you prepared to defend it if need be your birthright?' It is a sad picture.

Foremost among the raging controversies in America today is the great crisis over the so-called Civil Rights Program. Better be called, 'Civil-Wrongs Program.'

As part and parcel of this same rotten vote-getting scheme, the F.E.P.C., the so-called Fair Employment Practices Committee, is a sham. Every businessman should realize the serious implications of such a piece of preposterous legislation. It would mean that here in Gordon, if we are hiring two telephone operators, both white, and some Negro girl applies for the job, we may get in court with the Federal Government because we have supposedly 'discriminated'. It would take thousands of Federal agents to enforce such foolish measures and we shall not tolerate it.

I am a Southerner by ancestry, birth, training, inclination, belief and practice. I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed, and I shall always so act. I shall be the last to submit to any attempt on the part of anyone to break down and to weaken this firmly established policy of our people.

If my own brother were to advocate such a program, I would be compelled to take issue with and to oppose him to the limits of my ability.

I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.

Though he now specifically renounces and rejects these words which he finds abhorrent, the fact that remains that G. Harrold Carswell gave that speech.

Many people have attempted to pass the speech off as the speech of a youthful politician. But as Louis Pollak, dean of the Yale Law School, observed, had Carswell's speech attacked Jews or Catholics, Carswell's name would have been withdrawn as soon as this speech had been unearthed. I would like to quote from Dean Pollak's testimony before the Judiciary Committee dealing with the 1948 speech in which he not only points out that the Carswell nomination would have been withdrawn had he attacked any group other than Negroes but also shows why the analogy between Carswell and Justice Black is weak and falls flat.

I would ask the committee to address once again the significance of the nominee's now notorious speech of 1948, a speech which he, I am happy to say, has forthrightly repudiated. I do not think, I would add that I have never thought, that the 1948 speech standing alone irretrievably disqualified the nominee, but what that speech did do was to sharpen the question which this committee and the Senate faces with respect to every nominee for the Supreme Court. Has the nominee given evidence of the highest level of professional and public responsibility save only the Presidency, which lies within the gift of the American people? That is the question which is sharpened, put in sharper focus by the 1948 speech.

Here the question is sharpened in the sense that, confessedly, this nominee began his professional career with a set of beliefs wholly antithetic to the central purposes of our constitutional democracy. It might be possible to surmount such a handicap. There has been discussion by prior witnesses and by members of this committee of the example of Mr. Justice Black. Certainly a complete analogy does not lie. The Justice did have a connection with the Klan, but at very much the same time he was himself a lawyer emphatically and vigorously representing black citizens of his own State. More to the point, of course, before Justice Black was called to the Supreme Court of the United States, he had become a well-known figure of national consequence. There could hardly be doubt of what his basic principles were when he was appointed to the U.S. Supreme Court 33 years ago.

One might, I suppose, go back to the elder Justice Harlan. That distinguished Justice was, it is hard to remember it but he was, an outspoken foe of the 13th amendment to the Constitution, and yet before the Justice came to the Court he too had become a figure, a great public figure of distinction, and one whose own public views were clearly transformed into commitment to and support of the fundamental principles of the post-Civil War amendments, and so he lived to be the Justice who dissented with such distinction in the civil rights cases in Plessy vs. Fergeson.

Can we find in the present nominee any comparable demonstration? To ask the question, as Mr. Chief Justice White was wont to say, is to answer it.

I wish the committee to understand that I do not question Judge Carswell's good faith in repudiating a speech of which he and of which all of us I am sure are ashamed. What I ask is, What symbolism would attach to Senate confirmation as Associate Justice of the Supreme Court of the United States of a lawyer whose later career offers so meager a basis for predicting that he possesses judicial capacity and constitutional insight of the first rank? What symbolism, I ask, and in answering the question I remind you of the dictum of the late Mr. Justice Jackson: One takes from a symbol what one brings to it.

I put it to this committee that if the nominee's unfortunate speech, and I say this advisedly, if that speech had been an attack on Jews or an attack on Catholics, his name would have been withdrawn within 5 minutes after the speech came to light. We are asked to ignore the speech he actually gave, a speech declaring in effect that America is a whites-only country. We are asked to ignore it as a youthful indiscretion, just the kind of thing one had to say if one wanted to get ahead in Florida politics vintage 1948.

I submit with all respect that to confirm the nominee on this record is to make a statement of a different sort. That lukewarmness to the rights embodied in the Constitution, and most especially rights of black people, is not just Georgia politics vintage 1948 but American politics vintage 1970, and on that reckoning it is not Judge Carswell who is accountable, not his good faith which is in question. What is called into account is the constitutional commitment of the American people today, and most particularly on the U.S. Senate, because it is in your hands, you as Senators of the United States. It is you who must choose whether to consent to this nomination.

One gets out of a symbol what one brings to it even if that symbol is our highest court, even if that symbol is the constitution of the United States to which we all owe true faith and allegiance.

Many prominent lawyers, both practicing and teaching have come out in strong opposition to Carswell. In another part of his testimony before the Judiciary Committee, Dean Pollak said:

I submit to the committee that in nothing that I have read of the judicial work of the nominee are there any signs, and I say this with great deliberation, aware of the importance of what I am saying, are there any signs of real professional distinction which would arise one iota out of the ordinary.

On the basis of the nominee's public record, together with what I have read of his work product, I am forced to conclude that the nominee has not demonstrated the professional skills and the larger constitutional wisdom which fits a lawyer for elevation to our highest court. I am impelled to conclude, with all deference, I am impelled to conclude that the nominee presents more slender credentials than any nominee for the Supreme Court put forth in this country; and this century began, as I remind this committee, with the elevation to the Supreme Court of the United States of the Chief Justice of Massachusetts, Oliver Wendell Holmes.

Mr. LONG. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. LONG. Mr. President, is the Senator aware of the fact that any time a judge says he finds the law to be clear and holds it to be what the Founding Fathers always intended it to be and follows legislative history, there is nothing out of the ordinary involved. He will not be famous for doing what is obviously right.

It is when some upside down thinker upsets the law and tries to be a usurper that he does something out of the ordinary.

So, when we get down to it, when a judge is hearing cases where the law is established and clear, it should not be considered to be out of the ordinary or to appear to be out of the ordinary, having just to carry out his job.

It is when a judge seeks to change things that he attracts a great amount of attention.

Mr. PROXMIRE. Mr. President, I read the colloquy the Senator from Louisiana had yesterday with the Senator from Indiana and others. And the Senator from Louisiana is, I think, without peer in the Senate for his eloquence and persuasiveness. I have said that a number of times and I feel it. But I simply cannot understand how the Senator with his eloquence can say that we ought to confirm a man's nomination for the Supreme Court because he is an ordinary fellow, a C student instead of an A student. Rather than obtain a man with distinguished ability, intellect, and capacity, the Senator says, "Let us get the ordinary fellows and put them on the Supreme Court."

I think the Senator knows far better than I—and I am not a lawyer—that the Supreme Court has tremendously complex and demanding problems to solve.

It is not a matter of whether a man is a strict constructionist or a liberal constructionist of the Constitution. It is a matter of whether a man possesses clear intellectual distinction.

Mr. LONG. Mr. President, is the Senator a lawyer?

Mr. PROXMIRE. I am not a lawyer—one of my few clear quallfications for the Senate.

Mr. LONG. Mr. President, I want to have it clear in my mind because I want to address the Senator in one capacity or another.

Is the Senator aware of the quotation from Washington's Farewell Address in which that great President and leader of this Nation said that if one wishes to change the law, he should do it in the manner provided in the Constitution and the law, and he should not do it by usurpation? Is the Senator aware of that?

Mr. PROXMIRE. I am not aware of that specific quotation. But I think there is a very strong argument to be made in favor of that kind of construction of the Constitution. And, indeed, President Nixon has indicated his support for that, as many others have. I have no particular argument with that view. I think it is desirable that the Constitution be used as a vehicle that can accommodate change.

I think this is one of the reasons why it has been preserved for so many years and is the only Constitution that has lasted as long as it has. But I think the Senator can make a good case for strict construction. But that is not my argument.

The fact that this man is a strict constructionist is all right. I argue with him on the ground that he is not a distinguished attorney or judge. And I think that the Supreme Court deserves men of distinction and outstanding, intellectual capacity.

Mr. LONG. Mr. President, if the Senator will be kind enough, may I try to make the point I intended to make?

Fundamental to a government under the law and to law and order in this Nation is the fact that no branch of this Government should engage in usurpation.

I have always felt that it is very bad for the Court to engage in legislation. The Court should not invade the legislative branch, just as Congress should not invade the judicial branch.

Is the Senator aware of the fact that the Constitution forbids us to issue a bill of attainder?

Mr. PROXMIRE. Yes, indeed.

Mr. LONG. Mr. President, does the Senator know what a bill of attainder is?

Mr. PROXMIRE. Yes, indeed.

Mr. LONG. What is it?

Mr. PROXMIRE. Mr. President, the Senator from Louisiana always comes on the floor and does this to me—usually when I am dealing with the subject of oil. However, I welcome it on this occasion, too.

A bill of attainder is an attempt by legislative action to affect a particular, specific individual on the basis of the legislative action—for example, to punish an individual or to penalize an individual for some action he has taken rather than to pass a law which would have general application to all citizens. And the law would therefore have to be enforced by the executive branch and perhaps interpreted for its constitutionality by the courts.

Mr. LONG. Mr. President, if we sought to do that, we would be invading the role of the judiciary in its job of saying whether someone is guilty of committing a crime. That is not our job. We would be doing something evil. We would be engaged in an act of usurpation.

When one goes on that Supreme Court and proceeds to hold that the Constitution says something that it does not say, or proceeds to rule that it does not mean what the Founding Fathers intended, he is guilty of an act of usurpation.

Whether the Senator wants to admit it or not, men have been put on that Court for the express purpose of reversing prior decisions. And in my judgment, that is an act of usurpation.

Some of our liberal friends have happily supported men of that sort.

In my case, when the name of Judge Fortas was submitted to the Senate for his confirmation as Chief Justice of the United Sttaes, even though I was one of the party leaders for the Democrats, I had to inform the President—who was a very dear friend of mine and also a very dear friend of Judge Fortas—that I could not support him. Justice Fortas came up with some innovative ideas that played a major part in the judgment of this Senate; that helped to increase murder, armed robbery, and rape by 100 percent in this country for over a 10-year period. According to your statement, he was the sort we need on the court. I

made the statement to my people that I could not vote to make a man Chief Justice or even to continue a man on the court if one were guilty of that kind of intellectual mischief, brilliant and intellectual conduct though it might be.

I might say to the Senator that all we are talking about here is confirming a man who has a way of saying, "Here is what the law is although some people may not like it. If that is not what the laws is, Congress should change it." I must applaud that lack of distinction.

Mr. PROXMIRE. May I say to the Senator from Louisiana that I applaud his ingenuity in getting away from the point. I am not talking about Justice Fortas or Justice Holmes; I am talking about Judge Carswell. I am not criticizing him for being a strict constructionist. I would support a strict constructionist if he were qualified. I said nothing about his being a strict constructionist.

What I am opposing him for are his blatantly conspicuous racist attitudes; and I am opposing him because he is a man who, on the basis of his record, is not qualified.

Mr. LONG. Was the Senator talking about that country club episode?

Mr. PROXMIRE. I am talking about a whole series of episodes.

Mr. LONG. The country club episode is one I find to be somewhat amusing. That episode was about 1955.

Mr. CASE. It was 1956.

Mr. LONG. 1956. In 1964, 8 years after that, we had the Civil Rights Act of 1964, which was the big one, on the floor of the Senate. I personally offered an amendment to make crystal clear that a private club could discriminate in its membership in any fashion it felt like, if it were truly a private club, and that amendment was agreed to by the unanimous vote of the Senate.

Mr. PROXMIRE. But in that episode they took a public facility and made it private.

Mr. LONG. And you voted to make it 100 percent legal to do that. You voted for that. Explain why you should be voted back in the Senate when you say a man should not be on the Court for doing what you voted to do. You voted for that. How do you contend you should be a Senator and he should not be a judge?

Mr. PROXMIRE. The Senator could not be more wrong. I did not vote that we should turn public facilities into private clubs for the purpose of preserving segregation of the races and to keep black members from enjoying the public facilities.

Mr. LONG. Senator, you had a bill on this floor now known as the Civil Rights Act of 1964. It was managed by Hubert Humphrey who stood in this place and managed it. I remember the language. It said: "This does not affect bona fide private clubs."

It was said someone might question whether a club was in good faith if one of its purposes was to maintain segregated facilities, and I substituted the words "in fact" for the words "bona fide" with the advice of the same people who were advising Mr. Humphrey. Hubert Humphrey agreed, and the Senate voted for it unanimously. Why did you vote for it?

Mr. PROXMIRE. I did not vote for that at all.

Mr. LONG. It was unanimous. Would you like to stand here and say you did not know what you were doing?

Mr. PROXMIRE. I think the Senator knows perfectly well that when I voted for the Civil Rights Act of 1964 I did not vote to take a specific public golf course and make it a private club so that he could exclude blacks from membership in that golf course.

Mr. LONG. You voted to make legal in 1964 what that man did in 1955.

Mr. CASE. Mr. President, will the Senator yield?

Mr. LONG. It absolutely is beyond my comprehension why a man would take the floor now and say someone should not be confirmed to be on the bench because he did what you voted for.

Mr. CASE. Mr. President, will the Senator yield?

The PRESIDING OFFICER (Mr. HOLLAND). Does the Senator yield?

Mr. PROXMIRE. I yield.

Mr. CASE. Almost the only happy aspect of this unhappy episode is the ability that his colleagues have to observe the extraordinary mental agility of the Senator from Louisiana. It takes a situation as difficult as this to bring him to his full power. And yet even he is not capable of handling this job.

It is obvious that to have voted or not to have voted for language which was intended from the beginning to make it clear that a really true private club was not within the reach of the Civil Rights Act has nothing whatever to do with the question of whether public facilities should be taken by people deliberately and turned into a private club for the purpose of excluding blacks who formerly by law had the right to use those facilities.

This is perfectly clear to my friend from Louisiana as his benign countenance already indicates. I do not think that saying it 10 times is going to make it more true than saying it one time. I think I will stop.

Mr. PROXMIRE. I think the Senator is saying what I was trying to say and that he said it better.

Mr. CASE. Not as well, but I wanted to rest the Senator's vocal cords for a moment.

Mr. LONG. Mr. President, will the Senator yield?

Mr. PROXMIRE. If the Senator is going to say it again, he may say it again but I will say what the Senator from New Jersey and I have been saying. What Mr. Carswell did was to take a public facility that was open to Negro citizens to use, and by making it into a private club denied them using it. That is different than voting for the Civil Rights Act; and all the eloquence of the Senator from Louisiana—and he can talk many days on it and I expect he will—will not make that equivalent to voting for the Civil Rights Act.

Mr. LONG. Seeing the Senator from Washington present in the Chamber reminds me of an occasion when one of our friends took the floor to proclaim his outrage about the fact that someone made a speech. A labor leader—and I believe it was Walter Reuther—was visiting on Capitol Hill at the time. The man held a press conference to make a statement and a Senator demanded to know who authorized that man to go into that room to make that statement. At that particular time the distinguished chairman of the Committee on Commerce leaned over to me and said, "It is just a room. People can do all sorts of things in a room. How do you know what a man is going to do when he goes into a room?"

The Senator is talking about a piece of property; somebody sells the property. At one time all the property in this country belonged to the Government once we captured it from the Indians and when we successfully revolted against the Crown. Perhaps the Senator would hold that the U.S. Government is responsible for all the mischief that people have conducted on property that was once part of the United States in all history. I would hate to think that. People sell property; people do what they want with property. Sometimes they obey the law and sometimes they do not.

What the Senator was talking about was within the law and the Senator voted to make it clear it was legal 8 years after it happened. Now he wants to condemn somebody else for doing what he endorsed. I find it difficult to follow that rationale.

Mr. CASE. I do not want to paint this lily, or carry coals to Newcastle, or do any other exaggeration, but I am reminded of the remark of the Duke of Wellington, who was a very unpleasant fellow when he wanted to be, and who, when a preposterous statement was made in his presence would say, "Well, if you believe that, you can believe anything."

Mr. PROXMIRE. I thank the Senator for that conclusion to our part of the colloquy.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. MILLER. I believe the Senator a moment ago said something to the effect that Judge Carswell and his group organized a corporation to take over a public facility and transform it into a private, segregated facility. Is that about what the Senator said?

Mr. PROXMIRE. He organized a private club to take over the public facility. That is right.

Mr. MILLER. And to make it into a segregated facility?

Mr. PROXMIRE. He was one of those who took part in that.

Mr. MILLER. And in that operation, I think the Senator said, to make it into a segregated, private facility?

Mr. PROXMIRE. It was widespread public knowledge at that time that that was his purpose.

Mr. MILLER. I would appreciate it if the Senator would refer to the evidence he has as the basis for that statement.

Mr. PROXMIRE. I will be happy to do that. I do that later in my speech. I will be happy to accommodate the distinguished Senator from Iowa.

Mr. MILLER. Well, the Senator from Iowa can hardly wait for the evidence. The Senator from Iowa does not want to disturb the continuity of my colleague's

speech, but I am interested in where in the printed record this evidence will be found.

Mr. PROXMIRE. I will be very happy to supply it to the Senator. I am working on it now.

Mr. MILLER. I will be waiting.

Mr. PROXMIRE. Mr. President, I will say to the Senator from Iowa that the appendix of the hearing is replete with documentation of the connection of the nominee with the Capital City Country Club, the purpose of which was to segregate the golfing facilities to prevent blacks from using it. Let me give the precise pages, pages 333 through 373. That is 40 pages of documentation in the appendix.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. BAYH. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield first to the Senator from Indiana, because he has worked closely on this.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. PROXMIRE. Before I yield to the Senator from Iowa, I think the Senator from Indiana may help clarify the situation.

Mr. BAYH. Mr. President, I thought the question of our distinguished colleague from Iowa went to the question of whether this was public knowledge or not. If the matter that concerns the Senator is the real intent and purpose of the change in status of the golf course, I will be glad to help because I know he is a real stickler for not getting anything out of perspective, and I compliment him for that. The Senator from Indiana listened to the evidence on the deed to which the nominee added his name as a subscriber, and had the opportunity to read the front-page story in the Tallahassee newspaper, which described in some detail the confrontation that had gone on within the city council, and in which the first time the city council took this matter up, I think one of the councilmen—I think a Mr. Easterwood—objected to it, and they put it over. In that interim, Mr. Easterwood left the city council and was elected a county commissioner. Then, when he was no longer on the city council, the city council went ahead and passed this act. Mr. Easterwood was quoted as saying the city council should recognize the fact that the reason for this was to try to provide a segregated facility for a public facility which, by Supreme Court edict, could no longer be maintained.

Mr. MILLER. Mr. President, will the Senator from Wisconsin yield so I can ask the Senator from Indiana a question?

Mr. PROXMIRE. I yield.

Mr. MILLER. Is the Senator from Indiana referring to that newspaper account on page 261 of the hearings record?

Mr. BAYH. Yes, that is one of the stories to which I referred.

Mr. MILLER. May I say to my colleague from Indiana that I am familiar with that story, but I do not see the relevance of the story on page 261 to the statement made by the Senator from Wisconsin, as to which I asked for evidence to support his statement that Judge Carswell's corporation had organized a private club for the purpose of obtaining from the city a public facility, to transform it into a segregated private facility.

I do not believe that the Senator has been helpful by citing the story on page 261, because that story relates to a lease for $1 a year from the city of Tallahassee to a private corporation to which Harrold Carswell had no relationship at all.

Mr. PROXMIRE. Mr. President, may I say to the Senator from Iowa that all he has to do is read the first four sentences of that newspaper article. Here is what it says:

> For the price of $1 greens fee the city commission yesterday leased the municipal golf course—
>
> The municipal golf course—
>
> to the Tallahassee Country Club, a private corporation.
>
> The vote was 4 to 1, with Mayor J. T. Williams registering the objection.
>
> On a motion by Commissioner Fred Winterle, the commission also agreed to make the same deal on a Negro golf course—
>
> A Negro golf course, Mr. President—
>
> now under construction to "any responsible group" that wants to take it over.
>
> Asked if the course would be open to the public, Robert Parker, who represented the country club group, said "any acceptable person will be allowed to play."

This is the front page of the Tallahassee newspaper. If it was not public knowledge that the purpose of this corporation was to provide segregated facilities for white persons to use to play golf, I would like to know what that article means.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. MILLER. The Senator might be right in his interpretation of that. Of course, he is reading something into it. But it is all irrelevant, unless the Senator is claiming that Harrold Carswell was a member of the Tallahassee Country Club.

Mr. BAYH. He was a director of the corporation.

Mr. MILLER. I am sorry, but the Senator's statement on that point is not supported by the record at all.

Mr. PROXMIRE. I am sure it is.

Mr. BAYH. He was a subscriber.

Mr. MILLER. He was not even a subscriber. The Tallahassee Country Club was the original old corporation, organized back in 1924, which did, indeed, get a lease of the golf course, for $1 a year. But Carswell was never a member of that. Carswell was a member of the Capital City Country Club, Inc.

Mr. BAYH. Which was designed to take over that other corporation.

Mr. MILLER. I grant it did take over the other corporation, but that is not what this newspaper article is about at all.

Mr. BAYH. May I go through this from A to E, F, or G, so that perhaps I can make it clear?

Mr. PROXMIRE. I yield to the Senator from Indiana for that purpose.

Mr. MILLER. I believe the Senator from Wisconsin is confusing corporations.

Mr. BAYH. I do not think he is doing so intentionally.

Mr. MILLER. I do not think he is, either.

Mr. BAYH. I think it is easy to look at the record and become confused. But I think what we need to keep in mind is what was sought to be accomplished here, which I think is very clear.

Mr. MILLER. This article on page 261 talked about the Tallahassee Country Club. That has nothing to do with any corporation of which Harrold Carswell was a member. If the Senators will look at page 260, they will find an article relating to the corporation of which Judge Carswell was, indeed, a subscriber. We are talking now about the Capital City Country Club. The Senator will find that about a year after this article appearing on page 261, there appeared another article, which appears on page 260, which talks about the fact that the public can play:

> Although the new club is now a private organization, the golf course facilities are open to the public at daily, monthly or yearly green fees.

There are no cute words or phraseology such as in the other article the Senator from Indiana has talked about—which is not relevant—cute phrases such as "Any acceptable person will be allowed to play."

That is a phrase relating to that private corporation of which Judge Carswell was not a member.

Mr. BAYH. I think the Senator from Iowa should look a little bit more carefully at the whole thrust of what was sought to be accomplished, and put it all in perspective. At the time the Supreme Court of the United States had said that public facilities could no longer be segregated, and this was at the time a Pensacola case, I think it was, was decided in Florida. That was the time that this effort was made right there in Tallahassee.

Mr. MILLER. When was that?

Mr. BAYH. I call the Senator's attention to two affidavits that are contained in the hearing record on page 274, one by Christene Ford Knowles, and the other by Mr. and Mrs. Clifton Van Brunt Lewis, in which they express their feeling that it was general public knowledge that the purpose of this corporation was to provide segregated facilities.

There was a fellow by the name of Smith, I think it was Julian Smith—I cannot put my finger on it, but at some place in this record, I recall, during the hearings it was pointed out that Julian Smith said that he was one of the cosubscribers with Judge Carswell and Smith said that this was in the back of his mind, that he knew this was what it was for, and he was one of the fellows who signed the document to which the Senator from Wisconsin referred.

Mr. MILLER. Did the affidavits on page 274 relate to the Tallahassee Country Club Corp., which obtained the $1-a-year lease from the city, or did they relate to the corporation of which Carswell was a member?

Mr. BAYH. They relate to the general feeling in the community that the whole thrust of this venture was to try to create a facility that black people could not participate in.

Mr. MILLER. Recognizing the affidavits for what the Senator from Indiana suggests they say, it seems to me that a point should be made that when the Tallahassee Country Club got this course for a dollar a year from the city on February 15, 1956, the statement was made, in answer to a question as to whether or not the public would be permitted to take advantage of these facilities, by a representative of the Tallahassee Country Club—which Carswell had no membership in at all; he was not a subscriber, and he had no relationship to it at all—that "Any acceptable person will be allowed to play."

I think that most of us know that "any acceptable person" can be interpreted many ways. But I am wiling to suggest that the proper interpretation to be placed on it is in the same light as that suggested by the Senator from Indiana.

But that is not what we are talking about here. We are not talking about the corporation at all. We are talking about another corporation, to which Carswell was a subscriber, and that corporation was known as the Capital City Country Club, Inc.

The article in the newspaper that referred to this corporation came along on September 5, 1956. The other article, of February 15, 1956, related to the Tallahassee Country Club. But on September 5, 1956, we have an article that relates to the corporation Carswell was in. And what do we find, after Carswell gets into the corporation and that corporation gets into the picture? We find an article on the front page of the Tallahassee newspaper, that says:

> Facilities are open to the public at daily, monthly, or yearly green fees.

And no cute phraseology about "any acceptable person" being allowed to play.

It looks to me as though quite a change in attitude has taken place between the time the Tallahassee Country Club took over, to which that article on page 261 refers, and the time that the Capital City Country Club, took over, which is Carswell's corporation, and to which the article appearing on page 260 relates. I would suggest to my friend from Indiana that if, in fact, Judge Caswell had anything to do with any of the policies relating to the club, it looks to me as though he had a very affirmative effect, because of the change in terminology relating to the public's ability to play in this course.

But here, again, all I can find from the record is that he had no activity in the club at all. He was so inactive that after they organized this Capital City Country Club, Inc., they proposed 42 names from whom the members were going to select 21 as "original incorporators," and he was not even selected as one of those 21, because he had been so completely inactive.

So I do not see how we can impute any policy or any ideas to him with respect to the way this club is going to operate, except that I do invite the attention of my colleagues to the fact that there was quite a change in the front page stories regarding the public's ability to play. I think the article appearing on page 261 shows—when you talk about acceptable people—that in the setting you could very well be talking about whites only. But there is no equivocation on the new club in the article appearing on page 260.

(At this point Mr. SPONG took the chair as Presiding Officer.)

Mr. BAYH. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. BAYH. I think that if we examine the record carefully, we will find that we are talking about the same general transaction. The first corporation was established as a profitmaking corporation; and since they had been operating as a public facility prior to that time, they soon found out—I think it was in about a year's time—that they could not make a go of it as a profitmaking corporation. Then they tried to incorporate, and did incorporate, as a not-for-profit corporation.

The whole proof of the pudding is in the eating.

If the Senator from Iowa knows anything contrary to this, I wish he would tell me, because I certainly do not want to put anything over on him or anybody else.

The fact was that black people were not permitted to play on this golf course at any time, except in the early mornings, when they did permit the Florida A&M golf team to practice. Black people were not permitted to use the facilities.

I do not care whether it is for profit or not. It is only recently that black people were permitted to be a part of that golf course.

I think this is what the Senator from Iowa would be concerned about: What, indeed, was the practice of this institution?

Mr. MILLER. The Senator from Iowa is very definitely interested in that aspect of it. He is interested in looking at the evidence. If there are inferences to be drawn from the evidence one way or the other, the Senator wants to know what those inferences are. But when a statement is made that Judge Carswell and his group did this and this and this, the Senator just wants to know what the evidence is.

I know that the Senator from Indiana is also conscientiously trying to evaluate the evidence, but when he talks about a profitmaking corporation going into a nonprofit corporation, I must tell him that he is not talking about anything that is responsive to the Senator from Iowa's problem. The nonprofit corporation was organized after Judge Carswell got out of the profit corporation. I think that some of the opponents are not following the record very carefully.

Let me point this out to my friend from Indiana. There was a profit corporation which was the old Tallahassee Country Club, organized back in 1925. Then in 1935 it turned the course over to the city, during the depression. Later on, in 1954, 1955, or 1956, they said to the city, "The course is rundown. We want it back."

Finally, after the city council had met on it, they said, "Okay. Take it back for a dollar a year. We're losing $14,000 a year in the operation of this thing. It is rundown; and nobody likes the way it is going. Take it on for a dollar a year. You save us $14,000 out of the city budget."

So this private corporation took it on. Later on, another private corporation, for profit, known as the Capital City Club, Inc., of which Judge Carswell was a subscriber, came along and took it over from the previous private corporation for profit. Two private corporations for profit are in the picture so far—Tallahassee Country Club and Capital City Club, Inc.

Judge Carswell, of course, was only in this thing for a few months, put a hundred dollars in, and asked for his refund the following February. Then along came the third corporation, after he was long gone, known as Capital City Country Club, a nonprofit organization.

So when the Senator starts talking about a nonprofit country club, he is talking about stuff that has nothing to do with what we are talking about.

Mr. BAYH. If the Senator from Wisconsin will yield—I hate to try his patience like this—I share the concern of the Senator from Iowa that we not leave any misrepresentation here.

As I said yesterday in my remarks, I do not think we ever dealt with this particular item. But with respect to the covenant, the transfer of the property, I think the same thing can be said for that as can be said for this. I speak for myself and no one else. If we take one of these instances as an isolated instance, it is relatively inconsequential. But what some of us are struggling with is to try to find evidence to support the fact that Judge Carswell no longer shares the thoughts that he shared and expressed, most unfortunately, back in 1948. In that context, as a Federal district attorney, he participated in this corporation for a short period of time, and in which I think we have ample evidence, whether it is a profit or not-for-profit corporation, to prove the fact to the satisfaction of the Senator from Indiana, that the purpose of this incorporation, the whole thrust of this action was designed to maintain separate facilities. I think the fact that black people were not given equal access to this facility is ample proof of their motives relating to the incorporation.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. PROXMIRE. May I say to the Senators that I think we have gone over this enough now, so that the situation is pretty clear. The Senator from Iowa takes the position, as I understand it, that Judge Carswell was not one of the original incorporators or subscribers of the Tallahassee Country Club, that he was a subscriber of the Capital City Club.

Mr. MILLER. That is correct.

Mr. PROXMIRE. The Senator from Indiana points out that, regardless of when Judge Carswell came into the act, this device was used to create a private club that excluded blacks from playing golf, except under extraordinary circumstances. They were allowed to play early in the morning, and they were

allowed to play only in the last few years. But they were not allowed to play in 1956, 1957, and so forth. Judge Carswell was a subscriber to the golf club.

I think the contribution of the Senator from Iowa is useful. It does give me a clearer and better picture than I had before of the country club situation. Frankly, I do consider this to be a very minor element here, and I want to tell the Senator from Iowa——

Mr. MILLER. The Senator from Iowa does not consider it minor.

Mr. PROXMIRE. If Judge Carswell had never made a speech in 1948, if he had never indicated any racist bias, if he was a swinging liberal from the standpoint of civil rights, I would not vote for him under any circumstances, because he is not qualified to serve on the Supreme Court. That is the brunt of my position. This man does not have the legal distinction, he does not have the ability, the brains, the capacity to serve this country on the highest court we have. That is the thrust of my position.

If the Senator wants to talk on this matter on his time, fine; but I really do not think I should yield much further.

Mr. MILLER. Mr. President, will the Senator yield for a comment?

Mr. PROXMIRE. On this issue, yes.

Mr. MILLER. The point I am making is this. I do not think we should leave the Senator from Indiana's statement hanging in the air, when he says that whatever you call it, regardless of what corporations they are, they were in there for a purpose, and that was to segregate a private facility.

Assuming that that is exactly what went on in Judge Carswell's mind at the time he paid $100 for a share of stock—assuming that—it would seem to me that in fairness we should say that after he found out what the situation was, he got out in a matter of 4 or 5 months. Why not give him credit for that? Certainly, if that was exactly what went on in his mind, give him credit for getting out of the thing; whereas, many other people stayed in it. I think we might give him credit as well. If you want to blame him, blame him; but give him credit where credit is due.

I think we are trying to read a person's mind here too much. But if we are going to indulge in mindreading, let us give both sides, so that the people will know there are two sides and two interpretations. Give him a black mark here and a white mark here.

But let us keep a balance. What I am trying to bring into this discussion is some perspective. May I say to my friend from Wisconsin that so far as Judge Carswell's competence and all that is concerned, I read the testimony of some of the witnesses who appeared and I read the testimony of others. There is no group of lawyers that cannot get into a difference of opinion over who is competent and who is not to serve as a Supreme Court Justice. I do suggest to my friend from Wisconsin that I do not believe there are very many Members of the Senate who are qualified by their own background to stand up here and say that that judge is not competent to be on the Supreme Court.

Mr. PROXMIRE. We have to vote on this nomination. It will be up to us. We cannot evade our responsibility. We cannot say, "I am not qualified, so I will not vote, so I will delegate my vote to JACK MILLER who is better qualified." We have to make up our own minds on the best way to solve our problems. We have to do it. That is our job. That is why we are discussing this now.

Mr. MILLER. Competence can be based on what someone else says, someone who is in a better position to know more about it than we are.

Mr. PROXMIRE. I do not believe the Senator thinks that we have such weak minds and that——

Mr. MILLER. Is it not better to have the testimony from practicing lawyers, from law schools, and deans and professors, in the record?

Mr. PROXMIRE. That is part of it, but I think it is only one part of it. Frankly, Mr. President, I think we have to take many things into consideration. The fundamental point is that President Nixon stated he would appoint extremely qualified men to the Supreme Court, and that is right. He should. Especially when we consider the thousands and thousands of lawyers and judges who would give their eyeteeth to serve on the Supreme Court. Thus, the President has a great opportunity here in such an appointment to demonstrate that, whether a man be a strict constructionist, a liberal—whatever—he should be a man with outstanding intellect and distinction. There is no question that this man is not.

Now, Mr. President, the Senator from Florida (Mr. HOLLAND) has been waiting patiently to discuss this subject. As we have been discussing Florida for some time now, I am happy to yield to him.

(At this point, Mr. BELLMON took the chair as Presiding Officer.)

Mr. HOLLAND. I thank the Senator very much for yielding to me.

Mr. President, in the first place, I know a good deal about this country club. I served 8 years in the State Senate, which meant that I was in Tallahassee for a good many months, with my wife, and we attended social affairs there. The country club at that time was the center of such social affairs. It was an old wooden building which looked like a bungalow which had been moved there and it was completely inadequate. It was the subject of frequent conversation not only among the people of Tallahassee, whom we knew well, but also among the visitors to the country club. I suppose I have attended 30 or 40 receptions at that old country club, along with Mrs. Holland, receptions given by the President of the Senate, and the Speaker of the House, and various others, during the course of the 4 sessions of the State legislature that I attended.

Later, as the Senator from Wisconsin knows, I served as Governor of the State of Florida and thus lived in Tallahassee for 4 years. That old wooden building was still there, even more decrepit than it had been before. There was much talk of having a better country club building created there. The site was a beautiful one. But the club had run down very badly, not just the building itself, but the golf course as well. Although I am not a golfer, I heard this repeatedly, as we took a house that fronted the golf course, and I saw what was going on, that the club was run down terribly.

Now, Mr. President, first, I ask unanimous consent that the testimony of Julian Proctor of Tallahassee, Fla., which begins on page 107 of the hearings be printed in the RECORD at this time.

There being no objection, the testimony was ordered to be printed in the RECORD, as follows:

TESTIMONY OF JULIAN PROCTOR, OF TALLAHASSEE, FLA.

Mr. PROCTOR. Mr. Chairman, I am Julian Proctor. I am from Tallahassee, Fla. I have lived in Tallahassee all of my life with the exception of the time when I was away at the university—for 2 years I lived in Hartford, Conn.—and the time I spent in the Navy.

I am married. I have six children. I am an automobile dealer. I am not a lawyer. This is all new to me. I came here for some records on the Capital City Country Club, which I think speak for themselves. I will be happy to turn the records over.

The CHAIRMAN. As I understand it, there was a country club organized in 1924, is that correct?

Mr. PROCTOR. The original Country Club of Tallahassee was, yes, a private country club organized in February of 1924.

The CHAIRMAN. What was the name of it?

Mr. PROCTOR. Tallahassee Country Club.

The CHAIRMAN. All right, and what became of that?

Mr. PROCTOR. On August 27, 1935, the Tallahassee Country Club deeded the property to the city of Tallahassee for financial reasons. They were having a hard time operating the club. There were few members, very few people, citizens playing golf. It was a financial burden, so they turned it over to the city for a very small, nominal sum to operate.

The CHAIRMAN. And the city did not operate it satisfactorily, is that correct?

Mr. PROCTOR. Well, that is correct.

The CHAIRMAN. Senator Holland tells me that when he was Governor it was more like a big barn there.

Mr. PROCTOR. The country club itself, the house, was an old frame building. It was run down. Termites were in it; it needed rebuilding. This was one of the few places in Tallahassee that was large enough to have parties when the legislature used to come to Tallahassee.

The CHAIRMAN. State whether or not there was a provision in the deed that it could be sold to another group.

Mr. PROCTOR. In the deed transferring the property there was a clause that stated that if at any time the city of Tallahassee decided to lease the property to others, or dispose of the property, that the original stockholders would have the right of reacquiring the property on a lease basis.

The CHAIRMAN. All right. Now, was that exercised?

Mr. PROCTOR. Yes, sir. It was exercised on February 14, 1956.

The CHAIRMAN. What was the reason it was exercised?

Mr. PROCTOR. The reason for it, the members of the country club had been unhappy with the operation of the old club. As I previously stated, the country club itself was run down. The golf course needed work. The city was not willing to spend money either to renovate or rebuild the country club because it had been a losing proposition with the city, and so the——

The CHAIRMAN. The city refused to rebuild it?

Mr. PROCTOR. To build a new club?

The CHAIRMAN. Yes.

Mr. PROCTOR. Yes, sir. They refused to build. They wanted a swimming pool, and the city

said that they could not afford to do it or would not do it, so for that reason the original stockholders went to the city and requested that they lease the club and the golf course back to the original stockholders.

The CHAIRMAN. All right. Now was another charter taken out then?

Mr. PROCTOR. Yes. At that time the members who were active, the golfers—I would not say members of the club because they actually got together and formed a new country club. That was on April 24, 1956, the Capital City Country Club filed a certificate for a charter with the secretary of state of the State of Florida.

The CHAIRMAN. How did you finance it?

Mr. PROCTOR. We went around to the citizens of Tallahassee who were interested in the growth and the development of Tallahassee. We told them that we needed a new golf course or at least to rebuild the golf course and develop it. We also needed a country club. So a group of I guess about 25 citizens went around to probably 350 or 400 citizens of Tallahassee, asking if they would subscribe to the country club, and if they would subscribe to the club if we could get it off the ground.

The CHAIRMAN. You got $100 out of Judge Carswell and Governor Collins?

Mr. PROCTOR. That is right. At that time we were asking for a $300 membership fee with $100 of it paid. We went to Judge Carswell, we went to Governor Collins, all the prominent citizens of Tallahassee, including the Supreme Court, the Cabinet, and everyone interested, and signed them up to join the country club, with a guarantee of the payment of $300 over a period of time. At the time when we had got the club started, they would pay the first $100. Judge Carswell was one of those, one of the persons that we went to, and who agreed to subscribe to the stock.

The CHAIRMAN. All right. Now then what happened,

Mr. PROCTOR. Then we began operating on May 4 of 1956. The old Tallahassee Country Club assigned its lease from the city to the Capital City Country Club, Inc. On August 23, we mailed out the notice of the first annual meeting of the Capital City Country Club. During the time before that, or at least prior to that time, we picked out 21 subscribers, and asked these subscribers to go ahead and pay the $100, and we wanted, when we petitioned, that we name them as the original subscribing board of directors. Judge Carswell's name was on this list.

Judge Carswell himself was not active. He never attended a meeting to my knowledge. I happened to be one of the original founders of the club. I attended all of the meetings, and I don't think Judge Carswell ever attended a meeting of the founders of the country club.

In September of 1956 we took over the course. On September 4 we had the first annual meeting. We elected the first board of directors of the Capital City Country Club. We submitted 42 names—of those 42 names, to select 21. Judge Carswell's name was on the 42, that is on the list of 42 names. He was not elected to the board of directors of the country club. We elected seven directors for 3 years, seven for 2 years, and seven for 1 year. On January 29, we petitioned the court, the local court, to change the Capital City Country Club from a profit organization to a nonprofit organization.

The CHAIRMAN. That was the second charter, was it not?

Mr. PROCTOR. Yes; we petitioned the change.

The CHAIRMAN. Yes.

Mr. PROCTOR. Of the second charter. It of course was not granted on that date. The second charter was acknowledged in August, on August 6, 1957. On February 1, 1957 Judge Carswell requested that his name be withdrawn from the club, and asked that his original subscription or payment of $100 be refunded. I believe the record shows that he was refunded $76, and that was on February 12 of 1957.

As I mentioned, on August 6, 1957 the Capital City Country Club became a nonprofit corporation, and the name was changed from Capital City Country Club, Inc., to Capital City Country Club.

The CHAIRMAN. And that is the corporation?

Mr. PROCTOR. Right.

The CHAIRMAN. Any questions?

Senator BURDICK. To get the chronology straight here, this country club was established in 1924?

Mr. PROCTOR. 1924, yes, sir; by a small group of interested citizens.

Senator BURDICK. In 1935 you had money difficulties?

Mr. PROCTOR. Right.

Senator BURDICK. Because of the depression, I presume?

Mr. PROCTOR. The depression.

Senator BURDICK. Then in 1956 the city had money troubles?

Mr. PROCTOR. Well, in 1956, Senator, yes, I guess you might say the city had financial troubles, but they were not willing to spend money on a golf course. They were not willing to build a new golf club or house.

Senator BURDICK. Then by 1956 they were a little more affluent than they were in 1935 and they took it over in 1956 again?

Mr. PROCTOR. Right.

Senator BURDICK. And that has been the continuity?

Mr. PROCTOR. And of course Tallahassee has grown. Back in the days of 1935 I would say there were probably less than 50 interested citizens. At the time that they formed the country club, I do not know how many.

The CHAIRMAN. This corporation, to which there was subscribed $100, relinquished its charter and you got another charter?

Mr. PROCTOR. That is right.

The CHAIRMAN. And that is the equivalent operation.

Senator BURDICK. That was in August 1957?

Mr. PROCTOR. That is right. We petitioned in January.

Senator BURDICK. Is that corporation still in being?

Mr. PROCTOR. I beg your pardon?

Senator BURDICK. Is that in being today?

Mr. PROCTOR. Yes, in being today, and we have, approximately, between 450 and 500 members.

Senator BURDICK. Did Judge Carswell have any further interest after his stock was picked up in February of 1957?

Mr. PROCTOR. Yes. Let's see. August the 29th of 1963 Judge Carswell became a member, and he remained a member of the club until September 7 of 1966, at which time we accepted his resignation.

Senator BURDICK. But all during these years from 1924 on, this club was located in the same property, and had the same name except that it was changed to Capital City from Tallahassee in 1957?

Mr. PROCTOR. Right.

Senator BURDICK. Located in the same place?

Mr. PROCTOR. The same place.

The CHAIRMAN. You did build a swimming pool and you added 9 holes to your golf links, is that correct?

Mr. PROCTOR. Yes, we built the swimming pool later, as soon as we got the club. That was one of the first things that we did. It took a little time to get it.

The CHAIRMAN. And you enlarged the golf course?

Mr. PROCTOR. Well, we rebuilt the golf course. We put in a watering system, and we have replanted our fairways, and of course, we built a very nice new country club, for which we are heavily in debt.

The CHAIRMAN. Are there any further questions? [No response.]

Thank you, sir.

Mr. PROCTOR. Thank you, sir.

The CHAIRMAN. Prof. James W. Moore.

(At this point in the hearing a short recess was taken.)

The CHAIRMAN. The committee will come to order. Prof. James W. Moore.

Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MOORE. I do.

The CHAIRMAN. You may sit down. Please identify yourself for the record and give us your background.

Mr. HOLLAND. Mr. President, I have known Julian Proctor since he was a small boy. He is a highly reputable citizen. He came here as an officer of the present country club to testify, with the records of the club, and did testify before the committee. I was not able to stay to hear his testimony, although I did introduce him to the committee, as will be shown from the record.

His testimony, I think, is completely correct and bears out the recent statements of the Senator from Iowa (Mr. MILLER), as to the fact that there were three different country clubs. As to the chronology of those clubs, the testimony will speak for itself, so I am not going to go into that in detail. But I do know that eventually the place became further run down, so that something had to be done about it. When the original Tallahassee Country Club had deeded its property to the city, hoping for a better situation there, it included in the deed, as Mr. Proctor told me—I have not seen the deed, but I believe him implicitly—a provision that in the event the city sought to lease it, or convey it to someone else, it should come back to the members of the original club, which was done. As the testimony will show, it came back. I know nothing about the racial problem that was involved but I do know something about the club and about the golf course.

Mr. PROXMIRE. May I say to the Senator from Florida that——

Mr. HOLLAND. Mr. Proctor makes it clear that it came back among other things first as to the need for a representative building, which they did build. It is a very fine country club, which I have frequently visited since that time. Also, for the purpose of reconditioning the golf course; and Mr. Proctor states in his testimony that that was one of the first things that was done. The Senator will find that at the bottom of page 110 of the printed hearings. It also came back to them because of the need for a swimming pool. They did all these things with contributions, as Mr. Proctor states in his testimony, and so I believe from having talked with numerous people, including my own relatives, who live in Tallahassee, that this was done by contributions also of many people, during which time Judge Carswell was district attorney.

Governor Collins, who is certainly anything but a racist, and many other people, including the people of my kinship there by marriage, and whom I completely believe, say that this was done with contributions of some 300 or 400 of the outstanding people of Tallahassee, to get a really representative country club built there, and to get a swimming pool, and

a golf course put back in reasonable condition, all of which things were done.

I shall not comment further on the testimony because I think it is very clear. It completely bears out the statement of the Senator from Iowa (Mr. MILLER). I believe that this point has been badly misunderstood and badly overplayed. I just want to say that. I also want to say that I, as one who still has some of his own living relatives right there in Tallahassee, both by blood and by marriage, and who has kept in close touch with the situation there, cannot conceive of Governor Collins' coming here to tell us about his good faith participation in this effort, and his contribution of $100, and have any thought in my mind that this was all a conspiracy simply to carry these assets away from use by colored people.

I remember it, because I was present when Judge Carswell testified that he said he had seen people of color there on occasions when he had attended receptions there. The Senator will find that in his testimony.

All the Senator from Florida can say now is that he believes implicitly the testimony of Julian Proctor, whom I consider to be a good and decent man and a public-minded citizen. I do not see how anyone can read that testimony and fail to believe it.

I thank the Senator from Wisconsin.

Mr. PROXMIRE. I thank the Senator from Florida. I think his statement is especially useful because, as he says, while he has firsthand personal knowledge over many years of the club situation, he did say that he is not indicating whether he has any specific knowledge about the racial element involved, which is the heart of it.

I call to his attention once again an article from the front page of the Tallahassee Democrat which pertains to this—and I want to make it clear that this pertains to the Tallahassee Country Club, not to the Capital City Country Club—which states:

For the price of $1 greens fee the city commission yesterday leased the municipal golf course to the Tallahassee Country Club, a private corporation.

The vote was 4 to 1, with Mayor J. T. Williams registering the objection.

On a motion by Commissioner Fred Winterle, the commission also agreed to make the same deal on a Negro golf course now under construction to "any responsible group" that wants to take it over.

Asked if the course would be open to the public, Robert Parker, who represented the country club group, said "any acceptable person will be allowed to play."

The action came after a two-month cooling off period following the proposal's first introduction. At that time Former City Commissioner H. G. Easterwood, now a county commissioner, blasted the lease agreement.

He said racial factors were hinted as the reason for the move.

When we get this kind of a frank statement in a front page article in the Tallahassee paper, I think it is proper to take notice that this was an element that we should consider.

At that point I think it is fair to say, as the Senator from Iowa properly emphasized, that Carswell was not in it. He came in later as a subscriber to a successor corporation. And it is not as obvious and blatant as some of us thought. However, it nevertheless has a connection.

Mr. HOLLAND. The fact is that that later organization, as shown by the record, was formed to promote the interest of the good citizens who wanted to have a decent clubhouse built there. And it was built there. I was later present in the new edifice, which is a fine one. I have not swum in the swimming pool, but I have seen it. It was not there before.

I do not play golf, but I am told by my relatives who do that the golf course has been reconditioned and is now a good golf course. I cannot support that statement from personal knowledge by having played there. But I do know that the place was as run down as anything I have ever seen in the city of Tallahassee at the time these remedial measures were taken.

I thank the Senator for yielding. I thought that I should contribute these things which are of my own knowledge.

Mr. PROXMIRE. Mr. President, I thank the senior Senator from Florida.

I yield now 2 minutes to the junior Senator from Florida.

Mr. GURNEY. Mr. President, I have never been too impressed with playing the numbers game concerning Judge Carswell and saying that he is good because 500 lawyers say so or that he is bad because 501 lawyers say he is.

It is like those people who in deciding a case say that the party with the largest number of attesting witnesses should prevail.

I do not think it would be fair in judging Judge Carswell to have him bear the weight of so many unfair criticisms from those who do not know him without making a part of the RECORD the many endorsements he has received from the bench and bar.

In light of unfavorable statements from lawyers who do not know Judge Carswell, I ask unanimous consent that there be printed at this point in the RECORD some of the many telegrams I received yesterday and this morning from Florida judges and attorneys who do know Judge Carswell personally and have a high regard for his judicial ability.

There being no objection the telegrams were ordered to be printed in the RECORD, as follows:

TALLAHASSEE, FLA.,
March 16, 1970.

Senator GURNEY,
Senate Office Building,
Washington, D.C.:

As a lawyer who is a member of the Tallahassee and Florida Bar Associations who has practiced before the Hon. Harrold Carswell both in my capacity as a private attorney and previously as an assistant United States attorney in which capacity I practiced for 2½ years I wish to make known my very strong support on behalf of Judge Carswell and urge the Senate to confirm his nomination to the Supreme Court. He is known to me as a brilliant jurist whose integrities and capabilities could never be accurately attacked.

MURRAY M. WADSWOTH.

TALLAHASSEE, FLA.,
March 16, 1970.

Senator EDWARD GURNEY,
Washington, D.C.:

As a practicing attorney and one who has for the past decade been very active in local bar affairs I am personally aware that Harrold Carswell possesses all of the necessary qualities to serve with distinction on the U.S. Supreme Court. This opinion is shared by all of the qualified practicing members of this bar.

MARION D. LAMB, JR.,
Vice President, Tallahassee Bar Association.

TALLAHASSEE, FLA.,
March 16, 1970.

Senator EDWARD GURNEY,
Washington, D.C.:

As a practicing attorney before Judge G. Harrold Carswell I unequivocally endorse him for the United States Supreme Court.

STEVE M. WATKINS.

SARASOTA, FLA.,
March 16, 1970.

Senator EDWARD GURNEY,
Washington, D.C.:

We the undersigned circuit judges of twelfth judge circuit, Florida join with the many other Floridians urging confirmation of Honorable Harrold Carswell to Supreme Court bench.

JOHN D. JUSTICE,
LYNN N. SILVERTOOTH,
ROBERT E. WILLIS,
ROBERT E. HENSLEY.

SANFORD, FLA.,
March 16, 1970.

EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

As practicing attorneys we urge confirmation of Hon. G. Harrold Carswell to Supreme Court.

PHILIP H. LOGAN,
A. EDWAIN SHINHOLSER.

TALLAHASSEE, FLA.,
March 16, 1970.

Senator EDWARD J. GURNEY,
Washington, D.C.

As a practicing attorney before Judge G. Harrold Carswell I unequivocally endorse him for the United States Supreme Court.

STEVE M. WATKINS.

GAINESVILLE, FLA.,
March 16, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senator,
New Senate Office Building,
Washington, D.C.

I urge the confirmation of Judge Harrold Carswell as Justice of the Supreme Court. I have known him for many years. It is my considered judgment that he posssses the intellectual capacity, the moral fiber, and innate sense of justice that would fit him for this high position.

JOHN A. H. MURPHREE,
Presiding Judge,
Eighth Judicial Court of Florida.

TITUSVILLE, FLA.,
March 16, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

As a member of Florida and Federal Bar I urge your continued support of Judge Carswell.

STANLEY R. ANDREWS.

MIAMI, FLA.,
March 16, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

As a member of the American Florida and Dade County Bar Associations I heartily endorse the nomination of Judge G. Harrold Carswell to fill the existing vacancy in the United States Supreme Court.

THOMAS D. WOOD.

TALLAHASSEE, FLA.,
March 16, 1970.

Senator GURNEY,
Washington, D.C.:

As an attorney I unequivocally endorse Judge G. Harrold Carswell for the United States Supreme Court.

JOHN F. MILLER, Jr.

MELBOURNE, FLA.,
March 16, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

As a member of the Florida Bar and American Bar Association urge your continued support of Judge Harrold Carswell and your best efforts at securing senatorial confirmation from fellow Senators. As a law clerk for Judge Carswell for two and a half years I can attest to his competence, fairness and integrity.

KIKE KRASNY.

ORLANDO, FLA.,
March 16, 1970.

Senator ED GURNEY,
Senate Office Building,
Washington, D.C.:

Urge your confirmation of Justice Carswell.

Very truly yours,

ROBERT EAGAN,
State Attorney.

ORLANDO, FLA.,
March 16, 1970.

Hon. EDWARD GURNEY,
U.S. Senator,
Washington, D.C.:

Request your affirmative vote for Judge Carswell appointment Supreme Court United States.

B. C. MUSYNSKI,
Circuit Judge.

EAU GALLIE, FLA.,
March 16, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I wholeheartedly approve of the nomination of Harrold Carswell to the United States Supreme Court.

E. TOM RUMBERGER,
Circuit Judge,
18th Judicial Circuit of Florida.

CORAL GABLES, FLA.,
March 15, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

After sixteen years of observing the career of Judge Carswell I strongly urge his confirmation as Supreme Court Justice.

Judge TOM BARKDULL.

PANAMA CITY, FLA.,
March 17, 1970.

Hon. ED GURNEY,
U.S. Senate,
Washington, D.C.:

I wholeheartedly indorse and recommend Honorable G. Harrold Carswell for the position of Justice of the Supreme Court of the United States. I am a member of the American Bar Association and have been a member for more than 15 years. I have been engaged in the private practice of law for more than 20 years in the Northern District of Florida and practiced before Judge Carswell all during the time he was U.S. District Judge. I am a former member of the board of governors of the Florida bar and a former member and former chairman of the Florida board of bar examiners. I know Judge Carswell has the legal ability, temperment, experience, integrity and energy necessary to be an outstanding member of the Supreme Court of the United States.

ERNEST W. WELCH.

JACKSONVILLE, FLA.,
March 17, 1970.

Senator EDWARD GURNEY,
Washington, D.C.:

You have our unqualified endorsement in urging the confirmation of Judge Carswell.

MARTIN SACK,
GERALD TJOFLAT,
LAMAR WINEGEART,
CHARLES LUCKIE,
ALBERT GRAESSLE,
HENRY MARTIN,
MARION GOODING,
THOMAS LARKIN,
Judges.

FT. LAUDERDALE, FLA.,
March 17, 1970.

Senator EWARD J. GURNEY, Jr.,
Washington, D.C.:

I urgently and respectfully request your favorable consideration and affirmative vote for confirmation of Judge Carswell's nomination.

H. JOHN MOORE,
Circuit Judge.

FORT MYERS, FLA.,
March 16, 1970.

Hon. EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

We sincerely endorse Judge G. Harrold Carswell for Associate Justice of the United States Supreme Court.

LYN GERALD,
Circuit Judge.
ARCHIE M. ODOM,
Circuit Judge.

TALLAHASSEE, FLA.,
March 17, 1970.

Senator GURNEY,
Washington, D.C.:

I have practiced law for six years in Judge Carswell's court here in Tallahassee, Florida. I know him to be a fair and impartial judge eminently well qualified by judicial temperament, education, and experience to serve as Associate Justice of the Supreme Court of the United States. I urge you to vote for and support his confirmation.

F. PERRY ODOM.

ORLANDO, FLA.,
March 17, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate
Washington, D.C.:

I respectfully solicit your continued support for the nomination of Judge Carswell now in debate.

KEITH YOUNG MATEER,
Frey Young and Harbert.

PANAMA CITY, FLA.,
March 17, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate
Washington, D.C.:

By way of identification I've practiced law in Florida for approximately thirty two years and am a member of the Florida bar and American Bar Association. Thirty one years of this practice has been in the United States District Court for the northern district of Florida. I was previledged to try numerous cases while the Honorable G. Harrold Carswell presided. I can attest to his honesty, integrity, and legal ability. He has the knack for understanding the legal points involved and litigation before him more rapidly than most judges before whom I have appeared. His elevation to the Supreme Court is highly desirable to me. As I am sure that he would serve with honor, distinction and fairness.

CHARLES F. ISLER, Jr.

EAU GALLIE, FLA.,
March 16, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: As a member of the American and Fla. Bar Assoc. I whole heartedly endorse Judge Carswell.

Sincerely,

JAMES A. NANCE.

EAU GALLIE, FLA.,
March 16, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: As a member of the American and Florida Bar Assoc. I whole heartedly endorse Judge Carswell.

Sincerely,

SAMMY CACCIATORE.

PANAMA CITY, FLA.,
March 16, 1970.

Re Nomination of Judge G. Harrold Carswell
U.S. Supreme Court

Hon. EDWARD J. GURNEY,
U.S. Senate, Washington, D.C.

DEAR SIRS: This is to advise of my wholehearted support to the confirmation of the nomination of Judge Carswell to the United States Supreme Court. I am a relatively young attorney admitted to practice in the States of Georgia and Florida and have been so engaged for the last nine years. I am likewise a member of the American Bar Assn. and have been privlledged to practice before Judge Carswell in the United States District Court for the Northern District of Florida for the past five years. I have found Judge Carswell to be able, abundantly fair and possessed with superior judicial accumen. Our Federal judicial system will be the ultimate benefactor by his investiture as justice of the United States Supreme Court.

LYNN C. HIGBY.

WINTER PARK, FLA.,
March 17, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate, Washington, D.C.

Judge G. Harrold Carswell has the support of every member of the Florida Bar I am acquainted with. I know you will do all you can to assure Senate confirmation of his appointment.

DAVID W. CUNNINGHAM.

Mr. PROXMIRE. Mr. President, I yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I have been very interested in the colloquy which has transpired. We are all trying to make certain that everything is in the record so that we may each make a final determination on this matter.

I thought it might be helpful—and I have never seen a more patient soul than the distinguished Senator from Wisconsin—to point out that it was on November 7, 1955, that the U.S. Supreme Court ruled that the city of Atlanta in refusing to permit Negroes to use the municipal golf course was a direct violation of the equal protection clause of the Constitution and ordered that the golf course be integrated. This was in the case of Holmes against the City of Atlanta.

Shortly thereafter, another suit entitled Augustus against the City of Pensacola was filed in the northern district of Florida. That is the same district represented by our nominee.

It seems to me there was ample evidence at that particular time, late in 1955, before the story of February 16,

1966—as the Senator from Wisconsin points out—that there was public knowledge of what was going on.

I would like to read excerpts from one affidavit which appears on page 274, and I ask unanimous consent that the affidavit of Clifton Van Brunt Lewis, because I think it goes directly to the case in question, as well as the previous affidavit of Christene Ford Knowles be printed in the RECORD, as it also deals with the same subject.

There being no objection the article was ordered to be printed in the RECORD, as follows:

AFFIDAVIT

STATE OF FLORIDA,
County of Leon:

Before me the undersigned came and appeared on 1 February, 1970 who after being duly sworn, did depose and say that:

I am an adult White citizen who has been a life-long resident of Tallahassee and whose family has domiciled in the city for several generations. I am the wife of the Chairman of Florida's oldest bank, The Lewis State Bank of Tallahassee.

My interest in the Tallahassee Golf Course goes back to my early childhood, as my father was one of the early golfers of Tallahassee and had, in fact, helped to plan the course itself.

When the original club deeded the course to the City of Tallahassee it was known as the Municipal Golf Course—for some 21 years. The city acquired the spendid 205 acres through an agreement whereby the city paid off a 6,500 dollar note and agreed to obtain funds to improve the property. The agreement stipulated that the funds should be 35,000 dollars of WPA money! The 1935 agreement also gave the club first option to lease the land, which it did in 1956 at the rate of one dollar a year for 99 years!

My husband and I were invited to join the Capital City Country Club at its inception. We refused the invitation because we wanted no part in converting public property to private use without just compensation to the public—and because of the obvious racial subterfuge which was evident to the general public.

My husband and I have been members of the interracial Tallahassee Council on Human Relations since its inception several years before the Country Club fiasco. In this Council I knew first hand from Charles U. Smith, Professor of Sociology at Florida A&M University of the desire of specific Tallahassee black citizens to play on the city golf course.

This discussion with Mr. Smith was one of many that I had with a variety of parties during that period on the subject of the golf course, the issue being of wide civic concern. I would have been surprised if there was any knowledgeable member of the community who was unaware of the racial aspect of the golf course transaction. The controversy appeared in the local newspaper of the time, and a city commissioner was known to have raised questions about the racial implications involved.

CLIFTON VAN BRUNT LEWIS.

Subscribed and sworn to before me this 1st day of February 1970.

AFFIDAVIT

STATE OF FLORIDA,
County of Leon, SS:

Before me the undersigned authority came and appeared on 1 February 1970, who after being duly sworn, did depose and say that:

I am an adult Black citizen residing in Tallahassee, Florida, who has worked as an Administrative Assistant to the Reserve Officers Training Corps for 5½ years, ten years public high school teacher, ½ year Business Manager of Tallahassee A and M Hospital, and at the present 2 years and 10 months as Educational Specialist, Federal Correctional Institution, all of Tallahassee, Florida. (I reside at 819 Taylor Street, Tallahassee, Florida).

I remember in 1956, deeply resenting the transfer whereby 205 acres of what was formerly municipal property converted to private ownership. At the time, Reverend C. K. Steele, myself, and other members of the Local SCLC chapter were disturbed at what was clearly an attempt to bar Black people from using the golf course. It was evident to us that the transaction, that is the leasing of the course to a private group, had but one real intent. Tallahassee was in a racial uproar over the bus boycott and other protests—bringing a reaction of fear to the white community. The word "private" had increasingly become a code name for segregation.

The Capital City Country Club incorporation proceedings were well publicized and the racial overtonss were necessarily clear to every knowledgeable citizen in the area, and it would have been surprising to me if an intelligent man, particularly an incorporator was not aware of the repeatedly emphasized racial aspects of this case.

We did discuss this corporation widely at the time, and had we not been so preoccupied with other protests, we would have undoubtedly moved against the corporation in civil suit.

CHRISTENE FORD KNOWLES.

Subscribed and sworn to before me this 1st day of February 1970.

DULUTH H. BAKER, Jr.

Mr. BAYH. Mr. President, I am particularly impressed by the affidavit of Clifton Van Brunt Lewis. It says in part as follows:

I am an adult White citizen who has been a life-long resident of Tallahassee and whose family has domiciled in the city for several generations. I am the wife of the Chairman of Florida's oldest bank, The Lewis Bank of Tallahassee.

This lady is no insignificant citizen in the community.

She said further:

My husband and I were invited to join the Capital City Country Club at its inception. We refused the invitation because we wanted no part in converting public property to private use without just compensation to the public—and because of the obvious racial subterfuge which was evident to the general public.

Mr. PROXMIRE. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. PROXMIRE. Mr. President, was the Capital City Country Club the club that was formed with Judge Carswell as one of the subscribers?

Mr. BAYH. The Senator is correct.

There has been some concern expressed about whether there was discrimination. I do not know. I have never played on that course. But I thought the closing remarks of Mrs. Van Brunt Lewis would be appropriate to read. She closes by saying:

I would have been surprised if there was any knowledgeable member of the community who was unaware of the racial aspect of the golf course transaction. The controversy appeared in the local newspaper of the time, and a city commissioner was known to have raised questions about the racial implications involved.

Mr. PROXMIRE. Mr. President, I thank the Senator from Indiana. I think that is an excellent and very helpful clarification.

Mr. President, I ask unanimous consent that I may yield to the Senator from Michigan without losing my right to the floor.

Mr. GRIFFIN. Mr. President, I thank the Senator from Wisconsin. He certainly is very patient. I appreciate the opportunity to deliver my statement at this time.

Mr. President, some of the arguments leveled against the nomination of G. Harrold Carswell to be an Associate Justice of the Supreme Court bring to mind a passage from Alice in Wonderland, which goes like this:

"He's in prison now, being punished," said the White Queen, "and the trial doesn't even begin 'til next Wednesday; and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it?" the Queen replied.—Alice in Wonderland by Lewis Carroll.

Of course, as a Senator, I respect the sincerity of those colleagues who argue that the nominee is not qualified. But, in all candor, I must say that most of the criticism simply presupposes something which no one can predict—that he will not be a great Justice of the Supreme Court.

Such a prejudgment not only runs counter to fundamental concepts of fairness, but it does a great disservice to the historical role of the Senate in the exercise of its advice and consent responsibility.

That is not to say, of course, that the Senate has never judged a nominee unfairly. It has.

But, in general, when the Senate has worked its will with respect to Supreme Court nominations, it has proceeded with a sense of balance and fairness.

Perhaps no nominee suffered more abuse than did Justice Louis D. Brandeis. Among the numerous witnesses to protest his nomination were seven former presidents of the American Bar Association, who stated that:

Taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.

Nevertheless, in its wisdom, the Senate saw fit to confirm that nomination and, needless to say, Justice Brandeis went on to serve the Nation and the Court with great distinction.

Chief Justice Charles Evans Hughes was bitterly opposed by some who felt that his prior legal representation of large corporations had committed him to their philosophy. As the noted scholar, Joseph P. Harris, has observed:

It was anomalous that most of the arguments against him dealt with decisions of the Supreme Court in which he had no part, on the unsupported assumption that had he been a member he would have sided with the conservative majority of the Court. The opposition served a useful purpose, though had it prevailed the country would have been deprived of the services of a Chief Justice who now ranks with Marshall and Taney.

No one in this Chamber could be more pleased than this speaker to observe that the Senate is once again taking very seriously its advice and consent power. But history tells us that we should proceed

with caution—that a nominee subjected to intense criticism may well prove to be a distinguished selection.

In 1930, the Senate rejected President Hoover's nomination of Judge John J. Parker. Union leaders opposed the nominee on the ground that he harbored an antilabor bias. Negro groups opposed the nominee because of a statement he had made 10 years before in the heat of a political campaign. As a candidate for Governor of North Carolina in 1920, Parker had said:

The participation of the Negro in politics is a source of evil and danger to both races and is not desired by wise men in either race or by the Republican Party of North Carolina.

Significantly, despite those unfortunate remarks, the judgment of history now is that:

In retrospect, it is generally agreed that both organized labor and Negroes were mistaken in their opposition and defeated a nominee who was liberal in outlook and sympathetic both to organized labor and to Negroes.

The role of the Senate in passing upon such a nomination was aptly described in 1945 by Senator AIKEN during the debate on President Roosevelt's nomination of Aubrey Williams to be the REA Administrator. At that time, the distinguished Senator from Vermont said:

The main issue involved in the vote which we are soon to take is whether a man can come before this Senate for approval and have that approval granted or refused on the basis of the evidence presented, or whether such judgment will be influenced by policies, prejudice, racial and religious discrimination, and all the other evils which Members of the United States Senate should rise above.

The pending nomination has been the target of much criticism. Charges have been made that the nominee is not sympathetic to civil rights causes; some assert that he is openly hostile to such causes.

In my opinion, the record of hearings and the evidence simply do not fairly support such conclusions.

It is well known that the nominee did make a speech in the course of a campaign for public office in 1948—a speech that contained racist comment.

But some critics who seem determined to portray the nominee as a racist ignore the nominee's statement that—

When this was first brought to my attention and found upon the records of the little Irwinton Bulletin paper, I really was a little aghast that I had made such a statement . . . I state now as fully and completely as I possibly can, that those words themselves are obnoxious and abhorrent to me. I am not a racist. I have no notions, secretive, open, or otherwise, of racial superiority. That is an insulting term in itself and I reject it out of hand. (Hearings, page 10.)

A former Justice Department official advised the Judiciary Committee that—

Shortly following the controversial *Brown* decision (in 1954) on segregation I held a conference in Washington of all the Southern U.S. attorneys to help the Department of Justice to implement the decision. Harrold Carswell was the only (Southern) U.S. attorney who was helpful to me and the department in this respect. (Hearings, p. 327.)

Of particular interest, I believe, is a telegram in the hearing record from Mike Krasny, a former law clerk of the nominee. I reads in part:

I was Judge Harrold Carswell's law clerk from February 1960 to June 1962, a period of approximately two and a half years. I believe I was his law clerk longer than any other law clerk he had before or since . . .

As a member of the Jewish faith and consequently a member of a minority, I sincerely believe that the day to day association which I had with Judge Carswell, both in and out of the courtroom, would have revealed any racist tendencies or inclinations, had there been any. Without the slightest hesitation, I can assure you and the members of your committee that the litigants in the United States Federal District Court in Tallahassee were not judged by their race, creed or color. Judge Carswell's integrity and honesty is beyond question in this regard

He dealt fairly, honestly and respectfully with all those who came before him. His judicial manner was not altered by the race or color of those who appeared before him. I believe that I am more qualified to judge this man than are his accusers. I would be willing, at my own expense, to testify under oath that none of the decisions rendered by him during my tenure of office were tainted in any manner with a so-called racist philosophy, nor were civil rights lawyers or litigants treated in any manner other than the respectful manner accorded to all litigants and attorneys appearing before him.

Although I do not necessarily agree with all of the nominee's decisions as a judge, I share the view expressed by the distinguished columnist, Carl Rowan. Mr. Rowan comment in part as follows:

I am far more impressed by Judge Carswell's frank and unambiguous repudiation of white supremacy in 1970 than by his endorsement of racism as a 28-year-old law school graduate struggling to defeat an uncompromising white supremacist.

At age 28 or 38 you could find Lyndon B. Johnson endorsing segregation and making the racist noises expected of a Texas politician. But at age 58 Johnson was the greatest friend of civil rights and the black man ever to occupy the White House. That says a lot about human redemption.

As a Senator who has had the privilege of voting for every civil rights law passed by the Congress in the past 14 years, quite frankly, I am very conscious of the civil rights concern of some who oppose this nomination.

But a Senator has the obligation to assess equitably the evidence which is presented. Although I would have preferred a nominee with a more distinguished civil rights record, I do not believe Judge Carswell can fairly be considered an extremist or racist.

Some people have asked how I can support the pending nomination in light of my prior opposition to the nominations of Justice Fortas and Judge Haynsworth.

My views on the Fortas and Haynsworth nominations have been publicized. In those cases, my position related to questions of ethics—and did not relate to the very different philosophies of the nominees.

Although an individual Senator is free, of course, to oppose a nomination for any reason, the Senate, as a whole, has been reluctant to reject nominations for the Supreme Court on the grounds of philosophy alone.

But opponents also challenge the credentials of this nomineee.

During the Senate's consideration of the nomination by President Truman of Tom Clark, the Washington Post stated editorially that the selection did not meet the highest judicial standards and that Clark's name would not have appeared on any "list of distinguished jurists such as a conscientious President usually assembles before making an appointment to the Supreme Court."

The Richmond Times-Dispatch characterized Clark as a "political partisan and a legal lightweight" who "would reflect no credit upon that tribunal."

As we know now, Justice Clark served admirably on the High Court.

Quite frankly, it is difficult, if not impossible, to answer or to rebut charges such as those leveled against Justice Clark—and presently leveled against the nominee.

A charge of mediocrity, by its very nature, is incapable of close analysis. By what standard does an individual Senator evaluate such a nebulus concept as potential for greatness?

Would the public interest have been better served by the Senate's rejection of the nomination of Justice Clark on such grounds? Obviously not.

As the Washington Daily News, a Scripps-Howard newspaper, has commented:

As for measuring what a man will do once on the Supreme Court, we recall Justice Felix Frankfurter, the darling of the liberals who wound up as the strictest constructionist of modern times. And think of Justice Hugo Black, now regarded as a great justice, who began his Supreme Court career under the cloud of having once been a member of the Ku Klux Klan . . .

Mr. President, history has a way of putting things in perspective. Even those who do the nominating may misjudge a nominee. At one point, President Theodore Roosevelt was so disappointed in the performance of one of his appointees to the Supreme Court, Justice Oliver Wendell Holmes, that he commented:

I could carve a judge with more backbone out of a banana.

Mr. President, the pending nomination has been of deep personal concern. As a member of the Judiciary Committee, I have carefully followed the hearings and have carefully reviewed his record as a Federal judge.

As one Senator, I do not believe the record justifies opposing the nomination.

Accordingly, I shall vote to confirm G. Harrold Carswell to be an Associate Justice of the Supreme Court.

Mr. PROXMIRE. Mr. President, William Van Alystyne, a professor of law at Duke University, opposed Carswell's confirmation in testimony before the Judiciary Committee. Van Alystyne told the committee that he supported the nomination of Judge Haynsworth but strongly opposed the Carswell nomination. I would like to present to you, Mr. President, some parts of Professor Van Alystyne's testimony:

A short time ago, as you gentlemen recall, this committee was asked to report to the Senate its recommendations as to whether the Senate should consent to the nomination of Judge Clement Haynsworth as Associate Justice of the Supreme Court. At that time, I felt some obligation to file a

statement because of a profesional familiarity with Judge Haynsworth's judicial record which I believe might be of assistance to the Senate. I was prompted to appear as well because of a substantial belief, formed after a review of Judge Haynsworth's opinions and decisions during 12 years on the court of appeals, that the extent of the criticism then being made by others was not in fact justified. While it was not possible to review and to report on any large number of Judge Haynsworth's decisions in my filed statement, I did attempt to examine a sufficient number fairly to reflect in my statement what I believed to be of principal interest to this committee and to the Senate. On that basis, I concluded that Judge Haynsworth was an able and conscientious judge, that his decisions manifested a greater degree of judicial compassion within the allowable constraints of proper discretion than others had taken the care to acknowledge, and that even in instances where I could not personally find agreement, private or professional, with a particular result, I could, nonetheless see from the quality of the opinion that that result had been arrived at with reassuring care and reason.

In the little time available prior to this hearing, I have sought to review Judge Carswell's work in an equivalent fashion. My impressions are sharply different from those I held of Judge Haynsworth, however, even without regard to additional circumstances which have made this an extraordinary case.

Reference has been made to an earlier published statement by Judge Carswell in 1948. I would agree with those who believe that unless that statement can be significantly discounted by clear and reassuring events since that time, 20 years ago, it would be uniquely inappropriate for the Senate to consent to his nomination as an Associate Justice of the Supreme Court. But an examination of his decisions and opinions as a district judge since that time, even laying his earlier statement entirely aside, provides no feeling for a basis of reassurance whatever. Again, without beginning to exhaust all that might be mentioned in this regard, a brief review of several particular cases may illustrate the lack of any reassuring quality in the opinions or results.

In the case of *Due* v. *Tallahassee Theatres, Inc.*, for instance, several Negro plaintiffs sued to enjoin an alleged conspiracy by the local sheriff and others to perpetuate segregation in public facilities by means of harassment and discriminatory law enforcement against blacks. The decision by Judge Carswell granting summary judgment in favor of the sheriff without a hearing was reversed in the court of appeals on grounds that it was "clearly in error," that the allegations readily supported a cause of action under various civil rights acts and preexisting Supreme Court decisions, and that a hearing should have been held.

In *Singleton* v. *Board of Commissioners of State Institutions*, suit was brought by four Negro children sent to a segregated institution after conviction for participation in a sit-in, to enjoin that segregation and to have the State statute requiring such segregation declared unconstitutional. The suit was dismissed as allegedly being moot by Judge Carswell, but the court of appeals reversed in an opinion further indicating that relief on the merits should have been granted to the plaintiffs.

In *Dawkins* v. *Green*, Negro plaintiffs sought to enjoin police and municipal officers from seeking to enforce certain statutes on a discriminatory basis to intimidate and harass Negroes, and to prevent them from exercising certain constitutional rights. Without holding any hearing to provide the plaintiffs an opportunity to establish that the officials were in fact acting maliciously and in bad faith, Judge Carswell granted summary judgment against the plaintiffs based only on conclusory affidavits submitted by the officers. Again the court of appeals reversed, holding that this preemptory use of summary judgment was in error, and remanding the case for a hearing on the merits.

In *Steele* v. *Board of Public Instruction*, Judge Carswell accepted an extremely grudging desegregation plan submitted by the county in 1963 and approved its continuing operation in 1965, to be reversed by the court of appeals on the basis that the plan was constitutionally inadequate.

In *Augustus* v. *Board of Public Instruction of Escambia County*, suit was brought on behalf of Negro children to enjoin segregation in the county schools and racial assignment of the teachers. Judge Carswell's opinion manifested a severely restricted interpretation of the Supreme Court's opinion in *Brown* v. *Board of Education*, concluding that it applied only to the segregation of children, not the teachers, finding no basis at all for the proposition that the racial assignment of teachers may also violate equal protection owing the students, and he denied them an opportunity to establish that systematic racial assignment of teachers may obviously bear on the quality of the student's own education. In reversing, the court of appeals held that it was error not to allow the plaintiffs an opportunity to show to what extent they may be injured by racial segregation of teachers.

Let me interrupt my prepared statement at this point to point out that when the identical issue came before Judge Haynsworth he, as the fifth circuit judge, of course recognized that the students were in a suitable position to contest that issue and granted full relief on the merits.

In a companion case brought before Federal district court Judge Simpson in the middle district of Florida on the same issue Judge Simpson also recognized that that was the point.

In short, gentlemen, Judge Carswell's opinion on this issue stands unique as a severe and restrictive and subsequently reversed interpretation on a principal point of constitutional law.

It is correct also, of course, that there are several cases in which relief was not denied to plaintiffs suffering injury from unlawful racial discrimination (see, for example, *Brooks* v. *City of Tallahassee*, 202 F. Supp. 56 N.D. Fla. 1961, *Pinkney* v. *Meloy*, 241 F. Supp. 933 N.D. Fla. 1965). They have been repeatedly mentioned here as the *Air Terminal* and *Barber Shop* cases.

Senator BAYH. Are there others that have come to your attention?

Mr. VAN ALYSTYNE. Respectfully, Senator, those were the only two that I was able to find in 72 hours of research. It is also possible that opinions were overlooked in that these cases are nowhere indexed by judges names.

Senator BAYH. If you find others—I do not speak for the whole committee—I would hope you would bring those to our attention as well.

Mr. VAN ALYSTYNE. I would wish to do so in any case from a private sense of responsibility to this committee. Respectfully however, while relief was not denied in these cases, it was only in circumstances where heavily settled higher court decision and incontestably clear acts of Congress virtually compelled the result, leaving clearly no leeway for judicial discretion to operate in any other direction. I would respectfully invite the committee's particular attention to the particular opinions to establish that conclusion.

More disturbing in the cases generally, and by generally I mean not to restrict myself to the area of race relations at all, although intrinsically far more difficult to illustrate in the nature of the shortcoming, there is simply a lack of reasoning, care, or judicial sensitivity overall, in the nominee's opinions.

There is, in candor, nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States.

It is, moreover, in this context and on the basis of this subsequent record that the Senate must resolve fair doubts in assessing the significance of an acknowledged statement made by the nominee under public circumstances, as a mature man of 28 years, with a graduate education in the law and experience in business affairs, now to be considered for the highest judicial office in the United States. This is not the time, in this public room, for any of us to weigh these words for all their impact. Rather, it is for each of you to go to some private place, to these words again, slowly and aloud, listening again, then to decide the future of the Supreme Court and the advice of the Senate:

"I yield to no man, as a fellow candidate or as a fellow citizen, in the firm vigorous belief in the principles of white supremacy and I shall always be so governed." (G. Harrold Carswell)

I have not come here to damn Judge Carswell. I do not know him personally.

I merely wish to volunteer this observation if I could. It was really after a great deal of personal agonizing that I decided to appear at all. I was concerned, however, that with the relative brevity of time for others to make some systematic and professionally responsible review of the judge's decision there might be no one else who could attempt to advise members of this committee in terms of your own question, Senator, whether there were reassuring events in this 20-year hiatus of time, so that one could honorably, as I should want to do as well, wholly dismiss and discount the utterance of 1948.

Discussing the dissimilarity between the nominations of Justice Black and Judge Carswell, Professor Van Alystyne goes on to say this:

As county prosecutor of Bessemer County in Alabama, Hugo Black prosecuted the mayor and chief of police for extorting confessions from Negroes. That is a reassuring event in my mind. As a U.S. Senator, he had ample opportunity to take a political position under very public circumstances on a variety of constitutional and civil liberties issues. In one case, for instance, he voted against the Smoot-Hawley tariff, a very complicated bill, and primarily on the basis that it gave a certain power to one of the customs masters to screen out certain forms of writing from the United States; that is to say, his was the first amendment objection.

This matter was carefully reviewed by people of politically liberal persuasion at the time, and they did find a repeated series of reassuring events at this time, so to indicate that at the very worst then Hugo Black's affiliation with the KKK was one of convenience, given their overwhelming political control of the area, but neither by public utterance nor by private conduct nor by subsequent participation in the U.S. Senate or otherwise in public or private life was there lacking the presence of reassuring events or any presence of things more detrimental.

There is, however, a different distinction as well, Senator; 1948 is not 1933. The race issue was not a major issue in 1933. The affiliation of convenience may not speak particularly well of a man, but this was by no means so serious a matter in 1933 as in 1948. In 1948 civil rights legislation was before Congress. This was in the context of all the political controversy. The President had just desegregated the military in which Mr. Carswell himself had been matured in part. The Nation had just then read President Truman's special report "To Secure These Rights." The issue was now central, the oc-

casion to reflect was far better provided than in 1933.

We have to look at the situation in terms of distinction in point of time: When Senator Black was before the Senate for confirmation to the Supreme Court, and the relative unimportance, although I say that with regret, the relative public unimportance of the race issue, and the posture of the Supreme Court, and the difference in quality today.

If the Warren court will be historically a monument, it will probably be principally because it at least gave that initial push to the momentum of concern in the United States dating from 1954. There has been in my view a unique and admirable unanimity on this crucial question since that time.

I can think of no more regrettable insult to the Warren court, unless the committee is virtually reassured that this was merely a forgivable incident, and can find those reassuring events, in the absence of that kind of evidence I tell you in all respect that it will be a major insult to the legacy of the Warren court if this nomination is confirmed.

I find no similar situation in the circumstances of the confirmation of Senator Black.

And just last week a group of almost 500 prominent lawyers, including Democrats and Republicans, liberals and conservatives, as well as the deans of the law schools at Harvard, Yale, and the University of Pennsylvania, and the president of the Association of the Bar of New York City—and incidentally also the president of a bar association from the State of the distinguished Senator from Michigan, the Detroit Bar Association—signed a statement asking the Senate to reject the Carswell nomination and at the very least to reopen hearings.

These outstanding lawyers feel that Carswell has neither the legal nor mental qualifications necessary for service on the Supreme Court, or for that matter on any high court. Their analysis of his record indicates that Harrold Carswell still believes in the separation of the races as the proper way of life.

In a letter to Senators accompanying the statement these lawyers write:

We respectfully urge that, although this is a second nominee for the vacancy, the Senste has a greater constitutional duty to exercise independent judgment in judicial appointments than it has in executive appointments. We believe that, in the exercise of that duty, the Senate should confirm an appointment to the Supreme Court only if the nominee is of outstanding competence and superior ability. Judge Carswell does not, in our opinion, meet that test.

The Senate has recognized this obligation in repeated instances. For example, the 71 Supreme Court nominations sent to the Senate during the nineteenth century by the Presidents, more than one-fourth were denied Senate approval (Charles Warren: The Supreme Court in United States History, Vol. II, pp. 758–762).

In my view, Mr. President, this group of outstanding lawyers has developed powerful and cogent arguments why the nomination of G. Harrold Carswell should be rejected. Considerable study is given to Carswell's role in leasing a public golf course to a private club in an obvious attempt to exclude Negroes from using the facilities. The statement in question is so significant and so convincing that I would like to read it to the Senate.

The understigned members of the Bar, in various sections of the United States, and of differing political affiliations, are deeply concerned about the evidence in the hearings of the United States Senate Judiciary Committee on the confirmation of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court of the United States.

The testimony indicates quite clearly that the nominee possesses a mental attitude which would deny to the black citizens of the United States—and to their lawyers, black or white—the privileges and immunities which the Constitution guarantees. It has shown, also, that quite apart from any ideas of white supremacy and ugly racism, he does not have the legal or mental qualifications essential for service on the Supreme Court or on any high court in the land, including the one where he now sits.

The testimony has shown no express or implied repudiation of his 1948 campaign declarations in favor of "white supremacy" and of his expressed belief that "segregation of the races is proper and the only correct way of life in our State"—until his confirmation for the United States Supreme Court was put in jeopardy by their disclosure. On the contrary, it shows a continuing pattern of reassertion of his early prejudices.

That pattern is most clearly indicated by his activities in 1956 in connection with the leasing of a public golf course in his city to a private club, for the purpose of evading the Constitution of the United States and excluding blacks from its golf course.

We are most deeply concerned about this part of the testimony. He was then no longer the youthful, enthusiastic campaign orator of 1948 running on a platform of "white supremacy" and "segregation as a way of life." He was then a mature man, holding high Federal office.

Unfortunately, insufficient public attention has been paid by the media of public information and by the public in general to this episode.

The testimony as to the golf club is particularly devastating, not only because of the nominee's lack of candor and frankness before the Senate Committee in attempting to explain it, but because his explanation, if true, shows him to be lacking the intelligence of a reasonable man and to be utterly callous to the implications of the scheme to which he was lending himself.

The circumstances surrounding this golf club incident are extremely important, and should be made clear. By 1955, the Supreme Court of the United States had declared that it was unconstitutional for a city or state to segregate any of its public recreational facilities, such as golf courses. As a result of this decision, a common and well-publicized practice had grown up in the South, in order to keep blacks off municipal golf courses, by which the cities would transfer or lease the public facilities to a private corporation, which would then establish rules for exclusive use by whites. This was, of course, a palpable evasion—and universally understood so to be.

By 1956, many cases had already been filed in various cities of the South to invalidate these obvious subterfuges. Several lower United States Courts had already struck them down as unconstitutional. These cases were well publicized at the time when United States Attorney Carswell, who had been, of course, sworn as a United States Attorney to uphold the Constitution and laws of the United States, became involved in the matter of the municipal golf club in Tallahassee, Florida, where he lived.

By the date the Tallahassee incident occurred, five lawsuits had already been started in different cities in the State of Florida to desegregate municipal recreation facilities, including, among others, golf clubs; and it was clearly evident that Tallahassee and its municipal golf club would soon be the target of such a suit.

Therefore, to circumvent the results of such a suit, some white citizens of Tallahassee incorporated a private club, to which the municipal golf course was thereupon leased for a nominal consideration. Affidavits, dated in February 1970, were submitted and read to the Senate Committee, signed by both blacks and whites who were residents of Tallahassee at the time, showing that it was generally understood that this transfer was being made solely for the purpose of keeping black citizens off the course.

One of these affidavits (TR 610)* was by a Negro lady, a public high school teacher for ten years, the business manager of Tallahassee's A&M Hospital for one-half year, and presently an Educational Specialist at the Federal Correctional Institution in Tallahassee. It said in part:

"Tallahassee was in a racial uproar over the bus boycott and other protests—bringing a reaction of fear to the white community. The word 'private' had increasingly become a code name for segregation.

"The Capital City Country Club incorporation proceedings were well-publicized and the racial overtones were necessarily clear to every knowledgeable citizen in the areas, and it would have been surprising to me if an intelligent man, particularly an incorporator was not aware of the repeatedly emphasized racial aspects of this case.

"We did discuss this corporation widely at the time; had we not been so preoccupied with other protests, we would have undoubtedly moved against the Corporation in civil suit."

Another affidavit (TR 611) was signed by a white lady, "a life-long resident of Tallahassee whose family has been domiciled in the city for several generations," "the wife of the chairman of Florida's oldest bank, the Lewis State Bank of Tallahassee." It stated that: (1) the golf course had been developed and improved by a grant of $35,000 of WPA funds; (2) she refused to join in the new club "because we wanted no part in converting public property to private use without just compensation to the public, and because of the obvious racial subterfuge which was evident to the general public"; (3) that she had discussions at the time of the lease "with a variety of parties during that period on the subject of a golf course, the issue being of wide civic concern." She stated:

"I would have been surprised if there was any knowledgeable member of the community who was unaware of the racial aspect of the golf course transaction. The controversy appeared in the local newspaper of the time and a city commissioner was known to have raised questions about the racial implications involved."

There was then received in evidence (TR 613), a clipping from page 1 of the local newspaper referred to, the Tallahassee Democrat, for February 15, 1956. This contemporaneous clipping corroborated the affidavits in showing the community discussion of the racial purpose of the lease. Reporting the fact that the lease had been entered into by the City Commission with the private club, it stated:

"The action came after a two-month cooling off period following the proposal's first introduction. At that time former City Commissioner H. G. Easterwood, now a county commissioner, blasted the lease agreement.

"He said racial factors were hinted as the reason for the move.

"Under the arrangement, the country club group would take over the operation of the course September 1. The lease is for 99 years, running through 2055, and calls for a $1.00 a year payment."

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*References are to the transcript of the hearings on the nomination before the Senate Committee on the Judiciary.

The then United States Attorney, now seeking to become an Associate Justice of the Supreme Court of the United States, became an incorporator and director of that private club to which the golf club was to be leased. Here was a high Federal public official, thoroughly cognizant of the decisions of the Federal courts, participating in a scheme to evade the Constitution.

The answer of Judge Carswell to the disclosure of this was that: (1) he thought that the papers he signed (with a subscription of $100) were for the purpose of fixing up the old golf club house; (2) that he at no time discussed the matter with anyone; and (3) that he never believed that the purpose of this transaction had anything to do with racial discrimination or keeping blacks off the course.

Some of the Senators at the hearings were as incredulous as we are. We think that a few short extracts of the Judge's testimony on this matter will give a clearer picture of the man who now seeks a seat on the Supreme Court of the United States—the final guardian of the individual rights of all of us:

Judge CARSWELL (In answer to a question by Senator Kennedy as to whether the Judge was testifying that the transaction was principally an effort to build a club house) : "That is my sole connection with that. I have never had any discussion or never heard anyone discuss anything that this might be an effort to take public lands and turn them into private lands for a discriminatory purpose. I have not been privy to it in any manner whatsoever." (TR 65)

Senator KENNEDY (TR 149) : Mr. Nominee, I think the document speaks for itself in terms of the incorporation of a club, a private club . . . I think, given the set of circumstances, the fact that they were closing down all recreational facilities in that community at that time because of various integration orders, I suppose the point that Senator Bayh is getting to and some of us asked you about yesterday is whether the formation of this club had it in its own purpose to be a private club which would, in fact, exclude blacks. The point that I think he was mentioning and driving at, and Senator Hart talked to, and I did in terms of questions, is whether, in fact, you were just contributing some $100 to repair of a wooden house, club house, or whether, in fact, this was an incorporation of a private club, the purpose of which was to avoid the various court orders which had required integration of municipal facilities. . . .

"Now, I think this is really what, I suppose is one of the basic questions which is of some interest to some of the members and that we are looking for some response on."

Judge CARSWELL: "Yes sir, and I hope I have responded, Senator Kennedy. I state again unequivocally and as flatly as I can, that I have never had any discussions with anyone, I never heard any discussions about this."

Senator BAYH: "You had no personal knowledge that some of the incorporators might have had an intention to use this for that purpose?" (TR 150)

Judge CARSWELL: "I certainly could not speak for what anybody might have thought, Senator. I know that I positively didn't have any discussions about it at all. It was never mentioned to me. I didn't have it in my mind, that is for eure. I can speak for that." (TR 150)

Senator Bayh then asked whether there were then any problems in Florida relating to the use of public facilities and having them moved into private corporations. Judge Carswell answered:

"As far as I know, there were none there and then in this particular property."

Senator Bayh then asked whether Judge Carswell was not aware of other cases in Florida?

Judge CARSWELL: "Oh, certainly, certainly. There were cases all over the country at that time, everywhere. Certainly I was aware of the problems, yes. But I am telling you that I had no discussions about it, it was never mentioned to me in this context and the $100 I put in for that was not for any purpose of taking property for racial purposes or discriminatory purposes." (TR 151)

Senator KENNEDY: "Did you have any idea that that private club was going to be opened or closed?

Judge CARSWELL: "The matter was never discussed."

Senator KENNEDY: "What did you assume?"

Judge CARSWELL: "I didn't assume anything. I assumed that they wanted the $100 to build a club house and related facilities if we could do it. . . ." (TR 153)

Senator KENNEDY: "When you sent this and you put up the money, and you became a subscriber, did you think it was possible for blacks to use that club or become a member?"

Judge CARSWELL: "Sir, the matter was never discussed at all."

Senator KENNEDY: "What did you assume, not what was discussed?"

Judge CARSWELL: "I didn't assume anything. I didn't assume anything at all. It was never mentioned."

Senator KENNEDY: "Did you in fact sign the letter of incorporation?"

Judge CARSWELL: "Yes, sir. I recall that. . . ."

Senator KENNEDY: "Did you generally read the nature of your business or incorporation before you signed the notes of incorporation?"

Judge CARSWELL: "Certainly I read it, Senator. I'm sure I must have. I would read anything before I put my signature on it, I think [sic]."

We cannot escape the conclusion that a man, in the context of what was publicly happening in Florida and in many parts of the South—which the nominee says he knew—and what was being discussed locally about this very golf club, would have to be rather dull not to recognize this evasion at once; and also fundamentally callous not to appreciate and reject the implications of becoming a moving factor in it. Certainly it shows more clearly than anything else the pattern of the Judge's thinking from his early avowal of "white supremacy" down to the present.

Particularly telling—as showing the continuing pattern of his mind which by the time of the golf club incident, if not before, had become clearly frozen—are the testimony and discussion of fifteen specific decisions in civil and individual rights cases by the nominee as a United States District Judge (TR 629, et seq.). These fifteen were, of course, only a few of the decisions by the nominee. A study of a much fuller record of his opinions led two eminent legal scholars and law professors to testify before the Senate Committee that they could find therein no indication that the nominee was qualified—by standards of pure legal capacity and scholarship, as distinguished from any consideration of racial prejudices—to be a Supreme Court Justice.

These specific fifteen cases are all of similar pattern: they involve eight strictly civil rights cases on behalf of blacks which were *all* decided by him against the blacks and all *unanimously* reversed by the appellate courts; and seven proceedings based on alleged violations of other legal rights of defendants which were all decided by him against the defendants and all *unanimously* reversed by the appellate court. Five of these fifteen occurred in one year—1968.

These fifteen cases indicate to us a closed mind on the subject—a mind impervious to repeated appellate rebuke. In some of the fifteen he was reversed more than once. In many of them he was reversed because he decided the cases without even granting a hearing, although judicial precedents clearly required a hearing.

We do not dispute the Constitutional power or right of any President to nominate, if he chooses, a racist or segregationist to the Supreme Court—or anyone else who fills the bare legal requirements. All that we urge is that the nominee reveal himself, or be revealed by others, for what he actually is. Only in this way can the Senate fulfill its own Constitutional power to confirm or reject; only in this way can the people of the United States—the ultimate authority—exercise an informed judgment. That is the basic reason for our signing this statement, as lawyers, who have a somewhat special duty to inform the community of the facts.

We agree with Judge Carswell that a nominee for the Court should not ordinarily be compelled to impair his judicial independence by explaining his decisions to a Senate Committee. But this was no ordinary situation. It involved a consistent and persistent course of judicial conduct in the face of continual reversals, showing a well-defined and deeply ingrained pattern of thought.

We believe that—at the very least—the hearings should be reopened so that an official investigation can be made by independent counsel for the Committee, empowered as it is to subpoena all pertinent records, including the files of the Department of Justice and the records of Judge Carswell's court. So far, the evidence in opposition—compelling as it is—has been dug up solely by the energy and efforts of private citizens or groups, without power of subpoena. For example, the episodes of the 1948 pledge to "white supremacy" and the country club lease were both dug up by independent reporters.

Are there any other incidents like the golf club, or other public or private statements about "white supremacy"? Are there additional, but unreported, decisions in the files of Judge Carswell's court, not readily available to lawyers who can search only through the law books for cases which have been formally reported and printed? What information can be found in the files of the Department of Justice, unavailable, of course, to the opposition but readily subject to a Committee subpoena?

One vote out of nine on the Supreme Court is too important to rely on a volunteer investigation, on the efforts of private, public-spirited lawyers and reporters, although they have already uncovered evidence clearly indicating, in the absence of a more credible explanation, rejection of the nomination.

The future decisions of the Supreme Court will affect the lives, welfare and happiness of every man, woman and child in the United States, the effectiveness of every institution of education or health or research, the prosperity of every trade, profession and industry. Those decisions will continue to be a decisive factor in determining whether or not ours will, in the days to come, truly be "a more perfect Union," where we can "establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

We urge that the present record clearly calls for a refusal to confirm by the Senate of the United States.

Signed:

BRUCE BROMLEY,
Former Judge, Court of Appeals, State of New York.

FRANCIS T. P. PLIMPTON,
President, the Association of the Bar of the City of New York.

SAMUEL I. ROSENMAN,
Former President, the Association of the Bar of the City of New York.

BETHUEL M. WEBSTER,
Former President, the Association of the Bar of the City of New York.

Mr. CASE. Mr. President, will the Senator from Wisconsin yield?

Mr. PROXMIRE. I am happy to yield to the Senator from New Jersey.

Mr. CASE. I asked the Senator to yield only to underscore the fact that these four principal signers of the statement he has just read are, indeed, among the most distinguished, able, and well-known lawyers in the country. Except for Judge Rosenman, they are all Republicans. All of them, perhaps including Judge Rosenman, are conservative people—certainly very solid people.

We do not get a Bruce Bromley, leader of the New York Bar, or a Webster, or a Judge Rosenman, or a Plimpton—he is presently president of the Association of the Bar of the City of New York, and active in all good works, among other things, a longtime trustee of Columbia University—we do not get people like that making statements of this sort lightly.

Their consciences were outraged by this appointment. I must confess that mine was outraged, too.

Appointments of this sort are never good or acceptable. They are especially unacceptable now, if the Senator would yield further, if I am not interrupting him——

Mr. PROXMIRE. No. This is a very good time for me to yield——

Mr. CASE. I did not wish to interrupt the flow of the Senator's thoughts. I thought this might be a good time to say something since he has finished reading the rather long statement by these lawyers.

Mr. PROXMIRE. I thank the distinguished Senator. His point is most useful because there is an assumption that people opposing the nominee are wild-eyed liberals——

Mr. CASE. That they are long-haired liberals and——

Mr. PROXMIRE. But these are solid members, as the Senator from New Jersey has stated, of the President's own party who are men, I am sure, who would not take a position lightly. They would like very much, as would the Senator from New Jersey and the Senator from Wisconsin, to support a nomination for the Supreme Court if they could possibly do so.

Mr. CASE. Mr. President, I appreciate the Senator's giving me this chance to say this. Since I have interrupted, there is one other point that I would like to underscore, if I may, at this time.

Many arguments have been made that less than wholly distinguished people have been appointed and in some cases have come to be acceptable or even good judges. The thought has been expressed that this might be true in the instant case.

I think we have to go a little on the law of averages. And we will get a better Court if we do the best we can. No selection process is perfect. Even with the best of intentions and with the highest criteria and the highest intelligence, one can make a mistake sometimes on how a person will turn out. But certainly the chances are greater that a selection from the top drawer will be more successful as far as the outcome is ultimately concerned than if the selection were made as our friend, the Senator from Louisiana suggested, from A, B, and C groups, with some idea that we need a representation across the board.

Even if this were so, let us leave everything else aside and let us assume that this man, having been appointed and seated on this Court, has a whole change in his views about race and develops an unusual diligence and surprises all of us with latent powers that he has not yet shown. Still, we would be taking a chance on that.

Let us assume that he worked out. It would still be a most unfortunate appointment, because it represents something wholly unnecessary. There are many other conservative people from the South that could be selected. It represents wholly unnecessarily a slap in the face to the black community of this country.

It represents a most unfortunate repudiation of those black moderate leaders who have been doing their best to help this country stay on an even keel.

It is irresponsible to do this at this time, and the argument that this man might change his mind on these matters would not correct the deep wound that would be caused in this area at a time when this country needs no further wounds, but, rather, a healing, an understanding, and an encouragement to the members of the black and white communities who are doing their best to help us over this most difficult period.

Mr. PROXMIRE. Mr. President, I thank the Senator. I am honored to have been on the floor when he made this extremely eloquent and moving statement. I think it is one that we ought to dwell on.

This is a wholly unnecessary insult and wound to the black community, as the Senator has said.

I think a point that we should consider is that the great need in our country is to persuade those who have been denied justice. And certainly all of us know that the blacks in this country have been denied justice.

They have been told that they should work within the system for change. How can they work for a change? One way is to blow up a courthouse. Another is to start a riot. Another is to work through the Supreme Court of the United States. And that way has been found to be enormously effective.

We have made great progress in civil rights in the last 16 years, since 1954.

But what kind of hope for progress by working within the system can we hold up to the American blackman when people like Carswell are nominated, men with his background?

As the New York Times said when the nomination was announced by President Nixon:

> It may well be that an appointment to the Supreme Court will do G. Harrold Carswell a world of good.

Maybe it will. But this is an incredible justification for appointing a man to the highest court of our land.

We can only judge him on the basis of what he has been, what he has done, and what he has stood for.

We cannot get a more distinguished group of lawyers and jurists than the 500 who have appealed to the Senate not to confirm Judge Carswell.

And these eminent men point out that not only has he acted and spoken in favor of segregation, but also his court opinions clearly reflect this again and again. He has decided against black persons who have appeared before his court again and again. And he has been reversed, and reversed in many cases unanimously.

I should like to document further the point made by the Senator from New Jersey by pointing out some of the many distinguished men who have signed this appeal to the Senate that it should not under any circumstances confirm the nomination of Judge Carswell.

Charles S. Desmond, former chief judge, New York State court of appeals, Buffalo, N.Y.

John G. Buchanan, first chairman, American Bar Association committee on the judiciary; former president, Allegheny County Bar Association, and Pennsylvania Bar Association, Pittsburgh, Pa.

Dean Robert F. Drinan, S. J., Boston College Law School, Boston, Mass. He is a man who we have had testify before many Senate commitees with great distinction. He is recognized as a legal scholar and an expert.

Cyrus Vance, partner, Simpson, Thacher & Bartlett, New York, N.Y.

Simon H. Rifkind, former judge, U.S. district court, New York, N.Y.

Chauncey Belknap, former president of the New York State Bar Association, New York, N.Y.

Haskell Cohn, president of the Boston Bar Association, Boston, Mass.

Warren Christopher, partner in O'Melveny & Meyers, Los Angeles, Calif.

We then have a number of distinguished professors and the dean and faculty of Yale University Law School. Yale University Law School is certainly one of the most eminent law schools in our country. Many people feel it is the best. The dean and a number of the members of the faculty have supported this statement.

John W. Douglas, former U.S. Assistant Attorney General, Washington, D.C. Mr. Douglas is a son of former Senator Douglas.

Robert M. Morgenthau, former U.S. attorney for the southern district of New York, N.Y. He recently submitted his resignation.

Sumner T. Bernstein, past president of the Maine State Bar Association, Portland, Maine.

We have the dean and a number of the faculty members of the Notre Dame Law School, Notre Dame, Ind.

We have a number of distinguished men from California, New Jersey, and Montana, and a number of distinguished members of the faculty of Ohio State University at Columbus, Ohio.

We have the dean and a large number of the faculty members of Columbia University. The dean is William C. Warren.

Professor Harold Havighurst, certainly one of the most distinguished legal scholars in the country.

Theodore Chase, former president of

the Boston Bar Association, Boston, Mass.

We have distinguished lawyers from Chicago, Ill., and Detroit, Mich., and many other parts of the country.

Mr. President, I ask unanimous consent that the entire list be printed at this point in the RECORD.

There being no objection the list was ordered to be printed in the RECORD, as follows:

LIST OF LAWYERS OPPOSING NOMINATION OF G. HARROLD CARSWELL

Charles S. Desmond, Former Chief Judge, New York State Court of Appeals, Buffalo, New York.

John G. Buchanan, First Chairman, American Bar Association Committee on the Judiciary; Former President, Allegheny County Bar Association and Pennsylvania Bar Association, Pittsburgh, Pennsylvania.

Dean Robert F. Drinan, S.J., Boston College Law School, Boston, Massachusetts.

Cyrus Vance, Partner, Simpson, Thacher & Bartlett, New York, New York.

Simon H. Rifkind, Former Judge, U.S. District Court, New York, New York.

Chauncey Belknap, Former President, New York State Bar Association, New York, New York.

Haskell Cohn, President, Boston Bar Association, Boston, Massachusetts.

Warren Christopher, Partner, O'Melveny & Myers, Los Angeles, California.

Dean and Faculty, Yale University Law School, New Haven, Connecticut: Louis H. Pollak, Dean; Boris I. Bittker; Ralph S. Brown, Jr., Associate Dean; Arthur A. Charpentier; Thomas I. Emerson; William L. F. Feistiner, Associate Dean; Daniel J. Freed; Abraham S. Goldstein, Dean Designate; Joseph Goldstein; Friedrich Kessler; Ellen A. Peters; Charles A. Reich; Eugene V. Rostow; Robert B. Stevens; Clyde W. Summers; Harry H. Wellington.

John W. Douglas, Former U.S. Assistant Attorney General, Washington, D.C.

Robert M. Morgenthau, Former U.S. Attorney for the Southern District of New York, New York, New York.

Sumner T. Bernstein, Past President, Maine State Bar Association, Portland, Maine.

Dean and Faculty, Notre Dame Law School, Notre Dame, Indiana: William B. Lawless, Dean; Frank E. Booker; Leslie A. Foschio, Assistant Dean; Godfrey C. Henry; Charles W. Murdock; Thomas L. Shaffer, Associate Dean.

Robert H. Fabian, San Francisco, California.

Burrell Ives Humphreys, Former Deputy Attorney General, State of New Jersey, Wayne, New Jersey.

Richard A. Bancroft, San Francisco, California.

Gardner Cromwell and Lester R. Rusoff; Professors, University of Montana School of Law, Missoula, Montana.

Samuel H. Hofstadter, Former Justice, Supreme Court, State of New York, New York, New York.

Walter S. Hoffmann, Wayne, New Jersey.

Faculty, Ohio State University College of Law, Columbus, Ohio: Merton C. Bernstein, Mary Ellen Caldwell, Howard P. Fink, Michael Geltner, Lawrence Herman, Michael Kindred, P. J. Kozyris, Stanley K. Laughlin, Jr., Richard S. Miller, John B. Quigley, Jr., Keith Rosenn, Peter Simmons, Roland J. Stanger, R. Wayne Walker.

Harold E. Kohn, Partner, Dilworth, Paxson, Kalish, Kohn & Levy, Philadelphia, Pennsylvania.

Ramsey Clark, Former Attorney General of the United States, Washington, D.C.

Eli Frank, Jr., President, Maryland State Bar Association, Baltimore, Maryland.

Harold C. Havighurst, Professor, Arizona State University College of Law, Tempe, Arizona.

Robert M. Landis, Partner, Dechert, Price & Rhoads, Philadelphia, Pennsylvania.

Theodore Chase, Former President, Boston Bar Association, Boston, Massachusetts.

Dean and Faculty, Columbia University School of Law, New York, New York: William C. Warren, Dean; Harlan M. Blake; William L. Cary; George Cooper; Robert M. Cover; Henry de Vries; Harold S. H. Edgar; Sheldon H. Elsen; Tom J. Farer; E. Allan Farnsworth; Wolfgang G. Friedmann.

William R. Fry, Assistant Dean; Mrs. Nina M. Galston; Richard N. Gardner; Walter Gellhorn; Frank P. Grad; R. Kent Greenawalt; Milton Handler; Robbert Hellawell; Louis Henkin; Alfred Hill; N. William Hines; William Kenneth Jones.

Harold J. Rothwax; John M. Kernochan; Victor Li; Louis Lusky; Willis L. M. Reese; Albert J. Rosenthal; Benno C. Schmidt, Jr.; Edwin G. Schuck; Hans Smit; Abraham D. Sofaer; Michael I. Sovern; Telford Taylor; H. Richard Uviller; Herbert Wechsler; Walter Werner.

John Ritchie, Chicago, Illinois.

Clifford L. Alexander, Jr., Partner, Arnold & Porter, Washington D.C.

David Goldstein, Former President, Connecticut Bar Association, Bridgeport, Connecticut.

Dean and Faculty, Columbus School of Law, Catholic University of America, Washington, D.C.: E. Clinton Bamberger, Jr., Dean; Brian M. Barnard; Kendall M. Barnes; L. Graeme Bell, III; Marilyn Cohen, Assistant Dean; Fernand N. Dutile; Carson G. Frailey; Arthur John Keeffe; Vernon X. Miller; Michael D. O'Keefe; Ralph J. Rohner; John R. Valeri; Matthew Zwerling.

Morris Abram, Member of the Georgia and New York Bars; Former President, Brandeis University, New York, New York.

Addison M. Parker, Partner, Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa.

Faculty, School of Law, University of California, Los Angeles, California: Reginald H. Alleyne; Michael R. Asimow; Roger L. Cossack, Assistant Dean; Kenneth W. Graham, Jr.; Donald G. Hagman; Harold W. Horowitz; William A. Klein; Leon Letwin; Henry W. McGee, Jr.; Herbert Morris; Addison Mueller; Melville B. Nimmer; Monroe E. Price; Barbara B. Rintala; Arthur I. Rosett; Lawrence Sager; Gary T. Schwartz; Herbert E. Schwartz; Luis Schuchinski; Robert A. Stein; Michael E. Tigar; Richard A. Wasserstrom.

G. D'Andelot Belin, Partner, Choate, Hall & Stewart, Boston, Massachusetts.

Charles F. Houghton, Partner, Reardon, Thoma & Cunningham, Yonkers, New York.

Donald E. Freedman, Partner, Berman & Tomaselli, Freeport, New York.

Nathaniel Colley, Partner, Colley & McGhee, Sacramento, California.

Dean and Faculty, Valparaiso University School of Law, Valparaiso, Indiana: Louis F. Bartelt, Jr., Dean; Charles R. Gromley; Jack A. Hiller; Alfred W. Meyer; Seymour Moscowitz; Richard Stevenson; Michael Swygert; Fredrich Thomforde; Burton Wechsler.

Louis Garcia, San Francisco, California.

Dale A. Whitman, Professor, University of North Carolina School of Law, Chapel Hill, North Carolina.

Graham B. Moody, Jr., Partner, McCutchen, Doyle, Brown & Enersen, San Francisco, California.

Dean and Faculty, Georgetown University Law Center, Washington, D.C.: Adrian S. Fisher, Dean; Addison Bowman, III; Richard F. Broude; Paul R. Dean; Frank J. Dugan; Stanley D. Metzger; John G. Murphy, Jr.; Donald E. Schwartz; Don Wallace, Jr.

Dean David H. Vernon, University of Iowa College of Law, Iowa City, Iowa.

Lloyd K. Garrison, Former Member, Executive Committee of the Association of the Bar of the City of New York and Former President, Board of Education of the City of New York, New York, New York.

Sadie T. M. Alexander, Secretary, Philadelphia Bar Assoication Foundation, Philadelphia, Pennsylvania.

Dean Jefferson B. Fordham, University of Pennsylvania Law School, Philadelphia, Pennsylvania (embracing basic objection to confirmation, but uncommitted as to factual details).

Edwin P. Rome, Partner, Blank, Rome, Klaus & Comisky, Philadelphia, Pennsylvania.

Faculty, Loyola University School of Law, Los Angeles, California: Richard A. Bachon, S. J.; George C. Garbesi; Frederick J. Lower, Jr.; Walter R. Trinkaus; Martin F. Yerkes.

Faculty, University of Maine School of Law, Portland, Maine: Orlando E. Delogu; Harry P. Glassman; David J. Halperin; Pierce B. Hasler; Edwin A. Heisler; William F. Julavits, Assistant Dean; Gerald F. Petruccelli, Jr.

Irving M. Engel, Partner, Engel, Judge & Miller, New York, New York.

Henry W. Sawyer, III, Partner, Drinker, Biddle & Reath, Philadelphia, Pennsylvania.

Morris Gitlitz, Former President, Broome County Bar Association, Binghamton, New York.

J. A. Darwin, Treasurer, San Francisco Council for Civic Unity, San Francisco, California.

Dean and Faculty, Indiana University School of Law, Bloomington, Indiana: William Burnett Harvey, Dean; Joseph Brodley; Edwin Greenebaum; Dan Hopson; Val Nolan; William Popkin; Thomas Schornhorst; Alan Schwartz; Philip Thorpe.

Jacob D. Zeldes, Chairman, Committee on Administration of Criminal Justice, Connecticut Bar Association and Bridgeport Bar Association, Bridgeport, Connecticut.

Bernard Wolfman, Dean Designate, University of Pennsylvania Law School, Philadelphia, Pennsylvania.

Dean and Faculty, Rutgers University School of Law, Newark, New Jersey: Willard Heckel, Dean; Frank Askin; Alfred W. Blumrosen; Victor Brudney; Norman L. Cantor; Richard M. Chused; Julius Cohen; Vincent E. Fiordalisi; Steven Gifis; Eva H. Hanks; John Lowenthal; Saul H. Mendlovitz; Sidney L. Posel; J. Allen Smith.

David M. Heilbron, Partner, McCutchen, Doyle, Brown & Enersen, San Francisco, California.

Faculty, State University of New York at Buffalo, School of Law, Buffalo, New York: James Atleson; Thomas Buergenthal; Kenneth M. Davidson; Louis Del Cotto; Mitchell Franklin; Daniel J Gifford; Paul Goldstein; William R. Greiner; John H. Hollands; Jacob D. Hyman; Kenneth F. Joyce; David R. Kochery; Steven Larson; Joseph Laufer; W. Howard Mann; Albert R. Mugel; Wade J. Newhouse, Jr.; Robert Reis; Herman Schwartz; Louis H. Swartz; Lance Tibbles.

F. W. H. Adams, Former Police Commissioner of New York City, New York, New York.

Dean and Faculty, University of Illinois College of Law, Champaign, Illinois: John E. Cribbet, Dean; Marion Benfield; Robert W. Brown; Michael O. Dooley; Roger W. Findley; Stephen B. Goldberg; Peter Hay; Edward J. Kionka; Wayne R. La Fave; Prentice H. Marshall; Thomas D. Morgan; Jeffrey O'Connell; Sheldon J. Plager; Charles Quick; Ralph Reisner; Warren F. Schwartz; Herbert Semmel; Victor J. Stone; Lawrence Waggoner; J. Nelson Young.

George N. Lindsay, Partner, Debevoise, Plimpton, Lyons & Gatee, New York, New York.

Dean David M. Helfeld, University of Puerto Rico, School of Law, San Juan, Puerto Rico.

Ted Foster, Associate Dean, Oklahoma City University Law School, Oklahoma City, Oklahoma.

Ernest Angell, Former Vice-President, Association of the Bar of the City of New York, New York, New York.

Faculty, The University of Chicago Law School, Chicago, Illinois: David P. Currie; Kenneth C. Davis; Allison Dunham; Grant Gilmore; Geoffrey C. Hazard; Harry Kalven, Jr.; Edmund W. Kitch; Franklin Zimbring.

William T. Coleman, Jr., Member, Board of Governors, Philadelphia Bar Association, Philadelphia, Pennsylvania.

D'Army Bailey, Former Director, Law Student Civil Rights Research Council, San Francisco, California.

Dean and Faculty, New York University School of Law, New York, New York: Robert B. McKay, Dean; Edward J. Bander; Thomas G. S. Christensen; Leroy D. Clark; Daniel G. Collins; Norman Dorsen; James S. Eustice; M. Carr Ferguson, Jr.; Albert H. Garretson; Gidon A. G. Gottlieb; Howard L. Greenberger; Roland L. Hjorth; William T. Hutton; J. D. Johnston, Jr.; Delmar Karlen; Lawrence P. King; James C. Kirby, Jr.; Charles L. Knapp; Harold L. Korn; Andreas F. Lowenfeld; Charles S. Lyon; Julius J. Marke; Guy B. Maxfield; Robert Pitofsky; Bert S. Prunty, Associate Dean; C. Delos Putz, Jr.; Norman Redlich; Michael Schwartz; Michael A. Schwind; Charles Seligson; Harry Subin; John Y. Taggart; Peter A. Winograd; Victor Zonana.

Breck P. McAllister, Partner, Donovan Leisure Newton & Irvine, New York, New York.

Noel F. George, Partner, George, Greek, King, McMahon & McConnaughey, Columbus, Ohio.

Justin Doyle, Partner, Nixon, Hargrave, Devans & Doyle, Rochester, New York.

Manly Fleischmann, Partner, Jaeckle, Fleischmann, Kelly, Swart & Augspurger, Buffalo, New York.

Ely M. Aaron, Partner, Aaron, Aaron, Schimberg & Hess, Chicago, Illinois.

Hugh McM. Russ, Former President, Bar Association of Erie County, Buffalo, New York.

Jerome E. Hyman, Partner, Cleary, Gottlieb, Steen & Hamilton, New York, New York.

Norman Harris, Partner, Nogi O'Malley & Harris, Scranton, Pennsylvania.

Jack D. Harvey, Albany, New York.

Dean and Faculty, The University of Connecticut, School of Law, West Hartford, Connecticut: Howard R. Sacks, Dean; Robert Bard, Joseph D. Harbaugh, Lewis S. Kurlantzick, Judith Lahey, Neil O. Littlefield, Elliott Milstein, Leonard Orland, Louis I. Parley, Craig Shea, Philip Shuchman, Lester B. Snyder, Alvin C. Warren, Jr., Donald T. Weckstein, Robert Whitman.

Harold Cramer, Vice-Chancellor, Philadelphia Bar Association, Philadelphia, Pennsylvania.

John O. Stewart, Coordinator, Neighborhood Legal Assistance Foundation, San Francisco, California.

Ralph F. Fuchs, Bloomington, Indiana.

Dean Malchy T. Mahon, Hofstra University School of Law, Hempstead, New York.

Harold Evans, Partner, MacCoy, Evans & Lewis, Philadelphia, Pennsylvania.

H. Greig Fowler, Member, Steering Committee, San Francisco Lawyers Committee for Urban Affairs, San Francisco, California.

George R. Davis, Lowville, New York.

Robert H. Cole, Professor, University of California School of Law, Berkeley, California.

Jonathan P. Harvey, Member, Membership Committee, New York State Bar Association, Albany, New York.

Walter E. Dellinger, Professor, Duke University School of Law, Durham, North Carolina.

Dean and Faculty, University of Toledo, College of Law, Toledo, Ohio: Karl Krastin, Dean; Edward Dauer, J. Kirkland Grant, Judith Jackson, Vincent M. Nathan, Assistant Dean, Martin Rogoff, John W. Stoepler, Janet L. Wallin, Thomas Willging.

John P. Frank, Partner, Lewis Roca Beauchamp & Linton, Phoenix, Arizona.

Benjamin E. Shove, Past President, Onondaga County Bar Association, Syracuse, New York.

Arthur J. Freund, Former Member House of Delegates of American Bar Association, St. Louis, Missouri.

Alfred M. Saperston, Partner, Saperston, Wiltse, Duke, Day & Wilson, Buffalo, New York.

Charles W. Allen, Former Chairman, Portland Maine City Council, Portland, Maine.

Victor H. Kramer, Partner, Arnold & Porter, Washington, D.C.

William Lee Akers, Philadelphia, Pennsylvania.

William L. Lynch, Partner, Cleary, Gottlieb, Steen & Hamilton, New York, New York.

Theodore Sachs, Detroit, Michigan.

Reuben E. Cohen, Partner, Cohen, Shapiro, Berger, Polisher and Cohen, Philadelphia, Pennsylvania.

Faculty, University of Arizona College of Law, Tucson, Arizona: Arthur Andrews, James J. Graham, Junius Hoffman, David Wexler, Winton Woods.

Edward E. Kallgren, Partner, Brobeck, Phlegler & Harrison, San Francisco, California.

Thomas M. Cooley, II, Professor, University of Pittsburgh School of Law, Pittsburgh, Pennsylvania.

Dean Louis A. Toepfer, Case Western Reserve University, Franklin J. Backus Law School, Cleveland, Ohio.

A. Crawford Greene, Partner, McCutchen, Doyle, Brown & Enerson, San Francisco, California.

Herbert B. Ehrman, of Counsel, Goulston & Storrs, Boston, Massachusetts.

John J. Barcelo, Professor, Cornell Law School, Ithaca, New York.

Louis B. Schwartz, Professor, University of Pennsylvania Law School, Philadelphia, Pennsylvania.

Faculty, Syracuse University College of Law, Syracuse, New York: George J. Alexander, Robert M. Anderson, Samuel J. M. Donnelly, Samuel M. Fetters, Martin L. Fried, Peter E. Herzog, William J. Hicks, Robert F. Koretz.

Dale Swihart, Professor, Washington University School of Law, St. Louis, Missourt.

Maurice H. Merrill, Professor, University of Oklahoma College of Law, Norman, Oklahoma.

Robert F. Henson, President, Hennepin County Bar Association, Minneapolis, Minnesota.

William L. Marbury, Former President, Maryland State Bar Association, Baltimore, Maryland.

Community Action for Legal Services, Inc., New York, New York: Joshua H. Brooks, Jr.; Oscar G. Chase, Lawrence J. Fox, John C. Gray, Jr.; Manuel Herman; Marcia Lowry; Cornelia McDougald; Gerald Rivera; Robert Roberts; Richard A. Seid; Alfred L. Toombs; Napoleon B. Williams.

Arthur J. Harvey, Former President, Board of Directors, Legal Aid Society, Albany, New York.

Alfred A. Benesch, Partner, Benesch, Friedlander, Mendelson & Coplan, Cleveland, Ohio.

Frank T. Read, Assistant Dean, Duke University School of Law, Durham, North Carolina.

Francis H. Anderson, Professor, Albany Law School, Union University, Albany, New York.

Dean Russell N. Fairbanks, Rutgers University School of Law, Camden, New Jersey.

David L. Cole, Former President, The National Academy of Arbitrators, Paterson, New Jersey.

Asa D. Sokolow, Partner, Rosenman Colin Kaye Petschek Freund & Emil, New York, New York.

Archie Katcher, President, Detroit Bar Association, Detroit, Michigan.

Vincent R. FitzPatrick, Partner, Willkie Farr & Gallagher, New York, New York.

Joseph L. Rauh, Jr., Partner, Rauh and Silard, Washington, D.C.

Michael V. Forrestal, New York, New York.

Boris Kostelanetz, Former Special Assistant to the Attorney General of the United States, New York, New York.

Charles Denby, Partner, Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania.

Hugh A. Burns, Partner, Dawson, Nagel, Sherman & Howard, Denver, Colorado.

Faculty, College of Law, Willamette University, Salem, Oregon: Courtney Arthur, Edwin Butler, Edwin Hood, Dallas Isom, John Paulus, John Reuling, Ross Runkel, Robert Stoyles.

Wayne B. Wright, Former President, Bar Association of Metropolitan St. Louis, St. Louis, Missouri.

Ross, Stevens, Pick & Sophn (all eleven partners), Madison, Wisconsin.

Melvin G. Shimm, Professor, Duke University, School of Law, Durham, North Carolina.

Leonard M. Nelson, Chairman, Judiciary Committee, Maine State Bar Association, Portland, Maine.

Lloyd N. Cutler, Washington, D.C.

Lyman M. Tondel, Jr., Former President, New York State Bar Association, New York, New York.

Dean and Faculty, University of Kansas School of Law, Lawrence, Kansas: Lawrence E. Blades, Dean; Jonathan M. Landers; John F. Murphy; Arthur H. Travers.

Dean and Faculty, Harvard University Law School, Cambridge, Massachusetts (Subscribe to the conclusions expressed herein concerning the qualifications of Judge Carswell for appointment to the Supreme Court); Derek C. Bok, Dean; Paul M. Bator; Stephen G. Breyer; Abram Chayes; Jerome A. Cohen; Charles Fried; Livingston Hall; Louis L. Jaffe; Benjamin Kaplan; Robert E. Keeton; Louis Loss; Frank I. Michelman; Albert M. Sacks; Frank E. Sander; David L. Shapiro; Henry J. Steiner; Donald T. Trautman; Adam Yarmolinsky.

Carroll J. Donohue, Former President, Bar Association of St. Louis, Former Member, Board of Governors of Missouri Bar Association, St. Louis, Missouri.

James W. Lamberton, Partner, Cleary, Gottlieb, Steen & Hamilton, New York, New York.

Joseph A. Califano, Jr., Washington, D.C.

Edwin B. Mishkin, Partner, Cleary, Gottlieb, Steen & Hamilton, New York, New York.

R. Walston Chubb, Partner, Lewis, Rice, Tucker, Allen and Chubb, St. Louis, Missouri.

Shedd, Gladstone & Kronenberg (all three partners), Hackensack, New Jersey.

Mr. JAVITS. Mr. President, I shall be speaking at great length tomorrow on this nomination. I notice the Senator has gone over a list of law school deans and distinguished lawyers and their views on this matter. I, too, have heard a little of the very eloquent explanation by the Senator from New York (Mr. CASE) of the impact on that segment of the community which is extremely important, because it emphasizes what we all know; there is a deep suspicion of national regression in this regard. I do not wish to discuss this point in great detail at this moment. It should stand on its own. I think this is critically important and I shall be speaking with regard to it.

It is important in this case to consider the names of the parties involved. I know the Senator agrees with me that we are not just dealing with men making up their minds as we do. We are the ones who must decide by looking over the record and then voting yea or nay.

However, one of the things bothering us about Judge Carswell, without in any way denigrating the man or reflecting on him as a man, is that he is just not up to Supreme Court caliber. I think that on this point the Senator's reference becomes extremely pertinent. After all, who judges the qualifications of a judge if it is not the men who make and devote their lives to teaching and to the practice of law?

I might add to what the Senator said on that score by stating one of the things that impresses me very deeply. I do not practice law every day, as I used to. I used to try cases every day of the week. I do not do that now although I try to keep reasonably in touch. However, these are the views of men who are active at the bar and active all the time.

When three former presidents of the Association of the Bar of the City of New York, including traditionalists such as Judge Bromley, Francis T. P. Plimpton, and Sam Rosenman come out against Judge Carswell, it seems to me it is singularly impressive. Certainly Judge Bromley is not going to be against a nominee of the President unless his qualifications as a lawyer are suspect. Judge Bromley headed the list. It might be interesting to the Senators to keep in mind why it is important to go over the views of these eminent authorities in this case.

Mr. PROXMIRE. I think the Senator makes a very, very helpful point. It is not as if all the lawyers in America were polled and asked to vote yes or no on the nomination of Judge Carswell. They voluntarily take this extraordinary and emphatic public position which they have taken in this case, in which they go into a great deal of detail and insist on being counted. We know how reluctant Senators are—and these men are every bit as eminent and distinguished as Senators—we know how reluctant we are to stand up and be counted. It is our job, but these men felt so deeply they took a most extraordinary action, as the Senator said, in agreeing that they would make this very emphatic and very well reasoned document available to the Senate and they do plead with the Senate to reject the nomination.

Mr. JAVITS. I would like to observe as to myself that I had a fairly good idea what I would do about this nomination very early in the game. I generally say what I am going to do right away on a matter, if it is appropriate. However, I did not do so in this instance. I read the decisions because I was aware that I had turned down the President once with my vote. I did not want to do it again. However, I have arrived at my decision after careful consideration and thought and after reading the record; and I decided I could not vote for the nominee. I hope very much the White House will understand this is not any ideological opinion arrived at because it is Carswell, a southern judge—not at all. I would like to be able to vote for a southern judge as a member of the Supreme Court if I could in conscience; but I cannot in this case. Yet I know there are judges for whom I could vote and I am sorry about the fact that one of those was not nominated. I would rather have been for than against.

Mr. PROXMIRE. I thank the Senator.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. GURNEY. Mr. President, I have been in the Chamber listening to the colloquy between the distinguished Senator from Wisconsin and the distinguished Senator from New York. I also heard the list of names of certain lawyers who oppose the nomination which the Senator read.

I was admitted to practice law in the State of New York. I practiced there for some years before World War II, before I went to Florida after World War II. As a matter of fact, I used to know many of the young lawyers in the firms of some of the senior members of the bar who are mentioned by the Senator from Wisconsin as opposing the nomination.

I also heard some of the colloquy by the Senator from New Jersey about the fact that some of these men were conservatives and Republicans. I do not know whether they are or not.

My impression of the bar of New York from my own personal experience as a young lawyer is that it is a lot more liberal than most other parts of the country. I think this may have had something to do with the decision and attitude of these lawyers in opposing this Southern judge, who is a conservative and a strict constructionist.

Mr. PROXMIRE. Will the Senator yield on that point?

Mr. GURNEY. I wish the Senator would permit me to finish this thought because I am now coming to the part I think is important.

None of these lawyers, to my knowledge, unless the Senator from Wisconsin can correct me, knows anything about Judge Carswell personally, did not practice before his court or, for that matter, have had any contact or association with him.

On the contrary, the State of Florida is now the eighth State in size in the Union. It does have a distinguished bar and bench. I was a member of the bar there and I still am. I know many of these lawyers personally and I know many of these judges personally.

The bar in the State of Florida cannot be all that bad. Yet, I do not know a single voice in the entire bar and bench of the State of Florida that has opposed this nomination, Democrat, Republican, liberal, or conservative. As a matter of fact, they have unanimously supported it. These are men who know him, men who practice in his court. They are judges who know him as a judge and a colleague.

I must say this kind of evidence impresses me much more than evidence of lawyers in New York or in any other city who never practiced in this man's court and who did not know him.

I wish to make one further comment which I think is rather interesting. The statement was made that the dean of the Yale Law School opposed this nominee. The record also shows Prof. James W. Moore, who is still a professor of law at Yale, one of the distinguished professors in the Yale Law School, had personal knowledge of Judge Carswell. As a matter of fact, he worked with him in the establishment of one of the distinguished law schools in the State of Florida, the law school at the Florida State University. I am impressed by this professor—the Senator from Wisconsin referred to it as the most distinguished law school in the country, but I might argue that since I am a graduate of Harvard, but it is distinguished—and his work with Judge Carswell in the very important project of establishing a very great law school in this country; and his impression of this man and his views on legal education, the type law school he desired to establish, free of all racial discrimination—and he was clear about that—one offering basic and higher legal training, and one to attract students of all races and creeds, from all walks of life and sections of the country.

This kind of personal working relationship with Judge Carswell impresses me far more than Bruce Bromley and Francis Plimpton and a lot of other attorneys in New York who have had no personal association with or knowledge of the nominee.

Mr. PROXMIRE. May I say to the distinguished Senator from Florida that, of course, he makes a telling point, or seems to make a telling point, but does the Senator from Florida really expect that there would be a list of opposing lawyers from Wisconsin if the President had nominated somebody from Wisconsin to the Supreme Court? I think the Senator knows how those things operate and work. I certainly would not want to rely upon the opinion of a person who was a friend of his, or was intimately associated with him, or had worked closely with him as a partner. I would far prefer to rely upon the independent judgment of competent legal scholars; and these are competent legal scholars.

There is no indication that these men have any ax to grind. The only implication—and I am sure the Senator from Florida did not mean it invidiously as far as prejudice is concerned—is that, somehow, he merely feels that the bar association of New York and the faculties of these great law schools oppose a strict constructionist and would favor a liberal constructionist.

They do not oppose Judge Carswell on grounds that he would be a strict constructionist on the Court, not at all. In fact, they indicate Judge Carswell has been reversed frequently because he does not keep up with interpretations of judicial authority, but there is no indication that they feel this man should be rejected because he feels the law should be interpreted strictly. That was the first point made by the distinguished Senator from Florida. It seems to me he has made no case against these very distinguished scholars on those grounds.

Mr. GURNEY. Mr. President, if I may reply to some of the points the Senator from Wisconsin made, first of all, while I think it is true there would be no great outpouring of opposition from people in the State of Florida as far as his nomination is concerned, neither could we expect a tremendous display of enthusiasm if the nominee were of the mediocre va-

riety that the Senator from Wisconsin and other Senators have claimed that he is. The point I make is that, as far as the bar and the bench of the State of Florida are concerned, there has been a vast outpouring of support in favor of this nomination.

Incidentally, on that score, I might also bring to the attention of the Senator from Wisconsin, and also the Senate, at this time the fact that earlier in the year, before the name was presented to the Senate by the President, I was attending an investiture of a Federal district judge in Florida, actually the man who replaced Judge Carswell on the Federal district bench. There was some speculation at that time that Judge Carswell's name might be presented to the Senate by the President, and I was very curious. I did not actually know of it myself. I had been away on a few days' vacation at that time—it was during the recess—and this was the first I had heard of it.

The interesting thing to me was that many of his colleagues, both on the circuit court of appeals and on the district court in Florida—and all the members of the Federal district court in Florida were there at the ceremony, as well as a number of the circuit court judges—urged that I do what I could in favor of this appointment, stating that here would be indeed an outstanding judge on the Supreme Court if the President would see fit to nominate him.

I bring this point out because it occurred before the nomination was made, and it was voluntary on the part of these Federal judges in Florida, showing the worth and esteem in which they held their colleague.

I simply say that the point I was trying to make was that to me it is far more impressive to have the opinion of men who know a man, who work with him, who see him day after day, who are able to judge his merit, his worth, and his ability in terms of personal contact, than to have the opinion of some corporation lawyer in New York who sees on the surface a southern judge who is a known conservative and who probably does not want him for that reason.

Mr. PROXMIRE. May I say to the Senator from Florida that, of course, most of us are not only tolerant, but we like to be enthusiastic about people we know and work with. I do not think we would be human or tolerant people if we did not say the best that could be said of people with whom we work. I think the best way to evaluate a person is not to rely on people who come from the same State or have gone to the same law school or have worked with him in the same office or in the same fields.

I think more reliable is the evidence that Judge Carswell was reversed on 58.8 percent of the appeals from all his printed decisions, which is practically three times the 20.2 percent average for all Federal district judges and 2½ times the 24 percent for district judges in the fifth circuit.

As a percentage of all his printed decisions, Judge Carswell's rate of reversal was still twice as high as both the national and fifth circuit district judge average, 11.9 percent as against 5.3 percent and 6 percent, respectively.

Throughout the period Judge Carswell sat, his decisions were accorded relatively little authoritative weight by other judges. Each of his opinions was cited by all other U.S. judges less than half as often, on the average, as those of all district judges and fifth circuit district judges.

In other words, Judge Carswell was reversed more frequently and more continuously than were other comparable judges. His opinions were cited rarely as authoritative. Judge Carswell's opinions were about two-fifths as thoroughly documented with case authority, and less than one-third with secondary source authority, as the average of all district judges.

Judge Carswell's average opinion was less than half as extensive as the average for all other district judges.

All these are facts—objective facts and relevant facts.

To have somebody say a man is of good character, has a fine character, has a good attitude, means very little when we are trying to evaluate the legal capacity of a nominee for the Supreme Court.

I do not say that a man has to be qualified in all kinds of ways, but it seems to me it would have been helpful if Judge Carswell, for example, had written a number of articles for legal publications. When he was asked how many articles or what articles he had written for bar publications or law journals, his answer was, "None." He had not written any. So there is no demonstration of any record of Judge Carswell as a legal scholar at all. On the other hand, we have this very convincing record, which has not been challenged, that he is a judge who has been continually reversed and his opinions are without distinction.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. PROXMIRE. I yield.

Mr. HOLLAND. I think the Senator is dealing largely with decisions in civil rights cases. I think the Senator from Mississippi made it very clear yesterday that many of them were reversed by the circuit court of appeals because of an opinion that they had rendered between the time of the trials of those particular civil rights cases—I think five of them—and the time that they heard the appeal.

However, the record of the attitude of the circuit court of appeals on his criminal cases is a very impressive one, and I hope the Senator has looked at that. It is printed in the RECORD. I do not remember the number of appeals—it seems to me it was over 40—and practically all of them were affirmed.

Then I hope the Senator will permit me to state of my own knowledge something he did which did not get to the circuit court of appeals.

The largest civil case that had been heard in Florida before a jury in my lifetime—or in my professional lifetime, let us put it that way, which began in 1916—was the so-called Crummer against Ball and others case, of which I am sure the Senator has heard. I cannot say how long that trial lasted; certainly for weeks.

The Senator from Florida was summonsed down there, and agreed to go down and testify provided he could base his testimony wholly on the records of the Governor's office and the records of the State board of administration, of which the Governor was chairman, and of which I served as chairman while I was Governor.

On that basis, I went down and testified all day long, from early in the morning, let us say 10 o'clock, until perhaps 6 in the evening, except for a short time off for lunch. In that courtroom were a dozen or more of the leading attorneys of Florida and some of the leading attorneys of the Nation, one of them having been the former Attorney General of the United States, Mr. McGramery; and if there ever was a hard fought case, that was. Judge Carswell was called upon, as presiding judge, to make many rulings during the course of that day, and I am sure that was the case also during the whole course of the trial, though I attended only the one day.

I was exceedingly impressed by the dignity, the demeanor, and the high state of acceptance of Judge Carswell which was evident among those distinguished lawyers on both sides of the table. Notwithstanding the fact that there were many objections to the evidence, his rulings, if I may say so, coincided with my own views as to what they should have been all during the day; and, as the Senator knows, I have practiced law actively since 1916.

The point of my making this remark, though, is this: That was the biggest trial in Florida in my professional lifetime. I think it involved a claim for $39 million in damages. When the jury returned its verdict, which it did, after all the rulings, and all that trial, no appeal was taken from their verdict. To my mind, the fact that a judge could have presided over a case of that long duration, and with the exceeding bitterness that prevailed in the controversy that was tried there, and with the necessity of having to rule on, I suspect, hundreds of objections during the course of the trial, and then have no appeal taken at the end of the trial, in spite of all the controversy and all the bitterness, I think speaks eloquently for the ability of the presiding judge. Certainly I was greatly impressed with his ability. I have made that statement before, and I make it now.

I think no other Senator here today has had any opportunity to see Judge Carswell function. My own feeling is—and I would never support a judge who I thought was inadequate or was immoral or unethical, or was biased—that I thought he did a fine job, and I commend the type of job he did. It is inconceivable to me, with all those lawyers there participating, and all the bitterness in that trial, that there should have been no appeal, unless the case had been handled with the greatest of skill, the greatest of fairness, and the greatest of justice.

I wanted this statement to appear in the RECORD because I do not believe any other lawyer here had a chance to see Judge Carswell in action as a judge in

a bitterly fought matter, as did I on that occasion.

Mr. PROXMIRE. Mr. President, may I say to the Senator from Florida that that is a very useful observation, because it is a personal observation, and I have great faith in the judgment and fairness of the Senator from Florida.

Mr. HOLLAND. I thank the Senator. The Senator will remember that in the Fortas case, I was fair enough to say, at the beginning of my statement, that while I had had cordial personal relations with Judge Fortas, I had had two matters against him in previous years, and had found him highly ethical, exceedingly able, and exceedingly resourceful. My objection at that time was not based at all on any inadequacy of Judge Fortas as a lawyer, but upon other reasons which appear in my argument.

I do not visit personal feelings into a matter of this kind. Judge Carswell was recommended and appointed, every time I have voted to confirm him, by a Republican President: as a U.S. district attorney, as a district judge, and as judge of the circuit court of appeals. He was not my nominee, but I thought that he measured up, and I think that his performance shows that he measured up. I was greatly impressed when I had that one chance to observe his performance. I thought I had done the right thing. I still think so, and I think I am doing the right thing now, particularly when I have in my file—and shall produce later—letters from such men as former Gov. Millard Caldwell, who served later as chief justice of our Florida Supreme Court, and other justices of our State supreme court, who had the chance to observe him, living there in the same city with him, and the many circuit judges and justices of the district court of appeals of Florida whose communications I placed in the RECORD yesterday.

I state again what I stated the other day: I have yet to receive, on all of these nominations and in all of this controversy this year, the first expression from any lawyer or any judge in the State of Florida other than in recommendation of Judge Carswell and approving him as to his judicial competence, his fairness, and his performance; and I think that those people who see him every day, as did I, who sat there and listened to him a whole day in that very difficult case I have mentioned, have some right to speak of his ability. I doubt if many of the people from other parts of the country who object to his philosophy have had anything like the chance to observe and to form their own analysis of his character and his qualities as have I; and, as I have stated, as have the other judges of the State of Florida.

Mr. PROXMIRE. Mr. President, may I simply say to the Senator from Florida that I was not talking only about civil rights decisions. I was talking about all—every one—of his 84 printed decisions.

Judge Carswell was reversed on 58.8 percent of the appeals from all his printed decisions, which is three times the average for all Federal district judges, and twice the average for Federal district judges in the Fifth Circuit.

So I was not talking about just one or two, three, five, eight or 10, or 15 or 20 decisions. I was talking about every decision he had ever made that had been printed.

Mr. HOLLAND. The point of my remark was twofold. I wanted the Senator to know that I felt the nominee to be competent in the criminal field—and criminal trials are very difficult, as the Senator probably knows; the Senator from Florida knows, having at one time presided over criminal trials in lesser offenses—and also I wanted the RECORD to show something about my own observation in this very difficult civil case, the largest one ever tried in Florida during my professional life.

His performance was impressive, and from my point of view, as nearly perfect as it could be, and evidently opposing counsel in the case, who lost the decision when the jury came in, must have thought the same thing, because they made no appeal.

I thank the Senator.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. PROXMIRE. Mr. President, I yield to the junior Senator from Florida, and then I shall yield the floor.

Mr. GURNEY. I thank the Senator from Wisconsin.

I merely wanted to comment on the Crummer case, which my distinguished colleague discussed. I was not present, as he was, at the trial held before Judge Carswell. However, as a young lawyer, when I first went to Florida, I worked on the Crummer case as one of the several counsel for Mr. Crummer.

I want to attest to what my senior colleague has said. To my knowledge, this was the largest civil suit in the history of Florida, and also one of the largest antitrust suits in the history of the Sherman Antitrust Act in the United States, involving, as my senior colleague stated, many, many millions of dollars. There were brilliant counsel on both sides, both for the plaintiff and for the defendant. As a matter of fact, the counsel came and went in the preparation of the lawsuit, and it encompassed a period of many years before it came to trial before Judge Carswell.

So when my senior colleague makes the point that this Federal judge—then quite young in terms of service on the Federal bench in Florida—Judge Carswell, the nominee now before the Senate, had this case in his court, what better test can there be of his judicial ability and the fact that he was not a mediocre judge than the very able handling, witnessed by the senior Senator from Florida, of one of the largest Sherman antitrust cases in the history of this country?

Again, my senior colleague has brought out the point I made a short time ago. What we are talking about and referring to are personal experiences, the personal experiences of lawyers in the judge's court. I think they are far better able to judge the merit and worth of this nominee to the Supreme Court of the United States than a few lawyers in New York or some of the other larger cities in the country who have had no personal knowledge or acquaintance with this man at all.

Mr. PROXMIRE. Mr. President, I would not expect the two able Senators from Florida to oppose this nominee. They support him with great sincerity. They support him because they believe in him. They are two of the ablest Members of the Senate.

At the same time, I say that personal observation and personal knowledge and personal friendship usually are not the best sources for a recommendation. We know that from people we hire.

In determining my own position on a Supreme Court nominee, I would greatly prefer to have access to a statistical analysis of a judge's decisions, to have access to the affidavits, and so forth, which are in the hearing record, to determine exactly what this nominee did, to determine what his record was, to determine whether his opinions were distinguished, whether they were cited, whether he has a record of legal scholarship of any kind.

While I have great respect and admiration for the Senators from Florida, I think I would prefer to make up my mind on the basis of the objective record, to the extent I could get it, rather than two warm supporters of his.

I yield the floor.

MESSAGE FROM THE HOUSE—ENROLLED BILL SIGNED

A message from the House of Representatives, by Mr. Bartlett, one of its reading clerks, announced that the Speaker had affixed his signature to the enrolled bill (S. 3427) to increase the authorization for appropriation for continuing work in the Missouri River Basin by the Secretary of the Interior.

PHILADELPHIA PLAN UPHELD BY COURT

Mr. JAVITS. Mr. President, I wish to call to the attention of the Senate the fact that when we debated very strongly here on the Philadelphia plan, the plan endeavoring to find some opportunity for blacks and other minorities in the building trades, I strongly supported the plan proposed by the Department of Labor on the ground that it was in accordance with the Constitution.

Mr. President, I am pleased to announce that Federal Judge Charles R. Weiner of the U.S. District Court for the Eastern District of Pennsylvania has issued an opinion sustaining the legality of the Philadelphia plan. Judge Weiner ruled that the plan did not violate title VII of the Civil Rights Act of 1964, and was constitutional.

Mr. President, this decision vindicates the opinion of the Attorney General, with respect to the legality of the Philadelphia plan, and the refusal of the Department of Labor to follow the contrary opinion of the Comptroller General concerning the plan.

The decision sustaining the Philadelphia plan is predicated upon the fact that the plan, contrary to some of the allegations which have been made by those opposed to it, does not impose rigid quotas on employers. It requires only that employers make good faith efforts to achieve stated goals, and such good faith

efforts do not include "reverse discrimination." It is, of course, unfortunate that the Government must resort to Philadelphia plans to insure equal employment opportunity, and it is true that plans which are agreed upon by all of the parties concerned are far preferable to any governmentally imposed plan. The Department of Labor has continually stated its preference for "hometown solutions" such as the Pittsburgh plan and the Chicago plan. The fact is, however, that without the Philadelphia plan, there might not have been any Pittsburgh plan or Chicago plan.

As Judge Weiner stated in his opinion:

Present employment practices have fostered and perpetrated a system that has effectively maintained a segregated class. That concept, if I may use the strong language it deserves, is repugnant, unworthy and contrary to present national policy.

Mr. President, I ask unanimous consent that an article concerning Judge Weiner's opinion which appeared in the New York Times, Sunday, March 15, be printed in the RECORD.

There being no objection the article was ordered to be printed in the RECORD, as follows:

U.S. JUDGE UPHOLDS CONTROVERSIAL PHILADELPHIA PLAN TO INCREASE HIRING OF MINORITIES IN BUILDING INDUSTRY

(By Donald Janson)

PHILADELPHIA, March 14.—The controversial Philadelphia Plan to increase minority employment in construction trades has cleared its first court hurdle.

Federal District Judge Charles R. Weiner upheld its constitutionality yesterday and ruled that it did not violate the Civil Rights Act of 1964.

"It is fundamental," he said in the 22-page decision, "that civil rights without economic rights are mere shadows."

The plan, promulgated last year by the Department of Labor, requires contractors to make good-faith efforts to hire specified percentages of blacks in federally aided projects costing $500,000 or more.

The Contractors Association of Eastern Pennsylvania, in a suit filed Jan. 6, sought an injunction against the plan and a declaration that it was unconstitutional.

CONTRACTORS' PLEA

The contractors said the plan denied them equal protection of the laws because it was being applied only here. But in February, Secretary of Labor George P. Shultz announced that it would be extended to 18 other cities, including New York, unless those cities devised satisfactory plans of their own.

The main argument in opposition to the plan was that it required racial "quotas" in hiring. The Civil Rights Act of 1964 forbade this in order to protect nonwhite workers against low quotas set by some employers.

The Philadelphia Plan, when first tried under the Johnson Administration in 1967, set quotas that unions and contraotors held to be discrimination in reverse. Under the Nixon Administration, the quotas become more flexible "goals" within percentage ranges and the only requirement was a good-faith effort to meet the goals.

Elmer B. Staats, United States Controller General, said the plan violated the Civil Rights Act and declared he would not approve payment to contractors using the plan.

In December, the Senate supported the Staats view, then reversed itself under pressure from the Administration and civil rights forces and joined the House in rejecting an appropriations bill amendment that would have killed the plan.

The contractors' test suit followed. Robert J. Bray Jr., attorney for the 80 contracting companies in the association, said today it had not been determined whether the decision would be appealed.

Judge Weiner said the plan did not violate the civil rights act because it "does not require the contractor to hire a definite percentage of a minority group."

The plan's ground rules for Philadelphia, where more than a third of the population is black, call for contractors to pledge to try to hire blacks at a rate of at least 4 per cent of their new employes for projects undertaken this year, 9 per cent next year, 14 in 1972 and a top range of 19 to 26 per cent after that. Some of the trade unions involved have no more than 1 per cent now and have long excluded Negroes.

Judge Weiner noted that the contractor was required only to "make every good faith effort" to achieve specified percentages. The Government has said that tests of this would include whether a contractor relied solely on unions to assign workers to him or, if necessary, participated in federally funded training programs and went to community organizations that had agreed to supply blacks.

The Philadelphia Plan has not gotten off the ground here, in large part because of the dispute over its legality.

"It is beyond question," Judge Weiner said, "that present employment practices have fostered and perpetrated a system that has effectively maintained a segregated class. That concept, if I may use the strong language it deserves, is repugnant, unworthy and contrary to present national policy."

He said the Philadelphia Plan would provide "an unpolluted breath of fresh air to ventilate this unpalatable situation."

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. FANNIN. Mr. President, under our Constitution, both the President and the Senate are responsible for insuring the integrity and superiority of nominees to the Supreme Court. Because of this responsibility and because of recent controversies over both nominees to the Supreme Court as well as sitting Justices, the question of confirmation is a matter of vital importance.

I have decided to vote in favor of the confirmation of Judge Carswell. In making this decision, I have relied to a large extent upon the numerous endorsements Judge Carswell's nomination received from a wide variety of people. It is just a matter of commonsense to know that it is easier to fool people at a distance than it is at close range. For this reason, I believe that the statements of those lawyers and judges who have known and worked with Judge Carswell over the years are much more reliable than the opinions of some of the weekend experts that this nomination has produced.

The opponents of Judge Carswell have argued that he is biased against the civil rights movement. However, the testimony of those who know Judge Carswell best demonstrates that this argument is totally unfounded.

If the objection to Judge Carswell is that he is a racist who is biased against the civil rights movement, then it does not take much sense to realize that the people who would know the most about this bias would be Negro attorneys who appeared before Judge Carswell during his 12 years on the bench. It is for this reason that I was particularly impressed by a letter the committee received from a Negro attorney named Charles F. Wilson. Part of the letter he sent to the Judiciary Committee is quoted in the committee report. The entire letter and two newspaper articles describing the nature of Mr. Wilson's activities can be found on pages 328–330 of the hearings. Because they are such an eloquent refutation of the charges against Judge Carswell, I commend them to every Senator's attention.

Mr. Wilson is certainly not a Negro who was satisfied with Negro rights in the South. Nor is he the kind of man who would let others do the fighting. An article appearing in the Baltimore Afro-American, a Negro newspaper, gives an excellent idea of his activities. The headline states: "If it's integrated in Florida, Atty. C. Wilson helped to do it." I would like to read to the Senate the first line of that article. Under a Pensacola, Fla., dateline, it says:

According to national and local observers on the civil rights scenes, one of the most impressive records of civil rights and human relations legal activity in the Southeast is that of Atty. Charles F. Wilson of this city, a member of the Florida bar.

The article then goes on to describe the impressive number of civil rights cases which Mr. Wilson handled. Indeed, he handled many of the most important civil rights cases which appeared before Judge Carswell. He represented the Negroes in the school desegregation case of Augustus against the Board of Public Instruction of Escambia County, in which the public schools were desegregated from the elementary grades through junior college. He also represented the civil rights litigants in the case of Steele against the Board of Public Instruction. He was the Negro attorney who appeared on behalf of the civil rights litigants before Judge Carswell in seeking to desegregate the schools of Leon County, Fla., and, in a separate case, the schools of Bay County, Fla. He represented the Negro litigants in seeking to desegregate the municipal golf course at Pensacola, Fla. As a service to his alma mater, Mr. Wilson represented numerous Negro Florida A&M University students in picketing and civil rights demonstration cases in Tallahassee. He represented the Pensacola NAACP Youth Council and the Council of Ministers in desegregating lunch counters and other places of public accommodation in Florida. As anyone can see, Mr. Wilson has compiled an impressive record in representing the cause of civil rights in Florida. In addition to this impressive list of civil rights cases in which Mr. Wilson appeared before Judge Carswell, Mr. Wilson had known Judge Carswell earlier when he opposed Judge Carswell as defense counsel in criminal prosecutions brought by Judge Carswell when he was U.S. attorney.

It seems self-evident to me that in

evaluating the charge that Judge Carswell is biased in the civil rights movement, the first place the Senate should turn is to the Negro lawyers who argued before Judge Carswell. I would like to read to the Senate part of the letter that Mr. Wilson wrote to the Senate Judiciary Committee.

DEAR MR. CHAIRMAN, I am writing to the Committee at this time because for a period of five years, from 1958 to 1963, I represented plaintiffs in civil rights cases in the Federal Court for the Northern District of Florida, which was then presided over by Judge G. Harrold Carswell. I also represented criminal defendants and other civil clients in his court during this period of time. Previous to his taking the bench in 1958, I had opposed him as defense counsel in criminal prosecutions brought by the United States when he was United States Attorney. I am certain that during the five-year period from 1958 to 1963, I appeared before Judge Carswell on a minimum of not less than thirty separate days in connection with litigation which I had pending in his court.

As a black lawyer frequently involved with representation of plaintiffs in civil rights cases in his court, there was not a single instance in which he was ever rude or discourteous to me, and I received fair and courteous treatment from him on all such occasions. I represented the plaintiffs in three of the major school desegregation cases filed in his district. He invariably granted the plaintiffs favorable judgments in these cases, and the only disagreement I had with him in any of them was over the extent of the relief to be granted.

It is true that some witnesses appeared before the Senate Judiciary Committee and testified that Judge Carswell was biased and prejudiced against civil rights litigants. However, none of these witnesses had nearly as much experience in dealing with Judge Carswell as Mr. Wilson. For example, a white professor from Rutgers University had only appeared before Judge Carswell in one case. Another witness flew down from New York and was only in Florida for 2 weeks. Consequently, he was only involved in a part of a case. Another witness was a recent law school graduate who sat in Judge Carswell's courtroom on one occasion.

When I balance the testimony of these northern lawyers with very limited experience before Judge Carswell against the impressive testimony of a black lawyer who argued against Judge Carswell when he was a U.S. attorney and who appeared before Judge Carswell in most of his major civil rights litigation—indeed, enough times so that a Negro newspaper could say, "If its integrated in Florida, Attorney C. Wilson helped to do it."—it is not difficult for me to make my decision.

The endorsements Judge Carswell has received from his fellow judges are worthy of the consideration of every Senator. As I said earlier, I think that a man can best be judged by those with whom he regularly and constantly associates in his field of work. The judges who voluntarily informed the committee of their views on Judge Carswell were unanimous in their support of him.

I was most impressed by the opinions of the other Federal district judges and circuit judges who voluntarily wrote the Senate Judiciary Committee to express their support of Judge Carswell. Here is what Circuit Judge Robert Ainsworth of the Fifth Circuit Court of Appeals had to say about Judge Carswell:

He is a person of the highest integrity, a capable and experienced judge, an excellent writer and scholar, of agreeable personality, excellent personal habits, fine family, a devoted wife and children, and relatively young, as judges go, for the position to which he has been nominated.

In my view, Judge Carswell is well deserving of the high position of the Supreme Court Justice and will demean himself always in a manner that will reflect credit upon those who have favorably considered his qualifications. Undoubtedly he will be an outstanding Justice of the Supreme Court and will bring distinction, credit and honor to our highest Court.

Another of his fellow judges, on the fifth circuit court of appeals, Circuit Judge Bryan Simpson, has written as follows:

More important even than the fine skill as a judicial craftsman possessed by Judge Carswell are his qualities as a man: superior intelligence, patience, a warm and generous interest in his fellow man of all races and creeds, judgment and an openminded disposition to hear, consider and decide important matters without preconceptions, predilections or prejudices. I have always found him to be completely objective and detached in his approach to his judicial duties.

In every sense, Judge Carswell measures up to the rigorous demands of the high position for which he has been nominated. I hope that the Judiciary Committee will act promptly and favorably upon his nomination. It is a privilege to recommend him to you without reservation.

Another circuit judge, Warren Jones, made these comments about Judge Carswell:

I regard Harrold Carswell as eminently qualified in every way—personality, integrity, legal learning and judicial temperament—for the Supreme Court of the United States.

These ringing endorsements of Judge Carswell from his fellow appellate judges should be entitled to great weight in determining whether he shall be confirmed. The opinion of these distinguished judges fortifies my own conclusion that Judge Carswell will serve his country well as an Associate Justice of the Supreme Court. These endorsements stand as a complete refutation of the argument that Judge Carswell is mediocre and unqualified—an argument advanced by people who only have a fleeting familiarity with Judge Carswell's work.

Judge Carswell has, of course, been highly recommended by the prestigious American Bar Association Committee on Judicial Selection. This committee is made up of 12 distinguished lawyers from various parts of the country. These lawyers are by no means members of one political party, nor do they subscribe to one particular ideology or judicial philosophy. Their duty, as members of this distinguished committee, is to evaluate the qualifications of a nominee to the Supreme Court of the United States—not in terms of whether they agree with his judicial philosophy, but in terms of whether he possesses the necessary "integrity, judicial temperament, and professional competence," to quote from the letter written by the chairman of the committee to the chairman of the Senate Judiciary Committee.

This committee goes about its work by interviewing a substantial number of judges and lawyers who are familiar with the nominee's work, and also surveys his published opinions. They thereby are able to formulate a balanced judgment as to a nominee's professional qualifications. They found Judge Carswell to be qualified in all of these respects to assume a seat on the Supreme Court of the United States.

One of Judge Carswell's principal opponents, the dean of the Yale Law School, also happens to be a member of the board of directors of the NAACP legal defense fund. The NAACP, of course, has come out in opposition to Judge Carswell. Dean Pollak at the time of Judge Carswell's nomination was apparently completely unfamiliar with the judge's opinions, and had never even appeared before the judge as an attorney. Nonetheless, he made the trip to Washington to appear in opposition to the judge, stating that "arrogant as perhaps this seems, I wanted to come before this committee and express my deep concern."

It seems that Dean Pollak spent a part of one weekend reading some opinions that Judge Carswell had written, and that this was the basis on which he criticized the nominee as being undistinguished.

The plain truth of the matter, of course, is that most of us in the Senate—and certainly most of the Senators who are not lawyers—do not have the time or disposition to thumb through the opinions that any particular nominee to high judicial office has written in order to evaluate them for ourselves. Of necessity, we must take someone else's word as to whether these opinions bespeak judicial temperament and professional competence.

I have no hesitation, in a situation such as this, in choosing the advice of the distinguished Committee of the American Bar Association, which has systematically interviewed judges and lawyers acquainted with the nominee and familiar with his work. When the bar association's evaluation is buttressed by the endorsements of the judges on the Fifth Circuit Court of Appeals, and when the black lawyer who represented many civil rights litigants before Judge Carswell states that he is unbiased, I have little difficulty in making my decision. Mr. President, I shall vote to confirm the nomination of Judge Carswell and trust the vote will not be unduly delayed.

Mr. TYDINGS. Mr. President (Mr. FANNIN), Judge Elbert Tuttle is one of the Nation's most respected jurists. As a member of the Fifth Circuit Court of Appeals from 1954 to the present, and as the circuit's chief judge from 1961 to 1967, Judge Tuttle has developed a reputation for competence, fairmindedness, and courage that has served to reinforce the respect in which the American people hold the Federal judicial system and to enhance the strength of that system.

Consequently it was a matter of sig-

nificance when on the first day of hearings on the Carswell nomination a letter from Judge Tuttle requesting the opportunity to testify in Judge Carswell's behalf was introduced in to the record.

That letter now appears on page 6 of the record of the hearings before the Committee on the Judiciary on the nomination of Judge G. Harrold Carswell for the Supreme Court.

Judge Carswell's supporters have relied heavily on that letter, and rightly so, for Judge Tuttle's support cannot be lightly dismissed.

That letter as I have indicated is still in the record.

Gov. Leroy Collins of Florida testified before the Judiciary Committee and indicated the weight given to Judge Tuttle's support for Judge Carswell.

After discussing the doubts that had risen about Judge Carswell, Governor Collins said the following, which can be found in the record on page 76:

Now, if there are any lingering doubts with any of you, I would urge you to consider carefully the judgment of the judges who have worked on case after case involving civil rights with Judge Carswell. Surely Judge Tuttle would know all about this. Judge Tuttle wanted to be here and to testify personally in this hearing in support of Judge Carswell. He couldn't come for reasons he explained in a handwritten note to the chairman.

* * * * *

Now, I think most of you know who Judge Tuttle is. He has served as chief judge of the Fifth Circuit Court of Appeals, and this man has made more judgments, and he has written more opinions, upholding civil rights matters, I think, than any judge in all the land. And it is inconceivable to me that he would have served alongside Judge Carswell and make a statement of support like he has made here, and like he feels deeply, if he had the slightest feeling that there was any racial bias or prejudice within this man.

Mr. President, what Governor Collins did not know, what the members of the Judiciary Committee did not know, and what the American people did not know was that Judge Tuttle had called Judge Carswell on the telephone the night before Governor Collins testified and told him he would not testify in his support.

Between the day Judge Tuttle sent his letter of Januray 22 to the committee and his call to Judge Carswell, he decided to withdraw his offer to testify.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. TYDINGS. I would be happy to yield.

Mr. EASTLAND. Mr. President, I would like to set the Senator straight. We received, as the Senator knows, letters from a number of Judge Carswell's fellow members of the fifth circuit. Those were all put in the record.

At the conclusion of the hearings that day, I told Judge Carswell that I did not think we could call any of the judges unless we called all of them. I did not see any point in calling all of them in. I said that I did not think we would use Judge Tuttle or any other judge as a witness.

Judge Carswell got to his room late at night and found a call from Judge Tuttle. He telephoned Judge Tuttle the next morning to tell him that we would not need Judge Tuttle's testimony or the testimony of any other judge from the fifth circuit.

Judge Tuttle told him this, as I understand the matter, "I cannot come to testify for reasons that I will tell you when I see you."

We have a handwritten letter that was submitted for Judge Carswell from New York City, under date of January 22. He was going from there to Boston to see his daughter. There was no retraction of this support. There was certainly no retraction of this letter, because the place to retract that would have been within the Judiciary Committee.

Mr. TYDINGS. Mr. President, is it the position of the Senator that Judge Carswell called Judge Tuttle the morning of the 28th of January to tell Judge Tuttle that it would not be necessary for him to testify?

Mr. EASTLAND. That is correct. That is absolutely correct. And Judge Tuttle broke into the conversation and told Judge Carswell, "I will not testify, anyway, for reasons that I will tell you when I see you."

Mr. TYDINGS. Mr. President, I think perhaps to complete the record I will first finish my statement, and then we can have a discussion.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. TYDINGS. I yield.

Mr. HRUSKA. Mr. President, I thought the Senator read the date of January 27. It should have been the early morning of the 28th.

Mr. TYDINGS. The Senator is correct.

Mr. EASTLAND. At 7 a.m.

Mr. TYDINGS. The Senator is correct.

Between the time Judge Tuttle had written the handwritten letter which Senator EASTLAND has referred to, and which is still in the record, and his call to Judge Carswell on the morning of the 28th withdrawing his offer to testify, Judge Tuttle had learned, as indeed some others had, additional facts far more pertinent than the speech made in 1948, which cast serious doubts on Judge Carswell's present attitude toward according equal justice to all.

On the basis of these facts, Judge Tuttle concluded that he could not in good conscience testify in support of Judge Carswell's elevation to the Supreme Court.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. TYDINGS. I yield.

Mr. EASTLAND. Mr. President, I want to correct one statement. The telephone call that Judge Carswell made to Judge Tuttle was in reply to the call that he had received late the night before.

He began the conversation as I have described and in line with the decisions which were made the night before.

Mr. TYDINGS. The first inkling of this situation was the article that appeared in the March 3, 1970, edition of the Atlanta Constitution, written by Bill Shipp, entitled, "Tuttle Cuts Carswell Off."

I ask unanimous consent that that article be printed in the RECORD at this point.

There being no objection the article was ordered to be printed in the RECORD, as follows:

WOULD NOT TESTIFY: TUTTLE CUTS CARSWELL OFFER

(By Bill Shipp)

Judge Elbert P. Tuttle Sr., retired chief judge of the U.S. Fifth Circuit Court of Appeals, has withdrawn his support of Judge G. Harrold Carswell's nomination to the U.S. Supreme Court, The Atlanta Constitution learned Monday.

Judge Tuttle, who handed down some of the most far-reaching desegregation decisions in the South in the past decades, was asked by Carswell to endorse him for the position, a reliable source reported.

Tuttle, who was in Washington at the time in early January, agreed and wrote a letter to the Senate Judiciary Committee offering to testify in Carswell's behalf and saying, in effect, that this Harrold Carswell "is not the same Harrold Carswell I used to know," apparently meaning that Carswell's hardline position on segregation had changed over the years.

On Jan. 29, former Gov. Leroy Collins, testifying in Carswell's behalf, read Judge Tuttle's letter of endorsement to the Senats Judiciary Committee.

But Tuttle already had decided he could not support Carswell. Tuttle, who was appointed by President Eisenhower to the appeals court in 1954, phoned Carswell earlier at his lodging place in Washington and told him that "under the circumstances" he was withdrawing his offer to testify.

Tuttle reportedly was upset because of Carswell's involvement in a Florida club and a land development that barred Negroes.

"I'm sorry but, under the circumstances, I can not testify for you," Tuttle reportedly told Carswell. "Come and see me when you can. I would like to talk to you."

Carswell replied: "You don't have to explain."

However, Tuttle did not withdraw the letter from the Judiciary Committee. He told close associates that although he could not testify for Carswell, he still did not want to hurt his colleague on the fifth circuit bench.

Mr. TYDINGS. Mr. President, in that article the reporter from the Atlanta Constitution stated basically the facts that I have now enumerated on the floor of the Senate.

I was concerned about the matter because if that article was accurate, it meant that the letter in the record in support of Judge G. Harrold Carswell to be a Justice of the Supreme Court had no business being in the record and that Judge Carswell knew it.

So last Friday, which was when I first saw a copy of the article, I called Judge Tuttle.

I read the article to him and asked him basically whether the facts it contained were accurate.

He told me that the article was basically accurate.

At that point, I discussed this telephone conversation with one of my colleagues, the Senator from New York (Mr. JAVITS), and told him that I was deeply disturbed that that letter of support was still in the record.

On the suggestion of the Senator from New York (Mr. JAVITS), I wired Judge Tuttle to get the facts on paper.

Prior to doing so I called Judge Tuttle on the telephone and asked him if he would be willing to respond to a telegram from me, using that article as a basis, and whether he would mind if I put his response in the record of the

debate. He said he would not mind, and he would respond.

First, I will read the article published in the Atlanta Constitution and then the telegrams. This is the Atlanta Constitution article which I saw last Friday which triggered the sequence of events. The article has a dateline of Monday, March 3. I did not see it until last Friday.

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But Tuttle already had decided he could not support Carswell. Tuttle, who was appointed by President Eisenhower to the appeals court in 1954, phoned Carswell earlier at his lodging place in Washington and told him that "under the circumstances" he was withdrawing his offer to testify.

Tuttle reportedly was upset because of Carswell's involvement in a Florida club and a land development that barred Negroes.

"I'm sorry but, under the circumstances, I can not testify for you," Tuttle reportedly told Carswell. "Come and see me when you can. I would like to talk to you."

Carswell replied: "You don't have to explain."

However, Tuttle did not withdraw the letter from the Judiciary Committee. He told close associates that although he could not testify for Carswell, he still did not want to hurt his colleague on the fifth circuit bench.

I sent this telegram last Friday evening to Judge Tuttle:

MARCH 13, 1970.

Hon. ELBERT W. TUTTLE, SR.

DEAR JUDGE TUTTLE: I have read with interest the Article in the Atlanta Constitution of March 3, by Bill Shipp, Political Editor which states that you declined to testify in support of G. Harrold Carswell after initially writing a letter to the effect that this G. Harrold Carswell is not the same Harrold Carswell I used to know. Apparently meaning that Carswell's hard line position on segregation had changed over the years. As you know your letter was read into the record at the Judicial Hearings as an endorsement of Judge Carswell. I would appreciate it if you would clarify the record for myself, the Judicial Committee and the U.S. Senate.

JOSEPH D. TYDINGS,
U.S. Senator, Chairman.

I sent that telegram last Friday. Last Saturday I received the following telegram in response:

MARCH 14, 1970.

Hon. JOSEPH D. TYDINGS,
Senate Office Building,
Washington, D.C.:

Reply your telegram inquiring about Atlanta Constitution article March 3. I telephoned Judge Carswell at seven AM January 28 that I had concluded that I could not testify in support of his nomination. My previous letter to the committee was an offer to testify if called after notifying Judge Carswell that I would not do so. It did not occur to me that it was necessary also to notify the committee. I was surprised to learn later that the letter was used for a purpose inconsistent with my decision not to testify as communicated directly to Judge Carswell.

ELBERT P. TUTTLE.

Sunday passed. Monday I received another telegram from Judge Tuttle which I shall now read into the RECORD:

MARCH 15, 1970.

JOSEPH D. TYDINGS,
Senate Office Building,
Washington, D.C.

This is a more accurate answer, your telegram about Atlanta Constitution article since I have now talked to Governor Collins, I telephoned Judge Carswell at 7AM January 28 that I had concluded that I could not testify in support of his nomination. My previous letter was an offer to testify if called. After notifying Judge Carswell I would not do so it did not occur to me that it was also necessary to notify the committee. I was surprised to learn later that my letter was introduced into the record and referred to in the hearings on January 28. I now find that my letter along with others had been introduced the first day of hearings before my telephone call and before any evidence was taken and that Governor Collins did not know of my call to Judge Carswell when he referred to my letter. I have also learned that he did not discuss his proposed testimony with Judge Carswell and that the Judge was not present at this hearing on January 28.

ELBERT P. TUTTLE.

Today I received a third telegram from Judge Tuttle which states:

MARCH 17, 1970.

Hon. JOSEPH D. TYDINGS,
Senate Office Building,
Washington, D.C.

Please add to my wire of yesterday under the circumstances state in my telegram I do not believe that Judge Carswell had any intention to or did deceive the committee respect to the matter of my letter to the chairman.

ELBERT P. TUTTLE.

I had never raised the issue of Judge Carswell attempting to deceive the committee. The telegrams speak for themselves. A man is going to be elevated to the Supreme Court, standing on a record and testimony ostensibly in support of his nomination from the former chief judge of his circuit, a distinguished jurist, and the nominee never said one word to my knowledge to any Senator that Judge Tuttle had called him up and said he would not testify in support of his nomination.

In view of the telegrams I have here, the letter which was introduced in the hearing record on page 6 cannot be cited from this point forward as evidence that Judge Tuttle supports the nomination of Judge Carswell for the Supreme Court.

As to why Judge Carswell did not clarify the record and remove the letter, I draw no conclusions. I will let Senators draw their own conclusions as to this man who is nominated to the Nation's highest judicial position.

(At this point, Mr. HART assumed the chair.)

Mr. EASTLAND. If this puts anyone in a bad light, certainly it is not Judge Carswell. It would be Judge Tuttle. Now, these gentlemen have known each other for many years. The Committee on the Judiciary did not solicit anything from Judge Tuttle, but here is a handwritten letter in his own handwriting from New York City where he solicits the right to testify and where he says this:

I have been intimately acquainted with Judge Carswell during the entire time of his service on the Federal bench, and am particularly aware of his valuable services as an appellate judge, during the many weeks he has sat on the Court of Appeals both before and after his appointment to our court last summer.

Now get this:

I would like to express my great confidence—

My great confidence—

in him as a person and as a judge.

He knew all about these charges about racism because he wanted to come down to refute it.

My particular reason for writing you at this time is that I am fully convinced that the recent reporting of a speech he made in 1948 may give an erroneous impression of his personal and judicial philosophy, and I—

What is that word?

Mr. HOLLAND. I would be prepared.

Mr. EASTLAND. Yes.

I would be prepared to express this conviction of mine—

Now get this:

based upon my observation of him during the years—

I emphasize, during the years—

I was privileged to serve as Chief Judge of the Court of Appeals for the Fifth Circuit.

Written on the 22d of January. This telephone call—there is another error there; I do not think it means anything——

Mr. TYDINGS. At 7 a.m., January 28.

Mr. EASTLAND. Yes. It says he called Judge Carswell. The fact is that Judge Carswell telephoned him. There is his statement, written in his own handwriting.

Mr. TYDINGS. While the Senator is on his feet, could I get a couple of facts into the RECORD? Did Judge Carswell, either directly or indirectly tell the Senator, in writing, on the telephone, or in person, that Judge Tuttle told him he would not testify in support of his nomination prior to the time this incident arose this weekend——

Mr. EASTLAND. That is correct.

Mr. TYDINGS. I did not——

Mr. EASTLAND. Wait a minute.

Mr. TYDINGS. This is important.

Mr. EASTLAND I want to clarify it. There were two gentlemen with him who told me that Judge Tuttle said that he would not testify for reasons that he would tell Judge Carswell when he saw him.

Mr. TYDINGS. There were two men who were with Judge Carswell——

Mr. EASTLAND. The two men with him told me that, but the committee heard nothing from them.

Mr. TYDINGS. Did Judge Carswell ever tell you, Mr. Chairman——

Mr. EASTLAND. No, sir.

Mr. TYDINGS. Did he ever raise the point with the Senator from Mississippi whether or not it was proper to leave the letter in after he had been advised by Judge Tuttle that he would not testify?

Mr. EASTLAND. It was very proper to leave the letter in.

Mr. TYDINGS. I am not asking the Senator whether it was very proper to leave the letter in. I am asking the Senator whether Judge Carswell ever raised the question.

Mr. EASTLAND. No, and he should not have.

Mr. TYDINGS. All I asked was the simple question——

Mr. EASTLAND. I know what the Senator asked, but here is a blanket endorsement of him. It goes far beyond any civil rights question. It is a blanket endorsement of him as a judge.

Mr. TYDINGS. The Senator made two points. The date of the letter is January 22. As the Senator well knows, and I think those in this Chamber know, most persons are not going to hold a speech made 20 or 30 years ago against a person, if it is obvious that over the years his positions have changed and he has developed and he has matured. I think in all the minority comments the speech is given little emphasis. At least, I knew it was not emphasized in my views.

Mr. EASTLAND. Let me say——

Mr. TYDINGS. Let me point out that the letter relates to Judge Carswell's service as an appellate judge. As the Senator knows, his nomination as an appellate judge was confirmed last year. The issues which arose in the committee hearings were not based on his conduct as an appellate judge, but were on whether it was possible to receive a fair trial from him if a person were poor——

Mr. EASTLAND. Now, wait a minute——

Mr. TYDINGS. Or black——

Mr. EASTLAND. Wait a minute——

Mr. TYDINGS. In a civil rights matter——

Mr. EASTLAND. Wait a minute. I have the floor. The Senator asked a question.

Mr. TYDINGS. I have the floor. I yielded to the Senator from Mississippi, and I will be happy to let him continue.

The PRESIDING OFFICER. Let the Chair state that although the Senator from Maryland did not take his seat, it was the Chair's understanding that he had concluded his remarks, and the Chair recognized the Senator from Mississippi.

Mr. EASTLAND. It is all right with me for the Senator to go on.

The PRESIDING OFFICER. The Senator from Mississippi.

Mr. EASTLAND. I want the record to show that this letter, which was unsolicited, speaks for itself. The Senator asked me if Judge Carswell had ever asked to withdraw this letter. Was that the question?

Mr. TYDINGS. That was the question.

Mr. EASTLAND. I will tell the Senator now, if he had requested it, I would not have permitted it.

Mr. TYDINGS. I did not ask the Senator that.

Mr. EASTLAND. I know. But I have answered.

Mr. TYDINGS. I asked the Senator whether Judge Carswell ever asked to withdraw it.

Mr. EASTLAND. I have the floor. If he had, I would not have permitted it.

Mr. TYDINGS. That is all I wanted to know.

Mr. EASTLAND. This was a letter that was unsolicited, that came to me as chairman of the Judiciary Committee.

Mr. TYDINGS. Did Judge Carswell tell the Senator from Mississippi that this letter was unsolicited from Judge Tuttle?

Mr. EASTLAND. I said I did not solicit it.

Mr. TYDINGS. No, but did Judge Carswell tell the Senator that? The Senator from Mississippi has used the term "unsolicited" three times during the debate. Did Judge Carswell tell the Senator from Mississippi this letter was unsolicited?

Mr. EASTLAND. Referring to myself; I have received no letter from anybody and did not know the witness was not going to testify——

Mr. TYDINGS. It is not the Senator's function to solicit letters.

Mr. EASTLAND. That is correct, but I would not have permitted the withdrawal of the letter from the record. This letter goes much further than these telegrams, because it is a blanket endorsement of Judge Carswell as a judge and a man.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. HRUSKA. Did the chairman of the Judiciary Committee ever get a request from Judge Tuttle to withdraw that letter?

Mr. EASTLAND. No; we never got a request. That would have been the proper way. If he had requested it, yes, we would have withdrawn the letter.

Mr. HRUSKA. It would have been in the transcript, and the later transcript would have shown the request was made to withdraw it?

Mr. EASTLAND. That is correct.

Mr. HRUSKA. It would have to, because the hearing was not 30 minutes old when the letter was placed in the record, in good faith.

Mr. EASTLAND. That is correct, and to this day we have heard nothing from Judge Tuttle.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. GURNEY. As I understand it—and this is extremely important in this colloquy—at 7 in the morning of the 28th of January, in a telephone conversation between Judge Carswell and Judge Tuttle, the gist of it was he advised Judge Carswell he could not come down to testify and would tell Judge Carswell later why. Judge Carswell interpreted the statement to mean his inability to come down for some reason he was not telling Judge Carswell over the phone and had nothing to do with the substance of the letter and his endorsement of Judge Carswell for this position.

Am I correct in that understanding?

Mr. EASTLAND. That is the impression I got, and that is the information I received. I did not know anything about it.

Mr. GURNEY. The reason why it is important to clarify this version on one side as contrasted to the version of the Senator from Maryland is that the latter indicates the telephone conversation had something to do with, "I can't testify because I am withdrawing it."

Mr. EASTLAND. I was informed by the two gentlemen who were with Judge Carswell that Judge Tuttle could not testify or would not testify for reasons that he would tell Judge Carswell when he saw him. I say this in justice to them—that they had no earthly idea why he had withdrawn his support.

Of course, Judge Tuttle is a very intelligent man, and he would be intelligent enough to know that the only way he could withdraw this endorsement would be through the committee itself. If it throws anybody in a bad light, it certainly is not Judge Carswell.

Mr. GURNEY. If the Senator will yield further, I must say my own impression of this, after listening very carefully, reading the articles and then the telegrams, is that this is much ado about nothing and a very confused judge—Judge Tuttle.

Mr. EASTLAND. Correct. It is confused and it is much ado about nothing. The last telegram that my good friend, the distinguished Senator from Maryland, read from Judge Tuttle was that Judge Carswell had not attempted to deceive him or the Judiciary Committee.

Mr. GURNEY. If I may further complete the thought, it is quite obvious that Judge Tuttle was very confused about what Governor Collins testified to and when he testified to it and whether there was knowledge on Governor Collins' part of the telephone conversation between Judge Tuttle and Judge Carswell. There obviously was a great state of confusion in Judge Tuttle's mind. So we have here a letter of complete endorsement, we have three telegrams, we have a sketchy newsstory, and no one has said anything, including the Senator from Mississippi, about what changed Judge Tuttle's mind.

Mr. EASTLAND. My good friend from Maryland has since said—and he has a perfect right—and I am going to say this now:

The thrust of his speech was that there was some questionable conduct on Judge Carswell's part in not letting us know about the conversation.

But right in the face of it, the Senator has a telegram from Judge Tuttle saying that Judge Carswell has not attempted to deceive the committee or anyone else—just a blanket denial.

Several Senators addressed the Chair.

Mr. EASTLAND. I yield to the Senator from Maryland.

Mr. TYDINGS. Mr. President, just to get the record clear for the Senator from Florida and others as far as I am concerned, the Senate has to decide from the facts as shown by the telegrams, which are in the record.

The facts are that we have a letter ostensibly endorsing a man for the Supreme Court of the United States, written 6 or 7 days before the letter was put into the record.

Mr. EASTLAND. Four days.

Mr. TYDINGS. Well, it was dated January 22.

Mr. EASTLAND. And, of course, the 28th was when the Senator said the call came, which is correct.

Mr. TYDINGS. Which letter is still in the record, and when Senators get up on their feet and speak in favor of the nomination, they refer to the support of distinguished jurists in the fifth circuit.

Mr. EASTLAND. Do we not have that support?

Mr. TYDINGS. No, you do not have the support.

Mr. EASTLAND. I do not know about that.

Mr. TYDINGS. The former chief judge of the fifth circuit——

Mr. EASTLAND. He says:

I have been intimately acquainted with Judge Carswell during the entire time of his service on the Federal bench, and am particularly aware of his valuable service as an appellate judge, during the many weeks he has sat on the Court of Appeals both before and after his appointment to our court last summer. I would like to express my great confidence in him as a person and as a judge.

Then he goes on and says that the racial attitude is wrong, that that is one reason he wants to testify, and he winds up:

I would be prepared to express this conviction of mine based upon my observation of him during the years I was . . .

I cannot read his writing, he is getting so old.

Mr. TYDINGS. It says:

I was privileged to serve as Chief Judge of the Court of Appeals for the Fifth Circuit.

Mr. EASTLAND. Let me read it in print:

. . . and I would be prepared to express this conviction of mine based upon my observation of him during the years I was privileged to serve as Chief Judge of the Court of Appeals for the Fifth Circuit.

Which was about 10 years.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. HRUSKA. An attempt is made to put the burden on Judge Carswell at that point; that he was supposed to advise the committee; and that he was supposed to withdraw that letter.

Mr. EASTLAND. I would not permit him to withdraw it.

Mr. HRUSKA. The chairman correctly observed that it was not for Judge Carswell to withdraw the letter; and, in view of the tenor of the telephone call, the conversation from Judge Tuttle was that he simply would not appear to testify, and that he would give an explanation to Judge Carswell when he saw him personally.

Mr. EASTLAND. That is correct.

Mr. HRUSKA. Under those facts, any disclosure of that telephone talk by Judge Carswell to the committee would simply be something the committee already knew—to wit, that Judge Tuttle was not going to testify, and that is the sum and substance of it.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. HRUSKA. Yes.

Mr. GRIFFIN. And the last telegram from Judge Tuttle confirms that interpretation by Judge Carswell.

Mr. EASTLAND. Of course it confirms it.

Mr. TYDINGS. Mr. President, let us get the record clear. The Senator from Mississippi has a handwritten letter of endorsement—solicited by Judge Carswell from Judge Tuttle.

Mr. EASTLAND. Now the Senator is making a statement I know nothing about. He said it was solicited. I know nothing about that.

Mr. TYDINGS. All right. My position is that it was solicited.

Mr. EASTLAND. All right.

Mr. TYDINGS. The letter was placed in the record at a time when Judge Carswell was present in the committee room. The letter was dated the 22d of January, 5 days before the hearings began—before, indeed, a great deal of information involving Judge Carswell was known to the Nation, to the Senate, to the Committee on the Judiciary, and I am sure to Judge Tuttle; and we have here the telegram from Judge Tuttle stating what happened.

Let me read again the telegram by which he responded to me. This is Judge Tuttle, not Senator TYDINGS, not Senator GURNEY, or Senator EASTLAND.

Mr. EASTLAND. Read all of the telegram.

Mr. TYDINGS. It is already in the RECORD, but if the Senator wishes I will do so:

Reply your telegram inquiring about Atlanta constitution article March 3. I telephoned Judge Carswell at seven am January 28 that I had concluded that I could not testify in support of his nomination. My previous letter to the committee was an offer to testify if called after notifying Judge Carswell that I would not do so. It did not occur to me that it was necessary also to notify the committee. I was surprised to learn later that the letter was used for a purpose inconsistent with my decision not to testify as communicated directly to Judge Carswell.

Mr. GURNEY. Mr. President, will the Senator yield at that point?

Mr. TYDINGS. The Senator from Mississippi has the floor.

Mr. EASTLAND. I have the floor.

Mr. GURNEY. Will the Senator from Mississippi yield?

Mr. EASTLAND. If I do not lose my right to the floor.

Mr. TYDINGS. I will respond to the question, then.

Mr. EASTLAND. I am not engaging in this filibuster, now. We are ready to vote.

Mr. GURNEY. So am I, but let me ask the Senator from Maryland this question: Is there anywhere in that telegram that Judge Tuttle says why he is not going to come and testify? That is the whole point of this matter.

Mr. TYDINGS. The fact of the matter is that any way you look at it, Judge Tuttle will not testify in support of G. Harrold Carswell's nomination to the Supreme Court. He will not testify in support of a judge from his own circuit.

Mr. GURNEY. That may be true——

Mr. TYDINGS. And until today, until we put these telegrams—in the RECORD—it was held forth to the Members of the Senate, the member of the Committee on the Judiciary, and the American people that Judge Tuttle, a judge of his own circuit, was in support of Judge Carswell.

Mr. GURNEY. Will the Senator yield?

Mr. EASTLAND. And he has never withdrawn it. I could not conceive that that is his purpose.

Mr. TYDINGS. Mr. President, I have put these telegrams in the RECORD, but to clear up once and for all——

Mr. EASTLAND. I cannot conceive of a stronger endorsement than this, written in his own handwriting. He did not have a copy of the letter. As I understand——

Mr. GURNEY. That may be why he called up Judge Carswell.

Mr. EASTLAND. As I understand, he said he had not read the RECORD, and, not having the copy of the letter, he did not know how strongly he went at that time.

Mr. GURNEY. But the whole point of these telegrams, as I understand it, brought forth here by the Senator from Maryland, is to impugn the integrity of Judge Carswell into an attempt to deceive the committee. That is why I ask if there is anything in that telegram where Judge Tuttle said why he was not going to come down to testify, because that is the nub of the whole thing.

Mr. TYDINGS. I specifically stated——

The PRESIDING OFFICER (Mr. HART). The Senate will be in order. The RECORD will be much clearer if Senators will speak one at a time, and permit the official reporter to report what is being said.

Mr. TYDINGS. I specifically stated, Mr. President, that the telegrams I introduced would speak for themselves, that the Members of the Senate would have to draw their own conclusions on why Judge Carswell, after receiving a call from the former chief judge of his own circuit that he would not testify in support of him, made no statement to the chairman or to anyone else, and why the letter is still in the record. If the Senator wants to draw a conclusion, he can. I think it is up to each of the Members of the Senate of the United States to draw his own conclusion. I am not making any charges; I am merely putting the telegrams in the RECORD to get the facts clear.

The facts are that Judge Tuttle communicated to G. Harrold Carswell on the morning of January 28 that he would not testify in support of his nomination.

Mr. EASTLAND. For a reason.

Mr. TYDINGS. The facts are that that letter is still in the record, and the facts are that Judge Carswell never communicated to Senator EASTLAND his conversation with Judge Tuttle. Those are facts. Just facts. Senators may draw their own inferences from the facts.

Mr. EASTLAND. Yes, but in simple justice to Judge Carswell, now, the thrust of my friend's statement is that Judge Carswell has done something wrong.

Mr. TYDINGS. No, the facts speak for themselves.

Mr. EASTLAND. Well, that is my interpretation.

Mr. GURNEY. Mr. President, I think the facts very eloquently speak for

themselves, and best of all, in the language of Judge Tuttle, who said Judge Carswell——

Mr. EASTLAND. I know, but the last telegram from Judge Tuttle completely exonerates Judge Carswell of any wrongdoing.

Mr. GURNEY. That is the eloquent part about the whole matter.

Mr. TYDINGS. Mr. President, that is one of the reasons I do not state any conclusions myself. I let my colleagues draw their own conclusions.

Mr. GRIFFIN. The Senator from Maryland is not accepting the statement of Judge Tuttle, as I understand it. Is that correct?

Mr. TYDINGS. I am accepting all the statements of Judge Tuttle.

Mr. GRIFFIN. He is accepting some, but not all.

Mr. TYDINGS. I accept each and every one, including his last telegram, of which Senator Eastland has a copy. All of them go into the RECORD together. It is up to the Members of the Senate to draw the conclusions. It is not for me to tell the Senator from Michigan or anyone else what conclusion to draw from the telegrams and the facts. The Senator will draw his own conclusions. But the facts are there.

Mr. GRIFFIN. The Senator leaves the impression that he still tries to suggest there is some question about the integrity of Judge Carswell.

Mr. TYDINGS. I did not mention the word "integrity." The only suggestions of it come from the other side of the aisle. I merely put the records in about the facts and say that the Members of the Senate should draw their own conclusions.

Mr. GRIFFIN. We will see how the newspapers write it.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. HOLLAND. I have only two comments to make.

The first is that, apparently, the distinguished Senator from Maryland has overlooked the fact that Judge Carswell has served on the appellate bench in the fifth circuit not just since his appointment but many times before. This is indicated, I think, rather clearly by the letter from Judge Tuttle, because he speaks of his service on the appellate bench both before and since his appointment. My information is that he served many times. My information is that he was selected by the district judges of the whole circuit to represent them on the judicial conference here in Washington. He was repeatedly here, and I understood he was here for that purpose. So he was called by the circuit court of appeals frequently to serve on the appellate court, and did so. That is my first point.

My second point is based on a conversation I had with Judge Carswell. On Sunday, for the first time, I learned about this Atlanta Constitution article. I called Judge Carswell. I talked with him on the telephone in the presence of the Senator from Mississippi and the Senator from Nebraska (Mr. HRUSKA). Judge Carswell said to me:

> When he told me—
>
> Meaning Judge Tuttle—
>
> over the phone that he could not appear for me, I had not the slightest idea that he was meaning that he was withdrawing his support and his friendship and his confidence, because he did not so indicate. I was shocked when someone from Atlanta called about this article in the Constitution. And I called him later, and he admitted that he just told me that he felt that under the circumstances he could not appear and testify.

I have read these three telegrams and understand that they were all answers to the telegraphic inquiry of the distinguished Senator from Maryland. The first one simply says:

> I telephoned Judge Carswell at 7 a.m. January 28 that I had concluded that I could not testify in support of his nomination. My previous letter to the committee was an offer to testify if called.

He does not say there that he notified Judge Carswell that he was withdrawing his support, and that he decided that he could not support him. He just says——

Mr. TYDINGS. I ask the Senator to read the next sentence.

Mr. HOLLAND. I will read it:

> I could not testify in support of his nomination. My previous letter to the committee was an offer to testify if called. After notifying Judge Carswell that I would not do so, it did not occur to me that it was necessary also to notify the committee.

The thing that seems to have gotten Judge Tuttle upset was that he understood somehow that this letter was put into the record after the time that he had had this telephone conversation with Judge Carswell indicating that he could not come down and testify.

Judge Carswell, in talking with me, said:

> I had no intimation that he was instead turning against me, and I was never more shocked than when I heard the article in The Constitution read to me. And I called Judge Tuttle, and he told me, "No, I didn't tell you that I wouldn't support you. I just said that I could not come down and testify."

He states exactly the same thing in the first wire to Senator TYDINGS, and I read again:

> I had concluded that I could not testify in support of his nomination. My previous letter was an offer to testify if called. After notifying Judge Carswell I would not do so, it did not ocour to me it was also necessary to notify the committee.

The later wires carry out exactly the same idea. Nowhere does he say, in any of the three wires, that he had turned against Judge Carswell and would oppose him. The second wire says:

> I telephoned Judge Carswell at 7 a.m., January 28, that I had concluded that I could not testify in support of his nomination.

That certainly is a very different thing from saying, "I telephoned him to say that from what I had heard, I had decided that he was wrong instead of right, and that I would not support him further."

The last wire goes even further and says:

> Under the circumstances stated in my telegram, I do not believe that Judge Carswell had any intention or did deceive the committee with respect to the matter of my letter to the chairman.

Mr. President, I think we are asked to conclude some things that at least Judge Tuttle has not yet seen fit to state—at least, in his telegrams and in his telephone conversation to Judge Carswell as reported to me.

I know human nature pretty well, and when I talked with Judge Carswell, I could tell he was very much upset at the article in the Constitution, and that he had called Judge Tuttle to see what was wrong, and again simply received the information that Judge Tuttle decided he could not come down and testify. That is repeated a couple of times in the wires to the Senator from Maryland.

My own feeling is that we are asked to infer a great many things involving implications of bad faith which, for one, I cannot agree to; and, furthermore, that the letter written in Judge Tuttle's longhand expresses what I think is his verdict on Judge Carswell, based on his years of association—and they had been many years of association—and based on the service that Judge Carswell had rendered not just since his appointment to the appellate court, on that court, but in many instances previously, when he had been called to serve on the appellate court.

I think the distinguished Senator from Maryland has tried to make a mountain out of a molehill.

So far as the Senator from Florida is concerned, he completely approves the fact that the Senator from Mississippi, as chairman of the committee, placed in the record the first morning, as soon as the two Senators from Florida and the Congressman from Judge Carswell's district had testified, not just the Tuttle letter, but also all the letters from distinguished judges, including Judge Tuttle's letter, which he had received as chairman of the committee. I think he should have done that; I am glad he did it.

Without drawing any conclusions that are disparaging to anybody, I think that letter comes nearer to stating Judge Tuttle's attitude based on his years of association with Judge Carswell.

I think this matter has been maximized, so far as the Senator from Florida is concerned. He attaches little importance to it. He is more concerned about the reaction of Judge Carswell to the article in the Atlanta Constitution. Incidentally, in reading that article, it will be noticed that even it does not say that Judge Tuttle said he had changed his ideas entirely, but instead says much the same thing:

> Tuttle phoned Carswell earlier at his lodging place in Washington and told him that "under the circumstances," he was withdrawing his offer to testify.

That is a very different thing, even as quoted in the Constitution, from saying he had decided he was going to oppose Judge Carswell's nomination.

Mr. HRUSKA. Mr. President, will the Senator from Mississippi yield briefly, so that I may ask a question of the Senator from Florida?

Mr. EASTLAND. I yield.

Mr. HRUSKA. The telegram also stated that it did not occur to Judge Tuttle that it was also necessary to notify the committee. No blame is attached to Judge Tuttle for not notifying the committee. But somehow or other it is considered necessary that Judge Carswell should have notified the committee. The two ideas do not match. What could Judge Carswell have said to the committee about the conversation, except to affirm the fact that Judge Tuttle was not going to testify. The committee already knew that.

Mr. EASTLAND. We already knew it, and we decided not to use any of those gentlemen.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. EASTLAND. I yield.

Mr. HOLLAND. I call attention to the fact that letters appear, I think, in the record—I have seen them all—from the two active circuit judges from Florida, Judge David Dyer, of Miami, and Judge Bryan Simpson, of Jacksonville; from the retired circuit judge from Florida, Judge Warren Jones; as well as from the two active circuit judges from Georgia, Judge Morgan and Judge Bell; and from Judge Ainsworth who, I believe, is from Alabama——

Mr. EASTLAND. No; Judge Ainsworth is from Louisiana.

Mr. HOLLAND. Yes.

Mr. EASTLAND. And from Judge Thornberry, of Texas.

Mr. HOLLAND. And Judge Thornberry, who was nominated to the Supreme Court by President Johnson.

My feeling is that if there ever was substantial unanimity in the analysis of Judge Carswell and his service on the circuit court of appeals, it appears in the record.

Mr. EASTLAND. That is the reason we decided—Judge Carswell asked—I mean asked to come to testify, but we had the others, and it was my decision not to call any of them. I told Judge Carswell that, late in the afternoon of the first day of the hearings.

Mr. HOLLAND. I think that was a very proper decision, and I approve it.

Mr. President, I yield the floor at this time.

Mr. TYDINGS. Mr. President, has the Senator from Florida yielded the floor? I have one statement to make. Does the Chair recognize me?

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Mr. TYDINGS. Mr. President, finally, let me state the chronology of events on which this debate has rested this afternoon.

On January 22, Judge Carswell received a handwritten letter from Judge Albert B. Tuttle. The letter was dated——

Mr. EASTLAND. The Senator is mistaken. He said Judge Carswell received a letter. The committee received that letter. It was mailed on the 22d and evidently got down here a day or two later.

Mr. TYDINGS. Did the Senator receive that letter from Judge Carswell?

Mr. EASTLAND. Did Judge Tuttle hand the Senator the letter? It came through the mail from New York City.

Mr. TYDINGS. A letter came through the mail?

Mr. EASTLAND. There is the man that handed me the letter, Mr. Holloman, who is now in the Chamber.

Mr. TYDINGS. I am merely stating chronological order of events.

On January 22—a letter dated January 22 from Judge Elbert P. Tuttle was sent to Senator EASTLAND, endorsing or, at least on the surface of it, for the purpose of endorsing the nomination of Judge Carswell. The letter appears in the record on page 6.

On January 27, Judge Carswell sat in the hearing room, in front of the chairman, when the chairman placed Judge Tuttle's letter in the record.

The following morning, January 28, Judge Carswell had a telephone conversation with Judge Tuttle, at which time he told Judge Carswell that he could not testify in support of his nomination.

That morning, Governor Collins read the letter which had been put into the record the prior day. Governor Collins' testimony appears in the record of the hearings on page 76. Since that time, Senators——

Mr. GURNEY. At that point, Judge Carswell was not present at the hearing, was he?

Mr. EASTLAND. No, sir; he was not present.

Mr. TYDINGS. There is no evidence that Judge Carswell was present that day of the hearings.

Mr. EASTLAND. He was not present when former Governor Collins testified.

Mr. TYDINGS. That is correct.

Mr. EASTLAND. In fact, he stayed in my office during the rest of the hearing.

Mr. TYDINGS. That is my understanding of the facts.

Mr. EASTLAND. He was to be available. He stayed there, solely to be available in case they wanted him.

Mr. TYDINGS. After the hearings were completed, the Judiciary Committee, by the chairman, invited Judge Carswell, or asked him if there were any statements he wished to make to correct the record or add to the record, and he responded with the statement which appears in the record on page 320. That statement mentioned in no way the letter from Judge Tuttle.

I believe that Senators have risen on the floor of the Senate and referred to the Tuttle letter as the reason to support the nomination of Judge Carswell. The majority report of the committee uses that letter in support of Judge Carswell. Senators have written letters to constituents using the Tuttle letter as a reason for their support. Judge Carswell has not seen necessary to tell anyone, the chairman, Governor Collins, or any other Senator, that the letter from Judge Tuttle, at least in Judge Tuttle's mind, had been countermanded when Judge Tuttle called him up and told him he could not testify.

Those are just the points——

Mr. EASTLAND. I know, but the Senator wants a complete record, does he not? The Senator wants a complete record, in all fairness to Judge Carswell, does he not? Why does the Senator not put it in there, that Judge Tuttle at no time has withdrawn his endorsement of Judge Carswell or contacted the committee in any way?

Mr. TYDINGS. I cannot say. The telegrams are in the record——

Mr. EASTLAND. I know.

Mr. TYDINGS. Which specifically state that Judge Tuttle had withdrawn his support and was not willing to testify in favor of Judge Carswell.

Mr. EASTLAND. No, no——

Mr. TYDINGS. If the Senator does not wish to draw that from the telegram——

Mr. HRUSKA. Are there words to show withdrawal?

Mr. TYDINGS. I quote the telegram:

> Reply your telegram inquiring about Atlanta Constitution article March 8. I telephoned Judge Carswell at 7 a.m. January 28 that I had concluded that I could not testify in support of his nomination. My previous letter to the committee was an offer to testify if called, after notifying Judge Carswell that I would not do so it did not occur to me that it was necessary also to notify the committee. I was surprised to learn later that the letter was used for a purpose inconsistent with my decision not to testify as communicated directly to Judge Carswell.
>
> ELBERT P. TUTTLE.

I do not know how much clearer one can be than that.

Mr. HRUSKA. I would ask the Senator, where are the words saying that he withdrew his support? There is a simple statement that he would not testify:

> I had concluded that I could not testify in support of his nomination. My previous letter to the committee was an offer to testify . . .

He does not say he is withdrawing his support.

He can say that he wants to review the letter and revise it. If he does, God bless him. It is a wise man that changes his mind. Fools never do. But at any rate, they were predicating a base for saying that Judge Carswell faulted the committee and was to blame because he did not notify the committee that the testimony and the endorsement was withdrawn, when, in fact, it has never been withdrawn.

It seems to me that this is an unwarranted conclusion. In my judgment there is a very nebulous foundation here for that very conclusion.

Mr. TYDINGS. The telegrams speak for themselves.

Mr. HRUSKA. Indeed, they do, and they do not contain any withdrawal of the endorsement by Judge Tuttle.

Mr. TYDINGS. Mr. President, the Senator can fence with words from now until doomsday. But if these telegrams are not explicit, I have never seen any that were.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. TYDINGS. I yield.

Mr. GRIFFIN. Mr. President, if the only purpose of the Senator from Maryland was to convince the Senate that Judge Tuttle no longer supports the nomination of Judge Carswell, I can speak for no other Senator, but I am convinced on the basis of the telegrams that that is the case.

Mr. TYDINGS. Mr. President, I thank the Senator. That is the gist of the telegram.

Mr. GRIFFIN. What bothers me about the presentation of the Senator from Maryland is pointed up by the fact that he referred to the letter which Judge Carswell wrote to the committee after the hearings were completed; a letter which he was given an opportunity by the committee to provide after reviewing the record.

The very fact that the Senator from Maryland refers to that letter implies that Judge Carswell somehow deceived the committee by not saying in his letter something which he did not know; namely, the reason that Judge Tuttle was not going to testify. Leaving that implication is very unfair, I submit, and is directly contrary to, and in conflict with, the last telegram which Judge Tuttle sent.

Mr. HRUSKA. Mr. President, if the Senator will yield, the telegram reads, in part, as follows:

Under the circumstances stated in my telegram, I do not believe that Judge Carswell had any intent to, or did, deceive the committee with respect to the matter of my letter to the Chairman.

Mr. GRIFFIN. Mr. President, may I ask the Senator from Maryland what other purpose he had in mind when he referred to the letter from Judge Carswell at the end of the record?

Mr. TYDINGS. Mr. President, I think it is very important that the Members of the Senate have all of the facts possibly relating to the conduct of Judge Carswell during his service on the bench.

I think that his handling of the call from Judge Tuttle indicates the type judge he is.

I make no charges. I do, however, feel that the Members of the Senate should consider them. Let each Senator draw what conclusions he wishes. The facts speak for themselves.

I yield the floor.

Mr. HRUSKA. Mr. President, I want to corroborate the account of the telephone call referred to by the Senator from Florida on Sunday. In that conversation, Judge Carswell stated that Judge Tuttle, on the telephone January 28, did not reveal any reason withdrawing his support, nor, did he even say he would. He simply said that he could not come to testify and that at a later date when they could visit personally, he would tell him about it.

Now, that is the fact. And I think that is borne out by the language of the telegram.

The Senator from Nebraska repeats that there was nothing that Judge Carswell could have told the committee that would be a disclosure different from what the committee already knew; namely that Judge Tuttle would not testify before the committee.

Somehow, something sinister is tried to be imputed to Judge Carswell for not having told the committee about the Tuttle telephone call. But nothing is said here about the real cause of this discussion today. That is the failure on the part of Judge Tuttle, for not having called the committee and said, "I withdraw my support. I withdraw my letter and repudiate it." He has never done it. No fault is imputed to him. But an unwarranted effort is being made to place the blame on Judge Carswell. This is not right.

Mr. EASTLAND. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

Mr. EASTLAND. Mr. President, was it not Judge Tuttle's duty to contact the committee?

Mr. HRUSKA. It was, indeed. There was no one else who could have withdrawn that letter except Judge Tuttle.

He has never done it. Not to this minute has he ever communicated with the Judiciary Committee.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield.

Mr. TYDINGS. Mr. President, I have the greatest respect and affection for the Senator from Nebraska, as he knows.

Mr. HRUSKA. And it is fully reciprocated, I want the Senator to know.

Mr. TYDINGS. We are frequently on the other side. But we have frequently worked together in constructive efforts.

I have the greatest respect for the deputy minority leader, the Senator from Michigan (Mr. GRIFFIN), and also for my colleague, the senior Senator from Florida (Mr. HOLLAND), and also for the junior Senator from Florida (Mr. GURNEY), who has made a fine record since he has been here.

Having listened to the debate during the last 20 or 30 minutes, I am reminded of the famous play "Hamlet," and the line which says:

The lady doth protest too much methinks.

Mr. HRUSKA. And my observation would be that it is a wise saying and the statement is highly apropos. And I am glad that the Senator characterizes his position in this fashion.

THE OPERATION OF THE GENERAL SERVICES ADMINISTRATION

Mr. GRIFFIN. Mr. President, I ask unanimous consent, as in legislative session, that a statement by the distinguished minority leader, the Senator from Pennsylvania (Mr. SCOTT), on the operation of the General Service Administration under its able Administrator Robert Kunzig be printed at this point in the RECORD.

There being no objection the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF SENATOR SCOTT

Mr. President, today marks the first anniversary of the unanimous confirmation by the Senate of Robert L. Kunzig of Pennsylvania as the Administrator of the General Services.

On this anniversary of his appointment, I want to pay a special tribute to Bob Kunzig. I am proud of my long association and friendship with Bob. He has served as my Administrative Assistant, close personal advisor, campaign manager, and is my trusted friend. Over the years, Bob has devoted his unusually dynamic talents to serving the people of the United States. He has served as a member of Governor Raymond P. Shafer's cabinet, as an Eisenhower appointee to the Foreign Claims Sttlement Commission, and as executive head of the Civil Aeronautics Board.

The Nixon Administration, and in fact, the Nation is fortunate to have Bob Kunzig at the helm of the agency which is the multibillion dollar business manager of the Federal Government—the largest agency of its kind in the world.

Some have felt that in past years the General Services Administration has been a slow-moving, stodgy, unglamorous organization. Mr. President, I can assure you that this is no longer the case. Under Bob Kunzig's leadership, GSA is now a people-oriented agency committed to creative and innovative change. It is also a "can do" agency which has achieved a reputation of working hard and of solving problems.

The record of accomplishments since Bob Kunzig was named Administrator of General Services is a record which emphasizes the needs of the general public. Highlighting this record are actions ranging from the appointment of a National Public Advisory Council comprised of 16 distinguished American citizens—the first time such a council has been appointed in the history of the General Services Administration—to the establishment of Federal Information Centers where private citizens can present ideas or ask questions and be guaranteed attention from responsible Federal authorities, to making GSA a leader in equal employment opportunity so that every employee may advance without regard to race, creed, sex, age or national origin.

Mr. President, Bob Kunzig has made the General Services Administration a new forward-looking agency which serves to improve the lives of the American people.

I extend my sincere congratulations to Bob Kunzig after his first year of successful service and wish him many future years of equal success.

ORDER FOR TRANSACTION OF ROUTINE MORNING BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on the completion of the remarks on tomorrow of the able Senator from South Dakota (Mr. MCGOVERN), there be a brief period for the transaction of routine morning business, as in legislative session.

The PRESIDING OFFICER. Does the Chair understand that the statements made in the morning hour are to be limited to 3 minutes?

Mr. BYRD of West Virginia. Mr. President, I did not so state. However, I will add that to my request.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

PROGRAM

Mr. BYRD of West Virginia. Mr. President, for the benefit of the Senate, I would like to give a short resume of the orders for Wednesday, March 18.

We shall adjourn, as in legislative session, until 10:30 a.m. tomorrow.

Following the disposition of the reading of the Journal, the Senator from South Dakota (Mr. MCGOVERN) is to be recognized for a period not to exceed 30 minutes, following which there will be a brief period for the transaction of routine morning business, as in legislative session.

ADJOURNMENT UNTIL 10:30 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, if there be no further business to

the Senate Com. on the Judiciary, 91st Cong., 1st Sess.

[5] *The Washington Post*, September 11, 1969, at A2, Col. 1–2.

[6] *Consumer Bulletin* at 26 (April 1965).

[7] 24 F.T.C. 1413–14 (1936).

[8] *Consumer Bulletin* at 25–26 (April 1965).

[9] See 55 F.T.C. 55 (1958).

[10] *Id.* at 91, *aff'd*, 295 F. 2d. 302 (7th Cir. 1961).

[11] In Re Holland Furnace Co., 241 F. 2d. 548 (7th Cir.), *cert. den*, 381 U.S. 924 (1965).

[12] See Dixon, *Federal State Cooperatives to Combat Unfair Trade Practices*, 30 State Gov't 37 (1966); Mendell, *N.Y. Bureau of Consumer Frauds and Protection*, 11 N.Y.L.J. 603 (1965); O'Connell, *Consumer Protection in the State of Washington*, 39 State Gov't 230 (1966); Rice, *Remedies, Enforcement Procedures and the Quality of Consumer Transaction Problems*, 48 B.U.L. Rev. 559 (1968).

[13] See Dole, *Consumer Class Actions under Recent Consumer Credit Legislation*, 44 N.Y.U.L. Rev. 80 (1969); Staars, *The Consumer Class Action*, 49 B.U.L. Rev. 211 (1969).

[14] E.g., *Holland Furnace Co.* v. *Robson*, 157 Colo. 378, 402 P. 2d. 628 (1965).

[15] E.g., *Holland Furnace Co.* v. *Korth*, 43 Wash. 2d. 618, 262 P. 2d. 772 (1953).

[16] See *Dolgow* v. *Anderson*, 43 F.R.D. 472, 485–88 (E.D.N.Y. 1968); Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968, Duke L.J. 1101, 1103.

[17] Daar v. Yellow Cab Co., 63 Cal Rptr. 724, 433 P. 2d. 732 (1967).

[18] *Id.* at 746; accord, *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d. 555, 563 (2d Cir. 1968).

[19] *Holstein* v. *Montgomery Ward & Co.*, No. 68, CH 275 (Ill. Cir. Ct., Cook County, 1969).

[20] *Holstein* v. *Montgomery Ward & Co.* at 27.

[21] E.g., *Society Milion Athena, Inc.* v. *National Bank of Greece*, 231 N.Y. 282, 22 N.E. 2d. 374 (1939); *Brenner* v. *Title Guarantee & Trust Co.*, 276 N.Y. 230, 11 N.E. 2d. 890 (1937).

[22] E.g., *Gaynor* v. *Rockefeller*, 15 N.Y. 2d. 120, 204 N.E. 2d. 627, 256 N.Y.S. 2d. 584 (1965).

[23] *Hall* v. *Coburn Corp.*, 160 N.Y.L.J., No. 28, at 2 (Sup. Ct. Bronx County, 1968), *aff'd mem.* (1st Dept. 1969), appeal pending.

[24] 246 Mass. 259, 140 N.E. 795 (1923).

[25] *Id.* at 797.

[26] Ch. 690, 814, 1969 Acts, Commonwealth of Massachusetts, amending Ch 93A, General Laws of Massachusetts.

[27] 394 U.S. 332 (1969).

[28] See Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C.L. Rev. 527 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 Harv. L. Rev. 356, 375–400, 414–16 (1967).

[29] *The Class Action—A Symposium*, 10 B.C. Ind. & Com. L. Rev., Spring (1969).

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

SUPREME COURT OF THE UNITED STATES

The ACTING PRESIDENT pro tempore (Mr. ALLEN). The Chair lays before the Senate the pending question, in executive session, which the clerk will state.

The ASSISTANT LEGISLATIVE CLERK. The question is, Will the Senate advise and consent to the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, as we enter the continuance of the debate on the Carswell nomination, I would like to refer the Senate, especially because of the discussion that took place here late yesterday on the question of who is for and who is against the confirmation—which I think is an important point—to a rather extensive statement on the confirmation of Judge Carswell, the distribution of which was initiated by four members of the bar of New York, among its most eminent, and which has such unique qualification in terms of this particular line of inquiry, that I think it bears very important scrutiny by the Senate.

This statement was subscribed to and initiated by three former presidents of that association and one present president of the Association of the Bar of the City of New York, probably as well known and highly reputed a bar association as we have in this country. I do not claim it to be superior, but I think it certainly is the equal in quality of any bar association.

The list is headed by:

Bruce Bromley, former judge of the Court of Appeals of the State of New York, a man of most unusual reputation, and I do not think he would mind my saying that he is generally regarded as a conservative in his political orientation and in his attitude toward the law and jurisprudence generally.

Samuel I. Rosenman, adviser to President Franklin D. Roosevelt and a very distinguished lawyer in his own right.

Francis T. P. Plimpton, who is president of the Association of the Bar of the City of New York. I emphasize, naturally, that he speaks for himself, and not the association, though that is not a factor either way, as the association has not acted, but many of its members have expressed themselves, generally speaking, on this subject, and many have signed this declaration.

And Bethuel M. Webster, a most distinguished New York lawyer, a former president of the Association of the Bar of the City of New York.

I will go into this in more detail later, but I would like now to briefly discuss the significance of this statement, which was joined in by over 400 lawyers, and other statements which have been made upon this subject, including the statements which are recited in some detail in the committee report upon this nomination, which were referred to in the debate here yesterday, including the very eloquent statements of both the senior Senator from Florida (Mr. HOLLAND) and the junior Senator from Florida (Mr. GURNEY) relating directly to this subject.

First, we must consider the general issue of ability, which is pertinent and important to the point of view of lawyers and judges with respect to a judge and his qualification to be a Justice of the Supreme Court of the United States. I think this goes to an interesting point which has been made on the floor of the Senate time and again, and that is the quality and character of the decision-making process in Senate confirmation of the nomination of a high official of Government of this kind to the judiciary. The question really posed, on the part of at least some of the proponents of confirmation, is that the President having made the appointment of Judge Carswell, he bears the responsibility for Judge Carswell's capability as a judge to perform the office, and that the Senate is restricted only to questions of really personal disqualification, disqualification on the grounds of ethical conduct—something of that kind is an echo of the struggle over the nomination of Judge Haynsworth; questions of impropriety, which a man might have been guilty of as a judge, if any were discovered; the fact that he is a member in good standing of a bar; or anything which may have occurred in his personal life which would not be suitable and fitting for a Justice of the Supreme Court of the United States.

On the other hand, there is a body of opinion, with which I identify myself, that says that this is not the only function of the Senate. Certainly it is to be included, but it is not to be the only function of the Senate. The Senate's function is always to appraise whether or not a nominee can carry out the responsibilities of being a Justice of the Supreme Court of the United States on the basis of his professional attainments as well as the other facts, and the question is not to be decided solely, to use an aphorism to express it, on the ground of name, rank, and serial number. I identify myself with that group. It seems to me that the debate, as it goes pro and con on who is for and who is against Judge Carswell, reflects, certainly by clear implication, the acceptance of that view.

It seems to me that a Senator of the United States has broadly the same function as the President at the given moment of confirmation; to wit, in his conscience he must feel and vote that this is the man to be a Justice of the Supreme Court of the United States. The President has the right to nominate him; we have the right to confirm or reject the nomination. Ours is a composite judgment; the President's is a single judgment. But I do not consider the elements of that judgment to be any different for the President than it is for us. I think that is the way in which this particular nomination, or any such nomination to very high office, must be regarded.

If it is not so regarded, what is our purpose? Are we merely a reviewing agency, or do we have a substantive right to consent and confirm or to deny confirmation? I believe that the history of confirmations of nominations by the Senate bears out my view and the view

taken by the large group of lawyers, law school deans, and others who have subscribed to the statement I referred to when I opened, rather than to the name, rank, and serial number view, which I do not think is constitutionally consistent with the role allocated to the Senate in respect to this appointment. That is very important in this matter, because I respect, and I think every Member of the Senate would respect, not alone the statements to which I am referring—and there are many of them in opposition to Judge Carswell—but also the representation, which we certainly have a right to accept completely, made by the Senators from Florida (Mr. HOLLAND and Mr. GURNEY) with respect to the attitude toward the nominee, both as a citizen and as a judge, by the bench and bar of that State, and the various situations, set forth in the committee report, of others, including a distinguished professor of law at Yale University, concerning Judge Carswell's capability as a judge.

Also, I think it bears on the evaluation of legal distinction which is shown by his opinions. This, too, has been called into question by the general allegations that have been made that if we confirm a nomination that is before us, we follow, in a sense, our own ideology or philosophy, which then makes it a partisan operation.

But I do not think that that extends to the question of professional capacity. There I think we have a right to say, "This is an able judge. I do not agree with him, but certainly he is an able man, well able to analyze a legal problem and to write a good opinion on it."

Mr. President, I think that represents something of the ambit of the considerations which represent the principle upon which this matter must be judged.

I know that the Senator from Maryland last night made certain references to the position of Judge Elbert B. Tuttle of the Circuit Court of Appeals in which Judge Carswell serves. There, too, the pertinence of Judge Tuttle's attitude, however Members may analyze that attitude in terms of confirmation or denial of confirmation, is important also from the point of view of whatever it reflects in terms of Judge Tuttle's views as to competence and professional attainment.

So that I believe that both on the part of the proponents and the opponents, this kind of evidence is very germane to the issue; and I believe that Members have a duty to weigh it as an important aspect on the issue of confirmation.

For myself, I feel that the conclusion I have reached—and again I wish to repeat every moment I make that statement that it is without any reflection on the particular nominee as a man and as a citizen—that I cannot vote to confirm, is based upon the ground that it is my honest judgment that the nominee is not equipped, based upon all the evidence I have mentioned, to perform this very high role in our national life in the way that one needs to be equipped to be a Justice of the U.S. Supreme Court.

I reject the idea that this is to be decided on the basis solely of the technical qualifications of the nominee, but believe that at this particular juncture the Members of the Senate have a right—indeed, a duty—to evaluate the quality of the ability of the nominee to be a Justice of the Highest Court, where the decision is final and nonappealable. I rest that argument also very heavily upon the fact that we are confirming a Justice of the U.S. Supreme Court for life. To me, this is a very important consideration. This is the only time we have a chance to do anything about it. From this point on, we are ruled by the man whose nomination we have confirmed. Especially is this true in the case of Judge Carswell, who has the opportunity to sit on the bench for many, many years, long after we have had this opportunity to confirm, probably long after I and many other Members will be in the Senate.

So, it adds a particular poignancy to our role in exercising the authority we shall exercise in the near future with respect to this matter.

From that point of view, Mr. President, I would now like to undertake some analysis of this statement, as well as those who subscribed to it, because I believe that it represents great pertinence to the issue, just—I repeat—as the deeply held views of the Senators from Florida and the members of the bench and bar, whom they have an absolute duty to quote, have a real pertinence and real importance to the decision. They, for example, argued that many of the members of the bar who have subscribed to this statement have not appeared personally before Judge Carswell or are not personally acquainted with him.

I think that is a point properly made. I wish to point out, however, that there have been lawyers who personally appeared before him and came away with an adverse reaction, who have appeared before the committee and testified in opposition to confirmation. At the same time, I do not feel that we can dismiss the opposition to confirmation by the outstandingly fine lawyers who base their opinion upon the opinions of Judge Carswell and the legal distinction and scholarship which he has shown in his decision-making as a judge.

I think that is also an important evidentiary factor which should be weighed affirmatively in the case against confirmation, just as I feel that the fact that they have not appeared before Judge Carswell personally and do not know him personally is an evidentiary factor that should be considered in evaluating their views. I do not believe that we have to appear before a judge to know his views or to have an opinion of his ability, but that we can study his record carefully and come to a conclusion as to his professional attainments based upon his record. Indeed, because of the size of our country and the complexity of our life, that is the way in which the reputation of most judges is established. Relatively few members of the bar or of the public or of the press have actual exposure to the man as a person, but the whole country can certainly learn and read exactly what he stands for as a judge.

It is in that respect that I think the statement made in the letter of transmittal by former Judges Bromley and Rosenman and Mr. Plimpton, and Mr. Webster is very important. They say:

> We respectfully urge that, although this is a second nominee for the vacancy, the Senate has a greater constitutional duty to exercise independent judgment in judicial appointments than it has in executive appointments.

This refers to an independent appointment. It is not the appointment of an aid to the President, with whom the President would have to work, and on whom Congress would have all kinds of handles other than impeachment if he turns out to be unsatisfactory. Congress can deny him money and make life pretty miserable for an administration if they do not like the Secretary or some other high official of a department or feel he is not performing. But Congress can do no such thing concerning a Justice of the Supreme Court. We want him to be independent. On the contrary, we would not want to put strings on him and would not want him subject to being overweened by whatever we may think, even if we expressed it in a formal resolution. That is his courage and capacity as a judge. This is a one-shot operation, decisive in its application.

These eminent lawyers go on to say:

> We believe that, in the exercise of that duty, the Senate should confirm an appointment to the Supreme Court only if the nominee is of outstanding competence and superior ability. Judge Carswell does not, in our opinion, meet that test.

They also cite in that regard Charles Warren, leading authority on the subject:

> The Senate has recognized this obligation in repeated instances. For example, of the 71 Supreme Court nominations sent to the Senate during the 19th century by the Presidents, more than one-fourth were denied Senate approval.

I think this is a very important point, because I do not think anyone would wish to hurt Judge Carswell as an American and as a citizen. I point out that Judge Haynsworth, whose nomination was rejected in the very recent past, serves in an entirely honorable way on the Circuit Court of Appeals, on which he served before.

Let me point out again, in terms of reasonably modern history, not contemporary but modern, that one of the most distinguished chief judges of any circuit court of appeals, Judge Parker, was also rejected as a Supreme Court Justice nominee and went on to build a reputation of great distinction in our country because he served so nobly and well as a chief judge. Indeed, maybe, one can only speculate that the adverse turn of events which he encountered as an individual had a good deal to do with broadening, maturing, and deepening his insights which had an effect upon the quality with which he served from that point on.

Now, the other aspect of the case respecting Judge Carswell, which is dealt with in this statement to which I refer again, is the question of the mental outlook of the nominee respecting the basic racial issues which have faced us with grave problems in our Nation with respect to justice, enforcement, and the

assurances and guarantees of the Constitution, and of public order.

On this subject, the statement says:

> The testimony indicates quite clearly that the nominee possesses a mental attitude which would deny to the black citizens of the United States and to their lawyers, black and white, the privileges and immunities which the Constitution guarantees.

Now, that is a very serious finding, Mr. President, considering the high character and quality of the lawyers who are making this statement, which I think is entitled to a considerable amount of interest and concern by the Senate; for although I do not expect that any judge who is going to be named to this slot will be an ardent advocate of the most advanced concepts of civil rights as they are developed by judicial decision, I do not believe, on the other hand, that such a person is very likely to be, whether Judge Carswell or someone else the President names, other than a strict constructionist, as the saying goes, taking a conservative view of the powers of the Supreme Court to interpret the Constitution, being far more bound by precedents than other members of the court may be, both precedents in body of law and tradition, and precedents in specific cases. We cannot expect anything else, considering the position which President Nixon has taken with respect to this appointment.

But, I do not believe that that includes a nominee who possesses a mental attitude, as this statement concludes, which would deny to our black citizens in the United States the privileges and immunities which the Constitution guarantees.

I think it is not a question of being liberal or conservative, a strict or a liberal constructionist of the Constitution. That is a matter of obeying the law and adjudicating according to the law of the land which has now been clearly delineated not only by the Judiciary but by Congress in the landmark civil rights acts it has passed, and by the President, as seeking to serve, protect, and grant the privileges and immunities which the Constitution guarantees to the black citizens of the United States.

Now, Mr. President, in analyzing this latter point, the statement traces it from an admitted beginning. There is no question about the fact that in 1948 the nominee declared the most explicit conviction in favor of segregation of the races, which is directly contrary to the Constitution when it deals with the enormous range of human activity, from attending school to buying a hamburger in a restaurant and "he expressed his belief that segregation of the races is proper and the only correct way of life in our State."

That is a long time ago, 22 years. Judge Carswell, when he testified within the last few weeks, deplored that statement and said he did no longer subscribe to it and had not for years. We can understand that and, indeed, I would almost say that the presumption is in favor of accepting that statement. Normally, it would have been accepted, being within his frame of reference, where he was born, his education, where he lived, and the so-called social order of the South for so long, at least that part of the South. It is entirely understandable that a man would grow, would mature, and from his learning accept those tenets and be completely indoctrinated by them.

The only difficulty is that the pattern did not stop there but the pattern continued. This is where the very hot controversy comes in. It is understandable that Judge Carswell would make the statement he did in 1970 as contrasted with the experience of 1948.

But this is a moment of tremendous importance to the nominee himself. Indeed, I do not challenge the sincerity of his statement, but I think we still have to realize that we have a duty beyond the person and go to what he will be as a judge, as a vessel, so to speak, through which the United States expresses its power and, in the case of the U.S. Supreme Court, a very decisive power.

We still have to examine his conduct following 1948 in order to determine whether this is or is not his sentiment today and is at the root of his personality and the basis of his thinking.

Of course, there we have pieces of evidence which are extremely worrying. Again, one cannot say that they are conclusive, or that they are proved beyond a reasonable doubt, but they are extremely worrying, and it would seem to me to indicate a continuing pattern which, considering the unbelievable size of the responsibility, I do not wish to take a chance on. That is what it comes down to.

If a man wants to be a Supreme Court Justice, we have a right to feel that we have to be satisfied that there is in him no vestige of this kind of thinking and no reservation of this kind respecting the segregation of the races, or that "segregation of the races is proper and the only correct way of life in our State" in the thinking of a man whom we are going to vest with all this power.

The evidence to support these concerns and these questions arises in the so-called golf club incident where, at best, the testimony is hazy, having occurred in 1956. At that time the nominee was already a U.S. attorney and certainly must be presumed to be following the state of the law as decided by the U.S. Supreme Court; this occurring a year after the Supreme Court expressly declared that it was unconstitutional for a State or a city, directly or indirectly, and was a denial of governmental power, to segregate, specifically, a golf course. Nothing could be more precise than that. Yet 1 year later we find the nominee engaged in that kind of activity; and, for a lawyer, we cannot assume that he was engaged in that kind of activity without knowing the decision of the courts and what was the current state of the law, and without knowing the legal effect of what he was doing himself as being a party to the organization of what is called a "lily white" golf course and converting what was a municipal golf course into that kind of golf course. In addition, we have the affidavit submitted in February 1970 by local citizens, both black and white who were residents of the area, showing that they understood what the purpose of this transfer was to, as the statement says, "keep the black citizens off the course."

It is almost inconceivable—and I emphasize this because it shows evidence of a continuing course of conduct—that 8 years after the 1948 segregationist speech of the nominee, this attempt took place. It certainly is entitled to be received as evidence that there was really no basic change of mind in the nominee. And let us remember that at that time we had a right to believe that there was already a change of mind.

Mr. President, I have little doubt if these facts had been known the confirmation of Judge Carswell to be U.S. attorney in Florida in 1953 would have been very sharply challenged at the time of confirmation in the Senate by some Senators. I was not a Member of the Senate then; however, there were plenty of other Senators who were very sensitive to this issue. And I cannot conceive of that nomination not having been challenged then and there by some Senator if the 1948 speech had been revealed at that time.

I think that is just as true also of the 1956 incident, when Judge Carswell was confirmed as a district judge a few years later and when he was confirmed very recently as a judge of the circuit court of appeals.

So, I do not believe there is any sleeping on rights, or laches as we say in the law, on the part of Members of the Senate raising these issues now as fundamental reasons for inhibiting a negative vote on confirmation.

I will not go into the details which are spelled out in the statement elaborately in terms of the explanation given by Judge Carswell for this golf course deal. They are spelled out in the record that has been debated time and time again by the very Senators who participated in the debate and in the questioning. I refer to the Senator from Massachusetts (Mr. KENNEDY), the Senator from Indiana (Mr. BAYH), and others.

It seems to me that at the very least it leaves a question inconclusive—certainly, as it does in 1956—on an issue on which we cannot be inconclusive, in the granting of such power and authority as we give to a Judge of the Supreme Court.

The statement makes further reference, and I again refer to the statement of the four leading members of the New York bar, subscribed to by more than 400 other very distinguished lawyers:

> We cannot escape the conclusion that a man, in the context of what was publicly happening in Florida and in many parts of the South—which the nominee says he knew—and what was being discussed locally about this very golf club, would have to be rather dull not to recognize this evasion at once; and also fundamentally callous not to appreciate and reject the implications of becoming a moving factor in it. Certainly, it shows more clearly than anything else the pattern of the Judge's thinking from his early avowal of "white supremacy" down to the present.

The statement then proceeds to analyze the state of mind of the judge as represented by his decisions. And I think, having laid the basis in the way that these two events have done—the 1948

highly segregationist speech and the 1956 golf club incident—having laid the basis by those facts up to 1956, I think it is then just to continue, based upon that statement of facts, an analysis of the judge's outlook upon this question in his subsequent decisions, which takes us right through step by step, from 1958, when he became a district judge, right up to roughly the present time.

Mr. President, the base which has been laid certainly raises a serious question about the outlook of the nominee on this crucial question concerning which the Supreme Court will be deciding cases vitally affecting the Constitution and justice in our country and public order and tranquillity for years to come. And if we have any doubt about it, Chief Justice Burger has already laid on the table the area of decisions involved. For instance, Judge Burger said they will have to be deciding cases in the Supreme Court on what has been called here de facto segregation, with its enormous complications of materially direct control of education within the States.

It is hard to think of a domestic issue which is more emotionally laden and which could confer more benefit or cause more trouble to our country than that kind of decision.

And if we confirm Judge Carswell, since President Nixon has indicated his appointments will make the Court more of a strict constructionist one, within a very few years Judge Carswell's vote could easily be the decisive vote on such very deeply pressing and very consequential issues, issues such as the one I have described respecting de facto segregation in the public schools and the effect of such a decision upon public control of Federal education.

So, I think it is fair, considering the exigencies which will face the newly confirmed Judge, if he is confirmed, that we consider the matter.

Mr. President, I think therefore that it is fair under those circumstances, and with a factual basis having been laid, to go into what the decisions reveal about his state of mind on this very vital issue.

I have described why it is so vital.

That is what this statement does.

I would like to deal with another matter before I pass on to the cases. And I emphasize that it seems to me that, having laid a factual basis up to 1956 on the outlook on the part of this individual which at least leaves a troubling question in the minds of many Senators—at least, it does in mine, and also in the minds of many other Senators who oppose the nomination—having given that basis in fact, we then have a right to look at the decisions from that point of view, quite apart from the other question which relates to the fitness of the nominee in professional terms to occupy the highest of all judicial offices.

And the incident to which I refer occurred in 1966, which is quite contemporaneous. It dealt with a restrictive covenant in a deed, which type of covenant long prior thereto, in 1948 to be precise, had been decided to be nonenforceable by the U.S. Supreme Court.

Certainly, the case of Shelley against Kramer is familiar to any law school student, let alone a former U.S. attorney and judge.

Again we are asked to say that it was unthinking and unwitting. Nevertheless, the judge himself signed the deed which reincorporated this unconstitutional covenant from a deed first written in 1963. I only mention that not because it is, in my judgment, entitled to the same probative force as the 1948 speech on segregation and the 1956 golf club incident where there was active participation, but as indicating perhaps what the statement of the New York attorneys and other attorneys throughout the country concludes: "would have to be rather dull not to recognize this evasion at once."

They apply that to the 1956 incident. I think it applies, as well, to the very recent incident after the nominee was for quite a few years a judge and sat quite a few times en banc on the circuit court of appeals by appointment. I think the same thing applies not to have recognized that in respect to a covenant in a deed which he signed.

Now, to go to the case proper, and I wish to emphasize this because I think it is an important element in the structure of the opposition to this confirmation. Having laid the basis, in fact, for a condition of mind which is open to challenge, I believe that those who oppose the confirmation have a right to go on to see if that same outlook and that same state of mind, which is closed to the existing state of the law, is continued. The only evidence we can possibly get is in the decisions and the course of conduct which the nominee then followed in cases in this particular field. Fifteen cases have been taken as the standard by which this question may be judged, as these cases were decided by Judge Carswell. Obviously, the 15 cases were only a few, relatively speaking, of the total decisions by the nominee, but a study of a much fuller record of his opinions would not help him any more because there was actual testimony by outstanding legal scholars before the Senate committee with respect to the body of these other opinions as not showing the legal capacity and scholarship which these particular authorities felt was appropriate for a U.S. Supreme Court judge.

The statement which I am referring to and analyzing goes on to deal with the 15 cases to which I have referred:

> These specific 15 cases are all of similar pattern: They involve 8 strictly civil rights cases on behalf of blacks which were all decided by him against the blacks and all unanimously reversed by the appellate courts; and 7 proceedings based on alleged violations of other legal rights of defendants which were all decided by him against the defendants and all unanimously reversed by the appellate court. Five of these 15 occurred in one year—1968.

Certainly, it would be hard to allege that this is not pertinent here both to the state of mind of the judge respecting a constitutional inhibition against segregation of the races and the various fields in which that inhibition exists, and in respect of legal ability and scholarship.

> These 15 cases indicate to us a closed mind on the subject—a mind impervious to repeated appellate rebuke. In some of the 15 he was reversed more than once. In many of them he was reversed because he decided the cases without even granting a hearing, although judicial precedents clearly required a hearing.

I would like to insert at that point something I felt in respect of the other nominee we rejected, Judge Haynsworth. I said there my opposition was based primarily on Judge Haynsworth's insensitivity to the real meaning of equal protection when it comes to racial segregation and also to Judge Haynsworth's persistence in error. I find the same thing in Judge Carswell. Judge Carswell is insensitive and has shown persistence in error.

It is the latter to which I would like to devote a few moments. The genius of the judicial system of the United States is its decisiveness. It has many protections, it has many delays; but at the end there is a final decision, something is done or not done after all the action of the courts.

This is an enormous power. It is a greater power even than we exercise in Congress because theoretically anything we do might be upset by the courts. The courts throw out an enormous number of cases in which they feel no constitutional question is involved and they decide a great preponderance of cases on the ground we do have constitutional authority to do what we do. But a runaway Court—indeed, President Franklin D. Roosevelt felt he had found one—could wreak havoc with the Constitution and with our capability to run the country. It is early in American history. We are but a little under 200 years old and related to the history of other great countries and nations we are children at this stage of our national development.

We may find in some distant day—although I hope and I pray it does not occur—some grave constitutional confrontation between the power of the Supreme Court to strike down our enactments and our power to enact.

The validity, therefore, of the system and the way in which it works best is that it hangs together and that it at least speaks with a relatively common voice after all the dissidence and contradictions have been resolved; and they are resolvable by the Supreme Court which is truly as decisive a voice as we have in our land and probably as exists in the world.

Now, Mr. President, this means that judges—lower court judges, intermediate judges, and appellate judges—whatever may be their personal views, and many judges, I am sure, have personal views diametrically opposed to what they consider to be the law that must be reflected in the judicial decisions, must have a sense of accord with the system and the state of the law.

Therefore, the question of persistence in error becomes, in my judgment, a very important aspect of the development of a judge. I think that this statement alone, this conclusion by such an eminent section of the bar that "These 15 cases indicate to us a closed mind on the subject—a mind impervious to repeated appellate rebuke" would be a decisive

reason for me to vote "no" on confirmation.

Mr. President, they go on to analyze this whole subject to which I have been referring in some detail, but I think that for an analysis of the cases with respect to Judge Carswell's decisions and the dynamics of how they work, I would like to refer to a very detailed, and what I consider to be thorough, analysis of the line of these decisions made under the auspices of the Washington Research Action Council of Washington, D.C. I will not increase the size of the RECORD by including it—indeed, it may have been included heretofore—but I refer to it by title. The author is Richard T. Seymour. It is available in my office, and I am sure in many other offices, for any Senator to consult.

That is what is shown by these cases, as I see it, and I shall deal primarily with the leading cases, and in this field, in over ten years preceding the issue which we now face.

The first of these cases is Augustus against the Board of Public Instruction of Escambia County, which is the well-known Escambia case. Judge Carswell first dismissed that case for lack of standing of the plaintiff. He dismissed it on the ground that Negro pupils had no right to sue to desegregate faculties, which was the issue there.

He was unanimously reversed by the fifth circuit, which held that whether or not the pupils could be hurt by being taught by a segregated faculty was a question of such importance as should not be settled on a motion to strike, without a hearing.

Although the suit was originally filed in the spring of 1960, it was not until January of the following year that a hearing was held. Two months later—that is, a year after the suit was filed—an order was issued requiring the school board to formulate a desegregation plan, a task for which they were given another 3 months.

A hearing on the plan was not held until August 1961, and it was not accepted until September 1961, incidentally too late to be implemented during that new school year.

The following July—to wit, July of 1962—the court of appeals again reversed Judge Carswell, finding the plan that he had accepted after such a long delay to be ineffective, and remanded the case to the district court, to wit, Judge Carswell's court, with instructions to devise and implement a new plan before September—that September would have been 3 years after the suit was filed—if possible. Apparently ignoring the concern expressed by the circuit court of appeals, Judge Carswell did not even set a hearing on the new plan until November of that year, and thereby postponed the possibility of its taking effect until the 1963–64 school year.

That is the history in Augustus against Escambia County.

Soon thereafter, when a suit was filed in Leon County, which contains Judge Carswell's home city of Tallahassee, the judge accepted a school desegregation plan almost identical to the one in which he had just been reversed by the Fifth Circuit Court of Appeals in Escambia.

Indeed, in Steele against the Board of Public Instruction of Leon County, he employed a weak plan, allowing the automatic reassignment of all pupils to previously segregated schools and putting the burden on black students to apply for transfers. Affirmative desegregation, according to this plan, was to be accomplished on a grade-a-year basis, and this notwithstanding the Circuit Court of Appeals' direction in the Escambia case that unless complete desegregation could be accomplished by 1963 in a given public school system in a given district, plans should provide for at least two grades per year of desegregation. And inevitably, as Judge Carswell certainly should have known, once again he was reversed by the Fifth Circuit Court of Appeals.

Here were two reversals on the same grounds, which were made within a space of 3 years. Certainly, one would think that a district court judge would be impressed with what was the existing State of law—or perhaps a district court judge would have been impressed, but not Judge Carsweli, because he accepted an identical plan from yet a third school district a year later, to wit, in 1964, in the case of Youngblood against the Board of Public Instruction of Dade County.

In that case he accepted a plan which would not have brought about complete desegregation of the district until the fall of 1976. That was 12 years. And it was not until an exasperated—and I use that word advisedly—Fifth Circuit Court of Appeals set a deadline of 1967—only 3 years after 1964—for complete desegregation throughout the circuit—and that they did in Stout against the Jefferson County Board of Education; it was only after they had set an iron rule for the whole circuit—that Judge Carswell amended the Dade County plan and other weak plans which he had theretofore accepted notwithstanding two previous reversals on precisely the same grounds within the 2-year period before 1964 by the circuit court of appeals.

It is exactly that kind of persistence in error, more than the failure to initiate changes in law, which had characterized Judge Haynsworth's decisions and which I also find unacceptable in this nominee.

It seems to me that the judge would have read the fifth circuit's remand in the Escambia case, which was long before, 2 to 3 years before, 1964, as requiring more than a token freedom-of-choice plan, which he accepted as late as 1964, which would take 12 years to implement; but Judge Carswell chose to ignore that aspect of the decision of the circuit court of appeals and continued to accept plans in violation of the remand in the Escambia case.

It seems to me that is an item of importance for indicating his insensitivity to race problems which I find scattered throughout his decisions.

Another one, for example, that bears on the same question, decided in 1961, is that he held, in the case of Brookes against City of Tallahassee, that a restaurant in a municipal airport could not maintain segregated facilities for blacks and whites.

But in making that decision, he added a final paragraph which, I submit, subtly suggested an evasion of the decision which he was himself making. That final paragraph read as follows:

> Nothing contained in this order shall be construed as requiring the City of Tallahassee to operate, under lease or otherwise, restaurant facilities at the Tallahassee Municipal Airport.

It is very interesting that this sentence, which appears in the opinion as it is reprinted in a specialized publication seeking to ferret out just such attitudes on the part of judges—6 Race Relations Reporter 1099—was deleted from the same opinion as later published in the Federal Supplement.

Another item of evidence. In the case of Due against Tallahassee Theater, decided in 1963, Judge Carswell was quick to dismiss without any hearing a very serious constitutional question. He dismissed for failure to state a cause of action a suit filed by black citizens alleging a conspiracy on the part of private business and public officials to maintain segregated facilities.

Nonetheless, Mr. President, 5 months before that, before he made this decision without a hearing, the Supreme Court had decided the identical question of law in reversing convictions of black citizens seeking desegregated public facilities. The U.S. Supreme Court case which I refer to is *Lombard* v. *Louisiana*, reported in 374 U.S.

So naturally, Mr. President, the Supreme Court found Judge Carswell's decision in the Due case clearly erroneous, and reversed it.

Mr. President, I again refer back to the statement made by the distinguished lawyers to whose statement I have been referring rather consistently in this discussion of Judge Carswell's record, citing these 15 specific cases, in which they said:

> These specific fifteen cases are all of similar pattern: they involve eight strictly civil rights cases on behalf of blacks which were *all* decided by him against the blacks and all *unanimously* reversed by the appellate courts; and seven proceedings based on alleged violations of other legal rights of defendants which were all decided by him against the defendants and all *unanimously* reversed by the appellate court.

We continue to trace this record, Mr. President. In 1964, Judge Carswell dismissed for lack of standing a suit to desegregate the State reform schools in Florida which had been filed by former inmates who were, at the time of filing, on probation. The case is Singleton against the Board of Commissioners of State Institutions. There again, and very predictably, Judge Carswell was reversed by the circuit court.

Finally, as recently as 1968, Judge Carswell granted summary judgment in favor of defendants in a suit alleging bad faith in the initiation of prosecutions of civil rights workers. That case is Dawkins against Green. Again predictably, in 1968, there was still the persistence in error, still the same outlook; and Judge

Carswell was reversed by the Circuit Court of Appeals.

In addition, Mr. President, there is this record showing a continuing outlook for 20 years, from 1948 to 1968, on this critically important issue to our country and probably most important single constitutional question, which will come before the U.S. Supreme Court again and again and again if Judge Carswell sits on that Court as a Justice. We have shown what I believe is a continuing outlook which is precisely contradictory to the constitutional guarantees of equal rights and equal opportunity.

In addition to that, Mr. President, the hearing record on this nominee includes even charges and countercharges as to the Judge's attitude toward civil rights litigants and their attorneys—including some very serious charges respecting people who were arraigned, dismissed, and then rearrested, though they had previously been freed by Judge Carswell's own order.

I wish to point out that in the report on this nomination, the committee takes cognizance of those charges, and seeks to rebut them with the testimony of Judge Carswell's court clerks and court bailiffs, other judges, and other practicing attorneys; but, Mr. President, the evidence in a matter of this character—because we are trying to ascertain a man's state of mind in the face of probably the greatest inducement in his life to give himself the benefit of the doubt in explaining his own attitude and his own course of conduct—must be cumulative. I believe we must add together the many items of evidence which I have described, which have their origin, admittedly—Judge Carswell himself admits it—in a position which, within the context of the law which he will be passing upon as a judge, is absolutely inadmissible and absolutely contrary to everything which our country now stands for in terms of segregation of the races and the various fields to which it applies.

Now, Mr. President, I come finally to an analysis of the list of very distinguished judges and lawyers who have subscribed to this statement which I have described, interpreted, and developed for the Senate today.

I think, Mr. President, we have to understand that lawyers must appear before the U.S. Supreme Court, and this applies with a special impact to very distinguished lawyers. They are far more likely to argue before the Supreme Court than lawyers of less experience at the bar and less distinction; and therefore, such lawyers are not likely, unless they are really impressed in the most profound sense by the situation, to come out against the confirmation of a justice for the U.S. Supreme Court, especially—and all of us understand that, we are not children—in the face of the widespread predictions which we hear all over, including in the press, that Judge Carswell's nomination will in fact be confirmed. I think that lends all the more point to the impact of the position which has been taken by these very distinguished lawyers.

Therefore, Mr. President, I believe that the detailing of who they are is very important, as it is very unlikely that they would be volunteers except for the deepest cause of conscience in a matter of this kind.

I point out that among them are some of the most distinguished lawyers in our country, including Cyrus Vance, a former Under Secretary of Defense whom many of us know, of the very distinguished New York firm of Simpson, Thacher & Bartlett.

It includes Simon Rifkind, again one of New York's most distinguished lawyers, a former judge of the U.S. district court.

It includes Chauncey Belknap, former president of the New York State Bar Association.

Haskel Cohn, president of the Boston Bar Association, Boston, Mass.

A partner in one of the most important law firms in California, O'Melveny & Meyers, of Los Angeles, Mr. Warren Christopher, former Deputy Attorney General of the United States.

It includes Robert Morgenthau, who just resigned as U.S. attorney for the southern district of New York, and was immediately snapped up by Mayor Lindsay, and is presently deputy mayor of New York.

It includes Sumner Bernstein, past president of the Maine State Bar Association.

Samuel Hofstadter, former justice of the Supreme Court of New York.

Ramsey Clark, former Attorney General of the United States, who is now in practice here in Washington.

Eli Frank, president of the Maryland State Bar Association. Theodore Chase, former president of the Bar Association of Boston. Clifford Alexander, a partner in the Washington firm of Arnold & Porter, former chairman of the Equal Employment Opportunities Commission.

They include Addison Parker, a partner in one of the leading firms in Des Moines, Iowa—Dickenson, Throcknorton, Parker, Mannheimer and Raise.

They include G. D'Anaelot Belin, a partner in the very distinguished Boston law firm of Choate, Hall & Stewart, which is well known to many of us here.

They include a partner in one of the leading firms in San Francisco, Graham Moody, a partner in the firm of McCutchen, Doyle, Brown & Enersen, which is very well known to many of us here. They include Sadie T. M. Alexander, the secretary of the Philadelphia Bar Association.

They include, also, again to range around the country, because that is a very important consideration in matters of this kind, Noel F. George, a partner in the very distinguished firm of George, Greek, King, McMahon & McConnaughey of Columbus, Ohio.

Manly Fleishman, a very well known lawyer, a partner in the firm of Jaeckle, Fleischmann, Kelly, Swart & Augspurger Buffalo, New York. Eli Aaron, a partner in the firm of Aaron, Aaron, Schimberg & Hess of Chicago.

Mr. President, it is very important to understand that this is not some establishment opposition, but is very widely dispersed, by very distinguished lawyers throughout every part of the United States.

I come across the name of Norman Harris, a partner in the distinguished firm of Nogi, O'Malley & Harris of Scranton, Pa. George R. Davis, of Lowville, N.Y., in upstate New York.

I will mention a very few more which illustrate a trend of judgment that I think is critically important.

Here is Robert F. Henson, President of Hennepin County Bar Association, of Minneapolis.

William L. Marbury, former president of the Maryland State Bar Association, of Baltimore, Md. A partner in a firm in Cleveland, Ohio, Alfred A. Benesch, of Benesch, Friedlander, Mendelson & Coplan.

A partner in a firm in Denver, Colorado, Hugh A. Burns, a partner in Dawson, Nagel, Sherman & Howard.

Wayne B. Wright, former president of the Bar Association of Metropolitan St. Louis.

All 11 partners of Roth, Stevens, Pick & Spohn of Madison, Wis. Leonard M. Nelson, chairman of the judiciary committee of the Maine State Bar Association.

In addition, there are some very outstanding law school professors and deans and faculties of law schools throughout the United States. These are some:

The dean and faculty of Yale University Law School, at New Haven, led by Louis H. Pollack, its dean, with a list of those who teach there, including such eminent professors of law as Eugene B. Rostow, who served here for a long time and whom we know very well.

The dean and faculty of Notre Dame Law School, led by its dean, William B. Lawless.

The faculty of the Ohio State University School of Law.

The dean and faculty of Columbia University Law School, led by William C. Warren, its dean, with a list of some of the most eminent professors in the United States. I will not name any, for fear of omitting some who are equally important, as this is such a distinguished list.

The dean and faculty of Columbus School of Law of Catholic University, in Washington, led by E. Clinton Bamberger, its dean.

A large number of members of the faculty of the School of Law at the University of California in Los Angeles.

The dean and faculty of the Val Paraiso, University School of Law, Val Paraiso, led by Louis F. Bartlet, its dean.

The dean and faculty of Georgetown University, Washington, led by Adrian S. Fisher, its dean.

The dean and faculty of the Indiana University School of Law at Bloomington, Indiana, led by William Burnett Harvey, its dean.

The dean and faculty of Rutgers University School of Law, Newark, New Jersey, led by Willard Heckel, its dean.

The dean and faculty of the University of Illinois College of Law, led by John E. Cribbet, its dean.

The dean and faculty of the New York University School of Law, led by Robert McKay, its dean.

The dean and faculty of the Univer-

sity of Connecticut School of Law, led by Howard Sacks, its dean.

The dean and faculty of the University of Toledo College of Law, Toledo, Ohio, led by Karl Krastin, its dean.

In addition to the law schools whose deans join in this statement of opposition, we have members of the faculty. From Loyola University School of Law, Los Angeles; the University of Maine School of Law, Portland, Maine; State University of New York at Buffalo—a very large number of faculty members of the School of Law; the University of Chicago Law School, Chicago, Ill.; the University of Arizona College of Law, Tucson, Ariz.; the faculty of the Syracuse University College of Law, Syracuse, N.Y.; also quite a few members of the faculty of the College of Law at Willamette University, Salem, Oreg.

Mr. President, such an outpouring of opposition and of protest is not lightly to come by in a given situation, especially supporting as strong a statement as I have just described.

I hope very much that the Senate will evaluate, as it deserves to be evaluated, so weighty a case as this one and so heavily premised upon fact and a continuous history—I respectfully submit that the evidence beginning with 1948, the speech, and going right on through to almost the latest decided cases bears that out—which demonstrate an insensitivity at the very least, if not a mental attitude, which denies the rights under the Constitution to which black citizens in the United States are now conclusively demonstrated to be entitled as a matter of law, plus an inadequacy of scholarship and professional attainment which it seems to me are both bars to our confirmation of Judge Carswell to be a Justice of the U.S. Supreme Court.

Again I repeat, without any reflection on him as a man, and I think that he would be a loyal enough American himself to feel, were he a Senator of the United States, that people like myself and others in this Chamber can have no alternative but to vote "no," based upon what we consider to be so strong a case and when we are dealing with so critical an office, an office for life, in which this is our one and only opportunity to pass judgment on a nominee to be a Justice of the U.S. Supreme Court.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HUGHES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRAVEL). Without objection, it is so ordered.

VISIT TO THE SENATE BY DR. FRANZ JOSEF RÖDER, PRESIDENT OF THE FEDERAL COUNCIL OF THE FEDERAL REPUBLIC OF GERMANY, AND DR. ALBERT PFITZER, DIRECTOR OF THE FEDERAL COUNCIL OF FEDERAL REPUBLIC OF GERMANY

Mr. SYMINGTON. Mr. President, I have the honor of introducing to the Senate Dr. Franz Josef Röder, president of the Federal Council of the Federal Republic of Germany.

[Applause, Senators rising.]

Mr. President, I ask unanimous consent that a biography of Dr. Röder be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

There being no objection, the biography was ordered to be printed in the RECORD, as follows:

DR FRANZ JOSEFF RÖDER, PRESIDENT OF THE FEDERAL COUNCIL

Dr. Franz Josef Röder was born in Merzig (Saar) on 22 July 1909. He is married and has five children. He obtained his senior leaving certificate in 1928 and studied philology. After his studies he entered the teaching profession, his last appointment having been that of headmasteer of the Dillingen Realgymnasium. Since 18 December 1955 he has been a member of the Saarland Diet (Landtag). Until the political integration of the Saar into the Federal Republic of Germany he was a deputy member of the Consultative Assembly of the Council of Europe. From 4 January 1957 to 6 October 1957 he was a member of the German Bundestag; from 4 June 1957 till 19 July 1965 he was the Saarland Minister of Education and since 30 April 1959 has been the Premier of that Land. On 18 October 1959 he was elected chairman of the Saar CDU Land association. He has been decorated with the Grand Cross of the Order of Merit of the Federal Republic of Germany. Since 4 June 1957 he has been a member of the Federal Council (Bundesrat) and on 24 October 1969 was elected for his second term (1 November 1969 to 31 October 1970) as President of that Council, his first term having been from 1 November 1959 to 31 October 1960.

Mr. SPARKMAN. Mr. President, I ask unanimous consent that a biographical sketch of Dr. Albert Pfitzer, Director of the German Bundesrat, who is accompanying Dr. Franz Josef Röder, be printed in the RECORD.

There being no objection, the biography was ordered to be printed in the RECORD, as follows:

DR. ALBERT PFITZER, DIRECTOR OF THE FEDERAL COUNCIL

Born at Kirchen on 22 August 1912, district of Ehingen (Donau); is married and has two children. Obtained senior leaving certificate and studied law and political science at the universities of Tübingen, Munich and Berlin from 1931 to 1934. Passed the second State examination at law in 1938 at Stuttgart.

Has held appointments in the administration (executive service) since 1939. From 1946 to 1949, deputy president of the district of Wangen (Allgäu). 1950 to 1951, plenipotentiary of Land Württemberg-Hohenzollern in Bonn.

In the summer of 1951, appointed Director of the Federal Council by the Plenary Assembly of the Federal Council.

1953, visited the United States at the invitation of the U.S. Government to study U.S. parliamentary institutions.

1961, attended a conference of Governors of U.S. states in Salt Lake City and visited the legislative bodies of several states.

1966, visited Brazil at the invitation of the Brazilian Congress; delivered lectures on the federative system of the Federal Republic and the work of the Federal Council (Bundesrat).

Member of the Association of Secretaries-General of the Interparliamentary Union.

Publications: "Der Bundesrat" (The Federal Council), Series of Publications by the Federal Centre for Political Education, No. 11, 17th ed. 1969; "Organisation und Arbeit des Bundesrates" (Organization and Work of the Federal Council), in "10 Jahre Bundesrat" published by the Federal Council; essays and speeches on constitutional and parliamentary subjects.

MESSAGE FROM THE HOUSE

A message from the House of Representatives by Mr. Bartlett, one of its reading clerks, announced that the House had passed, without amendment, the bill (S. 858) to amend the Agricultural Adjustment Act of 1938 with respect to wheat.

The message also announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the amendments of the Senate to the bill (H.R. 11959) to amend chapters 31, 34, and 35 of title 38, United States Code, in order to increase the rates of vocational rehabilitation, educational assistance and special training allowance paid to eligible veterans and persons under such chapters.

The message further announced that the House had passed a bill (H.R. 15694) to authorize appropriations for procurement of vessels and aircraft and construction of shore and offshore establishments for the Coast Guard, in which it requested the concurrence of the Senate.

ENROLLED BILL SIGNED

The message also announced that the Speaker had affixed his signature to the enrolled bill (S. 858) to amend the Agricultural Adjustment Act of 1938 with respect to wheat.

HOUSE BILL REFERRED

The bill (H.R. 15694) to authorize appropriations for procurement of vessels and aircraft and construction of shore and offshore establishments for the Coast Guard, was read twice by its title and referred to the Committee on Commerce.

MESSAGES FROM THE PRESIDENT—APPROVAL OF BILLS

Messages in writing from the President of the United States were communicated to the Senate by Mr. Leonard, one of his secretaries, and he announced that the President had approved and signed the following acts:

On March 12, 1970:

S. 2809. An act to amend the Public Health Service Act so as to extend for an additional period the authority to make formula grants to schools of public health, project grants for graduate training in public health and traineeships for professional public health personnel.

On March 13, 1970:

S. 2523. An act to amend the Community Mental Health Centers Act to extend and improve the program of assistance under that act for community mental health centers and facilities for the treatment of alcoholics and narcotic addicts, to establish programs for mental health of children, and for other purposes.

On March 17, 1970:

S. 2701. An act to establish a Commission

on Population Growth and the American Future; and

S. 2910. An act to amend Public Law 89-260 to authorize additional funds for the Library of Congress James Madison Memorial Building.

EXECUTIVE MESSAGES REFERRED

The PRESIDING OFFICER (Mr. CHURCH) laid before the Senate messages from the President of the United States submitting sundry nominations, which were referred to the Committee on Commerce.

(For nominations received today, see the end of Senate proceedings.)

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HUGHES. Mr. President, the case against confirmation of Judge Carswell rests on two arguments so compelling to me that I am astonished at the necessity for our standing here in debate.

I cannot understand how the President has allowed himself to be so ill-advised as to nominate this man, or why, once made aware of the facts, he has not seen fit to withdraw the nomination.

In his search for a man from the South and for a "strict constructionist," whatever that term may mean, the President has found a man who has, on too many occasions, chosen to disregard the rights of individuals coming before his court, and who has repeatedly demonstrated blindness toward, if not outright disapproval of, the major developments in American society and in constitutional law over the past 22 years.

It cannot even be urged that he has distinguished himself in those areas of the law that are not so directly and urgently related to contemporary social pressures. The fact is that he has not distinguished himself as a judge in any way as yet illuminated.

As a result we find ourselves here today, Mr. President, debating whether a man has adequate intellectual qualifications for the job. His supporters cannot claim seriously that he is "outstanding," or that he is the best qualified among several men who might have been nominated. They can only argue that he is "good enough."

Surely, Mr. President, this kind of argument is demeaning to the South, which has many better men to offer. And it is demeaning to the many Federal and State judges throughout the Nation who are conservatives in the traditional sense of that word, but are also great scholars of the law, while the present nominee is not.

We are urged to confirm this nominee on the principle that the Supreme Court should be balanced. This is certainly an acceptable point of view for the President to hold, and I am inclined to agree with it. It may be better for the country to have a Supreme Court whose members hold varying views of the role of the law as an instrument of individual and social justice, rather than a Court whose members hold identical judicial philosophies.

In this case, however, we are not being asked to balance the philosophies of the Court. We are being asked to balance excellence with mediocrity, and to balance sound principles of justice for all with the principle that justice is only for some Americans.

The present Supreme Court may or may not be unbalanced. I leave that argument to those of this great body who are members of the legal profession. The President has expressed the view that the Court does lack balance, and it is his right to hold this conviction. My objection is only to the nature of the balance he will achieve if this nominee is confirmed.

The present members of the Supreme Court reflect a wide range of age, legal experience, and philosophy, but each individual member is highly respected in his profession. We may disagree with particular decisions of the Court. Yet we do not doubt the intellect and sense of high judicial principle brought to bear on each case coming before the Court.

The confirmation of this nominee would damage that confidence in the most serious way. At a time when the Court is under attack by extremist elements of various hues, and by those who are resisting the inevitable changes in our society, we cannot afford to strike at this great institution, whose wisdom and prestige is essential to our eternal search for a just and orderly society.

The case against confirming Judge Carswell must begin with his speech delivered during a 1948 campaign for a seat in the Georgia Legislature. At that time the nominee was 28 years old, a member of the bar, and a veteran of a world war in which one of our chief enemies had given expression to its repulsive racist theories in the most monstrous campaign to annihilate a whole race of people. The nominee was not too immature, not too uneducated, not too inexperienced to understand the terrible impact of inflammatory words. He had become a member of a profession trained to understand the meaning and impact of words on people, and it can only be presumed that he used words with full knowledge of their impact.

Mr. President, on January 23 of this year the New York Times printed what is labeled as excerpts from that speech. As far as I know, Judge Carswell has not denied the accuracy of these excerpts. He did deny that he now holds the views he expressed then.

For those who may not have read and pondered Judge Carswell's opinion of the law, morality, the Constitution, and the Federal Government, which he expressed at the age of 28, I will read the latter portion of that speech here:

> Foremost among the raging controversies in America today is the great crisis over the so-called Civil Right Program. Better be called, "Civil-Wrongs Program."
>
> An attempt to regulate the internal affairs of a state is an open abrogation of states' rights as provided by the 10th Amendment. These amendments disclosed a widespread fear that the Federal Government might (under the pressure of proposed general welfare) attempt to exercise powers that had not been granted to it.
>
> "Civil Wrongs Program," is just such an attempt.
>
> Thomas Jefferson wrote in 1823, "I believe that the states can best govern over home affairs and the Federal Government over foreign ones. I wish, therefore, to see maintained the wholesome distribution of powers established by the Constitution for the limitation of both and never to see all offices transferred to Washington."
>
> The statement by one who actively participated in the drawing of the Constitution shows that the original framers never intended for the Federal Government to control every phase of American life.
>
> By this "Civil Wrongs Program" the Federal Government is asked to go beyond its constitutional powers and usurp the powers of the individual states. This attempt to control the internal affairs of a state is an attempt to complete the federalization of American life. It is an attempt to provide more power to the Federal Government and unbalance the check and balance system.
>
> It doesn't take too much imagination to realize the ultimate outcome of having all power in Washington.
>
> The South has proved it can manage its own affairs. We who live here are the judges. This is a political football, obvious on its face as an attempt to corral the bloc voting in Harlem.
>
> As part and parcel of this same rotten vote-getting scheme, the F.E.P.C., the so-called Fair Employment Practices Committee, is a sham. Every businessman should realize the serious implications of such a piece of preposterous legislation. It would mean that here in Gordon, if we are hiring two telephone operators, both white, and some Negro girl applies for the job, we may get in court with the Federal Government because we have supposedly "discriminated." It would take thousands of Federal agents to enforce such foolish measures and we shall not tolerate it.
>
> I am a Southerner by ancestry, birth, training, inclination, belief and practice. I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed, and I shall always so act. I shall be the last to submit to any attempt on the part of anyone to break down and to weaken this firmly established policy of our people.
>
> If my own brother were to advocate such a program, I would be compelled to take issue with and to oppose him to the limits of my ability.
>
> I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.

Mr. President, in fairness to the nominee, it is noted that he now renounces the sentiments expressed in that speech. In fact, he has managed to disclaim any understanding of his mental processes and motives in making the speech.

When asked by Senator HART to explain whether he did or did not believe the statement when he made it or whether his position had changed since making it, he replied:

> Senator, I said it. I suppose I believed it at the time. But trying to reach back into the recesses of one's mind and say what motivated you to do anything 22 years ago on that subject or anything else would be an exercise in psychology and psychiatry that I don't believe I am qualified to answer or explore.

I suggest, Mr. President, that if we were to judge the man solely on the basis of that speech, it would matter little

whether he spoke out of personal conviction or out of political expediency. If he spoke from conviction, he was at least sincere, but he was terribly wrong. Mere political expediency from a man who knew better, although not unheard of, is probably worse, particularly on a subject as critical as this one was then and is now.

We are urged to concede that many of us have recovered from the errors of 20 years ago, that we have seen the light, and that events have altered our opinions. This is true, of course. Few of us who make public speeches have not lived to regret some of our words. And most of us like to believe that we are a little better and a little smarter than we were 20 years ago.

I hope I would be the last to suggest that a man cannot reform. I know he can. But I believe that his reform can only be measured by his record. Words alone will not do. In searching that record for evidence of reform, we find a number of incidents, which, taken individually, might seem relatively unimportant, but become crucial in proving that the nominee's position did not actually change.

Shortly after losing his 1948 campaign for the Georgia Legislature, he moved to Florida and entered the practice of law. Possibly this move did soften his rhetoric. At least we could assume that President Eisenhower would not have appointed to the position of U.S. attorney a man who had continued to make similar speeches until the time of his appointment in 1953. Yet, nothing in the record presented to the Senate Judiciary Committee suggests affirmatively that his convictions had altered during his few years in the private practice of law. Nor does such evidence appear from his record as a U.S. attorney.

Members recall that it was during these years of the middle 1950's that the Supreme Court handed down its decision on the desegregation of public schools in the landmark case of Brown against Board of Education. It was during these years that suits were begun in many Southern States looking toward the desegregation of many kinds of public facilities and institutions. It was a time of fundamental change, and certainly it must have been clear to most lawyers that the Supreme Court would no longer uphold the old rule of "separate but equal" as a tool for maintaining racially segregated public institutions.

In any event, regardless of his personal preferences, a U.S. attorney must have been sharply aware of these controversies and of the legal issues involved. It would seem that he could hardly help recognizing the various plans devised for avoiding desegregation, including methods for transferring facilities previously owned by the public into private hands.

Yet, we find that U.S. Attorney Carswell in 1956 lent his name to one of these plans. It entailed the transfer of a publicly owned golf course into the hands of a private club, where its use could be and was limited to white golfers. Information furnished to the Senate Judiciary Committee indicated that this result was not only intended, but was well known at the time. However, Judge Carswell now tells us that he was not aware that there was any racial issue involved.

Mr. President, a talent for isolating one's self from the social and legal issues of one's community is not a quality we hope to find in a nominee for the Supreme Court.

Obviously, this incident in the personal life of Judge Carswell reveals no change in the attitudes expressed in his 1948 speech. It was a relatively minor incident. It could be overlooked more easily if the nominee had not held an official position in which he should have been more acutely aware of oncoming issues. But it is evident that his point of view had not changed by 1956.

Mr. President, I leave to the lawyers among us the analysis of the legal issues in the cases decided by Judge Carswell after his ascent to the Federal bench in 1953. I am satisfied to accept the judgment of legal scholars; and I have read with interest not only the discussions of this aspect of the matter which appeared in the majority and minority views of our Judiciary Committee, but some of the analyses from other responsible professional sources. I was particularly impressed by the following passage from the statement prepared by members of the Association of the Bar of the City of New York:

> Particularly telling—as showing the continuing pattern of his mind which by the time of the golf club incident, if not before, had become clearly frozen—are the testimony and discussion of fifteen specific decisions in civil and individual rights cases by the nominee as a United States District Judge. These fifteen were, of course, only a few of the decisions by the nominee. A study of a much fuller record of his opinions led two eminent legal scholars and law professors to testify before the Senate Committee that they could find therein no indication that the nominee was qualified—by standards of pure legal capacity and scholarship, as distinguished from any consideration of racial prejudice—to be a Supreme Court Justice.
>
> These specific fifteen cases are all of similar pattern: they involve eight strictly civil rights cases on behalf of blacks which were *all* decided by him against the blacks and all *unanimously* reversed by the appellate courts; and seven proceedings based on alleged violations of other legal rights of defendants which were all decided by him against the defendants and all unanimously reversed by the appellate court. Five of these fifteen occurred in one year—1968.
>
> These fifteen cases indicate to us a closed mind on the subject—a mind impervious to repeated appellate rebuke. In some of the 15 cases he was reversed more than once. In many of them he was reversed because he decided the cases without even granting a hearing, although judicial precedents clearly required a hearing.

Mr. President, this was not a statement signed by a few law students or professors who might be charged with a somewhat limited or impractical point of view. It was signed by 457 lawyers and law professors, in communities throughout the Nation, including some in my own State of Iowa. Some of these men are deans and faculty members of our leading law schools. Others are partners in eminent law firms in the country's major cities. I am sure that it required courage and great strength of character for some, who must be responsible not only for their personal positions but for the positions and fortunes of the firms they represent.

Perhaps equally compelling from my point of view as a layman were the accounts of Judge Carswell's behavior toward persons arrested and brought before his court for alleged offenses committed during the course of their activities on a voter registration drive. These were not defendants who were charged with committing violent acts, which might understandably provoke a judge. Nor were they accused of misbehavior in the courtroom.

Moreover, his incivility was directed not only toward the defendants, but toward their attorneys, several of whom testified before the Judiciary Committee. One of these attorneys was, when he appeared before the committee, a Justice Department employee, who testified under subpena. I understand that he is no longer with the Justice Department.

This young man corroborated the statements of other attorneys who appeared as witnesses in these words, as they appear unedited in the print of the committee hearings:

> It is relatively clear in my mind. I remember this. This was my first courtroom experience, really, out of law school, and I remember quite clearly Judge Carswell. He didn't talk to me directly. He addressed himself to the lawyer, of course, Mr. Lowenthal, who explained what the habeas corpus writ was about, and I can only say that there was extreme hostility between the judge and Mr. Lowenthal. Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on and he was especially critical of Mr. Lowenthal in fact he lectured him for a long time in a high voice that made me start thinking I was glad I filed a bond for protection in case I got thrown in jail. I really thought we were all going to be held in contempt of court. It was a very long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people against—rather just arousing the local people, and he in effect didn't want any part of this, and he made it quite clear that he was going to deny all relief that we requested. At that point, Mr. Lowenthal argued that the judge had no choice but to grant habeas as the statute made it mandatory.

The young man then went on to describe the judge's call for law books and his final reluctant admission that the statute did, in fact, require him to grant the relief requested. The defendants, incidentally, had just been illegally tried in a State court by a judge who refused to admit that his court had no jurisdiction over the case and who insisted on trying the case while the defendants were without counsel.

Prof. Leroy Clark of New York University, who supervised the NAACP legal defense fund litigation in Florida for 6 years, testified that Judge Carswell was the "most hostile Federal district court judge" that he had ever encountered on civil rights matters. Professor Clark testified as follows:

> Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his

chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible. It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel.

At another point in his testimony Professor Clark reported to the committee:

Whenever I took a young lawyer into the State, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.

Mr. President, it is clear from the testimony of his friends, and perhaps indeed from Judge Carswell's demeanor before the Senate Judiciary Committee, that he is not considered to be naturally or habitually irascible. On the contrary, he seems to be pleasant and affable. Yet, several witnesses testified that, in their experience as attorneys before Judge Carswell, he treated them and their clients rudely, and even more important, he had to be forced to grant them the rights guaranteed both by the Constitution and by statute.

These witnesses had one thing in common: They had all appeared before Judge Carswell in the course of representing clients in cases involving civil and other individual rights. It is this kind of case which seems to bring out the worst in the nominee. And if we are to judge from the record of reversals by his Circuit Court of Appeals, it is this kind of case which found him the least willing, or the least able, to understand and follow the law as determined by the Supreme Court and the Federal appellate courts.

Senators will all agree that these are areas of the law still in evolution. In matters of equal opportunity for education, employment, housing, and voting many issues are not yet decided. There will be further legislative action in these fields during the coming months and years, and our courts will be faced with many crucial decisions.

As in the past, there will be those who will disagree with some of the decisions of the Supreme Court, and emotions will rise. I urge the Members of this great body to consider whether, regardless of private views on the particular issues, we can afford to have on the Supreme Court a justice who has already demonstrated his incapacity to suppress his own private feelings and to maintain a properly judicious approach in such cases. What kind of balance will this man give to the Court?

The nominee's attitude has been unbalanced over a period of many years. It is asking too much of the Supreme Court to hope that it can work some magic over emotions as well as intellect. Like the Presidency, the Supreme Court is reputed to change a man. However, it cannot be expected to work a complete transformation. To confirm this man will not give the Court balance; it will give it a burden. This is asking too much of the Court at so critical a time in our history.

I am concerned, also, over the lack of frankness with which the Senate has been dealt. Apparently, much of the information which the Senate must consider relevant was not furnished to the Senate by the Department of Justice, the White House, or any other source within the administration. Instead, it was obtained from independent sources such as the press and the various organizations concerned with civil rights and individual liberties. These sources are the first to admit that their resources have been limited, and that other information might be obtained from more thorough official investigation.

Judge Carswell himself has not chosen to answer his critics directly, and apparently, the President has not felt that it was his duty to encourage the nominee to do so. Instead, the nominee and his supporters have preferred to rely heavily on the endorsements of his colleagues on the Fifth Circuit Court of Appeals. It now appears that one of the most important of such endorsements, that of the distinguished retired member of that court, Judge Elbert Tuttle, may be questionable.

At this point, I wish to read into the RECORD Joseph Kraft's column from the Washington Post of March 17, in which Mr. Kraft asserts that Judge Tuttle actually withdrew his offer to testify on Judge Carswell's behalf after he learned of the material concerning the Carswell record on civil rights matters:

A QUESTION OF GOOD FAITH RAISED ABOUT JUDGE CARSWELL

As the Senate opens floor debate on the Supreme Court nomination of Judge G. Harrold Carswell, his supporters assert that there are only two adverse charges—racism and lack of distinction. But even as these claims are advanced, a third question is surfacing.

The third question involves good faith, perhaps even deliberate deception. Specifically, it is a question whether the judge did not mislead the Senate in allowing it to think that his nomination enjoyed the support of a distinguished Southern jurist—Elbert Tuttle.

Judge Tuttle has been a leading member of the Atlanta bar for more than 20 years. In 1954, after a year's service in the Eisenhower administration, he was appointed by President Eisenhower to the Fifth Circuit Court of Appeals—Judge Carswell's present court. From 1961 through 1967, when he reached the mandatory retirement age, Judge Tuttle was chief judge for the Fifth Circuit. In that position, he established among lawyers and judges a rare reputation as a man of integrity.

When Judge Carswell was nominated for the Supreme Court he sought out Judge Tuttle and asked him to support the nomination. Judge Tuttle agreed. On January 22, Judge Tuttle wrote the chairman of the Senate Judiciary Committee, James Eastland, that he was prepared to testify on behalf of Judge Carswell. He gave as a "particular reason" for wanting to testify "recent reporting" on a statement made by Judge Carswell when he was running for office in Georgia back in 1948. That statement was the original source of the racist charge against Judge Carswell. Judge Tuttle, in his letter, said he felt that the impression created by the 1948 statement was "erroneous."

In the next few days, however, there emerged more recent material on Judge Carswell and his attitudes on race questions. The new information apparently caused Judge Tuttle to have some second thoughts about testifying. On January 28, he telephoned Judge Carswell to say that, in the circumstances, he felt he could not testify. Judge Carswell said he understood. But that understanding was buried. For the official record of the Carswell hearing—the record read by senators in making up their minds—includes two references to the supposed support of the nomination by Judge Tuttle.

On the very first day of the hearing, January 27, Chairman Eastland placed in the record five "letters endorsing the nominee" from his fellow judges on the Fifth Circuit. One of those was the letter in which Judge Tuttle offered to testify.

Next day, hours after the telephone call, the committee heard the most (one is tempted to say, the only) impressive witness to testify on behalf of Judge Carswell—former Governor Leroy Collins of Florida. Governor Collins testified he had known Judge Carswell and Mrs. Carswell for many years. He alluded to the charges of race prejudice. And in rebutting them, he rested his case on the letter from Judge Tuttle. He told the Senate committee:

"Now if there are any lingering doubts with any of you, I would urge you to consider carefully the judgment of the judges who have worked on case after case involving civil rights with Judge Carswell. Surely Judge Tuttle would know all about this. Judge Tuttle was to be here and to testify personally in this hearing in support of Judge Carswell. He couldn't come for reasons he explained in a handwritten note to the chairman. Let me read you briefly from what Judge Tuttle said . . ." And then Governor Collins read excerpts from the Tuttle letter.

The Collins testimony compounded the misrepresentation. Not only did it cite a letter whose major thrust had been specifically disowned by Judge Tuttle. But it also asserted that the letter explained why Judge Tuttle wasn't on hand to testify. In fact, the letter said nothing about why Judge Tuttle hadn't come to testify.

Judge Carswell, of course, knew why Judge Tuttle wasn't on hand. But he hasn't been talking about the matter in public, despite numerous opportunities to set the record straight. He did not talk about the matter in January after Governor Collins testified. He did not talk about it on February 5 though he addressed that day a letter to Chairman Eastland based on a "full and careful reading of the entire transcript of the testimony." He said nothing on March 3 when the political editor of the Atlanta Constitution, William Shipp, printed the basic story of Judge Tuttle's change of mind and refusal to testify. And as of March 14, when this column began looking into the matter, he still had not said anything—not even, apparently, to Governor Collins.

Fortunately, that is not where the issue is going to stay. Senator Joseph Tydings, a Maryland Democrat on the Judiciary Committee, has become aware of the March 3 article in the Atlanta Constitution. He has been in touch with Judge Tuttle. And Judge Tuttle has agreed to set the record straight. It remains to be seen what explanation Judge Carswell gives of his curious reluctance to correct an obvious error in both the letter and spirit of the record. Perhaps there is a very good explanation. But perhaps not.

In any case, the question of whether Judge Carswell dealt with the Senate in good faith needs to be considered carefully, along with the other issues. It needs in particular to be considered by the many Republicans restrained by party discipline from voting against Carswell on what they know in their hearts to be the truly critical charge against him—the charge that he is just not up to the job.

Mr. President, on February 14 in Des Moines, Iowa, I announced that I would oppose the confirmation of Judge Carswell to the Supreme Court and summarized the reasons for my opposition.

I would like to share with you a few paragraphs of that announcement:

I have thus far voted for confirmation of all of Mr. Nixon's nominees except one. My decisions in both of these cases were arrived at only after long study and consideration.

In our office, we have examined every shred of evidence and testimony about Judge Carswell we have been able to obtain, including the full transcript of the hearings before the Senate Judiciary Committee.

At the outset, before examining any of the record, I took the position that a speech the nominee had made more than 20 years in the past and which he subsequently renounced should not in itself be regarded as a disqualifying factor, unless, in the context of the facts, an extraordinary point was involved relating to the nominee's fitness for the office.

In this case, having considered the entire record, I believe a critical point is involved.

I then outlined the various points from Judge Carswell's record that seemed to me to bear in an important way on his fitness for this high office.

Here are the concluding paragraphs of the statement:

At this stage, I hope it is clear that I do not oppose Judge Carswell on the basis of his being a Southerner or a strict constructionist. Obviously, there are many qualified jurists in America who answer this description.

It should be borne in mind that we are not considering a minor appointment, but one to the highest court of the land.

In evaluating the nominee's record, my legal advisors are in full agreement—that Judge Carswell's record reflects neither the high professional qualifications nor the freedom from bias that are expected from an appointee to the nation's highest tribunal.

As a Supreme Court Justice, Judge Carswell would be involved in decisions affecting the lives and rights of millions of non-white Americans.

Sometimes a simple analogy will put a picture quickly into focus.

Suppose Judge Carswell had delivered that racist speech he delivered in 1948 not against black citizens, but against the Catholics, the Methodists, the Mormons, the Jews, the Quakers, or any other white minority.

Do you seriously believe that such a man would be nominated, or if nominated, would be seriously considered for the Supreme Court of the United States?

Mr. President, I do not question the good and honorable intentions of my colleagues on both sides of the aisle who support the confirmation of Judge Carswell.

Nor do I purport to be an expert with regard to his professional qualifications. I did seek and receive the best legal advice available to me.

I believe I am one of many Americans of like background and temperament who wanted very much to approve the President's nomination, but who, when all of the facts on the record had been examined, were compelled to oppose it.

As I have pointed out, a crucial point involved was whether or not the nominee would be capable, as a Justice of the high tribunal, or acting without bias in matters affecting the lives and rights of 23 million black American citizens.

It is basically a matter of conscience.

I believe my southern colleagues have a right to ask: Is this a matter of northern conscience?

Do I condemn practices of racial discrimination in other States, but condone them in my own?

It is one thing to preach the gospel of racial equality for a State a thousand miles away.

What about my own State, where the black minority is only a fraction of what it is in many other States?

They are fair questions, and I will try to answer them in some degree from the record of my statements and actions as a three-term Governor of my native State.

One of my first actions in the area of minority relations was to issue an executive order, the first of its kind in Iowa, outlawing racial discrimination in State employment, as well as in contracting for work for the State government.

Subsequently, we enacted legislation providing for the first State civil rights commission, and I might add that it was endowed with enforcement powers. This was followed by the passage of a fair housing law for the State.

In 1967, when civil unrest was sweeping the great cities of the country, I made unannounced visits to the poor and black districts of several Iowa cities.

I did this not to pry in anyone's community, but simply to get some firsthand knowledge of the causes of the discontent which had not yet erupted in violence but which I knew must be there.

As I told the people of the State at the time, my findings made me appalled by my own ignorance and ashamed that I had not realized the need to make this kind of firsthand investigation before.

I talked with many black and poor people in their own homes and without others around.

I got an eyeful and an earful and, in all frankness, a noseful of the living conditions that had made these citizens deeply resentful.

In the summer of 1967, I met with the mayors, councilmen, and other municipal officials of the larger cities of the State in which our minority citizens are located.

In this and other meetings, I pledged the support of the State government to the municipalities in the event of violence. But the bulk of our discussion was directed toward what we could do to get at the root causes of the unrest.

I quote from my August 1967 speech to municipal officials:

Only in the framework of law can there be a better order of life for all citizens, regardless of race, creed or color.

In the meantime, we have a profound responsibility to do everything within our power, working together, to change the conditions that have produced unrest.

There are those who say that the racial problem in America is beyond solution. In my view, this just isn't true. Moreover, this philosophy of despair is disloyal to the ideals on which this nation was created.

We will meet this problem for the simple reason that we *must* meet it to preserve our union, our freedom and all that we hold dear.

We will meet it not with melodrama and glowing manifestos, but with hard work, patience, reason, practical common sense and, above all, faith in God.

I went on to tell the city officials that the grievances that have produced civil unrest in America have been abundantly documented, as follows:

They have been laid out in books; voluminous, revealing reports; and an endless succession of speeches, documentaries, magazine articles and newspaper editorials.

Much of this—

I said:

seems remote and abstract to the rank and file of us. Many of the real causes of racial discontent we have not seen, because we have not wanted to see them.

We can't go on in the dark. We must face the facts as they are, the conditions as they actually exist in our own communities.

We can't go on walking on eggshells, delicately bypassing the ugly realities. We need to call things by the right words.

The root causes of the racial tensions that have rocked the nation in recent months are well known to most of us, but I think it might be well to list some of them and take a fresh look at them.

At the top of anyone's list, of course, is poverty—not simply lack of money, but cultural and spiritual poverty as well—the kind of poverty that makes men lose hope for a better world.

Unemployment is obviously a big factor. Despite some progress toward eliminating job discrimination, Negro unemployment is growing, nationwide. It is easy to say that opportunity exists for those who have the incentive—but the fact is that the incentive, the hope, has been lost.

Earlier this week, I spoke of the urgent need to provide jobs for black citizens. Admittedly, I overstated the point, but I felt it was crucial to get the point across that whatever our rationalizations are, there is color discrimination in employment, and we need to lean over backwards to make up for the century of denying Negro citizens equal opportunity in employment. And we know in our hearts that while some progress has been made, there *is* discrimination in employment.

The breakdown of the black families in the ghettos is attributable in large part to the fact that men are unemployed and have lost hope for employment. And without a bread-winner, the family structure has neither stability nor meaning.

Housing is a major problem, and it should be clear by this time to any thoughtful person that segregating the ghetto—even if the ghettos were completely rebuilt—is not the answer.

As long as there is a "black community" and a "white community" in our cities, we will live in a divided land. The disquiet will not be ended until there is just one community—neither white nor black, but American.

One of the most tragic causes of minority resentment is the double-standard law enforcement that exists in some cities. There is a feeling on the part of officials in some communities that it is better to let the Negro section of town get along with a minimum of law enforcement. "We keep good track of them," these officials say, "and we know what is going on, and this is better than making them go underground in breaking the law. If they stray from the law a bit, they're among themselves."

But how does this make the majority of black citizens—the responsible, law-abiding Negro citizens feel?

The black citizen wants freedom from discrimination in public accommodations, housing, employment, education and all the other things that our society offers. And if we believe in equality of citizenship, we cannot deny this.

Contrary to the malicious misconception, he does not want to be white—he wants to be free and equal. And this is the birthright of citizenship in this land.

I do not pretend to you that the way is

easy. The injustices and deprivations of centuries cannot be overcome in a day.

But time has run out. The crisis is now. It isn't going to go away like the hula hoop craze. It will fester and grow unless we do the constructive things that must be done.

Many people of good will are ignorant of these facts, just as I was. Many people have let discrimination imbed itself in their lives without realizing it. Many people haven't the foggiest notion of what goes on in parts of town only a short distance from their homes and businesses.

Now it is time that we *should* know, and *must* know, in order to strengthen our society for the trials ahead.

We have a job to do—a job of rebuilding. It is not just a matter of tearing down buildings. It is a complex matter of reconstructing our society along the lines that it was always intended to be.

It can only be accomplished by the majority of our citizens, of all races and colors, working patiently together.

There is no doubt in my mind that our people, and their duly elected officials, are strong enough for the task. It requires some changing of long-held positions and attitudes. But we will be the better for it.

You know and I know that the conditions in our society that have been at the root of the disturbances exist in Iowa as well as in other states. The fact that the percentage of black citizens in our cities is small by comparison with some other urban areas does not excuse or lessen our obligation to meet their legitimate grievances.

To the contrary, I think here in Iowa we have an obligation and an opportunity to make Iowa a template among the states of a society where the people had the courage and the wisdom to make the big, necessary moves to assure equality for all citizens.

In acting to meet the immediate crisis, the No. 1 action needed was to provide jobs in our cities for unemployed young people.

The response of public officials and of private enterprise in various communities in setting up work programs to get these young people off the streets and to give them the self-respect and hope that come with employment was one of the greatest things that has happened in my State in my lifetime.

The genuine interest on the part of Iowa businessmen in these work programs, and their willingness to contribute substantial amounts of money for this purpose, exploded the allegation we sometimes hear—that the business community is too busy making money to care about human needs in the community.

In the meantime, the municipal officials from the larger cities, with whom I had met, set up a State task force for community interracial relations. I would not say that any wonders were accomplished by this group, with whom I met on a number of occasions. But for the first time, on a State level, we saw the decisionmakers of local government meeting across the table from representatives of minority groups and bluntly communicating. An interracial dialog in the interests of the various communities was initiated.

In early January of the following year, religious leaders of the major denominations in Iowa came to me with a unique request. They asked me to speak to a series of interfaith meetings of lay church people through the State on the crisis of American society as it applied to the lives of the people in Iowa.

In admiration, I can only say that these religious leaders meant business. They knew that the crux of the message would be the need to eliminate racial discrimination. They knew that there would be a backlash from an unknown percentage of the congregations. But they were determined to go ahead.

In a series of six regional meetings, covering the entire State, the lay people turned out in droves.

Here, from a transcript of my remarks, are a few excerpts of what they were told:

If we don't believe in the Golden Rule enough to follow it in our daily lives, it is time to change our religious professions or to brand ourselves hypocrites.

If we don't believe in a society of equality and justice for all—to the extent that we are willing to work for it, to plan for it, and to sacrifice for it—then we no longer have any right to quote the Gettysburg Address and the Bill of Rights as true expressions of our political creed.

We have a job—an incredibly massive job—of rebuilding to do. It is not just a matter of tearing down decayed buildings and erecting new ones. It is a complex matter of rebuilding the basic structure of our society along the lines it was originally intended to have.

It can only be accomplished by a majority of our citizens of all races and colors working patiently together.

The eye of the hurricane is the racial issue, although it must be recognized that this is just one aspect of the over-all crisis.

From a practical standpoint, the race relations problem is a logical focus of our attention; for if we face up to this part of our problem, it will mean that we are facing up to the entire problem of the disadvantaged and disinherited in our society.

Many of you people may be saying to yourselves, as I used to say a number of years ago: "My home town is Ida Grove, Iowa, a town of 2,300 people. The first time I ever saw a black man, I wanted to drive around the block and take another look, because I had never seen one in my youth." In many vast rural areas of Iowa, it is the same yet today.

I want to point out that the problems of Iowa belong to the citizens of Iowa, regardless of where they may dwell. What happens in Cedar Rapids, Davenport, Waterloo, Des Moines, Sioux City, and Council Bluffs belong to all Iowans, rural and urban.

At the same time, we're a fiftieth part of the union of states. What happens to any other state or city, or any citizen of this union, affects you and affects me.

In Iowa, we have, of course, a smaller percentage of minority citizens than other states....

The very fact that the percentage of minority races in our state is small, by comparison with other areas, places all the greater responsibility upon us to make Iowa a template among the states of a society where the people had the vision and the moral courage to make the big, necessary moves to assure equality for all citizens.

If, in this atmosphere of strength, prosperity and God-given abundance, you and I can't find these answers, what hope is there for the rest of America?

And how long do you think the peoples on this earth will listen to the leadership of a nation which cannot solve these internal problems of its own society?

We have an opportunity in Iowa that few people in America have. We can come to grips with these problems much easier than many other areas of this country. We can find these solutions but it is not a solution that is to be found on the Potomac or under the gold dome in Des Moines, Iowa.

It begins in your own heart . . .

Together we sit, perhaps feeling that we are innocent and bear no responsibility for these great problems of our nation and our state. But I ask you to consider for a moment, as a nation, dedicated as ours is, to believing in God—one nation under God with liberty and justice for all—what our individual responsibilities are . . .

The big fact that we must grasp is that we have a profound moral and practical responsibility to do everything in our power, working together, to change the conditions in our society that have produced the discontent of minorities and other deprived citizens.

I believe that the vast majority of the people of this state have a deep desire to eliminate discrimination from our society. I sincerely hope that our black citizens, so often disappointed, will recognize the good faith effort when it comes.

What is the solution? people keep asking.

In the final analysis, there are only two ways to go—the way of discrimination or the way of equality for all citizens.

In the light of our religious convictions and our political ideals, it will be quickly seen that there is only one way to go.

I went on, Mr. President, in these long and serious talks to the church lay groups in Iowa, to detail minority problems in our State in specific terms and what I felt needed to be done about them.

I tried to get these people to put themselves in the places of those who were poor and black and in many ways discriminated against in their own communities.

A little later, we organized a resource panel of State officials who had responsibilities in such areas as welfare, recreation, employment, health, and education.

I took this panel to the larger communities of the State, and we discussed with local officials and interested citizens what could be done to alleviate the plight of blacks, the impoverished, and the deprived.

In justice to my esteemed colleagues from other parts of the country, where there are greater concentrations of minority populations, poverty, and unemployment, I want to make it clear that we admit that we have problems in our own State, as well.

We also are not lily white so far as racial discrimination is concerned.

And when, as a matter of conscience, I oppose the nomination of Judge Carswell because I believe he would not be unbiased toward 23 million of my fellow citizens, I am not pointing a finger of accusation at other States.

I am acknowledging that we, in my own State, are not free from the taint of discriminatory practices.

And I am acting to protect the rights of my own minority citizens in Iowa as well as the rights of minority citizens throughout this land.

Mr. President, I came to the Senate a little more than a year ago. I did not expect that in so short a time I would find myself standing on this floor opposing a President's nominee for the Supreme Court. Yet, the constitutional responsibility of the Senate falls alike on all Senators, junior and senior. It requires us to consider the nominations

sent to us by the President, not merely to ratify the President's choices.

The care given to this task will necessarily be greater when the position to be filled is one that will intensely affect the life of the Nation. The position of a Justice of the Supreme Court is one of these. Moreover, its impact is likely to extend far beyond the tenure of the President and many of us here in the Senate.

Recognizing the significance of our decision, I am sure that every Member here has examined his own conscience first. We have also looked to the views of the citizens whom we represent. We cannot surrender conscience to popularity, nor can we hope to satisfy every voter. Perhaps at best we can merely hope for understanding.

In this instance, Mr. President, my own position is somewhat eased by the overwhelmingly favorable letters and telegrams I have received from Iowans during the past several weeks. Unlike my experience during the debate on the previous nomination, I could see little evidence of an organized letter-writing campaign on either side. Nearly every letter I have received from Iowa as well as from other States has been a personal expression of opinion, not inspired by an organizational affiliation of the writer.

At this point I would like to read some of these letters and telegrams. Listeners will note that, with varying degrees of skill and intensity of feeling, the writers express fear that confirmation of Judge Carswell will damage the prestige of the Supreme Court and will impede progress toward equal justice and good order in our society.

A citizen from Iowa City writes:

I would like to commend you for your opposing the nomination of G. Harrold Carswell to the United States Supreme Court. As a law student, I think that it is important to have a justice on the court who understands the problems and issues that he will be confronted with while on the court and who is progressive rather than resistant to change. It is my feeling that Mr. Carswell is not such a man.

A citizen from Davenport writes:

I am writing in regard to the nomination of Judge G. Harrold Carswell to be a member of the U.S. Supreme Court.

I am opposed to this nomination.

Any nominee to the Supreme Court should be an outstanding member of the judiciary. He should be a leader of men. One who is highly regarded by his peers. His personal conduct and judicial career should be above reproach. Surely there is one such person in our land.

I do not believe Judge Carswell is this man.

A man from Davenport writes:

I would urge you to vote against the confirmation of Judge G. Harrold Carswell's nomination to the Supreme Court. The candidate's record in Civil Rights Cases is a disgrace, and he has not displayed sufficient judicial competence to be worthy to sit on the bench of the highest court in the land. It is frightening to think that he is the best conservative, strict-constructionist Judge available.

A man from Iowa City writes:

Please accept my support of your position on the confirmation of G. Harrold Carswell as a justice on the nation's highest court. Surely we as a people can do much better than this.

A man from Iowa City writes:

At this time I am writing to express my opinion that Judge Carswell not be confirmed by the Senate as a Justice of the United States Supreme Court. His appointment will not strengthen the image of the Supreme Court and he will not be fully accepted and respected by a large segment of the citizens of our nation. As you know, the information available about Judge Carswell indicates that he is not an outstanding man in his achievements and not particularly experienced in terms of time spent on the bench of higher courts. His decisions from the bench have been other than profound but rather perfunctory, narrow and concrete. There is the history of his being a prejudiced person in respect to Negroes which at this time, particularly, cannot make him fully acceptable to serve on the United States Supreme Court.

But more importantly I am concerned that President Nixon after receiving a mandate from the people in respect to Judge Haynesworth would be so insensitive and contrary as to recommend the appointment of a man with no more qualities than Judge Carswell. I am concerned that the President would do so after his earlier statement expressing his interest in finding "the most outstanding men" for the high position of Justice of the Supreme Court. I am concerned that the President may persist in suggesting less than acceptable nominees for high office in the manner that the patience of the Senators and citizens alike will wear, that they will give in and condescendingly accept his appointees.

I know that you will give the matter of Judge Carswell as careful thought as you did the recommendation for the appointment of Judge Haynsworth.

A woman from Cedar Rapids writes:

I am writing because of my concern over the Supreme Court nomination of Judge G. Harrold Carswell. I agree with Senator Tydings that this appointment should not be steamrolled through for confirmation.

I do not believe President Nixon should be allowed to use the U.S. Supreme Court as a political football. He has chosen Judges only from the South, not even considering a very large number of well-qualified judges, just because he wants to win support of the Southern states and pay his election debts.

I am a white woman and this nomination of Judge Carswell infuriated me. If it would upset me, a white woman, so much how must the black people feel about it.

From everything I have read Judge Carswell is just giving lip service to the statement that his ideas on white supremacy have changed.

Senator Scott talks about a delay in the appointment interfering with the work of the Supreme Court. If this 50 year old anti-civil rights Judge is appointsd to the Supreme Court, I feel it will interfere, not only with the work of the court, but with the unity of the country, and the respect of the highest court in the nation, for the 20 or 30 years he will be serving on the bench. If delay in this appointment is slowing the work of the court, the blame should be put on President Nixon for using political appointments to his own advantage.

I strongly urge you to vote *against* the appointment of Judge G. Harrold Carswell for U.S. Supreme Court judge. Let's let President Nixon know he is responsible to *all* the people in his court appointments, not his unpaid debts.

I believe the reason the civil rights movement has come along as far as it has is because the majority of Americans know that superiority comes from within a man, not from the color of his skin.

I think what really makes me mad is the thought that President Nixon (and the Senate too, if this man is accepted) has no concern for the feelings of an entire segment of our country's population.

A man from Iowa City writes:

We applaud your expressed stand against the confirmation of the nomination of Judge G. H. Carswell to the Supreme Court.

President Nixon's choice casts further shadow on the administration's attempts to face integration in this country.

It is particularly appropriate at this time to fill the vacancy with a judge whose lack of bias is unquestionable, and whose professional qualifications are the highest.

We wholeheartedly will support your vote against the Carswell confirmation.

A man from Des Moines writes:

I wish to express my approval of your announcement that you will vote against Judge Carswell's appointment to the Supreme Court.

Judge Carswell's nomination was an insult to our colored citizens and was contemptuous of all of us.

God save the Republic.

A man from Iowa City writes:

Although you have already expressed your opposition to Judge Carswell's nomination to the Supreme Court, I want to express my disapproval of the nomination.

A Supreme Court Justice who is appointed for life must be above reproach. This is clearly *not* the case with Mr. Carswell.

I encourage you to oppose all nominations which are made as political payoffs.

A man from Alvord writes:

Twenty-two years ago, Judge G. Harrold Carswell publicly announced that he would forever embrace the principle of "white supremacy." He has since demonstrated in his public and private life that he has not abandoned that principle.

Speculate with us for a moment, Senator.

If I were Catholic or Jewish . . . and if a Supreme Court nominee had once proclaimed that Catholics or Jews were inferior beings, and still appeared to believe it . . . and if I heard that the United States Senate had confirmed such a man for the Supreme Court . . . How would I feel?

If I were of Mexican or Puerto Rican heritage . . . and if a Supreme Court nominee had once announced his belief that Mexicans or Puerto Ricans were inferior people, and gave every indication that he still believed it . . . and if I heard that the United States Senate had agreed that such a man could sit on the Supreme Court . . . How would I feel?

If I were young . . . and my disillusionment with the American system of justice had reached low ebb . . . and if I heard about the confirmation of such a man . . . How would I feel?

If I were black . . . .

If I were an American of any age, race, creed or religion, committed to democratic and moral principles, and I learned that a man whose principles are completely alien to those beliefs had been named to my country's highest court, what questions would you expect me to start asking?

We who are white and black, young and old, and of different religions, believe that every Senator must ask himself these questions in searching his conscience about the Carswell nomination. We also believe that no Senator could thereafter conscientiously vote for Judge Carswell's confirmation.

A woman from Richland, Iowa, writes:

Those of us concerned with the extension of human rights commend your position against the appointment of Judge Carswell

Thank you.

A man from Lake Mills writes:

I urge you to vote against the confirmation of Judge G. Harrold Carswell to the United States Supreme Court, on the basis of his marginal civil-rights record. The problems we have today imperatively underscore the importance of relentlessly seeking perfection in ethics in the area of civil rights.

A woman writes:

I am an Iowa-girl living now in Kansas, but I am so concerned about the pending confirmation vote on the appointment of Judge Carswell that I am writing to you as well as my present Senators. The appointment of this man makes me very uneasy. He has shown himself on occasion to be openly prejudiced. I refer to several of his civil rights decisions and to Congresswoman Patsy Mink's charges. If this man is appointed to the Supreme Court, there will be no one to overturn his prejudices should he choose to exercise them.

I am a voting Republican (yes, one of those) and as such I would like to see President Nixon's appointments confirmed, but I feel deeply that he has made a mistake this time.

Please give your decision on this vote careful consideration. There are better men available and it seems a shame to accept a man whose qualifications are that he is less controversial than his predecessor and that his finances are in better condition.

A woman from Omaha, Nebr., writes:

This is just a letter to tell you how I feel about the nomination of Judge Carswell the racist to the Supreme Court.

I am totally against the nomination of Carswell, since there is ample evidence that he has racist, segregationist views. I think these views and attitudes are more than enough to have him disregarded as a nominee for the Supreme Court. He's worse than Haynesworth in the fact that I never heard that Haynsworth was a racist, although I knew he was a conservative.

I read in the newspaper today that you would vote against his nomination. I hope more senators will come out as being against him. It would be a great setback for justice in the United States if a man of Carswell's caliber is elected (or appointed) to the Supreme Court. Thank you. (By the way, I'm 18).

A man from Clinton, Iowa writes:

I note it is reported you plan to vote against confirming the appointment of G. Harrold Carswell as an Associate Justice of the United States Supreme Court.

This letter is to concur in your decision. For a number of years the United States Supreme Court has been a secure focal point in the evolution of an orderly society under law in a new era.

While the nature of changes thus emerging is in turn bound to change in the future even as has been true in past years, nevertheless the nature of this development requires that our high court remain a dependable exponent of equality, effective justice and working democracy.

A man from Des Moines writes:

I am against the confirmation of G. Harrold Carswell for the Supreme Court.

A man from Orient, Iowa writes:

I doubt if this letter is really necessary for I feel sure you have already decided to vote against Judge G. Harrold Carswell for the Supreme Court. However, I have not seen any announcement yet of your intent, and do want to make my voice heard in the negative category.

A woman from Iowa City writes:

I would like to register my strong opposition to the nomination of Judge Carswell in light of his private and public racial bias and his lack of distinction in judicial matters.

A man from Coralville writes:

I think there is cause for voting against Judge Carswell.

He made the racist speech in the 1940's;

He collaborated on the whites-only country club deal in the 1950's;

He passed on a whites-only deed covenant in the 1960's.

I don't want to be worrying about his Supreme Court decisions in the 1970's.

A couple from Iowa City writes:

We wish to commend you for your decision to oppose the Supreme Court nomination of Judge Carswell. We are in agreement with you in your evaluation of his qualifications.

A man from Iowa City writes:

As a citizen of Iowa and as a supporter of yours, I urge you to vote against the nomination of Harrold Carswell to the U.S. Supreme Court. I believe his personal convictions are contrary to the meaning of the Constitution and Declaration of Independence.

A man from Clinton, Iowa writes:

I am writing to state that I am opposed to confirmation to the United States Supreme Court of Judge Harrold Carswell. I am now a student at the University of Michigan Law School but am a resident of Clinton, Iowa.

After reading many of Judge Carswell's opinions, I do not feel that he is qualified to sit on the court. It is unfortunate that the Nixon Administration has chosen to nominate an individual, lacking in the necessary credentials, as a political pawn. I urge the Senate to exercise its Constitutional duty and give its advice and consent to the President on all nominations.

Thank you for considering these views.

A couple from St. Louis, Mo., writes:

Because Judge Carswell's record disqualified him for the Supreme Court, we trust you will vote against his appointment.

A native of Waterloo, Iowa, now living in California writes:

Just add one more protest to your list on confirmation of the present nominee to the Supreme Court. When a man's own profession points to his mediocrity, I'm certainly inclined to believe it. The present nomination is so obviously purely political that its hard to stomach—"for the silent majority." While I live in what is definitely a sophisticated area, I am in no sense a "supercilious sophisticate." My feet are rather firmly planted in my legal and voting residence in Waterloo.

A woman from Medford Lakes, N.J., writes:

I am strongly opposed to the confirmation of Judge G. Harrold Carswell's nomination to the position of Justice of the Supreme Court. I feel that because of his record of anti-Negro actions, he will have a disastrous effect on the Negro population of this country and further divide the black and white elements of our society. We certainly cannot afford this at this time.

As a voter of New Jersey, I strongly urge you to vote *against* the confirmation of Judge Carswell's nomination to the Supreme Court.

A woman from Iowa City writes:

I ask you to vote against the confirmation of Judge Carswell to the United States Supreme Court. His judicial decisions and his courtroom performance are of an earlier day. America can not and will not tolerate its government drifting further away from the realities of this day and the days yet to come. Judge Carswell would be a step backward to government sanctioned racism.

A man from Davenport writes:

I trust that you will be voting against the nomination of Judge Carswell to the Supreme Court. His personal life, and his record as a judge prove him to be unfit for the Supreme Court. His nomination is an insult to 23 million black Americans.

A man from Iowa City writes:

I am writing in regard to the possible appointment of Judge Carswell to the United States Supreme Court. As a constituent of yours, I write with candor. We should not approve of Mr. Nixon's choice in this matter. The Court is in need of persons of more democratic persuasions than has been shown on the part of Judge Carswell. Furthermore, this nominee does not reflect the excellence of mind that we have traditionally sought to fill such a coveted position.

A woman from West Des Moines writes:

I am writing this to strongly urge you to do all that is in your power to reject the nomination of G. Harrold Carswell to the Supreme Court. Further, I hope you will, in the interest of racial equality in this country, urge your fellow Senators to do the same.

A woman from Marion writes:

I am writing to urge your vote against the confirmation of Judge Harrold Carswell as a Supreme Court Justice. Because of his attitude toward both blacks and women, I am sure it is in the best interests of the country not to have this man on the Supreme Court.

I urge you to vote against the Carswell confirmation and influence other Senators to do the same.

A telegram from Dubuque reads:

Gravely concerned about civil rights record of Associate Justice Carswell. Judicial record does not substantiate recent disavowal. Request opposition to nomination to U.S. Supreme Court.

A telegram from Burlington says:

I am strongly opposed to Judge Carswell's nomination to the Supreme Court.

A man from Des Moines writes:

Our Des Moines paper says that 15 of Judge Carswell's recent decisions have been unanimously overruled by the U.S. Circuit Court of New Orleans.

Is Judge Carswell a potential Oliver Wendell Holmes or merely a pay off to Strom Thurmond?

A couple from Iowa City writes:

Enclosed is an editorial taken from the Jan. 23, 1970 issue of The Denver Post. It succinctly expresses our views concerning President Nixon's nomination of Judge G. H. Carswell to fill the vacancy existing on the Supreme Court. In a time when our Society is undergoing such a moral upheaval and, Thank God, questioning its use of minority groups as an ego-building device, we feel it is inappropriate to place a man on the Court who has advocated "White Supremacy" and who has consequently shown little action to disavow that statement.

We hope that you and the Senate will not give its consent to this nomination.

The editorial from the Denver Post of January 23, 1970, reads as follows:

SENATE SHOULD REJECT CARSWELL

Sadly we feel compelled to urge the Senate to reject President Nixon's nomination of Judge G. Harrold Carswell to fill the

vacancy on the bench of the U.S. Supreme Court.

Up to the disclosure this week of comments attributed to Carswell in a campaign speech made in 1948 we were prepared to endorse his appointment. But that vigorous embracement of the doctrine of white supremacy and his avowal in the same speech to remain faithful to it in the future leads this newspaper to challenge his fitness for the high court appointment.

His repudiation, in which he renounced his previous comments "specifically and categorically," was logical and predictable for a man in his painful predicament. And we have no reason to doubt that he was as sincere in his latter as in his former statement.

But we worry about the decision-making problems and are reminded of Alexander Pope's couplet:

"Some praise at morning what they blame at night,
But always think the last opinion right."

The unfortunate fact is that Carswell is on record not only as formerly an ardent segregationist but also as a man who is capable of making a diametrical switch in his basic, personal philosophy. Now that he apparently has purged himself of the old and discredited doctrine of racial superiority, might he not "lean over backwards" in certain future decisions to support his passionate disclaimer of this week?

We are not contending that a man in public life should be criticized necessarily for changing his mind. We are saying that there could be legitimate questioning of any court decision in the area of civil rights in which Carswell participated, and in these critically sensitive times that kind of doubt ought to be avoided.

We feel personal sympathy for the judge. There must be many people like him in the South today who would like to take back the "praise at morning" they spoke at a time when the segregation tide was running strong and respectable. Most of them don't have to endure the crucible of securing Senate approval. And we have no reason to question his professional record, his legal background.

But his nomination now has suddenly spelled strife and controversy for the Nixon Administration. Neither the President nor the country can afford that. Its "Southern strategy" aside, the administration surely should exercise more thoroughness in examining a candidate's political fitness for a place on the Supreme Court.

If Carswell is approved, which now seems doubtful, he might turn out to have qualifications of the highest order. The history of Supreme Court appointments has several instances of controversial nominees who became outstanding justices. But we have grave fears that this nominee's old words would haunt his new career and jeopardize his effectiveness.

A lady from Des Moines writes:

I am appealing to you to please vsto the Judge Carswell nomination. My opinions are not only because of his 1948 speech, but also recent court rulings. For instance—he dismissed a case in 1963 when blacks protested theater segregation in Tallahassee.

He is obviously *not* a fair man. He is a bigot. If his nomination goes through—he is jeopardizing the American Negro.

Another lady from Des Moines writes:

This is in regard to the nomination of Harrold Carswell for the Supreme Court. I oppose this appointment and urge you to vote against his nomination.

I give Mr. Carswell credit; he may have changed his racial attitudes. But the slim chance that he has not changed cannot be taken in such an important matter. It would be truly an insult to Black Americans and an embarrassment to the U.S. in the eyes of other countries if he was seated on the High Court.

A man from Ames writes:

I am writing to encourage you to vote against the nomination of Judge Harrold Carswell to the Supreme Court. The Supreme Court must be free of any taint or even suggestion of racial or ethnic prejudice. Even though Judge Carswell's statement in support of white supremacy was made twenty-two years ago, it cannot be overlooked. If this statement reflects his true beliefs, he is totally unqualified to be a Supreme Court Justice; if it was made to enhance his chances for election in a prejudiced area, his integrity comes into question. And the possibility, even if it is only a possibility, that some of his rulings as a judge reflect the views of his 1948 statement makes him a very poor choice for the Supreme Court.

A man from Dubuque writes:

I was pleased that you opposed the confirmation of Justice Haynsworth to the Supreme Court last November. I sincerely believe that it is just as important to prevent Justice Carswell's appointment to the bench and I urge you to vote against his confirmation. I believe that he should be defeated for the following reasons:

First, Justice Carswell has had an undistinguished career as a jurist. This was the prime prerequisite of the President for a position on the court. Carswell's supporters simply gratuitously label him as a distinguished jurist while citing no evidence of an outstanding career.

Second, Justice Carswell has not had another career of solid accomplishment in public or in private life which would denote personal excellence and would give promise of future growth to honor the position on the court.

Third, he was at one time in his life a "dyed in the wool" segregationist. Granted that it is true that he made the racist utterances in the heat of a "white supremacy" primary contest, he has had twenty-two years to demonstrate by word and deed that he has really changed. I am sure that we all believe that men may change over a period of years, and perhaps Carswell has, but an alteration of belief is not evident in decisions he has handed down over the years.

Fourth, his appointment would further divide our nation. Although Carswell has publicly recanted racist statements he uttered, his appointment would encourage people who are presently defying integration; it would discourage those who have been struggling peacefully to obtain their rights as Americans citizens.

The appointment of Justice Carswell clearly demonstrates that the present incumbent of the White House is using court appointments as political strategy. The President says that he wishes to appoint a strict constructionist who has an outstanding record as a jurist. Justice Carswell may be a strict constructionist in the eyes of ardent states righters but he has failed to evoke any enthusiasm in any of the leading law schools of the country. There must be some justices in the United States who would possess the characteristics the President is seeking without the obvious disabilities of the present nominee.

These are some of the reasons why I hope that you oppose the confirmation of Mr. Carswell. Unless there are some facts to refute the points I raised, I am sure that you will vote against the elevation of Mr. Carswell to the highest court in our land.

A couple from Grundy Center writes:

We are most concerned about the possible appointment of Harrold Carswell to the U.S. Supreme Court. We strongly urge you not to support his nomination.

The president of the Des Moines Branch of the National Association for the Advancement of Colored People writes:

At its January 27, 1970 meeting, the Executive Board of the Des Moines Branch N.A.A.C.P. voted unanimously to support the position of the National N.A.A.C.P. in its opposition to the appointment of Judge G. Harrold Carswell to the United States Supreme Court.

We have not taken this position because Judge Carswell is from the South, but because of his record on Civil Rights matters, which has not been favorable. Without meaning to question his current sincerity and integrity, the Executive Board felt it is doubtful that black citizens would get justice from him on Supreme Court cases.

The Executive Board of the Des Moines Branch N.A.A.C.P, therefore, urge you to reject the confirmation of Judge Carswell to the U.S. Supreme Court

A man from Dubuque writes:

I write this letter to urge you to *oppose* the confirmation of Judge George Harrold Carswell to the United States Supreme Court.

I have recently been in conversation with a number of Black youth—both students and non-students. The effect of a Carswell confirmation on these youth can only result in further alienation and embitterment.

I am sure we would all like to avoid another Haynsworth episode. If Carswell were a man with a brilliant record we could perhaps risk the reaction to his confirmation. But he has a lackluster record and his confirmation will cost us more in further polarization than we can afford to pay.

I urge you most strongly to oppose the confirmation.

A Cedar Rapids constituent writes:

As you are well aware, one of our major problems today is respect for the law and the people who carry out the laws. At this time we cannot afford to select a Supreme Court Justice who does not command the full respect of all the people. Whether the selected individual is from the North or South, he must meet the highest standards for service, not the minimum.

While I have nothing personal against either of the Presidential nominees, I feel that we should be able to find an appointee at this time who is above any hint of either any wrong-doing or incompetence.

A woman from Washington, Iowa, writes:

I want to register my opposition to the nomination of Judge G. Harrold Carswell to the Supreme Court.

In no way do I consider Judge Carswell to be the caliber of man the Supreme Court needs. His racist stands as recently as a few years ago undermines the confidence thinking Americans have in him. As explosive as the racial situation is in our country today, it is no time to fan the flames.

I urge you to oppose the nomination of Judge Carswell to the Supreme Court.

A professor from Portola Valley, Calif., writes:

Some Senators who have announced their opposition to the Supreme Court nomination of Judge Carswell doubt openly they can block it. Public discussion of a filibuster has surfaced recently—but this is said to be premised on the existence of 30 firm votes against confirmation.

Please help dramatize the appalling nature of this nomination. A filibuster against it—even if it fails—is little enough in the name of decency. This is not just another vote—it is perhaps a last chance to keep faith with a large but politically underrep-

resented racial minority in this country. Given the course of recent events, black Americans can only view Judge Carswell's nomination as the death knell for "Equal Justice Under Law." Is there any chance whatever that a man who had behaved similarly toward Catholics or Jews (or any white minority) would be seriously considered for the Court? How many Senators could sit comfortably and listen to a public retelling of Judge Carswell's offensive—and recent—dialect joke? It is time to sacrifice some of the genteel tone of the Senate, if need be, to show the callousness of this nominee—apart from his complete mediocrity as a jurist.

Your vote is needed, but it will not be enough. Please speak bluntly and act forcefully against this nomination. A filibuster will speak for those Americans of all races who though politically weak, are distressed by this nomination.

An Army lieutenant writes:

In following the hearings of the United States Senate Judiciary Committee on the confirmation of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court of the United States, it is my wish, and you have my full support in refusing this man one of the most consequential positions in our Federal government.

The testimony of Judge Carswell certainly indicates to me that a man as blind and naive about his personal affairs is not competent to make decisions of the magnitude of those made in the Supreme Court as to interpretation of the law affecting the lives of everyone in this country. Furthermore, this man does not hold any credentials justifying his even being nominated to this position and certainly has not distinguished himself as an outstanding legal mind.

Please, Senator Hughes, cast your vote no!

A man from Gainesville, Fla., writes:

As a Floridian and university administrator, I urge you to vote against the nomination of G. Harrold Carswell to the U.S. Supreme Court on the grounds that his credentials are mediocre and his views on racial equality questionable. Certainly our highest Court deserves a man with impeccable credentials. This man's qualifications leave much to be desired.

A professor from South Orange, N.J., writes:

Again and again I hear people commenting negatively on the qualifications of Judge Carswell for the Supreme Court followed by the statement that there isn't enough fight left to keep him from being confirmed by the Senate.

This is appalling. If he has shown himself to be so little qualified for the highest judicial position in the country, you and your fellow Senators must work not only to keep him from being confirmed but to make clear to the Attorney General and the President that we will not tolerate such an abuse of their nominating power.

What is against his nomination? First, his adherence to some of the fundamental viewpoints of the Constitution and the Bill of Rights seems doubtful. Second, he has demonstrated his lack of a first-rate judicial mind by the quality of his opinions in the cases tried before him, in the absence of any contribution to scholarly journals, and more importantly in the number of instances in which his decisions have been overturned at the Appellate level.

I cannot believe that there isn't a first-rate candidate who is Southern and holds a viewpoint different from that of the present Court. Perhaps Mitchell and the President are demonstrating, although unwittingly, that a first-rate judicial mind is incompatible with the views they would like to impose on the Court. Thus, they are forced to select men of third-rate qualifications.

I urge you to use your influence to defeat this nomination and any future ones of similar candidates.

A constituent from Cedar Falls writes:

Make your vote count. Stop Carswell.

A man from Iowa City writes:

I feel recent events in Chicago have seriously questioned the fairness of our judicial process. What is perhaps more disturbing however is the pending appointment to the Supreme Court.

Anthropologically, law is not that written by the legislatures, but that interpreted by our courts. When so many of our imperfect laws are being challenged, we need a high court whose motives will be above questions of fairness. The assurance of a fair trial for all is the last stronghold of national order.

Mr. Carswell's previous racial statements and court decisions indicate at best lack of vision, while his land dealings would question his impartiality on any case involving civil rights.

Therefore in order that we may settle our problems of justice and freedom in unquestionable courts, I urge you to reject the nomination of Harrold Carswell to the Supreme Court.

A woman from Des Moines writes:

I am writing this letter in support of your intention to vote against the nomination of G. Harrold Carswell. If Judge Carswell's nomination is confirmed this will be a crushing blow to racial equality in America. Carswell's record demonstrates his long standing racial biases that would probably slant any decision he would make. A belief in racial inequality should certainly disqualify one for a seat on the Supreme Court.

I know you will do all you can to prevent Carswell from obtaining the nomination.

A woman from Sumter, S.C., writes:

Today, not only black Americans but white Americans, as well, are concerned about Nixon Administration policy. I am one such person.

My purpose in writing you is to urge you to vote *against* Judge Carswell's nomination to the Supreme Court.

Mr. Nixon's "Southern Strategy" will not stop with the naming of inferior and racist men like Judge Carswell, but will continue on, only to eventually turn back the clock on all the social progress already made in this country.

Please, sir, I urge you and your constituents *not* to let a self-spoken racist be seated on the Supreme Court.

If the U.S. Senate goes along with Mr. Nixon's choice (in Judge Carswell), it will be giving its blessing to a very dangerous trend.

Thank you for your attention.

A man from Ithaca, N.Y. writes:

Very shortly the Senate will be voting on the nomination of Harrold Carswell. Even though I am not part of your constituency, I felt you would be most sympathetic to the reasoning I will put forth for rejecting Judge Carswell.

The young people of this nation will be watching the balloting on this issue very closely, just as we did on the Haynsworth nomination. If your vote is not a 'right' one, you may be assured that when it comes time for your re-election, we will mobilize all our people in an attempt to defeat you, as we did a certain individual in 1968!

It should be obvious what the correct vote is. Although Judge Carswell has not made any obnoxious statements or decisions on labor issues, his view on racial matters is quite clear. Columnist James A. Wechsler pointed out that during Carswell's tenure as district judge, 60% of his 23 civil rights decisions were upset.

A man who believes that a law is bad for judicial reasons is an asset to the Court. However, a man who votes for or against something merely on the basis of his own personal beliefs without any judicial reasoning involved is quite harmful. I believe Harrold Carswell to be such a man and await patiently your reply when the roll is called.

A woman from Denver, Colo. writes:

Although I am no longer one of your direct constituents, (my husband and I moved from Iowa in 1968), I am following your senatorial career with great interest. I am quite proud that Iowa chose you to represent them. I have been impressed with your courage and action in supporting your views and I hope you will be an active voice in our government for some time to come.

My specific reasons for writing is to urge you to do everything you can to defeat the nomination of Harrold Carswell to the Supreme Court. It is terribly important that we show the black community every indication that we are striving to make justice available through the courts. Even if Judge Carswell has repudiated his racist views, (and I am well aware of the ability to change one's ideas), his nomination will appear to be a deliberate attempt on the part of the Administration to reverse the progress made in the field of civil rights.

I am curious to know what the feeling about Mr. Carswell would be if he has espoused communist philosophy in his youth instead of his racist views. I personally feel that the attitude toward the Negro in the past has been far more dangerous and threatening to the true values of a democracy than any external political force.

A man from Temple, Tex., writes:

I am most concerned about the nomination of Judge G. Harrold Carswell to the Supreme Court. I don't think the basic and crucial issues in his record and attitude have been investigated nor considered sufficiently to this point.

I hope you agree with me and will insist on a complete examination, before permitting his confirmation to come to a Senate vote. You know better than I do how imperative it is to have a Supreme Court that understands the "needs for flexibility and change" in these times of rapid social transition. The great Abraham Lincoln opposed the Dred Scott decision and other positions of the Court 120 years ago for the reason that it was stand-pat, without either sensitivity for or understanding of the requirement for change under the "American Way" of life.

The attached copy of a news column by Clayton Fritchey spells out my objections to Carswell in a very forceful and objective way. If you have already read Fritchey's column, I urge you to read it again.

"CARSWELL'S INVESTIGATION INADEQUATE

"(By Clayton Fritchey)

"WASHINGTON.—Suppose Associate Justice Thurgood Marshall, the only Negro member of the Supreme Court, had once said: 'I yield to no man . . . in the firm, vigorous belief in the principles of black supremacy, and I shall always be so governed.' Is is conceivable that the U.S. Senate ever would have confirmed him, regardless of how he tried to explain it away?

"Judge G. Harrold Carswell, Nixon's latest appointee to the Supreme Court, who made the above statement in reverse (substitute white for black) while running for public office on a white supremacy platform, seeks to justify himself on the grounds that it was merely a youthful indiscretion.

"Well, he was not a callow youth, but a callow adult of 28 when, in cold calculation,

he deliberately tried to exploit racial prejudice to advance himself politically. He was a university graduate, he had gone to law school, and he was the editor of a weekly newspaper.

"Men have won the Pulitzer and even the Nobel prizes before they were 28. Pitt was prime minister of England at 24. Robert Hutchins was president of Chicago University at 28. In any case, even teen-age dropouts should know the doctrine of white supremacy is un-Christian, un-American, and repugnant to everything America stands for.

"Attorney General John Mitchell, who is becoming an expert at whitewashing the delinquencies of the men he recommends for the highest court, is not disturbed at Carswell having said, 'I believe that segregation of the races is proper, and the only practical and correct way of life in our states. I have always so believed, and I shall always so act.'

"Mitchell, like Carswell himself, now wants the public to believe that the judge has repented and mended his ways. But there is no record of his ever having recanted or even regretted his statement, until he was confronted with it a few days ago after it was uncovered by an enterprising Southern journalist.

"Although Carswell has been on the federal bench for 11 years, there is nothing in his judicial record to suggest that he has had a change of heart on racial matters. In a number of civil rights cases the higher courts reversed his decisions, usually because they found that Carswell had wrongly denied Negroes' claims. The Senate Judiciary Committee owes it to itself to find out when and how Carswell's claimed conversion took place. Let us have the proof.

"Another extenuation advanced for the judge's anti-Negro speech is that he didn't really mean it, but in order to get elected he had to fool the voters in a white supremacy county. 'Ol' Harrold was just playing the game,' explains an old friend of the judge.

"Even assuming this is true, do Americans want a man on the Supreme Court who would violate their own principles so as to deceive voters into thinking he shared their racial prejudices? The passive reaction to the Carswell appointment suggests that the Senate has come to expect nothing better from Nixon. If Eisenhower, Kennedy, or Johnson had nominated a man with Carswell's lackluster record and bigoted outlook, there would have been general shock.

"After what the judge has so cruelly said about Negroes, how can these 23 million Americans ever believe they will get justice from him on Supreme Court cases involving their rights? To the blacks, it is all too obvious what 'strict construction' means.

"There are scores, perhaps hundreds, of able and distinguished men, both Republican and Democratic, whose appointment to the highest court would reassure the public and reflect credit on the President. Surely there are considerations superior to paying a political debt to Southern conservatives.

"For his own protection, the President at least ought to rely on somebody other than Mitchell to investigate future appointees. The FBI, it appears, somehow overlooked Carswell's white supremacy record. Or maybe, like Mitchell, they didn't think it was important."

A woman from the Bronx, N.Y., writes:

It is my opinion, and the opinion of many of my colleagues, that the central issue around the nomination of Judge Carswell has been blurred. We think that whether or not a man should be held responsible for something he said 22 years ago is *not* the critical issue here. On these matters, liberals, moderates, and conservatives alike can reach agreement.

The crucial point, it seems to us, is the fact that political acts and events have obvious and profound symbolic dimensions, and Carswell's nomination is a case in point.

It is regrettable, that the clear and probable repercussions of these symbolic assertions, are being ignored, or worse still, not even recognized. Our country is suffering under the strain of a number of "gaps": why introduce or reinforce another?

I would hope that you gentlemen would somehow find the strength to face this issue squarely with more recalcitrant colleagues as well as friends and try to address yourselves to the inevitable, (it seems to me) negative symbolic consequences of this appointment.

A woman from Boston, Mass., writes:

I urge you to do all you can to oppose the appointment of Judge Carswell to the Supreme Court. It seems to me far worse than the Haynesworth appointment, bad as that was.

A man from Jersey City, N.J., writes:

The Constitution of the United States *wisely* provides for checks and balances between the judicial, legislative and executive branches of our government, which makes our country truly representative of the peoples' wishes and therefore truly a democracy. At the present time, a perfect example of the applicability of this provision has come about (in the nomination of Judge Carswell), as it clearly provides for the *responsibility* and *duty* of the majority vote of the *entire* Senate to either confirm or reject the nomination to the highest court in our land.

In a dictatorship, the Premier (or party boss) nominates or appoints anyone he wishes (to any office) and that person is automatically installed to that office (or is removed or shot at the Premier's whim). That is the difference between a dictatorship and a true democracy, where the *majority* of its people and/or its elected representatives have the final say on practically all of the important offices, such as the Supreme Court.

I believe that President Nixon is dedicated, sincere and loves his country, just as I do (as well as millions of others). I also believe that had he known all the details of Judge Carswell's background and rulings, he would not have nominated him to the highest court of our land. However, as shown in the past (even if he won't admit it), the President seems to feel that once a candidate is nominated he cannot or will not withdraw it for whatever reason, and that is a mistake.

I don't believe the only question as to Judge Carswell's confirmation is purely ideological, *nor should* it be a question of *North v. South*. What should be of paramount importance is the *future progress* of this great country of ours, where a Supreme Court justice has the *power* and *authority* to shape and mold this Country's destiny in the *just* interpretation and judicial rulings of our Constitution. This is a *lifetime appointment* and should not be treated casually as any other minor appointment.

Although Judge Carswell refuted his 1948 racist speech, he has consistently *delayed, refused to hear,* or circumvented civil rights cases. Furthermore, his decisions have frequently been *reversed* by higher courts.

Are there any indications whereby any of Judge Carswell's previous rulings and actions have changed his 1948 racist views? Was it changed when he signed, contributed (and in all probability drew up) the incorporation document of the golf club? Was it changed when he consistently delayed, refused to hear or circumvented civil rights cases? Was it changed in his attitude and treatment toward Negro lawyers who appeared before him?

It is incomprehensible for anyone to confirm such a nomination (which is full of doubts and questions) to the highest court of our land, unless that Senator also shares the same views of Judge Carswell. In that case nothing that anyone can prove will alter their opinion or vote.

Judge Carswell's record indicates that he has not kept his oath of office to *defend* and *protect* the Constitution of the United States (*with justice for all*), as all public officials have sworn to do, and therefore his name should be rejected."

Another man from Madison, N.J., writes:

Although I am not a resident of Iowa, I strongly urge that you veto President Nixon's appointee for the Supreme Court. Judge G. Harrold Carswell has done various questionable items which have raised serious doubts to his credentials and character to serve as a Justice on the august Supreme Court. Various statements and incidents have been revealed concerning the conduct of Carswell as you probably are aware of. The Senate Judiciary hearings revealed those matters.

Members of the Senate are aware of the fact that some 450 lawyers recently signed a statement opposing the confirmation of Judge Carswell. In addition, a great many law students, faculties, and other professional people have written to express their concern. I will read some of these very fine statements:

STATEMENT OF PROFESSORS OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

To the Members of the United States Senate:

The events that have come to light through the Senate Hearings and the press persuade us to oppose the appointment of Judge G. Harrold Carswell to the Supreme Court of the United States.

We start with Judge Carswell's speech in 1948 expressing his belief in white supremacy. At a minimum, such a statement should require its author to evidence a rejection of his earlier views, a present commitment to uphold principles of equality which not only have a foundation in morality but also have come to form part of the law of our land. If we now recognize with a painful sense of relevance that respect for law by our ordinary citizens is a condition to the health of our society, can we make less exacting demands upon judges charged with administration of that law? Should not these demands be most rigorous when appointment to our highest court is at issue?

We believe the record to show that Judge Carswell lacks these minimum qualifications. His history bears no trace of commitment to those moral and legal principles which can now serve to bind our nation together. Rather, we find continuing evidence of his adherence to the racist views expressed in 1948.

The facts are too well known to need lengthy restatement. We refer principally to (1) Judge Carswell's involvement in 1956 (while serving as United States Attorney) with the leasing of a municipal golf course to a private club for the apparent purpose of maintaining segregated facilities in evasion of the Constitution; (2) the large number of his decisions against blacks in civil rights cases which were unanimously reversed by the appellate courts; and (3) the testimony by members of the Bar of his abusive conduct towards civil rights lawyers. We should add that we find unconvincing Judge Carswell's explanation to the Senate Judiciary Committee of the country-club incident. Confirmation of Judge Carswell would place on the Supreme Court a man of, at very best, shaky commitment to Constitutional principles which are of the gravest importance to our country. Such an act would serve neither the goal of a "balanced" Supreme Court, nor our larger national interest. Rather, it might prejudice the ability of our judiciary to hold the respect of all parts of our population, and exacerbate tensions in the country at large. For these reasons, we urge that the Senate refuse confirmation of Judge Carswell.

STATEMENT OF FACULTY AND ADMINISTRATORS, STANFORD LAW SCHOOL, STANFORD, CALIF.

DEAR SENATOR: It is my pleasure to enclose a petition, signed by 21 members of the faculty and administration of the Stanford School of Law, opposing the appointment of Judge G. Harrold Carswell to the Supreme Court of the United States. We respectfully urge you to oppose Judge Carswell's nomination.

The petition reads as follows:

"We, the undersigned faculty and administrators of the Stanford School of Law, oppose the appointment of Judge G. Harrold Carswell to the Supreme Court of the United States.

"Judge Carswell retracted his open espousal of the doctrine of white supremacy only when it became self-serving to do so. His conduct in the intervening years—his active participation in the formation of a segregated golf course, his rulings in school desegregation cases, his shockingly discourteous treatment of civil rights lawyers and their clients in his courtroom—make plain Judge Carswell's continued antagonism to the principle of racial equality.

"A man who had spoken and acted in this manner against Catholics or Jews would not even be considered, let alone nominated, for a position on the High Court. We cannot make an exception for Judge Carswell's conduct without breaking faith with the fundamental principles and commitments of our Nation.

"We respectfully urge all Senators of good will to vote against the confirmation of Judge Carswell."

POLICY STATEMENT OF THE CALIFORNIA LAW REVIEW, UNIVERSITY OF CALIFORNIA BERKELEY, CALIF.

The members of the *California Law Review* strongly oppose the nomination of Judge G. Harrold Carswell to the United States Supreme Court.

We recognize the President's prerogative of effecting a balance on the Court of competent men of varying schools of judicial philosophy. We are deeply concerned, however, about this nominee's early statement of undying belief in White Supremacy. His professed renunciation of this statement is belied by his intolerant behavior toward civil rights petitioners and their lawyers, his conduct in personally drafting a charter for a university booster club which prohibted membership by non-whites, his incorporation of a segregated country club to thwart integration, his sale of property subject to an unconstitutional racially restrictive covenant, and the disturbingly high rate of reversals of his civil rights decisions.

Of even greater concern, Judge Carswell's legal record and judicial opinions are devoid of any trace of distinction or contribution to the law which might set him apart from other judges and lawyers. Judge Carswell simply fails to meet the minimum standards of judicial competence necessary for service on the nation's highest court.

We therefore strongly urge the Senate, in exercising its duty of independent review, to withhold confirmation of Judge G. Harrold Carswell's nomination to the United States Supreme Court.

STATEMENT OF THE STUDENT BAR ASSOCIATION, THE NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

DEAR SENATOR: The following resolution was unanimously passed March 4, 1970:

"*Resolved*, That the Student Bar Association of the National Law Center urges each and every Senator of the United States to reject President Nixon's irresponsible nomination of Judge Carswell to the United States Supreme Court."

The Student Bar Association is the duly elected representative of 1600 law students of the National Law Center of The George Washington University.

STATEMENT OF COMMITTEE OF ATTORNEYS AND ACCOUNTANTS AGAINST CONFIRMATION OF JUDGE CARSWELL, PORTLAND, OREG.

DEAR SENATOR: Soon you will be performing one of the most important functions of your job as United States Senator—confirming or denying the latest nominee to the United States Supreme Court, Judge G. Harrold Carswell of Tallahassee, Florida. Our Committee feels Judge Carswell should not be confirmed.

In 1948 Judge Carswell said that he would always be governed by the principles of White Supremacy. Of course talk is cheap and comment was made during an election campaign against a sworn segregationist. Judge Carswell's renouncement of that statement seems to lay to rest fears of his White Supremacy feelings. But that renouncement also came during a time he is being considered in a campaign for appointment to the Supreme Court. Again, talk may be cheap.

Our Committee's concern is that actions speak louder than words. Judge Carswell's actions since 1948 tend to confirm his White Supremist statement. As a District Court Judge, Carswell continued to interpret cases involving Negroes from a segregationist point of view even though the United States Supreme Court and his immediate Court of Appeals, the Fifth Circuit, had reversed him and others on cases on that very point. As a private citizen Judge Carswell gave legal advice to operators of a public golf course helping them to convert it into a private club so that Negroes could not be admitted.

Finally as recently as 1966, Carswell, while a Judge of the United States District Court, signed a Deed surrendering his courtesy rights. That Deed contained a covenant providing that the property involved would never be sold to a non-caucasian, a covenant contrary to the very laws he interpreted as a District Court Judge!

It is the fear of this Committee that racism has been nominated to a high place where it does not belong. You, as a United States Senator, cannot and should not allow a White Supremist by Self-proclamation and by actions to become a Justice on the United States Supreme Court. You, our Committee and our nation cannot withstand such a terrible thing to occur at this stage of our societal development.

Please vote against confirmation of Judge G. Harrold Carswell's nomination to the United States Supreme Court.

STATEMENT OF BOARD OF CHRISTIAN EDUCATION OF THE UNITED PRESBYTERIAN CHURCH, PHILADELPHIA, PA.

DEAR SENATOR HUGHES: I am writing to express my strong hope that you will vote against the confirmation of Harrold Carswell as a justice of the Supreme Court. In two ways he seems to me inadequate. The first is because of a lack of competence for this high post. You are surely aware of the judgement of the Dean of The Yale Law School who describes Judge Carswell as having "more slender credentials than any nominee for the Supreme Court put forth in this century."

The second reason is that all evidence points to Judge Carswell's having the same white supremacist attitude which he avowed 22 years ago. It is not appropriate to place on our highest court a man who prejudices run against the Constitution and the laws of the land. I urge you to vote against Judge Carswell's confirmation.

STATEMENT OF INDUSTRIAL UNION DEPARTMENT, AFL–CIO, WASHINGTON, D.C.

DEAR SENATOR HUGHES: On behalf of the Industrial Union Department, AFL–CIO, I wish to express our opposition to the nomination of Judge G. Harrold Carswell to the U.S. Supreme Court. It is not my nature to speak harshly of a person who I do not know in a personal way for fear that I may do an injustice, but the importance of the issue in this situation overrides my native reluctance.

The record of this nominee, as it has emerged from newspaper stories and from testimony before the Senate Judiciary Committee, is most disquieting. It raises, for us, two basic objections to the appointment. First, a number of Judge Carswell's activities over the years—his drafting of the charter for an all-white booster club for Florida State University in 1953; his participation, as an incorporator and director, in the formation of a racially-segregated golf course in 1956; his concurrence in the sale of personal real estate, in 1966, that used a deed barring non-Caucasians from buying or occupying the property; his hostile treatment of Negro lawyers and civil rights defenders who appeared in his court—all indicate to us that he has had no change of heart since his know-nothing avowal of white supremacy in 1948.

Second, analyses of his decisions by distinguished lawyers, law professors and deans of law schools, reveal, according to a statement more than 400 of them have signed, that "quite apart from any ideas of white supremacy and ugly racism, he does not have the legal or mental qualifications essential for service on the Supreme Court or on any high court in the land, including the one where he now sits."

On November 21, 1969, the Senate rightly rejected the nomination of Clement F. Haynsworth, Jr. to the U.S. Supreme Court for the most part because he had failed to avoid the appearance of unethical behavior. If Judge Carswell is confirmed for the Court, what can we citizens conclude? That the *appearance* of misconduct disqualifies a man for service on the Court but that serious evidence of bigotry and incompetence do *not*?

To those of us in the Industrial Union Department and to millions of Americans who find white supremacy repugnant and the Supreme Court bench a place only for the most morally and intellectually fit, the answer is obvious. This shocking appointment must be rejected. We respectfully urge you to save the good name of the U.S. Supreme Court—as well as that of the U.S. Senate itself—by voting against the nomination of G. Harrold Carswell.

STATEMENT OF AMERICAN FEDERATION OF TEACHERS, AFL–CIO, WASHINGTON, D.C.

DEAR SENATOR: The Executive Council of the American Federation of Teachers meeting at Pittsburgh, Pennsylvania on Sunday, March 8, 1970 unanimously supported a resolution opposing the appointment of George Harrold Carswell to the Supreme Court of the United States.

In its statement, the Council regarded "the appointment of George Harrold Carswell as a threat to the integrity of the U.S. Supreme Court and the American system of jurisprudence." The Executive Council amplifies its position when it states that "we have exceptional reasons relating to our own role in public life to recommend that the U.S. Senate reject President Nixon's proposed appointment of Mr. Carswell."

Accordingly, as representatives of the more than 200,000 classroom teachers in the AFT, I respectfully urge that you vote "No" on the confirmation of George H. Carswell.

STATEMENT OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, WASHINGTON, D.C.

DEAR SENATOR HUGHES: On behalf of the membership of the International Union of Electrical, Radio and Machine Workers, a union dedicated to equality for all citizens, I urge you to publicly oppose and to vote against confirmation of the nomination of G. Harrold Carswell as an Associate Justice of the Supreme Court.

Testimony before the Judiciary Committee has demonstrated that Judge Carswell's record as a Federal judge, as a United States

Attorney and as a citizen seeking public office contains unmistakable evidence of bias against members of minority groups. Neither in his own oral testimony nor in his written reply has the nominee provided an adequate answer. On the contrary, by confining himself to protestations of fair-mindedness and by refusing to go beyond generalities, he has reinforced, rather than answered, the charges.

Civil rights is and has been for years the most crucial domestic issue in the United States. It is primarily to the Supreme Court that our minority group members have had to look for protection of their rights as citizens. Regardless of judicial philosophy, no judge should serve on that court whose record is tainted by evidence of bias in word and in deed.

This high standard, no less than high standards in conduct of financial affairs, must be maintained on the Supreme Court. Men—and women—who meet these and all other important criteria for Court service are available.

Only by voting against Judge Carswell's confirmation can you make it possible that the present vacancy on the Court will be filled by such a person. To do otherwise is to do worse than insult some of our citizens; it is to downgrade the court and endanger the rights of all citizens.

Mr. President, I yield the floor.

Mr. JAVITS. Mr. President, further continuing our discussion of the situation involving Judge Carswell, I would like to offer some statistics which relate to the record of the judge as a sitting judge in respect of the judgment of the Senate regarding his qualifications to occupy the highest judicial position in our land.

Mr. President, this information has been gathered together and published by the Ripon Society, an organzation of younger and more progressive members of my party, in which publication they have urged Republcan Senators to reject this nomination.

One of the categories analyzed is reversals on appeal.

Their compilation shows—and I will define it accurately—that during the 11 years 1958 to 1969 in which Judge Carswell sat on the Federal District Court in Tallahassee, 58.8 percent of all those cases in which he wrote printed opinions, as reported by the Digest of West Publishing Co., and which were appealed, resulted ultimately in reversals by higher courts.

They purported to take a random sample of 400 other district court opinions by other judges. They find that the average rate of reversals among all Federal district judges, extrapolated from the random sample of 400 during the same period, was 20.2 percent of all printed opinions—that is, cases in which opinions were printed when taken up on appeal.

And in the circuit in which Judge Carswell served, where they also purport to have taken a random sample of 100 district court cases emanating from the fifth circuit during the 1958–69 time period, the average rate of reversals was 24 percent of all cases in which there were printed opinions. They define a reversal to include an outright reversal, a vacation, a remand, and an affirmance with major modifications.

An affirmance is defined to include an outright affirmance, an affirmance with minor modifications, a dismissal of an appeal, and a denial of certiorari. The ultimate disposition of the case, rather than action alone in an intermediate higher court determined whether the result was to be classified as a reversal or affirmance.

It should be noted that these figures are based on 84 of Judge Carswell's reported decisions. They are believed by this group of researchers to be all of his printed court opinions.

They analyzed Judge Carswell's total rate of reversals for all his printed cases as 11.9 percent, compared, according to these researchers, to a rate of 5.3 percent for all Federal district court cases, and 6 percent for all district court cases within the fifth circuit during the same time period.

The majority of the cases, they say in their report, before any Federal district judge ordinarily do not result in appeals, hence precluding the possibility of reversals in those cases.

It is significant, however, that Judge Carswell's overall reversal rate for his printed cases is more than twice the average of Federal district judges. When additional unprinted opinions revealed in testimony before the Senate Judiciary Committee by Joseph L. Rauh, Jr., a lawyer, and by the memorandum of the Senator from Nebraska (Mr. HRUSKA) are included, they find that Judge Carswell has an overall reversal rate of 21.6 percent.

Mr. President, I yield the floor.

THE ANNOUNCEMENT OF SENATOR BYRD OF VIRGINIA THAT HE WILL SEEK REELECTION AS AN INDEPENDENT

Mr. ALLEN. Mr. President, I noted in the newspaper this morning a statement to the effect that the distinguished senior Senator from Virginia, the Honorable HARRY F. BYRD, will run for the U.S. Senate this year as an independent. The Junior Senator from Alabama wishes to congratulate the distinguished senior Senator from Virginia for his bold, his courageous, and his statesmanlike position in this matter, and he wishes him well in the coming election.

The junior Senator from Alabama noted that the distinguished senior Senator from Virginia made the point that the State Democratic Executive Committee in the State of Virginia is imposing the requirement on all candidates in the Democratic primary in that State that they agree in advance to support the national nominees of the national Democratic Party in order to be able to run in the State primary.

In the State of Alabama at one time we had a similar requirement. It was necessary that a candidate in the Democratic primary pledge in advance that he would support the national nominees of the Democratic Party. That requirement has been repudiated in the State of Alabama. That requirement is one of the principal reasons why there is an effective two-party system in the State of Alabama, because it caused people not to go into the Democratic primary. It repelled new adherents. Since the new voters had no other place to go, they would go to the Republican Party.

So it occurs to the junior Senator from Alabama that there is a similar situation in the State of Virginia in this regard; and he feels that the distinguished senior Senator from Virginia has made a bold and dramatic gesture indicating his great independence, indicating his nonpartisanship and nonpolitical approach to the problems of the Nation as they are considered in this great body.

The junior Senator from Alabama has long been a great admirer of the senior Senator from Virginia, as he was of his great and distinguished father, the late Senator Harry Flood Byrd; and he feels that the father of the present senior Senator from Virginia would certainly be proud of the action that his able son has taken in this regard.

It is the desire of the junior Senator from Alabama to commend the senior Senator from Virginia, because he has observed, during the short time he has been in the Senate, that the senior Senator from Virginia has voted for or against the President as his convictions dictated. He has voted for or against the policies of the national Democratic Party as his conscience and his convictions dictated. He has always put principle above politics. So it is the opinion of the junior Senator from Alabama that the loyal sons of Virginia will, in resounding terms, at the first opportunity they have to voice their opinions, give the distinguished senior Senator from Virginia a strong and overwhelming vote of confidence.

TV AND THE VOTE

Mr. PASTORE. Mr. President, in today's Washington Star appears an editorial entitled "TV and the Vote." This editorial deals with a plan I am now discussing with the Committee on Commerce with reference to the matter of the tremendous cost of campaign TV time and radio time in our elective process.

The editorial is rather complimentary and states:

There is nothing wrong, either, with the other major provisions of the bill that would abolish, the "equal time" rule. This restrictive yoke serves only to keep the nominees of major parties off major talk shows because of the possibility that a score of dingbat candidates will demand—and get—equal time.

The editorial then goes on, and here there is an error, which I should like to point out for the assurance of Members of the Senate who might be disturbed by the interpretation given in the editorial:

But the intent of Pastore's bill is not merely to let the networks decide which candidates are to be taken seriously. The idea is to clear the decks for TV debates between presidential candidates, and to make such political sideshows fixed features of the political scene. It is an abysmal notion. Debating skill—particularly under the artificial and arbitrary limitations of the TV format—is no true test of judgment, executive ability or intelligence, which are more reasonable presidential qualities than verbal agility.

Mr. President, let me say here that the "abysmal notion" is no part of the bill to be proposed. I share the sentiments of the editorial commentator—and there is no intent in the measure to dictate to broadcaster or to candidate the format to be followed.

As proof of that, I should like to point

out that in 1968, when I reported an amendment to section 315 of the Communications Act, in the report I was very explicit—and I read now from that report at page 5:

Encouraged by the results of the 1960 suspension, your committee believes that similar action with respect to nominees for the offices of President and Vice President will provide the opportunity for the major party nominees in cooperation with the broadcasters to present their views without the inhibitions presently contained in section 315.

Mr. President, I want to underscore this, because this is the important part of the report, in connection with the format discussed in the editorial.

I quote further from the report:

This committee wishes to point out that in urging the adoption of this legislation suspending section 315 as it applies to presidential and vice presidential nominees, it is not endorsing any particular format for the appearances of the nominees. Rather, complete freedom is being given to the broadcaster and nominees to develop specific program formats for the appearance of the nominees. The committee feels that the flexibility being given in this legislation will permit the broadcaster and nominees to innovate and experiment with various program formats, including joint appearances. Whatever is done, should be done as a result of discussion, negotiations, and cooperation between the nominees and the broadcasters.

Now, as a result of this, I have had a number of conversations with three presidents of the major networks.

Mr. Goodman, who is president of NBC, in appearing before our committee on the pending legislation had this to say:

To advance this purpose, 3 years ago, I pledged that the NBC Television Network would make available a designated number of prime-time half hours for appearances by the presidential and vice presidential candidates of the major parties in the 1968 campaign. We proposed to offer the time without charge, for the candidates to use as they saw fit, if section 315 could be amended to enable us to do this. We regretted that the offer failed because there was no legislative sanction that would protect us from having to offer the same number of evening half hours to at least 10 other presidential candidates, ranging from the Theocratic to the National Hamiltonian parties.

Mr. President, I want to make it abundantly clear that the plan we are discussing does not tie the hands of the broadcasters or the nominees for the office of President or Vice President. It does not bind them to any particular format, especially that of debates. The networks have promised that they would make available free, as the candidates saw fit to use, a number of half-hour programs which, I guess, would be a fine attack on these expanding costs.

The Republican Party spent over $12 million last year for presidential TV time. The Democratic Party spent about $6 million. Six years ago, I think it was just the reverse.

This whole matter is getting out of hand. There have been a lot of gimmicks suggested. For instance, one of the committees investigating this suggested that the cost be cut in half and that the Government pay that half.

I tell you very frankly, Mr. President, that sounds good but I am afraid it will be a long time before Congress will begin to underwrite that kind of bill.

But the networks realize their responsibility and their pledge to render public service. Realizing the costs involved, they have agreed that if we relieve them of the responsibility under section 315, they will give equal time, free time, and a format to the choosing of the nominees themselves without any restrictions, without any inhibitions.

We want to do away with this empty chair gimmick to embarrass anyone.

I just want to make that clear because, according to the editorial, there could be a misunderstanding.

For the convenience of the Senate I ask unanimous consent that the Washington Star editorial in full be entered in the RECORD at the conclusion of my remarks.

There being no objection, the editorial was order to be printed in the RECORD, as follows:

TV AND THE VOTE

The Senate's number one television watcher, Senator John O. Pastore, has produced a bill aimed at holding the political activity of the electronic Cyclops within reasonable bounds. Unfortunately, the blessings of the bill are considerably diluted by a proposal that the political monstrosity known as TV debates should be adopted as a permanent part of the elective process.

Certainly something has to be done to stop the wildly escalating cost of running for office. Any candidate, from dog catcher to president, is compelled to pour every cent he can lay his hands on into television and radio promotion. The increasingly common result is that the victory goes not to the candidate with the issues and the answers but to the man with the money, the sex appeal and the slogans.

The Pastore bill would limit the amount that can be spent to five cents for every vote cast for a given office in the preceding election. This ceiling, which would apply to all state-wide and national offices, would mean that presidential candidates in 1972 would be limited to $3.6 million each. Last time out, the Democrats shelled out $6.1 million and the Republicans $12.6 million for broadcast advertising.

There is nothing wrong, either, with the other major provisions of the bill that would abolish, the "equal time" rule. This restrictive yoke serves only to keep the nominees of major parties off major talk shows because of the possibility that a score of dingbat candidates will demand—and get—equal time.

But the intent of Pastore's bill is not merely to let the networks decide which candidates are to be taken seriously. The idea is to clear the decks for TV debates between presidential candidates, and to make such political sideshows fixed features of the political scene. It is an abysmal notion. Debating skill—particularly under the artificial and arbitrary limitations of the TV format—is no true test of judgment, executive ability or intelligence, which are more reasonable presidential qualities than verbal agility. In addition, it is unwise to hold such debates if one of the candidates is an incumbent president—which is the case roughly 50 percent of the time—because of the danger that in the heat of debate a president might produce a major disaster in diplomacy or national security.

The bill is expected to clear the Commerce Committee this week. When Congress starts chewing it over, two factors should be considered. First, those Republicans who might hesitate to limit campaign expenditures on the theory that it would help the impoverished Democrats, should remember that, not so very long ago, the tin cups were in their hands. Second, if Congress does anything at all about TV debates, it should outlaw them.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. CRANSTON. Mr. President, on February 23, I announced my intention to vote against the confirmation of Judge G. Harrold Carswell as an Associate Justice of the U.S. Supreme Court. It is my intention to explain my opposition to the Members of this body, and it is my hope that what I have to say may move Senators favoring the confirmation of Judge Carswell to reconsider their position, and those who have not yet taken a position to take one against him.

Although I am opposed to this nominee, I do not desire my opposition to be construed as a denial of the constitutional power of the President to make judicial appointments. Under our Constitution, the President is given the power to make appointments to the Supreme Court. That power, however, is not unlimited, for article II explicitly makes these appointments subject to the advice and consent of the Senate.

As has been pointed out, the power of any President to nominate constitutes only one-half of the appointing process. The other half of this process lies within the jurisdiction of the Senate, which has the constitutional power and the solemn obligation to determine whether or not to confirm a particular nominee.

In an article written for Prospectus, a University of Michigan Law School publication, Senator GRIFFIN, the distinguished assistant minority leader, reviewed the history of the powers to nominate and to confirm Supreme Court nominees. He found that conflicting views on this matter existed at the time of the constitutional convention, and that they were resolved through a compromise dividing the powers between the President and the Senate.

Those Founding Fathers who favored a strong executive favored giving the President unlimited powers in making appointments with one important exception: They feared giving him unlimited power over Supreme Court appointments. They thought such power might tend toward a monarchy. So they favored giving the Senate the unlimited power to make Supreme Court appointments. Others opposed giving the Senate this blanket power. The compromise embodied in the Constitution provides that the President shall nominate Justices to the Supreme Court and certain officers of the United States by and with the consent of the Senate. It gives to the President the prerogative to nominate individuals to Federal appointive positions. It gives to the Senate the right to pass upon the qualifications of certain of these individuals.

Mr. President, because of the importance of the issues involving Presidential prerogative and Senate rights in the appointing process, I would like to read selected parts from the article written by Senator GRIFFIN:

Much of the controversy revolves around the appropriate functions of the President and of the Senate in the circumstances of a nomination to the Supreme Court. There are some who suggest that the Senate's role is limited merely to ascertaining whether a nominee is qualified in the sense that he possesses some minimum measure of academic background or experience. It should be emphasized at the outset that any such view of the Senate's function with respect to nominations for the separate judicial branch of the government is wrong and simply does not square with the precedents or with the intention of those who conferred the "advice and consent" power upon the Senate.

To assure the independence of the judiciary as a separate and coordinate branch. . . . it is important to recognize that this power of the Senate with respect to the judiciary is not only real, but it is at least as important as the power of the President to nominate.

No one denies the constitutional power of the President to make an appointment to the Supreme Court, technically even at a time when he is only a few months from leaving office. But, of course, that is *not* the point. Some have not understood, or will not recognize, that under our Constitution the power of any President to nominate constitutes only *one-half* of the appointing process. The *other* half of the appointing process lies within the jurisdiction of the Senate, which has not only the constitutional power but the solemn obligation to determine whether to confirm such a nomination. Because the Senate has not used its power of "advice and consent," there is a widespread belief that it is almost a rubber-stamp.

However, against the backdrop of history we must recognize that the Senate has not only the right but the responsibility to consider more than the mere qualifications of a nominee to the Supreme Court of the United States, the highest tribunal in a separate, independent and coordinate branch of the government. The Senats has a duty to look beyond the question: "Is he qualified?" The Senate must not be satisfied with anything less than application of the highest standards, not only as to professional competence but also as to such necessary qualities of character as a sense of restraint and propriety. A distinguished former colleague, Senator Paul Douglas of Illinois, put it this way:

"The 'advice and consent' of the Senate required by the Constitution for such appointments (to the Judiciary) was intended to be *real*, and *not* nominal. A large proportion of the members of the (Constitutional) Convention were fearful that if judges owed their appointments solely to the President the Judiciary, even with life tenure, would then become dependent upon the executive and the powers of the latter would become overwhelming. By requiring joint action of the legislature and the executive, it is believed that the Judiciary would be made more independent."

Illuminating the appropriateness of these views is the clear history of the formulation of constitutional obligations built into the structure of our government to realize such objectives as an independent judiciary and checks and balances on respective centers of power. In the Federalist Papers, Alexander Hamilton wrote that the requirement of Senate approval in the appointing process would ". . . be *an excellent check upon a spirit of favoritism of the President*, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachments, or from a view to popularity."

In the Constitutional Convention of 1787, James Madison generally favored the creation of a strong executive; he advocated giving the President an absolute power of appointment within the executive branch of the government. Madison stood with Alexander Hamilton against Benjamin Franklin and others who were concerned about granting the President such power on the ground that it might tend toward a monarchy. While he argued for the power of the President to appoint within the executive branch, it is very important to note that Madison drew sharp distinction with respect to appointments to the Supreme Court, the judicial branch. Madison did not believe that judges should be appointed by the President; he was inclined to give this power to "a senatorial branch as numerous enough to be confided in—and not so numerous as to be governed by the motives of the other branch; as being sufficiently stable and independent to follow clear, deliberate judgments."

At one point during the convention, after considerable debate and delay, the Committee on Detail reported a draft which provided for the appointment of judges of the Supreme Court by the Senate. Gouverneur Morris and others would not agree, and the matter was put aside. It was not resolved until the next to last day of the Constitutional Convention. The compromise language agreed upon provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court and all other officers of the United States." Clearly, the compromise language neither confers upon the President an unlimited power to appoint within the executive branch nor confers upon the Senate a similar power of appointment with respect to the judiciary. * * *

I believe that history demonstrates that the Senate has generally viewed the appointment of a cabinet official in a different light than an appointment of a Supreme Court Justice. * * *

The reasons for a limited Senate role with respect to executive branch appointments, however, do *not* apply when the nomination is for a *lifetime* position on the Supreme Court, the highest tribunal in the *independent,* third branch of government (footnote omitted). No less a spokesman than former Justice Felix Frankfurter has emphasized one of the chief reasons for the higher responsibility of the Senate to look beyond mere qualifications in the case of a Supreme Court nominee:

The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views . . . Let us face the fact that five justices of the Supreme Court are the molders of policy rather than the impersonal vehicles of revealed truth.

In an oft-quoted statement Chief Justice Charles Evans Hughes noted wrly: "We are under a Constitution, but the Constitution is what the judges say it is."

Thus, when the Senate considers a nomination to one of the nine lifetime positions of the Supreme Court of the United States, particularly a nomination to the position of Chief Justice, the importance of its determinations cannot be compared in any sense to the consideration of a bill for enactment into law. If Congress makes a mistake in the enactment of legislation, it can always return at a later date to correct the error. But once the Senate gives its advice and consent to a lifetime appointment to the Supreme Court, there is no such convenient way to correct an error since the nominee is not answerable thereafter to either the Senate or to the American people.

Throughout our history as a nation, until the pending nominations were submitted, one hundred and twenty-five persons have been nominated as Justices of the Supreme Court. Of that number, twenty-one, or one-sixth, failed to receive confirmation by the Senate. The question of qualifications or fitness was an issue on only four of these twenty-one occasions. In debating nominations for the Supreme Court, the Senate has never hesitated to take into account a nominee's political views, philosophy, writings, and attitude on particular issues.

The Senate's responsibility to weigh these factors is not diminished by the fact that such professional organizations as the American Bar Association limit their own inquiries. The ABA committee on the federal judiciary has acknowledged limitations on its role. For example, letters from the chairman of the committee, Albert E. Jenner, to Senator James Eastland which transmitted the committee's recommendations with respect to the nominations of Abe Fortas and Homer Thornberry contained this statement:

Our responsibility (is) to express our opinion *only on the question of professional qualification,* which includes, of course, consideration of age, and health, and of such matters as temperament, integrity, trial and other experience, education and demonstrated legal ability. *It is our practice to express no opinion at any time with regard to any other consideration not related to such professional qualifications which may properly be considered by the appointing or confirmed authority.* (Emphasis added).

Mr. President, Senator GRIFFIN'S excellent article needs updating in one important respect. Since the time of its publication, three additional Supreme Court nominees have been submitted to the Senate. Of these, one Chief Justice Burger, was confirmed, and another, Judge Haynsworth, was rejected.

Mr. President, I am prepared to give special consideration to the President's wishes on matters relating to appointments to the executive branch. I recognize that unless he is given a strong hand in the choice of his associates, and the benefit of the doubt in cases where the merits or demerits of his nominees are not clear, he cannot be held accountable by the Congress or the people for the administration of the executive branch of Government.

I am not, however, willing to defer quite so easily to Presidential prerogative on matters relating to judicial appointments. It is true that Supreme Court justices are subject to impeachment proceedings. Unlike most other nominees, however, once judicial nominees are confirmed by the Senate, they are not directly accountable to either Congress, the Executive, or the people.

Federal judges serve for life and continue to affect the course of American history long after the President who nominated them has left the White House. This is particularly true of Supreme Court Justices who, as the final arbiters of our Constitution, set standards which are binding on both lower Federal judges and State judges.

Mr. President, before I outline my reasons for opposing the Carswell nomination, I want to clarify two additional points. I am not opposed to this nomination because Judge Carswell is a southerner. In my view, geographical factors should be irrelevant considerations in selecting Supreme Court nominees. President Nixon expressed this view in his 1968 campaign. But in picking first Haynsworth and now Carswell, the President obviously made geography his prime consideration. Their selections are an affront to the South, since the im-

plication is that this section of the country has no distinguished jurists. I believe that the South possesses its full share of outstanding jurists—some of them "liberals" and some of them "conservatives"—whose capacity and character would grace our Nation's highest Court.

Neither am I opposed to the Carswell nomination because Judge Carswell is considered a "strict constructionist" on matters involving constitutional interpretation. I can respect the Presidential prerogative of nominating strict constructionists to the Supreme Court. In the case of this nominee, however, the President has chosen a man whose judicial capabilities are so limited that it is doubtful that he could perform capably even as a strict constructionist.

The evidence adduced by the hearings on the nominee casts grave doubts on his basic intellectual qualifications to sit on the Court. His record as a jurist, lawyer, and U.S. attorney is totally devoid of professional eminence or distinction.

I believe, and the President led the country to believe, that professional eminence must be an indispensable qualification to those who are privileged to be considered to positions on our Nation's highest Court. Both in his campaign speeches and Presidential pronouncements, President Nixon assured the American people that he would consider for the position of Chief Justice only men possessing the "highest qualifications." Surely, the American people are entitled to the same consideration in nominations for Associate Justices.

Judge Carswell does not possess these qualifications. There is nothing distinguished in his record; on the contrary, his talents are permeated by a ubiquitous mediocrity.

Some have recently stated that mediocrity should be valued, rather than downgraded, and that it is essential to have a mediocre Associate Justice to represent those Americans who presumably are mediocre.

I cannot support this reasoning.

Who in America would want a mediocre Justice to sit upon our highest Court to pass upon his constitutional claims?

Clearly, there is no room for mediocrity in our courtrooms, especially in the Supreme Court which is the final arbiter of our constitutional rights. Those who have suggested that a mediocre Justice is necessary to represent mediocre Americans are not coming to grips with the real issue before the Senate. And, above all, they have grossly underestimated the intelligence and wishes of the American people.

I do not believe that the common man is mediocre or that he is entitled to mediocre justice. Every American, regardless of intellectual attainment, is entitled to have his complaint heard before a competent judge, whether at the trial of appellate levels.

I believe that the American people not only want, but are entitled to, the most highly qualified individuals to fill our Nation's highest and most responsible offices. This is particularly true in the case of Supreme Court positions, for, once Supreme Court nominees are confirmed, they cease to be directly accountable to the American people. As I have stated, Federal judges serve for life and continue to affect the course of American history long after the President who nominated them has left the White House. This unique feature alone requires the confirmation of only the most highly qualified nominees.

Mr. President, central to the question of mediocrity is the responsibility of constitutional interpretation. As today's Washington Post points out, perhaps the late Learned Hand, whose work is hailed almost universally as that of a great judge, explained best what qualifications a man needs for such fateful challenges:

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlye, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class.

Much has been said about Judge Carswell's insensitivity to civil rights. This stems in part from a white supremacy speech which he delivered over 20 years ago and in which he asserted that he would yield to no man in the firm vigorous belief in the principles of white supremacy and that he would always be so governed.

Though men do undergo changes of heart, Judge Carswell's record does not dispel lingering and disturbing doubts concerning the true nature of his present position on civil rights.

In 1956, at a time when he was a U.S. attorney sworn to uphold the Federal Constitution, he participated in a plan to convert a publicly owned golf course into a racially segregated club in an apparent attempt to avoid the Supreme Court's decision in *Holmes* v. *City of Atlanta,* 350 U.S. 879 (1955). In that case, the Supreme Court held that racially segregated municipal golf courses violated the equal protection clause of the 14th amendment.

Judge Carswell denied any knowledge of the discriminatory motives which prompted the conversion of the municipal golf course into a racially segregated private club.

Yet, he acknowledged that, at the time the conversion took place, he was aware of the fact that many lawsuits had been instituted in many places to prevent the type of subterfuge to which he claims not to have been a knowing party. Moreover, at the time of the conversion, a Tallahassee newspaper carried a front-page story in which the city commissioner stated that racial factors were hinted as the reason for the club's conversion into a private club.

After the hearings on the nominee had closed, it was reported that Judge Carswell joined in conveying a deed which contained a racially restrictive covenant. The property involved was acquired by Mrs. Carswell from her brother who had earlier acquired it from the Federal Government under a deed which did not contain such a covenant. The racially restrictive covenant was added by Mrs. Carswell's brother, and it was retained in the deed which was conveyed by Judge Carswell and his wife.

I am greatly troubled by Judge Carswell's participation in this transaction. Surely, a Federal judge who is sworn to uphold the Constitution of the United States knows or should have known that enforcement of racially restrictive covenants has been deemed to violate the rights guaranteed by the 14th amendment since 1948. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948). Although I have no way of knowing whether or not Judge Carswell actually read the deed carefully and was aware of this restrictive covenant, I have yet to hear him say one word about this matter.

There is no evidence in Judge Carswell's record that he ever changed the white supremacy views which he held as a young political candidate. The hearings show that he first disavowed these invidious views 22 years after their espousal, and then only when he was nominated to the Supreme Court and was publicly confronted with his own past.

I am convinced that the Senate would resoundingly reject a nominee who in the past advocated black supremacy, whose life record was consistent with that view, and who finally renounced his black supremacy philosophy only when nominated for the Supreme Court.

Mr. President, questions concerning Judge Carswell's candor to one side, I believe that Judge Carswell's position on civil rights will put America's morality to the test.

Two Washington columnists, Frank Mankiewicz and Tom Braden, stated it this way in an article which appeared in the Washington Post on March 17:

> The practical test of how the country feels about its race problem will be made in the next few weeks. Senators opposed to the Supreme Court nomination of G. Harrold Carswell plan—in effect—to test the national morality.

They go on to state:

> If the country doesn't care, Carswell is in, with perhaps 40 votes against him from senators who make equality of race a matter of personal morality. In putting the Carswell issue before the nation, they are not so much asking others to adopt their view as they are saying in effect, "Do you want a man of the extreme opposite view so dignified as to participate in the deliberations of the nation's highest court?

They believe that the answer to this question depends on the degree of national commitment to the principle of equality. They couch this answer in the following terms:

> If Mr. Nixon is right in his earlier suggestion that those who want permanent segregation of the races constitute an acceptable part of the spectrum of public opinion, there is no reason why Carswell shouldn't make the court. On the other hand, if the nation really believes that the law is color blind, and that black citizens are entitled to the privileges and immunities of the Constitution, it cannot have a Carswell in the position of interpreting that Constitution.

The strategy of the opposition is to ask the country to decide.

In concluding, Mr. Mankiewicz and Mr. Braden made the following observations:

In other years and in other times it might have been thought that a president was asking too much of his party to go down the line for a man who helped to re-segregate a public golf course after the Supreme Court had ruled it was unconstitutional, who did not repudiate his statement that "segregation of the race is only proper and correct way of life" until he was nominated, and who bullied civil rights attorneys in his court.

But after the events of the last few months, Carswell's views may reflect an emerging national standard. The debate—and the public reaction to it—will tell.

Mr. President, I turn now to the matter of ethics.

Last Friday the distinguished assistant minority leader of the Senate stated on the floor that, unlike the Haynsworth nomination, the Carswell situation involves "no significant challenge or significant question raised in the record involving ethical considerations."

It seems to me, however, that ethical questions are not restricted to cases involving financial considerations and conflicts. And I believe that the hearing testimony about Judge Carswell's hostile and nonimpartial demeanor and attitude on the bench toward lawyers raising civil rights contentions before him raises grave ethical questions.

I have read the hearing record, and I have read the Canons of Judicial Ethics. And again, it seems to me, as a layman, placing the two documents side by side, that Judge Carswell's judicial behavior raises most serious questions of violation of Canons 5, 10, and 34. These canons are as follows:

5. ESSENTIAL CONDUCT

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

* * * * *

10. COURTESY AND CIVILITY

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

* * * * *

34. A SUMMARY OF JUDICIAL OBLIGATION

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, *courteous, patient,* punctual, *just, impartial,* fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

I am not a lawyer, but the responsibility for making judgments and decisions in our Nation in these matters is not limited to lawyers. The President, empowered by the Constitution to nominate Justices of the Supreme Court, need not be an attorney. Members of the U.S. Senate, empowered by the Constitution to advise and consent in Supreme Court appointments, need not be lawyers. Actually, under the Constitution, Supreme Court Justices themselves do not have to be attorneys.

So I, a layman, chosen by the people of California to represent them in the Senate, must exercise my own judgment in the matter of the Carswell nomination, and all facts, issues and testimony relating to it.

I would like to read one brief extract from the report of the Judiciary Committee on the nomination of Judge Harrold Carswell, these being the separate views set forth by Senators HART, KENNEDY, and TYDINGS. They said, in a part of their statement:

Our judicial system must accord litigants a fair hearing. Justice is not dispensed when a judge's personal views and biases invade the judicial process. In Judge Carswell's court, the poor, the unpopular and the black were all too frequently denied the basic right to be treated fairly and equitably.

Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices. His hostility towards particular causes, lawyers, and litigants was manifest not only in his decisions but in his demeanor in the courtroom.

The record of the hearings held by the Judiciary Committee on Judge Carswell contain charges of behavior by him, both in his court and in his chambers, that violates Canons 5, 10, and 34. I have personally talked with four civil rights attorneys, white and black, who have appeared before Judge Carswell. They make the same sort of charges. Let me say that before charging Judge Carswell with violating the Canons of Ethics, I wanted to talk personally with attorneys who appeared before him.

It is most evident that there is a consistent pattern in his behavior of bias and hostility toward anyone arguing a civil rights case, of emotionalism, intemperance, and anger, and a close-minded determination to prejudge the cases before him even without listening to them.

Judge Carswell showed his antagonism toward all civil rights attorneys, including U.S. attorneys, and regardless of whether they were black or white.

This conduct violates Canons 5, 10, and 34. This conduct constitutes overwhelming evidence that Judge Carswell is not capable of the evenhanded justice Americans are entitled to in every court, high or low.

Of the four attorneys with whom I talked, two had not testified before the Judiciary Committee. One of these is Theodore Bowers. The other asked not to be identified. John Lowenthal and LeRoy D. Clark, with whom I talked, had testified.

I refer now to notes that I made during the course of my conversations with these attorneys. I refer first to notes of my conversation with Theodore Bowers, an attorney in Panama City, Fla.

He said of his experiences in Judge Carswell's court that the judge was hostile, even in regard to routine procedural matters.

He stated that civil rights cases seemed to affect him emotionally, that he would get excited in the course of such trials in his court.

Bowers told me that Judge Carswell turned away from him, looking off to the side, turning his body to the side, when he was presenting an argument. He stated that Judge Carswell stayed turned aside throughout half of his total argument. He argued for 10 minutes, and for 5 of those minutes Judge Carswell was looking away, had turned bodily away, seemed to be totally ignoring the case he was seeking to make.

He stated that Judge Carswell would appear especially hostile when he, Theodore Bowers, or others cited decisions of the Supreme Court. Judge Carswell attacked Supreme Court decisions while he was sitting on the bench of a lower court.

All this, said Bowers, was a consistent pattern of behavior by Judge Carswell from 1964 until 1968, when he left the court where these observations were made.

Theodore Bowers added that the judge would attack attorneys appearing in desegregation cases, and all this, he said, constituted what he would term to be "totally improper judicial posture."

Mr. President, another attorney, who did not wish me to name him, recalls also Judge Carswell turning away when he was making his argument, ignoring what he was seeking to say, the statements he was making in arguing his case.

He said:

I always felt there was an apparent burden on me in civil rights cases, beyond the normal burden of an attorney to prove his case in a normal case. In fact, he seemed to assume from the start that my side was wrong.

This attorney, too, stated that Judge Carswell would get excited in his courtroom, that he would lose his temper, and that he seemed to prejudge civil rights cases, adopting a hostile attitude before the first word was said by attorneys in civil rights matters. In one case, he said, Judge Carswell advised him, "Go ahead and talk if you want to talk, but you are wasting your time."

He also stated that Judge Carswell was impatient with him when he was seeking to present his case.

Another attorney, Leroy D. Clark, who is an associate professor of law at New York University, told me that Carswell would listen intently to the opposing counsel; then, when he would start his testimony on the other side in a civil rights matter, the judge would turn away, appearing bored and indifferent, as if what this attorney might say would be totally unimportant to the proceedings in the courtroom.

Clark also told me that Judge Carswell would get "angry and excited" in the course of civil rights cases in his court; he would be disrespectful to attorneys, he would be brusque, he would be abrupt, he would be impatient. Clark said, "It was just outrageous."

Clark told the committee, and also told me, that he literally had to coach attorneys before they appeared before Judge Carswell. They would act out how things would be expected to happen in his court. He would have to warn young attorneys, before they appeared before Judge Carswell that Judge Carswell would not let them complete an argument, that he would cut them off in the middle of a sentence, and they would practice this; they would practice with these young attorneys speaking to someone acting the part of a judge who would turn his back in the midst of an argument.

Clark said that he thought much of this was deliberate—the cutting off of the attorneys in the middle of a sentence—because such action would make the record, on appeal unclear, and muddy, thus make it more difficult to win the case on appeal.

Mr. President, I was quoting from statements made to me by Leroy D. Clark, associate professor of law at New York University, concerning the behavior of Judge Carswell as he had witnessed and experienced it in his court. He spoke of what he called "antics" by Judge Carswell which he felt were designed to intimidate and confuse the attorneys in his court. Some of these antics were grimaces, others consisted of turning his body, including his face, away from the lawyers, of constant interruptions, and of ignoring the words of the attorneys in his court. While these acts cannot really be made a part of the trial record, they serve to confuse the lawyers, and reduce the chances of winning on appeal.

He said that the judge would be extremely impatient with certain attorneys, including Mr. Clark. He said, "Rarely could you complete an argument in his courtroom." In his opinion, Judge Carswell was not an impartial mediator; in fact, he would take up the argument of the other side. For example, if opposing counsel failed to make their points, Judge Carswell would make them for them, and he would suggest the kind of questions which he wanted opposing counsel to raise. Clark said, "It was rather embarrassing to be there, up against two attorneys without a judge in the court."

He stated that Judge Carswell would make it plain that nothing that an unfavored attorney could say would affect him in any way. Signficantly, Mr. Clark told me that he was representing not only his views of Judge Carswell, but also those of several civil rights lawyers, who also practiced before Judge Carswell and who independently voiced the same complaints.

Professor Clark said that he had argued civil rights cases before judges in Alabama and Mississippi, and even though the judges may have been opposed philosophically to the interests of his clients, each of them, "acted like southern gentlemen" and presided fairly over the proceedings.

At this point, I would like to quote from statements made to me by Prof. John Lowenthal, a full professor of law at Rutgers University, on the matter of Judge Carswell's judicial temperament.

He said that, from the outset of proceedings, Judge Carswell would always evidence a predisposed view and a closed mind. This was apparent even before any testimony had been presented.

Professor Lowenthal described one incident which occurred in Judge Carswell's chambers, which is particularly distressing.

Judge Carswell remarked to Professor Lowenthal that he was "predisposed to do my clients in."

According to Professor Lowenthal, Judge Carswell's total lack of interests in the legal arguments led him to conclude, "If I ever saw a lack of judicial temperament, there it was."

Professor Lowenthal reiterated observations made by other lawyers with regard to Judge Carswell's propensity to become excited when civil rights cases were before him. He stated that Judge Carswell's voice would rise to a high pitch and that he would become quite hostile toward the civil rights attorneys.

He said, "I have never practiced before a judge more overly hostile than Judge Carswell."

Finally, John Lowenthal said, "Judge Carswell displayed a threatening attitude toward me."

Today, I also received a statement from still another attorney, who practiced before Judge Carswell.

I refer to Mr. Knopf and refer specifically to the transcript of a TV interview which he gave last Thursday, March 12, 1970, to Carol Lewis, Capital news correspondent of WTOP News, in Washington.

Mr. Knopf testified before the Senate Judiciary Committee under a subpena. At that time he was an attorney at the Justice Department.

After leaving the Justice Department and entering private practice, he said in an interview on WTOP News with Carol Lewis that he felt he could say more. He in fact added considerably more depth to his testimony given before the Senate Judiciary Committee.

I would like to read some excerpts from the TV interview:

KNOPF. When we first started out by asking the attorney where he was from and whether he was a member of the Florida bar and the attorney explained that they could not get members of the Florida bar to work in this controversial area of civil rights . . . that he had volunteered. And Judge Carswell then went on . . . delivered to him a lecture in a very loud voice and a very angry tone . . . telling him that he had no business coming down to Florida he didn't approve of lawyers meddling in local affairs and stirring up the local people with regard to civil rights I distinctly remember this because we had been trained . . . the little training we had received . . . at how to get civil rights workers out of jail. And I was listening to this lecture and listening to the judge getting angrier and angrier I began to wonder what do you do to get a lawyer out of jail. And then as the judge continued and got further angry I started to worry about what I would do to get myself out of jail because I expected that all of us would have been thrown in on some charge for contempt of court or something like that. He was that angry and that upset about our presence in Florida.

LEWIS. You said Judge Carswell lectured the lawyer. In what way did he lecture him? *What was the gist of his argument there in the courtroom?*

KNOPF. Essentially, that we had no business coming down to Florida and helping out other persons because we were just making trouble, that everything was peaceful before we had come down and that we were just stirring up trouble. The lawyer explained to him that we were trying to have these black people exercise their constitutional right to vote but this made no impression with the judge. And he also explained that every day these students stayed in jail . . . these voter registration workers . . . there was a danger that they would be beat . . . by other prisoners or by the guard officials and we seriously were concerned for their safety. This again had effect on him. We also said that the arrest was totally illegal and he had no choice but to release them.

And he said there must be some way that he could keep them in jail . . . even though the law was clear that he could not.

LEWIS. Would you say that he showed a certain insensitivity toward the role of the lawyers in the civil rights struggle. How would you characterize his attitude towards the whole struggle that you were involved in?

KNOPF. It was quite clear to me that he was totally opposed to all of our efforts. He implicitly or explicitly stated that he wanted to in no way help the civil rights efforts going on in Northern Florida at that time.

LEWIS. Mr. Knopf, you were a young lawyer who went to down to Florida feeling quite strongly about civil rights obviously. Is it possible that you yourself felt hostile toward the judge because he was a white Southern judge?

KNOPF. As a matter of fact, what I have learned in law school which proved false in this case was that we could expect hostility from the local state judges. But at least in federal court we thought we could get an impartial judge, and by impartial as lawyers as I guess the general public knows we meant someone who would listen to both sides and arrive at a conclusion based upon the evidence presented to him by competing sides. Here I found a judge who had no other side before him. There were only the civil rights side presented, who needed no other side because he took that position. He was the advocate for the anti-civil rights forces. He made all the arguments and had the attitude that there should be no relief granted civil rights attorneys. So instead of an impartial judge we were faced by his actions, I'd say . . . we were faced with a judge who already had his mind made up and he had said bluntly that he would do everything he could to make sure we were denied the relief that we requested.

LEWIS. During the hearings on Judge Carswell a statement he'd made in 1948 . . . a political statement clearly showed him to have some racist opinions. This was in 1948. From your experience of him in 1964 do you think he had changed from that position?

KNOPF. Well, any judge in my opinion who states that he will do everything he can to keep civil rights workers in jail, even though the law clearly favored their release, would seem to favor anti-civil rights actions and would be in accordance with his original speech.

LEWIS. Going back to your testimony . . . you were under subpena, Mr. Knopf. You were then working for the Justice Department and you no longer are working for the Justice Department. Did you . . . Was any pressure put on you from the department not to give total evidence before the committee?

KNOPF. No. The department was quite concerned about my presence there but they also went out of their way to make sure that nothing was said to me in the way of

pressures that could be later interpreted as pressure being put on me.

LEWIS. You were very very careful during the testimony not to express your opinions . . .

KNOPF. Well, it was suggested to me by various department officials that I was subpenaed to give the facts and not to give my opinions and I took those suggestions . . .

LEWIS. Who suggested that?

KNOPF. Well, I'd say they were from persons I regarded as trying to help me, rather than persons that were trying to get me in any difficulty.

LEWIS. Well, during the testimony you gave, Senator Tydings said . . . "Do you think that Judge Carswell gave a fair and unbiased hearing to persons in his courtroom" . . . and at that time you said . . . "Senator, if I may duck that question." Now, you're no longer with the Justice Department. Mr. Knopf, don't duck the question now.

KNOPF. I would say that civil rights . . . my civil rights clients . . . did not receive a fair and impartial hearing at all. They were met with a judge who had made up his mind in advance that he would deny them all relief if he possibly could.

LEWIS. One of the arguments put forward in favor of Judge Carswell is that he is a strict constructionist and therefore we should forgive some of the decisions that he made. From your experience with Judge Carswell would you say that he is a strict constructionist . . . or is there another way you could describe him as a Judge?

KNOPF. Well, any judge who says to a lawyer as he did to us that he doesn't care what the law says, but there must be some way he can get around it, in my view is not a strict constructionist . . .

In summary on this matter of ethics and in relationship to my view that Judge Carswell has violated Canons 5, 10, and 34 of the Canons of Judicial Ethics, I refer to the language in those canons:

5. ESSENTIAL CONDUCT

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

* * * * *

10. COURTESY AND CIVILITY

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

* * * * *

34. A SUMMARY OF JUDICIAL OBLIGATIONS

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

The evidence in the transcript of the hearings of the Judiciary Committee and the evidence that I today placed before the Senate from several attorneys, one of whom did not appear before the Judiciary Committee, and one of whom lately had more freedom to express his views, clearly shows that Judge Carswell's behavior in his court was, indeed, violative of Canons 5, 10, and 34 of the Canons of Judicial Ethics.

Mr. President, I now would like to turn to the views of those whom I represent here, the citizens of the State of California. They have taken the time to communicate to me their views concerning Judge Carswell. To date, I have received approximately 2,000 letters, and they are running 40 to 1 against the confirmation of the nomination of Judge Carswell. I wish to read extracts from some of these letters.

First, I would like to read a letter which is not from a constituent. I do so because I have received many letters from individuals outside California who oppose confirmation of Judge Carswell. This letter is from the Community Legal Assistance Office in Cambridge, Mass.:

COMMUNITY LEGAL ASSISTANCE OFFICE,
Cambridge, Mass., March 11, 1970.

Senator CRANSTON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: As a concerned citizen and as an attorney who represents the have-nots in this country, I feel compelled to write you urging that you vote against President Nixon's appointment of Judge Carswell to the Supreme Court.

In my work as a legal services lawyer in a number of communities, I have been in constant contact with the poor. A great many of them are black or Puerto Rican. In large measure, the goal of our program is to demonstrate to these oppressed groups that through use of our legal institutions, great strides can be made to end the cycle of racism and poverty in America. However, such a promise of help through the law becomes both illusory and hypocritical when the President appoints a man whose background would hardly justify confidence on the part of our clients. A judge who has had an undistinguished career on the bench, who has achieved no great distinction as a scholar or writer, who made that infamous speech over twenty years ago, who reinforced his lack of understanding and sensitivity to racial problems by participating in a scheme for the purchase of a municipal golf course, who has a record of antagonism toward civil rights lawyers, and who participated as recently as three years ago in the sale of property with a restrictive clause (violating a Supreme Court decision) is certainly not the type of candidate worthy of Supreme Court appointment.

I understand the natural hesitancy of a Senator to question the judgment of the President. However, the nomination of Judge Carswell represents such a slap in the face to all of those with whom we constantly work to encourage participation in the "system" that you must oppose it. Much of the work thousands of dedicated young attorneys and others are performing will be undone if Judge Carswell is permitted to join the Supreme Court.

I hope these thoughts will help persuade you that there is only one course of action you can take in good conscience.

Cordially,

LOUISE GRUNER GANS,
Staff Attorney.

Then, here is a letter which states:

MARCH 10, 1970.

Re Senate confirmation of Judge Carswell.

Senator ALAN CRANSTON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR CRANSTON: As an individual deeply concerned with the fight for dignity and human rights for all Americans I must register my complete dismay and dissatisfaction with the prospective confirmation of Judge Carswell to the United States Supreme Court. Judge Carswell's record in matters relating to human rights and equal rights for minorities indicates that he has a "passionate disrespect" for racial equality or understanding. His appointment to the Supreme Court would have an extremely damaging affect upon the faith that all people have in both the ethics and credibility of our nation's highest court.

I fervantly urge that you and your colleagues in the Senate reject this blatant attempt to introduce racism to the Supreme Court.

Sincerely,

GENE C. JOHNSON.

Here is another letter:

FEBRUARY 16, 1970.

Hon. ALLAN CRANSTON: As a veteran of the Vietnam conflict, I served in the defense of all Americans, regardless of their color or religion. I firmly believe, as I'm sure you and all other responsible Americans do, in the principle of equality for *all* Americans. I feel that the nomination of G. Harrold Carswell to the Supreme Court would be an appalling blow to civil rights and human dignity in this country. Therefore, I strongly urge you to vote against this nomination.

Sincerely,

MARK KATZMAN,
Ensign, USNR.

A group of law students wrote me the following letter:

DEAR SENATOR CRANSTON: As law students, our professional training helps us perceive the gravity of the issues raised by the nomination of G. Harrold Carswell to the Supreme Court. Even a cursory study of constitutional history makes clear the lasting imprint on the nation for good or for ill of each appointment to the Court. Our sober recognition of what is now at stake in filling the seat once held by Holmes, Cardozo and Frankfurter—jurists of wisdom and intellect—requires us to record our deep dismay at the nomination of a man whose lack of qualification for elevation to the Supreme Court is plain.

It is argued that the present nominee is a "strict constructionist" whose confirmation would bring "balance" to the Court.

We know something, however, of the difficulty of resolving legal questions. We know the fallacy of believing that the words by which the Constitution guarantees our scheme of ordered liberty and justice can be construed as if they contained, as Holmes put it, "only the axioms and corollaries of a book of mathematics." "Due process of law," Justice Frankfurter has written, "conveys neither found nor fixed nor narrow requirements. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right." It is precisely because, as Holmes has taught us, "judges are called upon to exercise the sovereign prerogative of choice" that we ask what accomplishments of Judge Carswell suggest that he deserves a place in this tradition.

We do not deny the President's prerogative of effecting a balance on the Court of men of highest distinction from different schools of judicial philosophy within the contemporary tradition whose rational discourse

may advance constitutional jurisprudence, or even of effecting a geographical balance. Our concern over the present nomination, therefore, in no way derives from Judge Carswell's Southern background. We know of many Southerners who, as outstanding judges, lawyers and legislators, have contributed their wisdom, compassion, perspective and courage to the development of our laws. The confirmation of a nominee of little distinction would be no monument to Southern jurisprudence. What view of the Supreme Court, we wonder, other than sheer contempt, requires "balance" by mediocrity?

Judge Carswell's record concerns us both for the presence of just the prejudice and fitfulness which Cardozo cautioned against and for the absence of excellent deserving of the highest reward.

We are concerned over his early statement of undying adherence to white supremacy beliefs, perpetuated by his intolerant behaviour toward civil rights petitioners and their lawyers, his incorporation of a club to thwart integration, his sale of property subject to a racially restrictive covenant, his "darky joke", and his disturbing rate of reversal in civil rights cases. Such evidence does not demonstrate the growth of Judge Carswell's decency and maturity—a minimal requisite for a judge called upon to interpret constitutional language which must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society."

We are even more concerned, however, that Judge Carswell's record is devoid of any trace of distinction or contribution to the law which might set him apart from other judges and lawyers. It has been recognized that Judge Carswell even falls well below the average of the more than 500 federal judges in both his scholarship and craftsmanship and in his perception and articulation of issues in his opinions.

We thus urge the Senate fully and faithfully to exercise its constitutional trust of independent review of this most important appointment: not to presume qualification in the absence of its disproof (although much disproof there be). Rather, we urge the Senate to require an affirmative showing that Judge Carswell possesses some special qualities of spirit and achievements of intellect for which he deserves elevation to the highest office of a co-equal branch of government. In their absence, we submit, confirmation must be withheld.

This letter is from Sacramento, Calif., my State capital:

SACRAMENTO, CALIF.,
March 13, 1970.

HON. ALAN CRANSTON,
U.S. Senate
Washington, D.C.

DEAR SENATOR CRANSTON: My wife and I have generally been members of the "silent majority", taking few opportunities to state our opinions on political issues and priding ourselves on analyzing political issues and government representatives. However, we feel the time has come to speak out on the nomination of Judge Carswell to the United States Supreme Court.

We strongly urge you to vote *against* his approval. The Supreme Court is the highest body of men in the country—in some respects outranking the President; to approve a member of this court demands the closest of scrutiny before approval and a maximum of ability from the nominee. In my opinion—hopefully yours also—Mr. Carswell falls far short. His background is that of a racial bigot and he has done little to indicate his views have changed. In addition the legal intellect demanded of a Supreme Court Justice is lacking in Mr. Carswell. Review of appeals from his court indicates approximately 50% reversal by the same Supreme Court to which he has been appointed by President Nixon. Many of the foremost leaders in jurisprudence have spoken out against approval despite the American Bar Association vote.

We're sure it is not necessary to recite the specific instances in the case against Mr. Carswell as you know them well. We hope you will vote against approval; however, if you are in favor of approval, we would appreciate hearing of your reasons. We shall eagerly await the confirmation vote.

Thank you for your time; we hope hearing from your electorate helps you reach a decision.

Sincerely yours,

JOHN W. YOUNG, M.D.
KAREN C. YOUNG.

The next letter is from a Republican campaign worker in San Carlos, Calif.:

JANUARY 28, 1970.

Senator ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: As a registered Republican and campaign worker, I am asking you not to vote for the Supreme Court confirmation of George Harrold Carswell. I am sure that Justice Carswell meets the needs of the judicial system of the United States Court of Appeals. I am also sure that Justice Carswell's views of our world is not one that we want as a national standard.

I do not believe that statements attributed to Justice Carswell reflect the type of character of an individual that will so greatly influence our national manners. If we are truly interested in law and order, I suggest that those who set the national standards such as the President and The Congress begin by demonstrating the type of law and order intended in the Constitution and not the type of law and order that serves political needs.

Very truly yours.

WILLIAM D. GOODELL.

SAN CARLOS, CALIF.

The next is a letter from a committee of attorneys and accountants who also oppose the confirmation of Judge Carswell:

COMMITTEE OF ATTORNEYS AND ACCOUNTANTS AGAINST CONFIRMATION OF JUDGE CARSWELL,
Portland, Oreg., March 13, 1970.

Re: Judge Carswell.
Honorable ALAN CRANSTON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: Soon you will be performing one of the most important functions of your job as United States Senator—confirming or denying the latest nominee to the United States Supreme Court, Judge G. Harrold Carswell of Tallahassee, Florida. Our Committee feels Judge Carswell should not be confirmed.

In 1948 Judge Carswell said that he would always be governed by the principles of White Supremacy. Of course talk is cheap and the comment was made during an election campaign against a sworn segregationist. Judge Carswell's renouncement of that statement seems to lay to rest fears of his White Supremacy feelings. But that renouncement also came during a time he is being considered in a campaign for appointment to the Supreme Court. Again, talk may be cheap.

Our Committee's concern is that actions speak louder than words. Judge Carswell's actions since 1948 tend to confirm his White Supremist statement. As a District Court Judge, Carswell continued to interpret cases involving Negroes from a segregationist point of view even though the United States Supreme Court and his immediate Court of Appeals, the Fifth Circuit, had reversed him and others on cases on that very point. As a private citizen Judge Carswell gave legal advice to operators of a public golf course helping them to convert it into a private club so that Negroes could not be admitted.

Finally as recently as 1966, Carswell, while a Judge of the United States District Court, signed a Deed surrendering his curtsey rights. That Deed contained a convenant providing that the property involved would never be sold to a non-caucasian, a convenant contrary to the very laws he interpreted as a District Court Judge!

It is the fear of this Committee that racism has been nominated to a high place where it does not belong. You, as a United States Senator, cannot and should not allow a White Supremist hy Self-proclamation and by actions to become a Justice on the United States Supreme Court. You, our Committee and our nation cannot withstand such a terrible thing to occur at this stage of our societal development.

Please vote against confirmation of Judge G. Harrold Carswell's nomination to the United States Supreme Court.

Very truly yours,

GEORGE WITTEMYER,
Chairman.

The next letter is from a large number of law professors at UCLA:

FEBRUARY 20, 1970.

Hon. ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: Surely no one who values the unique role of the United States Supreme Court as both a symbol and as a vital instrument of liberty can relish the spectacle of yet another struggle in the effort to maintain high standards and judicial integrity on the nation's highest tribunal. Exhausted from a struggle to save the Court from the damage it would have suffered from the appointment of a judge who demonstrated a singular insensitivity to accepted norms of behavior in conflict of interest situations, the legal profession must now protect the court from a one-time self-professed white supremacist whose undistinguished career on the bench has contributed to the fulfillment of the vows he made more than twenty years ago to uphold the "ideals" of racial segregation.

The Supreme Court is as threatened now by racism as it was by impropriety two months ago. A judge whose career has all too frequently been marred by evasion of the letter and spirit of Supreme Court decisions, who has repeatedly been reversed by the Court of Appeals for his decisions in racial cases, and who has demonstrated a callous indifference to the constitutional rights of America's black citizens can hardly be gauged the right man for the Supreme Court at this turning point in American history.

For these reasons, as law professors who view the law as an instrument of peaceful and orderly social change, we feel a special responsibility to oppose the elevation of G. Harrold Carswell to the Supreme Court.

Respectfully,

Benjamin Aaron, Reginald H. Alleyne, Michael R. Asimow, Robert C. Casad, George P. Fletcher, Kenneth W. Graham, Jr., Donald G. Hagman, Martin H. Kahn, Kenneth L. Karst, William A. Klein, James E. Krier, Leon Letwin, Henry W. McGee, Jr., Melville B. Nimmer, Monroe E. Price, Paul O. Proehl, Joel Rabinovitz, Ralph S. Rice, Barbara B. Rintala, Gary T. Schwartz, Herbert E. Schwartz, Henry J. Silberberg, Frederick E. Smith, William D. Warren, Richard A. Wasserstrom, Professors of Law.

Mr. and Mrs. Lawrence G. Mohr, Jr., of Menlo Park, Calif., wrote the following letter:

MENLO PARK, CALIF.,
March 15, 1970.

Senator ALAN CRANSTON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR CRANSTON: This letter is to protest the nomination of Judge Carswell to the Supreme Court.

It is totally reprehensible to me, a young white man, that the nomination may have a possibility of being ratified. My wife and I, as well as many of our friends, feel this selection not only runs counter to the obvious trend of requiring actions to demonstrate sincerity on matters such as race and equal rights. Any individual nominated to this highest bench must have total credibility with at least one tenth of our nation.

Most importantly, the judge does not meet the standards which we feel are minimal. The recent protest from eminent laws schools clearly demonstrates the judge's inadequacies.

Please vote against this nomination.

Very truly yours,

LAWRENCE G. MOHR, Jr.
NANCY H. MOHR.

Mr. George T. Caplan, from Los Angeles, Calif., wrote me as follows:

LOS ANGELES, CALIF.,
March 12, 1970.

Hon. ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CRANSTON: I am writing to you to urge you in the most forceful terms to oppose the nomination of Judge Carswell to the United States Supreme Court. As a lawyer and as a constituent of yours I feel most strongly and earnestly that the caliber of the highest bench will be substantially demeaned should Judge Carswell be confirmed. Certainly, there must be lawyers and judges in the South who are also Republicans and Conservatives who have significantly greater intellectual qualifications than Judge Carswell who, I can only conclude, can fairly be characterized as mediocre at best. As a lawyer I am reluctant to use these words to describe a judge but I believe that the magnitude of the error which would be committed should the Senate confirm his nomination requires vigorous opposition.

Respectfully yours,

GEORGE T. CAPLAN.

Rev. Edwin C. Lingberg, pastor of the Temple City Christian Church of Temple City, Calif., wrote me the following letter:

TEMPLE CITY CHRISTIAN CHURCH,
Temple City, Calif., March 11, 1970.

Hon. ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CRANSTON: I am writing to protest the nomination of Judge G. Harrold Carswell to the United States Supreme Court.

I urge you to vote against confirmation on these grounds.

First, the public statements and actions of Judge Carswell, together with his record of past decision, indicate to me that he is not as sensitive as he needs to be in the area of civil rights. Our nation is polarizing more and more on this issue. The Supreme Court has been a key institution in support of more sane civil rights for all persons. Its members should be outstanding examples of persons committted to civil rights for all men.

Second, the Supreme Court has, in recent years, given more emphasis to human rights than to property rights. As I read the Constitution, and especially the Bill of Rights, it seems to be most concerned with these precious human rights. I would not want to see the Court move away from this concern. I feel that Judge Carswell is more concerned with property rights than with human rights.

Again, I urge you to vote against the confirmation of Judge G. Harrold Carswell to the United States Supreme Court.

Sincerely yours,

EDWIN C. LINBERG.

Mr. Peter Haberfield, an attorney with California Rural Legal Assistance, wrote me the following letter:

CALIFORNIA RURAL LEGAL ASSISTANCE,
Marysville, Calif., March 12, 1970.

Senator ALAN CRANSTON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CRANSTON: I am a legal service attorney in Marysville, California. My clients are poor whites, poor browns, and poor blacks. As one who sees his role as channeling conflict into legal mecbanisms, and who sees as the necessary requirement for this task that poor people maintain some hope in legal processes, I wish to voice my very strong objections to the nomination of Judge Carswell to the Supreme Court. The combination of his now infamous speech, his involvement in the purchase of the municipal golf course, the antagonism which he demonstrated toward civil rights lawyers (some of whom I practiced with while in the civil rights movement in the south), and the recent disclosure of his involvement in the sale of property with the restrictive covenant makes him a man that cannot maintain the confidence of the poverty communities of our country. How can a black person give a man the benefit of the doubt with this record? I assure you that I have not met a black person who could venture such questionable "understanding".

This nomination, coupled with that of Haynsworth, and combined with the present administrations' role in trying to forestall integration of schools has, in my mind, panicked the members of black communities around the country. Black people are being driven more and more to the position of the Panthers, who they regard as their sole source of protection against the racism which they recognize in the white community. More and more black people are defining their problem as one of "fighting for survival".

I urge you with all my heart to oppose this nomination and to encourage as many other of your colleagues.

Sincerely,

PETER HABERFIELD.

Mr. President, I think these people have spoken eloquently for my State. I think they have also spoken eloquently for our Nation.

I now yield the floor.

DEEPER INTO THE SOUTHEAST ASIAN QUICKSAND

Mr. MONTOYA. Mr. President, Americans across the political spectrum have watched with growing apprehension the slowly lifting curtain on a new drama in Southeast Asia. Our obviously growing involvement in the remainder of what was French Indochina is becoming increasingly evident. Such a policy is ill-conceived, and can only lead to catastrophe of staggering dimensions.

Already, we are told by administration sources that more Americans have perished in Laos as a result of ground action than has previously been revealed. Separate reports are now being issued regarding our losses in Laos. Our casualties there in lives, aircraft, and dollars certainly are anything but insignificant.

In addition, an ominous new trend is developing, gaining terrifying momentum of its own. We could never have gotten involved in Vietnam without becoming committed in Laos. And we cannot become entangled in Laos without plunging eventually into Cambodia. Here is our next Laos, just as Laos is becoming our most recent Vietnam.

In spite of the President's efforts to withdraw from Vietnam, we are inexorably becoming more deeply committed in Southeast Asia, generally. Our profile is rising there, instead of becoming less visible.

It is obvious to all but the most myopic observer that the Government of Cambodia had a hand in organizing and encouraging recent demonstrations there against Communist troop presence in that nation. Official statements issued by the Cambodian Government tear away any remaining shreds of concealment on this particular matter.

The Communists may embarrassingly reject these demands, which curiously have not been made previously by Cambodia in such a strenuous manner. In such a case, the Government of Cambodia has a perfect excuse to appeal to our Government for assistance in removing the Reds.

In turn, our military on the scene in Saigon will have another lever to utilize against the President's commitment to inexorably extricate our forces from Southeast Asia. Here is a handmade excuse with which to broaden our involvement in another area of that segment of the globe. For years, some have called for major punitive action against Communist sanctuaries in Cambodia. It all goes far to show us the real extent of the macabre web we have become enmeshed in. Several options are available. We might enter Cambodia with major armed incursions of up to battalion size. Or we could edge into it in the form of another Laos-type commitment. Nonetheless, whichever route we travel, our destination is disaster. Whether it be special forces in mufti with air support or openly maneuvering and fighting regiments, only tragedy and frustration can result.

Let us understand that we cannot separate Vietnam from Indochina. If we are totally involved in one, we must inevitably become inextricably intertwined in the other. Throughout a thousand years of recorded history, this geographical area has been treated as a cohesive unit by every conqueror and each colonial power. It is considered one unit by the Communists. In order to effectively respond to them, we will have to become involved on the same level, or get out entirely. Are we ready for major, protracted war over all Indochina?

Do we want to become involved in a conflict that will rage indefinitely over an area immeasurably larger than the present involvement? Are we prepared to fight another Vietnam, and another, and yet another? Will we commit ourselves to setting up another regime that will be viable or in our favor in Cambodia and Laos? How long would that take? How many lives? How many billions?

Mr. President, I commend the study of Indo-Chinese geography to the distinguished Members of this body. We have thus far mainly struggled on the

cept with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate member in the case of a representative of a Member (or a member of his family) or with the Secretary General in the case of any person referred to in articles V and VI:

(b) A representative of the member concerned or the Secretary General, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

(c) Persons who are entitled to diplomatic privileges and immunities under the Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to members of diplomatic missions accredited or notified to the United States.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to vote on Executive I commencing tomorrow at 12 o'clock noon; that immediately following its disposition, the Senate vote on Executive J; and that immediately following the disposition of the vote on Executive J, the unfinished business be laid before the Senate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MANSFIELD. The votes on the treaties will be record votes. The yeas and nays will be obtained. I make this statement only so that Members of the Senate will be aware that there will be two record votes tomorrow on two separate treaties, one right after the other.

The unanimous-consent agreement was subsequently reduced to writing, as follows:

Ordered, That the Senate vote at 12 noon on Thursday, March 19, 1970, on the resolution of ratification to the Protocol to the International Convention for the Northwest Atlantic Fisheries (Ex. I, 91st Cong., 1st sess.); to be immediately followed by a vote on the resolution of ratification, with the two reservations, to the Convention on the Privileges and Immunities of the United Nations (Ex. J, 91st Cong., 1st sess.); following which the nomination of George Harrold Carswell will be the pending business before the Senate.

The PRESIDING OFFICER. What is the will of the Senate?

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR HANSEN TOMORROW

Mr. MANSFIELD. Mr. President, as in legislative session, I ask unanimous consent that, at the conclusion of the prayer and the disposition of the reading of the Journal tomorrow, the distinguished Senator from Wyoming (Mr. HANSEN) be recognized for not to exceed 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HRUSKA. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

VIRGINIA STATE GRANGE OPPOSES DIVERSION OF HIGHWAY TRUST FUNDS

Mr. BYRD of Virginia. Mr. President, I have a communication from the Virginia State Grange. It is a resolution concerning Federal highway policy. The resolution urges a consistent fiscal policy in the area of highway construction. It also discusses the Federal highway trust fund.

This resolution by the Grange says that the highway trust fund has been the target of various groups interested in seizing and taking from that fund money for other purposes, and it urges Congress to protect the integrity of the highway trust fund.

Mr. President, I want to say a few words about the highway trust fund. I feel that without this trust fund the great interstate highway system which has been developed in the last 15 years would not have come about.

I am going to do something today that I have never done before on the floor of the Senate, and it is a little sentimental, I must admit. I feel that the dominant factor, the dominant person, in the establishment of the trust fund and the safeguarding of that trust fund for so many years was my immediate predecessor in the U.S. Senate. I hesitate to say a great deal about him, because not only was he my closest and dearest friend, but he also was my father. In reading this resolution adopted by the Virginia State Grange, it brought back to my memory just what a strong and determined fight he made to establish this trust fund and then, after its establishment, to protect it.

So while I have some hesitancy, because of our relationship, in expressing my views on it, I do feel today that I want to commend the former senior Senator from Virginia for the part he played in this vitally important matter.

Mr. President, I ask unanimous consent to have the text of the resolution printed at this point in the RECORD.

There being no objection the resolution was ordered to be printed in the RECORD, as follows:

Whereas, the Virginia State Grange is vitally concerned with rising costs and spiraling inflation in every quarter; and

Whereas, highway transportation is one of the essential elements in modern agricultural production; and

Whereas, speedy completion of the Interstate Highway System and the upgrading of other roads and highways is vital to rural people's struggle for economic parity; and

Whereas, the Federal Highway Trust Fund has been the target of various groups interested in seizing the monies thereof for construction of rapid transit systems in large urban areas as well as for other non-highway purposes; moreover, said Fund has been the subject of various cutbacks for the stated purpose of fighting inflation but which in actuality served to create surpluses in the Fund from which revenues could be borrowed to finance other agencies of the federal government causing greatly increased costs in the highway program due to the resulting delays; and

Whereas, said Fund is entirely Self-liquidating, debt free and funded exclusively by taxes on motor vehicles and their owners and users thereby affecting no other federal program in any adverse way; Now, Therefore, Be it

Resolved, that the Virginia State Grange states its opposition to the diversion of highway trust funds for any non-highway purposes and the manipulation of the Highway Trust Fund revenues by the Executive Branch; moreover, we favor the enactment of legislation that would effectively suspend the numerous federal taxes providing revenues for the Highway Trust Fund during times in which the Executive Branches finds it necessary to cut back the highway program by withholding highway fund allocations to the States; and, Be it Further

Resolved, that we urge the speedy restoration of revenues borrowed from the Highway Trust Fund during the various stoppages of the highway program over the past few years in order that the present Interstate Highway System may be completed at the earliest possible date; and, Be it Further

Resolved, that copies of this resolution be sent to the members of Congress from Virginia, the Governor and the Master of the National Grange.

MESSAGE FROM THE HOUSE

A message from the House of Representatives by Mr. Hackney, one of its reading clerks, announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6543) to extend public health protection with respect to cigarette smoking, and for other purposes; that the House receded from its disagreement to the amendment of the Senate numbered 13 to the bill and concurred therein, with an amendment, in which it requests the concurrence of the Senate.

SUPREME COURT OF THE UNITED STATES

The Senate resumed the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HRUSKA. Mr. President, it would appear that the debate regarding the confirmation of Judge Carswell has entered—to paraphrase the late Justice Frankfurter—a semantic thicket.

This morning's Washington Post editorial page took me to task for suggesting—at least in view of the Post's editorial department—that Presidential appointments to the Supreme Court be placed under a quota system. The Post editorial was a reaction—almost precisely an overreaction—to remarks made by me in a television interview this past Monday regarding the President's power and right to nominate the man he deems fit and qualified to serve on the Court. In response to a question by the television interviewer I sought to reply to those political and editorial voices who, having failed to develop substantive arguments to the Carswell nomination, are

now reduced to making general, broad-gauged and unsubstantiated charges regarding the nominee's abilities.

Is he, these opponents have asked, a man of sufficient intellectual powers and talents to sit on the Supreme Court? The adjective—and let me stress it was not I but these opponents who first used it—"mediocre" has been applied in this case.

The point that I tried to make in the television interview—which I confess I made in a rather mediocre way—was that the measure of any man's intellectual powers and talents to hold a position depends more often than not on whether the persons giving out the grade are for or against the nominee. I have no doubt for example that some of the men sitting on the bench today, though considered by Judge Carswell's editorial and political critics to be brilliant, might be considered otherwise by other Americans.

I am reminded, too, of the aspersions cast on the qualifications of previous Supreme Court nominees in Senate debate of years gone by. In this regard, I invite the Post editorial writers, and other critics of the Carswell nomination, to examine the debates and editorial controversy surrounding President Roosevelt's nomination of Justice—then Senator—Hugo L. Black, August 12 to 17, 1937.

It was alleged of Senator Black at that time that he was unqualified to serve on the U.S. Supreme Court, inasmuch as his only prior judicial experience had been limited to having served for a brief period as a municipal night court recorder in Birmingham, Ala.

It was also charged that Senator Black lacked not only judicial experience but also judicial temperment.

Or, perhaps these oracles at the Post might want to examine the CONGRESSIONAL RECORD for February 3, 1965, when Senator Smathers presented a detailed analysis of the judicial experience of the then sitting members of the Court. His conclusion was that six of the nine—and this counted Justice Black—had no judicial experience.

As to whether Judge Carswell will be a brilliant judge, only history can decide. History is replete with men whose pre-confirmation critics were silenced by their brilliant performance on the Court. That Judge Carswell possesses here and now the capability of being such a Supreme Court Justice is, in my opinion, beyond question.

As for the question of semantics, the word "mediocre," if my dictionary serves me well, derives from the word "medio" or "medi," meaning middle. And while I certainly do not favor any quota system for the Supreme Court regardless of what the Post editorial says, if the question is raised as to whether that great body of citizens whom the editorial writers have come to call middle Americans, are entitled to a voice on the Supreme Court, my answer is a resounding yes.

In brief, I believe there is room on the Supreme Court of the United States even for a man not approved by those in charge of the grading system at the Washington Post, or any other newspapers of like mind, or who fails to meet the peculiarly biased demands of Judge Carswell's opponents.

Mr. President, in the television interview to which I referred, I said, as best I can recall, and here I am paraphrasing, but I will stand on the substance and the thrust of it:

Let no one leave this room with the idea that I accept for a moment the charge that Judge Carswell's record is mediocre.

I had just gone to the radio-television gallery after spending more than an hour on the floor of the Senate presenting the case for Judge Carswell. In that speech I said:

Judge Carswell's nomination is sound, logical, and desirable.

He is well qualified and well suited for the post.

He is learned in the law.

He is experienced.

He is a man of integrity.

He is possessed of proper judicial demeanor which he has displayed and exercised during his years of public service.

He enjoys the approbation and the respect of bench, bar and community.

All of these attributes appear affirmatively in his personal, professional and judicial acts and doings.

His elevation to the Supreme Court will serve to better balance the Court philosophically.

He should be confirmed.

In discussing the speech with reporters in the gallery, I sought to express the idea that whether a man is mediocre or distinguished, might like beauty be in the eye of the beholder. I suggested that whether a nominee is mediocre or not might depend on whether you are using the definition of his friends or his enemies. Theoretical legal scholars, I was trying to suggest, do not always make the best judges. A good judge, as I noted in my floor speech, needs practical courtroom experience. He needs commonsense—or, as we say in Nebraska, "horsesense."

Then, Mr. President, in dismissing the idea that the charge of mediocrity was really worth considering, I unfortunately asked the rhetorical question, "Even if he were mediocre."

That was clumsy of me, and I confess it candidly and in all good spirit. What I am about to say conveys the idea I failed to make in the press gallery.

Mr. President, here I ask unanimous consent to have the editorial printed in the RECORD at the conclusion of my remarks, I am vain enough to think someone will read them sometime, and will have the editorial I am discussing ready at hand.

The PRESIDING OFFICER (Mr. CRANSTON). Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, there is more than one criterion for requisite qualifications of a member of the Supreme Court. Next to integrity, comes at least average intelligence and what I just referred to as commonsense, both of which Carswell has demonstrated by working his way through college and up to his present position. These, of course, are basic requirements, necessary for future development after assuming the position and being confronted with complex judicial issues which will come before the Court.

Ideally, the Court would be composed of men of diverse backgrounds, representing the principal areas of the far flung Nation and the various philosophies of the citizens. Ideally, also, it would be at least principally composed of lawyers of substantial experience in the general practice of law who had, in addition, substantial experience as trial judges.

Commonsense, experience as a trial lawyer and experience as a trial judge are far more important than legal scholarship which too often is the only qualification an outstanding legal scholar has. Legal scholarship alone is woefully inadequate to qualify a lawyer for any bench, trial or appellate. Substantial experience as a lawyer in the general practice and especially a minimum of 10 years experience as a trial judge is the education and background needed to make it possible for a lawyer to become an effective appellate judge. A lawyer so equipped naturally becomes a legal scholar after appointment—elevation is an inaccurate term because the trial judge is at the least equally important in our judicial system—to an appellate bench by the very nature of the appellate duties. He should become a far superior scholar to one who has not had trial experience as a lawyer and judge because he understands the trial process and knows how to apply the law properly in specific factual situations in a practical and just manner. He does not get lost in the technicalities of the law as does a pure scholar who knows only theory.

It is a false basis to say that Judge Carswell has not shown legal scholarship in the written opinions rendered by him as a trial judge. Busy trial judges do not have time to indulge in the niceties of legal scholarship. They must decide most questions instantly while sitting in the trial of cases without opportunity for leisurely research in their library with the assistance of their law clerk. Those who cite the reversal of his decisions by appellate courts are not using a valid criterion. Appellate judges are not all blessed with divine wisdom, either.

The demands of the trial bench are great but very rewarding for one who wishes to understand the judicial process from the ground up. He acquires in the trial process, in the disposition of hundreds of cases a year—and that was the experience of Judge Carswell during his 11 years on the district court—broad experience that can be acquired in no other way and that is vital for an ideal appellate judge. He learns to evaluate evidence, he observes the tactics of lawyers appearing before him, learns why they do the things they do. When he becomes an appellate judge, he knows how to read the record meaningfully because he can read between the lines where the vital part of the record is contained. The records which come before the appellate courts, which are the basis of appellate decisions, are made by trial judges. In the trial process he acquires an insight that can be acquired in no

other way. He knows the problems of the litigants and approaches the appellate bench with a vast knowledge that contributes to what we call commonsense, which is a rare quality far too often lacking in our appellate judges.

It is so manifestly unfair to say that a lawyer with 10 years' experience on the trial bench is unqualified to sit on the Supreme Court because he has just average intelligence and has not demonstrated great ability as a scholar, when the fact is that he has acquired necessary experience that cannot be obtained anywhere else and has been involved in the merits of as many actual legal controversies as an appellate judge will review in an entire lifetime. A trial judge is the factfinder which is the most important step in the judicial decisional process. As a trial judge he has learned and will not forget as an appellate judge that under our judicial system it is the province of an appellate court to review the record for errors of law and not to try the case de novo from a cold record, and he will not be avid to substitute his judgment for that of the trial judge and jury who heard the evidence at firsthand.

Whether a judge is a good judge is not a justiciable issue. It is a matter of opinion which is usually based upon whether the litigant or lawyer expressing the opinion has been successful or unsuccessful when appearing before him and whether his political ideals are the same as the person expressing the gratuitous opinion.

It would seem that the principal objection to Judge Carswell is that he has just average intelligence and is not a profound legal scholar. Geniuses are rare. Many of our greatest men have possessed just average talents. That this is the principal objection to Judge Carswell speaks well for him since it proves that there is no valid deficiency in his qualifications and his detractors must rely on their opinion, based on incomplete knowledge since only those who have known Judge Carswell intimately for a long period of time know and are qualified to express a valid opinion as to his innate qualifications. It is manifestly unfair that a man carefully chosen by our President and Attorney General, both astute lawyers, both good men, both unquestionably having the ardent desire to choose a Justice for the Court who will do them honor in the years to come, should be submitted to the indignity of repeated press dispatches impugning his God-given talents as being only average.

Historically, our Justices have developed into either great Justices or those not so great after ascending the Bench. No one can prophesy accurately whether an appointee will become great. But no one has dared to attack Judge Carswell's integrity and most of his detractors have at least given him credit for average intelligence. None that I have heard have mentioned the value of his experience as a trial judge.

I venture to say that if he had had no experience at all as a judge, the opponents would have made their principal objection to his nomination that he lacked experience as a trial judge.

My opinion is that his rise in life from an obscure country boy who worked his way through college to his present position speaks well for him. The fact that he is from the southern part of our country should not condemn him. After all that is part of America and some of our greatest men who arrived at the point of true greatness began their careers with that apparent handicap. I predict that time will prove Judge Carswell's greatness and the good judgment of the President in choosing him.

EXHIBIT 1

THE SUPREME COURT: A QUOTA FOR MEDIOCRITY?

Until Senator Hruska brought it up Monday, we had never given much thought to selecting justices of the Supreme Court on the quota system. But now that he has suggested it—"There are a lot of mediocre judges and people and lawyers," he said, "and they are entitled to a little representation, aren't they?"—it raises all kinds of possibilities. For one thing, it would simplify the life of the President. He could limit his search for a nominee when a seat fell vacant to the group that was then underrepresented. And it would greatly simplify the life of those in the Senate who must now defend the President's nomination of G. Harrold Carswell.

Of course, the quota system would create a few problems. If the mediocre judges are entitled to have one of their own kind on the court, what about the bad judges? Heaven knows, there are enough of them to make up a sizable constituency. Or what about one to represent the old judges? Or the unethical judges or, as Senator Long suggested, how about some judges who were C students instead of just ones who were A students? Or, for that matter, what about the non-lawyers, aren't they entitled to some justices all their own?

We are not sure how far Senator Hruska would want this idea of quota representation to spread. We rather doubt that the body in which he sits would acknowledge a system under which a senator was selected because it was time for the mediocre people to be represented by a mediocre man.

Be that as it may, if Senator Hruska is serious, he'd better tell the President. Mr. Nixon, after all, has talked all along about appointing "extremely qualified" men to the court, stressing that he wasn't interested in quotas except one for "strict constructionists." Somehow, we doubt that Mr. Nixon would want to concede that he was departing from the standard of excellence all Presidents have clung to publicly in nominating justices—even when they departed from it in practice.

The problem of mediocrity and the court, however, is not a laughing matter for two quite different reasons. One is the fact that there is no tougher nor more responsible job in government, save for the presidency itself, than that of a Supreme Court justice. He must cast a vote on more than 3,000 cases each year; listen to arguments on more than 120 cases; write at least a dozen full-dress opinions if he is to bear his share of the load. This is not a job for a man of mediocre talents. The court's work suffers any time it is done by men of run-of-the-mill abilities.

Even more important is the burden of constitutional interpretation. Perhaps the late Learned Hand, whose work is hailed almost universally as that of a great judge, explained best what qualifications a man needs for such fateful challenges:

"I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class."

Somehow this doesn't strike us as work for mediocre men, for students with nothing more to recommend them than a gentleman's C, or even as far as that goes, B-plus. Although this country has been obliged to accept mediocrity upon occasion in presidents and senators—and even Supreme Court justices—it has never been public policy to the best of our recollection to go out actively in search of it. Certainly this is not the time, and the Supreme Court is not the place, to start.

Mr. DOLE. Mr. President, will the Sentator yield?

Mr. HRUSKA. Mr. President, I yield to the Senator from Kansas.

Mr. DOLE. Mr. President, I was privileged to hear the Senator from Nebraska make his statement with reference to Judge Carswell. Let me emphasize again, as I understand the statement of the Senator, Judge Carswell's nomination is, first of all, sound, logical, and desirable; that he was and is well qualified; that he is learned in the law; that he is experienced; that he is a man of integrity; that he does possess the proper judicial demeanor. He has displayed and exercised the proper demeanor for a number of years as a U.S. attorney, as a Federal district judge, and now as a Federal circuit judge, and that he does enjoy and continues to enjoy the approbation and respect of the bench, the bar, and the community.

This I understand is the position of the Senator from Nebraska. To this I would add another source. I have in my hand a statement prepared by Prof. James William Moore, who, as we know, is the Sterling Professor of Law at Yale University.

This statement was prepared for a nationwide television program. It was not used. But let me read from a portion of the statement with reference to his consideration of Judge Carswell.

The part I read appears on pages 4 and 5 and is as follows:

We of the Ivy League—the big, prestigious law schools such as Yale, Harvard and Columbia—are often intellectual snobs. Any lawyer, judge or professor who does not have an Ivy League degree or has not taught at one of our schools and written a law review article or a book is almost by hypothesis blessed with mediocrity. We seldom go west of Yankee Stadium or south of the Potomac, except to jet in the clouds over America en route to an association or business conference.

Having been in each of the fifty states, and having taught in most sections of this country, I have long been impressed with this country's diversity—economic, social, moral, and ideological. In my opinion the Supreme Court should be representative of that great diversity. That diversity will undoubtedly produce difference of outlook and, among judges, difference of judicial philosophy. But it adds nothing to intelligent discussion of the issues to use such "code words" as "mediocrity" and "insensitivity" when what the critics really mean is that they disagree with the nominee's philosophy.

I think the Senator from Nebraska will agree that this professor of law who, as I indicated, is the Sterling Professor of Law at Yale University and who has been teaching for 34 years, says it very well. I think there is a certain amount of intellectual snobism about those who would say the nominee is insensitive in one case, and in the very next case that the nominee is mediocre.

I would guess that the Washington Post should be expert on what may or may not be mediocre.

I would place my emphasis where the distinguished Senator from Nebraska did, on the positive fact surrounding the nomination made by a President learned in the law, and suggested to the President by an Attorney General who is also learned in the law.

Certainly no one questions Judge Carswell integrity, or his honesty, or ability or the respect he receives from the bar and the community.

I share the views expressed in the first instance by the Senator from Nebraska and restated on the floor of the Senate.

Mr. HRUSKA. I thank the Senator very much. It is noteworthy that Professor Moore has been on the faculty of an ivy league school for more than one-third of a century and he should know what he is talking about. As we all know, he is highly regarded at the bar.

I would make this further observation. No one has dared attack Judge Carswell's integrity, and most of his distractors at least give him credit for average intelligence. We must remember that there is ample evidence in the record from people who have spoken highly of him, who call him an excellent trial judge and appellate judge, and state that he not only possesses many fine attributes which would make him an outstanding member of the Supreme Court, but that he has a definite capacity for greatness.

It is interesting to observe that the witnesses who called him mediocre do not and have never known him. They base their conclusions upon the printed word with regard to his juristic attainments.

Those who have come out with these high opinions as to his future, have known him well. They have appeared before him and tried lawsuits in his court. These are the people who should know of his qualifications. Professor Moore is in an excellent position to make such a judgment.

Mr. DOLE. Mr. President, will the Senator yield further?

Mr. HRUSKA. I am happy to yield to the Senator from Kansas.

Mr. DOLE. I ask unanimous consent at this time to have printed in the RECORD the biographical sketch of Prof. James William Moore and the entire statement which I indicated was prepared for a network television program but was not used. It indicates the great work Judge Carswell did in connection with the establishment of a law school at the Florida State University.

There being no objection the material was ordered to be printed in the RECORD, as follows:

BIOGRAPHICAL SKETCH OF PROF. JAMES WILLIAM MOORE

Professor Moore is the holder of a named chair—Sterling Professor of Law—at Yale University. He has been a member of the faculty of Yale Law School for more than thirty years, and is a member of the Standing Committee on Practice and Procedure of the Supreme Court of the United States. He is the author of many legal articles and books, chief among which are the authoritative "Moore's Federal Practice", and "Collier on Bankruptcy". In addition to his teaching duties, he is presently counsel to the trustee of the New York, New Haven and Hartford Railroad, and has been since the beginning of its reorganization in mid-1961. Professor Moore was born in Oregon, grew up in Montana, and has lived for nearly a third of a century in Connecticut. En route to becoming a distinguished authority on federal procedure, he worked as a cowpoke and as a professional prize fighter.

REMARKS OF PROFESSOR MOORE

Some who oppose confirmation of Judge Carswell as an Associate Justice of the Supreme Court have said that he is a "racist" or a "segregationist". I know differently, from extended personal contact with Judge Carswell in connection with a matter in which both he and I were interested. I have a firm and abiding conviction that Judge Carswell is not a racist, but a judge who bas and will deal fairly with all races, creed, and classes. If I had doubts, I would not be here, for I have a minority ethnic strain, that of an American Indian, and during all my teaching life, over 34 years on the faculty of tbe Yale Law School, I have championed the rights of all minorities. About five years ago a small group of jurists, educators, and lawyers asked my help in connection with the establishment of a law school at Florida State University at Tallahassee. Judge Carswell was a very active member of that group. As I came to know him in working with them, I was impressed with his views on legal education and the type of law school that he desired to establish. He was very clear about the fact that he wanted a law school free of all racial discrimination—one offering both basic and higher legal theoretical training, and one that would attract students of all races and creeds and from all walks of life and sections of the country.

Judge Carswell and his group succeeded admirably. Taking a national approach they chose, as their first dean, Mason Ladd, who for a generation bad been Dean of the College of Law at the University of Iowa and one of the most respected and successful deans in the field of American legal education. Dean Ladd, too, was impressed with Judge Carswell, both as a man and as a judge. He has written the Senate Judiciary Committee a letter to that effect, stating:

"Carswell has an innate sense of fairness . . . is a careful student of the law, is a very hard worker. He is both scholarly and practical minded. He sees issues quickly but carefully explores the authority and legal materials involved in reaching a decision. I regard Judge Carswell as free from prejudice upon the current issues of the day and feel that he will search for the right solution based upon the law and the facts."

Dean Ladd concluded his letter by urging confirmation of Judge Carswell.

From the vision and support of the Carswell group has emerged, within the span of a few years, an excellent, vigorous law school. For example, every member of the first graduating class of Florida State University—consisting of about 100 students—passed the bar examination on the first go-round. This is a hallmark of distinction for any law school.

We of the Ivy League—the big, prestigious law schools such as Yale, Harvard and Columbia—are often intellectual snobs. Any lawyer, judge or professor who does not have an Ivy League degree or has not taught at one of our schools and written a law review article or a book is almost by hypothesis blessed with mediocrity. We seldom go west of Yankee Stadium or south of the Potomac, except to jet in the clouds over America en route to an association or business conference.

Having been in each of the fifty states, and having taught in most sections of the country, I have long been impressed with this country's diversity—economic, social, moral, and ideological. In my opinion the Supreme Court should be representative of that great diversity. That diversity will undoubtedly produce difference of outlook and, among judges, difference of judicial philosophy. But it adds nothing to intelligent discussion of the issues to use such "code words" as "mediocrity" and "insensitivity" when what the critics really mean is tbat they disagree with the nominee's philosophy.

I note the testimony before the Senate Judiciary Committee of the General Counsel for the United Automobile Workers, who criticized Judge Carswell as having "graduated from the third best law school in Georgia, I believe there are four . . ." I do not personally subscribe, and I certainly hope that the President, the United States Senate, and the Nation as a whole will never subscribe to the notion that only graduates of Ivy League law schools may be confirmed as Justices of the Supreme Court of the United States.

Indeed, I would go further and say that one of the reasons why I feel strongly that Judge Carswell ahould be confirmed is the fact that he will restore balance to the Supreme Court of the United States. Balance may be of different kinds—for example, the factor of geographical balance is one that numerous Presidents have considered in the past, and which certainly merits consideration here. Florida is the most populous state of the Union never to have had a Supreme Court Justice, and the South as a whole can fairly be described as having been underrepresented on the Supreme Court in the last generation. Ethnic, religious and racial considerations have undoubtedly played a part in nominations in the past and will do so in the future.

Judge Carswell will bring to the Court not only balance, but ability and experience as well. His experience encompasses both private and public practice, and he has served both as a trial and an appellate judge. I am generally familiar with his written opinions, and especially in the areas of the law with which I am particularly knowledgeable—federal practice, bankruptcy, and creditors' rights—I find them to be of excellent quality.

The President has chosen well. It is my belief and hope that Judge Carswell will be confirmed by the Senate.

Mr. DOLE. Mr. President, I might add that Professor Moore speaks as a member of a minority group since he is part American Indian. He knows, of course, about championing causes for the rights of minorities because he is a member of a minority group himself. Furthermore, as the Senator from Nebraska did today, the professor also notes that we are talking about the nomination of a man qualified by experience as a Federal district attorney and Federal district judge, and now as a circuit judge.

Certainly no one in this Chamber suggests that this experience disqualifies the nominee from sitting on the Court.

Mr. HRUSKA. I happen to be familiar with the document you describe. The manuscript was prepared by Professor

Moore for use on a television show. After having written it, he was advised that the format of the program would not allow him to read any prepared statement, but he drew from it and certainly supports it. Those are his views, as he expressed them.

Mr. HANSEN. Mr. President, will the Senator yield?

Mr. HRUSKA. I am delighted to yield to the distinguished Senator from Wyoming.

Mr. HANSEN. I am happy to have an opportunity to speak in support of Judge Carswell and to underscore the very basic and sensible points that have been made by my distinguished colleague, the Senator from Nebraska.

The Senator from Nebraska, speaking earlier in this Chamber, said, with reference to the speech that he had made when talking to reporters in the gallery:

I sought to express the idea that whether a man is mediocre or distinguished, might, like beauty, be in the eye of the beholder.

The distinguished Senator from Nebraska continued:

A good judge, as I noted in my floor speech, needs practical courtroom experience. He needs commonsense—or as we say in Nebraska, "horse sense."

He continued by saying:

There is one more criterion for requisite qualifications of a member of the Supreme Court. Next to integrity, comes at least average intelligence and what I just referred to as common horse sense, both of which Carswell has demonstrated by working his way through college and up to his present position.

I think what the distinguished Senator from Nebraska, who is the ranking minority member of the Committee on the Judiciary, has said needs to be pondered by all Americans. We have been debating, and likely will continue to debate for some days in the future, the qualifications of Judge Carswell. We are discussing whether he measures up to those tests that may be imposed on him by each Member of this body, for so far as I can determine the Constitution imposes a very broad standard which I am sure everyone would have to agree Judge Carswell eminently meets.

But beyond that what may qualify Judge Carswell in the eyes of the Members of this body will be determined by the self-imposed qualifications that each Member of the body may want to impose upon the judge.

Actually, he measures up very well. For those who contend he is mediocre—and that was not the word of my distinguished colleague from Nebraska as he pointed out; those words were used by others, not by him—I wish to call attention to what has been said of some other distinguished jurists.

When the distinguished minority whip spoke in support of Judge Carswell yesterday, he called attention to the fact that:

Chief Justice Charles Evans Hughes was bitterly opposed by some who felt that his prior legal representation of large corporations had committed him to their philosophy. As the noted scholar, Joseph P. Harris, has observed:

"It was anomalous that most of the arguments against him dealt with decisions of the Supreme Court in which he had no part, on the unsupported assumption that had he been a member he would have sided with the conservative majority of the Court. The opposition served a useful purpose, though had it prevailed the country would have been deprived of the services of a Chief Justice who now ranks with Marshall and Taney."

I would call to the attention of the detractors of Judge Carswell what was said by the distinguished columnist, Carl Rowan.

Mr. Rowan in his column said:

I am far more impressed by Judge Carswell's frank and unambiguous repudiation of white supremacy in 1970 than by his endorsement of racism as a 28-year-old law school graduate struggling to defeat an uncompromising white supremacist.

At age 28 or 38 you could find Lyndon B. Johnson endorsing segregation and making the racist noises expected of a Texan politician. But at age 58 Johnson was the greatest friend of civil rights and the black man ever to occupy the White House.

That says a lot about human redemption.

I would add that I think it says also a great deal about Judge Carswell.

As I interpret Mr. Rowan's remarks, he says, quite frankly, that he likes the straightforward manner in which Judge Carswell has responded to questions. He likes his lack of ambiguity.

I think it does all of us good to see people in prominent positions who readily admit that what they may have said earlier in their lives should not have been said. Judge Carswell has renounced what he said at age 28.

I would only gather, from what Mr. Rowan says, that he finds Judge Carswell most acceptable by this measure.

I ask my distinguished friend from Nebraska if, in his opinion, I am correctly interpreting what Carl Rowan said.

Mr. HRUSKA. I would think so. I have not read the entire article, but certainly the fashion in which he judges the episode of the 1948 speech and his drawing of the parallel with former President Lyndon B. Johnson is a candid appraisal of the Judge's remarks.

Mr. HANSEN. I admit the Washington Post is entitled to its bias. It has demonstrated that bias on many, many occasions. It does not always concern itself consistently. In yesterday's Wall Street Journal, the following inconsistency was pointed out.

I ask unanimous consent that, at the conclusion of my remarks, there be included in the RECORD the editorial from the March 17 issue of the Wall Street Journal, entitled "Playing With Fire."

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HANSEN. That is simply to underscore the fact that the Washington Post gets on both sides of an argument and is not a bit concerned about consistency.

I am pleased that the distinguished Senator from Nebraska has taken this occasion to get back into context the thread that ran throughout his very worthwhile speech on the floor of the Senate. Now all of us might understand more clearly the interesting and extremely worthwhile background of Judge Carswell. He has had the sort of experience in the past which I feel will enable him to be a very fine jurist, in fact an outstanding jurist.

I can recall, in the years I have watched the behavior of members of the Supreme Court, that it is very easy indeed to misjudge what a man may be. It has been said that while one can attempt to categorize a person, and while he may attempt to predict what he will be when he becomes a member of the Court, no one really knows. I say that about Justice White, who I think is a most distinguished member of the Supreme Court, a man who, in my judgment, has earned the respect of most Americans.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. HANSEN. I yield.

Mr. HRUSKA. How much judicial experience did Justice White have before he was named to the Supreme Court?

Mr. HANSEN. I think the Senator can answer that question better than I can, but it is my understanding that he had absolutely none.

Mr. HRUSKA. That is correct.

Mr. HANSEN. I think it is also a fact that a number of members of the Court who stand out as examples of the very finest of this coequal branch of Government were elevated to the Court without any prior judicial experience, experience that would have been invaluable.

What I think is important to understand is that each man must make his own way on the Court. It certainly cannot be said, as I was attempting to point out, that one can identify where a person will be philosophically. I spoke about Justice White. I know at the time of his appointment it was believed by many that he would be a very liberal member of the Court. I suspect that today most lawyers would not so categorize him. He is an outstanding jurist. I compliment the late President Kennedy upon his selection of Justice White for the Court. I have every confidence that when the nomination of Judge Carswell is confirmed, as I believe indeed it will be, he will write his own record on the Court, and he will eminently preserve the confidence that has been reposed in him by the President, and he will justify and merit the high regard for him that has been epitomized by the remarks of the Senator from Nebraska.

EXHIBIT 1

PLAYING WITH FIRE

The editorial page of the Washington Post, which we read every day and recommend for its clarity and style, ran a couple of items side by side last week on the general subject of disobeying the law.

The first was an editorial about the white violence against black school children in Lamar, South Carolina. It suggested the blame for such demented acts must be shared by our national leaders, especially those who have been talking equivocally about the Government's commitment to the equality of all its citizens. The editorial singled out Senator Thurmond and Vice President Agnew, who, it said, "have been playing with matches in public for some time now, and yet they want us to know immediately and for the record that if there is one thing they deplore its fire."

Beside it was an article entitled "One Way of Saying 'No More Deaths'," which ap-

plauded, with reservations, the anti-war protesters who have invaded draft centers and ransacked defense-companies' offices to dramatize their conviction that when life is at stake, marching is not enough. The article approvingly quoted Howard Zinn, a professor of political science at Boston University: ". . . And it is the mark of enlightened citizens in a democracy that they know the difference between law and justice, between what is legal and what is right . . ."

These two items are not remarkable; you can hear approximately the same two arguments almost anywhere these days. We single out the Post only because this juxtaposition presents us with the opportunity to say that we find the two statements utterly irreconciliable.

It is unfortunately true enough that Mr. Agnew and Senator Thurmond, though we wouldn't equate them, may have said things that encouraged some of their listeners to violence. Such people are easily encouraged. They are, after all, every bit as self-righteously zealous as the people who rip up draft offices. They believe *they* know the difference "between what is legal and what is right."

Which has always been our difficulty understanding how anyone can advocate setting the individual conscience above the law. We don't say the law is always wise, just or moral, but if you excuse the office-ransackers then you must also pardon the race warriors, and after them the people who set bombs in public buildings, and eventually anyone else who can claim a veneer of morality for his whims.

We appreciate that what the Post article condones is not a ventilating of whims but an expression of deeply felt conviction. The difficulty is drawing the line, being able to ensure that what begins in a limited, more or less harmless way doesn't get out of control.

Like playing with fire.

Mr. HRUSKA. I thank the Senator from Wyoming very much. He may be interested to know that, in addition to the examples cited by the Senator from Michigan, the distinguished minority whip, there was the historical instance of Judge Brandeis, highly beloved and greatly respected by all liberal groups and by all scholars and by all professors of the law. Yet when he was nominated in 1916 by President Wilson, there was severe and very bitter opposition to his confirmation.

Mr. President, seven past presidents of the American Bar Association opposed him; 55 prominent Bostonians, led by Harvard President Lowell, opposed him; and what do you suppose, Mr. President, their objection was? In writing, they put it, that he lacked proper "judicial temperament."

In light of the history which he compiled and the fashion in which he had conducted himself before confirmation of his nomination, as well as when he became a member of the Court, the seven past presidents of the American Bar Association and the 55 prominent Bostonians, led by President Lowell, could not have been more wrong. There again, what we call beauty is that which is being seen by the eye of the man who sees it. They did not want to see the virtue or merit in the appointment, so they let their emotions get away from them.

Mr. HANSEN. Mr. President, will the Senator from Nebraska yield?

Mr. HRUSKA. I am happy to yield.

Mr. HANSEN. The Senator has referred to the actions of the seven former presidents of the American Bar Association when the nomination of the late Justice Brandeis was before the Senate for confirmation. It might be worth noting, as I believe indeed it is, that they said, in addition to the statement that has just been read by the Senator from Nebraska:

> Taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.

I suspect that the persons who uttered those words must have had many, many occasions to regret such an unwarranted indictment of a great jurist. I think that most of us would agree that Justice Brandeis indeed looms large as one of the great men on the Supreme Court. Does the distinguished Senator from Nebraska suspect that it must have been a source of continuing embarrassment to those seven former presidents of the American Bar Association that they ever said a thing about the reputation, character, and professional career of Mr. Brandeis as making him unfit to be a member of the Supreme Court of the United States?

Mr. HRUSKA. There would be ample ground to feel a little embarrassed about it and perhaps bothered about it in later years.

Mr. HANSEN. I should think so.

Mr. HRUSKA. I thank the Senator from Wyoming, as I do again the Senator from Kansas (Mr. DOLE), for having engaged in this colloquy.

Mr. GRIFFIN. Mr. President, will the Senator yield?

Mr. HRUSKA. I am happy to yield.

Mr. GRIFFIN. I regret that I was not in the Chamber throughout the presentation made by the distinguished Senator from Nebraska, but I have had an opportunity to scan the text of his remarks. I commend him on another outstanding contribution to the debate on this nomination.

It is my belief that his statement puts in perspective the issue that has developed concerning the qualifications of Judge Carswell.

As a member of the Judiciary Committee, I listened and watched the nominee testify during the hearings. As one judge of his performance, I concluded—and it is in the record—that he handled himself and answered the questions in a manner that was anything but mediocre. In my view he was an outstanding and an excellent witness.

I was impressed with his demonstration of an excellent background in the law and in legal history, and his acquaintance with the history of the Supreme Court.

Certainly, I would not presume to be an adequate judge of another man's potential for greatness. Who am I to make such an assessment? Yet, as Senators, we have to try to pass on such nominations and, as best we can, we must decide whether such a nomination should be confirmed.

I have noticed the argument of some that Judge Carswell's decisions are not voluminous and wordy; so far as I am concerned, that is no argument at all. Certainly, I would not accept the contention that those in the Senate who make the longest speeches necessarily make the greatest contribution to the deliberations of this body. Indeed, I rather admire a Senator or a judge who can express his thoughts succinctly and get to the point. Needless to say, one of the greatest speeches ever made, and one of those which will be remembered the longest was a very short speech by Abraham Lincoln. I refer, of course, to the Gettysburg Address.

Mr. President, I have also noticed the argument of some who say that Judge Carswell has not authored many articles.

Of course, a review of his biography reflects that when he was out of law school only a few years he began working for the Government as a U.S. district attorney. Then he went on the bench and served as a district judge for 10 years, and finally went to the circuit court of appeals.

I realize that there may be a justice or judge here or there who busies himself writing articles. But it is my impression that most sitting judges, the outstanding ones, are very busy handling the business of the court. Furthermore, I believe a good judge is reluctant—and with good reason—to write articles and engage in extrajudicial writing which would tend to put him on record concerning issues as to which he might later be called upon in a case to decide.

I really do not see any merit at all to that criticism, which I have heard and read from time to time.

Mr. HRUSKA. What the Senator says is true. During his 11 years as a trial judge, Judge Carswell presided over and disposed of 4,500 cases. For all but a year, or maybe 18 months, of that career he was the sole judge in that district. The last year or 18 months he had added to his district another district judge.

So during that long period of time, he carried a heavy burden. In addition to his trial that he actually sat in judgment on and presided over, responsibilities he had to manage the district. He had to make the arrangements for the jury terms and the grand juries, and do all the other administrative work that is involved in a busy court.

It would tax one's imagination to understand where a man having on the average about 500 cases a year—would find time to do the research and creative work of writing a book. I must commend those who carry the heavy burden of being judges and still find time for literary work.

Mr. GRIFFIN. The Senate is, and should be, interested in excellence. We should strive to join in the appointment, if possible and to the extent possible, of outstanding Supreme Court Justices. It would be my view that, while no one can predict with certainty whether any nominee will become a great Justice of the Supreme Court, I would say that this nominee has credentials and experience which give him a much better start, and indicate a greater likelihood, that he might achieve greatness as a member of the court, than has been the case with respect to a number of nominees in the past, who have been confirmed by the Senate, and who are now recognized by history as having been great justices of the Supreme Court.

So once again I commend the Senator from Nebraska.

Mr. HRUSKA. I thank the Senator. It might interest him to know that in this commentary of Prof. James William Moore, a man who has been teaching law school and who has practiced also, and had a tremendously fine career in the practice and the teaching of law, there is this language:

> Having been in each of the 50 States, and having taught in most sections of the country, I have long been impressed with this Court's diversity—economic, social, moral, and ideological. In my opinion, the Supreme Court should be representative of that great diversity—

Mr. President, that includes the middle America that we hear so much about these days—

> that diversity will undoubtedly produce difference of outlook and, among judges, difference of judicial philosophy; but it adds nothing of intelligent discussion of the issues to use such code words as "mediocrity" and "insensitivity," when what the critics really mean is that they disagree with the nominee's philosophy.

It is language like that which, it seems to me, should be very well considered in connection with the subject about which I have undertaken to make remarks during the course of this afternoon.

Mr. President, I yield the floor.

ORDER FOR TRANSACTION OF ROUTINE BUSINESS TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, at the completion of the remarks by the able Senator from Wyoming (Mr. HANSEN) on tomorrow, there be a period for the transaction of routine morning business, that Senators be permitted to make speeches therein, and that there be a limitation on those speeches of 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECAPITULATION OF SENATE ORDERS FOR TOMORROW

Mr. BYRD of West Virginia. Mr. President, for the information of the Senate, I would like to recapitulate briefly the orders for tomorrow.

The Senate will adjourn shortly, as in legislative session, until 11 o'clock tomorrow morning. Following the disposition of the reading of the Journal, the able Senator from Wyoming (Mr. HANSEN) will be recognized for 20 minutes; following which there will be a period for the transaction of routine morning business, with statements therein limited to 3 minutes; following which, at 12 o'clock noon, there will be a rollcall vote on Executive I, 91st Congress, first session, to be followed by another rollcall vote on Executive J, 91st Congress, first session; following which the unfinished business will be laid before the Senate by the distinguished Presiding Officer.

ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment, as in legislative session, until 11 o'clock tomorrow morning.

The motion was agreed to; and (at 5 o'clock and 52 minutes p.m.) the Senate adjourned until tomorrow, Thursday, March 19, 1970, at 11 a.m.

NOMINATIONS

Executive nominations received by the Senate March 18, 1970:

U.S. COAST GUARD

The following-named graduates of the Coast Guard Academy to be permanent commissioned officers in the Coast Guard in the grade of ensign:

Michael Ray Adams
Michael Duane Allen
William Howson Anderson
Samuel Janison Apple
John Holland Baker, III
Timothy Glenn Balunis
Donald George Bandzak
James Ronald Beach
John Lawrence Beales
William Lawrence Beason, Jr.
Edward Joseph Beder, Jr.
David Stephen Belz
Thomas Edward Bernard
David George Sidney Binns
Ernest Joseph Blanchard, IV
Allen Kenneth Boetig
Richard Walter Brandes
Lawson Walter Brigham
Charles Richmond Brown
James Stuart Brown
Joseph Lance Bryson
James Steven Carmichael
Roy James Casto
John Davis Clark, Jr.
James Byrne Clarke
Jeffrey Nathaniel Compton
Rodney Longhurst Cook
Roger Charles Cook
Richard Marshall Cool
Michael Dillon Cooley
Richard Dail Crane
Robert George Cross
Terry Michael Cross
David Dahlinger
Thomas Lee Davis
Edward John Dennehy
Christopher Desmond
Donald Robert Dickmann
Terrance Martin Edwards
John Haley Fearnow
Gale Wayne Fisk
Michael Francis Flessner
James Black Friderici
Gerald Alan Gallion
Melvin Wayne Garver
John Anthony Gaughan
Michael Don Gentile
Guy Turner Goodwin
Victor Joseph Guarino
Paul Leonard Hagstrom
Terrance Patrick Hart
Harold Wayne Henderson
John Edward Hodukavich
Thomas Michael Howard
John Francis Hughes
Conrad Richard Huss
David Bruce Irvine
Paul Chandler Jackson
George Francis Johnson
Horton Winfield Johnson
David Timothy Jones
Richie McMillan Keig
Harold Gregory Ketchen
Michael John Kirby
John Kent Kirkpatrick
David Bruce Klos
Glenn Gene Kolk
William Edward Kozak
Kenneth Charles Kreutter
Lawrence Vincent Kumjian
Edmund Francis Labuda, Jr.
Larry Franklin Lanier
Kim "I" MacCartney
Steven Andrew Macey, Jr.
Andrew Malenki III
David John Maloney, Jr.
Ronald Anthony Marcolini
James Gordon Marthaler
William Anthony McDonough, Jr.
John Francis McGrath, Jr.
Gary Robert McGuffin
Edward Allen McKenzie
Dennis Robert McLean
Thomas Lee Mills
Anthony Thomas Mink
John Ross Mitchell
Theophilus Honiz III
David Richard Moore
Richard Stephen Muller
John Michael Murphy
Spencer Michael Neal
James Quentin Neas, Jr.
Mark Andrew O'Hara
Peter Carlton Olsen
James Clifford Olson
Donald Burnham Parsons, Jr.
Michael Mariano Pawlik
Marc Pettingill
Douglas Craig Phillips
Peter Quido Pichini
William Wilbert Pickrum
Dennis Michael Pittman
Robert Lee Pray
Thomas William Purtell
John Edward Quill
Kevin Lawrence Ray
David John Reichl
Stephen Michael Riddle
Thomas Bernard Rodino
Henry John Rohrs, Jr.
Stephen Richard Rottler
Albert Joseph Sabol
Julius Benjamin Sadilek, Jr.
Steven Edward Sanderson
Fredrick Henry Sellers, Jr.
Philip Edward Sherer
Robert Dennis Sirois
Anthony Raymond Souza
Alan Edward Spackman
Frederick Norman Miner Squires III
Douglas Bruce Stevenson
Bruce Beverly Stubbs
Anthony Stanislaus Tangeman
Thomas Brogden Tayor
Timothy Lenox Terriberry
Myron Frank Tethal
William Brinker Thomas
Joel Alan Thuma
Frank James Tintera, Jr
Ralph Dean Utley
Jonathan Michael Vaughn
Robert Julius Vollbrecht
Gregory Steven Voyik
Alan Frank Walker
Chester John Walter
George Paul Waselus
Charles Rodney Weir
Robert John Williamson, Jr.
David Edward Wilson
Thomas Xavier Worley
Ralph Arner Yates
Thomas Joseph Ziezlulewicz
Kenneth Michael Zobel

The following-named officers of the Coast Guard for promotion to the grade of lieutenant (junior grade):

Philip K. Hauenstein	Robert L. Hoyt
Donald A. Kirkham	William J. Hamilton
Jerry E. Bowersox	Michael T. Burnett
Robert B. Millson	Ronnie T. Wheeler
James L. O'Brien	John H. Burger
Robert M. McAllister	Paul D. Huffman
James L. Jones	Miller R. Chappell
Gary A. Bird	Curtis J. Olds, Jr.
Theodore C. Scheeser	Douglas R. Peterson
Paul E. Hill	Carl R. Sosna
John E. Steve	Michael J. Arnold
Richard L. Youdal	Richard D. Carmack

requirements. I welcome this feature for it promises adequate coinage that will circulate and meet the coinage needs of our commerce. The inclusion of a cupro-nickel dollar coin means the return to general use of a cartwheel dollar to fill the void left by the disappearance of our silver dollar. This will be applauded in my State of Nevada and, I think, throughout the country.

As Members of the Senate know, I have for a number of years fought to keep silver in our coinage. Many residents of my State of Nevada are not enamoured of coins without intrinsic value, and for many years cherished the cartwheel dollar. As I am sure most Senators know, the silver dollar circulated freely in Nevada until the Congress and the Treasury began tampering with our coinage system.

I want to commend my distinguished friend, the Senator from Colorado. He has been in the forefront of the struggle to preserve silver in our currency for many years, and I have been honored to work with him in this vineyard over much of that time. There is no more effective and able a champion. I congratulate him for his leadership in developing and bringing forth this amendment, and I urge the Senate to give it its resounding approval.

Mr. CANNON. Mr. President, I join my colleague from Nevada (Mr. BIBLE) in urging that some consideration be given to the Nevada State Museum, housed in what was formerly the Carson City Museum, the place where our silver dollars were once minted. These will be silver dollars that now remain in the Treasury and I hope will be circulated, so that some consideration can be given to their request, as presented by my colleague (Mr. BIBLE), in order that they can at least get some of those Carson City silver dollars back.

Mr. PEARSON. Mr. President, I wholeheartedly support this amendment, just as I wholeheartedly supported and was a cosponsor of S. 2582 and the Senate amendment which was substituted for the original Senate Joint Resolution 158.

The present amendment has the support of the White House and the Treasury Department, and I understand that there is now a good likelihood that the House of Representatives will concur in it.

I favor this compromise move for several reasons:

First, and perhaps the most important, I feel that a commemorative dollar in the likeness of our former great soldier and President, General Eisenhower, should be a coin which is deserving of recognition and should not, in my opinion, be minted exclusively in cupronickel. Some of these coins should, by all means, contain a metal with intrinsic value such as silver.

Earlier this week I received from Mrs. Mamie Beyreis, of Kansas City, Kans., a very good letter, illustrative of the thinking of many people. I ask unanimous consent that the letter be printed at this point in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

Hon. JAMES B. PEARSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PEARSON: As a citizen of the United States of Amerca, I wish to express my opinion with regard to the minting of a coin in honor of the late President Dwight D. Eisenhower.

I feel that the late President Dwight D. Eisenhower should be honored with a Commemorative Coin minted of silver of which everyone would be proud to own.

I strongly feel that a clad coin, a dollar of copper-nickel, does not reflect consideration warranted to one of the greatest of Generals and President of the United States of America, whom we all loved and respected.

I truly hope you will see fit to vote against the minting of the clad dollar and use your influence toward the minting of a silver Commemorative Coin.

Sincerely yours,

MRS. MAMIE BEYREIS.

KANSAS CITY, KANS.

Mr. PEARSON. Mr. President, the amendment calls for 150 million Eisenhower silver dollars containing 40 percent silver to be minted, commencing in fiscal year 1971. These coins will be uncirculated, and proof sets will be sold at a premium price determined by the Treasury.

In addition to these 150 million silver-clad dollars, a cupro-nickel dollar coin will be minted concurrently for general circulation.

Congress recognized the value of minting a coin in commemoration of one of its leaders which has an intrinsic value when it produced silver half dollars with the likeness of former President John Kennedy. It has been said the silver half dollars did not circulate freely. This is perhaps true; nevertheless many millions of our citizens hold and cherish a Kennedy silver half dollar.

Second, the Senate has already made its position known on this matter by adopting the previous Dominick substitute amendment to Senate Joint Resolution 158 by a record vote of 40 yeas to 21 nays on October 15, 1969. This proposal, while similar, is, as I said previously, a good compromise considering the deadlock that has taken place between the House and the Senate on this legislation.

Third, the Treasury Department was against the other substitute amendment to Senate Joint Resolution 158, but through the untiring efforts of the Senator from Colorado (Mr. DOMINICK) to reach this compromise, they are now willing to back this legislation. This says a great deal to me.

Fourth, under this amendment, Treasury sales of silver will continue through GSA through November 10, 1970, at 1.5 million ounces per week. Also, the Office of Emergency Planning will transfer to the mint 25.5 million ounces of surplus silver no longer needed for the emergency stockpile. This silver will be used only for coinage and is in accordance with the recently revised stockpile objectives.

And last, we must move rapidly on this legislation to allow time for the Treasury to obtain a supplemental appropriation and still make the proposed October 14, 1970, issuance date. This date is, of course, the late President's birthday, which would have been his 80th.

I urge the Senate to adopt this compromise move.

The PRESIDING OFFICER (Mr. GRAVEL). The question is on the motion of the Senator from Colorado (Mr. DOMINICK) to concur in the House amendment with an amendment in the nature of a substitute.

The motion was agreed to.

Without objection, the title was appropriately amended.

ORDER FOR ADJOURNMENT UNTIL 11 A.M. TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that when the Senate completes its business today it stand in adjournment, as in legislative session, until 11 o'clock tomorrow morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR COOK TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that immediately upon disposition of the reading of the Journal tomorrow the able junior Senator from Kentucky (Mr. COOK) be recognized for not to exceed 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUPREME COURT OF THE UNITED STATES

Mr. BYRD of West Virginia. Mr. President, I ask that the unfinished business be laid before the Senate.

The PRESIDING OFFICER. The clerk will state the unfinished business.

The ASSISTANT LEGISLATIVE CLERK. The nomination of George Harrold Carswell, of Florida, to be an Associate Justice of the Supreme Court of the United States.

The Senate resumed consideration of the nomination.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is, Will the Senate advise and consent to the nomination of G. Harrold Carswell to be Associate Justice of the Supreme Court of the United States?

Mr. BROOKE. Mr. President——

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. BROOKE. Mr. President, just 4 months ago the Senate was considering the nomination of another man to be Associate Justice of the Supreme Court of the United States. At that time, opposition to confirmation was based on a number of questions. And there is no doubt that the ethical questions involved were sufficiently grave in themselves as to cause many Senators to look critically at the nomination and eventually to deny him confirmation.

But, in my judgment, ethical questions were not the primary concern. In my initial speech, announcing opposition to the nominee, I stressed that the question of confirmation quite properly dealt with the nominee's intellectual capa-

bilities, his judicial temperament, and his personal integrity.

The nominee certainly possessed high intellectual capabilities, although I do not believe he exercised them with equal objectivity and independence in all areas of the law. Nor did his judicial temperament reflect a clear and impartial application of the law.

But in the final analysis I based my decision upon the answers to the question I had originally raised with regard to that nomination:

First, was he the man to restore the Nation's confidence in the integrity of the Supreme Court?

Second, was he the man to maintain the faith of this vast majority of fair-minded Americans in the Supreme Court of the United States, not to mention that of the disillusioned minority who look to the Court as the indispensable instrument of equal justice under law?

Having concluded reluctantly and sadly that he was not, I cast my vote in the negative.

Mr. President, it is tragic indeed that these same questions have been raised again with regard to a second nominee for the Supreme Court of the United States, and that again they must be answered in the negative.

Is Judge Carswell the man to restore the Nation's confidence in the highest court of our land?

How, indeed, could a man who has been reversed by an appellate court in nearly 60 percent of his published decisions, a man who has actively sought to circumvent the rulings of the Supreme Court itself, restore confidence in that Court?

Is it not much more likely that by the elevation of such a man, disobedience and delays would be encouraged?

Mr. President, I raise this as one of the most important factors in this entire debate concerning the nomination of G. Harrold Carswell. The Supreme Court of the United States has been under attack. It has been under attack from the so-called left and from the so-called right. Much has been said about the Supreme Court and its decisions and the members of that Court.

If there is anything we need in the Nation today, it is to restore the utmost confidence in the third branch of the Government, the judicial branch, and more particularly in the Supreme Court of the United States.

People can stand for mediocrity in either branch of the Government—either the President of the United States, Members of the Senate, Members of the House of Representatives, or heads of the various departments and agencies of the Federal Government. But there is one place in this land where the American people cannot stand for anything less than the highest possible quality. And that is in the Supreme Court of the United States.

Whenever there is a murmur of doubt regarding integrity or the competency of that Court, the very foundations of this great Nation are shaken. Equal Justice under law is perhaps the most righteous and respected tenet of all American rights.

Therefore, when there is an opportunity to choose a man who will sit on the Supreme Court of the United States, the entire Nation looks to the President, who has the responsibility of making that nomination, for the best man that possibly can be obtained for that high position.

The President has a responsibility to nominate. The Senate of the United States has the responsibility to advise and consent to that nomination.

Many people across the country have been concerned about whether the Senate should approve a nomination without really seriously questioning the candidate submitted by the President.

I believe that the President should be given all consideration when he sends a nomination to the Senate for confirmation, particularly, of course, when he nominates a man to serve in his Cabinet, or to serve as an Ambassador to the nations of the world, or a man to head up the agencies of Federal Government.

The Senate, under those circumstances, will, of course, look at the qualifications of the President's nominee. And unless there is some serious question about the honesty and integrity of the man, generally speaking, the President's nominee will be confirmed by the Senate.

I remember when the President nominated Mr. Hickel to serve as Secretary of the Interior. In my lifetime I have always considered myself somewhat of a conservationist. I come from a State where people are very much concerned about matters of conservation.

I had some serious doubts about Mr. Hickel's views concerning conservation. I debated on the floor of the Senate about that confirmation and ultimately I had to resolve the question as to how I would vote. I voted for the Secretary's confirmation after making a statement on the floor of the Senate about my views and about many questions which that appointment raised. I am very pleased to say that Secretary Hickel, in my opinion, has turned out to be one of the great Secretaries of the Interior.

My fears about conservation, and some of my other doubts and fears, have certainly not materialized, and I am very pleased and proud to be able to say so.

But the Secretary of the Interior serves at the will of the President of the United States, as do all members of the Cabinet, and as do all heads of departments and agencies of Government who are appointed by the President.

Is this true about a justice of the Federal courts? Obviously, the answer is "No." When we choose a Supreme Court Justice, the executive and the legislative branches of Government, and in this case specifically the Senate, are creating a third coequal branch of our Government.

The President and the Senate are joining together to create a third branch of Government, the judicial branch of Government, which is coequal and independent of further supervision. That Supreme Court Justice does not serve, nor should he serve, at the will of the President or at the will of the Senate. He is independent once he has been nominated and confirmed.

During the debate on the confirmation of Justice Fortas to be Chief Justice of the United States an issue was raised by my distinguished colleague and now minority whip, the distinguished Senator from Michigan (Mr. GRIFFIN), concerning some consultation which Justice Fortas was to have had with the then President, Mr. Lyndon Baines Johnson, at which time Justice Fortas was to have given some counsel and advice to the President, independent of his responsibilities as a Supreme Court Justice. Such action was wrong because a Supreme Court Justice is not counsel to the President nor should he be. He is independent, and thus, when his name is submitted for confirmation before the Senate it is no longer just a question as to whether he is the President's appointment and, therefore, should be approved by the Senate.

In short, I say our responsibility goes far deeper. We are concerned not only with the integrity and honesty of the nominee, but also with the competence, ability, and qualifications above and beyond the man's moral fitness to sit on the highest bench of the land.

It is far more difficult for those of us on this side of the aisle, those of us who are Republican Members of the Senate. It is far more difficult for us because the President is a member of our party; he is the leader of our party, and he has now submitted two names to the Senate for confirmation. One nominee I have referred to in my opening remarks, Clement Haynsworth. During that debate there were Republicans who believed that Mr. Haynsworth was not qualified to sit on the Supreme Court for a variety of reasons. When his name was submitted for confirmation, 17 Republican Senators voted against Clement Haynsworth. It was not easy for those 17 Senators; and I am sure, Mr. President, it was not easy for those Democratic Senators who voted against the confirmation of Mr. Haynsworth to sit on the Supreme Court.

As one who did vote against the nomination of Clement Haynsworth, I said at the time that it was indeed a painful experience for me. It is always a painful experience for me to deny any man that opportunity to achieve the highest honor his profession has to offer. For a man in the legal profession, and that is my profession as well—there is no greater achievement than to be honored by an appointment to the Supreme Court. Without question, it is the pinnacle of legal success. So just to deny that man the opportunity, in and of itself is a painful experience. Then, to deny the President of the United States and the head of our party the opportunity to name a man to the Court is another painful experience.

The Senate, after long and arduous debate, was greatly divided. It was a very close vote, as you will recall, Mr. President. Feelings at times ran high. The mail from our constituencies across the land was voluminous, and all of us had wished that we had never been placed in those painful circumstances.

But that is our job, Mr. President. That is our responsibility. When we walked down the center aisle, raised our right hands, and took our oath of office, we took on these very grave responsibilities. Painful though they may be at times, we have to undertake them with all the courage and conviction within us.

Mr. Haynsworth's nomination is now history. After that unfortunate experience, we had hoped the President, when he was to send up another nominee to fill the existing vacancy would have taken a long and more in-depth look at the qualifications, not only the legal qualifications and integrity but also the quality of the man and the competency of the man—yes, even the background and training and philosophy and strong beliefs, political and social beliefs. All these make up the composite man.

It would be simple, Mr. President, for the Senate to look at the paper qualifications of a man submitted to serve on the Supreme Court of the United States, John Doe, graduate from X college, from X law school, received a bachelor of laws degree in such and such a year, master of laws degree, if he did, served in a law firm, engaged in the private practice of law for x number of years; perhaps served as a municipal court judge, or perhaps took the Federal route, and went on the district court and circuit court of appeals; and therefore, per se, he is qualified.

But do we really live up to our responsibilities when we make such an examination, when we do not look more in depth into the man, the total man, who would sit on the Supreme Court of the United States of America?

I am sure there is not a man of this august body on either side of the aisle who did not hope and pray that the next name that would be submitted to our body could have received 100 percent support and prompt consideration and confirmation. This is true not because the Senate wants an easy job. I do not know any of my colleagues in this body, Democrat or Republican, who are not, in my opinion, courageous men. They are accustomed to making tough decisions, hard decisions, decisions many times which are not in their political interests, if you please, because that is their sworn duty and obligation and responsibility.

We waited several months before the name G. Harrold Carswell was submitted to the Senate for confirmation. I must confess that I knew little or nothing about Judge Carswell when his name was submitted.

As is the custom of the press, I, like my other colleagues, was questioned as to my opinion about the President's nominee.

I have been described as a moderate man, a man who does not shoot from the hip, a man who likes to gather the facts before he makes a decision. And I plead guilty to that description. I like to believe that I am that sort of man. I voiced no opinion on Judge Carswell at that time because I had none. I said nothing about him because I knew nothing about him. And in keeping with the procedures of this body, I knew that under our procedures—and I think they are the best procedures known to man—the proper committee, namely the Judiciary Committee, would have an opportunity to hold hearings, to receive evidence and testimony from proponents and opponents alike, to have the nominee appear before them personally, to look into his eyes and to listen to him and review his total record.

So I postponed my opinion, and certainly my decision, until such time as we had gone through the proper procedures and I would have the benefit of the testimony before the Senate Judiciary Committee.

I regret to say that in some few instances that procedure was not followed. Some of my colleagues formed rather hasty opinions, in my opinion. I do not say this critically, Mr. President, because every man must make his decision according to his own conscience and dictates. But some did not wait for the results of the Judiciary Committee hearings prior to announcing their decisions.

Let me say that I do not think anyone was any more eager than I to vote for confirmation. I would have loved to have voted for confirmation of the President's second nominee, as I would have loved to have voted for confirmation of his first nominee, let me assure you, Mr. President.

I waited, as I said, for the full transcript of the hearings before the Senate Judiciary Committee, and in the meantime I sent for the opinions of Judge Carswell, for he had served as a district court judge and, for a short period of time, a member of the circuit court of appeals. And I studied those opinions.

As I said, Mr. President, I am a lawyer by profession. I served for two terms as attorney general of my own State, the Commonwealth of Massachusetts. I have been in the habit of reading judicial opinions and citing them for authorities in various cases in point and on issues of law. And so I read the opinions of Mr. Justice Carswell. I tried to find out, as best I could, about the man, G. Harrold Carswell. What kind of man is this? Not only is he a lawyer, not only is he a judge, not only is he a member of the Republican Party, not only is he a resident of the State of Florida, not only was he born where he was, but what kind of man is he?

That is a very hard question, Mr. President, what kind of a man is a man? How do you determine this? Can you pick up a record and look at it: "Born such and such a date, mother and father such and such, church such and such, married to such and such a person, so many children, educated in such and such a school"?

Does that tell you what kind of a man he is?

As I said, this is not an easy question to determine. Is a man determined by his heredity, or by his environment, or by his experiences? How do we arrive at that? What kind of a man are we looking for? Are we setting the standards too high? Are we setting them much higher than those which we set for ourselves?

Mr. President, I happen to think that in choosing a man to put on the Supreme Court of the United States of America, we have to choose the highest quality that we have in this country. I do not accept the standard, that some of my colleagues have attempted to establish, of a B or C or D quality candidate.

We may not always get an A quality candidate, but, oh, Mr. President, I think we have always got to strive for an A quality candidate. I think we can accept no less in our search than the highest quality that we can obtain, to sit on the Supreme Court of our land.

Mr. President, I feel this is so true that I feel perhaps the standard should be higher than that for our elected officials; and I certainly do not except myself, nor do I except the President of the United States, from this judgment. Because when we are dealing with elected officials, we all know how men are elected to even the highest office in this land. Of course, we look for A quality in the President. We look for A quality in the Senate, and in the House of Representatives, and all through our Government. Oftentimes we do not get it, and it is somewhat understandable why we do not get it.

But in the selection of a Supreme Court Justice, we have perhaps the best system devised by man to achieve the highest standard; and it hurt me when I read in the press—I must confess I was not on the floor at the time—that some of my dear colleagues were saying, "Well, we have mediocre men in other places in the Government, and perhaps there ought to be an opportunity for mediocre men to sit on the Supreme Court of the United States of America."

What a specious argument. How can we ever say that? What student, even though he may end up with a D or an F when he goes to school, is not at least trying to get an A?

Of course, we all want the highest. We want the best air, we want the best water, we want the best house, we want the best education for our children. And, Mr. President, we want the best men to sit on the Supreme Court of the United States. And let there be no doubt in any American's mind that the Senate is ever going to accept anything less.

I do not say we have always had it. I think we are looking closer all the time, more in depth all the time, in order to see that we get exactly that—the highest quality possible for the highest bench.

Mr. President, we received the nomination of Mr. Carswell. We had important legislation before us for some time before we got to the debate, even after the hearings of the Committee on the Judiciary had been concluded. We read the testimony. Certain things were revealed in that testimony which were very disturbing to many of us.

Let me say that the nominee started off with a presumption of rightness. He started off with the most favorable presumption there is. I do not believe that any of the 100 Members of this body started off in opposition to a President's nominee. I think we all started out favorably inclined.

So when, as in the law, we talk about the burden of proof, we should probably be talking about the burden being on the side of those who raise objections to the confirmation; because we can presume that the President and the Justice Department have made thorough examinations into the total man, and into the backgrounds of those whom the President would designate for such an office.

If I may refer back, Mr. President, to the Haynsworth nomination very briefly, I think it illustrates well one point that has disturbed me in connection with both these nominations, and that is the

amount of investigation that is conducted into the total background of candidates for this high position.

I have never asked the President about this. I know only what I have read and heard. I am not generally one who accepts hearsay; but I have never heard this repudiated: That the President did not actually meet Mr. Haynsworth until such time as his nomination had been rejected by the Senate.

If that is true, it would seem rather incredible to me. Oh, I know that the Presidency is a great responsibility, that the demands upon the President are vast, that much of what the President does has to be delegated to various departments and to the members of his Cabinet. I am in great sympathy with the office of the President because it has grown so large and the magnitude of its problems has become such that it is very difficult for any one man to begin to do all of the things which are demanded.

But there are only nine members of the Supreme Court of the United States; and in the course of a President's term of office of 4 years, very few members, generally, are appointed by an incumbent President, because Supreme Court Justices serve for life. Many of them serve actively until their 70's, and some into their 80's. So it has usually been true that a President may have one or two such appointments, or, if he serves two terms, he may have three or four in the course of his term of office. President Franklin D. Roosevelt, I think, is given credit for having appointed more Justices than any other President in the history of the Nation, and I presume that is probably true, but only because he was in office longer than any other President.

Before a man is appointed to the Supreme Court of the United States, no matter how busy and how occupied the President is, and how many demands he has upon him, it would seem to me that the President would want to meet the man, look into his eyes, listen to him talk, and get some feeling or understanding as to the composite, the total man with whom he had been speaking.

I understand that the President has met Judge Carswell. I do not know whether he met him prior to submitting his name or afterward. I really do not know. But I did hear the President say on national television that something which had come out about Judge Carswell after his name was submitted to the Senate had not been known to him prior to that time. That is understandable. I guess every little speech and every little thing and every litt e act would not be known to the President, even if a rather thorough investigation was conducted by the Department of Justice, which is the arm of Government that has that responsibility in these cases.

But, Mr. President, then I read a statement first attributed to and then acknowledged by Mr. Carswell that he had made when he was a young man 28 years of age. Those words to me were not merely political rhetoric—and I am familliar with political rhetoric. I guess none of us in this business is unfamiliar with political rhetoric. I am sure all of us, if we were perfectly candid with ourselves, would admit that we have been at some time guilty of using purely political rhetoric, even though we may not be trying to do so or intend to do so.

I examined these words and tried to understand whether this was political rhetoric or whether these were the deep-held feelings of the man who was uttering them. In other words, did he believe them? Did he harbor them? Was this something that was inside the man? Was this part of the total man?

I recognize the right of other men to read the same words and perhaps to come to a completely opposite conclusion from that which I finally came to. It seemed to me that Mr. Carswell had gone beyond the realm of political rhetoric, that he was talking his innermost, heartfelt, in-depth feelings. Whether because of environment or experiences—I do not know—he had these thoughts and these feelings, and they were part of him at the time he made the utterances. If that conclusion is wrong, I would be very happy, indeed, and very pleased to say so. I looked at the circumstances. I looked at the forum. I looked at the electoral race in which he was engaged.

I am not naive. I know what it took to win elections in 1948 in the district in which Carswell was running. I regret it. I cannot condone it. I am very sorry that was the case. But I am realistic enough to understand that that was the case.

Then I said to myself, "Ed Brooke"—not Senator Brooke—"Ed Brooke, can you in good conscience, as a man, vote to confirm a man for the Supreme Court of the United States who advocates racial superiority in this country?" Then I said to myself, "Ed Brooke, could you in good conscience, as a man, vote to confirm a man who was black and who advocated racial superiority in this country?"

Mr. President, my answer to both of those questions is a resounding "No." I do not believe in racial superiority. I do not believe in white superiority, and I do not believe in black superiority. I do not believe there is a master race in God's earth. I have fought and talked out against black militancy, black power advocates who do support separatism in this country. I have spoken out, and always will, against blacks or whites who pit the races against each other.

So it was not without some real soul searching that I came to the conclusion that I could not support a man for this office who harbors racial superiority in himself. I said "harbors" because I was then sitting in judgment on a man who had made a statement in 1948, at the time he was 28 years of age, and I was sitting in judgment in 1970, not 1948.

I certainly am well aware that men can change, that men mature, that great social changes have taken place in this Nation and across the world. I have always been glad that I lived in the time when Pope John lived on earth. He said, "Open the windows and let the fresh air in," and a great ecumenical spirit swept across the land, and men's minds did begin to change. It was a healthy period. Oh, if that period had stayed longer with us, would not this country be in a much better position than it is today, and would not the world be in a much better position than it is today.

So I recognize the right of a man to change his mind. Again, because of his experiences and because of social and economic and legal changes, actually, that had taken place in this country, in my attempt to be as fair as I could, I then delved into the books again, asked the questions of people who knew the man, and did everything I could to find evidence of change.

Mr. President (Mr. Inouye), I searched in all sincerity to try to find that change. I would have been pleased to have found a change. I said at the time when we were considering the nomination of Mr. Haynsworth, when there was great talk about the nomination of a man from the South or a man who was a strict constructionist to sit on the Supreme Court, that I would be proud to vote for a man from the South or a strict constructionist and would find no problems there at all in having voted for either. I do not believe that all men on the Supreme Court should come from the North, East, or the West. That is ridiculous. Of course we want men from the South. We want men from all sections of the country. Every man who is qualified should be ellgible. I would like to see women sit on the Supreme Court. I would have no objection to a Chinese-American or a Mexican-American sitting on the Supreme Court or anyone else who is an American citizen—and qualified. They all should be able to sit on the Supreme Court of the United States of America. That would give me no problem whatever, and still does not give me any problem.

But I looked for change in this particular man. He was 28 years of age when he made that statement. Some people said at the time that the man was immature, that he was a young man and did not know what he was saying or doing.

Well, let me examine that briefly. He and I served in the same war. I served for 5 years in World War II, in Africa and Italy.

When I went into the Army, I had finished college but had not gone to law school yet. I guess I could have been accused, as most young men were in those days, of not really having grown up, of not having a great social conscience, perhaps, at the time. I lived a fairly good life. I was one of those lucky ones, whose father was able to educate me and send me to school. I attended fraternity dances and enjoyed life pretty much in general.

But when I came back from 5 years in the Army, I think I was pretty much a man. I think I was pretty mature. I think I knew pretty much what I was saying when I was 28 years old. I got married and had a child, was supporting my wife and my young daughter. I think that most men are pretty much men at 28 years of age, even if they have not had the sobering experi nces of war.

We are talking now about giving the right to vote to the 18-year-olds, I think that is an excellent idea. I believe in it. I voted for it with many of my colleagues on the Senate floor. I hope soon, that it will pass. I think that American men and women at 18 years of age are old enough to vote today. They are even, if anything, more intelligent than they were at my age. They have had the benefits of tele-

vision and many other advantages that we did not have. They are very knowledgeable and have a social conscience. I think 18-year-olds should vote. They fight, they pay taxes, they do all the other things, so that certainly if they are old enough to vote at 18, they are old enough to understand the significance of their statements and their stands on important subjects, such as this one, when they are 28 years of age.

Thus, I believe that in 1948, G. Harrold Carswell was a man, not a boy. I do not accept the argument that he was not responsible for what he said at the time that he said it in 1948.

Let me quickly add thereto that I also think he certainly was capable of changing his feelings from 1948 to 1970 when the President saw fit to name him to the Supreme Court of the United States.

So now, Mr. President, we are talking about a period of 22 years between the statement made in 1948 as a political candidate and a man, if one is to accept my assessment of it, and the time when his case now comes before the Senate for confirmation.

How do we know if a man changes his mind?

How do we know that he is a different person?

How do we know he is the same man who spoke in 1948?

Well, do we ask him in 1970? I suppose we do. That is what the Judiciary Committee did. It asked him whether he had made that statement in 1948.

He honestly said that he did make that statement. I am not going to get into the trivia of whether he remembered it or did not remember it. That did not carry much significance with me.

So we ask him today and he says "No," I do not feel that way, as I did in 1948. I was a candidate in 1948 when I made that statement.

I do not want to misquote him, but I think he said that perhaps, at the time, he may have meant it. But he certainly knew now that it was obnoxious to him, and I am quoting him when I use that word, that it was obnoxious to him. And it is obnoxious.

I trust that every one of my colleagues has spent as much time as I have in reading the statement, because it goes far beyond just a statement on racial superiority; it goes much deeper than that. But then in 1970 he denied that he feels that way now.

Well, let us examine the circumstances under which he makes this denial. He makes the denial after he has been nominated to the Supreme Court of the United States

Of course, he would make that denial.

I suggest that we have to consider a denial at that time in the light of and under the circumstances that he made it, just as we have to consider the time when he made the statement initially in 1948 in the light of and under the circumstances that he made it.

I do not say that he could not be telling the truth now, when he made that statement before the Judiciary Committee. But, no one would expect him to say that he still held those feelings today, in 1970. He hardly would want to feel that way, to say that he felt that way in 1970, when he probably knew that if he did he would not be confirmed as an Associate Justice of the Supreme Court. I do not blame him. I would not say it either.

But, let us give him all the benefit of the doubt. That was not the basis upon which I drew the conclusion.

I would like to believe that he meant what he said in 1970, as I would like to believe he did not mean what he said in 1948.

But let us look at the interim period between 1948 and 1970. That is where judges and lawyers would go and members of the jury, if you please, Mr. President, would go, to find out whether the man had made any changes in his basic philosophy and beliefs, whether the total man had changed, or whether he still harbored those same sentiments and strong beliefs.

Well, I searched and I searched and I searched. And I searched in vain, Mr. President.

For I found no utterances, public or private, that would indicate any change had been made. In fact, I found evidence to the contrary. I found supporting evidence that, in fact, he had not changed in that interim period.

One example of supporting evidence is the much discussed golf course case, if I might so describe it. Let us look at the golf course case breifly.

If I may refresh our recollection, there was a period of time when a battle was going on in the country to open up public facilities to all Americans, particularly to Americans, of course, who had until then been denied access to them—namely, black Americans and other minority groups.

I am sure it will be remembered that there were many cases before the Federal court, particularly the Supreme Court, involving lunch rooms, golf courses, rest rooms, and other public facilities of the sort where there had been separation of the races in the past.

The Supreme Court issued an opinion which stated that these facilities were illegally and unconstitutionally segregating the races. And they issued what was in effect was a cease-and-desist order.

In an attempt to circumvent the law, a flood of private clubs sprang up all over the country. Florida was no exception to this practice. What had been public golf courses, overnight were being turned into private clubs.

Judge Carswell was called upon to become an incorporator of a private golf club. He told the Judiciary Committee that he paid $100 and that he felt the purpose of that $100 was to make some repairs to the old club house

At that time, as I have said, the practice of organizing and forming and incorporating private clubs was widespread. Most people in and out of the legal profession knew about it. As I said earlier, this was clearly an attempt to circumvent the law. I think it was wrong, Mr. President, but I am not going to get into that, as that is not really the issue before us now, as to whether that was right or wrong.

The white population understood it. The black population understood it. Everyone knew what was going on at the time. Civil rights advocates immediately went back to the courts to have the private clubs declared unconstitutional.

Where was Mr. Carswell at that time? What was he doing? He was in Florida, and he was a U.S. attorney.

I have been an attorney general, and I can say that in that office, which is comparable to the office of U.S. attorney, our duty and our obligation is not only to uphold and support and defend the law of the land, but it is also our obligation to enforce the law of the land and of the State and of the Federal Government.

Here was Mr. Carswell, the chief law enforcement officer in that district at the time. The time, I believe, was 1956; that is, 8 years after his statement was made. The chief law enforcement officer was called upon by a group of citizens to join in the formation of a club. And there is no dispute about this, it was a private club that denied admission to blacks.

Even though I disagree with the creation of a private club for the sole purpose of denying admission to blacks, browns, reds, whites, or any other class of people, I am not going to argue that point. The thing that I think is of the utmost importance is that in this case the chief law-enforcement officer of the district, a Federal law-enforcement officer of the district, was joining in a device to circumvent the Federal law of the land.

One can say, "Well, Carswell said he did not know about this and did not realize or did not do it for that purpose." Then, if one argues that, he has to say that we had a very naive U.S. attorney.

It is incredible that a man—and even a man who was not U.S. attorney—would not understand the purpose for which that private golf club was being established.

If this were just another white citizen of Florida that wanted a golf club, and a golf club that did not have blacks in it, that would be his private desire. I can disagree with him, but that is all right, if that is what he wants to do. But that is not G. Harrold Carswell. He was not a private citizen. He was the chief law-enforcement officer who had the responsibility of enforcing the laws of the land—the same laws which he would now be called upon to interpret if he were confirmed by the Senate of the United States, the same opinions that he would be writing and rendering, the same decisions that he would want U.S. attorneys all over the land to enforce.

Yet when he was in the position of having to enforce them, whether he agreed or disagreed with them, he joined a device to circumvent them.

When I was the attorney general of Massachusetts, I had to enforce certain laws with which I disagreed. I did not always agree with every law that the Legislature of Massachusetts passed. I have not always agreed with every law that has been passed by the Congress of the United States.

I do not want to say it again. We say it all the time, but it is true that the Nation is supposed to be a nation of laws and not of men. There would be anarchy

if we were only to obey those laws we wanted to obey and disobey those laws we did not want to obey, particularly when it is our duty to uphold and defend and enforce the law.

I think that was one of the most damaging pieces of evidence to come before that committee.

If Mr. Carswell had still been a candidate in 1956, perhaps even if he had been the mayor of a city or town, I think I may have understood it—still not condone it, but perhaps not place as much weight upon it as I would when he was U.S. attorney.

That to me is unconscionable. Perhaps if I could believe as some believe that he is so naive not to understand the consequences of his act it would be more easy for me to accept. But I do not know that I would want to see a man on the Supreme Court who was that naive, Mr. President. A man who is on the scene and in this position as U.S. attorney and totally oblivious to what is going on around him, particularly in this very important field at that time—a man no longer 28 years of age, but then 36 years of age—is that the kind of man we want on the Supreme Court?

Well, some might say that because I am a black man I might be expected to be excited about this particular issue. I said on this floor the other day that I am an American before I am a Republican. And although I am as proud of my heritage as any other man, I believe I am an American before I am a black man. I love this country. I do not want to see this country torn asunder. I do not want to see the races split and divided. I do not want to see the black supremists, or black superiority people, or white superiority people get a foothold or even a slight foothold in this country. I am a strong believer in integration. I believe if this country is to be strong it is going to be strong only because it is a united nation and not divided.

I served on the so-called Kerner Commission I went into Detroit, New York, Chicago, and Boston. I saw what was happening in the country during that period and immediately following periods of violence, burning, and destruction. I have been to East Berlin. As I have said, I served in the war, and I have been to Vietnam. It hurt me to see this country look like those battlefields. I do not want to see it come again to this Nation.

If we find a man harbors racist feelings I do not think that he should sit on the Supreme Court, or, in my opinion, serve in any real high position in the country. I do not think it is going to do well for this Nation.

I do not say here on the floor today, nor do I allege, that G. Harrold Carswell is a racist. I do not know that, in all fairness to the man. I think that one of the worst things a man can say about another man is that he is a racist, whether he is a black racist or a white racist. In my opinion, that is one of the worst things that can be said, and I do not so charge Mr. Carswell.

I am going to end on this point, because I want to get to another point later after my distinguished colleague from Alaska speaks. I have not been satisfied that he is a man who at one time admittedly harbored these racial feelings but does so no longer. He stated his views in what I bel e to be perhaps the worst tone I have seen them set forth—not nasty language so much as the actual tone and depth of it. And I see no evidence wh tsoever that this is not the same G. Harrold Carswell who comes before us in March 1970 for confirmation to the highest court in our land.

I see no evidence that this is not the same G. Harrold Carswell who spoke before an American Legion assembly in the State of Geo gia in 1948. If I could find that evidence, even today, I would be pleased to find it. If I could reassure myself today that these are two different men; if I could believe we are not putting a man on the Supreme Court who harbors these views even today, I would seriously consider changing my announced decision to vote against this confirmation. Failing to get it, Mr. President, I must follow the dictates of my heart and my mind, and I ask my colleagues to do likewise.

Mr. GRAVEL. Mr. President, I do not think I ever heard a more eloquent statement of the facts of this most unusual case. I am honored to hear a statement, not from Senator BROOKE, but from ED BROOKE, the man, who poured out his heart here for over an hour. I am honored to follow him, because all I can humbly do is merely take up in a brief fashion the points that he so lucidly brought forth.

Mr. President, I rise to speak against the confirmation of Judge Carswell to a seat on the Supreme Court of the United States.

Like my colleagues, I gave long and hard thought to the earlier nomination of Judge Haynsworth. I studied the three major arguments used against him—the arguments of civil rights, judicial ethics, and judicial stature. For me, these arguments were not persuasive against Judge Haynsworth.

The same arguments are now being used against Judge Carswell and this time I find them compelling.

Let me elaborate briefly.

First, the civil rights argument.

To me, the Haynsworth matter was not in any fundamental way a civil rights issue. Scattered points were raised, but they were not, in my mind, convincing. However, in my judgment the Carswell nomination presents us squarely with a civil rights issue. The man said, at the mature age of 28, that he believed in white supremacy. I can understand a politician seeking office in the South 20 years ago paying lip service to s gregation. But, Mr. President, I cannot accept, nor understand, an American putting forth the view of white supremacy, regardless of where he comes from, in this Nation

I certainly do not believe that a man's views, once expressed, should haunt him forever. Nevertheless, I do think there should be ample evidence in word and deed in the intervening years that these views have changed. Proof of the "redemption theory" is obviously required in this case in view of his extreme statement of 20 years ago. But Judge Carswell's actions in en uing years up to the present day, have m re y shown an ability to express the e same beliefs in more subtle and soph'st'cated ways.

Many felt the issu of judicial ethics in the Haynsworth case to be conclusive. I did not Nor do I find t o with Judge Carswell; that is, if we e talking only of the use of his po i io f r personal financial gain.

The matter of ethics, however, transcends monetary considerations There are other ways to misuse ne s position.

There are other modes of ethical misconduct.

I find deeply d'stu bing Judge Carswell s use of his judicia osi ion to delay and frustrate ord rs of hi her courts in matters of desegregation

I find equally abho rent, his lack of judicial temperament disp ayed by open hostillty to civil rights workers and their counsel who came before his court seeking justice.

I find totally unacceptable his personal activities in effecting the transfer of a municipal country club from public to private ownership, with the result of denying black citizens access.

The ethics of this conduct has far greater implications to society than the question of the ethics of financial gain that surrounded consideration of Judge Haynsworth's nomination.

Finally, there is the matter of judicial stature. Probably most would now agree that in Judge Haynsworth we were presented with a jurist of some considerable stature. This is not to be said of Judge Carswell. Neither supporters nor detractors have found any legal opinion of the nominee which advanced the field of law in any notable way.

Not all jurists need be recognized scholars. But undistinguished persons should not be appointed to the highest court in the land.

It should be noted, too, that the academic legal community, which remained generally silent or mildly favorable to the Haynsworth nomination, is painfully appalled at the prospect of elevating Judge Carswell to the Supreme Court.

Each of us may give this fact a different weight, but I find it significant that in a community that is generally very protective of its own, the faculties of many of our leading law schools have felt strongly enough about the matter to actively oppose Judge Carswell's nomination.

In conclusion, I am compelled to vote against the nomination of Judge Carswell, because of his civil rights record, because of his misuse of judicial power, and because of his nonexistent judicial stature.

I believe President Ni on has exercised poor judgment in this nomination. I think it is incumbent upon the Senate to exercise its good judgment.

Certainly the fact that the Senate in the past 18 months has had a role in denying two Supreme Court nominations should not diminish our efforts to secure a nominee of superior caliber.

I would hope that, if we had to reject 10 qualified persons for this high office, we would not tire in our search. Each

nominee must be considered on his own merits. We should start anew each time.

I hope that the Senate will deny confirmation to Judge Carswell.

Mr. BROOKE. Mr. President, will the Senator yield?

Mr. GRAVEL. I yield.

Mr. BROOKE. I certainly know what agonizing the distinguished Senator from Alaska has gone through in reaching his ultimate decision in this very important confirmation. I think perhaps even more difficult was the Senator's decision in the Clement Haynsworth confirmation. I know at that time the distinguished Senator gave in-depth consideration to that nomination; that he listened very attentively to the debate. I know that, personally, even though I do not believe he is a lawyer by profession, he read opinions and did all he could possibly do before reaching his conclusion. As I recall, because of that consideration, he did ultimately vote for the confirmation of the nomination of Judge Haynsworth.

I think certainly he has given the same in-depth consideration to the confirmation of the nomination of G. Harrold Carswell, and I know that he has spent considerable time in reviewing the record of Judge Carswell's decisions and opinions. I am sure that to him, like others who have stated their opposition to this confirmation, it is a painful task as well.

I just want to say, Mr. President, I know it takes great courage on his part. It is not something that a man enjoys doing. But it is a responsibility that he has undertaken, and he has made his decision and has so spoken.

I think perhaps one of the most important things that the Senator from Alaska (Mr. GRAVEL) has said today is that even if the names of 10 nominees are sent to the Senate for confirmation and they are not of the highest quality, the Senate should not hesitate in the rejection of those nominations.

If you reject candidate A because you do not feel he has the qualifications for the office, and then candidate B is submitted and you vote for confirmation because you feel you voted against candidate A and therefore you owe it to the administration, or to the President, or it does not look good to reject candidate B, are you really living up to your responsibility?

How can you justify it? The Senator from Alaska is saying that if you reject candidates A, B, C, D, E, F, G, H, I, and J, and if candi ate K is presented and he lacks the qualifications, we ought to, just as strongly and just as courageously, and without any political considerations at all, reject candidate K.

I do not know, Mr. President, that I could say it better than the distinguished Senator from Alaska has said it; and I think that that is one of the most important matters that has been raised on this floor in this debate. I have heard the very argument to which the Senator has directed his remarks. I have heard colleagues say, "How can you go against the President twice?"

But is that the question before us, whether we are going against the President twice, three times, or 10 times? As the Senator from Alaska says, we are not going against the President any time. We are not here battling the President. I support the President of the United States. I am sure that the Senator from Alaska supports him. We would be in serious difficulty if we did not support the President. He is our President, and we respect him.

But we do not have to agree on everything that the President says or does, or even confirm every nominee to the Supreme Court whose name he submits. The President himself has admitted that he did not know some of the things that have come out about his candidate before he submitted his name to us. Our responsibility is to delve deeply into the background ourselves, independently of the executive branch, to find out what the facts are upon which we can base our decision. If we are merely to say "yea" to the President's nominee, then we are not living up to the responsibility that the people, under the Constitution, have given to the Senate of the United States.

So for one to argue that we should merely go along because we did not go along before is, in my opinion, a very weak, and very poor argument that should not be heeded by the Senate.

I did not fail to go along with the President when he first submitted Mr. Haynsworth's name. I do not think that the Senator from Alaska went along with him when he submitted his name. The Senator voted according to the merits of the case, and he made his decision on that basis. I, too, voted according to the merits of the case as I saw them, and based my decision upon them; and we came out in opposition to each other.

That is perfectly all right. That is what it is all about. That is why we are here. That is why the Senator is a Democrat and I am a Republican.

We are not here to "go along" with anyone. I am sure the Senator would agree with that.

We are not here to go along with anyone. I do not think we went along before, or did not go along. I do not have any less respect for the President because I happen to disagree with what he believes as to the qualifications of this or that particular candidate.

You know, the most important thing that might come out of this debate is that not only this President, but every President to come, will spend even more time than Presidents have spent in the past looking into the total man and the qualifications of their nominees to the Supreme Court of the United States; and th t every Attorney General and every Justice Department will make more exhaustive investigations than have ever been made before; and that, when the nominations get to us, we will have a choice of riches rather than a choice of poverty, Mr. President, so that we might be asked to judge only upon the highest quality that the legal profession has to offer in this land.

If that is the result of this lengthy debate and an ultima e rejection of this candidate then, in my opinion, it w ll have served a most worthwhile cause. And if it takes us 10 candidates to do it, then let us take the time for 10 candidates. I do not think there is anything more important.

We have plenty of time, Mr. President. We have spent far more time on far less important issues in this body, even in the short period of time that I have been here, than this issue deserves.

Mr. GRAVEL. Mr. President, will the Senator yield at that point?

Mr. BROOKE. Yes. I just want to say to the Senator from Alaska that I have great respect for both of his decisions, not only because on this decision we happened to come out the same way, but I have respect for him on his other decision as well. I have respect for any man, as long as he makes his decisions based on what he actually believes, in his head and heart, is right.

I am very happy to yield to the Senator from Alaska.

Mr. GRAVEL. Mr. President, I think the Senator has brought out the essential point very well, which was that since the President handed down this nomination, certain facts have been brought forward that he was not aware of, that might have caused him not to have selected Judge Carswell for the position.

I think the constraints of the office and the operation of the political system that we have conspire somewhat to prevent the President from stepping forward at this particular point in time and saying, 'I think I made a bad decision; I change my mind; I wish to withdraw his name." I think that now the mechanism is in operation the Senate can act, and the Senate can reject this nomination.

I would hope that the President would not use the force of his office and the influence at his disposal, upon the members of the Republican Party who sit in this body, to elicit their votes in support of this nomination. I would hope that he would fall back to a more dormant position, so to speak, and let the facts permeate this body; and I am sure, with full knowledge of all the facts, that we will arrive at a conclusion which will correct what I think was an unfortunate error in judgment.

I should like to take a moment to address myself to two particular points of the argument that has been made over the last week. The first is summarized on the first page of the report of the Committee of the Judiciary. That is that the reason why many Senators are opposing Judge Carswell is because he is a southerner.

I think the fact that I have made a decision different from my prior decision with respect to a southern gentleman, the fact that I have fairly decent credentials with respect to votes affecting the South, and the fact that in all sincerity, I have deep affection for the South and individuals from the South, is proof that at least in my mind there is no regard as to which part of this country Mr. Carswell comes from.

I would hope that if the nomination is not confirmed by the Senate, the President again would go to the South and choose a person with a name, a southern name, a southern gentleman, a man who before his profession has shown some distinction. So I would hope that my

vote on this nomination would lay that allegation to rest.

The second point of the argument on the front page of the report of the Committee on the Judiciary relates to a constitutional conservative. I think there are many misplaced views in this regard. I think the inference in this instance is that we will have a judge who will sit on the Supreme Court of the United States who will be able to perform some extraordinary feats in laying to rest the scourge that is abroad in this country in the way of crime and in the way of individual pillage. I think that that almost begs the question to the point of being ridiculous. Certainly if Judge Carswell had a record of being such a distinguished jurist, it would be apparent to all; but the burden of proof in this document is directly to the contrary. Distinguished scholars in the area of torts have come out and said that Judge Carswell used almost insulting language.

Distinguished scholars in the field of criminal law have put statements in the public records to indicate that Judge Carswell made statements that would be insulting to an individual. How could anyone hope that a person with so little to offer in the field of experience would grace the Supreme Court of the United States and render some service toward the great problems that face the Nation in the area of crime?

I think both of these areas have been adequately answered in this brief document. I think I have made my point as lucid as I am able to.

Mr. President, I yield the floor back to the Senator from Massachusetts, if he wishes the floor; if not, I yield the floor.

Mr. BROOKE. Mr. President, I again thank the distinguished Senator from Alaska for the opportunity to engage in this short colloquy with him. He has performed a service to the Senate both by his statement and the material he has placed in the RECORD. We have both addressed ourselves primarily to one issue involving the qualifications of Mr. Carswell to sit on the Supreme Court of the United States.

As this debate continues, I expect to have an opportunity to discuss some of the other issues to which the Senator has referred; namely, the overall question of legal competency for this high post. I think that perhaps some of the people in the country might be rather confused in that here is a man who already has served as a U.S. attorney, which requires confirmation by the Senate; a Federal district court judge, which requires confirmation by the Senate; and a member of the circuit court of appeals, which requires confirmation by the Senate. They might wonder why this debate has not taken place earlier and how a man can arrive at practically the pinnacle of the legal profession without a similar debate. I question it myself, Mr. President.

I think that perhaps in the future we are going to have to take a much harder look at the responsibility we enjoy in the Senate for confirmation of U.S. attorneys, the confirmation responsibility we enjoy for Federal district court judges, and the confirmation responsibility we enjoy for members of the circuit court of appeals.

I think that, quite rightly, much of the law is interpreted at lower levels than the Supreme Court. Decisions are important in the Federal court, and several Presidents have shown an inclination to nominate to the Supreme Court only those members—or at least some members—who have served in one of the lower Federal courts.

It would appear to me that in the past—and I do not want to make this an indictment of our system—many times U.S. attorneys have passed pretty swiftly through the committee, after a look into their basic qualifications and into their honesty and integrity. The Judiciary Committee certainly has enough work to do, I am sure, and perhaps to a minor degree more is done with Federal district court judges and circuit court of appeals judges. When it gets to the Supreme Court, it seems to me that we say, "Wait a minute. Let us really take a look." I think that perhaps in this colloquy we are pointing out the necessity to say, "Let us really take a look at the U.S. attorney level and at the Federal district court level and at the circuit court of appeals level as well as the Supreme Court of the United States level." Then, of course, we would have more of a record to go on if someone is elevated to the High Bench.

There was very little in the Carswell case for the Senate to go on in previous confirmatory procedures, because very little testimony and evidence had been brought to light. I would hate to feel, even as important as the Supreme Court is, that we felt that any of our Federal courts were unimportant to the degree that we might pass judgment on nominees for those courts with very little in-depth investigation and scrutiny and hearings before the committee and debate before the Senate.

I know that we have so much to do that we cannot debate as fully every Federal district court judgeship that comes before us for confirmation, but we might want to look more closely at what the Justice Department does in its investigation. We reply pretty heavily upon the Justice Department for information on nominees for the Federal judiciary and for the U.S. attorney offices. We in the Senate do not have any investigative staff to look into this ourselves, other than individual staffs, and, of course, the staff of the Judiciary Committee, which certainly is not a large staff—not large enough to send out investigators all over the country for the many posts we have to fill in the Justice Department and in the Judiciary. But we might want to take a closer look at our practices and our procedures in the future, to forestall the circumstances with which we are laboring at the present time in the G. Harrold Carswell case.

I just bring this matter up to the Senate in this form because of the statements made by the distinguished Senator from Alaska which provoked this thought.

Mr. GRAVEL. I think the members of the fourth estate share as much credit for discovery in these particular proceedings as the Senate, the entire Justice Department, and all the arms of the Government. Some of the key items were discovered by individuals of the press corps in their search to make a proper evaluation in meeting their responsibilities to the public at large.

I think it is fortunate that here, again, they play a role concurrent with the Senate, and that is, that as we debate these issues, the public at large becomes informed.

It is very difficult to endorse or defeat the nomination of a person who has no particular credentials one way or the other. The only thing about Judge Carswell that seems to stick out is the racist issue, and I think it sticks out with great preponderance.

Mr. BROOKE. Mr. President, will the Senator yield at that point?

Mr. GRAVEL. I yield.

Mr. BROOKE. Mr. President, the Senator refers to the statement of Judge Carswell in 1948. Now this statement was never revealed by the Justice Department. It was revealed by no arm of Government at all. In fact, to the best of my knowledge, the statement came to light only because of the—shall I say, digging in by a member of the press who went down into the records in Florida in the fifth circuit, and in the morgues of newspapers for that year, and came up with this statement.

Are we going to have to rely upon the perseverance and ability of the press totally for information—and very important information, I might add—concerning a judicial nominee?

Is that going to be the basis upon which we make our judgments?

Can we not have an independent investigative source of our own that would be thorough enough to reveal such information as this reporter came up with, which has created such doubts in many Senators' minds, which you and I have already indicated we find offensive and which even Judge Carswell himself has said he finds obnoxious?

I cannot believe that Judge Carswell would volunteer that information, but, when he was confronted with it, he could not quite recollect whether he had made the statement or not. I think the record indicates that.

Mr. GRAVEL. That really is the area that triggered my decision. Obviously, as the Senator stated earlier, it was in his best interests at this time, of wanting to become a Justice of the Supreme Court, to recant the statement. It is clear that he could have a sincere change of heart at this particular time, and I am prepared to accept that. But, in accepting that sincerity, I am compelled to go back over the years, and over that particular time, as to the acts and things he has done to indicate a change of mind. Perhaps there would be one item, or one statement disavowing his 1948 speech, or perhaps some particular court case, so that he could stand up and say, "Well, I changed my thinking and here is proof of it." But, the contrary is true. There is no sequential chronological change since this statement was made in 1948. It

was not a statement about integration, or nonintegration, it was white supremacy. That is a good deal diffierent in my mind.

Mr. BROOKE. I said earlier, as the Senator will recall, that I had searched in all sincerity for any evidence whatever to support the contention that Judge Carswell had had a change of mind or heart on these strong and deeply felt beliefs between 1948, when he admittedly made the statement, and 1970, when he appeared before the Judiciary Committee. I said that I searched in vain. Did the Senator from Alaska find any evidence at all, even a scintilla of evidence, that there had been any change at all on the part of the judge?

Mr. GRAVEL. I found no evidence that there has been a change. I found ample evidence that there has been a continuation of those beliefs, and that those beliefs have sort of changed—as one does as he adds years to his life—into something more subtle and actually in a sense, more diabolical.

Mr. BROOKE. The golf course case, which I discussed in some detail, as the Senator will recall, is not the only evidence I found in the record which would indicate that not only had he not changed but that those beliefs were still with him during the period 1948 to 1970.

Mr. GRAVEL. Let me elaborate on that. I think the chain is more complete than that.

Mr. BROOKE. Oh, yes.

Mr. GRAVEL. The statement was made in 1948. But in 1953 he served on Seminole Boosters, Inc., which clearly is discriminatory, and the statement there in the charter which from all appearance he drew up. He affixed his signature at the top. His signature was also part of the attestation. That was in 1953. There was also the golf course, which is the Capital City Country Club, and that was in 1956. Then in 1966 the sale of a piece of property which was initially signed by his wife but, I might add, he had to sign it also in 1966.

Thus, not as an attorney but as a lay person, I occasionally sign documents that I do not particularly read, and I have been scolded by members of the bar for doing such things. I can only infer that Judge Carswell, when he signed the deed conveying that parcel of land in 1966—not in 1948, not in 1953, not in 1956, but in 1966, he signed it with knowledge of that clause, a clause which had been stricken down earlier.

Mr. BROOKE. Let me reply to that. I want to say to the Senator that I certainly would agree with him that there is a sequence of acts, deeds, from 1948 to 1970 to support that contention.

I addressed myself today to only one, and that was the golf course case. I did not want to take the floor of the Senate for any prolonged period of time, as I want to share the floor with my other colleagues who wish to discuss this matter. But I intend to take the various items and cases in the future and discuss them one by one. I think that I can probably make a greater contribution to this debate by doing it in this manner, and I am very much pleased that the distinguished Senator from Alaska understands that we do not want our colleagues to think we are talking about only one isolated case upon which we are making our judgments that, indeed, Judge Carswell has not changed from 1948 to 1970, or had changed, whichever way one wants to look at it. On the contrary, we found much evidence that there had been no change. I think it is important that we develop these one after another so that our colleagues will have the entire record upon which to base their opinions out in the open.

I thank the Senator from Alaska.

Mr. GRAVEL. I thank the Senator from Massachusetts.

Mr. President, I yield the floor.

NEED FOR ADDITIONAL EIGHTH CIRCUIT JUDGESHIPS

Mr. SYMINGTON. Mr. President, as approved yesterday by the House, S. 952, the omnibus judgeship bill, deletes the authorization of 13 Federal district judgeships from the 67 that were authorized when the Senate acted on the bill earlier this year. The Senate-passed bill made provision for an additional judge for both the eastern and western districts of Missouri and for the district of Nebraska. I am pleased that both the Senate and House approved the additional judge needed for the eastern district of Missouri. However, I believe it is most unfortunate that the House bill does not provide the additional judges requested for the western district of Missouri and the district of Nebraska. The Judicial Council of the Eighth Circuit has carefully considered both these requests and has confirmed the need for these additional judges.

The increased number of cases in Federal courts in the Nation arise not only by reason of population growth but also because of the volume and complexities of Federal civil and criminal laws which we in the Congress adopt. That should be frankly recognized in terms of sufficient judgepower in the courts of the Nation.

In due course, the provisions of the House and Senate bills will be considered in conference. And I would urge, with the greatest respect, the conferees to fully consider the strong documented case requiring another judge in the western district of Missouri.

Last March when, joined by Senator EAGLETON, I introduced S. 1712 to provide an additional judge for the western district of Missouri, I stated the workload experience of that district justified the additional judge which that bill requested. The testimony of Chief Judge William H. Becker of the U.S. District Court for the Western District of Missouri before the Senate Subcommittee on Improvements in Judicial Machinery fully bears that out. Moreover the increased rate of filings in the first half of 1970 underscores the need.

The president of the Missouri bar writes that the State bar executive committee also has reviewed the question and recognizes fully the urgent need for two additional district judges in Missouri. He points out that—

Lawyers who practice repeatedly in the Western District Court of Missouri are well aware that the case load confronting the judges of that District is inordinately heavy, and that an additional judge should be provided to handle the work in that Court. One of the principal reasons for this need is the great number of *prisoners' cases* arising out of the Federal Penitentiary located in Springfield, Missouri; and the State Penitentiaries located in Jefferson City and Moberly, Missouri. These three institutions produce a substantial case load which is a very difficult type of case to handle and which is very time consuming.

Mr. President, I believe Members of Congress also would recognize the significance of another and more general comment in this letter:

The burden being placed on our Federal Courts, and the attacks being made on the court system of this nation, are such that the cost of needed additional judges is a small price to pay to assure litigants that adequate care and consideration will be given by qualified and sufficient judges.

Mr. President, I would urge the conferees to consider favorably the record that has been made in the committees which I believe fully substantiates the need for an additional judgeship in the western district of Missouri.

I ask unanimous consent that the letter referred to from the President of the Missouri bar be printed in full at this point in the RECORD.

There being no objection the letter was ordered to be printed in the RECORD, as follows:

THE MISSOURI BAR,
March 13, 1970.

Hon. STUART SYMINGTON,
U.S. Senate,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR SYMINGTON: The Executive Committee of The Missouri Bar has carefully reviewed the need for additional Federal District Judges in Missouri, and it recognizes that there is an urgent need for two additional District Judges. We are aware that members of the Senate and House Judiciary Committees have had substantial information and statistical data presented to them demonstrating the need for these two judges. We, therefore, are not submitting additional data now.

Because of the termination of some committees and the appointment of new committees in the Federal Judicial Conference, creating a time lapse, the Conference failed to make timely recommendations for an additional judge in the *Western* District of Missouri. An additional judge *was* recommended for the *Eastern* District of Missouri. We are sure that if the appropriate opportunity for consideration had been presented, a recommendation from the Federal Judicial Conference would also have been made for an additional judge in the *Western* District of Missouri.

The criteria used for measuring case loads in the Federal District Courts are admittedly obsolete and out of date. Yet the use of these outmoded criteria has caused the Western District of Missouri case load to appear erroneously lower. "Lawyers who practice repeatedly in the Western District Court of Missouri are well aware that the case load confronting the judges of that District is inordinately heavy, and that an additional judge should be provided to handle the work in that Court. One of the principle reasons for this need is the great number of *prisoners' cases* arising out of the Federal Penitentiary located in Springfield, Missouri; and the State Penitentiaries located in Jefferson City and Moberly, Missouri. These three institutions produce a substantial case load which is a very difficult type of case to handle and which is very time consuming."

Because of these factors and others which are commented upon in the earlier data presented to the House and Senate Judiciary Committees, *we strongly recommend* that the *Omnibus Bill* not only include an additional District Judge for the *Eastern* District of Missouri, but that it be *amended* to include an additional District Judge for the *Western* District of Missouri. The burden being placed on our Federal Courts, and the attacks being made on the court system of this nation, are such that the cost of needed additional judges is a small price to pay to assure litigants that adequate care and consideration will be given by qualified and sufficient judges.

We, therefore, urgently request you to support S. 952, S. 1712, and H.R. 9638 now pending, and that you support an *amendment* to provide for an additional Federal District Judge in the *Western* District of Missouri. We certainly would bs pleased to receive an indication of your support.

Thank you very much.

Sincerely yours,

EDGAR G. BOEDEKER,
President.

Mr. EAGLETON. Mr. President, I, too, would like to address myself to the same subject matter that has been set forth by my distinguished colleague, Senator SYMINGTON.

The principal reasons advanced against approval of the judgeship in question, the one in the western district of Missouri, are:

First, the Judicial Conference of the United States did not recommend or approve the additional judgeship.

Second, the weighted caseload system presently employed shows no need for an additional judgeship.

Third, suspended eminent domain cases will not materialize.

I should like, if I could, to answer each of these objections which have been made to the additional judgeship in the western district of Missouri.

First, my reply to the argument with respect to the lack of approval by the Judicial Conference.

The needs of the western district of Missouri and for that matter, the district of Nebraska, were never considered by the full Judicial Conference of the United States because of the failure of those districts to receive notice of the opportunity to submit their needs for study to the Judicial Conference Committee on Judicial Statistics.

Nevertheless, the Judicial Council for the Eighth Circuit did consider and approve the additional judgeship for western Missouri and Nebraska because of the exceptional circumstances preventing western Missouri and Nebraska from being considered by the Judicial Conference.

Second, my reply to the argument dealing with the weighted caseload system presently employed.

The weighted caseload system presently employed is considered generally as an inaccurate and unreliable measure of today's judicial burden.

A letter from the Director of the Federal Jud cial Center, Mr. Justice Tom C. Clark, dated October 7, 1969, stated clearly the need for a new weighted caseload system and the inadequacies of the old system. I read a part of that letter:

Discussions between the Judicial Conference Subcommittee on Judicial Statistics of the Court Administration Committee, the Administrative Office and the Federal Judicial Center have led to the conclusion that a new formula clearly related to sitting judgeships, present filings and case categories should be designed.

When the new weights resulting from the current study are revealed, a greatly different and reliable picture of judicial needs and rankings of courts will emerge.

Further, western Missouri has a unique problem in hearing petitions from prisoners of the U.S. medical center at Springfield. This is recognized in the administrative office paper on the "Judicial Business of the U.S. District Court for the Western District of Missouri," provided for the use of interested Congressmen. In that document the following statement appears:

Petitions by federal prisoners have increased from 73 in 1964 to 133 in 1968 and 255 in 1969. The petitions by federal prisoners arise primarily from the Medical Center at Springfield, Missouri, and present unique legal questions.

These prisoners include a large number of persons who have not been convicted but who are committed because of suspected or proven mental incompetence, and also include problem convicts transferred from conventional penitentiaries.

Looking to the only presently available reliable measure, the number of cases filed by districts, a picture entirely different from the weighted caseload rankings emerges.

The figures for the last 4 fiscal years and the figure for the current unfinished fiscal year show the case filings by number per judge for the western district of Missouri as follows:

In 1966, the number of cases per judge was 294.75.

In 1967, the number of cases per judge was 265.25.

In 1968, the number of cases per judge was 262.75.

In 1969, the number of cases per judge was 286.75.

In 1970, on an estimated basis, the number of cases per judge is 397.50.

I come now to objection No. 3 and my response thereto. This objection deals with the suspended eminent domain cases.

Third, the Corps of Engineers can accurately predict eminent domain filings because of the long experience of the corps and detailed planning.

In addition, the potential burden of condemnation cases of the Whiteman Air Force Base ABM system scheduled by the executive department for an early start cannot be ignored in any projection of the needs of this court. The burden of the earlier Whiteman missile site cases in the western district of Missouri shows that this type of condemnation case is much greater than that of condemnation for conventional purposes. This is true because of the speed required in the acquisition program and the unprecedented complex nature of the uses and of the easements acquired.

In summary, we must take into account:

First, gross underestimate of the burden of Federal habeas corpus petitions of Federal unconvicted and convicted prisoners in the U.S. Medical Center for Federal Prisoners. No o her district has this unique problem.

Second, gross underestimate of the burden of Federal habeas corpus by State prisoners to review validity of a State court conviction under 1966 amendments of Public Law 89–711, and recent controlling decisions.

Third, gross overestimate of the burden of conventional tort cases, for example, of which about 90 percent are settled by the litigants. There is no way to settle habeas corpus cases, which must be decided unless withdrawn or made moot.

Fourth, failure to take into account the backlog of suspended and unfiled eminent domain cases certain to be filed when budgetary restrictions are removed.

Mr. President, I am happy to join with my distinguished senior colleague, Senator SYMINGTON, in urging that the additional Federal court for the western district of Missouri be restored.

Mr. President, I ask unanimous consent that a statement made by Judge William Becker, the presiding judge of the western district of Missouri, before the Senate Judiciary Committee be printed at this point in the RECORD.

There being no objection the statement was ordered to be printed in the RECORD, as follows:

A FINAL CONCLUSORY WORD

One factor which greatly bothers the judges of the Western District of Missouri is the fact, as shown on Table I of the data presented the Congress by the Administrative Office, that while Local Rule 20 enabled our Court to make inroads on backlog in 1966 and 1967, the mounting pressures of prisoner petitions and condemnation cases broke that pattern in 1968.

In 1966 the Western District of Missouri reduced its backlog by terminating 910 civil cases against 798 filed. In 1967, 783 were terminated against 734 commenced. In 1968, however, in spite of the decrease in filings of personal injury diversity cases, we terminated only 577 cases in 1968 against 708 filed. Every active judge in the Western District worked as hard in 1968 as he did in 1967 and 1966 if, indeed, he did not work harder and, because of his added experience, more efficiently.

One is forced to conclude that unless given relief in the form of an additional judge, the record of accomplishment of making inroads on a backlog will not continue because the present judges of the Western District have no more judicial hours to give the United States, and endeavor to spend their limited time more efficiently.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nominat'on of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. INOUYE. Mr. President, at a time when our thrust should be toward drawing our country together, we witness movement toward separation and polarization. At a time when our leaders should be marshaling all forces to pro-

pel this forward thrust, we review with alarm this administration's backward leap over the past year.

We witness the go slow approach our administration has adopted in the area of desegregation—its support of an amendment which would work to weaken the enforcement of school desegregation rulings in the South and its equivocation on extending for another 5 years the Voting Rights Act of 1965.

We remember the Justice Department's request to postpone for a year the enforcement of school desegregation orders in Mississippi which cause a "revolt" by lawyers in the Department's Civil Rights Division.

We recall the recent memorandum sent by a high level adviser to the President suggesting that the administration pursue a policy of "benign neglect" on racial issues at a time when the very fabric of our Nation is being torn at the seams by so many years of this very neglect.

We watched the removal of Leon Panetta from his post as Director of the Officer for Civil Rights in the Department of Health, Education, and Welfare because he tried to implement the law.

We notice a reduction in funds for inner cities at a time when they fester in desperation and the severity of their problems take quantum jumps. We heard, for example, our administration indicate that limited funds would be allocated to such programs as title I of the Elementary and Secondary Education Act—the primary vehicle by which compensatory services have been provided in school districts serving the poor.

It is with despair that we watch our administration seek a low profile in all areas of civil rights—a low profile which can only trigger high profiles on indices of dissatisfaction, alienation, and fragmentation among the already polarized groups in our Nation.

And now to hit the lowest point of its silhouette in this area, our administration has called upon Judge G. Harrold Carswell, a man who only two decades ago proudly declared he was an unabashed racist, to assume the mantle once worn by such distinguished judges as Justices Oliver Holmes, Louis Brandeis, and John Marshall.

Let me say that while I would have expected a nominee to the Supreme Court to have shown by word and deed a deep commitment to the principle of equal opportunity for all citizens, so eloquently expressed in the 14th amendment to our Constitution, I do not hold against Judge Carswell the speech he delivered in 1948 in which he declared:

> I yield to no man in the firm vigorous belief in the principles of white supremacy, and I shall always be so governed.

I am well aware that this speech expressing his vigorous belief in the "principles of white supremacy" was delivered in his youth and in the heat of an election campaign designed to sway white voters. At one time or another in our political careers, we have all made unfortunate statements which we would prefer to forget. However, I am distressed by the fact that since delivering this speech 22 years ago, Judge Carswell has done little to indicate by deed or decision that his views on civil rights have changed in any way.

The Judiciary Committee hearings have, in fact, revealed that between 1958 and 1969, 15 of Judge Carswell's decisions on civil rights and individual rights cases were unanimously reversed by the fifth circuit court. It is worthwhile to note that even those who support his nomination have admitted that his decisions in five cases "may fairly be described as anticivil rights."

In addition, the hearings disclosed that in 1956, Judge Carswell served as an incorporator and director of a private golf course in Tallahassee, a segregated course specifically formed to circumvent a Federal Court order requiring the desegregation of municipally operated recreational facilities. Judge Carswell's testimony that despite his official position and his knowledge of suits compelling equal treatment of blacks and whites at public golf courses, he did not know that the purpose of establishing the private club was to avoid the results of such suits. Is simply not one that we can accept from a U.S. attorney. Such a statement demonstrates an alarming lack of candor.

The Judiciary Committee's hearings also pointed out that as recently as 4 years ago Judge Carswell sold property with a provision that ownership, occupancy and use of the property would be restricted to members of the Caucasian race.

I was astounded that the White House reacted to this disclosure by stating that "this particular incident is not isolated at all." While I have no doubt that there are hundreds if not thousands of real estate deeds in this country which contain racial covenants, it is quite another matter to find such a covenant appearing in a deed held by a man who aspires for the High Bench. That Judge Carswell claims he was not aware of the covenant is hardly an excuse we can accept from a lawyer and judge.

If Judge Carswell had, in fact, renounced the doctrine of white supremacy enunciated in his 1948 speech, he should have shown a change of heart by deed rather than mere rhetoric. Opposition to the racial covenant covering the property he sold would have illustrated his belief by deed. Here was an opportunity he "missed."

Judge Carswell's civil rights record would alone be grounds enough for questioning his nomination. There is, however, yet another area of concern. I speak here of his judicial competence.

While I am not a member of the Committee on the Judiciary and, therefore, hesitate to discuss Judge Carswell's legal qualifications, I am concerned with the serious doubts and questions regarding his judicial competency raised by both my colleagues and an alarming number of distinguished jurists and legal scholars. The letter we recently received from 457 of our Nation's most prominent lawyers—among them the deans of Harvard, Yale, and the University of Pennsylvania—urging the rejection of this nomination cannot be ignored.

While I am concerned with Judge Carswell's civil rights record, my opposition is not just that of a liberal on civil rights to a "southern" judge. Judge Carswell's own southern judicial colleagues have demonstrated a remarkable coolness to his nomination to this high post. I gather from press accounts that Judge John Minor Wisdom as well as Judge Elbert Tuttle, both of the Fifth U.S. Circuit Court of Appeals, have refused to approve his elevation to the Highest Court—a refusal which stands in sharp contrast to the previous practice. This is particularly noteworthy because I believe if anyone can judge his professional qualifications objectively it is those who have worked with him in a professional capacity over the years.

There is no room for mediocrity on the High Bench. The Supreme Court deserves the best we can offer.

I am reminded here of our President's declaration that his nominee to the Supreme Court would be a man of as great judicial distinction as former Justices Oliver Holmes and Louis Brandeis. The record of the Judiciary Committee's hearings clearly indicates that Judge G. Harrold Carswell is simply not such a man.

To elevate to the Bench of the Highest Court in our Nation a man whose judicial career has been described as one of consistent mediocrity, even by some who support his nomination, would serve only to deteriorate the credibility of the Supreme Court at a time when its very welfare and prestige hang in the balance.

To elevate to the Bench of the Highest Court in our Nation a man who has done nothing to indicate by deed that his views on civil rights have changed over the last 22 years would be to undermine the Supreme Court's well earned reputation for equity and justice.

To support this nomination would be to violate my conscience and that of the American people.

Mr. President, for these reasons I cannot and will not support the elevation of Judge G. Harrold Carswell to the Supreme Court. I urge my colleagues to likewise clearly demonstrate their concern.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GURNEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GURNEY. Mr. President, all of us, at one time or another, have awakened from a dream in the middle of the night, trying hard to resurrect the scenes that played before our unconscious minds, with a disturbing feeling that we had been looking at pictures that we had seen before.

The speeches that have been made here in the Senate in the last few days on the Judge Carswell nomination, as well as the daily reports in the press, and the nightly bits and pieces on television, remind me so much of those dreams I just mentioned. The debate on the Judge Carswell nomination is scene for scene, word for word, almost a replay of the Haynsworth affair The same

actors are leading the opposition, the lines are so nearly identical, that it is uncanny.

Those directing the production for the opposition are precisely the same, organized labor bosses and civil rights leaders. The audience cheering and applauding the opposition is the same, people who do not want to see an end to the era of liberal domination of the political and economic and social affairs of this country by reform of an activist, lawmaking Supreme Court.

About the only difference in the cases is a slight rearrangement of issues and arguments against Judges Carswell and Haynsworth.

The ethical issue which was the false peg upon which the opposition hung their hats in the Haynsworth matter is missing, mainly because Judge Carswell and his wife are people of limited means. There can be no conflict of interest in his case, because there are no property holdings which can give any hint of conflict.

The civil rights issue is here as it was in Haynsworth. However, the civil rights case against Judge Carswell is a specious one indeed.

Except that there is so much at stake, the appointment of one of the nine Judges of the Supreme Court of the United States, one might be tempted to dismiss the civil rights arguments as not worthy of discussion.

But they have been raised, hence we must examine them.

First, there was the political speech which Harrold Carswell made 22 years ago, in 1948, as a candidate for public office, in which he defended segregation of the races as proper. This indiscretion received some momentary play in the press at the time, but I do not think that any broadminded or decent person can view this in any other light than a political statement made in the heat of a political campaign in rural Georgia 22 years ago. Judge Carswell was running against another candidate who had accused him as being liberal and in favor of integration. In that area, at that time, he said what many others running for public office said. It was an obnoxious statement as Judge Carswell has said but I doubt if there is a single Member of this great body, the U.S Senate, who has not made statements in his political speeches over the years, statements that he would be very glad to be able to delete or rephrase at this time.

I think that the significant fact about Judge Carswell's Georgia political speech was his reaction when this came to light. He said: ' Specifically and categorically, I renounce and reject the words themselves and the thoughts that they represent. They are obnoxious and abhorrent to my personal philosophy." This is the important thing to me, for this immediate reaction is most revealing of the man's character. It would have been very human had he tried to defend or to explain the statement. Many might have reacted so. However, Judge Carswell did not do this but he rejected the words out of hand. I think that this speaks much in favor of the character of the man. It indicates a drastic change in his attitude on the whole matter of segregation and integration. Judge Carswell is obviously a man who can change with the times.

The second building block for those who would like to prove Judge Carswell a racist is the matter of the Capitol City Country Club.

It appears that the local golf course in Tallahassee was municipally owned. The course was running at a loss of some $14,000 or $15,000 a year and the city wanted to dispose of the club. In the year 1956, a group of local citizens got together for the purpose of acquiring the municipal course and operating it as a private club. Some 21 signed a corporate charter for an enterprise called the Capitol City Country Club. Each put up $100. Harrold Carswell was one of the signers.

Opponents of Carswell claim the main purpose of the new club was to change a public course to a private one which could then exclude blacks from playing golf.

The hearing record reveals that this corporation never got off the ground, that it did absolutely nothing and that $76 of the $100 paid in by Judge Carswell was refunded to him.

Another group went ahead with the country club but Carswell was not a part of the second group. He had nothing whatsoever to do with it.

He did join the club some years later for 3 years from 1963 to 1966 so his children could play golf. He dropped out in 1966.

The opponents claim that this set of facts shows Judge Carswell participated in a scheme to deny blacks the right to play golf.

How in heavens name that conclusion is arrived at is a mystery to me.

Carswell signed his name to a charter of a corporation that did absolutely nothing.

It was succeeded by another corporation that operated the golf course. Judge Carswell was not a member of this second group.

Again the opposition has struck out.

The third attempt to brand Judge Carswell with a racist label came in connection with a transfer of a building lot to his wife. The lot came out of a subdivision which had restrictive covenants including one preventing transfer to any Negro.

The lot was never built upon by Mrs. Carswell and subsequently she sold it. The deed of conveyance contained a clause "subject to restrictive covenants of record."

As a former practicing Florida lawyer, I can say that this is standard language in Florida conveyances. There are probably deeds in the millions on record in Florida with this language, certainly in the hundreds of thousands.

No specific mention of the Negro covenant was made in the deed of conveyance that Carswell signed.

The facts then are that Judge Carswell never owned the land, there is no evidence that he ever knew anything about the covenant. He signed the deed because under Florida law, even though a husband has no interest whatsoever in his wife's property, he must join in conveyances of her real property. The deed says nothing about the covenant.

One wonders what this deed has to do with the Carswell nomination.

One questions why the minority report accompanying this nomination recites these facts.

Next there is mention of a joke alleged to have been told by Judge Carswell. Here the facts are so vague that the joke is not even set out in the minority report, simply alluded to. I might say that the least the attackers of Judge Carswell might have done here was to give the rest of the Senate the benefit of the joke so we could judge for ourselves its impropriety and perhaps even pass upon the merits of the humor in it, whether good or bad.

There is the last so-called racial fact involving the "Seminole boosters." This was a typical club of city folk and university alumni formed in 1953 to drum up support for the athletic teams of Florida State University. The charter has a clause limiting members to whites. Carswell's law firm drew the corporate charter for nothing by copying a charter then in use for a booster club of another college. How many lawyers in this body have done similar free acts—given a copy of a charter to a secretary for copying.

Now all these racial bits against Judge Carswell come under the heading in the report "Judge Carswell's Insensitivity to Human Rights."

In years to come, future historians in my view, are going to wonder what kind of political times these must have been to have motivated outstanding members of the U.S. Senate to indulge in this insensitivity thing.

It occurs to this Senator that the insensitivity here is clearly one directed against Judge Carswell.

There is not a single fact of substance in the record that indicates, except the speech of 22 years ago, and I doubt even those who signed the minority report against Carswell take that too seriously.

The rest of the case against the Judge rests upon an accusation of mediocrity.

I do not know whose brainchild this one is, although it is quite clear that it is a well organized campaign which has gathered a number of supporters, lawyers and law professors. These are also mainly, although not entirely, from the northeastern part of the Nation There is no time to analyze their political affiliations or philosophies, but I would feel quite safe in venturing an opinion that they are of splendid liberal persuasion, great admirers of an activist Supreme Court like the Warren one, and of one clear, common mind, that a conservative judge has no place on the Supreme Court.

One fact about the mediocrity argument and the people who advance it, they do not know Judge Carswell, they have not practiced before his court, they do not know him as a colleague.

How does one define mediocrity or excellence in a Federal district judge? I must confess, I do not know even though I have been a practicing lawyer and in Federal courts on many occasions.

If he is a busy, hardworking trial judge there is infrequent occasion to write

opinions and little time even where opinions are written, to produce legal tomes.

The same would be true of legal tracts or articles, especially for law reviews.

Some lawyers like to see their name in print. In the case of law professors, it is a necessity to write and publish to get ahead in one's profession.

Not so a Federal district judge. In fact, a great production of legal essays, or for that matter, lengthy opinions on the part of a Federal district judge, would lead me, a former practicing lawyer, to suspect that some other judge was doing that particular judge's work, or else he was bucking for something besides being a district judge.

Now any practicing lawyer knows where to go to find out what judges are of excellent legal mind and have judicial abilities. That is to seek the opinion of the bench and bar where the judge is located.

The bench and bar of Florida, almost to a man, speak highly of Judge Carswell and his qualifications. He enjoys the almost unanimous endorsement of his colleagues on the bench and of the countless numbers of lawyers who come before him in his 11 years as a Federal district judge.

I have discussed Judge Carswell with a great many distinguished and able lawyers in Florida, men in whom I have the utmost confidence. To a man, they have said he has an excellent legal mind, he has been an outstanding Federal Judge and that he is Supreme Court material. That opinion is far more meaningful to me than opinions of lawyers and professors hundreds and thousands of miles away who have never laid eyes on Judge Carswell.

We have heard a lot in the last 2 weeks about Judge Carswell's reversal record. I suggest that the case put forward by the Ripon Society and other groups presents a distorted and unreal picture of Judge Carswell's record in this regard.

Let us look at the real record. Judge Carswell was a trial judge in the Federal District Court for the Northern District of Florida from 1958 to 1969. During that period he heard more than 4,500 cases. That figure does not, of course, include guilty pleas, motions, hearings, and so forth.

Approximately 2,500 of these cases were criminal cases. Of all the criminal cases over which he presided, 44 appeals were taken to the court of appeals for the fifth circuit.

On 36 occasions, Judge Carswell was affirmed. On eight criminal cases, Judge Carswell's opinion was reversed in whole or in part. Out of more than 2 500 criminal cases over a 12-year period then, Judge Carswell was reversed in eight cases, and only partially in some of those cases. The list of the 44 cases is found at page 319 of the hearings.

I think that is a pretty good track record, and hardly one on which to found any kind of accusation that Judge Carswell's reversal record does not qualify him for the Supreme Court.

The Ripon Society's analysis of Carswell's record deals with published district court opinions: Only about 100 of Judge Carswell's 4,500 cases while on the Federal district court were printed and published. I suggest that it is impossible to make an accurate assessment of Judge Carswell's record—particularly one concerning reversal rates on the basis of 100 printed cases out of a 4,500 total.

During his tenure on the Federal district court, Judge Carswell heard approximately 2,000 civil cases, including civil rights cases. Of that number a total of 63 were appealed. Judge Carswell was reversed on 30 cases and affirmed on 33 cases. Of the cases reversed, again we must point out that in very many cases the reversal was partial. So much for allegations that Judge Carswell was frequently reversed: 30 cases out of more than 2,000 civil cases; eight out of more than 2,500 criminal cases. Like so many of the charges against him it dissolves when exposed to the light of day.

We have a very excellent summary of Judge Carswell's civil rights cases—there were very few of them—placed in the Judiciary Committee's record beginning at page 311.

Let me quote a passage from the separate individual views filed by the distinguished Senators from Indiana (Mr. BAYH), from Michigan (Mr. HART), from Massachusetts (Mr. KENNEDY), and from Maryland (Mr. TYDINGS). I respect my colleagues immensely, but I think their characterization of Judge Carswell's attitude regarding habeas corpus petitions is most unfair:

> An examination of Judge Carswell's habeas corpus decisions evidences a judge who does not take seriously the importance of this vital constitutional provision. It reveals a judge who has developed with regard to the writ a pattern of inattentiveness—inattentiveness which could deprive our Constitution of any real meaning. It reveals a judge who is inclined to look the other way.
>
> The record reveals that in at least nine cases, Judge Carswell has been unanimously reversed for refusing even to grant a hearing in habeas corpus proceedings or similar proceedings under 28 U.S.C. 2255. Whether this unseemly record is the product of simple callousness, obliviousness to constitutional standards, or pure ignorance of the law, one might only surmise.

I should point out to you that during his tenure, Judge Carswell heard petitions for hundreds of writs of habeas corpus—in Tallahassee alone he heard over 250 applications and petitions for habeas corpus in the last 10 years. From this list of cases, my colleagues have selected nine cases where Judge Carswell was reversed on appeal. In many of those cases, the hearing was held, as directed by the court of appeals and the result was the same as the judge has originally decided on the basis of the affidavits and prior submissions: That is the writ was denied and nothing more was heard of the case.

I think it is wildly and grossly unfair to play a numbers game with cases. Cases are full of intangibles, and subtleties which do not permit such a procedure; any so-called statistical breakdown of cases must necessarily fail to take into account th se subtleties and fine distinctions.

Implied in the whole discussions is the erroneous notion that when a trial court judge's opinion is reversed, he is necessarily wrong or in error. That is not the case. Frequently, the law has changed, by virtue of statutory enactment or higher judicial opinion between the time the trial court hears the case and the time the case reached appellate court. Those who applaud the sociological approach to the law must be prepared to accept its implications: By that I mean that the abandonment of the doctrine of stare decisis has meant the abandonment of many of our fundamental notions of jurisprudence. Willy-nilly, doctrines of long standing have been diluted or altered or scrapped completely. This unhappy state of affairs has left our trial courts in a quandary. They have been forced to project, to suppose what higher courts had in mind, what implications there might be from decisions in different but related areas of the law. Trial courts do not make law; if they attempt to do so they are properly struck down. They rely on higher court guidance. That guidance in recent years has been a fluid thing; cherished and longstanding attitudes have been reformed and reshaped by the Supreme Court to fit the individual notions of virtue and truth of the sitting members.

One of the most telling criticisms of the Warren court, I think, has been that its abandonment of the doctrine of stare decisis has created chaos in the lower courts. The lower courts and lower court judges cannot fairly be blamed for this state of affairs.

There is a body of valid and very telling criticism of the Warren court from very eminent and responsible commentators, including the present membership of the Supreme Court, in their dissenting opinions. The best summation of this criticism that I know is contained in the address of Prof. Alexander M. Bickel, chancellor Kent professor of law and legal history at the Yale law school who was last year's Holmes lecturer at my alma mater, the Harvard Law School. Professor Bickel gave the following analysis:

> The Warren court has come under professional criticism for erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions and for imagining too much history . . . the charges against the Warren court can be made out, irrefutably and amply.

Trial court judges, as I say, cannot be indicted for these shortcomings. The indictment is returnable again to the Supreme Court itself.

SOME COMPARISONS OF PRIOR JUDICIAL SERVICE

Mr. President, Chief Justice Warren Burger served on the U.S. Court of Appeals for the District of Columbia circuit from 1956 to his elevation in 1969, a period of 13 years. If we except Mr. Chief Justice Burger, Mr. President, we must go back to Justice Benjamin Cardozo to find an Associate Justice who came to the Supreme Court with more previous on-bench judicial experience than Judge G. Harrold Carswell.

Mr. Justice Cardozo was appointed to the high court by President Hoover in March 1932, having previously served on New York's highest court, the court of appeals, from 1917 to 1932.

I think it would be well to note the judicial experience of the intervening justices at this point.

President Roosevelt appointed Mr. Justice Hugo Black to the Court in 1937. Mr. Justice Black had served as a police judge in Alabama from 1910 to 1911, for a total period of about 18 months.

Mr. Roosevelt's next three appointees came to the Court without any prior judicial experience whatsoever: I refer to Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Douglas.

Mr. Justice Murphy, who was appointed by President Roosevelt in 1940, had 7 years of prior judicial experience in the Detroit Recorder's Court.

Mr. Justice Byrnes and Mr. Justice Jackson, both appointed by President Roosevelt in 1941, each came to the Supreme Court without prior judicial experience.

Mr. Justice Rutledge, who was appointed by President Roosevelt in 1943 had served on the Court of Appeals for the District of Columbia from 1939 to 1943, a period of 4 years.

In all, President Roosevelt appointed eight new Justices to the Supreme Court; together these eight gentlemen had total prior judicial experience totaling slightly less than 12 years, roughly equal to G. Harrold Carswell's individual period of service.

We should note that President Roosevelt elevated Justice Harlan Fiske Stone to the post of Chief Justice in 1941; Chief Justice Stone had, of course, served on the High Court from 1925 to the time of his elevation, having been first appointed by President Coolidge.

President Truman appointed Harold Burton to the Court in 1945. Mr. Justice Burton came to the Court with no prior judicial experience.

Mr. Justice Tom Clark was appointed by President Truman in 1949. He came to the Court wth no judicial experience.

Mr. Justice Minton was appointed to the High Court by President Truman in 1949. He came to the Court with 8 years of experience on the U.S. Court of Appeals for the Seventh Circuit.

President Truman appointed Fred Vinson to the office of Chief Justice in 1946. Chief Justice Vinson had served on the U.S. Court of Appeals for the District of Columbia from 1939 to 1943, a period of 4 years.

In all, President Truman during his presidency appointed four members of the Supreme Court. The total prior judicial experience of these gentlemen amounted to approximately 12 years. Judge Carswell, as we know, served 12 years in the Federal judiciary prior to his nomination.

President Eisenhower appointed Earl Warren to the High Court in 1953. As we all know, to our sorrow, Mr. Chief Justice Warren came to the Supreme Court without prior judicial experience.

President Eisenhower appointed John Marshall Harlan to the Court in 1955. Mr. Justice Harlan had served for 1 year on the U.S. Court of Appeals for the Second Circuit.

Mr. Justice Brennan came to the Supreme Court with a good deal of judicial experience, having served on the New Jersey Superior Court, the appellate division and the New Jersey Supreme Court for a total of approximately 7 years, prior to his appointment by President Eisenhower.

Mr. Justice Whitaker, the next nominee of President Eisenhower, served on the Federal District Court for the Western District of Missouri and on the U.S. Court of Appeals for the eighth circuit for a period totaling approximately 3 years.

President Eisenhower appointed Mr. Justice Potter Stewart to the Court in 1958. Mr. Justice Stewart had served on the sixth circuit court of appeals for 4 years, 1954–58, prior to his elevation.

President Eisenhower thus appointed five members to the Supreme Court. Judge Carswell's prior judicial experience surpasses the individual experience of each of those justices. The total prior judicial service of President Eisenhower's nominees represents approximately 15 years. As an individual, Judge Carswell's prior judicial experience amounts to more than 12 years.

President Kennedy appointed two men to the Supreme Court, Byron R. White and Arthur J. Goldberg, both in 1962. Neither Mr. Justice White nor Mr. Justice Goldberg had prior judicial experience at the time of their appointments.

President Johnson, as we know, appointed two Justices during his tenure: Mr. Justice Abe Fortas and Mr. Justice Thurgood Marshall. Mr. Justice Fortas has no prior judicial experience, but Mr. Justice Marshall had served on the second circuit court of appeals for 4 years prior to his elevation.

The four justices appointed during the Kennedy-Johnson years had a total of 4 years prior judicial service among them. Judge Carswell, with 12 years experience, thus has three times the total prior judicial service of the four justices appointed by Presidents Kennedy and Johnson.

SUMMARY

In summary, the Carswell nomination boils down to these facts in the view of this Senator.

We have a nominee who has spent nearly all his working lifetime within the Federal court system, as a U.S. attorney, as a Federal trial judge, as a Federal appellate judge. Seldom has a prospective appointee to the Nation's highest court received a better preparation. This man understands the problem of lawyer and client in court because he has appeared at attorney for the prosecution and defense in countless cases. He knows the problems confronting a trial judge because he sat as one for 11 years. He has had appellate training in the busiest Federal appellate circuit and one, incidentally, which has had the bulk of the civil rights cases.

His fellow lawyers and judges hold him in high regard as an excellent legal mind and a first-rate judge.

His opposition have not made a case. Snowman after strawman which have been put up by them, have been knocked down and have been found to be of no substance.

In the last analysis, this Carswell nomination is a replay of Haynsworth.

The question is whether labor and civil rights leaders are going to be permitted to have a veto power over a conservative appointment to the Court or whether the President of the United States shall be permitted to carry out his constitutional functions and appoint a judge of his choosing.

To put it another way, is the Senate of the United States going to prevent one of the clear mandates of the 1968 election, which was to change the political philosophy and direction of the Supreme Court?

The liberals lost the 1968 election. They should not now perpetuate a Supreme Court which the people of this Nation deeply desire to be changed.

The President should be permitted to work his will in this nomination. There is no sound justification for the Senate to withhold its consent.

CONCLUSION

President Nixon has set about to reshape the Supreme Court with his appointive power. He has the right to do that under the Constitution and he has a duty to do it because of the promises he made to the American people during his successful election campaign in 1968. He has so far sent to the Senate jurists with wide experience on the bench, men whose views on the judicial process are known and certain. In this way, he hopes to restore to the High Court the dignity and objectivity that once marked its deliberations and by doing so restore it to the esteem it once enjoyed with the American people. As I see it, the Court went astray in recent years, at least partly because too many of the Justices appointed to it had little or no experience in the judiciary, State or local, prior to their appointment. Warren, Fortas, White, Douglas, and Black fall into that category. Justice Black served briefly as a police court judge in Alabama, as I mentioned before. The Burger appointment and now the Carswell appointment offer very real and substantial encouragement to many of us, in public and private life, who have been worried about the direction of the Court in recent years. The Warren court has made its record and is now part of history; frankly, I find that record leaves much to be desired in several respects and I think the country is the worse for it. It is time for a change and a new record to be made. I think it will be a commendable record and I look for Harrold Carswell to play an influential role in its making.

Mr. President, I ask unanimous consent to have printed in the RECORD at this point numerous telegrams I have received from lawyers and judges in the State of Florida over the last 2 days backing the nomination of G. Harrold Carswell.

There being no objection the telegrams were ordered to be printed in the RECORD, as follows:

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

J. R. WELLS, JR.,
Attorney.

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

H. M. VOORHIS,
Attorney.

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Judge of the Supreme Court of the United States.

R. F. MAGUIRE, Jr.,
Attorney.

WINTER PARK, FLA.,
March 17, 1970.

HON. EDWARD GURNEY,
U.S. Senate,
Washington, D.C.:

As a member of the Florida Bar I would greatly appreciate your doing all that you can to assure Senate confirmation of the appointment of G. Harrold Carswell.

L. PHARR ABNER.

PANAMA CITY, FLA.,
March 17, 1970.

HON. EDWARD J. GURNEY,
Washington, D.C.:

I strongly urge confirmation of Judge Carswell's nomination to the Supreme Court. I am a member of the Florida Bar and American Bar Association. I practiced before Judge Carswell during his tenure as United States District Judge in Florida. I am an honor graduate of the University of Florida College of Law, and feel my own academic achievement qualifies me to evaluate and wholeheartedly recommend Judge Carswell based solely upon his demonstrated legal ability. The negative opinions of so called legal schools presently being circulated around Washington are nothing more than subterfuges to disguise philosophical objections.

C. DOUGLAS BROWN,
Attorney at Law.

PANAMA CITY, FLA.,
March 17, 1970.

SENATOR EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

As a practicing Florida lawyer of more than 20 years experience I wholeheartedly endorse the nomination of Hon. G. Harrold Carswell to serve on the Nation's highest court. I have practiced law primarily in northwest Florida, the area served by Judge Carswell as a district court judge. I have practiced law in Orlando, Fla., where I was a law partner of Hon. Don G. Baker. I served at one time as research aide to Hon. Campbell Thornal of the Supreme Court of Florida and at present I am a member of the Florida Board of Bar Examiners. I have done both trial and appellate work and have appeared before numerous judges of the State and Federal courts of Florida. I am acquainted with and have appeared before Judge Carswell in legal matters, it is my firm belief that Judge Carswell is eminently qualified in character, ability and experience and would serve with honor and distinction as Justice of the Supreme Court of United States.

LARRY G. SMITH.

ORLANDO, FLA.,
March 17, 1970.

SENATOR ED GURNEY,
Washington, D.C.:

I urge the appointment of Judge Carswell to the Supreme Court.

GROVER C. BRYAN.

ORLANDO, FLA.,
March 17, 1970.

SENATOR ED GURNEY,
Washington, D.C.:

I urge the appointment of Judge Carswell to the Supreme Court.

RICHARD L. FLETCHER.

ORLANDO, FLA.,
March 17, 1970.

SENATOR EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

The undersigned endorses and urges your continued support for the nomination of Judge Carswell to the Supreme Court.

RONALD A. HARBERT,
MATEER, FREY, YOUNG & HARBERT.

ORLANDO, FLA.,
March 17, 1970.

HON. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

This is to confirm my own support and actively solicit the continued support of the nomination of Judge Carswell now in debate before the Senate.

WILLIAM G. MATEER,
MATEER, FREY, YOUNG & HARBERT.

ORLANDO, FLA.,
March 17, 1970.

SENATOR EDWARD GURNEY,
U.S. Senate,
Washington, D.C.:

I urge the appointment of Judge Carswell to the Supreme Court.

ELDON C. GOLDMAN.

DALLAS TEX.,
March 17, 1970.

HON. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

Urge you do all in your power to obtain Senate confirmation of Judge Carswell as Associate Justice, United States Supreme Court.

FLETCHER G. RUSH,
Former President of the Florida Bar.

TALLAHASSEE, FLA.,
March 17, 1970.

SENATOR EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

As a former assistant attorney general for the State of Florida for 8 years I strenuously urge and support the confirmation of Judge Harrold Carswell to the Supreme Court of the United States I have had occasion to appear before Judge Carswell during this 8 year period in litigation involving civil rights and have always found him to be courteous able and impartial. The manner in which he conducted his court including treatment of counsel was beyond reproach and consistent with the highest judicial standards. Judge Carswell has served the Federal judiciary with honor and distinction both as a district court judge and court of appeals judge. His confirmation will bring to the U.S. Supreme Court a man of impeccable integrity and outstanding ability. U.S. Senate should take great pride in confirming Judge Carswell fo indeed he is, has been, and will continue to be a credit to the judiciary and the entire Nation.

GERALD MAGER

JACKSONVILLE, FLA.
March 17, 1970.

HON. EDWARD J. GURNEY,
U.S. Senator,
Washington, D.C.:

We appreciate your efforts in support of confirming President Nixon's nomina ion of Judge G. Harrold Carswell to the Supreme Court.

A diligent investigation of Judge Carswell's background has revealed no more than two or three incidents which only his most biased detractors can twist into arguments against him. The criticisms which have been voiced make him appear to be strangely different from the person who is known to Florida lawyers.

An insignificant number of lawyers from other States who do not know Judge Carewell have gained publicity by signing petitions which distort his personality, philosophy and qualifications.

By contrast, the lawyers in this State who have appeared before him, who know him personally and who have firsthand knowledge of his qualifications are virtually unanimous in his support.

It is apparent that the real objective of the publicity campaign against Judge Carswell is to prevent a conservative voice from being heard on the court. Opposition that is based on political grounds gives support to those who criticize Supreme Court decisions as being politically motivated. Such opposition is destructive of public confidence in the judicial system of this country.

Unless a vote on Judge Carswell's confirmation is taken as soon as possible, the continued controversy can only damage public respect for the Supreme Court and our system of justice.

William H. Adams III, Jack H. Chambers, Earl B. Hadlow, George L. Hudspeth, Fred H. Steffey, Thomas M. Baumer, Linden K. Cannon III, Phillip R. Brooks, John G. Grimsley, Wade L. Hopping, James Mahoney, J. Frank Surface, Brian H. Bibeau, David W. Carstetter, Walton O. Cone, Guy O. Farmer II, Mitchell W. Legler, Rolf H. Towe, William D. King, and Bryan Simpson, Jr.

COCOA, FLA.,
March 17, 1970.

Congressman ED GURNEY,
Washington, D.C.:

Strongly recommend Senate confirmation of our great Florida Jurist Judge Carswell

ROBERT G. FERRELL III,
Public Defender, 18th Judicial Circuit.

BROOKSVILLE, FLA.,
March 17, 1970

SENATOR EDWARD GURNEY,
Washington, D.C.:

Your support for Judge Carswell as Justice of the Supreme Court sincerely appreciated by the Judiciary of Florida. Carswell is a qualified jurist

MONROE W. TREIMAN,
County Judge, Hernando County.

FT LAUDERDALE, F A.,
Ma ch 7, 1970

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D C.:

I concur completely with the nomination of Judge Carswell and hope and trust you will continue to urge his confirma i n by the Senate.

DAVIS W. DUKE JR.,
Attorney

BRADENTON FLA.,
March 18 1970

Hon. EDWARD J GURNEY,
U.S. Senator, N w Senate Office Building,
Washington, D.C :

As p acticing attorneys in Fl rida, we urge quick confirmation of Judge Carswell to the Supreme Court

W J. DANIEL,
WALT R H. WOODWARD,
E N. FAY, JR.

FT. LAUDERDALE, FLA.,
March 18, 1970

Senator EDWARD J. GURNEY,
Washington, D.C.:

I concur completely with the nomination of Judge Carswell and hope and trust you

will continue to urge his confirmation by the Senate.

JAMES M. CRUM,
Attorney.

FT. LAUDERDALE, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I concur completely with the nomination of Judge Carswell and hope and trust you will continue to urge his confirmation by the Senate.

K. ODEL HIAASEN,
Attorney.

FT. LAUDERDALE, FLA.,
March 18, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

I concur completely with the nomination of Judge Carswell and hope and trust you will continue to urge his confirmation by the Senate.

JAMES D. CAMP, JR.,
Attorney.

FT. LAUDERDALE, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

In concurrence completely with the nomination of Judge Carswell. And hope and trust you will continue to urge his confirmation by the Senate.

RICHARD G. GORDON,
Attorney.

BRADENTON, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Washington, D.C.:

As an active practicing attorney in Florida I hereby urge the immediate confirmation of Judge Harrold Carswell to the Supreme Court.

JAMES M. WALLACE,
Attorney at Law.

BRADENTON, FLA.,
March 18, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D C.:

As practicing attorneys we urge immediate confirmation of Carswell to Supreme Court Justice.

DEWEY A. DYE, JR.,
KENNETH W. CLEARY,
JAMES M. NIXON, II,
ROBERT L. SCOTT,
DAVID K. DEITRICH.

SARASOTA, FLA.,
March 18, 1970.

HON. EDWARD GURNEY,
Washington, D.C.:

As a practicing attorney in Florida I urge quick confirmation of Judge Carswell.

RICHARD S. SPARROW.

SARASOTA, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
Washington, D.C.:

As a practicing attorney in Florida I urge quick confirmation of Judge Carswell.

WILLIAM A. SABA.

SARASOTA, FLA.,
March 18, 1970.

Senator ED GURNEY,
Washington, D.C.:

As a practicing lawyer in Florida I strongly recommend early confirmation of Judge Carswell to the Supreme Court of United States.

THOMAS F. ICARD.

CRESTVIEW, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Washington, D.C.:

Respectfully request that you vote for the confirmation of Judge Carswell nomination.

WILLIAM DEAN BARROW,
Attorney.

CRESTVIEW, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Old Senate Building,
Washington, D.C.:

Respectfully request that you vote for the confirmation of Judge Carswell nomination.

BEN L. HOLLEY,
Attorney.

LAKELAND, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

As member of the Florida Bar Board of Governors, I support the nomination of Judge Harrold Carswell to the Supreme Court of United States. Your continued support is urged and will be appreciated.

M. CRAIG MASSEY.

LAKELAND, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate,
New Senate Office Building,
Washington, D.C.:

I recommend support of Judge Harrold Carswell's nomination to Supreme Court. I am member of the Florida Bar and president of the Tenth Judicial Circuit Bar Association.

DAVID J. WILLIAMS.

MILTON, FLA.,
March 18, 1970.

Senator ED GURNEY,
Senate Building,
Washington, D.C.:

We circuit judges of the First Judicial Circuit or Florida have had the pleasure of knowing Judge G. Harrold Carswell as a lawyer and as a judge; it is a pleasure to vouch for him and urge his confirmation. Best wishes.

WOODROW M. MELVIN,
Presiding Judge.

BELLEAIR, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I urge the confirmation of Judge Carswell.

CHARLES R. HOLLY,
Circuit Judge, Clearwater, Fla.

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD GURNEY,
U.S. Senator,
Washington, D.C.:

The Judicial Administration Committee of the Florida Bar considers Judge Harrold Carswell to be eminently qualified, competent and learned to serve as Supreme Court Justice. We urge his confirmation without further delay. I also personally recommend this action.

PARKER LEE MCDONALD,
Circuit Judge and Chairman of Committee.

LAKELAND, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

As practicing attorneys interested in the return of sound constitutional government we respectfully request and urge you to continue your support of the nomination of Judge Carswell to the Supreme Court of the United States.

J. HARDIN PETERSON, SR.,
J. HARDIN PETERSON, JR.,
EUGENE W. HARRIS,
GEORGE C. CARR.

ST. PETERSBURG, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

I personally support the Senate's confirmation of Judge Harrold Carswell as a Justice of the United States Supreme Court.

BEN F. OVERTON,
Circuit Judge.

FORT LAUDERDALE, FLA.,
March 18, 1970.

Senator EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

I urge confirmation Judge Carswell on nonpartisan basis.

L. CLAYTON NANCE,
Circuit Judge.

TAVATES, FLA.,
March 17, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

I respectfully recommend Judge Carswell for your favorable consideration and urge you support his nomination by President Nixon as an Associate Justice of United States Supreme Court.

Sincerely submitted,
Circuit Judge W. TROY HALL, JR.

KEY WEST, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
U.S. Senator, Washington, D.C.:

We the undsrsigned, members of the Monroe County Bar Association, at Key West Florida, endorse, support and request the confirmation of the nomination of Judge G. Harrold Carswell to the United States Supreme Court,

Enrique Esquinaldo, William V. Arbury, William R. Neblett, Allan B. Cleare, Jr., W. C. Harris, M. Ignatius Lester J. Lancelot Lester, Jack A. Saunders, Paul E. Sawyer, Jr., Tom O. Watkins, Hillary U. Arbury.

BRANDENTON, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senator,
New Senate Office Building,
Washington, D.C.:

As a practicing Florida attorney and former State attorney for 24 years, I respectfully urge the immediate confirmation of Judge Carswell.

W. M. SMILEY.

ORLANDO, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
Senate, Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

R. H. WILKINS.

ORLANDO, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
Senate, Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

C. W. ABBOTT.

ORLANDO, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
Senate, Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

R. W. BATES.

ORLANDO, FLA.,
March 18, 1970.

EDWARD J. GURNEY,
Senate, Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

D. L. GATTIS, Jr.

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD J. GURNEY,
Senate, Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

M. W. WELLS, Jr

ORLANDO, FLA.,
March 18, 1970.

HON. EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

I urge your support and vote for the confirmation of G. Harrold Carswell as Associate Justice of the Supreme Court of the United States.

M. W. WELLS.

Mr. GURNEY. I yield the floor.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. SAXBE). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LONG. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GURNEY). Without objection, it is so ordered.

Mr. LONG. Mr. President, it has come to my attention that Judge John Minor Wisdom of the Fifth Circuit Court of Appeals has issued a public statement in opposition to the confirmation of Judge Carswell.

It seems to me this statement was highly inappropriate, in view of the fact that Judge Wisdom has a direct conflict of interest in this matter and nothing about the conflict of interest appeared in his statement.

It is common knowledge that Judge Wisdom has for 10 years been trying to obtain his own elevation to the Supreme Court. Judge Wisdom s friends did everything they could to suggest that Judge Wisdom, rather than Judge Carswell, should be nominated for the vacancy that presently exists.

If Judge Carswell is confirmed, as I hope will be the case, the presence of two judges from the South on the Court will mean that it will probably be a very long time before a man from that part of the Nation is appointed to fill a vacancy. So, here is Judge Wisdom, waiting in the wings, issuing a public statement against Judge Carswell and hoping that with the defeat of Judge Haynesworth and then Judge Carswell, President Nixon will be forced to turn to Judge Minor Wisdom, who is one of the Republican leaders for the State which I have the honor to represent in the Senate. During the time that Judge Wisdom has been on the court, he has agreed with virtually as many motions and requests of the Justice Department as, I suppose, any judge in the United States. He has been so completely subservient to the Justice Department, under both Democrats and Republicans, that we might well wonder whether he is a lawyer for the Government rather than a judge seeking to hear both sides of an argument and to dispense justice impartiality.

This is clearly a case of a jealous, frustrated, and ambitious man seeking to prevent the kind of a man which President Nixon promised to appoint from going on our Highest Court, in the hope that he, Wisdom, who is not the kind of man President Nixon promised to appoint, will be the successful nominee.

Since the debate has commenced on the nomination of Judge Carswell, I have undertaken to obtain the views of judges in Louisiana including those who have been confirmed by the Senate and are presently serving in the district courts. Thus far, every judge with whom I have discussed the matter has been high in his praise of Judge Carswell and has urged that Judge Carswell be confirmed.

Mr. President, I should like to make it clear that there is nothing inappropriate in a judge expressing his views about a nominee for the Court. However if a judge is to make a statement urging that a man not be confirmed, he should make clear in his statement his hopes that should the man be defeated there then will be a job open on the Supreme Court which he hopes to fill. When he does that sort of thing, he should make clear to all that his action involves an obvious conflict of interest. In this case no such clarification was made. If the man has reason to be prejudiced, or if he is biased, he should make the whole facts clear. This, it seems to me, would be more fair than simply saying that he has doubts about the qualifications of a man for a job without making it clear that he hopes that by helping to defeat the nominee, he will make it possible to have that same job.

It would seem to me that Judge Wisdom should have made that clear in his statement. I would say that if one talked to the lawyers in Louisiana, even though Judge Wisdom comes from Louisiana and Judge Carswell comes from Florida, or if he talked to the judges in Louisiana and talked to the law school deans in Louisiana or the law enforcement officials of my State, in an effort to compare the two men, he would receive the overwhelming suggestion that, by all means, Judge Carswell would be a better man for the Supreme Court than Judge Wisdom.

I do not say this to reflect on Judge Wisdom. I merely say that the opinions I have been able to receive are that Judge Carswell is highly qualified and would make a great Associate Justice. He is not the sort of extremist that some would make a great Associate Justice. come away with the view that Judge Carswell is a moderate, a middle-of-the-road type, and that Judge Wisdom is himself something of an extremist.

Mr. President, we have enough of extremism on the Supreme Court now. It is about time we tried to move toward moderation, which I believe would be what we would expect under Judge Carswell.

Mr. GURNEY. Mr. President, will the Senator from Louisiana yield?

Mr. LONG. I yield.

Mr. GURNEY. I read that account in the morning paper, as did the Senator from Louisiana, and I found nowhere in the news account any reason given by Judge Wisdom for opposing the nomination of Judge Carswell. I thought that was rather strange.

Does the Senator know whether he has advanced any reason for opposing the nomination?

Mr. LONG. I paid little or no attention to it. It just struck me as highly inappropriate. I did discuss it with the men who are high up in the legal councils of my State. These men point out that in viewing this action we have to keep in mind that when Judge Wisdom did that, he had perhaps more reasons than meet the eye for wanting the man defeated, he being in hopes of getting on the Supreme Court himself.

He has been trying to move in that direction for many years. I know of no speech in which Judge Wisdom has said this. But if you talk to the legal fraternities in my State, they will tell you it is common knowledge that that man hopes to be elevated to the Supreme Court. I read a publication recently, in which it was mentioned that some Republican leaders have suggested Judge Wisdom for the job. I noticed that when Judge Haynsworth's nomination came to the floor, the Washington Post was not enthusiastic about Judge Haynsworth, even though the Post finally suggested that he be confirmed, but it said, "Why not a man like Wisdom?" So, he has been considered. I am sure he was considered before the Carswell selection. I am sure he will be considered again, in the event that Judge Carswell were defeated.

May I point out that I come from Louisiana, and Judge Wisdom comes from Louisiana. I did not object to his appointment when President Eisenhower sent his name down. It seemed all right to me.

Mr. GURNEY. Mr. President, I think I can say that even though Florida is quite a bit east of Louisiana, Florida is also a member of the fifth circuit. And it is common knowledge among the lawyers there that Judge Wisdom does have ambitions to be on the Supreme Court.

To get back to the point I raised, I did not see any reason given by Judge Wisdom for opposing the nomination. All kinds of reasons have been given, such as insensitivity and things like that. I would imagine he could have found one. But he did not give any.

Mr. LONG. Mr. President, he had a real good one, because he hoped to get that job He was waiting in the wings in the event that man were defeated. I suggest that as a possible motive, for

all of those who want to judge for themselves.

And it might well have been desirable for him to mention in the course of the statement that he had hoped that the name sent up here would be that of Judge Wisdom instead of Judge Carswell, so that people would know the facts and could judge accordingly, rather than to pick up the morning paper and read that Judge Wisdom, whom they assume to be a fine man, is opposed to the nomination of Judge Carswell.

It did not make a much better impression on me than did the incident involving Judge Tuttle.

Here we have this fine old man, a veteran of the wars of the judiciary. He is getting a little old, and perhaps a little senile.

He sent a letter up here talking about a man he had known for more than 20 years and saying that he is a fine judge and ought to be confirmed for the Supreme Court.

Then, after a period of time passes, he sent another letter here repudiating his first letter.

About all I can say is that we should not pay any attention to what he says. He is getting a little old. He sends us a letter recommending a man he knew for 20 years. Then he sends another letter to contradict and repudiate the first letter.

He might send another letter here to repudiate the repudiation.

Mr. GURNEY. I agree with the Senator's analysis. Apparently the thing that made him change his mind was the country club incident at Tallahassee and the deed of conveyance. He obviously did not know the facts, because Judge Carswell signed his name to the charter of the corporation that never did any business and was never a member of the country club.

If the Judge had known this, I cannot imagine that he would not change his mind.

As for the deed, if the Senator recalls, there was a record of conveyance from Mr. Carswell. He had no interest in the property. He signed the deed, as a husband has to when he is conveying property.

The deed says subject to covenants of record which is a practice that is quite common in Florida.

It is quite obvious to me that Judge Tuttle was not aware of the facts.

Mr. LONG. Mr. President, the deed was a matter that was available to the Senate about a year ago when the Senate confirmed Judge Carswell for the Circuit Court of Appeals. And every Senator could have had that same information at that time if he had wanted it.

At that time, as I recall it the Senate unanimously confirmed Judge Carswell, without a single objection.

One must keep in mind that 99 percent of the cases decided by that court are decided finally. It is only about one out of 100 cases that is ever appealed to the Supreme Cou t. The Supreme Court does not allow a l of those appeals. It is only about 1 percent.

One should be very careful about whom he picks to sit on that circuit court of appeals.

Presumably, the Senate itself should be chastised for voting unanimously to confirm a man, knowing what it did about him.

In addition, when the Civil Rights Act of 1964 was pending before the Senate, I personally offered an amendment to make it crystal clear that if one were a member of a truly private club, that club could discriminate in any way it wanted to discriminate.

That amendment was agreed to upon the advice of attorneys of the Justice Department who were working on the civil rights bill at that time. It was agreed to by Mr. Hubert Humphrey and the leadership for the Democrats and the leadership for the Republicans. It was agreed to unanimously by the Senate.

I would say that any Senator, having voted and participated in the Senate action when we unanimously made it crystal clear that there was nothing whatever illegal about a private club discriminating in the matter of membership in any way it wanted to, would have to plead that he was either too ignorant to know what he was doing or else that he voted to make legal and proper exactly the action that he is contending Judge Carswell did that is wrong.

That being the case, I say that a Senator who was here in 1964 should either don a dunce cap and pretend he does not know what he is doing or else he should agree that he himself should be defeated because he voted to make legal what Judge Carswell did that he now contends is wrong.

The Senator knows as well as I do that that was during a time when, if I had been living in Tallahassee and wanted to play golf without competing with the crowd on the public links, I do not know how I could have found a golf club that was not segregated at that time.

In Louisiana we had clubs for the minority groups and clubs for the majority groups.

The people that were claiming discrimination then were the whites, because it was so much more crowded on their courses than on the other courses. They wanted to play the Negro courses and could not gain acceptance there.

If someone wanted to play golf in Louisiana, he would not have any chance. If he joined a country club, it would have had to be segregated at that time.

What about the members of the Forest Hill Country Club in New York, which was segregated for a long time until they let Althea Gibson go there to play? Should we put them in jail by passing an ex post facto law?

It seems ridiculous to me.

Mr. GURNEY. I thought the Senator made an interesting point in colloquy a while ago when he said he would not be surprised if other judges would send in telegrams repudiating the position they first took.

The Senator from Kansas (Mr. DOLE) handed me an item that appeared on the news ticker.

It is from New Orleans. It says:

U.S. Fifth Circuit Judge John Miner Wisdom said yesterday television reports he opposes the nomination of Judge G. Harrold Carswell to the Supreme Court "is going a little bit too far."

It says further:

Wisdom told UPI last night he felt he was not obligated to write a letter endorsing Carswell. "But to say I oppose him is going a bit too far," he said.

So here we have the repudiation by Judge Wisdom that the Senator from Louisiana was talking about a moment ago.

Mr. LONG. It is almost getting to be a farce. I think the best one can say is that based on their performance, it might be well to ignore what the judges on the circuit will say, if Judge Tuttle and Judge Wisdom are going to reverse themselves and say they do not mean what they say.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. LONG. I yield.

Mr. DOLE. Mr. President, I tried to reach Judge Tuttle on the telephone. I was confused by all of the telegrams flying around the Chamber.

I was told that I could find him in San Francisco. He was not available. But he returned the call to my office and said, he had sent the telegrams to Senator TYDINGS that Senator TYDINGS had requested. They were solicited by Senator TYDINGS. And they were very carefully written. If I wanted to talk to him about something else, I could reach him at a certain number in San Francisco, but he did not care to elaborate on the Carswell matter.

There has been much said about the role of Judge Tuttle and the great impact his statements might have. As one of those Senators yet in the undecided column I was seeking information as to whether he was for or against Judge Carswell. I hope to call him again tomorrow.

Mr. LONG. I am pleased to see that Judge Wisdom has at least modified his statement. I hope that Judge Brown, who is the chief judge in the fifth circuit, does not change his mind. He is supposed to have made a statement that that fine judge writes good and crystal-clear opinions.

I deplore the conversation of some who feel that Judge Carswell has not demonstrated the erudite brilliance of some. I think I understand what that is about now. It seems there are some judges who like to use all sorts of big words, to roam all over the English dictionary and use these mouth-filling words so that one has to retire to his library and read the law with a law book in one hand and a dictionary in the other.

Others, somewhat like this Senator, feel the English language is for the purpose of communication and the simpler one can say something the easier it is to understand. Judge Carswell seems to be that type person. Most of the judges with whom I have discussed this matter say they prefer that kind of opinion.

I recall that one time following a speech I made to the student body of the school which my daughter was attending, I asked her how my speech went over. She said she did not think it went over too well because the e young ladies

were used to hearing people give speeches using words they did not understand. She said they could understand my words, so they did not think I was very bright. I have been trying all of my life to say things so that everyone could understand what I was saying, so that it would not go over the heads of those in the audience. I found that did not appeal to the students of that fine school my daughter was attending.

I am reminded of the time my sister showed my father a theme she had written for her English class. He read it and said:

This demonstrates why so few college graduates are successful. Let me read some of this. If I could keep a speech or paper short, I know I would be heard for certain.

He made a point to use words more easily understood by the great majority of the people.

I personally approve of that. I do not approve of briefs being longer than they need to be. If one can say more in a few pages it has greater meaning than one which takes many more pages. I do not approve of writing 90-page opinions when 1 page could explain what he was doing and why. Of course, there are others who take a different point of view.

To criticize a person and say he should be denied a promotion or whatever emoluments that might come his way merely because he follows one school of writing which uses languages that people can understand is, I think, rather foolish.

Mr. President, if there are no other statements to be made at this time, I suggest the absence of a quorum.

Mr. HART. Mr. President, will the Senator yield to me?

Mr. LONG. I yield to the Senator from Michigan.

Mr. HART. If the Senator will permit me, I wish to suggest the absence of a quorum. I have a message to bring up.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HART. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

PUBLIC HEALTH CIGARETTE SMOKING ACT—CONFERENCE REPORT AND AMENDMENT IN DISAGREEMENT

Mr. HART. Mr. President, for the majority leader, as in legislative session, I ask the Chair to lay before the Senate a message from the House of Representatives on H.R. 6543.

The PRESIDING OFFICER (Mr. SAXBE) laid before the Senate the message from the House of Representatives announcing its action on the conference report on H.R. 6543 and its action on amendment numbered 13 of the Senate, as follows:

Resolved, That the House agree to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 6543) entitled "An Act to extend public health protection with respect to cigarette smoking, and for other purposes.

Resolved, That the House recede from its disagreement to the amendment of the Senate numbered 13 to the aforesaid bill, and concur therein with an amendment as follows: In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

"SEC. 3. Section 5 of the amendment made by this Act shall take effect as of July 1, 1969. Section 4 of the amendment made by this Act shall take effect on the first day of the seventh calendar month which begins after the date of the enactment of this Act. All other provisions of the amendment made by this Act except where otherwise specified shall take effect on January 1, 1970."

Mr. HART. Mr. President, on behalf of the majority leader, I move that the Senate concur in the House amendment to Senate amendment No. 13.

The motion was agreed to.

SUPREME COURT OF THE UNITED STATES

The Senate resumed the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HART. Mr. President, my opposition to the nomination of Judge Carswell has already been expressed in the Committee on the Judiciary and again in colloquy with Senators in this debate. I would like to explain my grave concern more fully in these remarks.

Earlier in our Nation's history, the Supreme Court was a remote institution, even to most lawyers. Today, it is a significant, visible factor in the lives of all Americans. Perhaps, in those early days, appointing a mediocre man without distinction—and I suspect it occurred—caused no grave hurt or great harm. Today, the country requires and is entitled to better.

The nomination of Judge Carswell presents us with a candidate whose credentials for this office are extremely difficult to perceive—a man described by the dean of the Yale Law School as having "more slender credentials than any nominee for the Supreme Court put forth in this century."

True, Judge Carswell has been a practicing attorney, a Federal prosecutor, and a judge on our lower Federal courts—as have countless others. Striking, however, is his lack of distinction in all these capacities. There simply has b en no indication that he has demonstrated uncommon excellence or accomplishment as a private practitioner, as a public advocate, or as a jurist

We have been told in this debate that the President's choice should not be scrutinized too closely if he is at least above some bare minimum level of adequacy. Indeed, the present Attorney General has suggested that the Senate had failed "to recognize the President's constitutional prerogatives" when it rejected his last nominee.

But if the President alone may examine a nominee's suitability and if a bar association committee is the final word on his professional stature then there is precious little left for the Senate to do but go through the motions of confirmation.

I do not believe that article II of the Constitution intends the advice and consent of the Senate to be such a pro forma ritual of the appointment process.

In the first place, the President's unilateral discretion to nominate candidates, itself, provides almost unlimited power to influence the Court. Only his choices can be considered by the Senate for confirmation. The President's power is not absolute precisely because article II of the Constitution distinguishes between the power to nominate and the power to appoint. As both Chancellor Kent and Justice Story pointed out long ago, the Senate, through its advice and consent, shares the appointing power—1 Kent, Commentaries, 310; 2 Story, Commentaries, section 1539.

Since the Senate's power is confined to passing upon the President's choices, there are inherent restraints upon its abuse which are certainly clear to us today. Alexander Hamilton presciently described these restraints as follows:

But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

That is one passage from the Federalist Papers that I think all of us ought to make reference to.

For the same reasons, however, the Senate's duty to review the President's selection persists in full measure even when it has been met by rejecting a prior nominee. The Senate's duty is to assure the Nation that the nominee who is accepted will be better qualified, not less qualified, than the previously rejected nominee or nominees.

Second, and more importantly, presidential nominees will usually be free of conspicuous disqualification, such as gross incompetence or unethical behavior The constitutional obligation of the Senate, therefore—if it is to have real meaning—would also seem to require an independent judgment of the nominee on other grounds, including his stature and his judicial temperament. On this point also, Hamilton's thoughtful commentary deserves close attention:

To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended, that a

man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other.

There is much else in the Federalist Papers from which I have drawn these two excerpts. It is Federalist Paper 76, and it bore the date April 1, 1788.

Mr. President, to confirm this nomination out of some sense of commity with the Executive would erode seriously the deterrence against poor appointments, which Hamilton described. This serious question of quality cannot be brushed aside by suggesting that dissatisfaction lies only with birthplace or philosophy. We have heard repeatedly that the substance of the argument against this nominee is that Judge Carswell is from the South and is a constitutional conservative. Let every Senator read closely the majority and dissenting views of the Committee on the Judiciary and, if he can, the hearings and ask himself whether this really is the burden of the objections to Judge Carswell.

This administration promised appointees to the Court who are strict constructionists and men of distinction. There are many judges, lawyers, and teachers of law throughout this country, including the South—should the appointment be made from that region—who would meet both tests. Judge Carswell does not.

An eminent professor from a southern law school, who submitted testimony to the Judiciary Committee in support of Judge Haynsworth's nomination, said that Judge Carswell's record on the bench gives no promise of ability or judicial capacity commensurate with a seat on our highest court. Even a charitable appraisal of such an undistinguished record is dismaying, when measured against the awesome responsibilities of the Supreme Court.

Nor should this concern be confused with academic pedigree or scholarly output. The history of the Court and its great judges makes this clear. Even in this century, men like Black and Jackson read law instead of completing law school. Many outstanding judges and other likely candidates for the Court have not gone to the most famous law schools or published widely. Some have demonstrated their outstanding ability and excellence by public service in other branches of the government than the judiciary. Diversionary discussion of "B students and C students," therefore, does little to clarify the important point which is involved That is, simply, the recognition that a nominee must have achieved during his career, in whatever way, some measure of professional stature and distinction beyond the most pedestrian, run-of-the-mill candidacy now before us To demand less is a disservice to the Court, an institution for which we seek to assure respect.

Beyond Judge Carswell's lack of distinction in any area of the law, there is a further disturbing aspect of his candidacy—his record in the field of civil rights and civil liberties. At best, it indicates an insensitivity to the right to equal justice and freedom from discrimination. For many, his record manifests a more positive hostility toward these constitutional mandates.

My colleagues on the Judiciary Committee, and other Senators opposing his nomination, have already reviewed in detail this distressing evidence; it suffices to note once more:

The white supremacy speech, repudiated for the first time upon nomination to the Supreme Court;

The large number of his decisions against blacks in civil rights cases which were unanimously reversed by the appellate courts;

The testimony by members of the bar about his hostile courtroom demeanor toward civil rights attorneys and about his questionable treatment of civil rights litigants;

His participation in the conversion of a municipal golf course into a private club to avoid the requirement of integrated public facilities; and

His stated lack of awareness of the purpose for creating the club, which explanation suggests either lack of candor with the Senate or surprising obliviousness to the society around him.

Unfortunately, public attention has concentrated on the 1948 speech and on the circumstances under which it was given. But it is not necessary to decide what opposition the 1948 speech alone would warrant. Judge Carswell's record since then, far from revealing any metamorphosis, is equally disquieting.

Significantly, when Judge Carswell was elevated to the court of appeals, before his white supremacy speech of 1948 had even come to light, the Leadership Conference on Civil Rights opposed his appointment on the basis of his record on the bench:

Judge Carswell has evidenced a strong bias against Negroes asserting civil rights claims and has been more hostile to civil rights cases than any other federal judge in Florida during his tenure as a district judge.

Some of my colleagues have indicated that they are disturbed by such evidence, but do not feel that the record in the Judiciary Committee hearing goes so far as to establish conclusively Judge Carswell's present bias on racial matters.

Assume this is true, Mr. President, for reasonable men may differ as to the conclusiveness of that evidence. Is this the most we can say about an appointment for life to our highest court:

He is not glaringly incompetent and the evidence which raises serious questions about his fairness on racial matters is inconclusive.

Does that conclusion really meet our constitutional obligations to the Court and to the Nation?

Mr. President, before my colleagues answer this question for themselves, I hope they will reflect upon the very difficult deliberations in this Chamber concerning the last nominee to the Court, who was ultimately rejected.

When I voted against the appointment of Judge Haynsworth to the Supreme Court, I stressed his record on civil rights. As I said then:

Disagreement even with a majority of a judge's opinions would not cause me to oppose his confirmation. But opposition is justified when his decisions indicate consistent insensitivity to the rights of individuals recognized to be within the reach of the law.

Such insensitivity is unmistakable from Judge Carswell's record and raises serious doubts about his ability to be impartial in matters of civil rights and liberties.

Other Senate opponents of Judge Haynsworth's appointment stressed the record of specific conflicts of economic interest. Those Senators said that although such conflicts may have led to no actual impropriety on the bench, they clearly raised the appearance of impropriety. And even the appearance of impropriety—at this point in our history—was deemed too destructive of public confidence in the judiciary. Therefore, my colleagues felt it essential that substantial doubts be resolved against Judge Haynsworth.

Some have suggested that the Haynsworth nomination presented entirely separate issues from the one now before us—that the last confirmation debate raised questions of ethics and morality, while Judge Carswell's nomination has merely raised a dispute over ideology. I suggest they are fundamentally wrong. Upon reflection, there is a profound analogy between the opposition to Judge Haynsworth based on conflict of interest, and opposition to Judge Carswell based on his insensitivity to individual rights.

The Supreme Court has neither purse nor sword to sustain it. Its authority in our society rests on the delicate balance of public confidence in its moral integrity and fairness in all matters. That confidence must be sustained.

The issue now is not public confidence in Judge Carswell's ability to be openminded in financial matters before the Court, but confidence in his ability to be openminded about the rights of particular citizens.

Our Nation promises its citizens equal justice under law. To the minorities and the underprivileged in our society, especially, the Supreme Court must symbolize assurance that equal justice will prevail, that inequities will be removed through due process of law. These citizens have good reasons—based on recent actions as well as past expression—to doubt Judge Carswell's willingness to listen, to hear them and to uphold the Constitution impartially.

I hope we are not prepared to say that this Senate is deeply concerned about the appearance of partiality in financial matters, but not about the appearance of unfairness in matters of human rights—that this Senate restricts consideration of our professed moral values to business

relations, and dismisses such considerations in human relations as "political ideology."

If anything, Judge Carswell's nomination poses a graver threat to continued trust in our courts than did the nomination of Judge Haynsworth.

The appointment of a man whose record presents a prima facie and, I believe, still unrebuttal cause for distrust by millions of Americans would be unfortunate at a time when we are trying to bring our society together.

President Nixon noted the danger of such distrust in his acceptance speech when he received his party's nomination in Miami. He said then:

> Let those who have the responsibility for enforcing our laws, and our judges, who have the responsibility to interpret them, be dedicated to the great principles of civil rights.

You can argue it as you will—you can go through the record from top to bottom—and you find nothing which would fit the nominee to that proposition, or let him pass the test established by President Nixon in that Miami speech.

Judge Carswell, at the very least, has shown a conspicuous lack of this dedication to the great principles of civil rights which our minorities should expect from the final arbiters of the Constitution and which the President, quite properly, underscored as an indispensable element, if you will, in those who should man the courts of this country—assuredly, the Supreme Court of this country.

It is not only a question of keeping faith with Americans. The Senate very recently offered the franchise to our youth over 18. It did so in recognition of their ability to be responsible, perspective voters, and also in the hope that they would be encouraged to work within and with our legal system. These younger citizens, too, can only be disillusioned by an appointment which downgrades our highest court and undermines its effectiveness as a steam valve for social turmoil.

For all these reasons, Mr. President, I voted against Judge Carswell's nomination in the Judiciary Committee, and I shall vote against his nomination now. I do believe that to consent to this nomination would be a tragic injustice to the Court, to the Senate, and to the American people.

The Court was intended to be a place where the best minds of this country could insure delivery to all the people of this country of the promises made by the Constitution. While there are many roads by which a man may demonstrate excellence, and on which the judgment can be made, if such a man's name came before the Senate, that he is indeed a distinguished American, Judge Carswell has managed to find no road on which he has been able to demonstrate that kind of distinction.

I sense that this argument may not have been made—at least, with success—in the Senate in connection with earlier nominations. I acknowledge that in times past mediocre men, men lacking in distinction, have been appointed to the Court, and they have served there without hurt or harm, apparently. But today that Court is a very real presence in the lives and the homes of every American, black and white; and I think it would be without excuse for the Senate to consent to the nomination of one whose very best friends find difficulty in establishing as more than a run-of-the-mill lawyer and a run-of-the-mill judge.

I know that this is a harsh statement to make, but I think it an accurate one. The Court is not a place for other than big leaguers, to put it in the language of the sports page when teams are down South in spring training. The management of those teams is seeking to identify the best and would be responsible to a harsh judgment by the fans if it fielded the mediocre, and if there were better available. I think we will be subject to the same harsh criticism if we consent to the nomination of Judge Carswell when so many others of greater distinction—big leaguers, if you will—are available.

Again, to pursue the sports analogy, because it is so much more easily understood, the hall of fame for football and baseball and other sports does not provide seats or space or shelf room or display cabinets for those who did not quite make it. The class D ballplayer is not enshrined—not even a triple A player; only big leaguers. How ridiculous if the argument was made that because many ballplayers do not quite make it, the hall of fame should have a shelf for some of them, too. How even more ridiculous to make that suggestion with respect to seats on the Supreme Court. Yet I think the suggestion has been made. I hope we do not consent.

Mr. KENNEDY. Mr. President, will the Senator be kind enough to yield?

Mr. HART. I am delighted to yield.

Mr. KENNEDY. First, I want to commend the Senator from Michigan for his comments and statements this afternoon to the Senate. I believe that this really is one of the most comprehensive and thoughtful and sensitive presentations that we have heard on the whole question of Judge Carswell and his nomination to the Supreme Court. I hope that all our colleagues will have a chance to look at this thoughtful and reasoned statement, which I think is extraordinarily compelling.

One of the points that has been made by those who have looked with some disdain on many of us who have expressed reservations with respect to the nomination is the belief that we are expressing opposition because Judge Carswell comes from a different part of the country, because he has a different political philosophy. They assert that in the past we have downgraded the questions of philosophy when there have been nominees who were perhaps more closely identified with many of those who are expressing reservations about Carswell. They say that the true issue really is not a matter of civil rights or a question of judicial temperament or competency or any of these other things which we have raised, but it is just that we are expressing reservations about Carswell because he comes from a different part of the country and has a more conservative outlook on the important social issues of our time.

I know that in the brief minority report signed by several members of the Judiciary Committee, on which the Senator and I were signatories, we indicate in a straightforward statement that our opposition to Judge Carswell is not based on geography or philosophy. Yet, time and again during the course of this debate we have heard those who are supporting Judge Carswell charge that this is the basis of the opposition.

I shall be interested in the reaction of the distinguished Senator from Michigan on that point. I feel that the Senator's statement today has expressed most adequately and eloquently the reasons for his own reservations; but I would be interested if the Senator from Michigan would respond to that point, because I think it would be enormously valuable to Members of the Senate.

Mr. HART. First, of course, I want to thank the distinguished Senator from Massachusetts for his comments.

Now to his question: Those of us who joined in the Judiciary Committee in opposition to the nomination and who filed the report to which the Senator from Massachusetts makes reference, were conscious, I think, even before we heard the charges, that in this case it would be suggested that our opposition was because of the region from which the nominee came. I will acknowledge that not only did we anticipate this charge, but that our only means of refuting it is to assert, as we have and do, that the President can deliver on his promise to appoint men of distinction as well as strict constructionists from the South, if he wants to add that requirement, because there are men of distinction, law professors, judges, both State and Federal practitioners in the South.

The Senator from Massachusetts will recall that in the executive meetings of the Judiciary Committee, when it was considering the nomination now before us, the able Senator from Maryland suggested perhaps a dozen such distinguished southerners. His background and knowledge in this area reflect his conscientious chairmanship of the Subcommittee on Improvements in Judicial Machinery. In the course of that assignment, he has come to know many distinguished judges and practitioners across the country. He listed by name and he spoke the names of a good many such men, acknowledging that, while their views with respects to constitutional construction might differ from his on occasion, nonetheless, in a full professional life they had demonstrated fitness, some measure of excellence, some uncommon capacity. I think it is now—if it has not been in the past—the responsibility of the Senate to assure itself that any nominee shall be possessed of those marks.

I am sure that the people of this country have assumed that basic to our inquiries, perhaps before we move to any other aspect of a nomination, we have satisfied ourselves with respect to that point.

Mr. KENNEDY. I thank the Senator. I think he has expressed very well what

I feel were the sentiments of a number of us on the Judiciary Committee who expressed reservations about this nominee and have been attempting to address ourselves to the problem of whether the opposition was in terms of geography.

I think another area on which the Senator touched in his speech is whether any presumption follows the President's recommendation with regard to nominees to the Supreme Court. The Senator fully reviewed in his statement what he believed to be the responsibility of the Senate in terms of advising and consenting on the nominees. But I think many of the people in this country wonder about the comments that have been expressed by some of our colleagues that because the Senate turned down one nominee, Judge Haynsworth, the Senate is emotionally expended or tired, that it has a responsibility and an obligation now to fall behind the President that if there is any kind of reasonable question or reasonable doubt, we should decide it in his favor in terms of any nominee, no matter how inferior his qualifications.

I would be interested in how the distinguished Senator from Michigan views his responsibility in terms of making a judgment on the question of Judge Carswell, and what weight he would give to the President's recommendation for a Supreme Court Justice.

Mr. HART. Well, in truth, in many respects, the Senate, over a long period of time, has sort of painted itself into a corner. We have, by and large, in judicial nominations, operated on the assumption that it is analogous to a nomination for a member of the Cabinet, that unless there is some glaring venality involved in the nomination, unless there is gross incompetence, the President has suggested him as the man he wants to work with him, the President will be responsible for the performance so, therefore, let us resolve our doubts in favor of the nominee.

I do not quarrel with that rule of thumb when it is an Executive nomination in the executive department. But we, as one independent branch are wrong to apply the same rule of thumb, and treat as analogous, the nomination made by the second independent branch of a person who shall staff the highest court in the third independent branch.

I do not argue that this has been our practice. I hope there have been instances when it has been. I know there have been instances when it has not been. But as of 1970, we should decide that it shall be our practice.

I have a strong feeling that if Alexander Hamilton were around here today and had the privilege of the floor, he would tell us that is exactly what he was trying to tell us in Federalist Paper No. 76.

It is too bad, in school, that we are not exposed to that paper, which is almost on the index, that we should not read it, that it is dangerous for us, and we are not encouraged to read it, so that generally the only time we do it is under compulsion, and it goes in one eye and out the other.

There is much thought in that particular paper relevant to the question that the Senator from Massachusetts raises and to which I am attempting to make a response. It is not analogous to the review that we give to a nomination for a member of the Cabinet or an ambassador, either. This independent body's, this independent branch's action—yes or no—is on the nomination by the head of the executive branch of a person who shall be a highly significant factor in the performance of the third independent branch.

So I think we should begin to review our practice and, to the extent that we have tended to resolve all doubts in favor of the nominee, insure that we are far more cautious in that practice as it applies to a judicial nomination, particularly to the nomination of a judge of the Supreme Court.

As I said earlier in my remarks, the most we can say about the appointee—I should say, the most I can say; I know there are Senators who would state a much stronger case for the nominee—but if a person, if a Member, if a colleague feels that he is troubled by these resolved doubts in favor of the nominee and says that the record is not conclusive with respect to his ability to rise above the 1948 statement, and therefore he tends to think that he will vote to give his consent, I would simply say that our responsibility is much more full than that.

We do not discharge our responsibility by saying, "Well, he is not conspicuously incompetent, and the evidence that raises the question about his fairness on racial matters is not conclusive; therefore I will vote for him." That does not meet our constitutional obligation to the Court, to the people of the country, nor to the Senate. That is not the way a manager would be fielding his team in anticipation of opening day. If he did, the fans and the ownership would be quickly down his throat. The ownership would insist that there are better men in the system. "Bring them up. Don't field this fellow merely because he doesn't fumble it every time."

Mr. KENNEDY. Mr. President, does the Senator from Michigan feel it is reasonable in evaluating Judge Carswell that we look at the series of incidents which have been developed in the minority report of the Judiciary Committee and look, as that report did, at his general views on the question of human rights, and consider these matters seriously, whether we go to the time of the speech, to the time of the golf course matter, to the sale of the land, or to various other incidents which have been suggested in the report? Does the Senator think it is reasonable for us to make some conclusions with respect to the personal attitudes of the judge, and then to read the civil rights cases in which he has participated, to determine whether his private predilections have spilled over into his courtroom demeanor, his temperament in terms of dealing with those involved in civil rights cases, and his ability and willingness to follow precedent in terms of higher court decisions, and all of his procedural and substantive attitudes in his handling of these cases? Does the Senator not feel that we are really fulfilling our responsibility in expressing some reservations about the nominee's competency and qualifications in that field?

Mr. HART. Unless we were to do that, I think we would be failing in our responsibilty. I know it can be abused and that to analyze particular opinions that a nominee has written and base one's final position solely on those opinions can be dangerous. It can produce, and I think in the past has produced, unhappy results. But clearly, there is an obligation to evaluate carefully the writings of the nominee and to develop along with the understanding that comes from the written word, an understanding of the reaction of appellate courts when reviewing that performance.

We have been reminded here of the reversals of cases appealed from Judge Carswell's court. On written opinions, his rate of reversals has been 2½ times higher than the average of such reversals of men in his own circuit.

This rate of reversal is also substantially higher than the national average. This is relevant. I do not suggest that in and of itself it is conclusive of our judgment. But to suggest that it is inappropriate to note the fact would be equally wrong.

Outside students have commented on this aspect of the nominee. I think reference has been made earlier to the finding of the Ripon Society, which, as I understand it, numbers no members of the Democratic Party among its ranks. Those findings speak of the reversals on appeal as one of a good many reasons that they assign to justify their conclusion that the nomination is inappropriate.

I do not want to paraphrase it or quote it. I am not sure it is an accurate paraphrase. I do not say whether they say they do not favor it or do not consent to it or that it should be withdrawn. But they assign a good many reasons for their recommendation that it is inappropriate.

An examination of these decisions, as well as his demeanor and his conflicting testimony about that, is wholly justified, especially when we are put on notice that we should scrutinize his approach in the area of civil rights because of the 1948 statement.

That statement was a pledge. In 1948 he said:

> I yield to no man in the firm, vigorous belief in the principles of white supremacy. And I shall always be so governed.

There are not many escape hatches left in that statement, except to say I change my mind. And that is the reason it is relevant to see, in view of these written opinions, to wh t extent there has been a change of mind.

And certainly, if I could conclude my response to the Senator from Massachusetts, where is there in the record the basis for saying that this nominee meets what President Nixon in his Miami acceptance speech so clearly said should be needed?

He said:

> Judges who have the responsibility to interpret the laws must be dedica ed to the great principles of civil rights.

I repeat what President Nixon, then the presidential nominee, said:

Let those who have the responsibili y for enforcing our laws and our judges who have the responsibi ity to interpret them be dedicated to the great principles of civil rights.

Who wants to get up here and explain that this man has a dramatic record reflecting dedication to the great principles of civil rights?

Mr. DOLE. Mr. President, will the Senator yield?

Mr. HART. Gladly. I would like to get an answer.

Mr. DOLE. I wish to ask a question.

Mr. HART. Am I yielding for the Senator to answer the question I just asked?

Mr. DOLE. No. I will let that rest for a while and ask a question, if I might.

Mr. HART. I am glad to yield for that purpose but I renew the hope that we will have an explanation of this nominee as one who is dedicated to the great principles of civil rights as judged by the record, citing again the test of the President.

Mr. DOLE. I listened to the Senator from Michigan with great interest because I know of his integrity and great interest in this particular area, as he is a member of the Committee on the Judiciary. I heard the Sentaor express his views that perhaps in the past that committee and this body may have failed in their obligation in regard to the nomination of other judges, whether for the the district court, circuit court, or U.S. Supreme Court. The Senator undoubtedly considers that a U.S. district judge nomination is highly important. I am certain the Senator from Michigan passed on a number of those nominations in the Committee on the Judiciary, and assume that in every instance he felt the man was highly qualified.

Mr. HART. No. The hard truth is, and I think it does us all good to say it, in reviewing district court and circuit court nominations, the tradition, deep, rich, and perhaps unwise, is that, absent some extraordinary circumstance the recommendation of the Senators and the concurrence of Senators from the place of residence of the nominee rather assures a pro forma performance by the committee. This is unfortunate. If we had the capacity to legislate 2 extra days for every one of the 52 weeks, it is possible the committee would be able to do with respect to district judges and circuit judges what I suggest in this case and every one hereafter with respect to nominees for the Supreme Court.

I am acknowledging that in the past the committee and the Senate very probably failed to treat as very different the tests we apply to a man to go to the Supreme Court from the tests we apply to the man who goes into the Cabinet. We should demand some excellence.

Mr. DOLE. Mr. President, will the Senator yield further?

Mr. HART. I yield.

Mr. DOLE. I suggested that after the Haynsworth nomination was rejected, perhaps the Senate by its action, indicated there was a new test, the Haynsworth test. I suggested to the committee that perhaps this test should be applied to all future Court nominees, whether Republican or Democrat.

As I understand the Senator, there is a difference in his reasons for opposing Judge Hayn worth than his reasons for opposing Judge Carswell. Is that correct?

Mr. HART. I suggested quite to the contrary. There is a fundamental analogy between the two. The apparent conflict of intere t resulting from economic interests, t e apparent conflict of interest charged against Judge Haynsworth, was the possession of stocks. We developed the theory that even if there was in fact no actual influence or no actual impropriety, the appearance of impropriety, was too destructive of public confidence in the Court to permit the man to be seated.

I make the same suggestion with respect to Judge Carswell. There is an analogy between the opposition of Judge Haynswoi th on conflict of interest and the opposition of Judge Carswell based on his insensitivity, based on the 1948 pledge that he would always be governed by the principle of white supremacy, so as to cause a loss of faith in the court—this, whether or not, in fact, as of 1970 he entertains any such notion. It is the appearance to minorities to whom we say, "Take your grievance to court." It is the appearance.

Given those circumstances it would persuade me to reach the decision, and others who could not vote for Judge Haynsworth because of apparent conflict of economic interest, that I cannot vote for Judge Carswell because of the same reason. It happens not to be economic but very deeply human.

Mr. DOLE. Perhaps I share the thought but not the conclusion the Senator exposed earlier, that more attention should be paid to nominations, whether they be for the district court, circuit court or U.S. Supreme Court.

I am reminded of a study prepared by Mary Curzan presented to the graduate school at Yale University on the selection of judges in the Fifth Circuit. In that paper she describes the contrast between the Kennedy administration and the Eisenhower administration and points out clearly that in the Kennedy administration the responsibility for judicial appointments was vested in Joseph Dolan, who was "a 'pol,' a former State legislator from Colorado, a Western organizer of the 1960 Kennedy campaign, a man who knew every county politician in the country by his first name."

I will quote from her report:

He sought to use his office both to strengthen the judiciary and to strengthen the political fortunes of the Kennedy Administration. If the two goals conflicted, he almost always preferred to advance the latter at the expense of the former. Thus, Dolan evaluated a judicial appointment to the Fifth Circuit not simply in terms of a man's qualifications but in the light of the future prospects of the entire Kennedy legislative program.

Summarizing on page 6 of this presentation she states:

Thus, the Kennedy Administration spent a considerable amount of time and effort conducting a "talent hunt" for competent administrators. It made no comparable effort to hunt for talent for the federal courts. In the Kennedy Administration, the Department of Justice tended to play a passive role in the jud'cial appointment process. Names were screened as they were presented to the Department. The Department had standards for making choices, but it did not have a mechanism to widen its choices.

I would point out this is an independent study indicating a basic contrast. Judge Carswell was appointed to the district court in 1958 by President Eisenhower who, according to the authority, placed great emphasis on appointing qualified judges. Then, last year, after a brief hearing by the Committee on the Judiciary, he was elevated to the circuit court. With respect to those who have said the man has no experience, I believe that that properly has been dispelled.

I disagree but do not quarrel with the Senator's conclusion but would add that other administrations have submitted other names. In fact, one that I believe the Senator voted for in committee was Francis X. Morrissey. This nomination was later withdrawn on the floor of the Senate, but the question of competency had been raised.

Mr. KENNEDY. Mr. President, will the Senator yield on that point?

Mr. HART. I yield?

Mr. KENNEDY. At that time the proponent of that nomination had, I think, the wisdom to withdraw the nomination. Some of us who have expressed reservations about this nomination hope that same judgment would be expressed by the administration on this nomination.

Mr. DOLE. Mr. President, if the Senator will yield further. At the time the nomination was withdrawn, the Senator from Massachusetts made it very clear that we should not depend solely on the great law schools of our country for our judges and that if we restricted judicial appointments to the graduates of such schools, we would adopt a selective system which was fundamentally undemocratic.

I share that feeling. There have been some statements that only those who graduate from Yale or Harvard or who have written in law journals or other publications should be placed on the Supreme Court. That does not mean that those who have not done so should not be selected, whether it be Carswell, Brandeis, or Learned Hand, who had tried only two criminal cases when he was appointed.

Mr. KENNEDY. Did Morrissey ever say he was committed to racial supremacy?

Mr. DOLE. He did not say much at all, as I recall.

Mr. KENNEDY. Were any such statements as that brought out? The bar association made an investigation of that nomination. The members of the committee could have revealed any such statement if there had been any. Was there anything to suggest that he made expressions about white supremacy or racial segregation?

Mr DOLE. He was not endorsed by the American Bar Association or the Boston Bar Association.

Mr KENNEDY. Will the Senator answer the question?

Mr. DOLE. He did go to a law school in Georgia, a southern school, as Judge Carswell did. That question was not raised, so I do not know. I do not know what his views on that were or may be now.

Mr. KENNEDY. As I remember, the question the Senator from Michigan asked the Senator from Kansas was what information the proponents of Judge Carswell had that would indicate his belief in full human rights for all Americans. I think that was a question that is deserving of an answer, not only for this body but for all Americans.

Mr. DOLE. If the Senator from Michigan will yield further, I believe the question involved was one of competence. I have read the record and it never got beyond that question. I am not certain of the exact date hearings were concluded but there were differences of opinion. The vote was 6 to 3 in the committee. The Senator from Massachusetts, the Senator from Michigan, and I might say the Senator from Mississippi, chairman of the committee, voted to report the Morrissey nomination. I was not a Member of the Senate at that time. The point I make is that some set one standard in 1965 and then another one in 1970. When are we going to have one standard for all nominees, whether they come from the North, the South, the East, or the West? If we are going to have one standard, I will accept that; but if we are going to have a different standard based on different views of someone in this Chamber, such practice should be rejected.

Mr. KENNEDY. I agree with the Senator from Kansas. I think the same procedures should be followed as to the Carswell nomination as was followed in 1965, and the Carswell nomination should be withdrawn. But let me ask another question: Was Morrissey being nominated for the Supreme Court?

Mr. DOLE. I may ask the Senator, Does he think that makes a difference?

Mr. KENNEDY. I certainly do think so. I think the criteria for a Supreme Court nomination should be much higher than those for a district court nomination. Does not the Senator from Kansas believe it makes a difference?

Mr. DOLE. The Senator is saying that a judgeship on a Federal district court is a relatively unimportant position?

Mr. KENNEDY. I am not saying that. I asked the Senator whether the previous nominee was being nominated for the Supreme Court.

Mr. DOLE. He was being nominated for the district court, but the Senator from Massachusetts maintained he was qualified throughout.

Mr. KENNEDY. That is right.

Mr. DOLE. I happen to believe it is a highly important position. It is in a trial court not an appellate court. I am a lawyer, the Senator from Massachusetts is a lawyer, the Senator from Michigan is a lawyer, as is the Senator from Florida. In jest I might add there is one honest man in the Chamber, the Senator from Delaware (Mr. WILLIAMS), who is not a lawyer. At any rate, the question is: Are we going to have a different standard for different court nominees, whoever it might be, whether Carswell, Haynsworth, White, or whoever? It is time, perhaps that new standards be established and that the Judiciary Committee have extensive hearings with respect to all nominees for all court nominations. Carswell has been approved twice, perhaps in a rather summary way, by the Committee on the Judiciary and the Senate.

Mr. HART. Mr. President, if I could interrupt——

Mr. DOLE. The Senator from Michigan has the floor.

Mr. HART. The question now is whether we bring him up to the big leagues. If the management was wrong in moving him from D to C, it was unfortunate, but we now know, with his fielding, batting, and thinking, that he should not be moved forward.

Mr. DOLE. We made mistakes, in my opinion, when Justice Douglas and others were put on the High Court. I do not believe any of those in the Chamber now were Members of the Senate when that mistake was made.

Mr. HART. The Senator from Kansas has described four lawyers here. For the record we will not say how many others are here, in addition to the Senator from Delaware (Mr. WILLIAMS), who are not lawyers; but, as lawyers, do we not agree that we should seek from among the best to put on the Court? Is there a lawyer who quarrels with that, seriously?

Mr. DOLE. I hope not.

Mr. HART. Well, should that be the test from now henceforth?

Mr. DOLE. But should it be the test for the district court, should it be the test for the circuit court, and should it be the test for the Supreme Court?

Mr. HART. And if we have to parcel our time, let us start by putting such people on the Court of the greatest importance, both in substance and symbolism.

Mr. DOLE. I raised that question with the chairman following the rejection of the nomination of Judge Haynsworth on the Senate floor. The first two nominations for judges who came up were members of the party on this side of the aisle. I heard of some comments on that proposal.

I feel very sincerely that if we intend to improve the judiciary, it will take additional effort by the Judiciary Committee. I recognize that the Senator from Michigan and the Senator from Massachusetts have many other commitments, and there is not enough time. That applies to the Senator from Nebraska and all other members of the committee. Senators have a myriad of duties, but this should be done. I am not derogating the nomination debated here but am speaking generally.

Mr. HART. I can make a suggestion as to how we can be helped, and that is to let the Department of Justice and the Chief Executive apply the test I am suggesting before they send a name of anybody in here from among the best.

Mr. DOLE. President Eisenhower attempted to do that. Mrs. Curzan carefully describes those who were proposed. I was quoting an independent source that indicates there was quite a distinction between the Eisenhower administration and the Kennedy administration on judicial appointments; they were not solely made on a political basis by President Eisenhower.

Mr. HART. Did the objective study conclude that political factors were not at work in nominations made to the court in any administration?

Mr. DOLE. No; I do not believe that conclusion was reached.

Mr. HART. And, therefore, not in the Eisenhower administration, either?

Mr. DOLE. The emphasis was on competence, as it is today.

Mr. HART. My memory fails me at the moment. I cannot recall whom the Kennedy administration proposed for a Supreme Court vacancy, and whom we consented to.

Mr. KENNEDY. Mr. President, will the Senator yield on that point?

Mr. HART. Yes.

Mr. KENNEDY. I think it was Justice Goldberg and Justice White. They were the two nominees.

Mr. HART. Justice Goldberg and Justice White. I hate to mention it, but Justice White was No. 1 in his class at Yale, but he would have been just as good if it had been at Michigan.

Mr. DOLE. Had he had a great deal of experience? Did he have wide judicial experience?

Mr. HART. He distinguished himself as a Rhodes scholar. I think there is great merit in both of those measures.

I think it is generally agreed that Justice Goldberg was one of the great figures of the American bar.

Mr. DOLE. In 1965 the then Senator from Florida, Mr. Smathers, indicated, if I am correct, that of the nine sitting Supreme Court Justices, only three had had prior experience on the bench. Perhaps that is not important. Some indicate it is; some indicate it is not. I recall the testimony of Mr. Segal, Mr. Jenner, and others from time to time in the hearings. They had a different view depending on the facts and circumstances.

I believe scholarship is an ingredient, but so is experience.

I come back to the experience of Judge Carswell. We cannot wipe it off and say he is not qualified. The Senator from Michigan looks at Judge Carswell and gives him credit for experience, maybe not much, but he gives him some credit for experience.

Mr. HART. I do. He has years of service in the Federal "league."

But my point is that it is not a record on which to move him up. The experience is there, but is the quality?

I yield to the Senator from Florida.

Mr. GURNEY. I say yes although I do not want to get into the argument about the excellence of the nominee All of us can make up our minds on that. I think our opinions could differ.

There is nothing undistinguished about the bar of Florida. Florida is the eighth largest State of the Union; but Judge Carswell was regarded by his colleagues the e as an excellent judge, with a fine legal background.

Mr. HART. If the Senat r will yield, I will agree that the point he makes does have relevance. All of us ought to resolve in our own minds how we will

decide this issue. It is relevant, and I will admit that we all have our own opinions.

Mr. GURNEY. Senators could argue here all day, and I do not think they would change each other's opinion on the issue of excellence. I was not interested in that. But another point does disturb me, and that is the point of sensitivity, which has been raised here so many times. In a way, I think it may be the main issue in this nomination and the vote by the Senate.

It puzzles me how the opposing members of the Committee on the Judiciary, the Senator from Michigan, who has the floor as well as the others who joined him in the minority report, can overlook the statement of Charles Wilson.

I have done some telephone calling back home during the argument here, checking with lawyers who could tell me personally about what has gone on in civil rights cases in Florida before Judge Carswell's court. They all tell me that Charles Wilson, a Negro attorney, actually began the civil rights prosecutions in Florida. He was the first lawyer, black or white, for that matter, to engage in civil rights litigation in Florida on the side of black plaintiffs. He spent 5 years in Judge Carswell's court, in all kinds of cases, desegregation cases in the schools as well as others.

This black lawyer has had more experience before Judge Carswell and in his court on civil rights cases than any other lawyer, all during this time; and, of course, the letter he wrote to Senator EASTLAND, the chairman of the Committee on the Judiciary, is found on page 328 of the record of the hearings.

He tells about what he did:

I represented plaintiffs, in civil rights cases in the Federal Court for the Northern District of Florida, which was then presided over by Judge G. Harrold Carswell. I also represented criminal defendants and other civil clients in his court during this period of time.

This is interesting:

Previous to his taking the bench in 1958, I had opposed him as defense counsel in criminal prosecutions brought by the United States when he was United States Attorney.

Now, here is the important thing:

As a black lawyer frequently involved with representation of plaintiffs in civil rights cases in his court, there was not a single instance in which he was ever rude or discourteous to me, and I received fair and courteous treatment from him on all such occasions.

For the life of me, I cannot see how Senators, in the face of evidence like that, can come here and say that Judge Carswell is insensitive, that he is not interested in human rights, that he does not like black people, that he does not give them a fair shake in his court.

The interesting thing about Mr. Wilson is that his present service, incidentally, is as Deputy Chief Conciliator for the U.S. Equal Employment Opportunity Commission, an appointment apparently made during the Johnson administration.

It seems to me this is the kind of direct evidence, by a lawyer who was personally present and who was part of the action for 5 years in Judge Carswell's court, that is the important thing. This is persuasive to me. Not nearly so persuasive is the testimony of a law professor, however eminent he may be, or a lawyer in New York, however eminent he may be. The opinion of such a witness on insensitivity or sensitivity does not bear nearly as much weight as that of this black lawyer, who was there in that court.

Mr. HART. Mr. President, I think in my remarks I acknowledged that there would be those among us who feel that the record does not conclusively resolve this particular question, and we shall each read the record and reach our individual conclusions.

But may I ask, how does one respond to the testimony of Professor Clark, a black lawyer who was, as I understand it, in charge of civil rights litigation generally in the southeast part of the country? He had had an opportunity to judge the performance of a number of Federal judges in that circuit, and he tells us, with respect to the nominee:

He was probably the most hostile judge I have ever appeared before. He was insulting to black lawyers, and he rarely would let me finish a sentence. . . .

It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel.

He went on to describe that he was so hostile and insulting to Negro lawyers that, when newcomers were getting ready to go to court in the interest of civil rights petitions or actions, he, Professor Clark, would spend the night before having them go through their addresses "while I harassed them as preparation for what they would get the following day."

That has a ring of truth to it, too.

Mr. GURNEY. I will say to the Senator from Michigan that of course that is a bit of evidence that we have to weigh.

Mr. HART. That is what we are talking about, bits and pieces.

Mr. GURNEY. I hope I can get some answers, not only to Clark but to Lowenthal, and I think one other professor who was involved in some of this litigation in Florida.

I do think, though, that even if you take their testimony as being of some weight, that, on a one-shot deal, which apparently is what they were engaged in down in Florida, it is not nearly as persuasive to me as a lawyer, and I am sure it is not to the Senator from Michigan as a lawyer, because he has been trying to weigh evidence and the importance of evidence, and what is perhaps more important than something else.

To me, when a black lawyer whose job it is to prosecute and defend civil rights cases, who spent 5 years in this district court of Judge G. Harrold Carswell, says that this man "was courteous at all times and fair to me, a black attorney representing black litigants," that is very persuasive, and I do not see how it can be ignored.

Mr. HART. The Senator from Florida properly describes it as a piece of evidence, when he talks about Professor Clark's testimony. The same description can attach to the piece of evidence reflected by the expression of views of Charles F. Wilson. All of us must resolve, through a multitude of these instances and examples and assertions and contradictions, precisely, first, what this man is as a person, and second, what this person on the Supreme Court would appear to be to black Americans.

That is where I find there is an analogy between the apparent conflict of economic interest that we raised as to Judge Haynsworth and the apparent conflict of human interest that we assign as a reason to reject the nomination of Judge Carswell.

Does not all this evidence raise enough serious questions about his hostility, on top of the white supremacy speech, to make us hesitant to tell the people of this country, "You can trust this man to be fair?"

Mr. GURNEY. If the Senator will yield further, turning to another bit of evidence that I noticed in the news this morning, about a lawyer in Florida, from Panama City, as I recall—and I think there is other testimony in the record about this—great weight, or some weight, I will say, has been placed upon the fact that when a lawyer was arguing before Judge Carswell in court, in some of these civil rights matters, he turned around and faced the wall, did not face the lawyer and look at him. I am not familiar with the law practice of the Senator from Michigan, but I can speak of my own personal view that I do not think I ever argued a case that took any length of time in which the judge and I locked eyes all the time and stared at each other all the time. It is just human nature that the judge will turn around in his chair and look at the wall, but listen.

This kind of evidence about the insensitivity or lack of sensitivity of a judge in these civil rights matters—I am appalled that that kind of evidence is even trotted out on the floor of the Senate, to say that a man is hostile to black litigants and black lawyers. To me, it smacks of trying to build a case that the opponents want to build and they cast around the country, so they can drum up support for their belief.

Mr. HART. Mr. President, the items we raise, we raise in an effort to assure that our decisions shall be right, that it shall be wise in history's verdict.

If there were nothing else in the record save the question—phrase it as you will—Are we discussing now one among the gifted few at the American bar who shall be put on the Supreme Court, or are we not? The answer is disturbing when we hear talk such as, "Let us raise our sights and let us apply tests uniformally," then now is the time to begin, if we have been lax in the past in insisting on demonstrable excellence.

If there is doubt that the bits and pieces—the Senator from Florida says every lawyer has argued a case to a judge who has turned his back. If all these items raise doubts, then let us resolve the doubt in favor of the disadvantaged American who is being persuaded to seek his relief in the court.

I probably will regret seeing this in the RECORD in the morning, although,

having said this clearly, it is not a slip of the tongue; but I know now, and every black lawyer will know, that if this nominee's back is turned to him during the course of an argument, there is on the wall above him, "I am a white supremacist, and I pledge that I always shall be."

This may not describe in the least the motive of this nominee in turning his back. It may be just as inappropriate and inoffensive as backs turned to me when I have tried to persuade judges. But there is the appearance that is now clear for all to see that I suggest raises the same kind of conflict that we talked about in the Haynsworth matter. What we seek to do is to develop those elements in this record which will enable us to answer the question wisely: Do we consent or withhold our consent?

Mr. GURNEY. Mr. President, will the Senator yield further?

Mr. HART. I yield.

Mr. GURNEY. I do not want this in any way to be interpreted as disparaging the sincerity of the Senator from Michigan; but, literally, if we take what the Senator has just said as the gospel truth, then I think we had better put a new canon in the canons of ethics of Federal district court judges: "Thou shall never turn thy back upon any attorney, but will always face him full in the face."

Mr. HART. Does the Senator know of anybody else nominated to the Supreme Court who pledged his people that he will always be governed by the principles of white supremacy? If there is such a one, we would take precisely this position, of cautioning that to preserve confidence in the Supreme Court of the United States, we can and should do better than that one.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. HART. I hope we do not have to add as a canon of professional ethics a caution against voicing the supremacy of the white. I hope all of us understand this—that we do not need it in our canons.

Mr. GURNEY. I would answer the Senator there—as he knows what the answer is—that any one of us has made statements on the political hustings that I am sure we are ashamed of, that we would like to delete, that we would like to rephrase, that we wish we had never said. I know I have, and I suspect the Senator from Michigan has.

Mr. HART. When I visited with Judge Carswell in the committee, I said the same thing. But I also said that what troubles me, and will trouble others, is that in a basic sense part of what we are is of what we were, and what we are now is part of what we shall be. Many people understand that when they look at me and wonder whether I really meant it and whether I have ever changed my mind about some of the idiotic things I have said on the hustings. That is what people will always wonder about if, in looking at the Supreme Court, they see a man who once said that he would always be a white supremacist. Is it still a part of him?

I think it is a mistake to raise that kind of apparent conflict in the 1970's in this country.

Mr. DOLE. Mr. President, will the Senator yield briefly?

Mr. HART. I yield.

Mr. DOLE. Let me say that I know the Senator from Michigan to be a fair man. I have known him in other circumstances far removed from this Chamber, and there can be differences of opinion.

There is evidence to indicate that certainly Judge Carswell is highly qualified. I am not going into the discussion of mediocrity as that question was raised on your side of the aisle. But there is evidence in the record that, despite the statement made, which has been declared by the nominee as being obnoxious to him at this time, it has been repudiated.

There is other evidence. As the Senator from Florida has stated and as the Senator from Michigan has stated, these are all bits and pieces. We must weigh them. Some have more weight than others.

Frankly, I was impressed with the statement inserted in the RECORD yesterday of Prof. James Moore, professor of law at Yale, in his discussion of Judge Carswell in what he felt Judge Carswell's attitude was toward members of minority groups. He pointed out that he is part American Indian, so he can speak with some authority; and he gave Judge Carswell very high marks for his successful efforts to establish a law school. It was made very clear by Carswell that there should be no bias because of race.

So as the Senator from Michigan and the Senator from Florida have said, it is all evidence that must be weighed by each of us. Some may reach a different conclusion. But I share the hope that the Senator from Michigan has expressed that perhaps, whatever may happen here, this signals a closer examination of judicial nominees—Democrat or Republican, district court or circuit court or the Supreme Court. If we confirm the nomination of a man once, twice, or three times in a perfunctory manner, that is our fault, and we do a disservice. We have a right to raise a question at any time but nonetheless I believe the evidence at this point favors Judge Carswell.

I might add that I have not made any final determination. I want to support Judge Carswell unless there is evidence that I should not.

I tried to reach Judge Tuttle this morning by telephone because of some confusing statements—at least in my thought—about his telegrams. He said the telegrams were solicited by the senior Senator from Maryland. He felt that they were very clear, and he did not want to discuss the nomination further. I believe he has some obligation. If he now is opposed to Judge Carswell, as a responsible member of the judiciary he has an obligation to those of us in the Senate to make his views known. Why should he hide his views? If he is opposed to Judge Carswell for some specific reason, we should know, and if he is not, we should know that; because, apparently, much weight has been given to the three telegrams. But again I say to my friend from Michigan that I trust he will permit us to weigh the evidence, the same evidence he does, and perhaps reach a different conclusion.

Mr. HART. Mr. President (Mr. GURNEY), of course that is what we are about. That is what we are seeking to do. In the case of Judge Haynsworth, we weighed the evidence and we resolved the doubts, perhaps hesitantly and reluctantly, against Judge Haynsworth to preserve confidence in the Supreme Court. I believe that we cannot do any less here, and I would hope that the nomination will not be confirmed.

Mr. President, I yield the floor.

SENATE RESOLUTION 373—SUBMISSION OF A RESOLUTION EXPRESSING THE SENSE OF THE SENATE THAT LAWS RELATING TO STRIKES BY GOVERNMENT EMPLOYEES SHOULD BE ENFORCED

Mr. WILLIAMS of Delaware. Mr. President, I ask unanimous consent, as in legislative session, to submit a resolution. For the information of the Senate, I ask that it be read.

The PRESIDING OFFICER. The resolution will be stated for the information of the Senate.

The legislative clerk read as follows:

S. RES. 373

Whereas section 7311 of title 5, United States Code, provides, inter alia, that an individual may not accept or hold a position in the Government of the United States if he participates in a strike, or asserts the right to strike, against the Government of the United States, or is a member of an organization of employees of the Government of the United States that he knows asserts the right to strike against the Government of the United States;

Whereas section 1918 of title 18, United States Code, makes it a Federal criminal offense, punishable by a fine of not more than $1,000 or imprisonment of not more than one year and a day, or both, to violate the provisions of section 7311 of title 5, United States Code; and

Whereas, reportedly numerous employees of the postal field service have participated in a strike against the postal service in New York City and other cities in the United States: Now, therefore, be it

Resolved, That it is the sense of the Senate that—

(1) the Postmaster General should immediately take such measures as may be necessary to enforce the provisions of section 7311 of title 5, United States Code, and

(2) the Attorney General should immediately take such measures as may be necessary to enforce the provisions of section 1918 of title 18, United States Code,

with respect to any individual striking, or asserting the right to strike, against the United States Post Office Department.

Mr. WILLIAMS of Delaware. Mr. President, I am sure we all recognize the importance of this resolution. Rather than proceed tonight, I ask unanimous consent that the resolution be placed directly on the Senate Calendar

The PRESIDING OFFICER (Mr. GURNEY). Is there objection to the request of the Senator from Delaware? The Chair hears none, and it is so ordered.

would be $0.5 billion less under the set-aside program. Said another way, the program is estimated to cost the U.S. Treasury $0.5 billion more than the 1969-type program in 1971 to achieve the same farm income.

He finds the set-aside program less effective than current programs in reducing the acreage of the major grains. If cotton, wheat and feed grain payments were kept at 1969 levels, Professor Tweeten estimated 10 million additional acres of feed grains would be planted.

This would be offset partially by the diversion of 15 million acres of minor crops, oats, tame hay, etc., under the set-aside program, but the increased supplies of feed grains would lead to lower prices and increased supplies of livestock products within a short time. Livestock producers would also experience lower incomes as output expanded against inelastic demand.

Professor Tweeten also observes that dropping the restraints on the production of allotment crops means that the conserving base will become a relatively more important factor than before in controlling production, yet some states have dropped or deemphasized the conserving base. States which have dropped the conserving base will be relatively advantaged under a set-aside program.

Mr. Chairman, I hope it will be possible for you to schedule Secretary Hardin's appearance before your committee at an early date so that we can obtain a better understanding of the advantages and disadvantages of shifting from our voluntary relatively successful acreage adjustment program for cotton, wheat and feed grains to an untried set-aside program.

Thank you for alloting me the time to appear before this Committee.

GOVERNMENT PAYMENTS TO MINNESOTA FARMERS
1966 68

[Dollars in thousands]

	1966	1967	1968
Conservation	$5,910	$7,069	$5,578
Sugar Act	3,298	3,275	3,343
Wool Act	835	615	1,220
Soil Bank	7,973	6,028	4,649
Feed grain program	105,200	62,141	103,424
Wheat program	9,796	11,247	11,863
Cropland adjustment	2,417	4,876	4,433
Total	135,429	95,251	134,510

Source: Economic Research Service, Farm Income, State Estimates 1949-68, FIS 214 Supplement.

REALIZED GROSS AND NET INCOME FROM FARMING
MINNESOTA, 1960 AND 1968
[Dollars in millions]

	1960	1968	Change percent
Cash receipts from:			
Farm marketings	$1,437.1	$1,864.9	+30
Government payments	31 7	134.5	+324
Value of home consumption	47.0	31.5	−33
Gross rental value farm dwellings	84.5	121.6	+44
Farm production expenses	1,167.3	1,571.5	+35
Realized net income	433.0	581.1	+34

Source: Economic Research Service, Farm Income, State Estimates, 1949 1968 FIS 214 supplement.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

SUPREME COURT OF THE UNITED STATES

The PRESIDING OFFICER. In executive session, the question recurs on the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

The Senate resumed the consideration of the nomination.

Mr. MILLER. Mr. President, on January 19, the President forwarded to the Senate his nomination of the Honorable George Harrold Carswell, a member of the Fifth Circuit Court of Appeals, to be a Justice of the U.S. Supreme Court.

Hearings on this nomination were held by the Senate Comimttee on the Judiciary on January 27, 28, and 29, and on February 2 and 3, 1970. The printed hearings were distributed to Members of the Senate on Monday, March 2.

Not being a member of the Judiciary Committee and not having any personal knowledge of Judge Carswell, it seemed prudent for me to study the hearings record before reaching a final decision on this matter. To do otherwise would be to make a judgment on a most important matter without considering the evidence—to indulge in "trial by the press" and to thus shirk the duties of a Member of a separate, coequal branch of our Federal Government in his exercise of the constitutional power of confirmation.

It should be pointed out that only last June 19, the Senate confirmed the nominee to his present position without debate. Perhaps the reason there was no debate was that there were no dissenting votes in the Judiciary Committee when the nomination was reported to the Senate with the committee's recommendation for approval. Similarly, there were no dissents at the time of the confirmation of his nomination to be a Federal district judge on March 31, 1958.

It should also be pointed out that no questions of substance have been raised regarding the nominee's adherence to the canons of judicial ethics—a far cry from the $437,000 financial interest in the case of Judge Haynsworth, which some journalists still persist in ignoring.

CIVIL RIGHTS DECISIONS

Shortly after the nomination was referred to the Senate by the President, news articles appeared which quoted from a speech given by the nominee over 21 years ago, August 2, 1948, when he was a candidate for the State legislature in Georgia. The quotation was:

> Segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed and I shall always so act.

It will be remembered that it was not until 1954 that the U.S. Supreme Court handed down its decision in the school desegregation cases of Brown against Board of Education, which reversed the longstanding "separate but equal" principle. However, since that time there has been a national commitment to the cause of civil and human rights—one which cannot be well served if biased individuals are elected or appointed to posts of leadership in our Government where the problems inherent in this great cause are not dealt with objectively.

When asked to comment on the statement he made over 21 years ago, the nominee said:

> Specifically and categorically, I renounce and reject the words themselves and the thought they represent; they are abhorrent.

Nevertheless, a number of witnesses appeared before the Judiciary Committee, seeking to show that the nominee's record on the Federal bench indicated a racist bias which would preclude his serving on the U.S. Supreme Court in an objective manner. One of the principal opponents to the nomination was Joseph L. Rauh, Jr., general counsel of the Leadership Conference on Civil Rights. Not to be overlooked are the facts that Mr. Rauh was national chairman of Americans for Democratic Action from 1955 to 1957 and is currently vice chairman of ADA; was vice chairman of the District of Columbia Democratic Central Committee from 1952 to 1964 and chairman from 1964 to 1967.

This witness placed the major portion of his argument on "the 15 cases in which Judge Carswell was unanimously reversed by the court of appeals in the area of human and individual rights," to use his words. He described eight cases in the field of civil rights and seven relating to habeas corpus proceedings.

Unfortunately, Mr. Rauh's presentation constitutes an example of the very bias which he sought to prove exists in the nominee. The presentation ignores all of the other civil rights cases in which the nominee participated as a Federal district judge for 11 years: six which were not appealed and four which were affirmed; also five since he was elevated to the court of appeals. The analysis appearing in the hearings record, commencing at page 311, discloses eight "pro-civil-rights" decisions; 10 "neutral"; and five "anti-civil-rights." The "neutral" decisions are classified into three groups: First, those in which Judge Carswell's ruling as a district judge was affirmed by the court of appeals, indicating his correct application of existing law; second, those in which he, while sitting on the court of appeals, joined in a unanimous decision; and third, those in which his ruling as a district judge was vacated by the court of appeals for reconsideration in light of U.S. Supreme Court or court of appeals changes in the law subsequent to Judge Carswell's district court ruling.

The "neutral" decisions include three claimed by Mr. Rauh to be "anti-civil-rights": *Wechsler* v. *County of Gadsden, Fla.*, 351 F. 2d 311; *Steele* v. *Board of Public Instruction of Leon County, Fla.*, 371 F. 2d 395; and *Youngblood and United States* v. *Board of Public Instruction of Bay County, Fla.*, CCA(5) No. 572.

However, Mr. Rauh did not reveal that in the Youngblood case Judge Carswell was one of the judges on the Fifth Circuit Court of Appeals who joined in a unanimous policy decision resulting in reversal of 13 cases—including Youngblood—in light of an intervening U.S. Supreme Court decision. Judge Carswell properly abstained from the decision re-

versing Youngblood, because he himself had sat on that case; but he joined in the others—all of which were governed by the intervening U.S. Supreme Court decision.

In Wechsler, the Fifth Circuit Court of Appeals vacated an order entered by Judge Carswell in light of two decisions handed down by the higher court after Judge Carswell entered his order.

And in Steele, decided by Judge Carswell in 1963, we have another situation involving an intervening decision of the fifth circuit in 1966, on the basis of which the district court decision of Judge Carswell was reversed in 1967.

Mr. Rauh apparently did not go to the trouble of looking to see whether the unanimous reversals of Judge Carswell in these civil rights cases represented reversals in light of intervening decisions which Judge Carswell could not have foreseen at the time he rendered his decisions. If he had done so, he could hardly have classified them other than "neutral."

Mr. Rauh's testimony with respect to the seven habeas corpus cases must be discredited for the same failure—either to properly research them or, if this was done, to present the full picture to the committee. Although his testimony received considerable publicity in the press and was, therefore, most unhelpful to the public's being fully and completely informed, the confirming power of the Senate must not be exercised on the basis of one-sided publicity.

Beginning at page 315 of the hearings report is a full analysis of these seven cases, along with the information that nine of Judge Carswell's decisions in habeas corpus cases were affirmed by the court of appeals—information which Mr. Rauh neglected to provide in his testimony. Nor did he point out in his testimony that in another case, *McCullough v. United States*, 231 F. Supp. 740, Judge Carswell had followed the more liberal position of the Fourth Circuit Court of Appeals in granting relief—a position later changed because of a less liberal position of his own fifth circuit.

As pointed out at page 318 of the hearings report, the question of when a hearing in this type of case is required has been a difficult one for lower Federal court judges generally, and seven reversals on different factual situations over a period of 11 years could hardly be considered a showing of bias against human and individual rights.

The one sidedness of Mr. Rauh's presentation is difficult to reconcile with his well-known ability as a lawyer and lays a foundation for concluding that his equally well-known partisan political proclivities simply overwhelmed the professionalism which should have characterized his testimony.

A complete and fairminded analysis of the decisions certainly does not leave the impression that the nominee would fail to serve obectively if he were a member of the Supreme Court.

THE COUNTRY CLUB ISSUE

One argument advanced by opponents of the nomination to support their allegation that Judge Carswell is biased is that 14 years ago, when he was a U.S. attorney with headquarters in Tallahassee, Fla., he was an incorporator and director of a corporation which took over from the city a golf and country club for the purpose of achieving a private, segregated facility. It is not argued that being a member of a private, segregated country club is illegal or indicative of racial bias. The argument, rather, is that it has been declared illegal to manipulate a transfer of a municipally operated facility, open to the public, to private ownership for the purpose of segregating the facility. And it is said that Judge Carswell knowingly participated in such a deal.

From some of the debate that has occurred and from the hearings record, it is apparent that the opponents have been confused between the Tallahassee Country Club and the Capitol City Country Club.

The Tallahassee Country Club was organized as a private country club in 1924. In August of 1935, during the depression, it turned over the clubhouse and golf course to the city, because the few members were unable to carry the financial burden; but it reserved the right to lease back the property should the city decide to lease or otherwise dispose of the property in the future.

In September of 1952, the stockholders of the original club reorganized and petitioned the city commission to return the property, because the clubhouse was run down, the golf course was in need of improvement, and the city—which had been losing some $14,000 a year in the operation—was unwilling to incur the expenses needed to restore the facilities. Finally, on February 14, 1956, the city leased the facilities back to the original club for $1 a year, thus getting out from under the $14,000 loss operation. The next day, February 15, 1956, a front-page story appeared in the Tallahassee Democrat captioned: "Municipal Golf Course Leased to Private Firm—Vote Is 4 to 1 as City Makes Deal for $1." The article reported that the representative of the original club, when asked if the course would be open to the public, said:

> Any *acceptable* person will be allowed to play. (Emphasis supplied.)

The article further stated that a former commissioner had said, at the time the proposal was first introduced 2 months before, that racial factors were hinted as the reason for the move.

Two affidavits from citizens of Tallahassee—page 274 of the record—claim that the transaction had racial overtones and that this was known to the public. Moreover, use of the phrase "acceptable person" could be interpreted as excluding Negroes in a racist environment.

However, Judge Carswell had nothing to do with all of this.

The following April 24, a new corporation—the Capitol City Country Club, Inc.—was organized, and on September 1, 1956, it took over operation of the facility from the old corporation. On September 5, there appeared an announcement by the new corporation on the front page of the local newspaper with the caption: "Country Club Corporation Elects 21 New Directors—Directors To Name Officers Before October 1." The announcement stated further:

> Public Can Play—Although the new club is now a private organization, the golf course facilities are open to the public at daily, monthly, or yearly green fees.

It is noteworthy that the announcement by the new corporation, in contrast with the statement from the old corporation, did not delimit the public availability of the facility to "acceptable persons."

Judge Carswell, who was U.S. attorney in Tallahassee at the time, was a nominal member, subscribing incorporator, and director of the new corporation. I use the word "nominal," because he was only one of over 400—including then Gov. LeRoy Collins—signed up for membership, each of whom paid in $100 toward a $300 membership; never attended a single meeting; did not participate in the management of the club or the drawing up of the bylaws; never had any discussion or heard anyone else discuss anything that this was an effort to take public lands and turn them into private hands for a discriminatory purpose; was not one of the 21 directors elected from a slate of 42—of which his name was one—obviously because of his inactivity; and the following February 1 withdrew his name from the club, requesting a refund of his $100; on February 12, he was refunded $76.

The degree of his inactivity is clear from his testimony in the record and also from the testimony of Julian Proctor, one of the original founders of the club, who brought all of the pertinent records before the committee for inclusion in the RECORD. In fact, Judge Carswell paid so little attention to the club that he thought he had received a certificate of stock for his $100—pages 12, 13 and 31; and Senator HRUSKA of Nebraska, in his questioning, thought that he had too—page 12. According to Proctor, however, no stock or membership certificates were issued until after Judge Carswell had withdrawn his membership—page 253.

In the face of the record, to argue that 14 years ago Harrold Carswell was a knowing participant in an illegal, racially motivated deal would be to draw inferences that distort the record. Those who would draw such inferences cannot distort the record in one place, to their advantage, and not permit inferences and distortion in another place to their disadvantage. If they wish to infer that Harrold Carswell knew this was a racially motivated deal when he paid in his $100 14 years ago, let his supporters infer that Harrold Carswell dropped out when he learned that it was a racially motivated deal. Either way, taking the evidence that he was not a knowing participant or distorting the record and inferring that he dropped out when he found it was an illegal, racially motivated deal, the opponents must fail on this point. Furthermore, there is no evidence that this was an illegal, racially motivated deal—as far as the Capitol City Country Club, Inc., is concerned.

ABILITY

Some of the opponents have loosely and superficially referred to the nominee as "mediocre," "incompetent," "undistinguished," "lacking the brains," possessing a background of no "demonstrated achievement" or "professional excellence," having only a "level of modest competence," and the like. One, for example, is Louis H. Pollak, dean of the Yale Law School, who testified "from what little I knew of him at hearsay and from the press" plus an admittedly limited review of some of Judge Carswell's opinions. Such testimony, from a registered Democrat, who, in turn, leans on the opinions of two other registered Democrats, Professor Van Alystyne of Duke Law School and Prof. John Lowenthal of Rutgers Law School, lacks the very "professional excellence" in which the nominee is claimed to be deficient.

Contrast this with the testimony of James W. Moore, sterling professor of law and 34-year faculty member of Yale Law School, "on the basis of both personal and professional knowledge: a vigorous young man of great sincerity and scholarly attainments—moderate but forward looking, and one of growth potential—a fine jurist." Contrast it with the letter—page 321 of the hearings report—from Mason Ladd, long-time dean of the Iowa Law School and, following his retirement, the first dean of the Florida State University Law School at Tallahassee: "Well qualified in every way—scholarly—free from prejudice upon the current issues of the day"—based on knowing the nominee well, personally. Contrast it with evaluations of several fifth circuit judges with whom he has served and who observed his record when he was on the district bench—set forth in letters appearing in the hearings record: "fine skill as a judicial craftsman," "superior intelligence," "an excellent writer and scholar," "his volume and quality of opinions is extremely high," "possesses the professional and judicial qualifications to be a distinguished Justice of the Supreme Court."

After reading a representative group of Judge Carswell's opinions, and taking into account the fact that a busy district judge rarely has the time to engage in long, erudite writing in the manner of an appellate judge, I cannot but conclude that Judge Carswell has the capacity to be a good Supreme Court Justice. Indeed, his responses to questions during the hearings display an ability to be both articulate and eloquent. This does not mean that I do not believe I could have selected someone whom I might, in my own subjective thinking, believe to be more erudite, more scholarly, or more experienced. Most Members of the Senate have their favorites and their preferences—just as we did when previous nominations have been made to the Supreme Court. But "preference" can hardly serve as a basis for evaluating a nominee of the President.

A DISTINGUISHED IOWAN WHO KNOWS JUDGE CARSWELL VERY WELL

I have already referred to the letter appearing in the RECORD from Mason Ladd, the long-time dean of the law school at the University of Iowa whom I have known well for 24 years. Dean Ladd has always enjoyed a reputation for being not only an outstanding educator and legal scholar, but for being a moderate, progressive, and very fairminded person. When he retired from his deanship at Iowa, he became the first dean of the new law school of Florida State University at Tallahassee in September 1966, from which he is now retired. He spends most of his time in Iowa, but occasionally returns to Florida State as a visiting professor of law.

On February 16, Dean Ladd wrote to me from Florida State University because, as he said:

I feel that the race claim and attack upon the Judge is a very unjust and unfair attack.

He went on to say:

I know Harrold Carswell very well . . . He is one of the five men with whom I visited when I decided to come down here to establish this new College of Law. At that time I made definite inquiry as to whether the law school would be integrated and how the blacks would be regarded. He was very definite in urging that Negroes be brought into the law school even though they might not meet the aptitude tests which we require of white applicants . . . I regard him as competent, capable, and he is one of the hardest working judges I know. I would very much like to see him go on to the Supreme Court.

Words and opinion from one of my distinguished fellow Iowans, who knows Judge Carswell very well, carry great weight with me.

I shall support the nomination.

Mr. KENNEDY. Mr. President, I believe that each Senator has two straightforward questions facing him:

First. Is George Harrold Carswell a jurist with sufficient eminence, intellect, legal scholarship, judicial insight, and professional leadership to be qualified, above all the other lawyers, judges, and legal scholars in the Nation, for one of the nine seats on our Highest Court?

Second. Has George Harrold Carswell performed his judicial functions fairly, justly, in accordance with the law, the Constitution, and the controlling decisions of higher courts, and with an objectivity that proves him able to separate personal prejudices from his official acts?

Unfortunately, for the President, the Senate, the nominee, and, most of all, for the country, the answer to both of these questions is clearly "No."

George Harrold Carswell's 12 years on the bench has provided no evidence whatsoever that he deserves to be placed in the first rank of American lawyers. Despite his long service, he has shown no ability to contribute to the development of the law. He has displayed no particular talent for articulating the logic of the law, for anticipating—or even keeping pace with—the direction of legal progress, for applying old legal concepts to new problems, for providing lawyers and judges with opinions which help explain and settle complex legal issues. Despite 8,000 opportunities to do so, he has rarely, if ever, produced opinions which generated interest or comment or respect in the legal community, with the exception of his human rights cases, which I will come to in a moment. Our Nation has hundreds, perhaps thousands, of eminent jurists and advocates and law teachers who have dedicated their lives to the study and advancement of the law, to the strengthening of the legal profession, of the progress of the judiciary, and to imparting an understanding of the law to aspiring lawyers. They are the standard against which every Supreme Court nominee must be judged, and by this standard George Harrold Carswell does not even merit consideration, let alone nomination.

Yet, even if Harrold Carswell's attainments and leadership did meet the minimum standards for Supreme Court eligibility, his performance as a district judge would disqualify him. The job of a district judge is to apply the law to the facts presented him, and to do so fairly, dispassionately, and objectively. He must take the law as he finds it, in the Constitution and in the code, and in the decisions of the Supreme Court and the appeals court for his circuit. To do his job well, he must adhere to both the letter and the spirit of those decisions, and must help explain their meaning and elaborate on their application. He must rule in such a way that his decisions will stand up on appeal, so that the workload of the higher courts is not expanded by the need repeatedly to substitute their decisions for his.

Judge Carswell has failed on all these counts. He has refused to follow controlling constitutional precedents, even when they had already been applied and explained in previous appeals from his room, has aided those who sought to own decisions. He has ignored statutes specifically mandating court procedures. He has been rude to lawyers in his court-evade his own decisions, has taken it upon himself to be advocate for one side in certain cases, even when representatives from that side did not choose to contest the proceedings. The evidence detailing these facts is set out at length in the hearings and in the minority report, but I think certain pieces of evidence bear repeating.

We have heard the charge that these facts were reported only by dissatisfied lawyers representing disappointed litigants and that, therefore, their recollections can be considered biased or faulty. We have heard claims that their views were based on brief encounters with the judge, so that they had an inadequate basis to get to know him. One Senator yesterday referred to these witnesses as lawyers who knew the judge only on a one-shot basis.

I believe that anyone who listened to the testimony of these witnesses, and had a chance to judge their sincerity and demeanor, would have been persuaded and moved by the facts each of them related. But one lawyer, in particular, provided information which leaves little doubt as to the facts. Mr. Leroy Clark is now a professor at the New York University Law School, one of the most respected legal training institutions in the Nation. From 1962 to 1968 he supervised all civil rights litigation in Florida for the NAACP legal defense fund. In that capacity and over that extended period of time, amounting to more

than half of Judge Carswell's tenure on the district court bench, Attorney Clark probably appeared before the nominee in more human rights cases than any other single lawyer in Florida. There can be no question whatsoever as to his substantive assessment of Carswell's work, for each of us can also make our own assessment from the printed opinions. Time after time, Judge Carswell threw plaintiffs or claims out of court on motions to strike or on motions to dismiss for failure to state a cause of action or similar motions. In layman's terms, the granting of such motions means that the defendant has met a heavy burden of proving that there is no possible way the plaintiff can win, that there are no real contested issues of law or fact, in short that even if the plaintiffs can prove everything they allege, there is no conceivable theory under which their claims can be granted. As every judge knows, these are extremely difficult motions to sustain. But Judge Carswell had no difficulty granting them when Negroes seeking to vindicate their rights were the plaintiffs. And so, plaintiffs were repeatedly denied a chance to prove their cases, and justice was either totally denied, where appeals were impractical or too late, or justice was substantially delayed, even where appeals could be taken in time to do some good. In some of those appeals, the reversal of Judge Carswell was so curt that one gets the impression there was a charade going on, a process in which the fifth circuit knew that almost any civil rights case in Judge Carswell's court had to go through his hands at least twice as a matter of routine. The Due case is indicative of this phenomenon. There the fifth circuit said:

> The orders of the trial court dismissing the complaint for failure to state a claim on which relief would be granted can be quickly disposed of. These orders were clearly in error.

The message here is not that Judge Carswell had a different view of civil rights from that of many Senators, or many citizens. The point is that he repeatedly decided difficult cases without even considering the issues, repeatedly refused to hold hearings on matters that were complex and plainly subjects, at least, of legitimate dispute. These are neither charges of mere judicial error, nor descriptions of judicial restraint—these are blatant examples of judicial abdication and judicial irresponsibility. If every judge acted as Carswell acted, and only did what the law required him to do when specifically told to do so by the appellate court in each case, then we would have no viable judicial system at all.

Let me stress again, however, Mr. President (Mr. HOLLINGS) that these are conclusions that all of us can reach from a reading of the judge's decisions and the appeals from them. We do not need to rely on the interpretations of Mr. Clark to see that Carswell's court was a barrier to law and justice rather than a source of law and justice.

But what Mr. Clark's testimony, based on his experience as a lawyer in Florida, adds, is a feeling for the tone and atmosphere in the Carswell courtroom, the factors of temperament and character that do not show up in a cold transcript or a written decision. Mr. Clark's description of these factors speaks for itself:

> Judge Carswell was insulting and hostile . . . He turned his chair away from me when I was arguing . . . It was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according to opposing counsel every courtesy possible. It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel.

Mr. Clark was sophisticated enough and secure enough a person not to get upset by such behavior, and does not even now consider these matters as important for what they show about Carswell the judge as for what they show about Carswell the man. But for the Senate, some of whose members might be willing to accept a nominee's personal predilections, no matter what they were, as long as they did not affect the quality of his official performance, the implications of this evidence regarding Carswell the judge are crucial.

And let there be no doubt of the strength of this evidence. These are not merely the isolated recollections, after the fact, by a single attorney. They are fully corroborated by the first-hand testimony of other lawyers who endured the same treatment. And the accuracy of Mr. Clark's recollections of past events is confirmed by his contemporaneous reaction. At the very time of these events, Mr. Clark considered appearances before the judge by his younger associates to be such harrowing experiences, that he prepared them by making them rehearse their arguments the night before while Mr. Clark, playing the role of Judge Carswell, harassed them.

Given this evidence, we must ask the question, "Why?" Why would a member of the Federal bench perform so poorly in substance and in style? Why should he frustrate justice and ignore the canons of judicial behavior? What philosophy or theory of jurisprudence could explain his attitudes and his abdication? I submit that we have heard no suggestion of a legitimate rationale for these characteristics. And I submit that there is only one possible explanation which fits the facts:

This nominee to the Supreme Court was not able to divorce his personal prejudices and predilections from his official actions. His private resistance to equality of opportunity and of rights overwhelmed his public obligation to adhere to constitutional, and statutory, and judicial guarantees of such rights. His personal disagreement with the law of the land led him to public attempts to frustrate it. His was civil disobedience of the worst order, for it was clothed in the robes of justice.

We have heard the incredible suggestion that those lawyers who are unqualified for services on our highest court should have a representative on it. But I daresay that no one would suggest that those few judges who are unwilling to adhere to the Constitution, to the Federal Code, and to controlling cases, deserve a representative on the Supreme Court. The possibility that such a phenomenon might occur is a slur on all American lawyers and all American judges, but it is an especially disheartening show of contempt for those judges who have courageously followed the dictates of the Constitution, the code, and the cases—and of conscience—in the face of the most serious threats to their careers, their social stature, and even their personal safety.

What, then, is the argument in favor of this nominee? Reduced to its basic terms, the argument seems to consist of the following claims:

First. The President has the right to choose anyone he wants for the Supreme Court.

Second. There is no "ethical" issue here, so the Senate has no basis for rejection.

Third. The Court needs a southerner.

Fourth. There is a philosophical imbalance on the Court which needs to be corrected.

Fifth. The Senate already rejected one nominee for this seat, and as a matter of etiquette towards the President should not reject the second, no matter how unqualified he is.

Sixth. The Senate rejected Haynsworth and got Carswell, who is plainly worse; thus, if we reject Carswell, we will get a nominee with even poorer qualifications.

It is hard to believe that this is the case being made, but I think I have read or heard every one of those arguments being made, almost in those exact words, and I am embarrassed to say that on occasion they have been tendered and received with a straight face.

Let me take them up one by one:

First. "The President can choose his own Court."

Certainly no one who has read the Constitution of the United States can accept such a claim. The Founding Fathers very wisely divided the responsibility for designating members of the judicial branch of Government between the other two branches. The President selects the Supreme Court Justice with the advice and consent of the Senate. Both have a role to play, and those roles are equally important. The President has the power to select, but the Senate has the power and the responsibility to decide whether the person selected meets the needs of the Court, the Nation, and the times. This responsibility is particularly crucial in the case of the Supreme Court, for in no sense is the Court "the President's own," in the way that the Cabinet is, or that some administrative agencies may be. The President's term is 4 years; the Justice's term is life—perhaps 30 years to make decisions from which there is no appeal, decisions of life or death, decisions of peace or turmoil, decisions of progress or retreat, decisions of liberty or bondage. The President does not choose a Justice for himself, or to reflect himself. He chooses a Justice for the Nation, and to reflect the best the Nation has to offer. And very properly the Constitution mandates that the standards and the limits for that choice be set by the Senate, by 100

elected representatives of all the people, acting in the interest of all the people.

Mr. President, the Constitution makes clear that we are not supposed to be a rubberstamp for White House selections. We are not intended merely to be an outer boundary to prevent the appointment of thieves, madmen, or fanatics. We do not meet our duty if we place the sole burden on those who question a nominee's qualifications, and no burden on those who propose him. When a man is selected to be one of the nine members of our highest judicial body for the rest of his life, there is a substantial burden on those who support him to demonstrate that he is qualified professionally and personally, that he will do honor to the Court, that he will have the respect and attention of the bar and the populace, that he will contribute to the work of the Court and the growth and progress of the law, that he has a breadth of understanding and sensitivity that enables him to deal with the great issues of the day, and perhaps most of all, that along with whatever normal human failings he may have, he also represents the best instincts of mankind. That is a difficult burden to meet, but it is a vital burden. And it is not presumed to have been met as to a particular individual merely because the President nominated him. The act of nomination identifies the person as to whom the burden must be met; but under no conceivable logic can that act meet it.

The pragmatic proof of this all too obvious proposition lies in the nomination process itself. The fact is that under today's selection system, unless the Senate performs its functions fully and aggressively, the Nation has less assurance of the quality of Supreme Court appointments than of its lower court appointments. In the process of selecting district or circuit judges, there are at least three points where a candidate can be screened out quickly and quietly.

First, the Justice Department can screen him out based on its full field investigation of his background, associations, writings, speeches, and paper records, and the detailed opinions and comments of his friends, neighbors, associates, subordinates, superiors, and even his enemies. Although such investigations draw some local attention, that notice does not produce any real constraints, since several candidates for each position are usually investigated, and almost everyone knows who they are anyway. Since secrecy is not a factor, the investigations can be careful and thorough and even lengthy if necessary. On the basis of this full field investigation, the Justice Department can frequently eliminate many candidates for lower court positions, or identify issues or doubts for the White House to resolve. Candidates who survive this test must go through still another pre-appointment stage. All proposed district and circuit court appointments are submitted to the American Bar Association Committee on the Federal Judiciary, and no action is taken on any candidate until that committee's report has been received. The committee has time to complete a thorough survey in the limited areas of the candidate's professional experience, integrity, and temperament. It can reach its conclusions knowing that since the nomination has not been announced, a rejection will not embarrass anyone. And since it knows that its findings will be adhered to, it can act in frankness and candor, without a need to protect its own flank. The third screening occurs once the selection has been announced. At that time, the bar and the local public becomes aware of the nomination, but it is frequently identified more with the nominee's political sponsor than with the President himself. Thus, the President retains ample legroom—and the sponsor, ample incentive—to withdraw the appointment swiftly and silently if adverse information is uncovered after the announcement.

Thus, by the time the Senate committee, let alone the Senate, receives most nominations to lower Federal courts, they have been screened though all three of these effective screens, although naturally the screening standards are much lower than they would be for the Supreme Court.

The strange fact is, however, that although the standards for the Supreme Court are higher, the screening process does not work at any of those three stages. Because of the recent fetish for total secrecy regarding all high appointments, the Justice Department cannot conduct its full field investigation with the usual thoroughness. In particular, it can interview safely only those who are known to have the candidate's interest at heart and therefore will keep the secret. Thus, for all practical purposes, those with adverse information cannot be interviewed if the secret is to be maintained. The Department and the President are then left, as the two most recent Supreme Court nominations have demonstrated, with only a fragmented and lopsided view of the candidate, and with no idea of the problems in his background, character, or associations.

The ABA screening of the Supreme Court candidates does not help at all to fill this gap. Although Presidential Candidate Nixon promised in the fall of 1968 to refer all judicial nominations to the ABA's Federal Judiciary Committee for preannouncement screening, President Nixon in 1969 changed his mind and decided to do so only with respect to district and circuit judges. Thus, the Bar Association Committee hears of the Supreme Court nominations only when the public does, and, of course, only after the damage has been done, in the sense that the full prestige of the President and the Attorney General have been placed behind the nominee.

The committee is thus faced not with proffering private advice to the Attorney General based on neutral principles as to the candidate's qualifications, but instead must decide whether or not to buck the political powers that be. Moreover, they only have the briefest period to do so. In the Carswell case, the ABA committee was invited by telegram on January 21 to submit its views in advance of a hearing scheduled for January 27. At most, it had 3 working days to complete its very difficult task. The result was expectable. It succeeded in accomplishing only the most perfunctory checks on the nominee's qualifications, failing to interview personally or in depth even those who were known to the committee or its agents to have relevant information. In fact, it, like the Justice Department, failed to obtain or consider much of the derogatory information which the hearing and subsequent inquiries later brought to light. But once its finding of "qualified" was issued on January 26, its own prestige was on the line, and a change of position would have constituted not only a rebuff to the administration, but also an admission of the inadequacy of its own procedures and the shallowness of its allowed role. As expected, once the die was cast, the committee stuck to its guns, upon a post-hearing review of some, but not all, of the evidence.

While I am on this subtopic, let me mention exactly what that committee's finding is and what it is not, because this finding has been one of the two chief underpinnings of the pro-Carswell case since the beginning. The other, of course, was the Tuttle recommendation, otherwise loosely referred to as "the support of his colleagues on the fifth circuit." As we have seen, despite the use of the Tuttle letter in the hearings, in the majority views, in constituent letters, and on the floor, that endorsement disappeared less than 1 week after it was solicited by Judge Carswell, although none of us in the Senate knew of that fact until 1 month later at the earliest. As to at least one, and probably two other fifth circuit judges, it turns out that the support never existed at all. But returning to the ABA committee, the Attorney General made a statement on network television the other evening which may have reflected and encouraged a general misunderstanding of what the bar association role has been. The Attorney General stated that the nominee had been "highly recommended by the American Bar Association." I would suggest to the Attorney General, and I would hope that the media can confirm this with the association's president, that there are two basic errors in this statement. First, no one connected with the association has "highly recommended" anyone. Second, whatever was done was not done by the American Bar Association. The facts are that an appointed group of 12 members of the association, constituting the Standing Committee on the Federal Judiciary of the ABA, but not the ABA itself, gave the nominee a rating of "qualified," without any adjectives. As the Members of the Senate well know, the ABA is extremely jealous of the accuracy of its public positions. If in a legislative hearing we have an ABA witness, we are always carefully told whether he is expressing the views of a committee, a section, a council, some executive body, or of the entire house of delegates of the ABA.

Perhaps the Attorney General's unfamiliarity with these distinctions led him to make a loose reference, but I hope that we can be more discriminating here

on the floor of the Senate. As for his extra adjective and his substitution of "recommended" for "qualified," I think they can perhaps be attributed to understandable enthusiasm in the heat of battle, but again our debates should avoid that error. One related point, the distinguished minority leader indicated that the ABA Committee on the Federal Judiciary was appointed by the eminent and respected president of tne ABA, a constituent of the minority leader's, Mr. Bernard Segal. The minority leader seemed to imply thereby that Mr. Segal would endorse the Carswell nomination. First of all, the committee serves in staggered terms and many of the members were appointed by Mr. Segal's predecessors. Second, Mr. Segal has certainly made no statements endorsing Mr. Carswell, and the public statements he has made on the subject justify a conclusion that he at least has grave doubts about the nomination and probably opposes it. Finally, of interest in assessing the weight to give the finding of the ABA committee is the fact, which may or may not be relevant, that the chairman of that committee was appointed to a judgeship and a sub-Cabinet post by the previous Republican administration, and served for a year in an important post in the present administration.

Returning to the inadequacies of the screening process for Supreme Court candidates, we have reached the last stage, where the public and press provide the President with vital information overlooked in the previous two stages. But unlike district and circuit court selections, Supreme Court nominations cannot be withdrawn quietly and without substantial embarrassment. The President and the Attorney General have placed themselves on the line, and it is hard for them to retrace their steps without appearing to admit gross error, even though such error, as we have seen, is almost inherent in the machinery. Thus, for example, during the Haynsworth debate, even after the administration realized that there was a substantial chance of rejection, even after leading Republicans had pleaded with the President to withdraw the nomination, and even after the nominee himself had suggested withdrawal, the President and the Attorney General felt the necessity to push through to the bitter end, regardless of the consequences.

I hope that the lessons of last time have been learned, and that the serious problems which have been revealed, and the substantial opposition in the Senate, will persuade the President that, even if party loyalty carries the confirmation through, the nominee's effectiveness will be so seriously impalred and the Court's stature so compromised, that the nomination should be withdrawn before the Senate is forced to make a decision it should not have to make.

Concluding my assessment of the first argument in favor of Carswell, I think it is clear that the notion of absolute Presidential discretion is unsupportable in theory or in history, and totally untenable in practice.

Second. The Senate cannot reject without an "ethical" issue.

This argument errs both in its premise and in its conclusion. In the first place, it is myopic and disingenuous to argue that there is no ethical issue here. The evidence of the nominee's behavior in court, his aiding and abetting the circumvention of his own orders, his refusal to adhere to direct precedents in his own cases, his failure to carry out Supreme Court and circuit court mandates, and, in general, his failure to resolve the conflict between his personal prejudices and his official obligations, raises the most serious and sensitive ethical questions. Senator CRANSTON performed a most valuable service earlier this week by pointing out that even from a layman's perspective, the evidence against Judge Carswell appears to indicate multiple violations of the canons of judicial ethics. And Senator GRAVEL yesterday added a most succinct statement of the ethical issues.

If the claim of those who make this argument, however, is that there is no question of financial ethics here, in the present state of the record, then they are correct. But I doubt that the Senate is willing to agree to the proposition that the only ethical questions relevant to judicial appointments are ones with dollar signs. If other kinds of conflicts of interest and prejudice and abdication of official duties are deemed irrelevant, then the days of excellence and fairness and justice on the bench cannot last much longer.

Of course, even if there were no "ethical" question here, the Senate's jurisdiction and responsibility would not be eliminated. The Constitution does not say that the Senate shall provide its advice and consent only on "ethical" grounds, and the Senate has never considered its role to be so constrained. Certainly qualifications are a legitimate and necessary criterion for our review. Surely, understanding of the times and sensitivity to the Nation's problems are factors we may and should take into account. And without doubt, we can consider what the impact of an appointment would be on our national fabric and our legal institutions. So I think we can justifiably reject this argument both in theory and in fact.

Third. The Court should have a southerner.

Of course, the Court already has a southerner, so this argument starts at a disadvantage. Despite the fact that the present nominee would be the second southerner, I have heard no Senator—and no one else for that matter—express opposition on that basis. There can be no doubt that those who are opposed to this nomination on its merits would be gratified, and required, to vote to confirm any southern lawyer or judge with the eminence and qualifications for Supreme Court service. But we are not going to vote to confirm a man who is not otherwise qualified, merely because he is a southerner.

What is more, as one who went to law school in the South, and who knows firsthand of the many distinguished lawyers and jurists and scholars there, I think I would be extremely unhappy about this appointment if I had remained in the South. The clear implication is that the administration feels that George Harrold Carswell is the best the bench and the bar of the South can produce. That notion is an insult to every judge and attorney in the region, whether he considers his own qualifications to be better or worse than the nominee's. For the suggestion that this man is outstanding and superior by the region's standards betrays a low opinion of the region and its lawyers.

Again, if the President wants to choose another southerner, that is his privilege. But let him choose a man who is clearly qualified and a credit, not an embarrassment, to his region and his nation.

Fourth. We need to balance the Court with a conservative.

This argument was a familiar refrain throughout the 1968 campaign, and was a key argument during the Burger nomination. The Senate overwhelming voted for Chief Justice Burger despite his reputation as a strong conservative. Most of us, including most of those who are opposed to Carswell, felt that Judge Burger's qualifications were so outstanding that his particular jurisprudential philosophy was irrelevant, and that would be our position with regard to any eminently qualified candidate, no matter what his judicial philosophy. Again, if I were a judicial conservative, I think I would take umbrage at the implication that this nominee was the best of my stripe that could be found. And again also, the mere fact of "conservatism" cannot turn an unqualified candidate into a qualified candidate.

Fifth. "Etiquette demands that we not reject a second of the President's nominees."

Mr. President, if I had not heard this argument seriously discussed in these Halls, I would consider it laughable. This is not a matter of etiquette or noblesse oblige. The stakes are too high to yield to politeness. Our responsibilities are too grave to fall before the interests of the President's pride. We have a duty to our own consciences, to the Senate as a coequal branch of government, to the Court, to the Nation, and to the President himself, to see that his legacy and our legacy to the next generation of Americans is not a Court which generates disrespect and derision.

There is no escape from the fact that the President has displayed neither etiquette nor kindness nor sensitivity toward the Senate and the citizenry in his last two nominations to the Court. Why we should now sacrifice substance and duty to some vague notion of courtesy is beyond my understanding. The administration has twice erred. We must not compound the most recent error by ignoring it. We are not given the power and obligation of advice and consent merely for show, just to trot out and exercise every once in a while to prove that we still have it. It was given to us as part of a very careful division and balance of powers to protect our democracy and our liberty, our Government and our people. If we let "etiquette" take precedence over our constitutinal mandate and over national need, then we are abdicating our functions in the govern-

ment of laws. Chivalry is fine in its place; but it is no substitute for the Constitution, for reason, or for the U.S. Senate.

Let the President send us a nominee he, and we, can be proud of and then we will show him how courteous and kind and cooperative we can be.

Sixth. If Haynsworth was bad, and Carswell is worse, just imagine what the next nominee will be like.

Once again, the logic would be ludicrous, something out of Art Buchwald or Russell Baker, if not for its repetition in the halls of the Senate. The clear message of the Haynsworth vote was "We want something better." Perhaps at the time Carswell was named, the President thought he was better; but as we have seen, we are in an a fortiori situation It is difficult to understand how anyone who voted against Haynsworth, for whatever reason, can vote for Carswell. And it is unlikely that anyone who was troubled by his vote for Haynsworth can vote with a clear conscience for Carswell.

We cannot, we must not, assume that because there have been two serious errors in the executive branch, there will be a third, even more serious. Perhaps we in the Senate are partially to blame. Our assignment is not only consent, but advice. Perhaps if this nomination is defeated, we can be more forceful and direct in our advice, both as to specific candidates and general principles. The message of a vote of rejection now would be clear: "Mr. President, we want a candidate who is so clearly qualified that we will all be pleased to share in the honor of his appointment. We want a man who represents the best this Nation has to offer. We want a man who will do justice to the Nation in every sense of the word, whom the entire country can look up to, whose opinions will enlighten and stimulate, even if they do not persuade. Mr. President, we have many such men, and we will help you to find them." That will be our message if we reject this nominee.

If we confirm Harrold Carswell our message will also be quite clear: "Mr. President, you can appoint anyone you like, no matter how pedestrian, no matter how undistinguished, no matter how pedestrian, no matter how unworthy of respect, no matter how abhorrent to our ideals, our traditions, and our liberty. And you will not have the Senate to worry about any more. We consider advice and consent a vestigial power which we are content to allow to atrophy."

Surely, we cannot allow such a message to go forth. We cannot dash the hopes of those who depend on the Senate as a bastion of liberty and justice and constitutional supremacy. We cannot take the easy route of silence and inaction. We must raise our voices in protest, and we must take action.

Mr. MONDALE. Mr. President, there has been a great deal of discussion in recent days about the standards for choosing and approving nominees to the Supreme Court. It has even been suggested that a nominee's mediocrity and lack of distinction are not valid grounds for voting against confirmation.

I refuse to believe that a majority of the Senate adhere to that view. But the very fact that such an argument has been made says something about the faith which Judge Carswell's defenders have in the nominee's abilities.

That their faith is shaken is not surprising in light of the overwhelming record verifying Judge Carswell's "slender credentials"—his failure to distinguish himself as a suitable candidate for membership on the Nation's highest court. For example, a Republican organization, the Ripon Society, stated:

> Virtually all legal historians and scholars who have examined G. Harrold Carswell's record have found him to be one of the least qualified, if not the least qualified, nominee to the United States Supreme Court in the twentieth century. Exhaustive studies which have been performed jointly in the last month . . . give extremely strong statistical corroboration to the contention of judicial scholars that G. Harrold Carswell is seriously deficient in the legal skills necessary to be even a minimally competent Supreme Court Justice.

The Ripon Society conducted a very unusual study of Judge Carswell's record upon the district bench. On the issue of reversals on appeal, the society came to this startling conclusion:

From 1958 to 1969 as a Federal district court judge, 58.8 percent of all of those cases where Judge Carswell wrote printed opinions and which were appealed resulted ultimately in reversals by higher courts. By contrast, in a random sample of 400 district court opinions, the average rate of reversals among all Federal district judges during the same time period was 20.2 percent of all printed opinions on appeal. In a random sample of 100 district court cases from the fifth circuit during the 1958–69 time period the average rate of reversals were 24 percent of all printed opinions on appeal.

Judge Carswell's rate of reversals for all of his printed cases was 11.9 percent as compared to a rate of 5.3 percent for all Federal district cases and 6 percent for all district cases within the fifth circuit during the same period.

When these results are analyzed cumulatively, they form a most impressive indictment of Judge Carswell's judicial competence. The incredibly high rate of reservals—59 percent—which Carswell has incurred on appeals in those cases in which he has written printed opinions brings into serious doubt the nominee's ability to understand and apply established law.

On the basis of this evidence, the Ripon Society has urged Republican Senators "to uphold their party's best traditions by rejecting confirmation" of this nomination. Coming from members of the President's own party, this can hardly be viewed as a partisan attack on a President's Supreme Court nominee.

The Ripon Society's analysis of Judge Carswell's qualifications is similar to views expressed by deans and faculty members from law schools throughout the Nation. Dean Derek Bok of the Harvard Law School stated that Judge Carswell has "a level of competence well below the high standards that one would presumably consider appropriate and necessary for service on the Court." Dean Louis Pollak of the Yale Law School testified before the Judiciary Committee that Judge Carswell "has not demonstrated the professional skills and the larger constitutional wisdom which fits a lawyer f r elevation to our highest court. With all deference, I am impelled to conclude that the nominee presents more slender credentials than any nominee for the Supreme Court put forth this century."

And Duke University Law School Prof. William Van Alstyne, who testified in favor of Judge Haynsworth's nomination, told the Judiciary Committee:

> There is, in candor, nothing in the quality of [Judge Carswell's] work to warrant any expectation whatever that he would serve with distinction on the Supreme Court of the United States.

These strong and unequivocal expressions of "no confidence" in Judge Carswell's qualifications are not unique. As the dissenting members of the Judiciary Committee point out:

> The outpouring of professional dismay over this nomination bas reached a level unequaled in recent history. Lawyers and law professors from all over the country, despite their preference for maintaining cordial relationships with members of the Court, have forcefully expresed their view that the Carswell nomination will demean the Court and dilute its stature.

This outpouring of professional dismay came to a head on March 13, 1970, when a group of almost 500 prominent members of the legal profession signed a statement urging the Senate to reject this nomination. This group—composed of Republicans and Democrats, liberals, and conservatives, academicians, and practioners—reminded the Senate of its constitutional duty in this matter:

> We respectfully urge that, although this is a second nominee for the vacancy, the Senate has a greater constitutional duty to exercise independent judgment in judicial appointments than it has in executive appointments. We believe that, in the exercise of that duty, the Senate should confirm an appointment to the Supreme Court only if the nominee is of outstanding competence and superior ability. Judge Carswell does not, in our opinion, meet that test.
>
> The Senate has recognized this obligation in repeated instances. For example, of the 71 Supreme Court nominations sent to the Senate during the nineteenth century by the Presidents, more than one-fourth were denied Senate approval (Charles Warren: The Supreme Court in United States History, Vol. II, pp. 758–762).

In addition to the nearly 500 prominent attorneys throughout the Nation who have urged the Senate to reject this nomination, nine of the 15 faculty members of the Florida State University Law School—a law school which Judge Carswell helped establish—yesterday wrote to the President of the United States, urging that his nomination be withdrawn. I think that statement, by a group of faculty members, is a significant statement indeed.

Given this overwhelming and unprecedented reaction to the credentials of a Supreme Court nominee by prominent individuals representing the mainstream of the legal profession, we might ask ourselves why the President made such a choice. Anthony Lewis, a distinguished

student of the Supreme Court, posed and then answered the question in a recent article:

How, then, have we arrived at a point where a man with as minimal qualifications as Judge Carswell can be appointed? He was chosen, evidently, as an earnest of President Nixon's declared intention to roll back Supreme Court decisions that he thinks have gone too far in a libertarian direction. . . .

But the tragedy is that the appointment of narrow men, men of limited capacity, will make things worse, not better. What that Court needs is not more war of doctrine, in which moderation is crushed.

The Supreme Court today needs more reason, more understanding, more wisdom. If it has strayed too far from the true vision of American life, as the President believes, those are the qualities that will bring it back. There is nothing wrong with the Supreme Court that G. Harrold Carswell can cure.

This evidence of Judge Carswell's minimal qualifications is, I believe, sufficient grounds for refusing confirmation. But there is a more fundamental reason for rejecting this nomination—one that involves a great deal more than diluting the stature of the Supreme Court by appointing unqualified individuals.

During the debate over Judge Haynsworth's nomination to the Supreme Court, I observed:

The question before us is much broader and much more important than merely the nomination of a single individual to our highest court, as important as that would be by itself. The question really is the direction in which we will move in the country concerning the quality of rights which we say we stand for as a nation.

It is tragic that the nomination now before the Senate raises that same question—and raises it in an even more compelling manner.

For the Senate's acquiescence in this nomination will have an impact beyond that on the Court itself. At the very least, it will signify to millions of Americans that substantial evidence of an individual's hostility and insensitivity to human rights is no bar to membership on the Supreme Court. Perhaps even more important, confirmation of Judge Carswell will amount to an endorsement of this administration's calculated effort to reverse antidiscrimination policies developed over the past 10 years.

To determine Judge Carswell's position on human rights, it is not necessary to rely on a speech made 22 years ago. Even if that speech were erased from the record, Judge Carswell's actions since that time speak for themselves.

There are three basic aspects of Judge Carswell's career which clearly demonstrate his low regard for minority rights: his private activities, first as a U.S. attorney, and then as a Federal judge; his judicial decisions; and finally, his demeanor on the bench.

In regard to Judge Carswell's private activities, I believe that the three most disturbing facts are the following:

In 1953, Judge Carswell chartered an all-white booster club for Florida State University;

In 1956, he was an incorporator and director of a private segregated golf course, a move designed to circumvent the right of Negroes to play on a public course; and

In 1966, he signed a deed containing a "whites only" racial covenant.

There has already been a substantial amount of discussion about each of these episodes. However, it should be pointed out that these incidences take on an added importance in light of Judge Carswell's repudiation of his 1948 advocacy of racial supremacy. The nominee told the Judiciary Committee:

There is nothing in my private life, nor is there anything in my public record of some 17 years, which could possibly indicate that I harbor racist sentiments or the insulting suggestion of racial superiority. I do not do so, and my record so shows.

As noted by the dissenting members of the Judiciary Committee:

Judge Carswell's official and unofficial conduct must be scrutinized with this standard in mind, as well as for its implications regarding his professional qualifications.

Measured against this standard, the nominee's private activities "betray a continuing insensitivity to human rights and to his status as a Federal official and judge."

While there might be argument as to the real motive underlying Judge Carswell's private activities, there can be little doubt about the disregard for human rights continually illustrated in the nominee's judicial record. The minority report of the Judiciary Committee best describes this record as "one of obstruction and delay, amounting too often to an improper refusal to follow the mandates of the Constitution and the clear guidelines of the higher courts."

The accuracy of this summary is obvious after examining some of the more important cases decided by the nominee. On the vital issue of school desegregation, Judge Carswell has demonstrated that he believes more in "obstruction and delay" than in the Constitution.

In *Augustus* v. *Board of Public Education of Escambia County*, 185 F. Supp. 450 (1960), reversed 306 F. 863 (1962), civil rights lawyers attempted to present evidence on the necessity of ending racial segregation of school faculties as an essential step to making school desegregation work. Judge Carswell responded that black students have no standing to sue for desegregation of faculties, stating:

Students can no more complain of injury to themselves in the selection or assignment of teachers than they can bring action to enjoin the assignment to the school of teachers who were too strict or too lenient.

He, therefore, refused to hold a hearing on the issue and struck it from the complaint.

This part of the decision was reversed when the case was appealed to the fifth circuit. The court stated that Judge Carswell was wrong to assume without thorough investigation of the law or the facts that Negro students could not possibly be injured by faculty segregation. The court ordered a hearing on the issues, saying that "whether as a question of law or of fact, we do not think that a matter of such importance should be decided on a motion to strike."

In another aspect of the same case, Judge Carswell delayed for a year and a half in obtaining a desegregation plan from local authorities. He then approved a plan which gave local authorities 1 more year before even token desegregation would begin. This plan also allowed only 5 days a year for blacks to request transfer to white schools, authorized the school board to reject transfer applications on general grounds, and provided insufficient notification of rights to black parents.

The plan approved by Judge Carswell was contrary to existing law. The memorandum filed by dissenting members of the Judiciary Committee pointed out:

Because of the danger that such plans could be used to maintain segregation, the Fifth Circuit had previously held in 1959 that a school board's adoption of the Florida Pupil Assignment Law did not meet the requirements of a plan of desegregation or constitute a "reasonable start toward full compliance" with the Supreme Court's 1954 decision in *Brown-Gibson* v. *Board of Public Instruction of Dade County, Florida* 272 F. 2d 763 (1959). The Fifth Circuit had reaffirmed this decision in 1960. *Mannings* v. *Board of Public Instruction of Hillsborough County, Florida*, 227 F. 2d. 370 (1960).

In *Gibson* the Fifth Circuit also held that the Pupil Assignment Law, even if administered nonracially, was not enough to satisfy a school board's duty to desegregate; it had to be desegregating its schools simultaneously with the application of the Pupil Assignment Law.

Despite the clarity of the law on this point, and despite Judge Carswell's obligation to follow the decisions of the Fifth Circuit, the desegregation order he entered against Escambia County in 1961, provided, in effect, only that the Board should continue using the Pupil Assignment Law which, up to that time, had resulted in the continuation of a fully segregated school system. No meaningful additional steps were required.

The fifth circuit, of course, reversed this desegregation plan approved by Judge Carswell. The court found that the plan "has not gone far enough," and then instructed Judge Carswell as to the minimum that should be required.

In another important desegregation case, *Steele* v. *Board of Public Instruction of Leon County*, 8 Race Rel. L. Rep. 932 (1963), Judge Carswell approved a desegregation plan giving all children blanket reassignment to the segregated schools they were presently attending; black children wishing to attend an integrated school would be required to follow the procedures of the Florida pupil assignment law before being reassigned to a white school. In addition, the Carswell-approved plan provided for desegregation at the rate of only one grade per year.

The the fifth circuit had already ruled every aspect of this plan unconstitutional in the previously decided Augustus case did not deter Judge Carswell. His disregarded for the guidelines of the fifth circuit was again illustrated a year later in *Youngblood* v. *Board of Public Instruction of Bay County, Florida*, 230 F. Supp. 74 (1964). In that case, Judge Carswell approved a plan intended to prevent anything but token integration—this plan, too, was based on the Florida pupil assignment law.

Judge Carswell's record in desegregation cases also demonstrates his refusal to speed the pace of desegregation. Ignoring various rulings by higher courts rejecting grade a year desegregation plans and calling for faster desegregation, Judge Carswell continued to deny plaintiffs' motions to change these plans in the counties under his jurisdiction.

As a result of Judge Carswell's refusal to abide by the Constitution and by higher court rulings in desegregation cases, two of the three school districts under his supervision were among the only four reported Florida districts maintaining completely segregated faculties into 1967. More than 90 percent of the black children in the Tallahassee schools were still in separate and completely segregated schools. Southern Education Reporting Service, statistical summary, 1966–67, page 11.

There are other illustrations of Judge Carswell's refusal to follow the law in cases involving racial discrimination.

In *Due* v. *Tallahassee Theatres, Inc.*, 335 F. 2d 630 (1964), Negro plaintiffs filed for injunction to restrain a conspiracy among theater owners, city officials, and the county sheriff to enforce a policy of segregated operation of theaters.

Judge Carswell dismissed three of five claims in the complaint for failure to allege a claim on which relief can be granted. No evidentiary hearing was afforded.

The fifth circuit was unanimous in reversing this decision, with Chief Judge Tuttle stating that:

> The orders of the trial court dismissing the complaint for failure to allege a claim on which relief could be granted can be quickly disposed of. These orders are clearly in error.
>
> * * * * *
>
> It appears, in fact, to be a classical allegation of a civil rights cause of action.
>
> * * * * *
>
> There is no doubt about the fact that the allegations here stated a claim on which relief could be granted, if the facts were proved.

In *Dawkins* v. *Green*, 285 F. Supp. 772 (1968), plaintiffs alleged that city officials had initiated bad faith prosecutions against them to retaliate for past civil rights activities and to intimidate them from engaging in future civil rights activities. Judge Carswell again granted the defendents' motions for summary judgment and dismissed the case. The fifth circuit reversed this decision, stating that "no facts were present so that the trial court could arrive at its own conclusions."

And in *Singleton* v. *Board of Commissioners of State Institutions*, 356 F. 2d 771 (1966), a suit to desegregate Florida State reform schools was brought by former inmates on probation at the time of the decision. Plaintiffs were still inmates when the suit was filed. Judge Carswell dismissed the complaint for lack of standing, stating that the plaintiffs were released from original commitment and were no longer under the board's custody.

The fifth circuit again reversed Judge Carswell, stating that the plaintiffs were released on conditional probation, and were thereby subject to recommitment if they violated the conditions. The Court found that this is "well within" the requirements for standing. The Court also observed that Judge Carswell's reasoning would prevent desegregation in reform schools, since an inmate's average stay was less than the time required to file suit and obtain a court order.

There are various other cases decided by Judge Carswell—involving issues of civil rights and of criminal rights—which present the picture of a judge who follows his own beliefs rather than constitutional and legal requirements. For example, there are at least nine criminal cases in which Judge Carswell was unanimously reversed by the fifth circuit for refusing to grant an evidentiary hearing in habeas corpus proceedings or similar proceedings under 28 United States Code, section 2255.

It is no wonder, then, that the dissenting members of the Judiciary Committee concluded that Judge Carswell's record:

> Reveals that he is not, in fact, a "strict constructionist" in any sense of that vague term. Indeed, he has displayed little, if any, regard for the principle of "stare decisis" when its application has directly required him to follow the holdings of the 5th Circuit and the Supreme Court in civil rights cases. His decisions in this area merely reinforce the picture of a judge who was unable to divorce his personal prejudices from his judicial functions.

Perhaps the most distressing aspect of Judge Carswell's overall record is the testimony before the Judiciary Committee concerning his courtroom demeanor when dealing with civil rights litigants and their lawyers. According to Prof. Leroy Clark, a black attorney who supervised the NAACP legal defense fund litigation in Florida between 1962 and 1968, Judge Carswell was:

> (T)he most hostile federal district court judge I have ever appeared before with respect to civil rights matters . . . Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.
>
> It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel.

Since appearing before Judge Carswell was such a unique experience, Mr. Clark was forced to take extraordinary precautions. He told the committee that—

> (W)henever I took a young lawyer into the state, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.

Three other attorneys appeared before the committee and verified Professor Clark's characterization of Judge Carswell's courtroom behavior. One of these witnesses, Norman Knopf, is now a Justice Department attorney who testified pursuant to a subpena. He corroborated the testimony of Prof. John Lowenthal of Rutgers University Law School that Judge Carswell "expressed dislike of northern lawyers" appearing in southern civil rights cases. According to Mr. Knopf:

> Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on . . . It was a very long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people, and he in effect didn't want any part of this, and he made quite clear that he was going to deny all relief that we requested.

Judge Carswell's hostility went beyond discourtesy and rudeness. These lawyers also testified that Judge Carswell acted outside a judicial capacity to detain civil rights workers in jail and to insure that nine clergymen arrested as "freedom riders" would retain a permanent criminal record.

I have been a lawyer for 15 years and served as attorney general in my State for 5 years, and I have never heard of any judge doing that sort of thing.

In addition to these witnesses, further evidence concerning Judge Carswell's antipathy to attorneys representing civil rights litigants was presented to the Senate by Senator CRANSTON on March 18, 1970. The distinguished Senator from California spoke with two other attorneys who had appeared before Judge Carswell and who had experienced the same hostility. Senator CRANSTON recounted his conversation with one of these attorneys, Theodore Bowers, of Panama City, Fla.:

> He said of his experiences in Judge Carswell's court that the judge was hostile, even in regard to routine procedural matters.
>
> He stated that civil rights cases seemed to affect him emotionally, that he would get excited in the course of such trials in his court.
>
> Bowers told me that Judge Carswell turned away from him, looking off to the side, turning his body to the side, when he was presenting an argument. He stated that Judge Carswell stayed turned aside throughout half of his total argument. He argued for 10 minutes, and for 5 of those minutes Judge Carswell was looking away, had turned bodily away, seemed to be totally ignoring the case he was seeking to make.
>
> He stated that Judge Carswell would appear especially hostile when he, Theodore Bowers, or others cited decisions of the Supreme Court. Judge Carswell attacked Supreme Court decisions while he was sitting on the bench of a lower court.
>
> All this, said Bowers, was a consistent pattern of behavior by Judge Carswell from 1964 until 1968, when he left the court where these observations were made.
>
> Theodore Bowers added that the judge would attack attorneys appearing in desegregation cases, and all this, he said, constituted what he would term to be "totally improper judicial posture."

I fully agree with Senator CRANSTON'S contention that Judge Carswell's courtroom behavior raises serious questions that he continually violated canons 5, 10, and 34 of the Canons of Judicial Ethics, which read as follows:

> **5. Essential Conduct**
>
> A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

10. Courtesy and Civility

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

• • • • •

34. A Summary of Judicial Obligation

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, *courteous, patient,* punctual, *just, impartial,* fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; . . .

Somewhat like those of us in the Senate:

He should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Despite the seriousness of the charges of unfairness and hostility made before the Judiciary Committee, Judge Carswell did not reappear to rebut these charges. Instead, he issued a general statement that there has never been "any suggestion of any act or work of discourtesy or hostility" on his part.

To accept this statement, we almost have to believe that four attorneys perjured themselves before the Judiciary Committee.

The significance of Judge Carswell's courtroom demeanor is best explained in the minority report on this nomination:

Our judicial system must accord litigants a fair hearing. Justice is not dispensed when a judge's personal views and biases invade the judicial process. In Judge Carswell's court, the poor, the unpopular and the black were all too frequently denied the basic right to be treated fairly and equitably.

Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices. His hostility towards particular causes, lawyers, and litigants was manifest not only in his decisions but in his demeanor in the courtroom.

Mr. BAYH. Mr. President, will the Senator from Minnesota yield?

The PRESIDING OFFICER (Mr. BYRD of Virginia). Does the Senator from Minnesota yield to the Senator from Indiana?

Mr. MONDALE. I yield.

Mr. BAYH. I note with a great deal of interest the reference my colleague from Minnesota made with regard to justice and the attitudes that citizens who become involved in the judicial process have relative to the treatment they get in our courts. Is the Senator from Minnesota at all concerned about the impact that this nomination will have on large numbers of people that, through his efforts, and the efforts of others, are beginning to have a better opportunity to join other Americans who live in prosperity?

Is the Senator at all concerned how they will view this nomination?

Mr. MONDALE. I thank the Senator for asking that question, because it is quite apparent that one of the great and fundamental debates in this country involves capacity of American institutions to respond to the just needs of the people of this country—particularly the poor and the deprived, who are not in a position politically, economically, culturally, or educationally to assert their rights as others more privileged are able to do.

Whether our institutions will respond to the rights and privileges found in the Constitution depends upon the sense of humanity of the judiciary and those who make it up. I very much fear that Judge Carswell not only lacks competence to perform his duties as a Supreme Court Justice in a technical sense; but also I am even more certain that he lacks the basic commitment to human rights, decency, and justice which is absolutely essential if this country is going to hold itself together.

Mr. BAYH. I concur in the evaluation of this particular concern that the Senator from Indiana shares. I have talked to a number of people, as I have gone about my various duties, and have been in and out of Washington in the past 2 or 3 days, and I have been surprised at the number of cab drivers, hotel employees, and restaurant employees who are concerned over the nomination of Judge Carswell to the Supreme Court. I cannot, in all honesty, suggest how severe this is, or how nationwide it is, but I must say it is significant enough that I am deeply concerned over the impact this nomination has on those who have been trying to work within the system.

I appreciate the Senator from Minnesota yielding to me.

Mr. MONDALE. I thank the Senator for his observations. What is unique about this debate is that it is only the second time in 20 years, perhaps more, that we have ever had a Supreme Court nominee presented about whom there is any question of personal commitment to human rights and the principles enunciated by the Supreme Court.

This certainly is not a partisan issue. President Eisenhower presented nominees who were brilliantly qualified and totally committed to human rights. Indeed, I would believe most attorneys would agree that most of the Eisenhower court appointees in the South, as well as to the Supreme Court, established a magnificent standard of commitment to the cause of human rights and the cause of human justice.

What is unique about Judge Carswell's nomination is that it raises the question of whether a person who has a lifetime record—a personal record as well as a judicial record—of antagonism and hostility to human rights and civil rights, and to the enforcement of the law of the land, and specifically to orders of the circuit court under which he operated, should be permitted to serve on the highest court of the land.

I believe that it would be exceedingly unwise and disastrous to do so. And I regard it as one of the great historical departures of modern American history that we should be reopening the question of human rights and the 14th amendment and argue again a question going back to the 19th century on the issue of human rights.

Mr. GURNEY. Mr. President, the Senator mentioned his lifetime of hostility on the part of Judge Carswell in talking about civil rights cases that went through his court.

I draw the attention of the Senator from Minnesota to the letter to the chairman of the Judiciary Committee, as shown on page 328 of the record, written by Charles F. Wilson. Mr. Wilson was a civil rights attorney in the northern district of Florida for many years. He writes about his experience from 1958 to 1963.

He says:

I represented plaintiffs in civil rights cases in the Federal court for the northern district of Florida, which was then presided over by Judge Harrold Carswell.

I remember he was a black attorney. As a matter of fact, in checking with some of the lawyers in Florida who I know were also concerned in civil rights cases before Judge Carswell's court, they tell me that Charles Wilson really was the first attorney to represent civil rights litigants in the northern district of Florida.

The letter says, as I am sure the Senator from Minnesota knows—and I will read a little bit from it:

There was not a single instance in which he was ever rude or discourteous to me, and I received fair and courteous treatment from him on all such occasions.

He talks about representing plaintiffs in three major school desegregation cases. And he goes on and generally says that, during all of the time he appeared before Judge Carswell, he had only one disagreement with him, and that was over the extent of the relief to be granted.

An interesting thing about Mr. Wilson is that he is presently employed, as the Senator will observe from the letter, as Deputy Chief Conciliator for the U.S. Equal Opportunity Commission.

He was appointed, I presume, by President Johnson.

How can the Senator from Minnesota say that Judge Carswell has had a lifetime of hostility in these cases in view of the evidence in the record?

Mr. MONDALE. Starting from 1948, when he made one of the most outrageous statements on racial supremacy that I have ever heard from a candidate for public office——

Mr. GURNEY. That was a speech he made as a young man.

Mr. MONDALE. I can refer to four specific witnesses who appeared under oath before the Judiciary Committee and personally testified to outrageous acts of insensitivity and hostility by Judge Carswell.

Mr. GURNEY. One of those was a law professor who went down there one time to practice in his court.

Mr. MONDALE. We have affidavits from Mr. Maurice Rosen, under oath, and from Theodore R. Bowers, both of whom practiced before Judge Carswell.

We have a statement made by the Senator from California (Mr. CRANSTON) yesterday, based on personal conversations with attorneys who practiced before Judge Carswell's court. Then we have, may I say, a very decided pattern——

Mr. GURNEY. If we are going to get into the facts——

Mr. MONDALE. In which Judge Carswell, time after time, would not even listen to the factual case that was brought before him by litigants asserting civil rights claims, but would dismiss them summarily.

Time after time the circuit in which he operated would reverse him. He would not even show courtesy to plaintiffs' counsel who appeared before him in civil rights cases, and he would strike the allegations in the pleadings.

These facts, I think, establish a very clear record of insensitivity and hostility in civil rights cases.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. MONDALE. I will yield in a moment. It is always said that those who know Judge Carswell best are for him. However, I note that in addition to the 500 prominent attorneys who urge the U.S. Senate to reject the nomination of Judge Carswell, nine of the 15 faculty members of Florida State University Law School yesterday wrote the President of the United States asking that the nomination of Judge Carswell be withdrawn.

I think that all of this establishes the type of pattern I have been discussing.

Mr. GURNEY. Mr. President, will the Senator yield further?

Mr. MONDALE. I would be delighted to yield at this time.

Mr. GURNEY. I would say in answer to the rebuttal argument of the Senator that there is some merit in it. I would point out, though, that he has not answered any of the questions I tried to get answered during his recitation.

So that we could get the facts on the table. How long had these lawyers practiced before Judge Carswell's court? I think in the case of one professor—and it may have been Lowenthal from Rutgers, but I do not recall—he appeared in court one time before Judge Carswell.

That is not exactly the kind of weighty evidence represented by Attorney Charles Wilson, who appeared before his court for 5 successive years, presented.

However, here is another——

Mr. MONDALE. I would be glad to respond to the Senator.

Mr. GURNEY. All right.

Mr. MONDALE. Mr. Clark, the NAACP Legal Defense Fund attorney in that area, on page 227 of the record said:

> Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carwell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible. It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel. But I mention those as asides, really, and I do not think them important, because I am sophisticated enough, and other lawyers, black lawyers who appeared before him, were sophisticated enough to sustain that kind of personal insult.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. MONDALE. I yield.

Mr. BAYH. I think it is most appropriate that the distinguished Senator from Minnesota raised this question on the testimony of Mr. Clark in relationship to the comment of our distinguished friend, the Senator from Florida.

I think it would be appropriate to add in the RECORD at this time the further testimony of Mr. Clark on page 226 of the hearings that indicate his competence to testify before us on this point.

Mr. Clark said:

> I knew every single lawyer in the State of Florida who practiced civil rights law, white and black, and indeed I know what their evaluation of Carswell was.

He goes on to say that he has appeared before Judge Carswell at least nine or 10 times personally, and that he has had access to the opinions of every attorney that has been working in this important area in the State of Florida.

So, I think the Senator from Minnesota has found the correct answer to the question raised by the distinguished Senator from Florida.

Mr. GURNEY. Mr. President, if the Senator will yield, he apparently has overlooked Mr. Charles Wilson, who appeared in the court for 5 years. He did not make any mention of him.

May I introduce one of the best pieces of evidence into the RECORD? On this matter of sensitivity I think it is very interesting.

I received a telegram from Julian Bennett. He also wrote a letter for the record, on page 328. Mr. Bennett represents the Bay County School Board in Bay County, Fla. That county has Panama City located in it. He handled the litigation involving the school desegregation in Bay County before Judge Carswell.

Here is what his telegram has to say:

> First counsel for Negro plaintiffs was Charles F. Wilson, Pensacola, Florida, who I understand has filed a letter supporting Judge Carswell's nomination to Supreme Court. Present counsel, Theodore Bowers, . . .

That is the attorney that the Senator from California (Mr. CRANSTON) mentioned the other day. I continue to read from the telegram:

> Present counsel, Theodore Bowers, is one of 14 different lawyers representing individual plaintiffs against school board in seven years that this case has been pending.
>
> Judge Carswell was a District Judge for approximately six of these seven years. During six years Judge Carswell . . .

I think this is extremely interesting on the sensitivity issue:

> actively encouraged and challenged the parties to pursue voluntary desegregation, failing which he entered numerous desegregation orders. He was constantly calling counsel together to determine desegregation progress. Voluntary efforts without court orders resulted in the total integration of high schools in 1967 by closing county's all-Negro school. Presently there are no all black schools in Bay County, Florida. Indicative of Judge Carswell's fair play and fair rulings is that in 6 years of continuous desegregation litigation, plaintiffs and NAACP, thought it necessary to appeal his orders only one time and that in 1969 resulting in the fifth circuit court of appeals, en banc, saying of the Bay County desegregation efforts: "This system is operating on a freedom of choice plan. The plan has produced impressive results but they fall short of establishing a unitary school system." Page 23 of slip opinion—Sing Leton et al. v. Jackson Municipal Separate School District et al., case No. 27863.
>
> In 6 years I saw Judge Carswell patiently listen to all arguments of all counsel. No allegation made in any pleading anywhere or on appeal to higher court of mistreatment of any client or counsel by Judge Carswell at any time. No attorney in my 6 years before the court complained to the court of any alleged mistreatment, publicly or privately, prior to nomination of Judge Carswell to U.S. Supreme Court. Judge Carswell did request Justice Department representing USA to try to assign the same lawyer to our case for continuity in order to avoid the court having to review for new counsel old ground already covered and former rulings of the court on evidentiary matters. His patience and courtesy in bring each new counsel up to date was remarkable to behold. All counsel were treated with respect and fairness. Judge Carswell constantly chided the school board to do better. He told us after Green v. New Kent County, that freedom of choice was out and that we must come up with some other plan. Presently school system operating on straight neighborhood zone plan with all black schools integrated with white students. Letter to follow.
>
> JULIAN BENNETT.

There is direct evidence from a lawyer who spent years in litigation in school desegregation matters before Judge Carswell. It seems to me that kind of evidence is very probative in our case and that it is far more important than a law school professor who came down there for one case. There is another side to the sensitivity story. It is borne out in the letter of Charles Wilson, in this telegram, and others letters in the record.

I thank the Senator.

Mr. MONDALE. I thank the Senator. Of course, the testimony of Mr. Clark was under oath before the committee. He tried nine or 10 cases before Judge Carswell. He was the Director of the NAACP Legal Defense Fund Office in the area. He supervised civil rights cases throughout the State of Florida and was in a fine position to know what was going on. Testimony on this matter was not limited to a single lawyer, but included several other attorneys who testified to the same effect with respect to Judge Carswell's record.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. MONDALE. I am glad to yield.

Mr. DOLE. I just noticed at page 324 of the hearings a letter from Mike Krasny. I will read a portion of that letter because it relates to whether there was a period of hostility and whether Judge Carswell was pro or anticivil rights:

> I was Judge Harrold Carswell's law clerk from February 1960 to June 1962, a period of approximately two and a half years. I believe I was his law clerk longer than any other law clerk he had before or since. I am a member of the Florida Bar practicing law in Melbourne, Fla.
>
> As a member of the Jewish falth and consequently a member of a minority, I sincerely believe that the day to day association which I had with Judge Carswell, both in and out of the courtroom, would have revealed any racist tendencies or inclinations, had there been any. Without the slightest hesitation, I can assure you and the members of your committee that the litigants in the United States Federal District Court in Tallahassee were not judged by their race, creed or color.

Judge Carswell's integrity and honesty is beyond question in this regard. He dealt fairly honestly and respectfully with all those who came before him. His judicial manner was not altered by the race or color of those who appeared before him. I believe that I am more qualified to judge this man than are his accusers. I would be willing, at my own expense, to testify under oath that none of the decisions rendered by him during my tenure of office were tainted in any manner with a so-called racist philosophy, nor were civil rights lawyers or litigants treated in any manner other than the respectful manner accorded to all litigants and attorneys appearing before him.

The people of this country have a right to know the truth about his beliefs, unsullied by false accusations and innuendo.

I deeply resent the attempt of some to tarnish the reputation of a man of Judge Carswell's caliber. He would be a great asset to the Supreme Court.

MIKE KRASNY.

That letter was sent to the chairman of the Committee on the Judiciary. The point I make is that apparently the Senator's case is built upon the statement of Mr. Clark, as well as the statement of the Senator from Massachusetts, but there is other evidence.

It has been pointed out many times that we all have a duty and obligation to weigh the evidence, not just the evidence against and not just the evidence for, but all the evidence. The Senator from Minnesota cites the statements of four witnesses but how many litigants and attorneys appeared before Judge Carswell all the time he was on the bench? What percentage of the total number of lawyers who appeared before Judge Carswell does Mr. Clark represent? There is no specificity about the number of litigants or their mistreatment, only general statements by the Senator from Minnesota and the Senator from Massachusetts about a man's bias and hostility. That may be a fair statement, but I do not believe it is.

It would be helpful to have the facts. How many lawyers appeared before Judge Carswell? How many litigants appeared before Judge Carswell? What was the occasion of his being rude or turning the chair?

Mr. MONDALE. I refer the Senator to my earlier remarks in which I detail the argument to which the Senator objects.

These are four witnesses who testified under oath. Mr. Clark had wide experience before several judges in Florida, including Judge Carswell. He was in charge of litigation in that area. There are several affidavits. The Senator from California (Mr. CRANSTON) testified as to conversations with attorneys who practiced before Judge Carswell. There is an abundance of evidence under oath which showed his antipathy toward settled law, his dismissal of legitimate lawsuits brought by civil rights attorneys, and his personal involvement in the efforts to keep segregated institutions in his own community—tracing from the present all the way back to 1948. All of these occurrences raise grave doubt as to whether there is any commitment whatsoever on the part of Judge Carswell to human rights and to the enforcement of the Constitution; they also raise grave doubt as to whether Judge Carswell has the competence necessary to discharge the responsibility of serving on the Highest Court of our land.

Mr. DOLE. Mr. President, will the Senator yield further?

Mr. MONDALE. I yield.

Mr. DOLE. I believe this information would be helpful to all of us in the Senate and to the public. The bad things about Judge Carswell are widely reported in the newspapers and the network programs.

I would like to know how many lawyers appeared before Judge Carswell. I would like to know how many litigants appeared before Judge Carswell. He has been a member of the bench for 12 years. He has handled approximately 4,500 cases. He has been a Federal district judge, which is a trial judge, as the Senator from Minnesota knows. He has been a member of the appellate court for well over a year. He has had literally thousands of litigants and lawyers before his court.

I would guess any of us, whether it be in a political campaign or a campaign of this kind, could pick up one or two, or half a dozen, people who may not agree with the Senator from Kansas or the Senator from Minnesota. So to be fair and honest, as I know the Senator from Minnesota wants to be, we should have relative numbers. The Senator is great on numbers of reversals—x number of x cases. But what about the total number of lawyers who appeared before him, the total number of litigants? Is that information available?

Mr. MONDALE. I do not know. I have referred to the record I have before me. I am no statistician on the northern Florida judicial district. I do not know how many lawyers practiced before the court or how many cases there were. One has to judge on the basis of his official opinions and on the basis of the experience of those who practiced before him; and the issue we are now debating is Judge Carswell's opinion on human rights. What is his attitude and demeanor toward those who practiced before him in those cases?

We have heard sworn testimony from NAACP legal defense fund attorney who tried cases before him nearly 10 times and sworn testimony from three other attorneys. All the testimony was to the same effect. How many other attorneys who tried other lawsuits? How many property cases? How many title cases? How many patent cases? How many aircraft accident cases? I would not have the slightest idea, and I do not think it is slightly relevant.

Mr. DOLE. Will the Senator yield further?

Mr. MONDALE. I am happy to yield.

Mr. DOLE. We are talking about the "total man." The Senator is looking for the perfect man, apparently.

Mr. MONDALE. I am looking for somebody better than this.

Mr. DOLE. I could comment on that.

We have heard these same arguments before. It is a replay of the Judge Haynsworth nomination—the same cast of characters, the same accusations, the same parts, are paraded in this Chamber. The arguments made during the consideration of Judge Haynsworth's nomination are now being applied in the case of Judge Carswell. Judge Haynsworth was "insensitive." I am not certain whether the Senator from Minnesota said this but others have said Judge Carswell is very mediocre; therefore, he is not worthy of the honor of sitting on this High Court. It is the same cast of characters and the same scenario—just a different picture.

Mr. MONDALE. And we were correct both times. The Senator from Kansas will recall that I supported the nomination of Judge Burger to be Chief Justice of the United States. The record will show I have supported most nominees sent to the Senate by the President of the United States. The President should have a broad parameter of choice. Where I draw the line is when a nominee is before us who is wrong on human rights—because we cannot back off the cause of human rights. We cannot back off the 14th amendment to the Constitution and still have a country.

That is why I am opposing the nomination of Judge Carswell. That is why I opposed the nomination of Judge Haynsworth. It may be the same cast of characters, but I am proud to be a part of the play. I am sorry we are faced with this kind of nominee.

Judge Carswell's record, both on and off the bench, persuasively leads to but one conclusion: that at best, the nominee has shown himself to be indifferent and insensitive to human rights; at worst, he has demonstrated his hostility to those who sought to challenge unlawful discrimination through legal channels.

To the nearly 500 lawyers who urged the Senate to reject this nomination, it is a record which clearly indicates that "the nominee possesses a mental attitude which would deny to the black citizens of the United States—and to their lawyers, black or white—the privileges and immunities which the Constitution guarantees." Anthony Lewis, a distinguished student of the Supreme Court, has said:

That record displays at the very least extraordinary insensitivity. It must raise questions about Judge Carswell's fitness for a lifetime position on a court that must decide some of the most sensitive and most important racial questions before the country. For the black community, the idea of Judge Carswell on the Supreme Court bench must now be a provocation.

Particularly disturbing about the nomination of Judge Carswell is the fact that it is one more symbol of the indifference to racial justice displayed by this administration. Those who believe that the southern strategy exists only in the minds of partisan journalists should consider this nomination as a part of the following pattern of administration actions:

The award of defense contracts to textile firms with a history of racial discriminations;

The proposal of a voting rights bill which was designed to downgrade our commitment to equal suffrage in the South and which was a patent call to southern members to embroil the simple

extension of the 1965 act in a welter of confusion and delay;

The issuance of a policy statement on school desegregation, which was nothing more than a blatant invitation to the South to delay further;

The request to the Supreme Court to slow down enforcement of school desegregation plans could not be implemented in time;

The refusal to seek cease-and-desist powers for the Equal Employment Opportunity Commission; and

The dismissal of Leon Panetta for attempting to enforce civil rights legislation, and the elevation of those who believe that the law should not be fully enforced.

Unlike the nomination of an individual to the Supreme Court, each of these actions can be reversed in a short period of time. But a Supreme Court appointment is a lifetime proposition, and one vote inherently weighed against civil rights litigants might decide close cases for years to come.

The Supreme Court is simply too vital an institution to be embroiled in any sectional strategys. It is the one institution which has represented the last hope for redressing the grievances of those who have been denied fundamental rights and opportunities.

If the President really wanted "geographical balance," he could have named John Wisdom, Griffin Bell, Frank Johnson, or a variety of other distinguished southern jurists—all of whom are fair and impartial judges.

But I fear that the President wanted something else—and thus he nominated G. Harrold Carswell.

I think all of us, including the President, should heed the words of Marion Wright Edelman, a young lawyer who has spent a good part of her life in a courtroom fighting against discrimination:

> We do not defuse the George Wallaces by selling our principles and becoming more like them—we defuse them by clear and resounding repudiation with a national tone and policy that makes it clear that the Constitution is not a political football. For surely whites cannot now expect, once again, blacks and Mexican-Americans and Indians and Puerto Ricans to respect a Constitution they render so cheap.

Mr. McCARTHY. Mr. President, I will speak today principally of the role of the Senate in the confirmation of nominations for Justices on the U.S. Supreme Court and of the very special responsibility which rests upon the Senate in performing that very clear constitutional responsibility.

Nearly every major compromise worked out at the Constitutional Convention involved the sharing of responsibility with the U.S. Senate. The conflict between the large and the small States was resolved by providing two Senators from each State and by assigning House membership on the basis of total population. The controversy over the power of the Executive—and particularly his power in the conduct of foreign affairs—was settled by providing that the Senate confirm high officials of the Government and that a two-thirds vote of the Senate be required for ratification of treaties.

The controversy over whether we should have a judiciary which was elected by the people or appointed by the Chief Executive was settled by the constitutional provision that members of the Federal courts must be confirmed by the Senate of the United States.

Today the Senate is called upon to exercise that responsibility.

As in the exercise of other responsibilities, Senators and the Senate can make a choice of playing any number of roles. Three principal roles are always available to us.

The first one is that in which the appearances of power and prestige are maintained without accepting the responsibility or exercise of power.

We can take on the role similar to that of the constitutional monarch in Great Britain, appear at ceremonial occasions and state dinners, and be invited to the White House for prayer services. Some accept special missions unrelated to the real world of authority of the Senate, and sign everything the President sends up to us.

The second role is that under which we can assume power without responsibility—as has sometimes been the case in the conduct of Senate business, and in irresponsible public statements—or in the Government by ordeal which is sometimes carried on under the name of the filibuster. We can act in this manner, and then second-guess, as we did to a large extent with reference to the Fortas case.

The third role is that of accepting full responsibility, set against the real power and authority which the Constitution does grant to the Senate.

This a time when the Senate must carefully reexamine its constitutional functions in relation to all of its obligations and duties, its relationship to the House of Representatives, and its relationship to the executive branch of the Government and to the judiciary. This reexamination is as important for the other agencies of Government as it is for the Senate, but the responsibility here is ours.

There is, I think, a very special need for this consideration today, because in the period of the last 25 years there has been a significant change both in the substance of American government and in the functioning of governmental institutions and the relationships among them. There are also special conditions today which make such a reexamination easier and potentially more productive.

I was one of many Senators who expected that after the rejection of the Presidential nomination of Judge Haynsworth for the Supreme Court, the President would offer a nominee of such qualifications that the Senate might quickly confirm his choice and turn to other important domestic and international matters.

I do not know of a case in which two successive nominees have been rejected, except in the administration of President Grant.

Mr. DOLE. Mr. President, will the Senator yield briefly?

Mr. McCARTHY. I yield.

Mr. DOLE. I think it is also true that the Senator from Minnesota opposed Chief Justice Burger's nomination.

Mr. McCARTHY. That is quite right, and every day I feel better about it. I was especially moved to think it was a good action when I heard the Senator from Nebraska say that only men who know the nominees intimately have any right to speak about them; and I suppose I knew Judge Burger more intimately than anyone else in the Senate. On that basis, I suggested that he should not be Chief Justice, and voted against him.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. McCARTHY. I yield.

Mr. HOLLAND. Other Senators have similar views with reference to Judge Carswell. I think I know him better than any other Senator, and I strongly support him. I have waited all afternoon to get a chance to take the floor, but the floor has been farmed out from the distinguished Senator from Massachusetts (Mr. KENNEDY) to the distinguished junior Senator from Minnesota (Mr. MONDALE), and now to the distinguished Senator from Minnesota who presently holds the floor.

We who know him best are given little chance to say anything, as long as this farming out process continues.

Mr. McCARTHY. Mr. President, let me say to the Senator that I did not say that Senators should vote for or against Judge Burger because I knew him more intimately than others did. I say this only because the argument has been made by supporters of Judge Carswell that only those who know him intimately should be listened to in this debate. The question about Judge Burger was raised incidentally to my presentation.

I might say, so far as farming out time is concerned, this is the first time that I have spoken with reference to the Carswell case, and I think that it is in order for me to speak for an hour without anyone charging that the floor has been farmed out to me. I do not know what the Senator from Florida has in mind. Who farms out time? I was recognized by the Chair. Nobody farmed out any time to me.

Mr. HOLLAND. Mr. President, if the Senator will yield——

Mr. McCARTHY. The Senator from Florida was not seeking recognition.

Mr. HOLLAND. The Senator from Florida meant that the Senator from Massachusetts had the floor, yielded to the Senator from Minnesota (Mr. MONDALE), who then proceeded and, after speaking at length, yielded to his able colleague.

Mr. McCARTHY. No; I was recognized by the Presiding Officer. I was not yielded the floor by another Senator.

The PRESIDING OFFICER. (Mr. BYRD of Virginia). The Senator is correct.

Mr. HOLLAND. The Senator from Florida simply reiterates that he knows Judge Carswell pretty well, and would like at sometime to be heard, and he thinks his experience might even be im-

pressive on the Senator from Minnesota, who does not know Judge Carswell.

Mr. McCARTHY. I would be quite willing. I have been listening, and have been reading what the Senator from Nebraska (Mr. HRUSKA) and others who are advocates of Judge Carswell have said; after some 2 or 3 weeks of listening and reading reports, and newspaper reports as well, I thought I might speak today.

The PRESIDING OFFICER. Will the Senator from Minnesota yield for a moment?

Mr. McCARTHY. For what purpose?

The PRESIDING OFFICER. For a statement by the Chair. The Senator from Minnesota is correct; the junior Senator from Minnesota had indicated he had finished, and thereupon the Chair recognized the senior Senator from Minnesota, who was the only Senator then seeking recognition.

Mr. McCARTHY. That is correct.

As I stated, I hoped President Nixon might send us the name of another nominee whom we might confirm rather quickly, and then turn to other important domestic and international matters. I am never happy to be involved in an action opposing any person who may be nominated, but I think in the case of confirming nominations to the Supreme Court, perhaps more than in any other action we take, we have to deal in personallties.

If you examine the composition of the present Court, you will find that it is made up of some men who were appointed by Franklin Roosevelt. Because of retirement there is no one there who was appointed by President Truman. It has two appointees of President Eisenhower, one by President John Kennedy, one by President Lyndon Johnson; and one by President Nixon. Now we are considering another.

Appointments to the Supreme Court are not the special right or province of the President in the way that other appointments are. Court appointees live on long after a President has left office, and in many cases even after he has died. The Senate has a continuing responsibility to take the long view in considering the appointment and confirmation of members of the Supreme Court.

We now have before us for consideration the nomination of Judge Carswell.

On Monday, the Senator from Nebraska (Mr. HRUSKA), the principal advocate of Judge Carswell's nomination, argued that the Senate should not really examine the qualifications of a Supreme Court nominee when considering confirmation, but should accept the President's recommendation. He also suggested that since there are, as he said, lots of mediocre judges, people, and lawyers, that they are entitled to representation, too.

I will not challenge this latest argument for mediocrity, and I trust that no one would be moved to vote to confirm on these grounds, but rather take up some of the more serious questions and more substantial considerations relating to the Court and to the nominee, Judge Carswell.

The persistent argument that was made when Judge Haynsworth was under consideration and one which has been continued in dealing with the present case—is that the Court needs balance and that the appointment of Judge Carswell will somehow balance it or at least bring it closer to balance.

On page 10 of the committee hearings, Senator HRUSKA was quoted as saying:

> There are some who feel there should be less act'vism and that the law should be strictly construed. The President has felt that there can be a better balance to the Court. He indicated this last summer.

According to Senator HRUSKA, the President indicated last summer that he wanted better balance on the Court. Neither the President nor Senator HRUSKA has explained in what way he considered the Court to be unbalanced.

Does he want one good decision and one bad decision? Does he want one right decision and one wrong decision? Is it geographical balance that he wants, or racial, or by sex, or religion, or age? Should we have more nonlawyers on the Court? There are not any nonlawyers on the Court now. There is nothing in the Constitution that says that members of the Supreme Court should be lawyers. In fact, there is nothing in the Constitution that says they have to be 21 years old. Perhaps we should have some people who are 18 or 16 on the Court. There may be some overrepresentation, now, of those who are old.

Is it certain decisions that the President would like to have reversed? If it is, we ought to be told which ones they are. Do we want to go back to Plessy against Ferguson, in 1896? That was a balanced decision—separate but equal. It sets back progress toward desegregation in this country by roughly 60 years.

Does the President want all decisions to be made by a vote of 5 to 4? Or would he like to have them 4 to 4? In that case we ought not to make this additional appointment and just run it with an e'ght-judge Court. You would have some kind of numerical balance which would not mean very much.

If the President is really concerned about this Court, if he does want to balance it, he should tell us how he wants to balance it. He should give us some explanation as to what this means, if this is in fact his objective.

In the same statement, the Senator from Nebraska said there should be "less activism" on the Court. What does the Pres'dent mean by "less activism" or what does the Senator mean by "less activism?" If he speaks for the President, we should know. Would he like to have the Court hear fewer cases than it now does? Should it postpone consideration of some of the vital issues before the country? Would he prefer that all precedents established in the 19th century be applied to contemporary problems? Would he suggest that at a time when social, economic, and cultural change in this country is growing at the most rapid rate in the history of our Nation, that the Court should be indifferent and unresponsive?

At a time when nearly every one of the traditionally established civil rights is under strain and requires new definition and new interpretations and new judgment—and freedom of speech, which was a relatively simple matter back in 1789 is now involved in the whole question of television and radio and newspapers, as the Vice President tells us almost every other day—should the Court be indifferent to the complexity of freedom of speech today?

Should the Court be indifferent to the problems of the right to assemble, which was also relatively easy to define in 1789, but which is now involved in very complicated questions of the right to belong to certain organizations or the right to picket or the right to march? Should the Court be indifferent to some of the basic questions of conspiracy such as were raised in the case of Dr. Spock and William Sloan Coffin, and in other cases that recently have been the subject matter of judicial proceedings?

Are we to have a Court which is indifferent to the question of the right to privacy, which in 1789 related to rather simple things like quartering troops and now involves all the technological complexity of electronic devices for spying upon people, either visually or by listening in or by other means that have been developed?

Should the Court be indifferent to the new problems of due process and individual rights and the rights of citizens as they move into a time of an emancipated and much more complex culture than we knew 160 or 170 years ago?

Is this the kind of activism which is frowned upon? Is this the kind of opposition to activism that we would expect if Judge Carswell were to be appointed to the Court?

The Senator from Nebraska did not stop with the statement that the President wants balance and less activism. He goes on to say, a few lines later, that it is not only the President who wants balance, but the country wants balance on the Court. He says it is obvious that the country wants balance on the Court, and he cites the election of President Nixon as an indication that the country wants that balance.

It is hard for me to accept that the result of the election in any way suggests that the country wants balance, unless we go again to the mysterious source of Presidential power which comes from the silent majority. Mr. Nixon was not elected by a majority of the people of this country. The vote for the presidency was almost a tie. This did not suggest that the country wanted much change in the Court, I would say.

If the Court was unbalanced, it would seem that the country was somewhat indifferent and would permit it to continue to be unbalanced. Ideally, of course, the Court should be made up of the most intelligent and respon ible and most learned men in the country. One would hope that, this being the case, almost every decision would be close to unanimous. You could have a kind of choir of angels in which all would see things in

the same light and judge it by the same high power of reason and conclude to the same end. We cannot reach that kind of ideal situation, but we ought to make a rather serious effort to come close to it.

The Senator from Nebraska goes on to another principle for selection. He quotes in this case Mr. Dooley, who said "No matter whether the Constitution follows the flag or not, the Supreme Court follows the election."

He goes on to say that he did not mean this literally, but that it has a grain of truth in it: the appointees to the Court should reflect the mood of the country, and the mood of the country is reflected in the election results.

Mr. President, the idea of a representative Court is something foreign to the American tradition. The men who drafted the Constitution were rather careful not to make the Court representative in the sense suggested by the Senator from Nebraska. The constitutional convention did not even consider having the Supreme Court elected by the people, or other judges. It rejected the idea that members be chosen by the House of Representatives and by the Senate, and adopted the rather simple provision that Justices be nominated by the President and confirmed by the Senate.

I ask to have printed at this point in the RECORD an explanation of what this process meant and how it was carried out by Chief Justice Hughes.

There being no objection the material was ordered to be printed in the RECORD, as follows:

THE SUPREME COURT OF THE UNITED STATES

(By Charles Evans Hughes, Columbia University Press, 1936, pp. 11–14)

Serious questions were raised as to the method of appointing judges. How was the ideal of the separation of powers to be reconciled with practical exigencies? Despite the emphatic terms in which the political maxim had been laid down by the States, Madison found "not a single instance in which the several departments of power have been kept absolutely separate and distinct." Jefferson in his "Notes on Virginia" observed that the legislature had in many instances "decided rights which should have been left to judiciary controversy." Rhode Island and Connecticut had long refused to recognize the principle of division of powers; in Connecticut, the legislature had been "in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials." After a careful review of State practice, Madison concluded that "the legislative department is everywhere extend ng the sphere of its activity, and drawing all power into its impetuous vortex."

In many States, the legislature appointed the judges directly, and, notwithstanding the devotion to the doctrine of Montesquier, it is not surprising that in the Federal Convention the Virginia plan should have proposed that the national legislature should appoint the judges of the Supreme Court. The Patterson plan provided for appointment by the Executive. James Wilson opposed appointment by the legislature. He said: "Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality and concealment were the necessary consequences. A pricipal reason for unity in the Executive was that officers might be appointed by a single, responsible person."

Dr. Franklin observed that two modes of choice had been mentioned, to-wit, by the Legislature and by the Executive. He wished that other modes might be suggested, "it being a point of great moment." Madison objected to appointment by the *whole* legislature. "Many of them were incompetent judges of the requisite qualification. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment." Madison proposed appointment by the Senate "as a less numerous & more select body"; or as he had said earlier, as "sufficiently stable and independent." This was adopted by the Committee of the Whole in their report on the Randolph plan and was embraced in the report of the Committee on Detail. Meanwhile it had been suggested, with reference to the practice in Massachusetts, that the judges be appointed by the Executive, with the advice and consent of the Senate, and this proposal was finally adopted.

Mr. MCCARTHY. In order to protect the integrity and the detachment of the Court, Justices were given life terms under the Constitution, which also provided that even their salaries could not be reduced during the period of their service. It really makes much better sense—the way some extremist groups call for the impeachment of Justices, Chief Justices, and others—to undertake to pack or unpack the Court, as has been done in times past, than to argue that we should have a balanced Court or a representative one.

Mr. President, this question has been asked by nearly everyone who has spoken of this matter during these many weeks, but I think it fair again to ask: What are the standards by which a Supreme Court Justice should be picked? The Constitution is not very clear, not very specific. It does not even, as I said earlier, lay down an age requirement as it does in the case of the President and for Members of Congress. The Constitution does not even, as I said earlier, require a Supreme Court Justice to be a lawyer.

Nonetheless, there are qualifications and standards, which have developed over the years from experience, from reflection on the nature and the importance of the Court, from historical forces that have run, from an examination of its historic achievements, and principally, from the conduct of the men who have been appo nted to the Court.

The Senator from North Carolina (Mr. ERVIN) on page 19 of the committee hearings set a limited standard, one which is clearly better than that wh'ch was stated by the Senator from Nebraska. The Senator from North Carolina said this:

I would like to say that the Senator from Nebraska used the quotation from Mr. Dooley facetiously, but I would like to expressly disavow myself as a disciple of Mr. Dooley. I don't think judges should follow election returns. I think that the duty of a Supreme Court Justice was stated by Chief Justice Marshall in the most lucid fashion in his opinion in the famous case of *Marbury* v. *Madison*, where he pointed out that the Constitution obligates a Supreme Court Justice to take an oath to support the Constitution, and declared that the obligation which that oath imposed upon a Supreme Court Justice is to accept the Constitution as the rule for his official actions.

Certainly, one must agree with that basic statement.

A much more complete and appropriate statement of his qualification is that presented by Alexis de Tocqueville in his book "Democracy in America":

So they created a federal Supreme Court, a unique tribunal one of whose prerogatives was to maintain the division of powers appointed by the Constitution between these rival governments. * * * But that is just the theory which has been put in practice in America. The Supreme Court of the United States is the sole and unique tribunal of the nation.

It is responsible for the interpretation of laws and of treaties; questions to do with overseas trade or in any way involving international law come within its exclusive competence. One might even say that its prerogatives are entirely political, although its constitution is purely judicial. Its sole object is to see that the laws of the Union are carried out;

To this first cause of its importance is added another even greater one. In the European nations only private persons come under the jurisdiction of the courts, but the Supreme Court of the United States may be said to summon sovereigns to its bar. When the court crier, mounting the steps of the tribunal, pronounces these few words: "The state of New York versus the state of Ohio," one feels that this is no ordinary court of justice. And when one considers that one of these parties represents a million men and the other two million—

This was about 1835—

one is amazed at the responsibility weighing on the seven men—

At that time there were seven on the Court—

whose decision will please or grieve so many of their fellow citizens.

The peace, prosperity, and very existence of the Union rest continually in the hands of these seven judges. Without them the Constitution would be a dead letter; it is to them that the executive appeals to resist the encroachments of the legislative body, the legislature to defend itself against the assaults of the executive, the Union to make the states obey it, the States to rebuff the exaggerated pretensions of the Union, public interest against private interest, the spirit of conservation against democratic instability. Their power is immense, but it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.

The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.

The President may slip without the State suffering, for h's duties are limited. Congress may slip without the Union perishing, for above Congress there is the electoral body which can change its spirit by changing its members.

Felix Frankfurter, in his book "Of Law and Men (Papers and Addresses)," page 39, writes in commenting on the quality of judges on the Court.

A judge whose preoccupation is with such matters (the problems faced by the United States Supreme Court under the Commerce Clause and under the Due Process Clause) should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the ourtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative proof.

Learned Hand further states:

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class.

Mr. President, I think that all of us who accept these rather general standards should ask how do we judge Mr. Carswell as measured against the standards. Let us begin with the most elementary consideration; namely, that of whether or not he is skilled in the law.

I always have some hesitation about raising a question of this kind. Sometimes Members of the Senate who are lawyers get up and say, "Now, speaking as a lawyer," and sometimes they say, "Now thinking as a lawyer."

I have never been sure what they mean. If they speak as a lawyer, does that mean with more competence, or does it mean that their competence is reduced, or discounted, lengthened, or expanded? I have asked this question several times of Senators who have spoken as lawyers and have never been able to get an adequate explanation of what they mean.

John Griffiths, of Yale Law School, in a letter to Senator EASTLAND, wrote:

That only the most distinguished and technically qualified members of the legal profession ought even to be considered for the highest court in the nation. . . . it is part of the Senate's duty to exercise the highest standard, in proficiency as well as integrity, as a minimum qualification for elevation to the Supreme Court. [p. 15 of Individual views]

There is little in the record of the hearings to sustain the argument that Judge Carswell is skilled in the law.

Mr. William Van Alstyne, professor of law at Duke University Law School, former special consultant to the Senate Subcommittee on Separation of Powers, chaired by the distinguished Senator from North Carolina (Mr. ERVIN), states on page 136 of the committee hearings:

Respectfully, however, while relief was not denied in these cases, it was only in circumstances where heavily settled higher court decision and incontestably clear acts of Congress virtually compelled the results, leaving clearly no leeway for judicial discretion to operate in any other direction. I would respectfully invite the committee's particular attention to the particular opinions to establish that conclusion.

More disturbing in the cases generally, and by generally I mean not to restrict myself to the area of race relations at all, although intrinsically far more difficult to illustrate in the nature of the short-coming, there is simply a lack of reasoning, care, or judicial sensitivity overall, in the nominee's opinions.

There is, in candor, nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States.

In the series of cases cited by Prof. Van Alstyne, on pages 134 and 135 it appears that despite clear indications from various civil rights acts, Supreme Court decisions, and companion cases in the neighboring district court in Florida, Judge Carswell's opinions stand, and I quote, as "severe and restrictive and subsequently reversible interpretations on a principal point of constitutional law." What makes Prof. Van Alstyne's testimony most significant is that this same person, after a similar study in the case of Judge Haynsworth, concluded on page 134 of the committee report:

After a review of Judge Haynsworth's opinions and decisions during 12 years on the court of appeals, that the extent of the criticism then being made by others was not in fact justified. While it was not possible to review and to report on any large number of Judge Haynsworth's decisions in my filed statement, I did attempt to examine a sufficient number fairly to reflect in my statement what I believe to be of principal interest to this committee and to the Senate. On that basis, I concluded that Judge Haynsworth was an able and conscientious judge, that his decisions manifested a greater degree of judicial compassion within the allowable constraints of proper discretion than others had taken the care to acknowledge, and that even in instances where I could not personally find agreement, private or professional, with a particular result, I could, nonetheless see from the quality of the opinion that that result had been arrived at with reassuring care and reason.

Yet, unfortunately, in Mr. Carswell's case, while Mr. Van Alstyne "sought to review Judge Carswell's work in an equivalent fashion," his impressions are, and I quote, "sharply different from those I held of Judge Haynsworth, however, even without regard to additional circumstances which have made this an extraordinary case."

Mr. President, I would like to quote from the Ripon Society statistical study concerning Judge Carswell's record:

REVERSAL ON APPEAL

During the eleven years (1958–1969) in which Judge Carswell sat on the federal district court in Tallahassee, 58.8% of all of those cases where he wrote printed opinions (as reported by West) and which were appealed resulted ultimately in reversals by higher courts. By contrast in a random sample of 400 district court opinions the average rate of reversals among all federal district judges during the same time period was 20.2% of all printed opinions on appeal. In a random sample of 100 district court cases from the Fifth Circuit during the 1958–1969 time period the average rate of reversals was 24% of all printed opinions on appeal.

The report further states that Mr. Carswell's reversal rate compares unfavorably with reversal rates within his own district as well as the general reversal rate for all Federal district cases. Mr. Carswell had a rate of reversal of 11.9 percent of his printed cases compared with 6 percent for all district cases within the fifth circuit. In other words, Mr. Carswell's rate of reversal is more than twice the average for Federal district judges.

A good indicator of the scholarly value of judicial work is the number of times a particular judge's opinions are cited by brother jurists' opinions. Again Mr. Carswell, in the Ripon report, is found woefully lacking. I quote:

CITATION BY OTHERS

Carswell's 84 printed opinions while he was serving as a district court judge were cited significantly less often by all other U.S. judges than is the average for the opinions of federal district judges. Carswell's first 42 opinions during his first five years on the federal judiciary (1958–1963) have been cited an average of 1.8 times per opinion. Two hundred opinions of other district judges randomly chosen from district court cases spanning this same period have been cited an average of 3.75 times per opinion. The 42 most recent of Carswell's printed district court opinions have been cited an average of 0.77 times per opinion. Two hundred opinions of other district judges randomly chosen from cases spanning the same 1964–1969 time period have been cited an average of 1.57 times per opinion.

In the final analysis, the Ripon Society can only conclude:

When these results are analyzed cumulatively they form a most impressive indictment of Judge Carswell's judicial competence. The incredibly high rate of reversals (59%) which Carswell has incurred on appeals in those cases in which he has written printed opinions brings into serious doubt the nominee's ability to understand and apply established law.

Mr. President, not only is there a grave question as to Mr. Carswell's legal competence but there exists strong evidence of disrespect even for the procedures of the law and of the courts.

Consider the remarks of Norman Knopf, an attorney in the Department of Justice, who was subpenaed to appear before the Judiciary Committee. Mr. Knopf was one of those persons who in the summer of 1964 volunteered to work with the Law Students Civil Rights Research Council. These students provided invaluable assistance to civil rights law enforcement. Mr. Knopf, assigned to the northern Florida region to assist the Lawyers Constitutional Defense Committee in that area, possesses first-hand knowledge, based on actual court-room experience, of Mr. Carswell's deportment in the critical area of individual rights. On page 177 of the hearings, Mr. Knopf testified:

It is relatively clear in my mind. I remember this. This was my first courtroom experience, really, out of law school, and I remember quite clearly Judge Carswell. He didn't talk to me directly. He addressed himself to the lawyer, of course, Mr. Lowenthal,

who explained what the habeas corpus writ was about, and I can only say that there was extreme hostility between the judge and Mr. Lowenthal. Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on and he was especially critical of Mr. Lowenthal. In fact he lectured him for a long time in a high voice that made me start thinking I was glad I filed a bond for protection in case I got thrown in jail. I really thought we were all going to be held in contempt of court. It was a very long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people against—rather just arousing the local people, and he in effect didn't want any part of this, and he made it quite clear that he was going to deny all relief that we requested. At that point, Mr. Lowenthal argued that the judge had no choice but to grant habeas as the statute made it mandatory.

Additional testimony given before the Judiciary Committee evidence a disposition of hostility on Mr. Carswell's part based on issues—in this case civil rights advocates rather than bad courtroom performances.

This view is bolstered by the sworn testimony of Mr. Leroy D. Clark, associate professor at the New York University Law School, who from 1962 to 1968 was staff counsel to the NAACP legal defense fund in charge of the entire civil rights litigation in the State of Florida. Mr. Clark's credentials are unique. On page 221 of the committee hearings he states:

> There is not a lawyer in the country today who has appeared before Judge Carswell on more cases with specific reference to civil rights matters, and indeed on each occasion on which I appeared before Judge Carswell, it was in connection with a civil rights case.

What was Mr. Clark's experience before Mr. Carswell? In his own words—page 227 of the committee hearings:

> Let me talk a bit about his demeanor with respect to lawyers. And I say that with this caveat: I believe that the documentation as to his judicial performance is much more important than his demeanor with respect to myself and other civil rights attorneys. Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.
>
> It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him using a civil tone to opposing counsel. But I mention those as asides, really, and I don't think them important, because I am sophisticated enough, and other lawyers, black lawyers who appeared before him, were sophisticated enough to sustain that kind of personal insult.
>
> What I am concerned about is whether it indicates that Judge Carswell is not only a political segregationist but is a personal segregationist, because that will have a great deal to do with whether or not this man can change when he is in a different environment.

Regrettably, Mr. Clark's testimony was substantiated and amplified by the sworn testimony of two additional committee witnesses. Mr. Ernest H. Rosenberger, a volunteer lawyer for the Lawyers Constitutional Defense Committee of the American Civil Liberties Union in northern Florida during the summer of 1964, was counsel for nine clergymen who were arrested when they attempted to integrate a Tallahassee airport restaurant in 1961. On page 156, Mr. Rosenberger notes that Mr. Carswell's reputation in the area of civil rights was "bad sir." He stated further:

> The filing fee is one example of obstruction without reason in a civil-rights situation. Another thing is a matter of applying for a writ of habeus corpus in that district, in that you had to use specific forms issued by the court. You could not just draw an application for a writ of habeas corpus. You had to use specific forms of that court for that purpose. His reputation was one of obstruction in civil-rights litigation.

Mr. John Lowenthal, professor of law at Rutgers University, another attorney who had first-hand experience before Judge Carswell in 1964, states on pages 141 and 142:

> He expressed dislike at northern lawyers such as myself appearing in Florida, because we were not members of the Florida bar. I might add here that we could not find local lawyers willing to represent the voter registration people in Florida. It was either northern lawyers or no lawyers.

Mr. President, the testimony of all these individuals adds up to only one conclusion, that Judge Carswell, all too often, has given too much weight to his own personal views and not enough to the law itself.

The third standard is, I think, the most important—that referred to by Justice Hand, Justice Frankfurter, and also by de Tocqueville, the question of whether the nominee possesses the kind of broad historical and philosophical knowledge that a man should carry to the Supreme Court of this country.

Little is known of Judge Carswell's views on economics or theology or politics or social change. The only one clear statement by him is the speech of 1948 in which he said, "I yield to no man as a fellow candidate."

If he had just stopped short and said, "as a fellow candidate," one might have a little different view of him. But he added, "or as a fellow citizen."

One does not know what the conditions were in that State. It might have allowed a limited kind of judgment in view of the politics in that State in 1948.

But he did not stop at saying, "I yield to no candidate as a fellow candidate or as a fellow citizen."

He said:

> I yield to no man, as a fellow candidate or as a fellow citizen, in the firm, vigorous belief in the principles of White Supremacy, and I shall always be so governed.

This was said in 1948 when Mr. Carswell was 29 years old. The judge says he no longer holds these views. A man can change. Living proof surrounds us as former White House and administration officials under President Johnson, who supported the Vietnam war for years, are being quoted as saying nowadays that the war in Southeast Asia is at least inadvisable. Conversions of such kind ought to encourage others.

There is too much evidence, I think, cumulated since 1948 down to very recent times that Judge Carswell still holds the rather deep philosophical views expressed in 1948 and that his pragmatic and practical position is consistent with the views which he says he has rejected.

In Mr. Carswell's case, time and his decisions have not indicated that he has altered his basic position. Some say, "What about Hugo Black? Was not Hugo Black a member of the Ku Klux Klan?" The fact is that Hugo Black, as Professor Van Alstyne indicates on pages 137 and 138 of the committee hearings:

> As county prosecutor of Bessemer County in Alabama, Hugo Black prosecuted the mayor and chief of police for extorting confessions from Negroes. That is reassuring. . . . As a U.S. Senator, he had ample opportunity to take a political position under very public circumstances on a variety of constitutional and civil liberties issues. In one case, for instance, he voted against the Smoot-Hawley tariff, a very complicated bill, and primarily on the basis that it gave a certain power to one of the customs masters to screen out certain forms of writing from the United States; that is to say, his was the first amendment objection. This matter was carefully reviewed by people of politically liberal persuasion at the time, and they did find a repeated series of reassuring events at this time, so to indicate that at the very worst than Hugo Black's affiliation with the KKK was one of convenience, given their overwhelming political control of the area, but neither by public utterance nor by private conduct nor by subsequent participation in the U.S. Senate or otherwise in public or private life was there lacking the presence of reassuring events or any presence of things more detrimental.
>
> There is, however, a different distinction as well; 1948 is not 1933. The race issue was not a major issue in 1933. The affiliation of convenience may not speak particularly well of a man, but this was by no means so serious a matter in 1933 as in 1948. In 1948 civil rights legislation was before Congress. This was in the context of all the political controversy. The President had just desegregated the military in which Mr. Carswell himself had been matured in part. The Nation had just then read President Truman's special report "To Secure These Rights." The issue was now central, the occasion to reflect was far better provided than in 1933.

It was late, in 1948, to hold the views expressed then by Judge Carswell. A campaign is a good time in which to discover what a man thinks and what he is prepared to do or say in order to win an election. What he does or says in a campaign is a good basis to judge his qualifications for other offices.

It was largely on the basis of this that I voted against the confirmation of Mr. Burger to be Chief Justice of the United States. It is an indication of how a man is likely to act when he is under pressure to make judgments. Judge Carswell does not stand the test of special legal competence as a candidate and as a judge. It raises most serious question and is a most important consideration of his judgment on history and philosophy. His conception of the role of a justice of the Supreme Court falls far short of any standard which the Senate should accept.

The suggestion that he be put on the Court to balance the Court indicates that there might be a policy of reversing the trend that has developed over the last approximately 20 years toward the cause of civil rights and securing rights for the people of this country and that we are moving backward, even beyond Plessy against Ferguson, a decision made in the 1890's when it was decided that the period of reconstruction was to be ended.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. McCARTHY. I yield.

Mr. BAYH. Mr. President, before the Senator goes back as far as the 1890's, I have noticed, with a great deal of interest, his assessment that this nomination tends to be a retreat from the positive direction in which we have been heading for years long past in the history of this country.

The Senator observed a moment ago that he thought 1948 was a little too late to make a statement like the one Judge Carswell had made that year.

I thought it might be appropriate to note also that 1948 was the year that President Truman won the nomination at the Democratic Convention. As the Senator from Minnesota well knows, there was quite a confrontation at that convention and there was a major decision made to push for a major civil rights plank in the Democratic Party.

It seems to me that we were then moving forward in that area. Yet, that was the time, during that very campaign, that Judge Carswell made his unfortunate statement.

Mr. McCARTHY. It was a year of truth, I think. He went beyond saying, "as a candidate." He said that "as a citizen" he held that position of white supremacy. It was too late and it was the wrong year in which to take that position.

In my opinion, the nominee fails on the most important point in the de Tocqueville list of qualifications.

The indications and the suggestion that this may be something comparable to the end of the period of reconstruction raises another question with reference to the whole Federal judiciary. The judiciary is certainly more than a supreme court.

Most presidential nominations for appointments to the Federal judiciary are approved without significant debate or serious controversy. Of the 421 circuit and district court nominations presented from the beginning of the Truman administration in April 1945 to the end of the Kennedy administration in November 1963, only a few proved to be controversial. Only four—all Truman nominees in 1950 and 1951—were rejected by voice votes on the Senate floor after having been reported unfavorably by the Senate Judiciary Committee.

In the 89th Congress, however, presidential nominations received searching attention: one was the nomination to the Fifth Circuit Court of Appeals, and the other the nomination to the District Court of Massachusetts.

Professional competence, reputation, personal history were, of course, considered in these nominations, but there was, in my opinion, a deeper consideration: whether the Federal judiciary should remain a regional or a State system or become a truly national judiciary.

The appointment of James P. Coleman to the Fifth Circuit Court of Appeals clearly raised the civil rights issue. Had James Coleman been nominated during the Truman or Eisenhower administrations, or perhaps even during the years when John F. Kennedy was President, it is likely that he would have been approved with scarcely a murmur of protest in the Senate.

Coleman was qualified as a lawyer. He had proved himself as a circuit judge and as a supreme court justice in his own State. His record as a Governor and in other State offices was such that he would have met the standards for appointment to the circuit for which he was nominated.

But when in 1965, his name was sent to the Senate by President Johnson, his views, as well as his record and his qualifications, were subject to most thorough examination. The reason is clear. Civil rights has become a truly national issue and to assure the carrying out of national policy under the Civil Rights Act, the law, it is recognized, must be applied uniformly in all of the courts of the country.

The courts of this land must administer the law more or less on a regional basis. We are still inclined to accept a kind of regionalized system of justice in this country. I suggest that because we have made such progress in improving justice at the Supreme Court level that it would be a serious step backward if the Supreme Court were to become a regional court. The district courts reflect regional differences largely because of appointments in the past but also in some cases, recent appointments. The circuit courts generally have reached the point where on appeal uniform justice is applied on uniform standards from one part of the country to the other. But to establish a regional division in the Supreme Court might not cause chaos, I would say, but undoubtedly it would cause great confusion.

Mr. President, I now wish to speak on one or two other matters which I think are related to the matter we have before us. One of these matters is the suggestion made by the Senator from Maryland (Mr. MATHIAS) in his individual views on page 12 of the committee report, where he stated:

> It is a political principle that was hard won by courageous men in England and preserved by brave men in America. The freedom of a judge to determine a case on its meri , subject only to other judges opinions on appeal, and not to suffer any retribution from any external authority . . . .

The suggestion is that somehow or other the act'on by the Senate is a review of a judicial finding or determination. The Senate is not reviewing previous decisions by Judge Carswell but passing a necessary judgment as to whether he is qualified to be on the Supreme Court. In doing so, we are exercising our constitutional responsibility to confirm or to deny to confirm a presidential nominee to the Supreme Court. To suggest that the Senate's role in this instance is that of a court above the Supreme Court or as endangering the freedom of judicial action is not only to misconceive the Senate's role in making judicial appointments but also to ignore the entire history of judicial appointments under the Constitution of the United States.

Mr. President, I ask unanimous consent to have printed in the RECORD certain remarks made by Alexander Hamilton on this matter in Federalist Papers Nos. 76 and 77.

The PRESIDING OFFICER (Mr. COOK). Without objection, it is so ordered.

The materlal, ordered to be printed in the RECORD, is as follows:

FEDERALIST PAPERS NO. 76

To what purpose then require the cooperation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

FEDERALIST PAPERS NO. 77

Let us take a view of the converse of the proposition—"The senate would influence the executive." As I have had occasion to remark in several other instances, the indistinctness of the objection forbids a precise answer. In what manner is this influence to be exerted? In relation to what objects? The power of influencing a person, in the sense in which it is here used, must imply a power of conferring a benefit upon him. How could the senate confer a benefit upon the president by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct; I answer that the instances in which the president could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the senate. The power which can originate the disposition of honors and emoluments, is more likely to attract than to be attracted by the power which can merely obstruct their course, if by influencing the president be meant restraining him, this is precisely what must have been intended. And it has been shewn that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrouled a ency of that magistrate. The right of nomination would produce all the good of that of appointment and would in a great measure avoid its ills.

Mr. McCARTHY. Mr. President, Leo Pfeffer, in his history of he Supreme Court entitled "This Hon able Court," accurately summarizes this h tory:

> The organizational integrity of the Court has not been touched by any act of Congress nor by any Constitutional amendment. No member of the Court has ever been removed from it other than by death, voluntary resignation or retirement. [p. 18]

This unique and integral sta us of the Court, so necessary to the maintenance of the vitality of the Government, is, therefore, not the result of carefully

drawn procedures. Rather, the Supreme Court has proved itself on the basis of the quality of individuals serving on its bench. What the framers of the Constitution did not anticipate or not provide, the individual justices through their actions have molded a necessary and singular institution of justice without parallel in any other government. The Supreme Court has not evolved into a department of intrigue as feared by some of the men gathered in 1787. Rather, it has become the foremost and at times the only protector of individual rights, the innovator of social change.

Two examples in recent times that I would cite would be civil rights actions and the one-man, one-vote principle. The court acted only when social pressure was so great that action had to be taken and only after it was satisfied a reasonable length of time had passed for Congress and the executive branch to initiate action.

Benjamin Franklin, on June 5, 1787, acquainted the delegates to the Constitutional Convention with a mode of selection practiced in Scotland. He related:

A Scotch mode in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him and share his practise among themselves. It was here, he [Franklin] said, the interest of the electors to make the best choice, which should always be made the case if possible. [Madison. p. 68]

Lincoln in 1864, when called upon to replace Roger Taney, stated what he considered acceptable criteria for determining an individual's capacity to sit on the Court:

We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known. [*This Honorable Court* by Leo Pfeffer. p. 165]

The standards we are applying to Judge Carswell are not unreasonable. It is said that Mr. Justice Taft envisioned heaven as a great court inhabited exclusively by angelic judges. Mr. Pfeffer, in his book cited earlier in my remarks, states:

Taft was thus the only mortal known to history who attained not only heaven but the heaven of heavens for he presided over this angelic court—ten years before his death. [p. 269]

I cite these examples of Benjamin Franklin, Abraham Lincoln, and Chief Justice Taft as three persons who have contributed a measure toward building the Court into the kind of reliable and trustworthy and important institution it has become.

Each Member of this body ought to consider the foregoing observations in making his decision. Each Member of this body ought to realize in making his decision that it has fallen to the men of the Supreme Court, to define and protect the Court's function and relevance to the national welfare. The triumph of Mr. Justice Marshall is evident. The Supreme Court has become an institution capable of withstanding the shifts of popular passions and has helped to shape the patterns of the Nation. In the words of Mr. Pfeffer:

Paradoxically, the institution least democratic in its structure—consisting of nine men serving for life and responsible to no one—has become the institution most committed to and effective in the promotion and preservation of democracy. [p. 425]

Mr. President, all of this, it seems to me, adds up to a rather strong case against the confirmation of Judge Carswell.

Mr. President, I would now make four or five observations on some incidental arguments which have been raised in support of the Carswell nomination.

The Senator from Nebraska has said that if Judge Carswell had had no trial experience, the argument would have been made that he should not have been appointed. I would suspect that someone would make the point, but it would not be a very telling argument. It could not have been made seriously, because there is a history of men who went on the Court without trial experience who turned out very well. I would rather see a Justice depend on his clerks for legal and technical advice than depend on his clerks for philosophy or knowledge of history or wisdom.

The Senator from Nebraska said that, because he was a trial judge, he did not have time to indulge in niceties of scholarship. I would not fault him for what he said. I think his case must be judged on the basis of what he has said and what he has done.

The Senator from Nebraska has suggested in that same argument that a trial judge is very good because he learns to read between the lines, where a vital part of the record is contained. This may be true. I do not know how important it is for a Supreme Court Justice to read between the lines. It might come to that if one is satisfied he has read what is written, if he had read the lines right in the first instance, and then judge him as to how well he reads between the lines. But when one cannot come to a positive, affirmative judgment on the basis of what was written or what was said, I do not think anyone should be moved to take action on the basis of what a prospective Justice may have read or seen somewhere between the lines.

It may be well to point out again that the term of office of a Justice of the Supreme Court goes far beyond the term of a President, which may be 4 years, and a maximum of 8 years. The Senate has the responsibility not to be moved by any special appeal which says we should confirm this nomination because a President of the United States has asked us to do so, that somehow he has the right to do so, or the argument that those who know the judge intimately are for him, and we ought to respond to their urging. If that is so, one would have to ask how intimately the President of the United States has known Judge Carswell, or what is his experience with him. Over how long a period of time did he know him? On what basis of the association did the President of the United States, Mr. Nixon, decide that Judge Carswell should be nominated for the Supreme Court?

So considering all of these factors, the legal record itself, his handling of his own court, and what I consider more important, the fundamental and basic expressions concerning the nature of the Court, the general question is whether or not Mr. Carswell possesses the breadth of knowledge and wisdom, a sense of what the function of the Supreme Court is, an awareness of that great tradition.

I would not want to say that he is disqualified totally on any one or more of these counts, but that, taken together, the Senate should not confirm the nomination of Judge Carswell to be a Justice of the U.S. Supreme Court.

Mr. HRUSKA. Mr. President, earlier this month a substantial quantity of mail, postcards, and letters were delivered to my Washington office. They appeared to be quite identical in their appearance as well as their substance, and also they were identical in another respect: none of them had a return address, although they were signed.

My staff made a diligent search in the city directory and the telephone book of Omaha to ascertain whether they could identify any of the senders of these letters, but they were unsuccessful.

Some days ago, a representative of the Chief Inspector of the Post Office visited my office and those of 20 other Senators and some 11 Representatives. This visit explains the bulk of the mail urging the defeat of Judge Carswell's nomination.

The inspector's purpose in calling at my office was to deliver several pieces of mail which came into the possession of the postal service as a result of incorrect addressing. Perhaps I should explain that when the Post Office receives undeliverable mail—that is, where the address is undecipherable or found to be incorrect, the envelope or parcel is treated as "dead mail" and forwarded to a special office. There the envelope or parcel is opened to see if it is possible to identify the intended recipient, or the sender, and get the material into the hands of the proper persons.

Toward the end of February, several parcels of dead mail came into the possession of the postal authorities. They were addressed to such organizations as "MPLA Publications, African Support Committee," the "Southern Patriot," and to named individuals. Some of the parcels were mailed from Oakland, Calif., on February 20, and some from San Jose, Calif., on February 18. Others had no identifying postmark. None of them had return addresses. They were found in several States far removed from California.

When the parcels were opened, it was discovered that they contained postcards and letters addressed to Senators and Members of Congress, urging that the nomination of Judge Carswell be defeated. They also contained an unsigned letter of explanation from what is described as ". . . a group of concerned citizens in California." I will discuss this unsigned letter in a few moments. I am informed that at last count, there were 586 pieces of mail of this description, delivered on Tuesday, March 3, and Wednesday, March 4.

In addition to those pieces of mail delivered by the Chief Inspector's office, I have received a flood of letters and post-

cards bearing Omaha, Nebr., postmarks. Some of these letters and postcards simply urge me to oppose Judge Carswell's nomination, while others are insulting and some border on the abusive.

Mr. HOLLAND. Mr. President, will the Senator from Nebraska yield? I ask the Senator to yield to me because I have probably 10 minutes of remarks on the same subject as those just made by the Senator from South Carolina. I ask the Senator if he will yield to me at a convenient time.

Mr. HRUSKA. Mr. President, I have a brief statement to conclude, and when I complete it I will be happy to yield to the Senator from Florida.

Not a one of them carries a return address.

Quite obviously, these letters were bulk mailed from some other point—perhaps from California, although there is no way of confirming that—for remailing in Omaha. Quite obviously, the purpose of all this was to create a false opinion that a great many people in Omaha objected to Judge Carswell's nomination.

The nomination of Judge Carswell has stimulated a great deal of debate, not only in the Senate, which has the constitutional responsibility to advise and consent in the matter, but also in the public press. There is, of course, nothing wrong at all with public exploration and consideration of the matter. In our open society we encourage the widespread discussion of important issues. I believe all my colleagues will join me in stating that we find it important to look and listen to what our people and the press are saying. Sometimes we agree and sometimes we disagree, but we must always listen.

For this reason, we want to make sure that what we are listening to is actually the voice we think it is. I certainly want to know what the people in Omaha are thinking about, not only on the matter of nominating associate justices to the Supreme Court, but on all other issues as well. It is important to me what they are thinking; they elected me to sit here and represent them. I am responsible to them. I must go before them every 6 years and demonstrate that I reflect their wishes and their views.

But the postcards and letters urging me to reject Judge Carswell's nomination to the Supreme Court were not the voices of Nebraskans even though someone went to considerable trouble and some expense to make me think that they were.

Now, I do not mind getting letters from Californians. I confess that they do not receive the same prompt attention in my office that letters from Nebraskans do, but that does not mean that I do not have affection for them, or that I do not value their opinion. Certainly, the distinguished Senators from California will understand and forgive me for the preferred treatment I give to Nebraskans.

However, I should think that if someone in California—or anywhere else—wanted to write to me, he would have the courage and common decency to properly identify himself. I should think that anyone with honest and honorable intentions would have no reason to try to conceal his address or what State he lives in.

Mr. President, a little earlier in these remarks I mentioned that the Post Office Department had found among the cards and letters addressed to Senators and Representatives, a letter of explanation and instruction. I would like to quote from that letter at this time. Please note that it does not carry any signature or return address. There is no way to determine who wrote it, who mailed it, or what his motives might have been.

The letter starts out with "Dear Friend." No name or address, just "Dear Friend." Now, that is a curious way to start a letter to a friend, and it is even more curious that a letter to a friend would not be signed.

Here is the text of the letter, Mr. President:

DEAR FRIEND: We are a group of concerned citizens in California. We feel that your organization would be interested in keeping the fires of democracy alive in our nation while we still have time.

There are many issues of great importance being deliberated at this moment. The Haynsworth nomination was such an issue and we felt that the people of this nation should be represented on the highest court with objectivity and reason by a man whose personal life as well as public life was beyond reproach. We made our voices heard on this matter. As you know Haynsworth was defeated.

Every letter that is written to a congressman represents over 600 people as it is unusual for people to write unless it is a subject which concerns them personally.

We write to our California congressmen and representatives on every issue that protects human and civil rights, but we would like to write Senators and Representatives in other states. As you know a letter from a Senator's own constituent carries more weight. Would you be willing to mail these letters in your state?

We have checked with our legal staff who report that there is no legal restriction on the mailing of letters.

If you have any questions on the content of the letters you are welcome to open them. We oppose war and the oppression of any minority on every issue.

We want to see social change which will create a more just society.

Please mail these and help maintain the freedom of all in the Nation. Thank you so much.

Note, Mr. President, that the second paragraph starts out with a statement that "There are many issues of great importance being deliberated at this moment," and then recalls the Haynsworth nomination. The letter goes on to say that "We made our voices heard on this matter. As you know, Haynsworth was defeated."

Whose voices? Mr. President, whose voices? Whoever the unknown authors of this letter might be, they appear to believe that they were influential in the rejection of Judge Haynsworth. How did they go about this? In the same way that they are trying to influence the nomination of Judge Carswell? By underhanded, cowardly methods calculated to deceive? By convincing those in positions of responsibility of a supposed public attitude which, in fact, was created out of whole cloth?

The unsigned letter continues—and I quote in part from the fourth paragraph:

We write to our California Congressmen and Representatives on every issue. . . . but we would like to write Senators and Representatives in other states. As you know a letter from a Senator's constituents carries more weight. Would you be willing to mail these letters in your state?"

So there it is. A clear invitation to duplicity. A blatant attempt to create a false impression of support for opposition to Judge Carswell's nomination.

One of the last remarks in the letter is especially interesting. It says that, "We want to see social change which will create a more just society."

I assume that means they reject the society that we now have—a society founded and preserved on a government of laws; a society which indulges behavior even of those who would destroy it, because that is the price of democracy.

Mr. President, as a result of this experience, I have had an exchange of correspondence with the Post Office Department. I would like at this time to read the letter which is dated March 16 from the office of the Chief Postal Inspector here in Washington, D.C. It is addressed to me, and says:

DEAR SENATOR HRUSKA: The Postmaster General has asked me to respond to your inquiry concerning the mass mailing of post cards and letters which advocate a particular course of action by the Senate on the nomination of Judge G. Harrold Carswell as Associate Justice of the United States Supreme Court.

We do not have a definite explanation for this type of mail recently received by you with the postmark of the Omaha, Nebraska post office under dates of March 2 and March 7.

There has come to our attention a series of similar mailings originating in California sent in individual parcel post packages to organizations in North Carolina, Tennessee, and Washington with the request that the receiving organization individually mail "these letters in your State". . . . "As you know a letter from a Senator's own constituent carries more weight."

The packages from California contained no name or return address of the initiating "group of concerned citizens in California." They came to our attention because they were not delivered as addressed and they were treated as dead mail. Following such treatment, the individual cards and letters were delivered to the addressed members of Congress with appropriate explanations.

We are making inquiry in an effort to identify the California source, but have negligible investigative leads at this point and, as you indicate, it appears rather questionable that a violation of the Mail Fraud Statute can be established.

Sincerely,

W. J. COTTER,
Chief Inspector.

IN RE CARSWELL MAILINGS

The Carswell material discovered in Seattle was addressed to MPLA Publications, African Support Committee, 11 West Cremona, Seattle, Washington 98119. There was no originating postmark.

The Tennessee mailings were addressed to Southern Patriot, 3210 West Broadway, Nashville, Tennessee with originating postmark of Oakland, California on February 20.

The North Carolina mailings (2) were addressed to Mr. Bob Friedman, P. O. Box 10, Carbarro, North Carolina, with originating

postmark of San Jose, California on February 18.

A total of 586 individual pieces involved in the mailings which have thus far come to our notice. The following Senators and Representatives are included among the addressees.

SENATORS

Jackson	Jordan
Magnuson	Kennedy
Bayh	Fong
Burdick	Baker
Byrd	Gore
Cook	Mathias
Dodd	McClellan
Ervin	Scott
Eastland	Thurmond
Hart	Tydings
Hruska	

REPRESENTATIVES

Brown, George E. Jr.	Preyer
Fountain	Jonas, Charles R.
Galifianakis	Mizell
Henderson	Lennon
Jones, Walter B.	Ruth
Taylor	

The mail was delivered to the named members of Congress on March 3 and 4.

That is the conclusion of the memorandum.

Mr. President, to make the record complete, the States to which these mailings were made to the Senators and Representatives are the following: Washington, Indiana, North Dakota, Kentucky, Connecticut, North Carolina, Mississippi, Michigan, Nebraska, Massachusetts, Hawaii, Tennessee, Maryland, Pennsylvania, and South Carolina.

I want to say again that people who use the mails in this fashion presumably have a right to do so. There very likely are no violations of the law. They have the right to use the mail this way if they wish. But those receiving the mail a right to know where it comes from and by what methods such mail finds its way into hands of the addressee, particularly when those receiving it are public officials trying to perform a duty. It would mean more if there were a constituent's name or if it were truly an anonymous source. Most of us would like to know who the witnesses are who appear before us, who the people are who communicate with us, and what their interests and motivations are. Who is paying the bill? Why the deceit in the method of mailing?

Is it really a groundswell or an indication of a groundswell of public opinion or is it a sham?

Note the words in the letter:

We write to our California Congressmen and Representatives on every issue that protects human and civil rights.

Then they branch out into the business of such mailings to other States.

I do not know what other Senators have in mind or what their thoughts are on the subject. I do know that there was delivered to my office a total of 250 or 300 such letters. I brought some of the samples to my desk here. There are post cards. Those that are not postmarked from my home city of Omaha, Nebr., are blank, because those were the ones brought us by the postal inspector.

The letters are pretty much on a uniform type of paper. Some of it is lined and some of it is plain. But nowhere in all these letters or on any of these postcards is there any name. Patently, it is an effort to try to create the impression of a groundswell when none actually exists.

I ask unanimous consent to have printed at this point in the RECORD an article published in the Columbus Dispatch of March 16, 1970, at page 3A of that paper. It is headlined as follows: "Postal Inspectors Discover Scheme To Dupe Solons; Carswell Foes Send Phony Mail."

There being no objection, the article was ordered to be printed in the RECORD, as follows:

POSTAL INSPECTORS DISCOVER SCHEME TO DUPE SOLONS: CARSWELL FOES SEND PHONY MAIL

(By George Embrey)

WASHINGTON.—Opponents of Judge G. Harrold Carswell's Senate confirmation to the U.S. Supreme Court engaged in a phony national mail campaign, The Dispatch learned Monday.

Post Office Department sources reported postal inspectors came upon shipments of hundreds of stamped post cards and letters addressed to U.S. senators which were to have been mailed from North Carolina and Washington state.

The parcel post packages had been undeliverable and carried no return addresses. They were opened under postal regulations which require a search to try to obtain the identity of the sender for return.

The inspectors found some 250 letters and cards with messages opposed to Carswell which obviously were to give the impression they were mailed from the senators' home states.

The cards and letters in the two parcels sent to the wrong addresses in North Carolina and Washington were to have been mailed to U.S. Sen. Sam J. Ervin Jr. D-N.C., B. Everett Jordan, D-N.C., Warren G. Magnuson, D-Wash., and Henry M. Jackson, D-Wash.

Discovery of the packages of mail sent to wrong addresses indicated to Washington observers that a major phony mail campaign was under way against Carswell.

A mimeographed covering letter was found in each of the two packages, both of which had been mailed from points in California.

The covering letter said at one point: "Every letter that is written to a congressman represents over 600 people as it is unusual for people to write unless it is a subject which concerns them personally."

The covering letter also observed that "our legal staff reported that there is no legal restriction on the mailing of letters."

The Post Office Department said it is required by law to deliver such material and will do so. However, postal inspectors are to accompany the mail to the four senators and explain they originated in California and not in their home states.

Mr. HRUSKA. I yield to the junior Senator from Florida for a unanimous-consent request, with the usual stipulation.

Mr. HOLLAND. I appreciate the Senator yielding to me.

Mr. President, I did not receive letters of the type mentioned by the distinguished Senator from Nebraska, but I did receive complaints from my State about this whole series of deceptive mailings.

The article which caused the furore—and it was that—in my State, as can well be understood, appeared in the Tallahassee Democrat on Monday of this week, March 16, entitled "Mail Plan Uncovered." I ask unanimous consent that the article be printed at this point in the RECORD.

There being no objection the article was ordered to be printed in the RECORD, as follows:

MAIL PLAN UNCOVERED

A scheme to flood U.S. Senators with phony anti-Carswell postcards and letters from their home states has come to light in North Carolina but could well be protected over the nation by "privacy of the seal," Tallahassee Postmaster Peyton Yon said today.

Postal officials have discovered at least three packages of stamped letters and postcards addressed to senators. The packages were prepared in California and mailed to persons in various states with the apparent object of having them mailed from "home states" to senators, giving them the impression the messages in opposition to the nomination of Judge G. Harrold Carswell to the Supreme Court came from their own constituents.

Two packages sent to an individual in North Carolina were opened by postal inspectors who could not locate the addressee. The packages carried no return address and were opened by the inspectore seeking identity of the sender so they could be returned.

The packages contained some 250 stamped postcards and letters, almost all of them addressed to Sen. Sam Ervin and Sen. Everett Jordan of North Carolina.

Postmaster Yon said first class, deliverable mail would never be opened by postal officials and that only if a package were torn open by accident in transit would its contents come to light.

Mr. HOLLAND. Several paragraphs in that article are well worthy of reading into the RECORD:

A scheme to flood U.S. Senators with phony anti-Carswell postcards and letters from their home states has come to light in North Carolina but could well be protected over the nation by "privacy of the seal," Tallahassee Postmaster Peyton Yon said today.

Postal officials have discovered at least three packages of stamped letters and postcards addressed to senators. The packages were prepared in California and mailed to persons in various states with the apparent object of having them mailed from "home states" to senators, giving them the impression the messages in opposition to the nomination of Judge G. Harrold Carswell to the Supreme Court came from their own constituents.

Two packages sent to an individual in North Carolina were opened by postal inspectors who could not locate the addressee. The packages carried no return address and were opened by the inspectors seeking identity of the sender so they could be returned.

The packages contained some 250 stamped postcards and letters, almost all of them addressed to Sen. Sam Ervin and Sen. Everett Jordan of North Carolina.

Mr. President, when I first heard this, which was on Tuesday morning, through a telephone call from a longstanding friend of mine in Tallahassee, I immediately contacted the Department of Justice, having been told that one of the Assistant Attorneys General, Mr. Rehnquist, was handling this matter for the Department of Justice. I told him of the report which had come to me and asked him if he would check this matter with the Post Office Department and advise me as to what he discovered.

Later I checked with the offices of the two North Carolina Senators, and I shall report on that later in this brief summary of my findings.

Yesterday, or the day before, I received from Assistant Attorney General William

H. Rehnquist, the gentleman whom I had contacted, a brief personal note which I shall not include in the RECORD—it is a simple note of transmittal—and a copy of the letter from Mr. W. J. Cotter, Chief Inspector, to Senator HRUSKA, which the latter has already placed in the RECORD, and a copy of the letter which was contained in the packages, which I shall mention later and which Senator HRUSKA has already placed in the RECORD. It begins "Dear Friend" and ends with these words, in capitals:

Please mail these and help maintain the freedom of all in the Nation. Thank you so much.

It is unsigned.

The communication to me also contained a letter from the Post Office Department to Mr. William E. Timmons at the White House. I take it that all of this is for the information of the Senate so I think this should be included in the RECORD.

I read it into the RECORD:

Postal inspectors have alerted me to a considerable mail campaign designed to damage the Senate confirmation of Judge Carswell.

Two packages, undeliverable and without return address, have been opened by postal inspectors in order to determine any contents that might indicate the identity of the sender for return. The envelopes contained some 250 stamped postcards and letters addressed to the United States Senators. Almost all of these are addressed to Senators Ervin and Jordan of North Carolina.

Obviously this letter to Mr. Timmons from the Post Office Department, Mr. Paul N. Carlin, the signing official, related to the North Carolina issue in particular.

Continuing to read:

Also enclosed is a "ditto" copy of a covering letter urging the recipient to remail the letters.

That is the letter read into the RECORD by the Senator from Nebraska which was contained in the packages not delivered and the letter was found when the packages were opened by the Post Office inspectors.

These parcel post packages originated in California. One is postmarked San Jose, undellvered to an individual in North Carolina whose name was Bob Freidman, and his address is stated as Carrboro, N.C., which is a suburb of Chapel Hill where the University of North Carolina is located.

I am told that the fact is this package could not be delivered because they could not find the addressee Mr. Freidman, and that was the reason for calling in the Post Office inspectors.

Continuing to read:

These parcel post packages originated from California (one is postmarked San Jose) and are directed to an individual in North Carolina. The object, obviously, is to have these California postcards and letters mailed in North Carolina to the Senators from that state, giving them the impression that these messages are from their own constituents.

A similar package from California to Washington state, undellverable at the address specified, also has been opened by postal inspectors and contains similar postcards and letters addressed to Senators Magnuson and Jackson in opposition to the confirmation of Judge Carswell.

The packages addressed to North Carolina and to Washington state to wrong addresses indicates a major mail campaign, using this misleading tactic to erroneously indicate greater opposition to Judge Carswell's nomination. The POD is required by law to deliver such material, and we are doing so. Postal inspectors will personally visit the offices of Senators to whom these letters and cards are addressed and explain to them that they originate in Calif. and not in their own states.

Enclosed is a copy of the covering letter.

I repeat that part of the covering letter because it seems to me to be particularly significant:

We write to our California congressmen and representatives on every issue that protects human and civil rights, but we would like to write Senators and Representatives in other states. As you know a letter from a Senator's own constituent carries more weight. Would you be willing to mail these letters in your state?

We have checked with our legal staff who report that there is no legal restriction on the mailing of letters.

Mr. President, I, too, have been advised that there are no legal restrictions on this kind of tactic, which is certainly completely reprehensible.

I immediately called Senator ERVIN and he told me that he was working on something else, but that he had a great mass of cards and letters which had been personally dellvered by a Post Office inspector who gave him the facts as stated in the letters which have been placed in the RECORD. He stated to me that all of the letters were sealed and stamped and were addressed to him, but were not canceled, and that he had not had a chance to go into them personally, although one of the employees in his office, Hall Smith, had gone into some of them, and he would send Mr. Smith around to my office with those which had not been opened.

Mr. Smith brought around to my office 51 unopened letters, all of which were addressed to Senator ERVIN, and 92 cards. Mr. Smith told me that he felt sure the others which had been opened already would equal 20 or 30 to add to that number.

We are talking solely about the number of letters and cards in the North Carolina package which were addressed to Senator ERVIN.

There was another group addressed to Senator JORDAN, but I am not able to make a report on that because I have not been able to contact Senator JORDAN today.

I have, however, along with Mr. Smith, personally opened, at the suggestion of Senator ERVIN, the letters which had not been opened, all of which were stamped and sealed and had been delivered to him by the Post Office inspectors.

I think it might be well to state that some of them are respectful and some of them are not. They were intended, as is clearly shown, to be mailed to Senator ERVIN from his home State over postal cancellations from certain places in his State. They had been included in one of the two packages sent to this little post office in Carrboro, just outside of Chapel Hill, addressed to one Bob Freidman, who could not be found.

Mr. President, the first of these letters which I opened at the suggestion of Senator ERVIN, reads as follows:

Senator SAM ERVIN, JR.: I am asking you to vote against Carswell he is no good for the poor we need man with issure—

I do not know what that word "issure" means—

to our country good not made pigs of the people.

Sincerely,

MITCHELL RICHARDSON.

Mr. President, that is one of the letters which I opened and which I now offer for the RECORD.

The second of the letters which I opened is a little dictatorial. It is written in red ink. The other one was written in blue ink. This second letter was to Senator ERVIN, and reads:

DEAR SIR: You must vote *no* to keep Carswell from being appointed to the Supreme Court.,

Sincerely,

PEARL MCGEE.

The third letter which I opened refers to Judge Carswell in a rather insulting way. Let us see what it says:

DEAR SENATOR ERVIN: Carswell is a fool and not a judge. He is an insult to the South.

ANDREW STEVENS.

The fourth one claims to be written by a citizen of North Carolina. It is one of the group of letters written in California seeking to mislead the Senator that the letters come from North Carolinians who are writing to their own Senators.

The letter reads:

DEAR SIR: I am a patriotic American and citizen of North Carolina, in this capacity I urge you to block the nomination of a Mr. Harrold Carswell to the Supreme Court.

Thank you,

ROBERT SIMPSON, Sr.

Mr. President, as to whether he is a citizen of North Carolina, I have no information, but it is one of the sealed letters written in California appearing as part of the group of letters coming in the package from California addressed to Mr. Freidman at Carrboro, N.C.

The next letter to Senator ERVIN reads as follows:

HONORABLE SIR: I as a citizen am asking you not to vote for Carswell. He is a dirty old racist. I am going to tell you, that if you vote for him I will have to put you in the same category as he is. Also you might not be a Sen. any longer if you vote for him.

Mr. HALL.

Mr. President, of course, none of these have any return address on them, nor are they identified in any way except that the letters are handwritten and were sealed when sent in this large package from California to Mr. Bob Freidman at Carrboro, N.C., with a covering letter asking that he make sure that they are mailed from points in North Carolina to Senator ERVIN.

Assumedly, the other group would be mailed to Senator JORDAN of North Carolina whom I have not yet had the privilege of seeing in his office.

The next letter addressed to Senator ERVIN reads as follows:

DEAR SENATOR: As a United States citizen, I demand you to make sure Harrold Carswell is not appointed to the position of Supreme Court Justice. I feel this man hasn't got the stature to hold a light post up let alone hold a job of this sort.

Thank you.

Mr. MICHAEL O'HARE.

That is written quite frankly, I should say, to indicate that Michael O'Hare might be a very frank Irishman.

The next of the letters is the one that refers to fascism as one of the things that they fear in the matter of the appointment of Judge Carswell. It reads:

Senator ERVIN: If you truly represent the people of this country, you will not allow Carswell to be appointed to the Supreme Court. He is worse than you last offering, Haynsworth! What is this country coming to anyway? You will find yourself on the short end of the stick also, if you put him into office. Fascism is rapidly taking over America. The Supreme Court is our final safeguard. Are you willing to see that safeguard removed by the appointment of this prejudice man? I hope not! Do not be caught up in the tradition of Southern hate for the Negro.

That is signed:

A Concerned White Patriot—Henry Jacobs.

Again, there is no return address on the outside of the sealed envelope.

The last letter refers to Senate bill 12. I had forgotten what Senate bill 12 was. I find in asking at the document room—and I have the bill in my hand now—that bill was introduced in the Senate on January 15, 1969, by Mr. EASTLAND for himself, the Senator from Utah (Mr. BENNETT), the Senator from Nevada (Mr. BIBLE), the Senator from West Virginia (Mr. BYRD), the Senator from New Hampshire (Mr. COTTON), the Senator from Illinois, Mr. Dirksen, the Senator from Connecticut (Mr. DODD), the Senator from Arizona (Mr. FANNIN), the Senator from Florida (Mr. HOLLAND), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Nebraska (Mr. HRUSKA), the Senator from Idaho (Mr. JORDAN), the Senator from South Dakota (Mr. MUNDT), the Senator from California (Mr. MURPHY), the Senator from Mississippi (Mr. STENNIS), the Senator from Georgia (Mr. TALMADGE), and the Senator from South Carolina (Mr. THURMOND), and that the bill is entitled: "A bill to strengthen the internal security of the United States."

There were, among the some 51 which we opened, five or six which referred to matters other than the Carswell nomination.

This letter reads:

DEAR SENATOR: Because I feel it is my duty to write and tell you how I feel about Senate bill # 12.

I feel it is outrageous to our country and, a complete violation.

Because if you don't do anything about it, it will be like Hitler was in Germany.

Please vote against this bill.

It is signed "Mrs. Donna Brimmer," without any return address or any other sort of address.

Mr. President, not only is this part of the program which on its very face is deceitful, but it is also deceptive, and meant to be so. It is dishonorable. And I think it is truly despicable.

I want to make it very clear that I do not think any Member of the Senate had any knowledge of this program or had any part in it. But I want to make it very clear for the record as to the type of campaign that is being aimed against an honorable man who has rendered many good years of service to his Nation—first in the Navy under fire, and second in the various positions which he has held, as U.S. attorney, as district judge, and now as judge of the circuit court of appeals.

I have been grieved to hear people talking about mediocrity in connection with this man. In the first place, I want to call attention to the fact that the Federal judges of the fifth judicial circuit have elected him, and he has served for some years as a representative of the district judges in that whole circuit on the National Judicial Conference. And how a district judge who was not highly regarded could be elected to that position and could serve in it honorably for these years, unless he had shown real honor, real character, and real upstanding performance in his service, I do not see.

I call attention also to the letter from Judge Tuttle which appears in the RECORD. And it is rather clear that Judge Tuttle has changed his mind in some respects. But that letter written by him in longhand on the 22d of January and filed in the record of the hearings on the 27th of January shows clearly his conviction that Judge Carswell had served with distinction. It even speaks of his having served with distinction as an appellate judge, not just since he was appointed last year, but on various occasions before then.

I find that because of the high esteem in which he was held by the Circuit Court of Appeals for the Fifth Circuit, he was called upon frequently to sit with that court and participate in making important decisions.

Judge Tuttle's letter thus truthfully reflects the fact that Judge Carswell rendered such service as to impress himself upon the members of the circuit court of appeals to the degree that they called on him frequently to sit with them on appellate matters.

I am distressed to have an attack made against this man of the kind such as is evident from this despicable letter-writing campaign. None of us know how far it has reached. But obviously it has reached into many States.

None of us can hear from the radio, television, or other coverage of this matter anything about the very creditable record this man has made.

I have known him since his marriage. The family into which he married were longtime friends of ours. His wife was a friend and classmate of our oldest daughter.

We were frequently in the home of the Simmons in Florida. During the years I was in Tallahassee, 8 in the State Senate and 4 as Governor, I was frequently in their home. I knew that family well. They were our close friends.

So, I met this man very shortly after he came to Florida.

I have yet to receive one letter from Florida attorneys or judges except letters in complimentary terms of this nominee, letters urging his confirmation.

I placed in the RECORD the other day the communications I had received from the Governor and members of the cabinet of the State of Florida on that subject.

I placed in the RECORD letters from the entire membership of the district court of appeals for the entire northern district of Florida. That consists of five judges, I believe. That is our second highest court, just below the Supreme Court.

I placed in the RECORD some 20 wires I had received from circuit judges. They preside over nisi prius courts which are courts of general jurisdiction.

I have yet to hear anything but friendly comment about Judge Carswell from any judge of our State, and I think I am correct in saying I have heard from way over 100 reputable lawyers to the same effect.

In closing—and I apologize to the Senator from Nebraska from taking so long—I wish to present for the RECORD a letter addressed to me from the president of the Florida bar dated March 16, 1970. Mr. Mark Hulsey, Jr., wrote to me enclosing a copy of a telegram he sent that day to the Senator from Indiana (Mr. BAYH) and the Senator from Maryland (Mr. TYDINGS). Since neither of these Senators has seen fit to have the telegram printed in the RECORD, I wish to do so.

Mr. Hulsey asks that I give publicity to his letter of February 17 to the Senator from Indiana (Mr. BAYH). He said he wrote a similar letter to the Senator from Maryland (Mr. TYDINGS) on that date.

Mr. President, I ask unanimous consent to have printed in the RECORD the letter of February 17, 1970, addressed to the Senator from Indiana (Mr. BAYH) from the president of the Florida Bar, and the letter which Mr. Huisey addressed to me under date of March 16, 1970, enclosing a copy of the telegram he sent to the Senator from Indiana (Mr. BAYH) and the Senator from Maryland (Mr. TYDINGS).

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE FLORIDA BAR,
OFFICE OF THE PRESIDENT,
Jacksonville, Fla., February 17, 1970.

Re nomination of Judge G. Harrold Carswell for Associate Justice of the U.S. Supreme Court.

Hon. BIRCH BAYH,
U.S. Senator,
Washington, D.C.

DEAR BIRCH: I regret that an unexpected travel schedule has prevented an earlier reply to your letter of February 3, 1970.

You have asked for my rebuttal on the statement made on behalf of the National Conference of Black Lawyers and the testimony of Professor William Van Alstyne. While it is now probably moot, I hope it will give you cause to reflect again on the entire subject and vote to confirm Judge Carswell when the matter is considered by the full Senate.

As I indicated to you earlier, it is certainly ironic that Judge Carswell is charged with being a racist. My experience with him and his reputation in the Northern District of Florida are just to the contrary.

The statement made by the National Conference of Black Lawyers is replete with mistaken assumptions and premises. It argues rather than states facts. Understandably, the National Conference would have difficulty in being objective.

The testimony of Profesor Van Alstyne is a different matter. His credentials are impressive. Conspicuous by its absence is his lack of trial practice. Professors are qualified to critique Appellate decisions but it takes the trial lawyer to evaluate the trial Judge. Professor Van Alstyne expected your committee to give his criticism of Judge Carswell greater weight because he supported Judge Haynsworth. Apparently, he did not appreciate the difference between the atmosphere in the trial arena and the serene Appellate Court.

No useful purpose will be served by a complete rehash of the various cases cited. In passing, however, I will comment on them:

1. *Due v. Tallahassee.* The real issue in this case was when is a summary judgment proper and also what states grounds for relief under the Civil Rights Act.

2. *Singleton* v. *Board.* The mootness issue was scarcely raised below. The issue boiled down to credibility. A trial judge who saw the parties thought one way, the Appellate Court disagreed.

3. *Dawkins* v. *Green.* The District Court found there was no material issue of fact to be resolved and granted summary judgment. The Circuit Court disagreed.

4. *Steele* v. *Board.* This case was remanded because of a new decision, *U.S. and Linda Stout* v. *Jefferson County Board of Education,* rendered by the Fifth Circuit *after* the District Court Order.

5. *Augustus* v. *Board.* The Fifth Circuit Court of Appeals held it was error to grant a motion to strike the allegations relating to the assignment of teachers, principals and other school personnel because this was not a matter that had "no possible relation to the controversy". The Circuit Court also stated that:

"In the exercise of its discretion, however, the district court may well decide to postpone the consideration and determination of that question until the desegregation of the pupils has either been accomplished or has made substantial progress."

Thus, it appears that the Circuit Court recognized that the issue of assignment of school personnel was not one that must be decided immediately, it was only an issue that must not be disposed of by a motion to strike.

Professor Van Alstyne did mention the *Brooks* and *Pinkney* cases as being favorable to civil rights plaintiffs. Other civil rights cases where the Judge's action was sustained include:

Robinson v. Coopwood, 415 F. 2d 1377 (1969).

Baxter v. Parker, 281 F. Supp. (1968).

Steele v. Taft (July 19, 1965).

Ball v. Yarborough, 281 F. 2d 789.

Knowles v. Board of Instruction of Leon County, 405 F. 2d 1206.

Presley v. City of Monticello, 395 F. 2d 675.

Professor Van Alstyne said he did not know Judge Carswell. Perhaps if he had known him in Tallahassee, had heard him cursed, had listened to the harassing telephone calls and practiced law in his Court, he would not have been so quick to condemn him.

I appreciate very much your asking for my comment. Please call on me again if I may be of service to you.

Sincerely yours,

MARK HULSEY, Jr.

THE FLORIDA BAR,
OFFICE OF PRESIDENT,
JACKSONVILLE, FLA., *March 16, 1970.*

Re Judge G. Harrold Carswell.

Hon. SPESSARD L. HOLLAND,
U.S. Senator,
Washington, D.C.

DEAR SENATOR HOLLAND: I enclose copy of telegram which I have today sent to Senators Birch Bayh and Joe Tydings. Please circulate copies of this telegram as you think appropriate. Also enclosed is a copy of a letter that I wrote to Birch Bayh in February which I am certain you will find of interest.

Please let me know if you think The Florida Bar can be of any further service in connection with the successful confirmation of Judge Carswell.

Sincerely yours,

MARK HULSEY, Jr.

MARCH 16, 1970.

Hon. BIRCH BAYH,
U.S. Senator,
Washington, D.C.

The 10-month vacancy on the United States Supreme Court and the passage of two months since the nomination of G. Harrold Carswell to that court makes it imperative for the Senate to act as soon as possible on his confirmation. Prolonged controversy will seriously erode public respect for the Supreme Court and our judicial system generally.

We respect your right to criticize Judge Carswell and oppose his confirmation, but excessive and extended criticism without developing new facts can become destructive to the court you seek to protect.

Tactics designed to delay a vote can only be characterized as fillibustering, a procedure we are certain you oppose. Unnecessary delay will diminish Judge Carswell's effectiveness and lastingly damage the public image of the Supreme Court.

Lawyers who have never met Judge Carswell, have never appeared before him, and know of him only from biased sources have signed and publicized petitions against him.

The lawyers of Florida actually know Judge Carswell best. The Florida Bar is the sixth largest organized Bar in America, with almost 12,000 members. Many of these lawyers have met Judge Carswell, have appeared before him, and know him and his record personally.

As President of The Florida Bar, I have been instructed by a unanimous vote of the Board of Governors to strongly endorse his confirmation.

I urge you to use your best efforts to cause an early Senate vote.

MARK HULSEY, Jr.,
President, the Florida Bar.

Mr. HOLLAND. I thank the Senator from Nebraska for his patience.

Mr. HRUSKA. I thank the Senator from Florida for his contribution. I am grateful to him for having included in the RECORD samples of the letters and postcards. I wish to join him in the belief and the statement that it would be unthinkable, and I am confident it is not so, that any of our colleagues in the Senate either knew about it or had any advanced information about this practice which has been described.

I yield to the Senator from Tennessee subject to the same stipulations heretofore stated.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. BAKER. Mr. President, I shall not take the time of the Senate for very long. I wish to speak briefly on the same issue which has been brought to the attention of the Senate by the distinguished Senator from Nebraska and the distinguished senior Senator from Florida.

The article which the senior Senator from Florida placed in the RECORD from the Florida newspaper, I believe, referred to mailings to Tennessee of these cards and letters. I can personally vouch for that.

It is interesting, or at least it is interesting to the junior Senator from Tennessee, that so far I have received about 270 letters in my office relating to Judge Carswell; and that approximately 200 of them were mailed in bulk to me by the postmaster in Knoxville, Tenn., by parcel post with a letter dated March 5, 1970. The letter is from our distinguished Postmaster C. Edwin Graves, who pointed out in his letter to me as follows:

U.S. POST OFFICE,
Knoxville, Tenn., March 5, 1970.

Hon. HOWARD BAKER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN: The enclosed were received at this office to be cancelled and placed in the mails.

I thought you should be informed that these were originally sent from the State of California. They are not from residents of this great State of Tennessee.

If we can be of further service, please let us know.

Sincerely yours,

C. EDWIN GRAVES,
Postmaster.

Mr. President, every constituent has the right to write to his Member of Congress in the House and in the Senate. I believe I speak for every Member of this body when I say we read and pay special attention to the sentiment, the drift of the sentiment, and the changing of opinions reflected in letters.

For that reason I am not sure I agree with my distingulshed colleagues that this is free of any taint because a fraud has been perpetrated or an attempted fraud has been perpetrated on Members of the Senate on the theory that constituents of theirs expressed opinions one way or another on a principal issue and they want us to react to a fraudulent situation they created knowingly.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. BAKER. I yield to the Senator, if I may.

Mr. HRUSKA. I am happy to yield to the Senator from Florida.

Mr. HOLLAND. Mr. President, I agree with the distinguished Senator. A fraud was attempted to be perpetrated. My statement was that after seeking legal counsel I was sorry I had been advised that under the postal laws they had to deliver those letters without opening them and they doubted any fraud charge could be made. I have not had a chance myself to research the postal laws.

Mr. BAKER. I am not sure the postal laws are all the laws that would apply in this case. I think that if any private citizen attempts to create a situation which misleads another person, public officials in this case, the statutory law might be applicable as the basis for an action and I suggest to the Department of Justice it might be looked into on that basis.

All of these letters I have just opened—they were not opened by my staff—are in the same size envelopes. They are all, with one exception, addressed in longhand; they are all in the same color ink with one or two exceptions; and most of them are on the same type paper. The post cards are all the same size. They are handwritten.

I will not detain the Senate long enough to read all the names, but it seems to me that the combination of the facts that they were forwarded from California, that they are all on the same material, and that we have here 200 names, should be enough for someone to seek to determine where they came from. I hope the postal authorities and the Department of Justice will do so because there is enough lawyer left in me, even after 3 years in the Senate, to find out who is trying to create a situation to make it appear that citizens of the State of Tennessee are writing to their Senators to suggest a position on an important matter, when they admit in this letter they are not citizens of Tennessee, that they are flying under false colors, and they parcel posted these communications to Tennessee by mail.

My father had recommended Eddy Graves for the position of postmaster in Knoxville. I am glad that Mr. Graves wrote me this letter. He points out that the communications did not come from Tennesseeans.

I will take them into account but I will also take into account the obvious lack of sensitivity of those who set up this effort to deceive this Member of the Senate on the matter of the nomination of Judge Carswell.

I intend to vote for the confirmation of Judge Carswell and from now on I intend to be on the lookout in my mail for any manufactured or contrived documents, contrived on the part of a few from whatever part of the country, to deceive elected officials. I think it is despicable. It is remarkable that about 70 percent of the communications on this subject received thus far in my office came by parcel post from California with a covering letter admitting the fraud.

Mr. HRUSKA. I thank the Senator for his contribution.

Mr. MANSFIELD. Mr. President, will the Senator yield?

Mr. HRUSKA. I yield to the Senator from Montana with the stipulations earlier stated.

Mr. MANSFIELD. Mr. President, until this afternoon I felt I was a prisoner in an isolated booth as far as a certain type of communication was concerned. I had not heard of any other Senator receiving the same kind of mail until I listened to the debate today. I became so concerned that on March 5 I made a statement on the floor of the Senate in which I stated as follows:

RETURN ADDRESSES, PLEASE

Mr. MANSFIELD. Mr. President, one of the basic duties of a congressional office is the receipt of and response to constituent mail. This is one way in which we can keep in touch with the people we represent and it is a reasonably good indication as to how they may feel on a particular issue.

Last week I received many letters and cards from what I assume are residents of Missoula, Mont., expressing their views on a variety of legislative matters. There were approximately 150 communications, all signed and postmarked Missoula, Mont., but not one single return address. They definitely were not form letters because they commented on issues such as the voting rights legislation, the Carswell Supreme Court nomination, taxes, integration, Vietnam, and extension of the Office of Economic Opportunity programs. Because these matters are very current, I would like to be able to respond to these letters, but it is impossible to do so under these circumstances. I checked very carefully to see if there might be one address, but I could not find one. The only indication was one reference to the views being expressed by an organization of some 600 people.

I am taking this means of stating to these people in Missoula, as well as to any of my constituents, that I welcome their comments and recommendations and welcome an opportunity to respond. However, in this case, it is impossible.

Since that time I have received in excess of 50 more post cards and letters, none of them, even yet, with an address.

It appears to me that this is an unorthodox way—to put it as mildly as possible—to try to exert pressure on a Senator or a Member of Congress. To me this type of mail could well be counterproductive. I think that is obvious. I do not approve of it. And I certainly am curious as to its source.

I am always delighted to hear from my own constituents. I am very happy to answer their questions, to the best of my ability. But I must say this is a new way to reach a Member of the Senate, and one which I do not approve of. I like to know who writes in. They know who I am. I like to know who they are so I can answer their questions, as I said, to the best of my ability.

I do not know what can be done about mail of this kind. I have received an education this afternoon in listening to various Senators expound their views on this question and also to find out that it goes far beyond the confines of the State of Montana and far beyond the confines of the city of Missoula, Mont.

If my mail originates as described in the remarks I have just heard, then I do not know what can be done. But I do know that, as far as I am concerned, I will make up my own mind, give due attention to all communications which I receive, pro and con, on any matter, and in that way try to face up to my responsibility, and not do it behind the dodge of not leaving an address.

I thank the Senator for yielding to me.

Mr. HRUSKA. Mr. President, I am pleased that the Senator from Montana has addressed himself to this question. It came to my attention that on either March 4 or 5, he made some comments on this matter. After discussing it in my office, we felt it would be better to refer it to the Post Office Department and have the postal inspector check into it so we would have a real basis. I think the basis, the pattern, the grand design of this public relations scheme has been unfolded this afternoon in the colloquy engaged in by several Senators.

Mr. President, I yield the floor.

COMPREHENSIVE DISASTER ASSISTANCE—REFERRAL OF BILL—ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the bill introduced by the Senator from Indiana (Mr. BAYH) having to do with relief of disasters be referred to the Committee on Public Works.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MANSFIELD. Mr. President, it is my understanding that after that committee has had the opportunity to study the proposal by the Senator from Indiana, it will be referred to other committees as well.

Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 10:30 a.m. Monday next.

Mr. HRUSKA. Mr. President, reserving the right to object—the ruling has not been made yet—is that a bill having to do with insurance or allowing insurance companies to work together for the purpose of issuing coverage against certain natural disasters?

Mr. MANSFIELD. Mr. President, I have not the slightest idea. I was requested to do so by the Senator from Indiana, and it is on that basis that I have made the request, which I understand the Chair has granted.

Mr. HRUSKA. If it is the type of bill of which I have some recollection, it is my understanding that it is a bill which would carve an exception out of the antitrust laws and permit companies to get together for the purpose of writing insurance against risks in certain national coverages. If so, it would be a bill that inherently would go to the Judiciary Committee on two counts: One is the antitrust laws and the other is that it has to do with a situation which is embraced in the McCarran-Ferguson Act of 1946.

Mr. MANSFIELD. I am informed it creates an agency under the aegis of the President. That same legislative proposal has been considered by the Public Works Committee previously, and, so far as I know, it is in accord with what has been done before in this body.

Mr. HRUSKA. I do not know what other legislation there is. I know there is a bill by the administration also pending in one House or the other which has the same general subject matter. It is that which caused me to perk up my ears here. If it is in that same field, then it gets into the antitrust law amendments and into the McCarran-Ferguson Act.

Mr. MANSFIELD. As the Senator knows, any Senator has a right to introduce a bill and have it referred. This bill will go to a number of committees, but the request made on behalf of the Senator from Indiana and which was granted by the Chair, was to refer it to the Committee on Public Works.

Mr. HRUSKA. May I suggest to the majority leader that, in due time, and if the nature of the proposed legislation is such that it would involve the antitrust laws or the McCarran-Ferguson Act, it would be in order that we ask, at a later

tant conference report coming up, which personally I would have liked to have seen go over until after the recess, and that we are up against a series of facts which I would think would be impossible to overcome at the present time.

I am prepared to continue to come in early and to stay in late. I am not prepared, and never have been, to stay in all-night sessions.

I do not think there is much more that can be added to the debate. I think most Senators have, by and large, made up their minds, or are on the verge of so doing, and it would be my hope that we would be able to dispose of the conference report next week—it may take more than a day. I hope some agreement can be reached—either at the end of next week before we go out, or on the day we come back—as to when we could vote at a time certain on the pending nomination.

I assure the distinguished acting minority leader again that if the Senator from Montana had his way, we would vote on the Carswell nomination next week.

Mr. GRIFFIN. I thank the distinguished majority leader. He has been most cooperative and helpful at all times.

Mr. MANSFIELD. I thank the Senator from New York for yielding, and apologize for the delay.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. GOODELL. Mr. President, on February 5 of this year, I announced my decision to vote against the nomination of Judge G. Harrold Carswell to be an Associate Justice of the U.S. Supreme Court.

I do not oppose him because he comes from the South, or because he may be considered to be a strict constructionist of the Constitution, whatever one's individual definition of that term may be I enthusiastically supported the nomination of Chief Justice Burger, who was also characterized by the President as a strict constructionist. I voted for the confirmation of Judge Burger because he was, in my judgment, eminently qualified.

The President has a right to nominate to the Supreme Court any man of his own choice, of any judicial philosophy, from any region of the country. The Senate has its own duty under the Constitution. Each Member of the Senate must exercise his individual judgment, and base his decision on the most careful scrutiny of the qualifications of the nominee, with a searching mind as to whether the best interests of the Nation will be served by confirmation.

The issue of consent in the case of a Supreme Court nominee is clearly distinguishable from that issue in the question of the confirmation of other presidential nominees.

For instance, the function of a Cabinet officer is to carry out and administer the President's policy. His term of office expires with that of the President. The Supreme Court, on the other hand, has a constitutional function which is clearly separate and distinct from those of its two coequal branches of the Government. Also, appointment to the Court is for life.

The President should be given great latitude in obtaining confirmation of his choices for positions in the executive branch; but, because of the unique constitutional role which the Supreme Court plays in American life, every Senator has a special duty in casting his vote on a confirmation issue involving a Supreme Court nominee.

He should ask himself, "What is my obligation, as an individual U.S. Senator, on an issue such as this?" It is not our function to demand that a Supreme Court nominee agree with us on all the issues and in all the cases he may have decided in the past; but there are certain issues that are so basic to our country that its very survival is tied to them.

One of these is civil rights. I oppose Judge Carswell because, as a member of the Federal judiciary, he has failed to heed the civil rights revolution of the past decade. He has demonstrated a basic insensitivity to fundamental civil rights issues—issues which are essential to our survival as one indivisible Nation.

In my view, any man proposed for a place on the Supreme Court must understand the meaning and the dimensions of that civil rights revolution. No matter what his other qualifications and virtues, if he fails to comprehend its meaning, he should not be confirmed. My opposition to Judge Haynsworth was predicated upon the same ground.

Mr. President, there are a series of cases that have been cited with reference to the judicial record of Judge Carswell. I shall mention only a few here today. And I might say, with reference to this debate, that I do not believe that all Senators have made up their minds. From my discussions with my colleagues, I think there are a great many who are uncertain, and they are listening carefully to the evidence being presented on both sides, and are particularly alert to any new evidence which comes to light.

I think this extended debate thus far has been of great utility to those Senators who are undecided. It also is of great usefulness in enlightening the American public as to this issue, so that citizens can have the opportunity to convey to their elected representatives their own inclination with reference to the approval of Judge Carswell.

President Nixon has indicated that he wanted a young man—one of his qualifications—in appointing a Supreme Court Justice. The reason for this, apparently, is that he wants someone who will remain on the Court for an extended period of time. Judge Carswell is 50 years of age. With even normal service on the Court, we are talking about 15 or 20 years of Judge Carswell sitting on the highest court of this land. With the longevity of Supreme Court Justices—the historical record—and their disinclination to retire, we may be talking about a considerably longer period of time in which this nominee will serve on the Court. He could well be serving on the Court 30 years from now, in the year 2000 with all the changes we can anticipate in this country in the last third of this century.

Mr. President, in that context, I think it is important that the U.S. Senate review the abilities and the disabilities of the Carswell nomination.

Much has been made during the last weeks debate of the fact that the American Bar Association's judiciary committee had rated Judge Carswell as "qualified" to sit on the Supreme Court. The Attorney General of the United States has, in fact, stated publicly that Judge Carswell was "highly recommended by the American Bar Association."

Forgotten has been the fact that the committee chose, for the first time in the history of its evaluation of Supreme Court nominees not to rate Judge Carswell on the comparative scale of "not qualified" or "highly acceptable from the viewpoint of professional qualifications." It would seem that the committee, therefore, did not consider Judge Carswell as "highly acceptable from the viewpoint of professional qualifications," and that by rating him on merely the new criterion of "qualified" the committee members were telling the Senate as much by their damnation with faint praise of the judge as they could have by rejecting him.

Forgotten has been the fact that the committee generally will rate a judge qualified for appointment if he displays even marginal professional qualifications coupled with an absence of gross ethical impropriety in his record. Shall this Senate confirm, for a seat upon the highest court of our land, one whom the ABA's judiciary committee has refused to rate as even marginally qualified according to its former standards of "highly acceptable."

Forgotten, finally, has been the fact that the committee chose not to reserve judgment until all of the evidence was in, but to render an opinion expeditiously. In doing so, it committed itself to an opinion before a report was released by the Ripon Society, an exhaustive statistical report completed by a number of law students, and lawyers, demonstrating that Judge Carswell is, on the basis of several criteria, an exceptionally inadequate Federal judge.

Mr. President, eight distinguished members of the American Bar Association opposed to the confirmation of Judge Carswell have sent a telegram of protest to Bernard Segal, president of the American Bar Association, and Lawrence Walsh, chairman of the ABA's judiciary committee, urging them to reconvene the committee in order to rate Judge Carswell on the established comparative scale used to rate nominees for the Federal judiciary. I would like, at this point, to read that telegram of protest into the RECORD.

It is addressed to Mr. Bernard Segal, president of the ABA and Mr. Lawrence E. Walsh, chairman of ABA judiciary committee.

We are members of the American Bar Association who do not believe that Judge Carswell meets the minimum requirements

of professional ability and judicial temperament to sit on the Supreme Court of the United States. Even if he meets the minimum requirements, we do not believe that a man with minimum qualifications should be confirmed by the Senate as a Justice of our highest Court.

It is our understanding that while the Committee on the Federal Judiciary ranks appointees to the lower federal courts on a comparative scale that covers the entire ranges from "not qualified" to "qualified," "well qualified" and "exceptionally well qualified," it rates appointees to the Supreme Court only as "not qualified" or "qualified." We further understand that this is a recent departure from earlier practice. Initially the same comparative scale was used for all courts, and thereafter until the Carswell appointment, Supreme Court appointees were rated either "not qualified" or "highly acceptable from the viewpoint of professional qualifications."

The action of the Committee on the Federal Judiciary in rating Judge Carswell as "qualified" has been used widely as an endorsement of Judge Carswell's nomination to the Supreme Court by those who support him. The Attorney General of the United States has stated publicly that Judge Carswell was "highly recommended by the American Bar Association."

We believe that the new "pass-fail" system of rating appointees to the Supreme Court deprives the Senate of information that is vital to the proper performance of its duty to advise and consent. For those Senators who may agree with us that their consent to the appointment of a man with minimum qualifications should be declined, it is vital to know whether the bar rates an appointee as barely "qualified," "well qualified" or "exceptionally well qualified." It is highly incongruous to continue supplying such information to the Senate for appointees to the lower federal courts and to withhold it when the Senate performs the vastly more important function of considering appointees to the Supreme Court.

We therefore respectfully request that the Committee meet again to rate Judge Carswell on the established comparative scale still used for the lower courts and that we be given an opportunity to present our views to that meeting. We urge that such a meeting be set as promptly as possible so that the Senate will know precisely where the Committee rates Judge Carswell before it completes its deliberations on his nomination.

We further request that the comparative scale be utilized in the Committee's rating of all future nominees to the Supreme Court.

SAMUEL I. ROSENMAN,
Judge, former president of the New York City Bar Association.
FRANCIS T. P. PLIMPTON,
President of the New York City bar Association.
DEREK BOK,
Dean of Harvard Law School.
LOUIS POLLAK,
Dean of Yale Law School.
BERNARD WOLFMAN,
Dean of the University of Pennsylvania Law School.
MURRAY SCHWARTZ,
Dean of the UCLA Law School.
NEAL RUTLEDGE,
Miami attorney, son of former Supreme Court Justice Wiley Rutledge and former law clerk to Justice Black.
WARREN CHRISTOPHER,
Partner in O'Melvany and Myers of Los Angeles, former Deputy Attorney General of the United States.

I am joining with several other Senators today in sending a telegram to Mr. Segal and Mr. Walsh affirming my agreement with the sentiments expressed by those legal scholars who signed the telegram of March 11, and requesting that the ABA committee indeed reconvene to reconsider its statement on Judge Carswell. It is clear that that statement has been flawed by its use of a new ambiguous criterion to rate Judge Carswell and by the fact that it was made before all of the evidence on the judge was in. For those reasons, no one can claim that statement to be an unqualified endorsement of Judge Carswell, and for those reasons, the committee should meet again to consider new evidence and to make an unambiguous statement on its opinion of the judge.

Mr. President, Attorney General Mitchell has also faulted the Ripon Society report; and I will make further reference to that study at a later time.

I might assure my colleagues present that that probably will not be tonight. But the Ripon Society study was a thorough study and examination of the record of Judge Carswell, comparing it to the record of other Federal judges in the fifth circuit.

The Attorney General asserted that only Judge Carswell's reported decisions were cited and, therefore, the preponderance of his decisions have not been analyzed. If the Attorney General has such faith that the unrecorded decisions will demonstrate the competence of Judge Carswell, why has he not released those decisions, which his Department surely has examined and filed in disappointment? Why did he not refute the Ripon study by forwarding to the Senate Judiciary Committee the file of those unreported decisions? I challenge the Department of Justice, if it is so convinced of Judge Carswell's juridical skill, to make public the evidence upon which their assertion rests, to present to this Senate the evidence which it needs to make an informed decision upon that judge.

Let me suggest, in the absence of that evidence, that the statistical techniques used in the Ripon study, and attacked by the Attorney General, have just been validated in the annual report of the Administrative Office of the U.S. Courts. The Director of that Office, in table B–1 of the report, presents statistics which nearly exactly replicate the figures of the Ripon Society on the rate of reversal in all Federal courts—20.2 percent—in 1969, and in all fifth circuit courts—24 percent. It is clear, since the Administrative Office has validated the reversal figures reached by the Ripon lawyers and law students, that the statistical techniques on the basis of which they came to their conclusion are valid, and that Judge Carswell is indeed juridically incompetent to sit upon the Nation's highest court.

If the Attorney General should say that the unreported decisions have still not been taken into account, then I say to him that such a study is now being made, by the same group of Columbia students and New York lawyers which authored the report put out by the Ripon Society. They are examining 7,000 unreported opinions, all of those appealed to the fifth circuit appellate bench since 1958, to measure Judge Carswell's record against that of each of the other trial judges in that circuit.

This comprehensive examination will come to us certified under oath from those lawyers signing it, and they will be affixing their professional reputations to that oath. The comprehensive study will end, once and for all, the speculation about whether Judge Carswell is impeached by his unreported cases as well as by his reported ones.

I challenge the Attorney General, since it is he who has implied that the record of unreported cases will be determinative, publicly to define the standard of competence by which he will judge a Supreme Court nominee. Let him define the term "competence," however he will, and I assure this Senate that Carswell will not meet it. It is the Attorney General, and those Senators who have supported the judge, who have stated that the unreported cases would be determinative. Fine. Let them now back up their words with a commitment, with a willingness to say "if he goes beyond this threshold, he would be unacceptable."

Should they refuse to do it, they demonstrate to the Senate and to the American public that they, indeed, fear the nominee to be unqualified by an objective standard, and that they are unwilling to define "competence" for fear that their man will be found wanting.

Let them set the standard, and then let us see whether the definitive study of 7,000 fifth circuit cases shows them that their man ought to sit upon the highest court of the land.

Mr. President (Mr. BAYH), there are many factors in the record of Judge Carswell which should be carefully considered by the Senate.

Judge Carswell has been, for a brief period, a trial judge in a rural district. No one can assert that he has been consistently exposed to well-briefed cases and sophisticated oral argument. It is clear that he has been consistently rude to lawyers, white and black, appearing before his court. He has had a disdain for the writ of habeas corpus which displays an insensitivity to civil liberties not often noted in this country in these times.

Are we not entitled, Senators, to ask for a nominee for the Supreme Court not merely that he be competent, but that there be an *x* factor of judicial prudence, of sensitivity, of inteliectual capacity for all those who sit upon the Supreme Court?

In this year of 1970, after the Supreme Court's image has been tarnished by the Fortas and the Haynsworth brouhahas, when law students across the country have begun to look upon the Court's decisions with increasing skepticism and even contempt, when more and more citizens unversed in the law have begun to suspect the impartiality, the wisdom, the values of the members of the Court, can we afford to confirm a justice whose presence on the Court can only exacerbate these trends.

If this Senate has any concern whatsoever with insuring that the Supreme Court and its decisions be respected across the land, can we place George Harrold Carswell on that Court?

Is there a man among us who can say that Judge Carswell has that *x* factor which ought to be the unique possession

of the nine most important jurists in the country? Is there a man among us who can say that he is impressed with Judge Carswell's prudence, his sensitivity, his intellectual capacity?

Mr. President, there have been many things said about the record of Judge Carswell. I would cite only one more, a specific item that I think is of interest. The hour is getting late.

Mr. President, in this morning's newspaper, I read a reference to a memorandum that had been submitted to some Republican Senators last fall. I would like to expand a little bit on that memorandum, because now that it has been revealed, I believe that its full import should be understood.

Mr. President, the President of the United States, in my opinion, has been poorly served by those in the Justice Department particularly in the office of the Counsel to the Department, who were to do the investigatory staff work on prospective nominees for the Supreme Court. Those staff members failed to disclose to the President the total Haynsworth record, and their negligence has now once again resulted in his being caught by surprise on the Carswell segregationist speech, the golf course incident, and the restrictive covenant on his house—and others, factual details in the background of Judge Carswell that are distinctly relevant to his qualifications to be one of the Supreme Court Justices.

As far back as November 1969, Mr. President, some Republican Senators were fearful that the President would not be fully informed of the background of his next nominee to the Supreme Court. Our forebodings, unfortunately, proved all too accurate. I would like to read to you from a memorandum prepared for some Republican Senators last November, dated November 5, 1969. It is labeled "Southern Judgeships" and reads as follows:

As moderate Republicans appointed by Eisenhower retire from the Fifth Circuit and as Haynsworth prepares to leave the Fourth, the Nixon Administration is choosing segregationist Democrats or Dixicans to replace them. Since these judges are being named by Mitchell and approved in a perfunctory way, Nixon may well not be fully aware of their record or probable impact.

The most recent appointee, pushed through the Senate Judiciary Committee and confirmed on the floor on Moratorium Day, is Charles Clark, a leading strategist in Mississippi's resistance to desegregation and close associate of William Harold Cox, segregationist District Court judge.

Clark defended Mississippi's segregated jury system at the time of the Philadelphia Klan murder trial; he proposed indictment of James Meredith in order that the University could exclude him as a criminal; he was the chief legal adviser in the challenge to unseat the first black elected to the Mississippi legislature in recent times. A Democrat, he is described by Jack Greenberg of the Legal Defense Fund as a "young, smart, effective lawyer, who has devoted his entire career to the segregationist cause." He joins the court at a time when Emmett Tuttle and other pro-civil rights Eisenhower appointees are retiring.

Nixon's other recent appointee to this crucial court, George Harrold Carswell of Florida, is described by Southern lawyers as an even more unfortunate choice than Clark, since Carswell is older, less intelligent and more set in his ways. As a district judge, he has been repeatedly reversed and reproached by the Fifth Circuit for his rulings in cases involving desegregation of everything from reform schools to theaters. But his chief technique, say civil rights lawyers, is prolonged temporization.

Mr. President, these are all new contributions to the debate which is arising over this important nomination. I am confident there will be more revelations as this debate progresses. And I intend to participate further in this debate in the hope that we can convince the Senators who are now uncertain and who have not fully made up their minds that it is in the best interests of the United States that the Senate reject the nomination of Judge Carswell.

I believe it is critical that my Republican colleagues view this issue in perspective and recognize its full import for our country.

This is not a matter of party loyalty. This cannot be a matter of partisanship. Each Senator should look to his own conscience and should not vote on the basis of who made the nomination and what party he belongs to.

The Supreme Court is an independent branch of Government. Every judge, once he is placed on the bench, becomes immune from politics. It is not significant whether a Justice of the Supreme Court is a Republican or Democrat. He is past party affiliation.

It is significant that a Justice of the Supreme Court in 1970, in the last one-third of this century, should be a man of wisdom, sensitivity, intelligence, and a man who understands the importance of the basic issues that face this country.

I do not believe on those standards that Judge Carswell qualifies, and I urge my colleagues to reject the nomination.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. COOK). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT TO MARCH 23, 1970, AT 11 A.M.

Mr. KENNEDY. Mr. President, if there be no further business to come before the Senate, I move, pursuant to the previous order, that the Senate stand in adjournment, as in legislative session, until 11 o'clock Monday morning.

The motion was agreed to; and (at 5 o'clock and 15 minutes p.m.) the Senate adjourned, as in legislative session, until Monday, March 23, 1970, at 11 a.m.

CONFIRMATIONS

Executive nominations confirmed by the Senate, March 20, 1970:

DEPARTMENT OF TRANSPORTATION

Charles D. Baker, of Massachusetts, to be an Assistant Secretary of Transportation.

DIRECTOR OF SELECTIVE SERVICE

Curtis W. Tarr, of Virginia, to be Director of Selective Service.

IN THE COAST GUARD

The nominations beginning Michael Ray Adams, to be ensign, and ending Merle L. Coohran, to be chief warrant officer (W-4), which nominations were received by the Senate and appeared in the CONGRESSIONAL RECORD on March 18, 1970.

EXTENSIONS OF REMARKS

ADDRESS BY HEW SECRETARY FINCH BEFORE THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

HON. WILLIAM A. STEIGER

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 19, 1970

Mr. STEIGER of Wisconsin. Mr. Speaker, on February 7 HEW Secretary Robert H. Finch addressed the National Association of Secondary School Principals. The Secretary emphasized two challenges which face our secondary schools: student unrest and effective education. While realizing that to a certain degree student unrest reflects the tensions within our society as a whole, Secretary Finch rightly pointed out that the educational process has often failed the student and that the Nixon administration is committed to learning much more about education techniques and the development of cognitive skills. Part of this challenge lies with developing an awareness and concern for our environment. "And in this battle," the Secretary states, "there is no weapon more critical than education."

I think my colleagues will find the Secretary's remarks of interest. The complete text follows:

ADDRESS BY THE HONORABLE ROBERT H. FINCH

As my own first item of business, let me convey to you, at his personal request, President Nixon's greetings. Even though the press of business has prevented his personal attendance, he asked me to express his concern and close attention to your endeavors.

Your convention theme, "What's Right With American Education", provides a healthy concern with the positive. I don't think by that focus that you are ignoring the problems and tensions which secondary schools are experiencing. Since you are at the eye of the storm, you obviously know that there are no rugs big enough to have some of your problems swept under.

It is in that same spirit of the positive that our own efforts are proceeding. And when we look at what is wrong with education, we do it in the sure knowledge that self-examination is the indispensible first step toward the achieving of the quality education Americans have always expected.

But to assess both what is wrong and what is right with American education—to es-

fellow prisoners expect discharge relatively soon and are presumed to have sufficient self-control not to attempt escape or misbehave. Despite this (though my research has been of short duration and with a fairly small group) there were two physical assaults of a nonsexual nature, one rape and one serious group-rape attempt.

The special nature of these prisoners makes them susceptible to a unique kind of discipline—if they do not toe the line, they can always be transferred to the parent institution, a maximum security prison. The implications are obvious. Few punishments that the administration can do directly are as potentially severe as what might be done by a general prison population. Even if they manage to avoid direct assault, it is at the cost of constant vigilance and constant terror.

SERVING CONSCIENCE RATHER THAN A CAUSE

Who are these men who find themselves in this position? When I began my actual visits to the prison on June 20, 1968, there were 739 imprisoned violators of the Selective Service law. This is an artificial figure because over three-fourths of them are Jehovah's Witnesses; their primary objection is not necessarily on a political or moral ground to this or any war; it is in terms of allegiance. They refuse to serve the government in any form. The decision was made for them; they are men obedient to authority—in this case, their church rather than their country.

Eliminated also are those who were not opposed to the war but who had been involved in conflict with law in general. They registered for nothing, were chronic criminals, and not registering for the draft was merely one of many crimes oommitted. I was not interested in either of these groups but in those who had made a decision of conscience to enter prison. Thus, I was left with somewhere between 60 and 70 men. Therefore, my small sample ended up being close to one-third of the total imprisoned population of war resisters.

Most people will visualize the war resister in prison in terms of the college radical. The imprisoned war resister is not this at all. He is generally less political, less self-dramatizing or self-serving, quieter, more withdrawn, more idealistic, more introspective and not generally an aggressive leader type. He is someone who is primarily serving his conscience rather than a cause. This, of course, is a generalization that is only partially true, for the most striking feature of the group is this heterogeneity.

An interesting aspect is that about 40 percent of these boys were eligible for draft deferments. Some were seminarians. Some were 4-F: one limped badly from childhood polio, one had severe asthma, another was almost blind. Invariably they refused to take this course, and the reasons most often given were twofold. First, if they are to preach or counsel against the war, what respect could a person receiving such counsel have for someone protected by a 4-F status. Second, they felt it would be an abandonment of all those who shared their emotional beliefs but had no built-in excuse for avoiding this crucial decision.

A SCAPEGOAT GROUP

In essence then, what we have, as demonstrated by the small number and nature of these men, is a testament of the effectiveness of the draft law. The United States Government has assumed that if you punish people severely for not going to the army, they will go—and, indeed, for the most part they do.

Not all of them though, because there are thousands who emigrate to Canada. More important, however, are the devices available—if the conscience of the individual permits—for avoiding the draft besides going to jail. You can lie and claim to be a religious objector, which will be effective in some cases; you can manufacture false medical records; you can claim to be a homosexual; you can claim to be a drug addict; you can become a drug addict.

All of these dodges are readily used, for while there are only a litle over 700 imprisoned war resisters, there are estimates of 25,000 to 30,000 draft evaders. And draft evaders do not include those who have legitimate deferments for illegitimate reasons, i.e., those who have developed physical or psychological ailments for purposes of evasion.

In addition, until recent years, the perpetual graduate student role became a way out. Prison authorities expected a flood of Selective Service violators when draft deferment was not allowed for graduate studies. The flood has not materialized. What has been flooded instead are the teaching professions. Draft deferment is offered by many larger cities in critical and often not so critical areas. In New York City alone, with the changing of the draft laws, there was an increase of 20,000 in the number of applications for teaching positions, primarily from men under the age of 26. So there are many ways to beat the draft.

What we have in prison, then, is a population that chooses not to "beat the draft" but chooses instead to bear witness against it. In essence it is a scapegoat group because under the broader interpretation of the law most of these prisoners are sincere conscientious objectors. It is presumed that their imprisonment will serve as a deterrent to others who may not have the same idealism.

Society may find it necessary to have such scapegoats in order to function, but one would think that there might be some recognition of this role and a consequent tempering of justice with mercy. The opposite seems to be the effect. The political war resisters are discriminated against in every way. Whereas Jehovah's Witnesses can expect parole after 12 to 15 months imprisonment, the political war resisters or moral objectors cannot. Up until recently they have not been granted parole at all. And as the frustration with the war increases to do the sentences—up to four and five years now.

ONE SEES A HARDENING

What happens to these young men when they enter the prison? Prison is both easy and hard—easy in the sense of the rawness of life, hard in the psychological sense. There is less brutality and more humiliation. A serious deterioration often occurs, a marked increase in depression, a loss of self-confidence, a sense of despair. These men feel they are isolated from the world about them, that they are forgotten men, and indeed they are. There is very little hue and cry in the community. They find few allies within the prison (the conventional prison chaplain and the chaplaincy service in general does not do credit to the churches).

These young men are struggling through a difficult period of their lives. Because of their youth their sense of identity has not yet been established, and they are put into a situation where individuality and identity are discouraged. They are treated as property to be moved around. The result is an arrest in that self-pride and self-confidence normally consolidated in this period.

This situation is particularly destructive in the sexual area. When you take a 19-year-old who has not yet completely established his sexual identity, who is not firmly in command of himself as a man, deprive him of his normal sexual outlets and then expose him constantly to homosexual seduction you run the risk of crippling or distorting his normal sexual development.

Another aspect of these men is their coarsening in all areas. They become less gentle and considerate, more survival oriented, more paranoid. They are keenly aware of this and are frightened that the changes may not be reversible after release. Their thought is also directed away from pacifism and idealism. They learn to hate the country and its institutions because, as represented by the prison, they warrant hatred.

Almost to a man they describe their change as a reconsideration of the idea of nonviolent resistance. A former Catholic seminarian said to me: "When I came in here I knew precisely where I stood. I would have called myself a Christian pacifist. Now all that is changed."

"Which has changed," I asked, "the Christian or the pacifist?"

"Both, I'm afraid, the pacifist as an act of reason, the Christian as an act of despair."

In every direction, therefore, what one sees is a hardening: an increasing hostility toward the environment, combined with an increasing distrust of self.

It is an enormous price we extract, not just from these men but from all prisoners. This country has ruled out cruel and unusual punishments. We no longer flog a man, cut off an ear or brand him for crimes; we merely "imprison." But the problem with imprisonment is that it becomes a word and words become institutionalized, and the vast majority of thinking men have never visited a prison. (How many readers of this journal have spent any appreciable time in a prison?)

What is cruel and what is unusual? We are taking from these youths two to five years of their lives. If a man is given an option whether he will sacrifice a lung that has become malignant to guarantee a continuation of life for a few more years, it is a rare person who refuses it. And this usually occurs in the middle or late years. What, then, is the value of these irreplacable years of youth, vigor and virility? What severity of crime warrants this punishment?

Yet how readily does society deprive these young men of this most precious and rarest of commodities, and how readily do the normal watchdogs of our society, the keepers of morality, the defenders of right close their eyes, maintain their silence, and sleep with conscience.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

SUPREME COURT OF THE UNITED STATES

The ACTING PRESIDENT pro tempore (Mr. EAGLETON). In executive session, the Chair lays before the Senate the pending question, which the clerk will state.

The ASSISTANT LEGISLATIVE CLERK. The question is, Will the Senate advise and consent to the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States?

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CHURCH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

THE CUSTOMARY CONFIRMATION TEST IS NOT SUITABLE FOR SUPREME COURT NOMINEES

Mr. CHURCH. Mr. President, the Senate is being asked to advise and consent

to the appointment of Judge George Harrold Carswell as an Associate Justice of the Supreme Court of the United States. If he is to be given the benefit of every reasonable doubt, which is the usual practice of the Senate in passing on Presidential appointments, then Judge Carswell should be confirmed. The question is, Whether the usual practice should be followed when it comes to filling vacancies on the Supreme Court.

I believe that it should not.

The Supreme Court, a separate and coordinate branch of the Federal Government, plays too vital a role in our national life to allow for the appointment of men whose qualifications are subject to serious doubt. During the 1968 presidential campaign, Richard Nixon said that he would appoint only men of high distinction to the Supreme Court. The record clearly reveals that Judge Carswell fails to meet such an exacting test.

If he were being nominated for a legal position in the executive branch of the Government, there is no question but that Judge Carswell should be confirmed. In such cases, the Senate quite properly gives the President wide latitude in the exercise of his discretion. As the Nation's Chief Executive, it has long been recognized that the President is entitled to have in his administration men and women of his own choice. Except on those rare occasions when the evidence points to immoral or unethical conduct on the part of the nominee, the consent of the Senate is given in a routine manner for the purpose of accommodating the President.

After all, executive branch officials, from the highest to the lowest, act on behalf of the President. The most important among them form his executive "team." Whether they serve as members of his Cabinet, as directors of Federal agencies, or as his ambassadors abroad, they must be individuals in whom the President can repose personal confidence, with whom he can easily work, and from whom he can expect full political support.

For example, a Secretary of State, though charged with great responsibility in the conduct of American foreign policy, remains, nevertheless no more than an arm of the Presidency. He may offer advice which the President is free to accept or reject. However, once the President makes his decision, the Secretary of State is obliged both to accept and to implement the decision to the best of his ability.

Typically, a Secretary of State might urge the President to submit a larger foreign aid bill to the Congress. Taking his entire budget into account, the President might decide against it, thereby overruling his principal foreign policy adviser. It then becomes the duty of the Secretary to publicly defend the smaller bill as if never a doubt had crossed his mind.

A treaty may be waiting submission to the Senate. The Secretary of State privately urges the President to delay moving it, owing to the delicacy of current negotiations on another front. But the President feels that other considerations are of greater importance. Despite the Secretary's dissent, the President instructs that the treaty be submitted to the Senate. That settles the matter.

Presidential primacy over the executive branch is too well settled for argument. Abraham Lincoln once dramatized it when he submitted a proposition to his Cabinet and called for a vote. Every member of the Cabinet voted "No." The President voted "aye," and announced "The 'ayes' have it." Those who act as the President's agents—no matter how highly placed in the executive branch—draw their authority from Presidential writ. They act upon the direction of the President and they serve at his pleasure.

Now, I submit that this principal-and-agent relationship which exists within the executive branch has no applicability whatever to the Supreme Court. An Associate Justice of the Supreme Court is not a subordinate of the President. Unlike executive officials, a Justice is part of no political administration. He takes no directions from the President. Indeed, he is expected to stay aloof. Mr. Abe Fortas, although a longtime friend of President Johnson, learned how ill advised it is to remain a White House confidant, once appointed to the Supreme Court.

The framers of the Constitution took special precautions to safeguard the independence of the Federal judiciary. The Federal courts are protected against being bent to the will of Congress or the President by specific constitutional guarantees for maintenance of salary and lifetime tenure. Moreover, the Founding Fathers implicitly recognized the gulf which separates Federal judges from the appointive officers in the executive branch. The latter generally may be removed from office on order of the President. But a Supreme Court Justice, like the President himself, can be removed from the bench only by Congress through the difficult procedure of impeachment.

There is yet another striking contrast between nominees for judicial and executive branch positions, even though both are filled by Presidential appointment subject to senatorial confirmation. When a President leaves office, he is customarily joined by members of his executive team who had served under him in appointive posts during his administration. But this is certainly not true of the men he has appointed to the Federal judiciary. Least of all is it true of the Supreme Court.

In fact, we have today, as sitting members of the Supreme Court, two Associate Justices who have rendered decisions while six Presidents occupied the White House—Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon. There are three other Associate Justices who first took their seats on the Supreme Court during Dwight Eisenhower's term, four Presidencies ago. It must be clearly understood, consequently, that a nomination to the Supreme Court is "for the ages," not merely for the duration of the administration of that President who makes the appointment. It should be a sobering point to reflect upon, as we deliberate the nomination of Judge Carswell, that his expectancy in office is not limited to the 1970's but might last through the 1980's and extend into the 1990's as well.

Surely, the reasons why the Senate customarily applies a lenient standard to Executive appointments, giving the President so much latitude in the selection of his own official family, are utterly lacking in relevance when applied to the Supreme Court of the United States. Under our Constitution, the Supreme Court, highest tribunal in the land, presides over an independent judiciary, separate and apart from the legislative and executive branches of the Federal Government.

As the institution of the Supreme Court is unique, so the standard applied by the Senate in passing on appointments to the Supreme Court should be unique. If the test is to fit the office, it must be one of singular excellence.

A nomination to the Supreme Court belongs in the highest category of Presidential appointments. Such is the stature of the Court that it has been graced through the years with men of great distinction—John Marshall of Virginia and John Harlan of Kentucky; Charles Evans Hughes of New York and Earl Warren of California; Oliver Wendell Holmes and Felix Frankfurter of Massachusetts and Benjamin Cardozo of New York. These were men of differing political and philosophical inclinations, but they possessed probing intellects, profound insights and sensitive perceptions. These and others have represented all sections of the Nation—North, West, East, and South.

President Nixon has indicated a desire to fill the pending vacancy on the Court with a southerner. There are many fine legal minds in the South. There are Senators in this Chamber representing the South, serving today, whom I would willingly support for a seat on the Supreme Court. There are others already serving with distinction on the Federal judiciary in the South. But the President does not send us the nomination of one of these. Instead, he sends us a man of little depth and breadth.

In the course of the hearings, two distinguished law school scholars addressed themselves to the question of Judge Carswell's qualifications.

Louis Pollak, dean of the Yale University Law School, testified that Judge Carswell has "more slender credentials than any other nominee for the Supreme Court put forth in this century."

Prof. William Van Alstyne, who we should remember publicly supported the nomination of Clement Haynsworth to the Supreme Court, stated that Judge Carswell has shown nothing in the performance of his profession "to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States."

In earlier times, such damning testimony from expert witnesses would surely have resulted in rejection of the nominee. During the last century, the Senate refused to "rubberstamp" Presidential nominations to the Supreme Court. On the average, one out of four were defeated prior to 1900. The Senate exercised its confirmation role in a far more responsible way during the first 110

years of our Nation's existence than it has in the last 70. The time has come for us to begin once more to perform properly our constitutional duty.

In examining Judge Carswell's record on the Federal bench, one searches in vain for a mark of excellence. We have yet to be shown a single decision he has handed down that reveals any exceptional qualities of learning, any flash of brilliance, or any special insight. Taken altogether, Judge Carswell's service has been utterly pedestrian in character.

Even his suporters make no claim that Judge Carswell's career has been particularly distinguished. The strangest argument of all delivered in his behalf comes from Senator HRUSKA, of Nebraska, who was recorded in a radio interview as having said:

He is a good judge, has been and has great potential. But suppose he isn't a good judge? Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. Aren't they entitled to a little representation and a little chance?

In all charity, this extraordinary statement should serve as a fitting epitaph in the Carswell nomination.

The Supreme Court, our tribunal of last resort, calls for jurists of the highest caliber, who will dispense justice with fine impartiality and keen intelligence. Above all, the Court calls for jurists whose comprehension of the Constitution is as profound as their duty to uphold it is imperative.

As measured against these criteria, George Harrold Carswell is indubitably deficient. I must vote against his confirmation.

Mr. President, in the course of the last few weeks I have received a number of letters and telegrams from Idaho, from constituents who have voiced their opposition to the confirmation of Judge Carswell. I have selected a few of these letters as a representative sampling of this opinion. I have not had an opportunity to secure the consent of these correspondents to include their names in the RECORD. Rather than do so without their permission, I would prefer to read from their letters and to withhold their names, at this time. But, taken together, these letters do represent a cross-section of opinion in my State against the confirmation of Judge Carswell.

Here is a letter from Boise, Idaho. It reads:

DEAR SENATOR CHURCH: All I know about Carswell is what has been brought out in the news media. His record on civil rights and racism—alone would be enough to disqualify him from serving on the Supreme Court but I do not think his ability and stature as a Judge and Attorney warrant his confirmation to this high post.

I know you will vote as you think best—but it is my hope that you will vote against his confirmation. If he is confirmed we will have him for 30 years.

Here is a telegram from Moscow, Idaho:

Please vote against Judge Carswell's nomination for the Supreme Court.

Here is a letter from the AFL–CIO in Boise, Idaho. It reads:

DEAR FRANK: We urge you to vote against the nomination of Judge G. Harrold Carswell to be an Associate Justice of the United States Supreme Court.

We feel his record reflects a lack of reasoning, care, or judicial sensitivity overall, and nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction in the Supreme Court of the United States. Further, that the Administration's sole guide in making its selection was its southern political strategy.

We feel that for the senate to allow a nomination that is a calculated political attack on the responsible Negro leadership of this country would be a national tragedy. The Idaho State AFL–CIO urges the Senate to refuse to confirm the nomination.

Here is another letter which comes from Nampa, Idaho. It reads:

DEAR SENATOR: I have been asked as the executive officer of our Local to ask you to oppose the appointment of Judge Carswell to the Supreme Court.

We certainly felt that you took the proper stand when you opposed Judge Haynsworth and feel that Judge Carswell should be opposed for the same reasons.

We want to take this opportunity to thank you for your assistance and your concern so often in the past, and look forward to continued cooperation.

Here is a letter from a constituent in Pocatello, Idaho. It reads:

DEAR SENATOR CHURCH: Hopefully you will carefully consider the qualifications of Judge Carswell. His past history suggests a lack of competence and a tendency to conduct himself in a bigoted manner where minority races are concerned.

Here is another letter from Pocatello, Idaho. It reads:

DEAR SENATOR CHURCH: It seems like every time Nixon nominates another nobody to the Supreme Court you get a letter from me. In comparison to Mr. Carswell, Judge Haynsworth was by far the better man. In any event, I urge you to consider what the mediocrity of Mr. Carswell can do to the progressive ideas supported by the U.S. Supreme Court. It is truly amazing that out of several thousand qualified people Nixon would choose a man of such lack-lustre qualifications. Think about it!

Here is another letter from Moscow, Idaho, It reads:

SIRS: The nomination of G. Harrold Carswell to the Supreme Court is surrounded by conflicting testimony. If this man is not outstanding as a jurist and as a citizen, I urge you to vote against his confirmation. Mediocrity and expediency will accelerate the national divisiveness originated by the last administration and promoted by the present one. Confirmation of this man as a simple courtesy to the President would be a tragic neglection of responsibility at a time when people like myself are looking to see if the government can and will act to develop the nation so that life can be worthwhile for everyone.

A further letter from Boise, Idaho. It reads:

DEAR SENATOR CHURCH: I commend your rejection of the nomination of Judge Clement Haynsworth to the Supreme Court, and heartily support your conservation measures.

Now I strongly urge you to reject the nomination of Judge Harrold Carswell to the Supreme Court. Fatigue and harassment do not justify his confirmation: his presence would be an offense to the Blacks of the nation, and to anyone who opposes mediocrity on the bench.

Here is another letter from Boise, Idaho. It reads:

DEAR SENATOR: I would like to voice my opinion against the appointment of Judge G. Harrold Carswell.

The Supreme Court decides the most important cases in the nation in all legal fields, including labor law, civil rights, and civil liberties. If confirmed, Judge Carswell will sit on the Court for life, or until he resigns. His term is, therefore, likely to be several decades. The decisions he makes could affect the ability of Unions to organize and bargain collectively as much as any act of Congress. His treatment of lawyers appearing before him, his advice to sheriffs on how to re-arrest men whom he had freed, his aid to prosecutors to keep people in jail and counter his own decisions from the bench make him a dangerous addition to the U.S. Supreme Court.

I ask you to oppose the confirmation of Judge Carswell.

Here is another letter from Nampa, Idaho. It reads:

DEAR SENATOR CHURCH: As an Idaho citizen, I want to ask that you oppose the appointment of Judge Carswell to the Supreme Court.

I know that you opposed the appointment of Judge Haynsworth, and I feel that Carswell is even less qualified for this high position.

I know that we in Idaho can expect you to give this your most serious consideration and know that we can count on you to always have our best interests at heart.

Here is a letter from Osburn, Idaho. It reads:

DEAR SENATOR: I am writing to ask you to vote against the appointment of Judge Harrold Carswell to the Supreme Court. When the now famous "White Supremacy" speech of 1949 was publicized, I was willing to give Judge Carswell the benefit of the doubt (I, too, am a native Southerner who has changed his mind), but just yesterday I read newspaper reports that Judge Carswell has, in very recent years, sold residential property with racially restrictive clauses in the deed. I am not so charitable about that. If these latest allegations are true, then, perhaps the Judge's attitudes about the races have not changed so much after all, and if this is so, he is not qualified to sit on the highest court in the land.

Here is a letter from Coeur D'Alene, Idaho. It reads:

DEAR SENATOR CHURCH: I still feel, as I mentioned to you in my letter of November 26, that the appointment of a strict constructionist to the Supreme Court is a mistake, especially since below the Mason-Dixon line, "strict constructionist" is only another of the many euphemisms which boil down to "anti-Negro." Although I would personally favor a liberal judge, such as Judge Traynor of the California Supreme Court, probably the best choice for the country would be someone whose philosophy is midway between his and that of the latest nominee, Judge Carswell. Feeling as I do, it is my hope that you will oppose the Carswell nomination if you can do so in good conscience.

Here is a letter from Bovill, Idaho. It reads:

DEAR SENATOR CHURCH: The enclosed clippings say so much better than I can what is a serious problem in government today. We can not have the best when political

bartering makes us accept mediocrity. Please vote against Carswell and speak out against him. Yours is a voice that is heard.

Finally, a letter from Pocatello, Idaho. It reads:

DEAR SENATOR CHURCH: My husband and I wish to ask you to vote against confirmation of Judge G. Harrold Carswell to the U.S. Supreme Court.

After reading many reports about him in the newspapers and several newsweeklies, we can not see how it is possible for him to be qualified to sit in the seat that was too good for Abe Fortas.

The low esteem the judicial system in the U.S. is held in now will not be helped by a Carswell.

(At this point Mr. PELL took the chair as Presiding Officer.)

Mr. CHURCH. Mr. President, these are representative samples of opinions from many of my constituents against the confirmation of Judge Carswell.

Let me sum up the reasons why I shall vote against this nominee: In doing so I should like, once again, to stress the special responsibility that falls upon the Senate where nominations to the Supreme Court of the United States are concerned.

As I have attempted to point out, there is a vast difference between confirming appointees to the executive branch of the Government and confirming judges who will sit as members of an independent and coordinate branch of Government, a branch which is neither subject to direction by the President nor within his administrative jurisdiction.

As I mentioned earlier, the Senate, in the last century, used to recognize this distinction. It did not regard its responsibility to pass upon an appointment to the Supreme Court as comparable to the confirmation role of the Senate when it came to other Presidential appointees. As a result, one out of four nominations to the Court, on the average, was rejected by the Senate prior to 1900.

I think it is unfortunate that the Senate has tended, in more recent years, to blend all Presidential appointments together, and to assume that considerations which are applicable to the executive branch, where the President is entitled to wide latitude in the selection of his own official family, are also applicable to every other Presidential appointment. There is no logical reason why this should be so. Least of all, is there any reason why it should be so when it comes to men who will sit on the highest court of the land. Here, it seems to me, a special test is required, a test of unusual excellence.

When that test is applied to the nomination now before the Senate for confirmation, the nominee simply does not meet it. I have looked at the record. I have reviewed the hearings. I have carefully examined the committee report, fully weighed the arguments of those who favor the nomination and those who oppose it. I cannot find anywhere any evidence which would suggest that Judge Carswell has served on the Federal bench with that measure of distinction which ought properly to obtain when it comes to elevating him to the highest court of the land. If there is evidence, then let someone present it. If there is anyone with evidence that this high standard of excellence which should apply to the Supreme Court is met, in one way or another, and can be found in an examination and review of Judge Carswell's record on the Federal bench, then let it be presented now. No such evidence has been forthcoming, because no such evidence exists.

I have been handed a paper entitled "A Note on Senatorial Consideration of Supreme Court Nominees," a paper which will appear in the Yale Law School Review. It is a scholarly and careful examination of the question that is now before us.

I should like to read a portion of that article, because it bears out so strongly the argument I have made this morning.

The author writes:

I shall, however, open the discussion by taking strongly the position that a Senator voting on a presidential nomination to the court not only may, but generally ought to, vote in the negative if he firmly believes on reasonable grounds that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the court, and that on the other hand no Senator is obligated simply to follow a presidential lead in this regard or can really discharge his own duty by doing so.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. CHURCH. I yield.

Mr. TYDINGS. Mr. President, I am sure the Senator is acquainted with this matter, but let me refresh his recollection.

Does the Senator recall the circumstances confronting the Committee of Detail of the Constitutional Convention of the United States with respect to the selection of Supreme Court Justices?

Mr. CHURCH. I am generally acquainted with that discussion. And I think it is particularly pertinent to the question of whether the Senate should confirm the pending nomination.

Mr. TYDINGS. Is my recollection correct that the original draft or proposal prepared for the Constitutional Convention provided that the members of the Supreme Court were not to be selected by the President, but by the Senate of the United States?

Mr. CHURCH. The Senator is correct. As I recall, the reason for that proposal was to provide an additional check and balance, and also to fortify the independence of the judiciary and protect it against the possibility of executive control.

Mr. TYDINGS. Let me ask the Senator if it was not as a result of a compromise between those who felt that the President should nominate Justices of the Supreme Court and those who felt that the power should be retained in the hands of the Senate that the final terms of article II as they appear today were agreed upon—namely, that although the President would select a nominee, and send to the Senate the name of a candidate to fill a vacancy on the Supreme Court, that nominee would not sit on the Supreme Court until the Members of the Senate had seen fit to advise and consent on it.

Mr. CHURCH. The Senator is correct. And both roles were regarded as equally important. The President was to nominate; the Senate was then to pass judgment on the qualifications of the nominee to sit on the Supreme Court of the United States. And the confirmation power was viewed by the Founding Fathers as equally important as the appointive power.

Mr. TYDINGS. As a matter of fact, the relevant Federalist Papers, which were authored by Mr. Hamilton, spelled out the Senate's responsibility of advising and consenting and indicated that unwise choices of men who represented purely sectional or political nominations would not be permitted because the Senate would intervene.

Mr. CHURCH. The Senator is absolutely correct. It was contemplated that the Senate should exercise a checkrein on nominations to the Supreme Court to avoid this kind of possible abuse.

Mr. TYDINGS. Would the Senator agree that there is considerable difference between the responsibility and the function of the Senate of the United States in advising and consenting to the nomination of a member of the President's own personal Cabinet and the responsibility and the function of the Senate in advising and consenting to the nomination of what amounts to a lifetime position on the Supreme Court of the United States?

Mr. CHURCH. I not only agree, but I also endeavored in the course of my prepared remarks this morning to point out the great gulf that separates highly placed officers in the executive branch of the Government from Justices of the Supreme Court.

One can point to so many basic differences, but I suppose the most important of all is that anyone who serves as a Presidential appointee in the executive branch of the Government serves as an agent of the President. These executive officers are subordinates of the President. They take their instructions from the President. Their judgment can readily be, and often is, overruled by the President.

They serve at the President's pleasure and are subject to his dismissal. They are, in every sense of the word, Presidential agents, a part of his own administration, for which ultimately the President himself must assume responsibility.

Now, none of this is true—none of it—concerning a Justice of the Supreme Court. He is not a part of the President's administration. He is not subject to the President's direction or control. While he holds office, his salary may not be reduced. He holds lifetime tenure. When he makes a decision, he does not consult with the President concerning it. Indeed, he associates with the President, even in an informal way, at his peril—as the sad experience of Justice Abe Fortas so well bears out.

Everything about the Supreme Court, every specific provision contained in the Constitution intended to strengthen and fortify the independence of the judiciary, makes it clear that appointees to the court were to be treated differently from those who serve under the President in the executive branch of Government. So

the lenient standard we use in the latter case should not be applied to the former. Indeed, the importance of the Court is such that the Senate ought to insist upon a standard of the highest excellence, in passing judgment upon Presidential nominees to the Supreme Court. Many of them, as I earlier pointed out, serve during the terms of many Presidents. Two of them today served with six different Presidents. In a very real sense, an appointment to the Supreme Court is an appointment for the ages.

I want to underscore what the Senator from Maryland had in mind in asking me this question. When it comes to Supreme Court nominees, it is the duty of the Senate to apply an exacting standard. That standard simply is not met by this nominee; and no Member of this body has produced any evidence to suggest otherwise.

Mr. TYDINGS. I wonder if the distinguished Senator from Idaho would permit me to read to him from some very pertinent pages of Federalist Papers Nos. 76 and 77, which deal directly with the responsibility of the Senate to advise and consent on nominations to the Supreme Court. Before quoting from Federalist Papers 76 and 77, again I wish to point out, as we have discussed and as the distinguished Senator discussed earlier, in the Constitutional Convention there was much support for appointment of Judges by the Senate alone, a mode which was approved on July 21, 1787, and carried through into the draft of the Committee of Detail. The change to the present mode came on September 4 in the report of the Committee of Eleven and was agreed to nem. con. on September 7.

This last part, I think it can be reasonably concluded, must have meant that those who wanted appointment by the Senate alone, and in some cases by the whole Congress, were satisfied that a compromise had been reached and did not think the legislative part in the process had been reduced to the minimum, as some of our colleagues in the Senate would have us believe today.

The whole process today suggests a very reverse of the idea that the Senate was to have a confined role. I think these passages from Federalist 76 and 77, written by Alexander Hamilton, are to the point. I now quote from Federalist No. 76:

> But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.
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> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.
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> It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.
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> If it be said they might sometimes gratify him by an acquiescence in a favorable choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The power which can originate the disposition of honors and emoulments, is more likely to attract than to be attracted by the power which can merely obstruct their course. If by influencing the President be meant restraining him, this is precisely what must have been intended.

I think the language in the Federalist Papers stating:

> He [the President] would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

The paper almost could have been written having in mind the debate on the present nomination now before the Senate.

Mr. CHURCH. I agree with the Senator completely. I think that the extracts he has read into the RECORD from the Federalist Papers establish beyond refutation that the Founding Fathers believed the confirmation role of the Senate to be of the most serious and important character. As I mentioned a moment ago, it was the equivalent in every way of the appointive power itself.

It was meant, particularly where the Supreme Court is concerned, to hold the President to a high standard.

If we are not going to do what the Founding Fathers intended, if we are not going to be mindful of our responsibility, or the way the Senate exercised it during the last century; if we are going to make our standards ever more lenient so that the President can do pretty much as he pleases, even when it comes to the appointment of the highest Justices of the land; then we fail in our duty and we do not give effect to the role that was intended for the Senate by the Founding Fathers.

I know that the Senator shares with me an apprehension about the declining role that the Congress of the United States plays in the Government. Nearly every serious student of government today has observed that the Congress is, and has for a long period of years been, in decline. I think that is a tragic development. I know that there are many Members of this body so greatly exercised about it that an attempt is now being made to reassert senatorial prerogatives in many fields—in the field of foreign policy, where we have largely abdicated our role to the Presidency to the point where Presidential powers have become practically plenary in deciding on war or peace. I know that an attempt is being made to restudy the function of the Congress in the matter of regaining the control that the Constitution intended us to wield over the public money.

More and more, the purse strings have fallen into the hands of the President.

If we are to uphold the Senate, if we are to keep faith with what the Constitution of the United States intended, then the time has come for us to begin to give substance once more to the confirmation role of the Senate. Otherwise, our powers will continue to erode, the Presidency will loom ever larger until, at last, it becomes a Caesardom.

Anyone weighing the trend of power over the past 50 years who is unconcerned about the declining role of Congress has little regard for the checks and balances which were written into the Consitution to preserve the Republic.

As the Senator well knows, every representative government is jeopardized by the growth of excessive executive power. That is what happened to the Roman Republic. Let it not happen to ours.

Mr. TYDINGS. I wonder if I could address another line of questioning to the distinguished Senator from Idaho. I wonder if the Senator would agree with me that in the function of a judge, whether he be a police magistrate in a small West Virginia county, or whether it be a judge in a U.S. District Court for the Northern District of Florida sitting in Tallahassee, or whether he be a judge for the circuit court of Harford County sitting in Bel Air, Md. There is no more vital or important requisite than the ability to give every person before him a fair trial, no matter how poor or unpopular.

Would the Senator comment on that?

Mr. CHURCH. I agree fully.

Mr. TYDINGS. I know the Senator from Idaho has been very busy, but has the Senator, by any chance, been aware of the testimony of a young Department of Justice lawyer named Knopf, who, after subpena, came before the Judiciary Committee of the U.S. Senate and told what to me was a shocking story of judicial intemperance and unfairness that

would have been unbecoming for a trial magistrate in the poorest county in my State or in any other State, but, coming from a U.S. district judge, was unbelievable.

Mr. CHURCH. As a member of the committee who heard that testimony, I was going to suggest to the Senator that he read it into the record.

Mr. TYDINGS. Let me, first of all, tell how Mr. Knopf, who was a young lawyer for the Department of Justice, came to testify before the Judiciary Committee of the U.S. Senate.

After the first several days of the hearings, he called my office—I had never heard of Mr. Knopf before—and said that he had material relating to the Carswell nomination that he felt was important. This was a man who was employed at the will of the present Attorney General of the United States. I said I would see him. I did see him.

I could scarcely believe what he told me, except that it correlated or confirmed the testimony given Thursday by another lawyer from New York City.

I asked Mr. Knopf whether or not he would be willing to testify. He said he was fearful, and he felt that he could only testify if he were to receive a subpena from the Senate of the United States.

So he was served with a subpena from the Senate of the United States, and he came to testify. Although the national news media had little to say about his testimony, and although there were very few members of the Judiciary Committee present when he testified, I was present and heard what he said, and it is in the record; and it is absolutely incredible that a man nominated to the Supreme Court of the United States should have engaged in the intemperate that Mr. Carswell did when he was a judge of the U.S. district court for the Northern District of Florida.

Let me read now from his testimony. I am particularly interested in the testimony that appears on pages 175 and 177, I will be quite frank with Senators, until this testimony came in I was not as deeply disturbed by this nomination as I have been since the testimony came into the record.

Mr. Knopf, by way of background, attended Columbia law school. When he graduated from law school and passed the bar, he volunteered to work with the law students civil rights research council. This was an organization of law students who wished to assist civil rights lawyers. Being law students or recent gradutes, they did no try any cases. They went down to assist various lawyers, who had volunteered for 1-week or 2-week periods to work with a voter registration project in the South, including the panhandle of Florida.

Mr. Knopf went down to Florida and was there in August, and part of September. He was assigned to a CORE voter registration project to register black people in the northern area of Florida.

The CORE volunteer workers, many of whom were from Florida itself, some of whom came from the North, did assist in the registration of black people so that they could vote in the Federal elections in November.

I shall now quote directly from the testimony of Mr. Knopf, on page 175:

As I stated, the town, the whole general area was extremely hostile. We were harassed by the police. We were harassed by the white populace in general. We felt that there was no chance of a fair trial in the local courts. I believe the courtrooms were still segregated. Negroes did not use—they had special rest room facilities and so on. We believe there hadn't been Negroes serving on the jury. This was our understanding anyway, and we were under the belief that Federal law permitted these registration workers, gave them the right to go and solicit, constitutional right and statutory right to go and help black people register in Federal elections, and we felt that this right would be thwarted, if it had to be, if workers were to be tried in a court where it was felt they could not be assured of impartial treatment.

Therefore, the attorneys instructed me to file removal papers, believing that it was a Federal matter, since these workers were operating under Federal law, there were Federal statutes regarding the right to vote, and that perhaps they would get a fairer trial within the Federal court.

Now, he is referring to a specific instance when several volunteers, the majority of them from Florida, went on to a plantation to suggest that black sharecroppers register to vote. One of those black sharecroppers was a relative of one of the young people endeavoring to get them to register. The property that they were on was reached by a road leading from the public highway and was not posted and not fenced.

The overseer of the farm or plantation heard about it, came along, and asked them what their purpose was in being on the property. They explained to him that they were encouraging the people to register and vote. He told them that they were trespassing, it was on private property. They said they did not realize it, that they would walk right to the road and get off.

He said, "Oh, no, you are going to be arrested."

He had them arrested, and he took them into a local court, where the local judge refused to permit them to be represented by counsel, because the counsel was not admitted to the bar in Florida, and even had the counsel thrown out of the courtroom. He refused to honor their removal petition to the U.S. district court, although under the law the filing of the removal petition automatically divests the State court of jurisdiction. The mere filing of the removal paper is all that is necessary.

These young people were thrown in jail, and they were fearful for their physical safety. So they filed a writ of habeas corpus in Judge Carswell's court to insure the removal of their case, as was their statutory right, to the U.S. district court in Judge Carswell's district.

Let me read to you from Mr. Knopf's own testimony—and remember that by his mere presence at the hearing, he was risking his job with the Department of Justice.

I asked him:

Tell the committee to the best of your memory what you observed.

Mr. KNOPF. Yes.

Senator TYDINGS. And we are particularly interested in Judge Carswell's attitude.

Now, remember, this is not some lawyer from New York, or some lawyer from Minnesota or Maryland or somewhere else. This was an employee of the Department of Justice, testifying under subpena before the Committee on the Judiciary of the U.S. Senate. I am only sorry that more of my colleagues were not there to listen to him.

I quote, now, from the testimony of Mr. Knopf. Senators will find this on page 177 of the hearings record:

Mr. KNOPF. It is relatively clear in my mind. I remember this. This was my first court room experience—

Any lawyer in this body knows he remembers his first court room experience very well.

This was my first courtroom experience, really, out of law school, and I remember quite clearly Judge Carswell. He didn't talk to me directly. He addressed himself to the lawyer, of course, Mr. Lowenthal, who explained what the habeas corpus writ was about, and I can only say that there was extreme hostility between the judge and Mr. Lowenthal. Judge Carswell made clear, when he found out that he was a northern volunteer and that there were some northern volunteers down, that he did not approve of any of this voter registration going on and he was especially critical of Mr. Lowenthal in fact he lectured him for a long time in a high voice that made me start thinking I was glad I filed a bond for protection in case I got thrown in jail.

How is that? How is that for judicial temperament, for a starter?

I really thought we were all going to be held in contempt of court. It was a very long strict lecture about northern lawyers coming down and not members of the Florida Bar and meddling down here and arousing the local people against—rather just arousing the local people, and he in effect didn't want any part of this, and he made it quite clear that he was going to deny all relief that we requested.

I ask the Senator from Idaho, is it not the basic requisite of any judge, whether he is a people's court magistrate or a judge of the U.S. district court, that he is basically fair, and does not prejudge a case on the basis of his own personal biases and prejudices?

Mr. CHURCH. The Senator is quite right. The capacity for objectivity is one of the most important attributes that a judge can have, as well as a capacity to pass upon questions that are brought before him in a calm and unimpassioned manner.

Mr. TYDINGS. If this were the only instance in the record where this man, nominated to be a Justice of the Supreme Court, had permitted his prejudices, his hostility, and his biases to show and to influence his conduct as a judge, perhaps we might forgive him. But this record is replete with instances of that kind.

When I hear that some of my colleagues are tired and fatigued, worn out because they have had one fight on a nomination from the President, which was turned down, and that even though this nominee is much less fit than the former, they are too worn out or too fatigued to make a fight, I am concerned.

Mr. CHURCH. That is just a confession of abdication of our responsibilities.

Mr. TYDINGS. Let me call the attention of the Senator from Idaho to another witness we had, Professor Clark, who was responsible for the entire civil rights litigation in the State of Florida.

His testimony is equally strong, or even stronger than Mr. Knopf's. I refer the Senator particularly to page 227 of the record.

Mr. President, I ask unanimous consent that all of Professor Clark's testimony, beginning on page 221, be printed in the RECORD, at this point.

There being no objection the testimony was ordered to be printed in the RECORD, as follows:

TESTIMONY OF LEROY D. CLARK, ASSOCIATE PROFESSOR, NEW YORK UNIVERSITY LAW SCHOOL

Mr. CLARK. My name is Leroy D. Clark, and I am an associate professor at the New York University School of Law. I have been on the faculty at New York University for approximately the last 2 years. From 1962 through 1968, I was staff counsel to the NAACP Legal Defense Fund, and in that capacity after the now Judge Motley left our office, I was put in charge of the entire civil rights litigation in the State of Florida, and I come to make a statement with that background, because I would suggest that there is not a lawyer in the country today who has appeared before Judge Carswell on more cases with specific reference to civil rights matters, and indeed on each occasion on which I appeared before Judge Carswell, it was in connection with a civil rights case.

I come here, however, not as a staff member of the NAACP legal defense fund, but to represent the National Conference of Black Lawyers. Our organization was founded in Virginia in December of 1968, to challenge the racism in our legal system, to articulate the needs of the black community, and to provide the legal expertise necessary in the black American's struggle for equality. We number in our ranks attorneys representing the entire spectrum of both the private and public sectors, as well as elected governmental officials from the local, State and national levels.

On behalf of the National Conference of Black Lawyers, I come before you today to speak in opposition to the confirmation of Judge G. Harrold Carswell. In the view of our organization, Judge Carswell is fit neither professionally nor personally to sit as an Associate Justice of the U S. Supreme Court. The acquisition of equal rights of citizenship for black people in this country has been a long and difficult task and in numerous instances almost totally dependent upon rulings by the Federal courts. As a Federal district judge prior to his recent elevation to the court of appeals, Judge Carswell was in a position to fulfill some of the American promise of equal rights under law. However, in disregard of the civil rights pronouncements of the Supreme Court, Judge Carswell frequently announced prosegregationist rulings which were then reversed by the court of appeals.

Moreover, repeatedly through the use of procedural devices, in cases in which I appeared before him, and the exercise of his broad judicial discretion, Judge Carswell caused unconscionable delay in civil rights cases, and limited their holdings to the narrowest possible scope.

In *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (1962) the court of appeals unanimously rejected the school desegregation plan approved by Judge Carswell and required the school board to take further action toward desegregating the public schools. In that case, the court of appeals also unanimously reversed Judge Carswell's procedural ruling which had eliminated the claims of racial discrimination in the assignment of teachers and other school personnel.

Whether as a question of law or one of fact, we do not think that a matter of such importance should be decided on a motion to strike. (306 F2d at 868.)

I would suggest that no competent unbiased judge could have made that kind of blatantly inappropriate ruling which as a matter of Federal procedure was long settled.

In *Due* v. *Tallahassee Theaters Inc.*, an action against theater managers, city officials, and the county sheriff alleging a conspiracy to enforce segregation, Judge Carswell again dismissed the complaint against some of the defendants and granted summary judgment as to another.

The court of appeals again reversed Judge Carswell, and in many of these cases you will note that no elaborate description of the law is given because none is needed, because the law was firmly settled on these procedural points at that time. Judge Carswell took these procedural devices, I would suggest, as a means of delaying the civil rights goal.

The court in that case said:

"The orders of the trial court dismissing the complaint for failure to state a claim on which relief could be granted can be quickly disposed of. These orders were clearly in error. (333 F. 2d 630 (1964) at 631.)"

Singleton v. *Board of Commissioners of State Institutions* was a case in which I was counsel. This was a case which arose out of the St. Augustine demonstration. We had four young black children ranging in age from 14 to 16 years old, who were incarcerated in the State reformatory for participation in a sit-in demonstration which subsequently was found to be unconstitutional. We were trying to get the children released from the reformatory. We filed a writ of habeas corpus asserting that the incarceration was illegal.

At this time the children had not even been convicted. We were simply trying to get them out of the reformatory prior to their trials. The trial judge in St. Augustine held children were not entitled to bail, so that adults who were arrested in the same demonstration were released and these four children were put into the State reformatory.

We tried all sorts of collateral proceedings in the State court to have the children released. We then decided that tactically the only way we could get those children out of that reformatory was to take the risk of filing a suit to desegregate that reformatory.

The reformatory was in fact segregated from top to bottom, with the black children being kept in what I can only describe as shacks, while the white children were put in the new buildings on the grounds.

We were running one of two risks: That the children would be kept in the reformatory and subjected to harassment, or that the reformatory officials would want to get these troublemakers out. Fortunately, they did the latter, and within 2 weeks after filing our complaint in the Federal district court, the children were released from the reformatory.

I note also they were released prior to the time they were supposed to be released. I anticipated that Judge Carswell would at that point dismiss our complaint to desegregate the reformatories. That is precisely what Judge Carswell did. And, I took Judge Carswell up on appeal, and he was reversed.

He asserted that the case was moot because our four plaintiffs were no longer in the reformatory. Again, I suggest to you that it was either one of two things, either judicial incompetence or bias, because the law was fairly settled that when a major public institution such as those State reformatories were proven to be segregated, that the case was not moot on the set of facts which Judge Carswell had before him.

I will not repeat the long period of delay and dilatory tactics which Judge Carswell adopted in the *Steele* case.

Senator TYDINGS. What case?

Mr. CLARK. The *Steele* case, *Steele* v. *Board of Public Instruction of Leon Country*, which Congressman Conyers has given you the details on. It took me, and I was counsel in that case, from May of 1964 until May of 1967 to secure a change in a desegregation plan where I was prepared to prove in 1964 that in a black school population of 16,000 students, only four students were attending white schools, and Judge Carswell did not see fit to revise that desegregation plan.

Senator TYDINGS. Would you tell us a little bit about it? I think that the *Steele* case is a very important case. You go into a little more detail in your statement, and I think it would be interesting for the Senators to hear a little bit more about how that case was delayed for 3 years.

Mr. CLARK. We followed the typical process after a suit has already been filed in a county, as had been done in this county. It was to bring on a motion for further relief.

At the point where it was clear that the desegregation plan was not working, and in 1964 it was impossible for any judge sitting anywhere in the Fifth Circuit to not know that four children out of 16,000 was an inadequate plan, we filed a motion for further relief.

This was the appropriate form to revise the desegregation plan. We could not get a hearing, and I finally had to file a motion for a hearing. These hearings in other courts and before other judges, when they were filed were granted as a matter of course. That is, the filing of the motion meant you got a hearing date, and I would suggest also that the periods of time that it took to get a hearing before Judge Carswell were inordinately long, if I compared it to my appearance before other judges in the State of Florida, and I appeared before practically every judge in that State, including a few who are now on the Court of Appeals.

When we got our hearing, then there was another delay before you get a ruling, and then when the ruling came, it did not address itself to the basic issue in the motion, namely, a revision of the plan.

Judge Carswell at that point told us that the defendants were complying with his previous order, which was not the point of the motion at all. We were saying, look, this plan is not working, and it must be revised. So we don't get a ruling.

Now, I suggest that that, again, is either one of two things, either it is judge who has not read your papers, and therefore does not know what your basic allegations are, or has deliberately ignored your basic allegations, because as any lawyer who knows anything about procedural matters would know, at that point you could not take an appeal; because if you took an appeal, the appellate court would say: But the judge has not addressed himself to your basic allegations, so therefore we don't know what his ruling is.

So you could bounce up, get essentially a meaningless kind of statement from the court of appeals, and you would be right back in the district court and, again, you would have lost 5 or 6 months, and I suggest that from my view Carswell knew that.

We then had to file a motion asking him: Would you please rule on our motion, and finally we got from Judge Carswell this statement, because I asked for a ruling on a motion or at least a hearing, so we could produce evidence to show him how this desegregation plan was operating.

Judge Carswell's statement in ruling on my motion was that no evidence could persuade the court to reorganize a desegregation plan, and evidence to that end "would just be an idle gesture regardless of the nature of the testimony."

Now, I can only read that as a statement that no matter what we showed Judge Carswell about the inadequacy of the desegregation plan, some 7 or 8 years after the Brown decision, that he was not going to review that case.

Now, one can view that as strict construction, literal construction, or one can view it as a deliberate attempt to rule against plaintiffs with limited resources and limited amounts of money, and limited numbers of

lawyers, and say: All right, take me up. Get me reversed.

If I had had time, I could document now at least 12 or 13 other instances in which Judge Carswell ruled against us on subsidiary motions for subsidiary points of law, in which he was wrong, but in which we could not take an appeal because we literally did not have the money and the time, and we had to devote our energies to other priorities.

For example: in *NAACP v. The State Board of Parks*, I filed a suit to desegregate the State Parks. In 1964, all of the State Parks in the State of Florida were segregated. Brochures were sent out announcing to black people as to which parks they could attend and which parks whites could attend. There were racial signs up at entrances.

We could prove this. It was a very simple matter of proof. We had photographs, we had witnesses, and indeed when the other side came in, they admitted that the parks were segregated and had been segregated. They did not assert that they had at that moment any plan for desegregation. They said that: Well, we will start on it.

So I said to Judge Carswell: But we would like an injunction. I know that they say they are going to start to desegragate the parks, but we would like an injunction. And I believe that under the law we are entitled to it, and indeed we were, because if at that point you prove your case, the defendant cannot come in and say: Oh, I am sorry, I am going to do better in the future.

You have a right to be protected by an injunction of a court of law, so that if the defendant continues this behavior in the future, you have the right to come back in on a contempt proceedings, from which other kinds of consequences flow.

Need I say that Judge Carswell refused the injunction in that case, and asserted that, well, the defendants say they are going to desegregate. We had no way under those circumstances, really, to require reporting from the defendants, which we would have required if there were an injunction.

They could have been made to come back 6 months later and say: We have taken down the signs, we have revised the brochures, we have informed our employees that this is the policy of this board.

We were totally unprotected in that circumstance. We had to rely on the good faith of people who did not see the need to desegregate their institution until we filed suit.

Now, this unfortunately occurred at the time of the St. Augustine demonstrations, with three to four hundred people being arrested every week. There was absolutely no time or energy to spend on that kind of appeal, so we could not take the appeal. But Judge Carswell was wrong.

I do not want to belabor this with the committee; I know you have heard many witnesses today, and a great deal of rhetoric.

Senator TYDINGS. Professor, you take the time. We want to hear everything you have to say.

Mr. CLARK. In closing, let me say this. That the National Conference of Black Lawyers urges this committee to weigh carefully, the analysis we have made of Judge Carswell's suitability for the United States Supreme Court and weigh it along with those others that will be and have been made on his professional and other qualifications.

The constitutional requirement of confirmation by the Senate must mean more than a perfunctory ratification of the President's choice. The Supreme Court plays a unique role in the shaping and growth of our institutions. It describes the contours of freedom and sets the course of national direction. It is the court from which there is no appeal—the last resort of the man who accepts and believes in our system of law.

Whatever may have been Judge Carswell's suitability to serve on a lower Federal court, completely different considerations must come into play when the question is one of a seat on the highest court in the land. We are not in the realm of a simple "liberalism" versus "conservatism" debate. We are in the altogether different dimension of questions concerning our national destiny. Black people do not want their destinies in the hands of G. Harrold Carswell; nor can the Nation as a whole—black and white—afford to have any part of its destiny there.

Black people have long been the victims of the law in this society. It was the law which created, protected and enhanced the institution of American chattel slavery. It was the law which provided the onerous slave codes to govern in oppressive detail the lives of millions of blacks before their emancipation, and which returned to perform the same function through the notorious Black codes after emancipation.

The Report of the National Advisory Commission on Civil Disorders, May 1, 1968, told the Nation that we live in a racist society. Black people—and in particular, black lawyers—have known this for some time. Thus far, the law has proved inadequate in attempts to remedy this condition, but some advance has been made.

If, relying on the legal system, we are to continue to give our people hope, then that system must give us cause for hope. If we are to continue growing into health as a Nation of free and diverse men, we cannot afford a retreat now from the struggle for racial justice. The ascendance of Judge Carswell to the Bench of the U.S. Supreme Court, as the first step in such a retreat, would dim the light of hope for change through legal means in the hearts of millions of Americans and diminish, worldwide, confidence in the American system of justice.

For all of the foregoing reasons, the National Conference of Black Lawyers respectfully, but vigorously, urges this august committee to disapprove the nomination of George Harrold Carswell to the U.S. Supreme Court.

Senator BURDICK. Thank you, Professor Clark.

Senator Kennedy?

Senator KENNEDY. Professor, while I missed the earlier part of your testimony, I did come in at the time that you were describing your own personal experience in trying cases before Judge Carswell. You testified to that, I believe.

Mr. CLARK. Yes, I did.

Senator KENNEDY. And you have practiced quite extensively in the other Districts of Florida, as well?

Mr. CLARK. That is correct. Perhaps I should describe that in some detail. I was on the staff of the NAACP Legal Defense Fund. The senior lawyers had areas, geographical areas, which they were to supervise, and Florida was one of the States that was under my supervision. Now that meant that I knew every single lawyer in the State of Florida who practiced civil rights law, white and black, and indeed I know what their evaluation of Carswell was. In a sense I tried to manage the flow, you know, the ebb and flow of litigation, what was to be filed, what appeals would be taken, trying to deploy lawyers in areas where there were few lawyers who would handle civil rights matters, so that in that capacity I not only got to know the civil rights lawyers but I had to appear in practically every district court in the State of Florida.

Senator KENNEDY. How many times did you appear before Judge Carswell?

Mr. CLARK. I would say at least nine or 10 times.

Senator KENNEDY. And as far as the other districts in Florida, this was an area of prime responsibility for you. Did you appear in the middle district nine or 10 times?

Mr. CLARK. Yes, that is true.

Senator KENNEDY. And in other districts as well in the State of Florida about a similar number of times, or did the nature of your practice bring you more often in front of Judge Carswell?

Mr. CLARK. I would say my practice or appearances in Jacksonville, Fla., and Tallahassee were roughly equal. I appeared before Judge Brian Simpson when he was on the Federal district bench at that time, and before Judge McRae in Jacksonville. To some extent in Tampa, Fla., to a lesser extent in a place like Miami. They had fewer segregation problems in that area of the State.

Senator KENNEDY. And your comment regarding the judge's attitude on civil rights questions is really based upon your own extensive personal experience in terms of appearances before the judge, as well as preparing your appearances before the judges, and his attitudes on these questions, and your appearances before other Federal judges and their attitudes as well?

Mr. CLARK. That is correct.

Senator KENNEDY. And based upon that experience over how many years?

Mr. CLARK. From 1962 through 1968, roughly 6 years.

Senator KENNEDY. And it is based upon that personal experience, plus your own rather unique background, that you express the serious reservations for yourself and the group which you represent in terms of the attitude of the nominee toward civil rights cases and attorneys?

Mr. CLARK. That is correct. I have said this before to the press, and I will repeat it for the benefit of this committee.

Judge Carswell was the most hostile Federal District Court judge I have ever appeared before with respect to civil rights matters.

Senator KENNEDY. That is a very serious charge, and I hope you would be prepared to justify that claim and that charge.

Mr. CLARK. Well, let me say I have gone through in my testimony many of the cases, and I am sure there will be other persons who will appear before you who privy to Mary Kurzan's doctoral thesis. I, by the way, was probably the first to receive the thesis. Mary Kurzan was a friend of my wife when she was at the Yale Law School, and so I saw the document, but I had had by that time extensive experience with Carswell.

Let me talk a bit about his demeanor with respect to lawyers. And I say that with this caveat: I believe that the documentation as to his judicial performance is much more important than his demeanor with respect to myself and other civil rights attorneys.

Judge Carswell was insulting and hostile, I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.

It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel. But I mention those as asides, really, and I don't think them important because I am sophisticated enough, and other lawyers, black lawyers who appeared before him, were sophisticated enough to sustain that kind of personal insult.

What I am concerned about is whether it indicates that Judge Carswell is not only a political segregationist but is a personal segregationist, because that will have a great deal to do with whether or not this man can change when he is in a different environment.

Is Carswell, a man who really, personally, does not like black people? That is the question which you will have to answer, it seems to me.

With respect to what happened to us, to

some extent we expect that kind of thing. And I don't think it is as important as his record, but I put it before you for whatever it is worth.

Senator KENNEDY. How many Federal district judges have you appeared before or practiced before?

Mr. CLARK. I would say I have appeared before, maybe, 10, 11, 12 district court judges, ranging from Florida to Alabama and Mississippi. I have appeared before Judge Clayton when he was in Senator Eastland's State. I have appeared before Judge Algood in Birmingham, Ala.; Frank Johnson in Alabama; so that I have had a fair contact with men functioning at that level of the district.

Senator KENNEDY. No further questions.

Senator BURDICK. Senator Hruska?

Senator HRUSKA. No questions.

Senator TYDINGS. In response to Senator Kennedy's question, you said you had appeared before other judges in the South such as Frank Johnson of Alabama. Have you ever been insulted or treated rudely in any other Federal District Court?

Mr. CLARK. No.

Senator TYDINGS. Senator Kennedy was interrogating you about your overall supervision of the lawyers involved in voting rights and other civil rights litigation. You said because of your work and supervision, that you knew personally and were in contact with lawyers, black and white, who handled civil rights litigation in Florida. Is that true?

Mr. CLARK. That is correct.

Senator TYDINGS. What was their evaluation of Judge Carswell insofar as his ability to be fair and unbiased toward black and white lawyers representing civil rights petitioners?

Mr. CLARK. I have not polled them since this nomination became a possibility, but I can tell you on the basis of general conversation with them that it was the view of the lawyers in the State that Carswell was the most difficult judge you could appear before, and indeed whenever I took a young lawyer into the State, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.

Senator TYDINGS. You mentioned a treatise by a woman named Kurzan. Would you describe for the committee that treatise to which you referred?

Mr. CLARK. Yes, Mary Kurzan is the young woman who is married to Mike Kurzan, an attorney here in Washington, D.C., and she did her doctoral thesis at Yale University on a performance of Federal District Court judges from 1953 through 1963, so that essentially her document is a supplement to the testimony I have given here.

I have talked only about cases occurring after 1963. And indeed I was not involved in the cases that she used for her thesis. She used a number of indices of essentially whether or not a decision was pro-civil rights or anti-civil rights, and she used the more crucial index, that is the number of times the man had been reversed on appeal, and her study included 31 district court judges throughout the South, and their performance in the civil rights area.

Using these two indices of a pro- or anti-civil rights decision and the number of reversals, she found that Judge Carswell was 23d on a spectrum of 31 judges, moving toward the segregationist spectrum. She also found that his reversal record was above 50 percent, and she had private anonymous evaluations from men at the court of appeals level that if a given Federal district court judge was reversed over 50 percent of the time in any given area of the law, they would consider that poor performance.

Senator TYDINGS. Did you ever discuss with Mrs. Kurzan her evaluation of Judge Carswell?

Mr. CLARK. No, I did not. She was working solely from documents, recorded cases in the Federal supplements or through the Race Relations Law Reporter, so I would imagine that her evaluation really would arise out of her report.

It is a fairly long document, I would say some 35 or 40 pages, in which, by the way, I think one of her conclusions was that many of the Republican judges in the South were the best men in the civil rights area, so that on the basis of her documents, and certainly my experience in the South, those men who were Republicans were quite often the most liberal on the civil rights issue, and it would seem to me that even if the President had to choose a Republican and had to choose a southerner, that he had a spectrum of judges who functioned with integrity around that issue, which is very crucial.

Senator TYDINGS. Professor Clark, you are quoted in Time magazine of February 2, 1970, at page 9, and I just want to ask you if this quote is correct that, "He," referring to Carswell, "was probably the most hostile judge I have ever appeared before. He was insulting to black lawyers, and he rarely would let me finish a sentence."

Is that quote correct?

Mr. CLARK. Surprisingly, yes.

Senator TYDINGS. Mr. Chairman, I ask unanimous consent that Professor Clark's entire statement be incorporated in the record at this point.

Senator BURDICK. Without objection, it is so ordered.

STATEMENT OF THE NATIONAL CONFERENCE OF BLACK LAWYERS BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

I represent the National Conference of Black Lawyers. Our organization was founded in Capahosic, Virginia in December, 1968 to challenge the racism in our legal system, to articulate the needs of the black community and to provide the legal expertise necessary in the black American's struggle for equality. We number in our ranks attorneys representing the entire spectrum of both the private and public sectors, as well as elected governmental officials from the local, state and national levels.

On behalf of the National Conference of Black Lawyers, I come before you today to speak in opposition to the confirmation of Judge G. Harrold Carswell. In the view of our organization, Judge Carswell is fit neither professionally nor personally to sit as an Associate Justice of the United States Supreme Court. The acquisition of equal rights of citizenship for black people in this country has been a long and difficult task and in numerous instances almost totally dependent upon rulings by the federal courts. As a federal district judge prior to his recent elevation to the Court of Appeals, Judge Carswell was in a position to fulfill some of the American promise of equal rights under law. However, in disregard of the civil rights pronouncements of the Supreme Court, Judge Carswell frequently announced pro-segregationist rulings which were then reversed by the Court of Appeals. Moreover, repeatedly through the use of procedural devices and the exercise of his broad judicial discretion, Judge Carswell caused unconscionable delay in civil rights cases, and limited their holdings to the narrowest possible scope.

In *Augustus* v. *Board of Public Instruction of Escambia County, Fla.*, 306 F2d862 [1962] the Court of Appeals unanimously rejected the school desegregation plan approved by Judge Carswell and required the school board to take further action toward desegregating the public schools. In that case, the Court of Appeals also unanimously reversed Judge Carswell's procedural ruling which had eliminated the claims of racial discrimination in the assignment of teachers and other school personnel.

Whether as a question of law or one of fact, we do not think that a matter of such importance should be decided on a motion to strike, 306 F2d at 868.

In *Due* v. *Tallahassee Theaters Inc.*, an action against theater managers, city officials and the county sheriff alleging a conspiracy to enforce segregation, Judge Carswell dismissed the complaint against some of the defendants and granted summary judgment as to another. The Court of Appeals unanimously reversed and stated:

The orders of the trial court dismissing the complaint for failure to state a claim on which relief could be granted can be quickly disposed of. These orders were clearly in error. 333 F.2d 630 [1964] at 631.

In *Singleton* v. *Board of Commissioners of State Institutions*, an action to desegregate Florida reform schools, Judge Carswell again dismissed the complaint and again the Court of Appeals reversed unanimously. 356 F2d771 [1966].

The school desegregation case, *Steele* v. *Board of Public Instruction of Leon County*, graphically illustrates Judge Carswell's practice of delaying civil rights litigation for extraordinary periods of time, giving defendants additional time under a segregated system.

In this case black plaintiffs filed a motion for further relief on May 7, 1964. May 26, 1964 the court sustained defendants school boards objections to interrogatories inquiring into teacher segregation. No further hearings were ordered before school opened and September 28, 1964 plaintiffs filed a motion for a hearing. January 20, 1965 the court found defendants to be in compliance with the outstanding order entered in 1963. February 15, 1965, plaintiffs filed a motion for hearing requesting an opportunity to present evidence on the motion for further relief noting that the January 20, 1965 order made no mention of the additional relief requested in the motion for further relief filed the previous May. April 5, 1965, plaintiff renewed the motion for further relief and asked for clarification as to whether the court intended to deny the motion for further relief by its order of January 20th. April 7, 1965, the court granted the motion for clarification declaring that the motion for further relief was denied, as it sought to change the basic structure of the desegregation plan.

A hearing was set for April 20th to determine if there was any necessity for an evidentiary hearing to reexamine the ruling on the motion for further relief. April 20th, the court reaffirmed its denial of the motion for further relief stating that no evidence could persuade the court to reorganize the desegregation plan and evidence to that end "would just be an idle gesture regardless of the nature of the testimony." Plaintiffs appealed to the Court of Appeals which remanded the case on January 18, 1967 for consideration in the light of its decision in *United States* v. *Jefferson County Board of Education*, 372 F2d 836. This was tantamount to a reversal. It was not until May 1, 1967 that Judge Carswell finally entered a Jefferson decree, requiring the school board to follow the standard as enunciated by the Supreme Court. At the time of filing the motion for further relief, in early 1964, there were already at that time, several Fifth Circuit and Supreme Court decisions entitling plaintiffs to the relief sought.

Nor has Judge Carswell's failure to follow the dictates of the Supreme Court in civil rights cases been limited to the distant past. In 1968, the Supreme Court ruled unanimously that school desegregation plans must offer a realistic promise of immediately integrating the schools in order to comply with the school boards duty to eliminate the racially segregated school systems created under segregation laws and practices. The Court particularly criticized the freedom of choice method of school desegregation then in widespread use throughout the South.

Green vs. *County School Board of New Kent County, Va*, 391 U.S. 430 (1968). Black plaintiffs filed motions for relief consistent with *Green* in the three school cases pending before Judge Carswell. Despite the *Green* decision, Judge Carswell entered orders allowing the continued use of freedom of choice in all three cases. The Court of Appeals unanimously reversed all three of Judge Carswell's rulings. *Wright* vs. *Board of Public Instruction of Alachua County, Fla.*; and *Youngblood* vs. *Board of Public Instruction of Bay County, Fla.*, (both decided *en banc sub nom Singleton* vs. *Jackson Municipal Separate School System* 5th Cir. No. 26285 Dec. 1, 1969). *Steele* vs. *Board of Public Instruction of Leon County, Fla.*, No. 28143 5th Cir decided Dec. 12, 1969.

In his entire record as a district court judge, Judge Carswell was affirmed in only one of the seven appeals taken from his rulings on civil rights cases—his denial of relief to a Negro teacher seeking the opportunity to teach in an integrated school. *Knowles* vs. *Board of Public Instruction of Leon County, Fla.*, 405 F. 2d 1206 (1969). We submit that this record evidences a strong judicial bias against blacks asserting civil rights claims which should not be rewarded with confirmation as an Associate Justice of the Supreme Court.

In recent times, we have become increasingly aware of the importance of scrutinizing a judge's conduct off the bench as well as his judicial craftsmanship. In this regard, Judge Carswell must be found severely deficient.

In 1948, Mr. Carswell, while seeking public office, appealed for public support on the basis of some of the most blatantly racist assertions imaginable. His speech contained the following remarks:

I am a Southerner by ancestry, birth, training, inclination, belief and practice. And I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed and I shall always so act.

If my own brother were to advocate such a program [of integration], I would be compelled to take issue with him and to oppose him to the limit of my ability.

I yield to no man, as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed. (Taken from New York Times, January 22, 1970, p. 15)

More recently in 1956, while serving as United States Attorney, Judge Carswell participated as an incorporator, in the conversion of a municipally controlled golf club to a privately controlled country club which excludes blacks from membership or guest privileges.

A person with the types of segregationists personal involvements and demonstrated judicial hostility to blacks is simply not suited to sit on the nation's highest court. Surely in 1970 a non-white litigant should not be forced to plead his case before a Supreme Court which includes a jurist who has made and acted upon such blatant racist assertions.

The National Conference of Black Lawyers urges this Committee to weigh carefully the analysis we have made of Judge Carswell's suitability for the United States Supreme Court and weigh it along with those others that will be and have been made on his professional and other qualifications. The constitutional requirement of confirmation by the Senate must mean more than a perfunctory ratification of the President's choice. The Supreme Court plays a unique role in the shaping and growth of our institutions. It describes the contours of freedom and sets the course of national direction. It is the court from which there is no appeal—the last resort of the man who accepts and believes in our system of law. Its impact and influence transcends administrations to determine and characterize whole eras of our history as a people. Whatever may have been Judge Carswell's suitability to serve on a lower federal court, completely different considerations must come into play when the question is one of a seat on the highest court in the land. We are not in the realm of a simple "liberalism" versus "conservatism" debate. We are in the all together different dimension of questions concerning our national destiny. Black people do not want their destinies in the hands of G. Harrold Carswell; nor can the nation as a whole—black and white—afford to have any part of its destiny there.

Black people have long been the victims of the law in this society. It was the law which created, protected and enhanced the institution of American chattel slavery. It was the law which provided the onerous slave codes to govern in oppressive detail the lives of millions of blacks before their emancipation, and which returned to perform the same function through the notorious Black Codes after emancipation. It was with the law that the racist architects of segregation built a Jim Crow society which is still intact a decade and a half after *Brown* vs. *Board of Education* and more than a century after the Emancipation Proclamation.

The Report of the National Advisory Commission on Civil Disorders (May 1, 1968) told the nation that we live in a racist society. Black people—and in particular, black lawyers—have known this for some time. Thus far the law has proved inadequate in attempts to remedy this condition, but some advance has been made. If, relying on the legal system, we are to continue to give our people hope, then that system must give us *cause* for hope. If we are to continue growing into health as a nation of free and diverse men, we cannot afford a retreat now from the struggle for racial justice. The ascendance of Judge Carswell to the bench of the United States Supreme Court, as the first step in such a retreat, would dim the light of hope for change through legal means in the hearts of millions of Americans and diminish, worldwide, confidence in the American system of justice.

For all of the foregoing reasons, the National Conference of Black Lawyers respectfully, but vigorously, urges this august Committee to disapprove the nomination of George Harrold Carswell to the United States Supreme Court.

CONTINUATION OF TESTIMONY

Senator KENNEDY. Thank you very much.

Mr. CLARK. Thank you.

Senator BURDICK. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. No question.

Senator BURDICK. Senator Cook?

Senator COOK. No questions. Thank you for appearing.

Senator BURDICK. Senator Mathias?

Senator MATHIAS. I would like to thank Dr. Clark for his conclusive testimony. It is very impressive.

Senator BURDICK. I believe that I have just a few questions.

Mr. CLARK. Certainly.

Senator BURDICK. You referred to some situations where you deemed Judge Carswell had decided wrongly but that for various reasons there was no appeal taken, so that we had no judicial determination whether he was right or wrong?

Mr. CLARK. That is correct, and indeed perhaps I shouldn't have referred to that.

Senator BURDICK. What appeals did you take during your experience down there in Florida? Can you name the cases?

Mr. CLARK. Yes.

Senator BURDICK. Do you have them in the record?

Mr. CLARK. I don't remember them all, but *Singleton* v. *The Board of Commissioners of State Institutions, Steele* v. *Board of Public Instruction of Leon County*. I am not sure but the Steele case might have gone up twice. And I was involved in the *Augustus* case, but I was not included on the brief at that time. I did research, but I had not been admitted to the bar.

Senator BURDICK. These two you handled, though?

Mr. CLARK. Yes, in *Singleton* and *Steele*, I was the prime lawyer.

Senator BURDICK. How far did those cases go?

Mr. CLARK. *Singleton* went to the court of appeals, and *Steele* went to the court of appeals.

Senator BURDICK. And what was the result?

Mr. CLARK. In *Singleton*, Judge Carswell was reversed. In *Steele*, so much time had gone by that the court had gone beyond even what I was requesting in my early relief in 1964, and they remanded the case and ordered the judge to revise the order in the light of the *Jefferson* case, which occurred at 372 F. 2d 836, but during the entire course of the proceedings from 1964 until May of 1967 there was absolutely no move made with respect to the court order in that case.

Senator BURDICK. The *Singleton* case was reversed?

Mr. CLARK. That is right.

Senator BURDICK. Are there any other cases?

Mr. CLARK. As I say, I worked on *Augustus* and that was reversed.

Senator BURDICK. And this is in your full statement, is it?

Mr. CLARK. That is right.

Senator BURDICK. Are there further questions?

Senator MATHIAS. Mr. Chairman, just one further thing, following up the question that you raised.

Senator BURDICK. Proceed.

Senator MATHIAS. You say there were a number of motions that, for lack of money, time, or people, you had to let go by the board. Can you estimate the number?

Mr. CLARK. It would be a loose statement, but I would say that, given the fact that I handled about nine or 10 cases in his court, and we were constantly trying to get revisions of the segregation plans, it must have occurred maybe 10 or 12 times, something like that, in which I took no appeal, so perhaps it is not appropriate to comment, but I felt that the judge had ruled against us on subsidiary issues of law, and it was clear that we had a right to get the relief which was requested.

In many instances, it was questions about the scope of discovery, how much could we inquire into the extent of teacher segregation, and the judge would cut off or limit the scope of the inquiry, things like that.

Senator MATHIAS. Were these matters which you felt were substantial?

Mr. CLARK. No.

Senator MATHIAS. Or would they have had an ultimate impact on the outcome of the litigation?

Mr. CLARK. They had an impact of slowing down litigation, but we had to make judgments in terms of priorities, so that if we felt that there was a major impediment to be created by a decision, then we took an appeal.

For instance, if a complaint were dismissed, which meant we would get no relief whatsoever, then in those instances we would take an appeal, but if it simply meant you would lose 6 months, or even sometimes a year, then we sometimes did not take an appeal.

Senator MATHIAS. Your feeling is that, taken as a body, that this amounted to a dilatory tactic?

Mr. CLARK. That was my impression, that that was the effect of it.

Senator MATHIAS. If you had been counsel for a large corporation with a big legal staff and plenty of money, would you have advised appeal?

Mr. CLARK. Then my testimony might here have gone on all day.

Senator BURDICK. Any other questions?

(No response.)

Senator BURDICK. Thank you.

The next witness will be Mr. Thomas Harris. I presume you have to be sworn, Mr. Harris.

Do you swear on this matter before the committee that you will tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. CHURCH. Does the Senator have reference to page 227?

Mr. TYDINGS. Yes.

In response to a question from the Senator from Massachusetts with respect to a public statement Mr. Clark had made, Mr. Clark responded in the following manner:

Mr. CLARK. That is correct. I have said this before to the press, and I will repeat it for the benefit of this committee.

Judge Carswell was the most hostile Federal District Court judge I have ever appeared before with respect to civil rights matters.

Senator Kennedy said:

That is a very serious charge.

Which indeed it was, particularly in view of the fact that Mr. Clark tried cases before judges throughout the South, not just in the State of Florida.

Mr. CLARK. Well, let me say I have gone through in my testimony many of the cases, and I am sure there will be other persons who will appear before you who are privy to Mary Kurzan's doctoral thesis.

He is referring now to a thesis prepared by a Yale law student which shows Mr. Carswell very, very low on a proficiency rating. Back to Mr. Clark's testimony.

Let me talk a bit about his demeanor with respect to lawyers. And I say that with this caveat: I believe that the documentation as to his judicial performance is much more important than his demeanor with respect to myself and other civil rights attorneys.

I do not necessarily agree with Mr. Clark on that point, but let us concede that point.

Judge Carswell was insulting and hostile. I have been in Judge Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.

As a lawyer who has tried many cases, in my judgment, there is no more despicable conduct a judge can engage in than showing outright preference to one lawyer over another lawyer in the trial of a case. This undermines the fundamental constitutional system of judicial fairness under our system of law.

Let me go on:

It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel. But I mentioned those as asides, really, and I don't think them important, because I am sophisticated enough, and other lawyers, black lawyers who appeared before him, were sophisticated enough to sustain that kind of personal insult.

What I am concerned about is whether it indicates that Judge Carswell is not only a political segregationist but is a personal segregationist, because that will have a great deal to do with whether or not this man can change when he is in a different environment.

Is Carswell a man who really, personally, does not like black people? That is the question which you will have to answer, it seems to me.

With respect to what happened to us, to some extent we expect that kind of thing. And I don't think it is as important as his record, but I put it before you for whatever it is worth.

I would have to ask the Senator from Idaho whether or not the Senator agrees with me, and perhaps disagrees with Mr. Clark, that the manner in which a judge treats litigants, particularly poor and unpopular litigants in his court, is a fundamental sign of his basic judicial temperament and his ability to be a judge.

Mr. CHURCH. Of course it is. His demeanor is a mirror of his own deeply held personal feelings. If he is unable, while sitting on the court, to restrain himself, it is a serious reflection on his capacity as a judge.

Mr. TYDINGS. Let me just direct the Senator's attention to one other paragraph in the testimony of Mr. Clark. He responded to a question I directed to him.

Mr. CHURCH. On what page?

Mr. TYDINGS. Page 228. This is directed to Mr. Clark:

Senator TYDINGS. Senator Kennedy was interrogating you about your overall supervision of the lawyers involved in voting rights and other civil rights litigation. You said because of your work and supervision, that you knew personally and were in contact with lawyers, black and white, who handled civil rights litigation in Florida. Is that true?

Mr. CLARK. That is correct.

Senator TYDINGS. What was their evaluation of Judge Carswell insofar as his ability to be fair and unbiased toward black and white lawyers representing civil rights petitioners?

Mr. CLARK. I have not polled them since this nomination became a possibility, but I can tell you on the basis of general conversation with them that it was the view of the lawyers in that State that Carswell was the most difficult judge you could appear before, and indeed whenever I took a young lawyer into the State, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.)

Would the Senator agree that the ability to give a fair trial and not to prejudge because of your personal biases or prejudices is as important as whether or not you have owned a security or have failed to mention a security which you owned in a company that was involved in litigation or matter before your court?

Mr. CHURCH. I think that the attribute to which the Senator refers is really indispensable in a man who would be a competent judge.

Let me say that implicit in the Senator's question is the assumption many Members of the Senate have come to make, which is that when it comes to passing upon a Presidential nominee, it is somehow bad form to vote against him unless there is some evidence of illegal or unethical conduct on the part of the nominee that has cropped up in the course of the hearing. If we are going to exercise our confirmation power only in those rare, unusual cases where that kind of evidence is uncovered, then we have narrowed it almost to the point where it becomes meaningless.

I can understand why Presidents want us to view our powers in this restricted way, because it naturally tends to reduce the importance of the Senate in our political life. But I find it hard to understand how readily Senators acquiesce in this demeaning definition of the senatorial role. Yet, this has happened to us—even though our history shows that it was not so intended by the Founding Fathers, and that it was not so practiced by the Senate in the last century; and I would hope——

Mr. TYDINGS. It will not be.

Mr. CHURCH. That as a result of this debate, and as a result of the earlier deliberation of the Senate on the nomination of Judge Haynsworth, that finally we are awakening again to our constitutional duty.

I think that the questions which the distinguished Senator from Maryland has raised have been penetrating questions and have been very helpful in making the record against the confirmation of the nomination of Judge Carswell.

Mr. TYDINGS. I think that the distinguished Senator from Idaho has made a great contribution. I think it is important that the people of the United States know that the man whose name has been sent to the Senate for confirmation as an Associate Justice of the Supreme Court of the United States is, as Dean Pollak described him, a man of the most slender credentials. I think it is important that they know his entire record. I think that before this debate is over they will know that entire record. I think that when the time comes, the Senate will vote against the nomination and discharge its responsibilities to the American people and will not be a rubber-stamp of the President of the United States.

Mr. CHURCH. I thank the Senator very much.

Mr. HARRIS. Mr. President, will the Senator from Idaho yield?

Mr. CHURCH. I yield.

Mr. HARRIS. I join the distinguished Senator from Maryland and others in commending the distinguished Senator from Idaho for an excellent and helpful address with regard to the confirmation of Judge Carswell.

Particularly do I commend the Senator for his commentary upon the constitutional responsibilities of the Senate, especially in regard to confirmation of appointments by the President. I think the distinguished Senator from Idaho has pointed out usefully and well the extra importance of appointment to the Supreme Court as distinguished from other appointments of the President.

In recent days, I have heard a report which I thought I might ask the Senator from Idaho to comment upon; namely, an article in the Philadelphia Enquirer recently which reported that President Nixon was supposed to have said that if the Senate should reject the nomination of Judge Carswell, he might thereafter appoint another person who would be even less to the liking of those of us who oppose this nomination.

I have also heard from sincerely concerned Members of the Senate from time to time the question: What, if we were to turn down this nomination, and get one that we like even less.

What would be the response of the Senator in that regard?

Mr. CHURCH. I have seen this commentary in the press. I think it needs to be rebutted. I cannot think of a less persuasive argument than that we should confirm the present nominee because, if we do not, then the next one may be worse.

The answer to that specious argument is simple enough: If the President keeps sending us nominees who rate lower and lower on the scale of qualifications that should properly apply to the Supreme Court, then the Senate should continue to reject them, and should go on rejecting them until the President sends us a man who qualifies to serve on the Supreme Court of the United States.

That is what our power is for. That is why it is in the Constitution. We are duty bound as Senators to discharge that power in a responsible way.

If the Senate were to reject this nomination, I have no doubt the President would get the message, and the next nomination he would make would be one that meets the high standards that should apply to so important a post.

The Senate had no difficulty confirming the new Chief Justice of the United States. He was nominated by President Nixon. We found him fully to qualify and we confirmed the appointment.

There is nothing of a partisan character in our opposition to Judge Carswell, but clearly this man lacks those elements of distinction in his own career as a judge on the Federal bench that should be necessary to qualify him for service on the Supreme Court of the United States.

Thus the answer is, Keep rejecting nominations which are deficient until the President sends up here the name of a man who meets the criteria that properly should apply to the Supreme Court of the United States.

If we reject Judge Carswell, I do not think that we will get a worse nomination. I think that we will get a much better one. The next nomination, in all likelihood, will be one that we can readily confirm.

Mr. HARRIS. I certainly agree with the response of the distinguished Senator from Idaho. I think that his comments should set at rest what has been a spurious argument used by some and the concern expressed by others. I agree with the distinguished Senator from Idaho. I think that we must presume, if the Senate makes its position clear, that that message will be received clearly by the President of the United States. I also think that fear of a repeated error by the President is not the proper basis upon which the Senate should exercise its constitutional responsibilities. I think, instead, that we should presume that the error will not be persisted in, if it is so labeled by the Senate in the pursuance of its duties.

Again I commend the Senator for an excellent address. I hope that it will be heard throughout the country as well as in the Senate.

Mr. CHURCH. I thank the Senator very much for his comments.

(At this point Mr. GRAVEL took the chair as Presiding Officer.)

Mr. PELL. Mr. President, will the Senator from Idaho yield?

Mr. CHURCH. I yield.

Mr. PELL. Mr. President, I had the good fortune to be sitting in the chair as the Senator from Idaho was advancing his ideas. There is great merit in his thought that when it comes to confirmation, there is one set of rules which should apply for the executive branch, which is under the President, but it is not the same thing when we are dealing with confirmation to office in the third branch of Government, the judiciary, which is not under the direction of the President. But, I must add here, we have already confirmed Judge Carswell twice for the courts.

How would the Senator from Idaho equate those confirmations with the present, strong views held against him? Should not those views have come to light before? Should not they have surfaced earlier?

Mr. CHURCH. There is no question that they should and would have surfaced earlier if the Senate had the time to make a searching inquiry into every appointment made by the President to the district and appellate courts. Then, I am sure, those objections to Judge Carswell would have surfaced earlier.

But, as the Senator knows, we are so burdened with our workload here that we cannot possibly spread ourselves over the entire appointive field. I think that this is unfortunate but, nonetheless, we must recognize that it is true. As the Constitution prescribes our confirmation role, it covers a vast array of appointive offices. Every time a second lieutenant in Armed Forces of the United States is promoted to a first lieutenant, the confirmation of the Senate is required. We have long lists of appointments that come in here as thick as these hearings on Judge Carswell, and we are asked to confirm them. Naturally, the Government has grown so large, and the Nation so big, that we cannot give the scrutiny we might like to each appointment. But when it comes to the Supreme Court, our duty is plain, because here we are dealing with Justices of great importance on the court of last resort, whose decisions will have a lasting and indelible effect upon the country. As to them, we cannot discharge our duty in a perfunctory way. It is incumbent upon us to make a searching examination of each nominee.

As the Senator has pointed out, twice we failed to do this in the case of Judge Carswell, but in the earlier cases he was not being urged upon us as an Associate Justice of the Supreme Court. That makes a big difference.

Mr. PELL. I thank the Senator. I think his argument is compelling. I had not properly considered it until it was being advanced at this time, that there is this peculiar situation applying to that small number of people who are appointed to the third branch of the Government.

In connection with the Senator's statement that he thought if Judge Carswell is rejected, we might hope for a nominee of a higher caliber. I gather that the Senator discounts the press reports that the administration was giving thought to sending General LeMay to law school. [Laughter.]

Mr. HOLLAND. Mr. President, will the Senator from Idaho yield?

Mr. CHURCH. I yield.

Mr. HOLLAND. Of course, it is true that Senators do not have time to give complete consideration to judges nominated to the lower courts. It happens, however, that Judge Carswell is from my State.

I gave very careful consideration to his nomination both at the time he was appointed to the district court and at the time he was appointed to the circuit court of appeals. In neither case was he my nominee, because he was appointed both times under a Republican administration. On both occasions there were good judges, whom I nominated, who came from the other side of the political scene and who were just as competent.

I did, however, give careful consideration to Judge Carswell. And I would not want the record to be in such a state as to indicate that the two Senators from Florida, simply because a judge came from their State, would be willing to confirm just anyone.

That is not the case. The Senator from Florida was offered a district judgeship himself many years ago, and he turned it down. And he was offered a circuit court judgeship, and he turned it down.

I know something of what is required of judges. And I know that Judge Carswell has a fine record. He was named by all of the judges of the fifth circuit to represent them on the Judicial Conference, which is a matter of great honor and would not have happened unless they regarded him highly.

I had occasion to testify in Judge Carswell's court a number of years ago in the largest case ever tried there. The case was very hotly contested, with some 20 or 30 lawyers involved, some of them lawyers from outside of Florida, one of them a former Attorney General. I sat there all day and answered questions, and many times there were objections to those questions.

I felt and feel now that Judge Carswell handled himself in a careful and fair manner. That was the case of Crummer against du Pont, and others. It involved, as I recall, a $39 million claim for damages and involved alleged gross violations of the antitrust laws of the United States.

After that case was tried and the jury rendered a verdict, the attorneys on the losing side—and there were many and they were capable—both from my State

and outside of my State, decided that the record was so clean that they would not appeal the case. That is unusual in a case of that size and of that degree of controversy.

I do not want the record to stand upon the mere statement that we simply gave a rubberstamp approval to Judge Carswell when he was named to the district court, not as my nominee, and when he was named to the circuit court of appeals, not as my nominee, because quite the contrary is true.

On both occasions, I had strong recommendations regarding him, aside from what I knew from my own observation. I had strong nominations from members of the Circuit Court of Florida and of the district court of appeals, which is next to the circuit court, and from circuit court judges as well as some officers of the bar association and numerous other outstanding lawyers.

I would not want the record to appear as some of these columnists and television speakers like to put it, that here is a man who is unqualified, who has not done good work, and who is not entitled to be considered as a candidate for a judgeship on a sound basis.

I thank the Senator for yielding.

Mr. CHURCH. Mr. President, I appreciate the comments of the Senator from Florida. I would be the last to suggest or even intimate that he would support the nomination of Judge Carswell simply because he comes from Florida.

If the Senator from Florida were persuaded that Judge Carswell were not fit to sit on the Supreme Court, the fact that he is a Floridian would have no effect upon him.

Mr. HOLLAND. Mr. President, I thank the Senator for that statement, which I hope is true, and I believe it to be true.

Mr. CHURCH. Mr. President, in conclusion, I ask unanimous consent that the article to which I referred, by Charles L. Black, Jr., Luce professor of law, Yale University Law School, entitled "A Note on Senatorial Consideration of Supreme Court Nominees," which will appear in the April issue of the Yale University Law Journal, be printed here in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

A NOTE ON SENATORIAL CONSIDERATION OF SUPREME COURT NOMINEES

(By Charles L. Black, Jr.)

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial judgments, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded for enough to enable me to make that pretense [1] I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, or where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why?" I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . ."? [2] Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

Procedurally, the stage of "advice" has been short-circuited.[3] Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textual reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration, and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not; I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy-orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his worldview will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from

Footnotes at end of article.

a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the life-view and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved on July 21, 1787,[4] and was carried through into the draft of the Committee of Detail.[5] The change to the present mode came on September 4th, in the report of the Committee of Eleven[6] and was agreed to *nem. con.* on September 7th.[7] This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

"But might not hie nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

"To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

"It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, then when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."

If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If my influencing the President be meant restraining him, this is precisely what must have been intended.* [emphasis supplied] And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid as evils.[8]

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterized, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than these. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.[10] John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.[11] Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.[12] There is the celebrated Parker case of this century.[13] The perusal of Warren [14] will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, excepted arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

FOOTNOTES

[1] I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten; for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Irwin; I have also had the benefit of talking to him about the piece after it was written. A specific addendum in proof: Harris, "The Advice and Consent of the Senate" (1963) came to my attention and hands, after the present piece had gone to the printer. This excellent and full account of the whole function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

[2] U.S. Const. art. II. § 2. cl. 2.

[3] Even this short-circuiting is not complete. First, the President's "appointment," *after* the Senate's action, is still voluntary (Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

[4] "2 Records of the Federal Convention of 1787" at 83 (M. Farrand ed. 1911).

[5] *Id.* at 132, 146, 155, 169. 183.

[6] *Id.* at 498.

[7] *Id.* at 539.

[8] "The Federalist No. 76," at 494-495 (Modern Library 1937) (Alexander Hamilton).

[9] *Id.* No. 77, at 498 (Alexander Hamilton).

[10] 2 C. Warren, "The Supreme Court in United States History" 864 (rev. ed. 1926).

[11] 1 *Id.* at 704.

[12] *Id.* at 413.

[13] L. Pfeffer, "This Honorable Court, a History of the United States Supreme Court" 288 (1965).

[14] C. Warren, "The Supreme Court in United States History" (rev. ed. 1926).

Mr. RIBICOFF. Mr. President, under our Constitution the Senate is assigned responsibility for confirming or rejecting the Supreme Court nominations of the President. This is one of our most important duties, for Justices of the Su-

preme Court occupy a unique position in the judicial system. They sit over more than 300 district judges and nearly 100 appellate judges. The cases which come before them involve more than technical questions of law. Inevitably they involve sensitive questions of constitutional law, economic and social policy. In deciding them a Justice cannot always rigidly apply past precedents. Life does not stand still, neither can the law. The legal rules which were adequate for an earlier day may be inappropriate today or tomorrow. The Supreme Court, at the pinnacle of the judicial system, often must lead the way.

Nearly 170 years ago Marbury against Madison established the position of the Supreme Court under our Constitution. Since that time, the Court has played a major role in developing the rules by which our society lives.

It would be very difficult to overestimate the importance of the Supreme Court in our system of government. It is the final authority on all questions of Federal law—antitrust, labor, and taxation—to name just a few. It is also the arbiter of relations between the States and the Federal Government, defining and adjusting their respective roles to keep them in tune with the times.

However, the heart of the Court's work is interpretation of the Constitution. This is a demanding task. As Judge Learned Hand aptly said:

> The words (a Justice) must construe are empty vessels into which he can pour nearly anything he will.

Accordingly, we must be sure that the men appointed to the Court meet the highest intellectual and moral standards. They must have more than knowledge. They must possess wisdom, which is knowledge tempered with judgment. They must demonstrate a sensitive understanding of the major issues confronting society. And they must show by sustained superior performance that they are worthy of elevation to a seat of great trust and responsibility.

In examining Judge Carswell's credentials, one should properly begin with the objective record he compiled on the bench. The Ripon Society has made a comprehensive study of his 11 years as a district judge. Using five relevant criteria—reversals on appeal, reversals in general, citation by other courts, elaboration of opinions and use of authority—the Ripon Society concluded that "they form a most impressive indictment of Judge Carswell's judicial competence."

Let me quote from the Ripon Society paper:

> 1. Reversals on Appeal: During the eleven years (1958–1969) in which Judge Carswell sat on the federal district court in Tallahassee, 58.8% of all of those cases where he wrote printed opinions (as reported by West) and which were appealed resulted ultimately in reversals by higher courts. By contrast in a random sample of 400 district court opinions the average rate of reversals among all federal district judges during the same time period was 20.2% of all printed opinions on appeal. In a random sample of 100 district court cases from the Fifth Circuit during the 1958–1969 time period the average rate of reversals was 24.0% of all printed opinions on appeal.
>
> 2. Reversals in General: Carswell's rate of reversals for all of his printed cases was 11.9% as compared to a rate of 5.3% for all federal district cases and 6% for all district cases within the Fifth Circuit during the same time period.
>
> The majority of cases before any federal district judge ordinarily do not result in appeals, hence precluding the possibility of reversals in those cases. It is significant however, that Carswell's overall reversal record for his printed cases is more than twice the average for federal district judges. When additional unprinted opinions are included, Carswell is found to have an overall reversal rate of 21.6%.
>
> 3. Citation by Others: Carswell's 84 printed opinions while he was serving as a district court judge were cited significantly less often by all other U.S. judges than is the average for the opinions of federal district judges. Carswell's first 42 opinions during his first five years on the federal judiciary (1958–1963) have been cited an average of 1.8 times per opinion. Two hundred opinions of other district judges randomly chosen from district court cases spanning this same time period have been cited an average of 3.75 times per opinion. The 42 most recent of Carswell's printed district court opinions have been cited an average of 0.77 times per opinion.
>
> Two hundred opinions of other district judges randomly chosen from cases spanning the same 1964–1969 time period have been cited an average of 1.57 times per opinion.
>
> 4. Elaboration of opinions: Carswell's printed district court opinions average 2.0 pages. The average length of printed opinions for all federal district judges during the time period in which Carswell sat on the district bench was 4.2 pages.
>
> 5. Use of authority: In the 84 abovementioned Carswell opinions the average number of citations of cases is 4.07 per opinion, and the average number of citations of secondary source material is 0.49 per opinion. The average for all district judges during the 1958–1968 time period was 9.93 case citations per opinion and 1.56 citations of secondary source material per opinion.

At the Senate hearing on Judge Carswell's nomination several noted authorities on constitutional law reviewed Judge Carswell's opinions and found that he lacks the necessary quallfications for appointment to the Court. Louis Pollak, dean of Yale Law School, said:

> I am forced to conclude that the nominee has not demonstrated the professional skills and the larger Constitutional wisdom which fits a lawyer for elevation to our highest Court.

Prof. William Van Alystyne, who had testified in favor of Judge Haynsworth's nomination, told the committee:

> There is, in candor, nothing in the quality of the nominee's work to warrant any expectation that he could serve with distinction on the Supreme Court.

Later, after considering the full printed hearings, Professor Van Alystyne wrote me a letter expanding his views. He said:

> A particular President can serve for no more than eight years, but one whom the Senate confirms to serve on the Supreme Court may influence the quality of American life for more than thirty years. The Constitution provides that the Senate shall advise the President on the appropriateness of such an appointment, rather than that it simply defer or acquiesce. In this instance, the need for advice rather than consent is surely compelling.
>
> No one appearing in behalf of Mr. Carswell was able to identify or commend any piece of work whatever during his eleven years on the federal bench as reflecting evidence of judicial stature. Nothing at all could be cited to contrast with Dean Pollak's observation 'that the nominee presents more slender credentials than any nominee for the Supreme Court put forth in this century,' and that 'as my mind ran and my eye ran back through all of the men who have sat on the Court in this past 70 years, it did seem to me striking the paucity of this nominee's qualifications as compared with all of the others.' Nothing was offered in derogation of my own reluctant conclusion, in contrast to what I was able to say of Judge Haynsworth, that:
>
> "More disturbing in the cases generally, and by generally I mean not to restrict myself to the area of race relations at all, although intrinsically far more difficult to illustrate in the nature of the shortcoming, there is simply a lack of reasoning, care, or judicial sensitivity overall, in the nominee's opinions."
>
> The testimony by Mr. (Thomas E.) Harris, moreover, closely reviewed the comparison of this appointment which the President had sought to make with previous judicial figures including Holmes, Hughes, Brandeis, and Frankfurter, adequately underscoring the near ludicrousness of such comparisons. It was repeatedly observed as well that these are not partisan concerns—that there are a number of judges including many in the South of Republican affiliation whom the President might nominate and of whom no similar criticism would have been made.

Judge Carswell's proposed appointment has evoked criticism from lawyers throughout the country. A statement signed by 457 prominent lawyers concluded:

> He does not have the legal or mental qualifications essential for service on the Supreme Court.

Never in history has there been such an outpouring of disapproval of a nominee from the most notable and respected members of the bar.

I can find nothing in Judge Carswell's record to convince me that he is qualified for the Supreme Court.

One searches his entire career, as a lawyer, U.S. attorney, and Federal judge for a significant contribution to the law, but there is none. His record is barren of accomplishment.

He was not highly regarded as a lawyer or a scholar before his appointment to public office. He introduced no innovations in law enforcement when U.S. attorney. As a judge his record has been unimpressive. His opinions have not been notably enlightening or clear sighted, nor has he shown particular moral courage. Overall, Judge Carswell's performance can be rated no better than mediocre, hardly qualifying him for the Supreme Court.

Mr. President, so far, I have discussed only Judge Carswell's general qualifications for appointment to the Supreme Court. I want to turn now to his civil rights record.

Inscribed across the facade of the Supreme Court building are the words, "Equal Justice Under Law." In the past 16 years the Supreme Court has led the way in transforming them from cold stone into a living reality for millions of Negroes across the land. By any standard, race relations is a major issue of our time. Any judge qualified for the Su-

preme Court must, at a minimum, show that he has followed the law in this area. Even more, he must demonstrate a commitment to the principle of a single society, with equal opportunity open to all.

But Judge Carswell's civil rights opinions remind one of King Canute, who tried to hold back the tide. For like him, Judge Carswell has tried to forestall and delay compliance with the law.

At the hearings, Prof. Gary Orfield said:

The record of Carswell's stewardship during the ordeal of school desegregation was one of magnificent inaction. While other judges were exploring ways to dismantle the system of separate schools, Carswell granted time for local delays. The results were clear. Two of the three districts under his supervision were among the only four reported Florida districts maintaining totally segregated faculties into 1967. More than 90 percent of the black children in the Tallabassee schools were still in separate and completely segregated schools that same year . . . Judge Carswell had put local values above his responsibility to uphold the Constitution.

And on this point Prof. Van Alystyne wrote me:

Finally, then, with the failure of any affirmative reason to confirm this appointment, must you not agree that the evidence otherwise brought forward makes this appointment singularly inappropriate and impossible to accept? Not until his very appearance twenty-two years later before the Committee did Mr. Carswell express a single word of regret for his avowal of white supremacy as an adult, lawyer, businessman, World War II veteran, and candidate for national office. Nothing in the course of the hearings furnished evidence of more reassuring events to keep the Court hereafter from reasonable suspicion of bias. To the contrary, first hand testimony from several attorneys, including one still with the Justice Department, attested to a conscious or unconscious hostility to Negro plaintiffs, volunteer attorneys in race cases, and Northern lawyers willing to furnish representation in a community described even by a long time resident as hostile and somewhat to the right of Louis XIV. The pattern of reversals by the court of appeals in the many cases where civil rights complaints were dismissed out of hand without a hearing must surely trouble you . . .

Mr. President, the nomination of Judge Carswell has impelled many individuals and organizations to speak out in opposition who are not normally heard on such matters. One of these is the National Education Association.

The NEA has furnished me with a penetrating analysis of Judge Carswell's school desegregation opinions.

I should like to read from it:

1. On June 24, 1960, Judge Carswell summarily struck portions of a school desegregation complain involving Pensacola, Florida seeking desegregation of teachers and principals, without even holding a hearing to determine the effects of faculty segregation on the rights of black students to an integrated education. *Augustus* v. *Board of Public Instruction of Escambia County, Fla.*, 185 F. Supp. 450 (N.D. Fla. 1960)

The black children claimed that "assignment of school personnel on the basis of race and color is . . . predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior . . . and, therefore, may not teach white children." 185 F. Supp. at 451. The intent of the 1954 decision, they argued, was the creation of a non-racial school system which they contended was impossible so long as completely segregated faculties signalled to the community and the children that one set of schools was "Negro" and another "White."

Judge Carswell not only dealt with this serious issue in an arbitarary manner, but treated it mockingly, stating: "Students herein can no more complain of injury to themselves of (sic) the selection or assignment of teachers than they can bring action to enjoin the assignment to the school of teachers who were too strict or too lenient." 185 F. Supp. at 43.

The Fifth Circuit unanimously reversed this decision, stating ". . . we do not think that a matter of such importance should be decided on motion to strike" and that Judge Carswell had erred in using a "drastic remedy" appropriate only where the question "has no possible relation to the controversy." 306 F.2d 862, 868 (5th Cir. 1962)

2. Judge Carswell did not obtain a desegregation plan from the defendants in the Pensacola suit until a year and a half had elapsed from the filing of the complaint. Then, in 1961, he entered a desegregation order which required only that the school board continue assigning students under the Florida Pupil Assignment Law. Under that law, every black student desiring to attend a white school had to pass a battery of tests that no white child wishing to remain in his segregated white school had to undergo. Judge Carswell's plan allowed the school board to assign every pupil to a segregated school at the start of each school year, and placed the burden of integration on the shoulders of black students asking for reassignment and willing to undertake the tests. Up to the time of Judge Carswell's order, the Florida Pupil Assignment Law had resulted in the perpetuation of a fully segregated school system. 6 Race Rel. L. Rep. 689.

This action of Judge Carswell in 1961 was taken in the face of an explicit decision of the Fifth Circuit in 1959, reaffirmed in 1960, that a school board's adoption of the Florida Pupil Assignment Law did not meet the requirements of a plan of school desegregation or constitute a "reasonable start toward full compliance" with the *Brown* decision. *Gibson* v. *Board of Public Instruction of Dade County, Fla.*, 272 F. 2d 763, 766 (5th Cir. 1959); *Mannings* v. *Board of Public Instruction of Hillsborough County, Fla.*, 277 F. 2d 370, 372, (5th Cir. 1960).

The 1961 order of Judge Carswell, being in clear conflict with prior decisions of the Fifth Circuit, was unanimously reversed by that court, which required that additional steps be taken. 306 F. 2d 862, 869. Yet Judge Carswell—notwithstanding the clearly enunciated contrary position of the Fifth Circuit—subsequently approved other desegregation plans under which pupils were assigned to the segregated schools they were then attending and black pupils seeking to attend an integrated school were required to go through the procedures of the Florida Pupil Assignment Law. *Steele* v. *Board of Public Instruction of Leon County, Fla.*, 8 Race Rel. L. Rep. 932, 933–34; 8 Race Rel L. Rep. 934; *Youngblood* v. *Board of Public Instruction of Bay County, Fla.*, 9 Race Rel. L. Rep. 1206, 1208–09.

It is instructive to compare Judge Carswell's treatment of the pupil assignment issue with that of Judge Skelly Wright, then sitting in the Eastern District of Louisiana. In *Bush* v. *Orleans Parish School Board*, 204 F. Supp. 568, 570–71 (E.D.La. 1962), Judge Wright concluded that: "To assign children to a segregated school system and then require them to pass muster under a pupil placement laws *is* discrimination in its rawest form." (emphasis added). This language was quoted with approval by Judge Wisdom of the Fifth Circuit in affirming this part of Judge Wright's decision. 308 F. 2d 491, 495.

3. In addition to flouting controlling precedents by approving plans based on the Florida Pupil Assignment Law, Judge Carswell continued to order grade-a-year desegregation and to refuse to modify such orders in the teeth of Fifth Circuit decisions expressly holding this rate of school desegregation inadequate.

After the Fifth Circuit had reversed his earlier order in *Augustus* v. *Board of Public Instruction of Escambia County*, Judge Carswell ordered elimination of dual attendance zones at the rate of a grade a year. 8 Race Rel. L. Rep. 58. On April 20, 1965, Judge Carswell denied plaintiffs' motion for changes in the plan, and entered a further order denying plaintiffs relief in October 1965. 11 Race Rel. L. Rep. 148.

On April 22, 1963, Judge Carswell ordered grade-a-year elimination of such dual attendance zones in *Steele* v. *Board of Public Instruction of Leon County*, 8 Race Rel. L. Rep. 934. On three separate occasions in 1965, he denied plaintiffs' motions for changes in this plan. 10 Race Rel. L. Rep. 607.

On July 20, 1964, Judge Carswell ordered grade-a-year elimination of such dual attendance zones in *Youngblood* v. *Board of Public Instruction of Bay County*, 9 Race Rel. L. Rep. 1206.

At the desegregation rate decreed by Judge Carswell, dual attendance zones based on race would not have been completely eliminated in Escambia County until the 1973–74 school year; in Leon County until the 1974–75 school year, and in Bay County until the 1975–76 school year—twenty-one years after the *Brown* decision.

On June 18, 1964—a month *before* Judge Carswell ordered grade-a-desegregation in the Bay County case—the Fifth Circuit held that a grade-a-year plan was impermissible even though, in the case pending before it, a large metropolitan school system was involved. Rejecting the view that the size of the system justified such a slow rate of desegregation, the court said:

"Plans providing for the integration of only one grade a year are now rare; and the possibility of judicial approval of such a grade-a-year plan has become increasingly remote due to the passage of time since the Brown decisions." *Armstrong* v. *Board of Education of the City of Birmingham, Alabama*, 333 F. 2d 47, 51 (5th Cir. 1964).

This was clear enough, but the Fifth Circuit made its position even clearer on February 24, 1965, months before Judge Carswell denied motions to change the grade-a-year plans in Escambia County and Leon County. On that date the Fifth Circuit handed down its decision in *Lockett* v. *Board of Education of Muscogee County School District, Ga.*, 342 F. 2d 225 (5th Cir. 1965), which outlawed any use of grade-a-year plans in the circuit. The court specifically traced the judicial decisions putting grade-a-year plans to rest, concluding that it had become clear "beyond peradventure that a shortening of the transition period was mandatory." 342 F. 2d at 227. The court noted that in five cases it had decided the previous summer, it had ruled that all grades in the school system had to be desegregated by September 1969," . . . or earlier, as we pointed out, if the school boards are unable to justify the delay on a future complaint." 342 F. 2d at 228. The court expressly noted that these decisions had laid out "minimal standards" to be applied in other cases. Id. at 229. Accord, *Bivins* v. *Board of Public Education and Orphanage for Bibb County, Georgia*, 342 F. 2d 229 (5th Cir. 1965).

4. Examination of the Carswell record in handling school desegregation cases also indicates that Judge Carswell engaged in protracted delays in processing cases.

An analysis by the Washington Research Project Action Council notes that in the Pensacola case, Judge Carswell, after striking the portions of the complaint seeking desegregation of faculties, denied plaintiff's

motion for summary judgment. 5 Race Rel. L. Rep. 645. On October 26, 1960, he set a date three months later for a factual hearing 6 Race Rel L. Rep. 73. The hearing was held on January 16, 1961. He waited until March 16, 1961—two months after the hearing—to write a two-paragraph order requiring the school board to develop a plan of desegregation. Id. The order gave the school board 90 days to develop its plan. Taking the full time allotted, the board, on June 14, 1961, submitted a two-paragraph plan with an accompanying letter to be sent to parents informing them that students could transfer to other schools under the Pupil Placement Law, and that the school administration would consider such applications without regard to race, 6 Race Rel. L. Rep. 689.

Judge Carswell waited two months before holding a hearing on this "plan." The hearing eventually was held on August 17, 1961. On September 8, 1961, shortly after the start of the 1961–62 school year, he accepted the plan with minor modifications. Since it was so late, the effective date of the plan was postponed until the 1962–63 school year.

The Fifth Circuit reversed Judge Carswell's September 8 decision on July 24, 1962, before it was to become effective. In its opinion, the Court of Appeals noted that it was too late to order changes in the plan for the 1962–63 school year, but indicated that the district court should examine the problem of time and implement the changes for that year if possible. 306 F. 2d at 869.

Judge Carswell, however, made no attempt to determine whether time permitted implementation of the changes for the 1962–63 school year. He waited until November 29, 1962—more than four months after the Fifth Circuit had cautioned him on the time problem—to order implementation of the Fifth Circuit's mandate. He then postponed its effective date until the 1963–64 school year. 8 Race Rel. L. Rep. 58.

5. Judge Carswell's attitude towards school desegregation is reflected in his actions when sitting by designation on a school desegregation case as a member of a three-judge panel on the Fifth Circuit. In *Gaines v. Dougherty County Board of Education*, 334 F. 2d 983 (5th Cir. 1964)—decided ten years after *Brown*—the court of appeals ruled that a minimum requirement was desegregation of the first two grades of school plus desegregation of the twelfth grade, "in order that every Negro child in the . . . school system have at least an opportunity to enjoy a desegregated education during his school career." 334 F. 2d at 984. The majority was concerned that a decade of children would otherwise have gone to school since Brown in completely segregated schools.

Judge Carswell found it impossible to go along with this not very radical doctrine. In an angry dissent, he used the following odd terminology in characterizing the action of the court of appeals: "In my view, this simply violates the long-standing, and wise, view that no court should *rain down* injunctions unless there be some demonstrated factual necessity to insure compliance with the law" (emphasis added). Judge Carswell apparently could see no basis for the limited injunction ordered by the court of appeals notwithstanding ten years of total segregation in the system following the *Brown* decision. On the contrary, he thought the local officials were "entitled to a presumption of good faith when they represent, as here, an intention to effectuate the law." 334 F. 2d at 986.

6. In assessing Judge Carswell's posture in these school desegregation cases, it is significant that the counties with which he was dealing were not black belt counties with large black majorities. The problems in these countries were manageable. Judge Carswell sat in a state which at the time was under relatively responsible political leadership. Florida, moreover, was the first state in the South to have all school districts not under court order in compliance with HEW's school desegregation guidelines. Most Florida school districts, in fact, opened all grades to freedom of choice desegregation in September 1965.

It is also significant that other Federal district judges in Florida were rendering contemporaneous decisions in marked contrast with those of Judge Carswell. For example, Judge Simpson, in the adjoining district, ordered two school districts, on August 21, 1962, to submit plans for the complete desegregation of teachers and other school personnel. *Braxton v. Board of Public Instruction of Duval County, Florida*, 7 Race Rel. L. Rep. 675; *Tillman v. Board of Public Instruction of Duval County, Fla.*, 7 Race Rel. L. Rep. 687. The Fifth Circuit affirmed Judge Simpson in an appeal from this portion of the Duval County order. 326 F. 2d 616 (1964) cert, den., 377 U.S. 924 (1964). Another Florida district judge ordered Indian River County to complete free choice desegregation by 1967. *Sharpton v. Board of Public Instruction of Indiana River County*, 11 Race Rel. L. Rep. 702.

Judge Carswell's actions in these cases throw light on his underlying attitude toward racial questions. Taken together, they show that he did everything possible to evade and resist the mandate of higher courts.

His behavior outside the courtroom shows a similar pattern of consistent hostility toward Negroes. To begin with, there was his 1948 statement in support of white supremacy. Some have said this should be dismised as a youthful indiscretion. I might be inclined to accept his repudiation of these words now if his conduct in the intervening years had not confirmed his original statement. But on three separate occasions he was involved in discriminatory acts against Negroes.

In 1953, he drafted a charter for a Florida State University Boosters Club that limited membership to white people.

In 1956, while U.S. attorney for the northern district of Florida, he joined in a scheme to subvert the law by leasing Tallahassee's public municipal golf course to a private group, so that it could remain segregated. Though the racist purpose of the plan was commonly known in the community, Judge Carswell claims he was unaware of it.

And in 1966, Judge Carswell sold land with a restrictive covenant for whites only.

Mr. President, this is the case against Judge Carswell. In my view it establishes that he is unqualified for a seat on the high court.

His nomination is regrettable. But it would be tragic to confirm him. For his elevation would decrease the Court's stature across the land.

Many years ago, Paul Freund, a noted authority on the Supreme Court, warned us:

> The quality of the institution depends not alone on its traditions but on the character of the individuals who man it.

Inferior men make a second-rate institution.

That is why this is a bad nomination. It is depleting the Court's prestige.

Ultimately, compliance with the law cannot be secured by force. It must be freely given as a result of moral suasion.

Under our system the majority agrees to redress the legitimate grievances of the minority, and the minority pledges to work through the established processes. In this way we have been able to reform our society again and again.

Judge Carswell's nomination is divisive.

Finally, Mr. President, I want to point out that last year at a news conference President Nixon listed the justices of the Supreme Court he particularly admired. They were Brandeis, Holmes, Cardozo, and Frankfurter. These are men of superior caliber and unquestioned merit. They set a high standard for Supreme Court nominees.

Judge Carswell does not measure up either to their standards or to those so well recognized by the President. Accordingly, I shall vote against his confirmation.

MOUNTING OPPOSITION TO CARSWELL NOMINATION

Mr. BROOKE. Mr. President, the tide of opinion against confirmation of Judge G. Harrold Carswell to be a member of the Supreme Court has mounted steadily. Thoughtful Members of the Senate of widely varying persuasions have felt growing doubts about this nomination.

Illustrative of this trend is the report by Roscoe and Geoffrey Drummond in Friday's Philadelphia Inquirer. As the Drummonds make clear, there is a grave apprehension on the part of many Senators that confirmation of this nomination would impair the Supreme Court and weaken its stature in our national life. The extraordinary frequency of reversals of Judge Carswell's opinions is one distressinig measure of the degree to which he has been out of step with modern constitutional practice. I believe that all Members of the Senate will be interested in the perceptive commentary of the Drummonds and I ask unanimous consent that be printed at this point in the RECORD.

There being no objection the article was ordered to be printed in the RECORD, as follows:

[From the Philadelphia Inquirer, Mar. 20, 1970]

DOUBTS INCREASING IN CARSWELL CASE

(By Roscoe and Geoffrey Drummond)

Liberal Republican senators—enough to determine if Judge G. Harrold Carswell will be confirmed or rejected for the Supreme Court—are having a painful time deciding how to vote.

Most of them are publicly uncommitted. They prefer to support their President. They recognize that his is the primary responsibility.

But some of them are becoming very uneasy. As facts have come out which were apparently not known to President Nixon at the time of the nomination, as testimony against Judge Carswell from impressive sources has grown, their doubts are mounting.

Some of them are beginning to lean against confirming Judge Carswell. They wonder if the appointment of a man of below-quality stature would not only impair the Supreme Court but would also signal to the aggrieved, the disadvantaged, the racially injured that the Establishment—President, Congress and court—is turning against them.

These uncommitted Republicans are not against naming a Southerner to the Supreme

Court. They are not against naming a conservative to the Supreme Court. They are not against naming a strict constructionist to the Supreme Court.

They are concerned with larger issues. They are concerned that now when the nation is finally coming to grips with racial justice, school integration and equal rights for all, Judge Carswell has so long been facing mostly in the opposite direction, that he is out of step with the times and that his elevation to the highest court could only be evidence that government is turning its back on the social and political reforms which are still only half achieved.

Those who are still pondering how to vote are asking themselves how out of step with the needs of the times is Judge Carswell? What levels of judicial competence would he bring to the Supreme Court?

One disturbing answer they find is that in all the cases which came before Judge Carswell on the Federal bench and were appealed to higher courts, 59 percent of his decisions were reversed.

Undoubtedly he called them as he saw them and rendered his decisions to the best of his ability.

Is this 59 percent reveral unusual? It is 300 percent higher than the national average of all Federal judges.

The Republicans who are now beginning to lean away from Carswell are aware that a committee of the American Bar Association indorsed his appointment.

It was their judgment that he lacks distinction and isn't even qualified for his present seat on the 5th Circuit Court of Appeals.

Those who are earnestly trying to weigh the evidence find their doubts increased by the kind of reply which Carswell supporters make to this point. Sen. Roman Hruska (R., Neb.) says the President has the right to name a "mediocre" judge. He actually said it. His words:

"Even if he (Carswell) were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?"

One uncommitted liberal Republican senator put his central thinking on Carswell this way:

"Nothing is more crucial today than to do everything we can to keep the justly discontented working within the political system and reasonably confident that our system is capable and intent upon dealing with just grievances. We must not give them any signal that their government is turning against them. I wonder if all the circumstances of the Carswell nomination won't do just that."

So do many others.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Bartlett, one of its reading clerks, announced that the House had agreed to the amendment of the Senate to the bill (H.R. 3786) to authorize the appropriation of additional funds necessary for acquisition of land at the Point Reyes National Seashore in California.

The message also announced that the House had agreed to the concurrent resolution (H. Con. Res. 554) authorizing certain corrections to be made in the enrollment of H.R. 11959, in which it requested the concurrence of the Senate.

ENROLLED BILL SIGNED

The message further announced that the Speaker had affixed his signature to the enrolled bill (H.R. 3786) to authorize the appropriation of additional funds necessary for acquisition of land at the Point Reyes National Seashore in California.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HARRIS. Mr. President, Mark Twain reminded us:

It is easy to find fault if one has that disposition. There was once a man who, not being able to find any other fault with the coal delivered for his furnace, complained that there were too many prehistoric toads in it.

Supporters of the nomination of Judge G. Harrold Carswell to be Associate Justice of the Supreme Court would like to cast the opposition in such a role, and they have endeavored to center the debate on such supposed issues as partisan politics, geography, and the conservative label.

If, indeed, these were the issues, this nomination would, by now, have already been confirmed. In fact, I think we all expected that the President would nominate a Republican, a southerner, and a strict constitutional constructionist, whatever that is interpreted to be.

Democrats do not think they have an exclusive claim on excellence and high qualification for office. We freely admit that the President had available to him many excellent choices for this position from within his own party.

The confirmation process should be free of partisan interests, and I am not aware of anyone attempting to make a partisan issue of the confirmation of this nominee. In fact, every effort has been made to keep the process free of partisanship. Indeed, it may well be easier for Democrats to shed their partisanship, since the President is not a member of their party, than for Republicans to do so, but it is important that it be done. The recent, mixed vote rejecting the nomination of Judge Clement F. Haynsworth, Jr., attests to the fact that, because of the importance of the Supreme Court, the Senate has not chosen to make the confirmation process a partisan one.

Likewise, the apparent desire of the President to appoint a southerner, is not in issue. I am content that the President should nominate a southerner, although I can think of no position where geography is less important. Justice is neither partisan nor sectional.

The final question concerning the label of constitutional conservative or strict constructionist is difficult to meet squarely. The thesis of conservative or strict interpretation of the Constitution is well within the framework of acceptability.

But there are matters concerning which this often artificial dichotomy between conservative and liberal ceases to exist. There is no conservative judicial error, no conservative concept of human equallty—and certainly no conservative justice. Error is error. The only alternative to justice is injustice—there is nothing in between.

What is then the real issue? To answer this question one must first, I think, understand the power of the Senate to advise and consent as provided in article II, section 2 of the Constitution.

The advise and consent of this body was never intended to be an act of acquiescence. The Federalist Papers clearly set forth the arguments which were made during the Constitutional Convention in support of various methods of appointing judges and other Federal officers.

At one point during the Convention, it was agreed that the President should appoint all officials. At another point, it was agreed that judges should be appointed by the second branch of the legislature, and that other officials should be appointed by the President. And, from time to time, during the Convention, an effort was made to vest the full appointing power in the upper branch of the legislature by those who feared that to give the President alone such power would surely lead to a monarchy.

Out of controversy and dispute a compromise provision was finally agreed to, giving the President the power to nominate and the Senate the power to advise and consent.

Those who favored appointment by the upper branch alone would never have agreed to this compromise, to give the Senate only the power of "advise and consent" if they had not assumed the Senate would assert itself fully in this role. Particularly do we know this is true because we also know that they feared the giving of absolute power of appointment to the President would lead to a monarchy.

Alexander Hamilton, in the Federalist Papers confirmed this when he stated:

To what purpose then required the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favortism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The fact that the Senate, over the years has rejected 22 nominees indicates that the Senate has considered these responsibilities under the Constitution to be very serious and important ones; it has not permitted the power to nominate to become the power of automatic appointment. We have done better than the Englishman in the poem "Lord Tomnoddy" who, when asked what qualification Lord Tomnoddy had to rule, replied:

One!
He's the Earl of Fitzdotterel's eldest son.

Nomination and appointment are not, and should never be, synonymous—especially when applied to the process of confirming Justices of the Supreme Court.

Our duty, individually and collectively as a body, is to give careful consideration to the qualifications of nominees.

We must determine, on the basis of the hearings of the Senate Judiciary Committee and all other facts that have been

brought to light, whether the nominee before us today possesses the intellectual and philosophical qualifications demanded for service on the highest court in the Nation, a Court which must serve as an example for every court in our country, and which should deserve the full faith and confidence of every man in the justness of its decisions.

Perhaps our role would not be so burdensome if a member of the Court served for a limited period of time only. Most Federal executives serve at the President's pleasure, and can be removed if they prove unfit for the job. Even commissioners of independent agencies, although appointed for specific terms of several years, can be denied reappointment if they become unsuitable in the judgment of the President or the Congress. But, a Justice of the Supreme Court serves for life, and, for life, hears final appeals for human justice. This is as it should be, if the Court is to retain the independence envisaged for it by the makers of our Constitution.

The Supreme Court should be coequal with the legislative and executive branches in our system of checks and balances, which has generally served us so well, and it has a distinct and vital role to play. That role, since the days of John Marshall, has been to decide the great controversies of the day on the basis of the fundamental principles of the Constitution. One reason our Constitution has survived for 18 decades is that its authors in their wisdom realized that changing times would weaken such a charter if the charter were to deal in too great specificity. They relied on succeeding generations to match guiding principles with specific details of important current cases.

This can only be accomplished if the men who are to do the matching, the Justices of the Supreme Court, have a sophisticated and subtle understanding of the Constitution and previous interpretations, of the Nation's history, and of the social trends and problems out of which both current laws and current litigation arise. Whether conservative or liberal in approach, these men must have a breadth of vision and a genuine feeling for the rights so clearly stated by the Constitution. They must also be innovators and groundbreakers, not merely the passive followers of interpretations laid down by others.

The landmark cases decided by the Court through the years have been important, precisely because these decisions provided what had been lacking until each such Court opinion had been given—the meshing of constitutional principle, precedent, current law, and individual dispute.

Think back across the rich panoply of American constitutional history. From *Marbury* v. *Madison*, 1 Cr. 137 (1803), in which Chief Justice John Marshall made explicit the review powers implicit in the Constitution, to *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), in which the Court mandated equal protection of the laws with respect to housing, and all the landmark decisions in between, one continuing element persists. That is the need for high intelligence and compassion in the way the Court approaches its job of melding all the elements together.

Whether the Court found itself defining the relationship between the three branches as it has in cases such as *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952), explicating the requirements of our federal system as it did in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), or developing the commerce powers of Congress, as in *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937), the task has demanded judicial excellence.

However, intelligence enough to deal with the complex issues is not enough, when the matter under consideration falls within the category of human rights, in consideration of which the compassion necessary to fairly weigh the impartiality of the law with the dignity of the individual is vital. Without compassion, the compelling arguments of Brandeis in his brief on the condition of women employees in *Muller* v. *Oregon*, 208 U.S. 412 (1908), would have gone for naught and those engaged in unfair labor practices would not have been placed on notice that henceforth their activities would have to meet the due process tests of the courts. Without social conscience, *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) would not have been reversed by *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Thus, we see that demands on Justices of the Supreme Court are extremely heavy. We do the country a grave disservice when we give "advice and consent" to nominees who do not meet the high standards required of them if they are to function effectively. As Justice Frankfurter has written:

> Such functions surely call for capacious minds and reliable powers for disinterested and fair-minded judgment. It demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. One in whose keeping may be the decision of the Court must have a disposition to be detached and withdrawn. To be sure, these moral qualities, for such they are, are desirable in all judges, but they are indispensable for the Supreme Court. Its task is to seize the permanent, more or less, from the feelings and fluctuations of the transient.

Thus, when it is determined that a nominee does not meet the high standards test for membership on the Supreme Court, it is the duty of the Senate to reject the nominee, rejection not of any one man, but an expression of intention to demand the highest standards of excellence for all future nominations to the Court.

Does Judge G. Harrold Carswell possess the qualifications the Senate should demand of any nominee? I think that the record reveals otherwise.

The hearings of the Judiciary Committee are replete with statements to the effect that there is nothing "in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States." Prof. William Van Alystyne, professor of law, Duke University Law School, who supported the confirmation of Judge Clement F. Haynsworth, Jr., but now opposes confirmation of Judge Carswell, said of the nominee's opinions:

> There is simply a lack of reasoning, care, or judicial sensitivity overall, in the nominee's opinions.

Two of the nominee's own judicial colleagues, Judge Elbert P. Tuttle, retired chief judge of the U.S. Fifth Circuit and Judge John Minor Wisdom of the same court, have withheld their support of the confirmation of Judge Carswell to serve on the Supreme Court.

Nine of the 15 faculty members of Florida State University Law School, which the nominee helped to establish, have written the President requesting that this nomination be withdrawn.

Recently, a group of 457 prominent law professors and lawyers, of diverse political affiliations and from different areas of the Nation, urged rejection of the nominee, or "at the very least," a reopening of the hearings so that an official investigation could be made by independent counsel for the Senate Judiciary Committee.

More and more concerned citizens have begun to question the qualifications of Judge Carswell since a survey has revealed that, as a Federal district court judge, he was reversed on 58.8 percent of all those cases in which he wrote a printed opinion. This rate of reversal was three times the average rate among all Federal district judges. The same survey revealed that Judge Carswell's rate of reversals for all of his printed cases was 11.9 percent, in contrast to a rate of 5.3 percent for all Federal district cases, and 6 percent for all district cases from the fifth circuit.

In an editorial which appeared in the February 27 edition of the Tallahassee Transaction, concern was expressed about the growing opposition to the nomination. The editorial writer stated:

> The extraordinary anguish among law school faculty members and leading lawyers over the nomination of Judge G. Harrold Carswell to the Supreme Court should alert every Senator to consider his responsibility to country and constitution.

The fact that such distinguished men and an increasing number of citizens are questioning whether the nominee has the requisite high competence and superior ability is disturbing enough, but the context in which this questioning is taking place is even more disturbing. The 1948 public words of the nominee, "I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed," permeates the entire process of considering his qualifications.

President Nixon, in a news conference on January 30, 1970, defended the nominee's statement on the basis that it was made 22 years ago and stated that we should not "question his integrity in his late years because in his early years in the South he took the position that other southerners were taking." To prove his point, the President referred to a statement made by the late and distingulshed Ralph McGill, editor of the Atlanta Constitution, in 1940 when he wrote a column, "in which he came out unalterably against integration of education of southern schools," to use President Nixon words. However, rather than proving the point the President hoped to make, the

reference to Ralph McGill and his career in the field of human rights disprove the point. We all know that Ralph McGill's long record on civil rights was outstanding. No one doubts that, through the influence of his column, carried not only in the Atlanta Constitution, but also in other southern newspapers, much was done to "bridge the river of misunderstanding."

Does the judicial record of Judge Carswell indicate that he has changed his mind concerning segregation of the races as a way of life? Has he adopted a different philosophy?

In the case of *Due* v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630 (Fifth Circuit, 1964), attempts were made by theater corporations and local officials in Tallahassee to keep black people out of the theaters. Judge Carswell granted summary judgment in favor of the local officials. The granting of summary relief under circumstances where facts had been alleged showing a violation of certain civil rights, and which facts were disputed, was strongly criticized by the circuit court in reversing Judge Carswell.

In the case of *Singleton* v. *Board of Commissions of State Institutions*, 356 F. 2d 771 (Fifth Circuit, 1966), the issue was desegregation of the Florida State reform schools. Suit was brought by Negro children, who were convicted but out on probation for participation in a sitin at one of the institutions, to enjoin the segregation, and to have declared unconstitutional a State statute requiring the segregation. Judge Carswell dismissed the suit on the ground that the plaintiffs lacked standing to sue even though the probation could be revoked at any time. Again the circuit court reversed Judge Carswell.

In *Dawkins* v. *Green*, 285 F. Supp. 772, reversed in 412 F. 2d 644 (1969), Negro civil rights workers sought to enjoin certain county officials from enforcing statutes on a discriminatory basis for the purpose of preventing the workers from carrying out their civil rights movement. Again Judge Carswell granted summary judgment and again was reversed by the circuit court for granting summary judgment.

I think it should be remembered that Judge Carswell's persistent granting of summary judgments took place at a time when the Supreme Court and the circuit courts were admonishing district judges to grant such relief only in cases where clearly there was no issue of fact, and no reason to secure any additional facts.

In the case of *Augustus* v. *Board of Public Education of Escambia County*, 185 F. Supp. 450 (1960), reversed 306 F. 2d 862 (Fifth Circuit, 1962), the issue was faculty segregation. The relief sought in the complaint, filed on behalf of Negro students, was for an injunction of segregation in the schools and racial assignment of the teachers. Without holding a hearing on the issue of faculty segregation, Judge Carswell on a motion to strike ruled that the matter should be stricken from the complaint. Reversal by the circuit court followed.

In numerous desegregation cases Judge Carswell approved grade-a-year desegregation plans even though the third, fourth, fifth, and eighth circuits had previously held such a slow rate to be constitutionally unacceptable. This was true in the cases of: *Augustus* v. *Board of Public Education of Escambia County*, supra; *Steele* v. *Board of Public Instruction of Leon County*, 371 F. 2d 395 (Fifth Circuit, 1967); and *Youngblood* v. *Board of Public Instruction of Bay County*, 230 F. Supp. 74 (1964).

Professor Van Alstyne considered the cases just discussed in the context of the statement made by Judge Carswell in 1948. In this regard he said:

> I would agree with those who believe that unless that statement can be significantly discounted by clear and reassuring events since that time, 20 years ago, it would be uniquely inappropriate for the Senate to consent to his nomination as an Associate Justice of the Supreme Court. But an examination of his decisions and opinions as a district judge since that time, even laying his earlier statement entirely aside, provides no feeling for a basis of reassurance whatever.

Nor are we reassured by the conduct of Judge Carswell on the bench, that he has changed his views since 1948. Proof has been furnished to the committee that on numerous occasions civil rights lawyers were subjected to improper judicial treatment, particularly if they were volunteers or from out of the State.

Prof. LeRoy Clark of New York University, who ran the NAACP legal defense fund litigation in Florida between 1962 and 1968, called Judge Carswell:

> The most hostile federal district court judge I have ever appeared before with respect to civil rights matters.

Professor Clark recited incidents wherein the nominee attempted to disrupt the argument of civil rights lawyers, even shouting at them at times, while according every courtesy to opposing counsel. Professor Clark stated:

> Whenever I took a young lawyer into the state, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.

In one case, another witness before the Judiciary Committee reported that Judge Carswell had not only acted in a hostile manner toward civil rights lawyers, lecturing them at length about northern lawyers coming to Florida and arousing the local populace, but had also made it clear that he was going to deny all relief the lawyers had requested for their clients. This he proceeded to do, exhibiting resentment toward the clients, who had been arrested for trespass while attempting to aid sharecroppers in registering to vote.

He made unnecessarily complicated the filing of a habeas corpus petition in behalf of the clients, who were being held in a county jail because a local judge refused to recognize the removal jurisdiction of Judge Carswell's court.

When the lawyers finally convinced Judge Carswell that he had no choice under the law except to grant habeas corpus, his actions still kept the civil rights workers in jail by granting the petition, and, then immediately remanding the cases right back to the county court. This was done on his own motion, without being requested by any of the involved parties and without a hearing or opportunity to present testimony or argument.

In an earlier case, Judge Carswell's actions resulted in nine clergymen freedom riders having permanent criminal records after they had been arrested in the Tallahassee airport restaurant. When appeals in the State court were terminated on a technicality, Judge Carswell, sitting as a Federal district judge, denied habeas corpus without allowing a hearing. This ruling was modified by order of the fifth circuit which provided that an immediate hearing should be held before Judge Carswell if the State court did not grant such a hearing. In a meeting with the clergymen's lawyer and the city attorney, Judge Carswell suggested that the whole case could be concluded by reducing the sentences of the clergymen to the time already served, in spite of the fact that they had not requested such a reduction and, in fact, wished to have their case decided on the merits so that their records would thereby be cleared. Mr. Ernst Rosenberger, who participated in this meeting with Judge Carswell, told the Judiciary Committee that his advice "could have no other effect except to moot the entire question" which would leave the clergymen "with no way for vindication," insuring them a permanent criminal record.

In short, Judge Carswell advised the city attorney in a State court proceeding how to circumvent an order of the circuit court. His advice was followed, despite the efforts of Mr. Rosenberger, and this action totally preempted the legitimate efforts of the clergymen to obtain a judicial ruling. If Judge Carswell had in fact moderated his early segregationist views by the time these incidents took place, his conduct on the bench failed clearly to show such a change.

At the time of his 1948 speech, Judge Carswell was a private citizen, while in the 1960's, when these events occurred, he was a Federal judge, sworn to uphold the Constitution and to provide equal protection under the law to all citizens.

Nor was Judge Carswell a private citizen when he participated in the well-known Tallahassee golf course matter—he was at that time the U.S. attorney.

The record clearly shows that in 1956 Judge Carswell and other citizens of Tallahassee undertook a course of action that would result in denying to the black community of Tallahassee the use of the municipal golf course. This was done by forming a private corporation to which the city transferred the golf course.

Judge Carswell has disputed that it was his intent to deny the use of this public facility to blacks and to circumvent a ruling of the Supreme Court making it unconstitutional for city or State to segregate any of its public recreational facilities. Judge Carswell does admit having knowledge of similar practices occurring in other cities in the South.

A group of distinguished professors and members of the bar commented on Judge Carswell's explanation of his involvement in the incident stating:

If true, (the explanation) shows him to be lacking the intelligence of a reasonable man and to be utterly callous to the implications of the scheme to which he was lending himself.

I think the obvious conclusion to be reached, based on the facts and the matters discussed, is that while America has come a long way since 1948, when it might have been acceptable in certain parts of the South to campaign as a white supremacist, it cannot be demonstrated from the record that Judge Carswell, personally, has come an equal distance.

Judge Carswell has said that he regrets having made the notorious white supremacy speech in 1948. But his record does not prove such a change of heart. Indeed, it raises serious questions as to whether such a change has taken place.

We are not the same nation we were in 1954. The Supreme Court has become the symbol of our awakening to the curse of racism, our growing commitment to eradicate it, and our renewed dedication to the dream of full freedom and complete equality of opportunity for all men.

We need no one to tell us that we are still far from our goal, however great our progress. But in the midst of our failures and disappointments, our frustrations and small victories, the Supreme Court has been like a lighthouse in a storm—an unfailing symbol of our highest ideals. It has been a beacon of hope to people who have regarded other institutions as their enemies.

It is hard for most of us to understand how one could feel so far outside the concern or benefit of laws or courts as to view them as enemies. Serving on the National Advisory Commission on Civil Disorders—Kerner Commission—enabled me to understand this better.

We traveled throughout America, listening to the voice of her people, seeing how they lived, and we said:

Our Nation is moving toward two societies, one black, one white—separate and unequal.

It has been said that there should be a balance on the Court, but I maintain that there should not be a dilution of basic and fundamental constitutional principles which uphold the inherent worth and value of every human being.

So far as I know, it is unprecedented that a judge's own colleagues, the men who know him best, would indicate their lack of support for him and for his appointment to a higher court. Yet, that is the situation in regard to Judge Carswell. Only lately has it become known that former Chief Judge Elbert P. Tuttle and Judge John Minor Wisdom declined to join in support for Judge Carswell, and there is even some question that this fact in regard to Judge Tuttle was not presented to the Judiciary Committee with full candor.

This newly developed circumstance causes me to believe strongly that this nomination should be referred back to the Senate Judiciary Committee for further consideration. Particularly appropriate, I believe, would be discussions by the committee, even privately, with Judge Tuttle and Judge Wisdom to obtain their views concerning this nomination and the reasons therefor.

I would hope that the President of the United States and Members of the Senate who support this nomination would gracefully agree to refer it back to the committee. It would be my hope that the committee might then decide to postpone further consideration of the nomination indefinitely.

In any event, I hope that the general public will have the time to become more fully aware of the serious objections to the confirmation of Judge Carswell. Fully informed, the people and the Senate will decide against confirmation.

Mr. President, I urge that the Senate do not advise and consent to the nomination of Judge G. Harrold Carswell to be Associate Justice of the U.S. Supreme Court.

Mr. President, the New York Times on March 23, 1970, published an editorial in regard to this matter, in which it was said that a group of distinguished lawyers, including Francis T. P. Plimpton, president of the New York Bar Association, as well as the deans of leading law schools, have charged that the qualified rating given Judge Carswell by the Federal Judiciary Committee of the American Bar Association is seriously misleading.

Mr. President, the Washington Post for Sunday, March 22, 1970, published a lengthy editorial on this same subject in which it says in part:

Judge Carswell is a bad choice, and the Senate should reject him out of its obligation to safeguard the paramount interests of our highest court. In the process of refusing his confirmation, the Senate has an opportunity, not just to say *No*, but also to say *Enough*—of insensitivity and indifference, of legislative retrogression and of catering to racist tendencies for political gain, of talking about blacks as if there were no blacks in the room. The Senate, in this fashion, could broadcast from at least one seat of government a signal to all races—a signal which at this stage can no longer be broadcast, in a way that would be believable, by anybody else.

Mr. President, I ask unanimous consent that the New York Times and the Washington Post editorials to which I just referred, be printed in full at this point in the RECORD.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

[From the New York Times, Mar. 23, 1970]

RATING JUDGE CARSWELL

The Senate, in its desultory debate over whether to confirm the nomination of Judge G. Harrold Carswell to the Supreme Court, is giving an uninspiring demonstration of its sense of responsibility on an issue of grave national concern.

President Nixon, in his weekend press conference, urged Senators to weigh, not the mail, but the evidence. It is precisely on the evidence that Judge Carswell emerges with a mediocre judicial record and with questionable attitudes toward social justice.

Senator Roman L. Hruska, Republican of Nebraska, in apparent contempt for excellence in American institutions, championed the right of all who are mediocre to be represented by mediocrity on the Supreme Court. Application of this view to the Senate is bad enough; to extend it to the highest court is intolerable. Yet, this appears to be the intent of those who deliberately spurn all honest assessment of evidence unfavorable to Judge Carswell.

For example, it has now become known that Elbert P. Tuttle, the retired Chief Judge of the United States Court of Appeals for the Fifth Circuit in the South, who originally backed the nomination, subsequently decided to withdraw his endorsement. But Judge Carswell's supporters let the impression of Judge Tuttle's approval be used as continuing support for him.

A group of distinguished lawyers, including Francis T. P. Plimpton, president of the New York Bar Association, as well as the deans of leading law schools, have charged that the "qualified" rating, given Judge Carswell by the Federal Judiciary Committee of the American Bar Association, is seriously misleading. They consider the issue sufficiently grave to demand that the committee reopen the case and provide a more explicit rating, as it does in the case of other Federal judges.

Judge Carswell's supporters have used the A.B.A. rating as a judgment of high merit, when it is little more than an evasive rubber stamp. Attorney General Mitchell, who undoubtedly knows the real meaning of the A.B.A.'s faint praise, has stated publicly that his nominee comes "highly recommended" by the association.

These misleading tactics amply justify the demand for a more enlightening reappraisal. An explicit rating would do much to help the Senators when they ultimately cast their vote on the dictates of both fact and conscience. The legal profession surely has a responsibility to offer credible guidance and, at the very least, make sure that its testimony cannot be abused in ways that might demean the Supreme Court.

[From the Washington Post, Mar. 22, 1970]

JUDGE CARSWELL: THE WRONG SIGNAL . . .

It is a longish leap from the fun and games at the Gridiron Club last weekend to the Senate debate on Judge Carswell. But bear with us because there is a logical connection here between the appointment of a decidedly second-rate judge to the Supreme Court and the ease with which President Nixon and Vice President Agnew stole the Gridiron show. As you may have read, the two men joined in a piano duet, with the President playing a medley of the favorite tunes of his predecessors and the Vice President interrupting him by playing "Dixie." Doubtless you had to be there to get it into the right context, to hear the rough but good-natured jibes at the Administration on race issues that preceded the surprise finale, and thus to appreciate the joke. Almost everybody agreed it was a *tour de force* gracefully done and quite in keeping with the spirit of an affair at which the tensions and antagonisms of the real world are supposed to be set aside.

So it is with no intent to disparage the performance of the President and the Vice President that we take note of this event. Still, at the risk of sounding stuffy, it strikes us as a small piece of a bad scene, and a significant measure of how great is the power of the Presidency to influence a public attitude. All of a sudden, it is all right to joke about something that responsible people in high places once used to handle with care and compassion and deadly seriousness.

In theory, a sense of humor is supposed to be a saving grace. So why not make sport of a Southern Strategy? The answer, of course, is that Southern Strategy is a euphemism for something that isn't funny. On its face it is no more than a cynical political tactic designed to innoculate the South against George Wallace for the sake of winning it for the Republicans, the better to secure a second term for President Nixon in 1972. As a political objective, this is fair enough—some people even see in it an admirable toughmindedness. But there is nothing admirable about the logical consequences of this strategy, for to bring it off it becomes necessary for the Administration to cultivate indifference, not to say hostility, toward the

fundamental principle of human rights in general, and the equality of education available to black children in particular. Putting it another way, and bluntly, Southern Strategy means a form of racism, tacit or explicit, by people in high places, because there can be no successful effort to undercut George Wallace in the South that does not play the segregation game.

It is important to be clear in our minds about the issue here. We are well aware that the White House will be publishing next week what has been billed as the most complete, the most comprehensive, the most closely argued legal brief ever composed on school desegregation and it is not our purpose here to judge it in advance. For that is not what this is all about. We are not talking just about schools, or doubts held by responsible people about busing or other methods for dealing with the de facto segregation which occurs as a result of natural, geographic imbalance. We are talking about what a President or an Administration can do, or not do, to create an atmosphere that is conducive, not to miracles, but to continuing progress, against racial discrimination all along the line. And this, in turn, is what is so troubling about the ease with which we now laugh at jokes about a Southern Strategy. It is what links the hijinks at the Gridiron with the nomination of Judge Carswell and a lot of other things—the abrupt removal of a Leon Panneta from HEW because he tried too hard; the effort to subvert Negro voting rights; the insensitivity, in tone and phrase, to black pride; the country club mentality.

Mr. Harry Dent, a presidential assistant, receives a written offer of campaign funds from a Georgia Republican leader in exchange for the restoration of Federal school aid in a Georgia school district. He casually passes it along to HEW—and nobody seems to mind. The Vice President brushes off the idea of quotas for black students by asking the crude question, "Do you wish to be attended by a physician who entered medical school to fill a quota . . .?" Mr. Jerris Leonard, the Justice Department's civil rights enforcer, thinks it clever, or something, to say that one reason blacks just out of law school are not attracted to Justice Department jobs is that they haven't yet bought their first cashmere topcoat. Confronted with a question about Judge Carswell's involvement with segregated clubs, the President thinks it an adequate defense to say, in effect, that everybody's doing it: ". . . if everybody in government service who has belonged or does belong to restricted golf clubs were to leave the service, this city would have the highest rate of unemployment of any city in the country."

And so it goes, right down to the vote on Judge Carswell, with the Administration's men telling Republicans who opposed Judge Haynsworth—in almost every respect a much superior choice—that they can't rebuff their President twice running. They can, of course, and they should, because this is nothing so narrow as a test of party loyalty. It is a test of policy and principle—a kind of Tonkin Resolution on race, if you accept the theory recently advanced in Life Magazine by Hugh Sidey that the race issue could be for President Nixon the disaster that Vietnam was for President Johnson.

The Tonkin Resolution on Vietnam was a fraud, and while that became clearer later, it might have been clearer at the time if the right questions had been pressed, if Congress had not closed its eyes out of misplaced deference to the President and waved him down a wrong road. Therein lies the analogy. Judge Carswell is a bad choice, and the Senate should reject him out of its obligation to safeguard the paramount interests of our highest court. In the process of refusing his confirmation, the Senate has an opportunity, not just to say *No*, but also to say *Enough*—of insensitivity and indifference, of legislative retrogression and of catering to racist tendencies for political gain, of talking about blacks as if there were no blacks in the room. The Senate, in this fashion, could broadcast from at least one seat of government a signal to all races—a signal which at this stage can no longer be broadcast, in a way that would be believable, by anybody else.

Mr. BAYH. Mr. President, will the Senator from Oklahoma yield?

Mr. HARRIS. I yield.

Mr. BAYH. I hesitate to interrupt the eloquent remarks of my friend and colleague from Oklahoma, but he appears to be headed into the area of the judge's qualifications, and I wanted to commend him for discussing at the outset of his remarks the broader question of whether Members of the Senate really do, in fact, have the authority to advise and consent.

As the Senator from Oklahoma knows, we have in this nomination the second distasteful disagreement with the President. During the first one, the Senator from Indiana had the opportunity to do some significant research in this area of qualification and some questions were brought to light by the Senator from Oklahoma. I suppose the Senator from Oklahoma is of the opinion that if, indeed, our constitutional fathers meant anything, when they gave us the authority to advise and consent they did in fact intend for us to speak out when we differed with the President on the matter of Supreme Court nominees.

Mr. HARRIS. I certainly do agree. The Senator from Indiana is chairman of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary and is, therefore, especially well qualified on the meaning of the provisions written into the Constitution by the Founding Fathers, particularly because of his interest in the high quality of the judiciary in this country which is a basic and fundamental need if our system is to continue. The Senator from Indiana is well qualified to discuss the "advice and consent" powers of the Senate. I think that their importance, which he has indicated, is quite correct.

Mr. BAYH. The Senator has been helpful in pointing out the number of nominees who have not been confirmed to the Supreme Court. Can the Senator recall the study we conducted earlier, that 25 percent of all nominees who have been recommended have either been turned down by the Senate or withdrawn by the President? I wonder whether the Senator is familiar with that rather significant percentage, as we look back over the nearly 200 years of history, in which Members of this body have taken as their personal responsibility, and rightly so, to speak out when they differ with the President.

The Senator from Indiana feels that there is inconsistency in some Members of the Senate who stand upon the floor of the Senate and bemoan the fact there seems to be a creeping executivism, so far as spreading of the powers of the executive is concerned, yet they are timid in exerting themselves in the area where their responsibility is most clear.

Mr. HARRIS. The Senator from Indiana makes a very important point. My own research, aided by two able legislative assistants in my office, Fred Gipson and Frank Cowan, has revealed to me a number of judicial appointments which had been rejected by the Senate. I had not realized that amounted to a percentage which was as high as the Senator from Indiana has indicated. That is an important point. I know that the Senator from Indiana would agree with me, and with the comments that have been previously made in the Senate about the extra responsibility which the Constitution places upon the Senate and Members of the Senate in regard to judicial appointments, as opposed to appointments of the President to his Cabinet and so forth.

I think that the percentage of rejections by the Senate points up that over the years the Senate has considered this to be a very important duty which it has under the Constitution.

Mr. BAYH. One further point, and then I will let the Senator proceed. He has been very kind to yield. The reason I brought this other figure up was the fact that the Senator from Oklahoma had suggested over the weekend on a nationwide news program, and has suggested here today on the floor of the Senate, that the Judiciary Committee have the opportunity to look at this nomination again in view of everything that has come to the fore. It is interesting to note that if the President were to withdraw this nomination, it would not be the first time in history that that course of action had been followed.

Mr. HARRIS. I agree with the Senator from Indiana that that is the course which should be followed here. If we are not ready to reject this nomination when we come back here after the Easter recess—and I do not think that we should vote on it before the Easter recess, because I think the general public has not had a full opportunity to know all the serious objections to the nomination—it might be well worthwhile to consider referring the nomination back to the committee. If I were the nominee, I would want that.

Serious questions have been raised about it which have only now come to light. It seems that former Judge Tuttle has declined actively to support the nomination. There has been some implication that that fact was not presented to the Judiciary Committee with full candor. Very serious questions have been raised about the effect of the American Bar Association's position with regard to this or any other nomination, which I think could well be gone into further now, since they have been raised. Thus, I think it might be well to do that.

If I were the nominee, this kind of nomination being so serious, I would not—if the man is to be confirmed—I would not, if I were he, want to embark upon my duties with these kinds of serious objections raised. If I were the President who had nominated him, I would not want that to be true.

Mr. BAYH. I appreciate the Senator's replies to my questions.

Mr. LONG. Mr. President, will the Senator from Oklahoma yield?

Mr. HARRIS. I yield.

Mr. LONG. Mr. President, may I say to the Senator that I personally have undertaken to find out, as best I could, all

about Judge Carswell, from people who know him and have worked and served with him. So far as I can determine, everyone I know of, including those who represent the State of Louisiana on the district court bench, who have served with the man, all urge that I vote to confirm him.

There are two or three who would like not to be quoted because they feel it is not appropriate for a judge to engage in saying whether a man should be confirmed or not.

One went to some pains to explain to me that he felt that there were political considerations involved in the appointment of a judge and that he had very grave doubts as to whether a judge ought to be telling the Senate whether a man should be a judge or not. The overwhelming majority of judges to whom I talked were willing to express their views.

And they were unanimous in the opinion that this man should be confirmed. Can the Senator say that I should not be willing to vote to confirm a man if everything is as I have related?

Mr. HARRIS. Mr. President, if the distinguished Senator from Louisiana is convinced that Judge Carswell is qualified and meets the high standards of a Cardozo or a Holmes or the kind of men that he and I would want to consider and act upon the law and the facts in a case regarding ourselves; if the Senator thinks this nominee is of the quality and caliber that he ought to be in order to serve as one of only nine men who sits for the rest of his life to hear last and final appeals for human justice—then I think he ought to speak in favor of the nomination.

If, on the other hand, the distinguished Senator from Louisiana is in the position that a growing number of members of the general public, as well as a growing number of the Members of the Senate, are, and upon reflection on the qualifications of this nominee and the full facts concerning the matter, the Senator is beginning to doubt that this appointment should be confimred, I think he ought to listen carefully to the statements made in the Senate and elsewhere and either join with me in suggesting that we refer the nomination back to the Judiciary Committee or that we go ahead and reject it.

I would call the attention of the distinguished Senator to an editorial which appeared in the Norman Transcript, of Norman, Okla., on Tuesday, March 17, 1970, because it bears upon the Senator's own position perhaps.

The Norman Transcript started out, as did the Senator from Louisiana, feeling that it probably ought to support the nomination.

The Norman Transcript is not known as a "liberal" newspaper. As a matter of fact, the editorial starts out saying that the identities of those opposing Judge Carswell made them want to support him.

They point out that among those opposing Judge Carswell are, as they say, "extreme civil rights advocates and organized labor," and "social activists." So, this is not a particularly liberal newspaper.

The Norman Transcript at first, then, determined, as maybe the distinguished Senator from Louisiana did, that perhaps it was a nomination which should be rather summarily approved.

Then the Norman Transcript said:

In the light of later information, however, and specifically on grounds of the nominee's evidenced racism and inadequate legal qualifications—the large number of his decisions in the field of civil rights that have been reversed on appeal—many people are having second thoughts.

While Judge Carswell is conceded to be honest, there is no question his record is one of unsurpassed mediocrity. The highest court in the land needs more than that, especially in view of the lowered esteem it enjoys in the eyes of much of the public and after the soul-wrenching crises of the past. It needs someone to add not only moral integrity, but also wisdom and judicial resourcefulness that will give the court more understanding of the practical effect of its decisions and make it less stubbornly doctrinaire.

About all that recommends Judge Carswell is that he is a southerner and thus, Nixon can meet his campaign promises to the South. But, if he cannot bring judicial talent to the bench, he probably should not be confirmed.

In that event, the President should look elsewhere than in Dixie for a man who would strengthen the Supreme Court—not only for now, when strengthening is so desperately needed, but for the years to come.

Mr. President, I ask unanimous consent that the editorial from the Norman Transcript from which I have read briefly be printed in full at this point in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

DOUBTS CAST ON CARSWELL BY RECORD OF MEDIOCRITY

To examine the identies of those who are opposing Senate confirmation of President Nixon's nomination of Judge G. Harrold Carswell to the Supreme Court is to understand the reason for their stand.

Invariably they are associated with groups holding a vested interest in a continuation of the social-activist type of court carried to the extreme during the tenure of former Chief Justice Earl Warren. The more extreme civil rights advocates and organized labor have not retreated in their battle to prevent a turning of the court into a more constructionist mold, the avowed aim of the President. A large share of the American public apparently agrees with him that the Supreme Court should be interpreting the Constitution rather than breaking new social ground.

With this principle in mind and with such substantial backing, it is unfortunate that the President and his advisers chose a nominee with an undistinguished judicial record. Precisely because of the critical conversion he was seeking to impose on the court's makeup and precisely because of the bitter opposition the liberals could be expected to mount, the administration should have been extra careful to pick a man whose credentials—moral, judicial and philosophical—were as much beyond question as possible.

While the nomination of Judge Carswell did not seem too inspiring when it was made, many, including this newspaper, felt the country should be spared another bitter fight over confirmation such as occurred with Judge Clement F. Haynsworth Jr. Even the senators opposed to Haynsworth seemed to lack enthusiasm for another all-out battle.

We derived some solace, too, from the absence of any evidence of financial conflict of interest or wrong-doing on the part of Judge Carswell. His disavowal of the views expressed in a segregationist speech he made years ago in a Deep South community, when the temper of the country was far different from what it is now, appeared to satisfy most people. It just didn't seem that the lack of an outstanding record was worth another divisive fight.

In the light of later information, however, and specifically on grounds of the nominee's evidenced racism and inadequate legal qualifications—the large number of his decisions in the field of civil rights that have been reversed on appeal—many people are having second thoughts.

While Judge Carswell is conceded to be honest, there is no question his record is one of unsurpassed mediocrity. The highest court in the land needs more than that, especially in view of the lowered esteem it enjoys in the eyes of much of the public and after the soul-wrenching crises of the past. It needs someone to add, not only moral integrity, but also wisdom and judicial resourcefulness that will give the court more understanding of the practical effect of its decisions and make it less stubbornly doctrinaire.

About all that recommends Judge Carswell is that he is a southerner and, thus, Nixon can meet his campaign promises to the South. But, if he cannot bring judicial talent to the bench, he probably should not be confirmed.

In that event, the President should look elsewhere than in Dixie for a man who would strengthen the Supreme Court—not only for now, when strengthening is so desperately needed, but for the years to come.

Mr. HARRIS. Mr. President, I read that editorial not to confirm or approve all of the statements in the editorial, but simply to say to the distinguished Senator from Louisiana that I hope what has happened to this editorial writer might also happen to the distinguished Senator from Louisiana and to other Members of the Senate generally who have tended to favor the nomination, and upon reflection the Senator will see that the nomination ought not to be confirmed.

Mr. LONG. Mr. President, the Senator started out by saying or suggesting that we ought to have someone of the caliber of Judge Cardozo or Judge Holmes on the Court. Then he said something about Judge Carswell having been overruled by the fifth circuit.

My impression was that Judge Holmes was known in his day as the Great Dissenter. He dissented more than did anyone else on the Court. And in that respect, one can consider that he was overruled by the Supreme Court more than anyone else on the Court during that period of time. Yet, he was regarded as one of the great judges of all times.

I would think the fact that Judge Carswell might have been overruled a number of times by the court of appeals might reflect in about the same way.

I have tried to determine something about the point that the Senator raised. And on the basis of my information basically, I believe that if one is writing cases to be reviewed by the fifth circuit and he wants to be affirmed by the Supreme Court, the safe thing for him to do is to always go to the liberal side, because one can err to a very considerable extent on the liberal side and still be confirmed.

However, if one errs on the conservative side, he will be overruled by that court.

That is a circuit which, above all, prides itself on the extent to which it has overruled district judges. And if that be a source of pride, they can certainly claim it.

Some people may not agree. But I see nothing upon the basis of which one should not vote to confirm Judge Carswell.

Someone brought up the country club episode. I point out that the Senate voted unanimously in 1964 for an amendment that provided that if one had a private club which was, in fact, a private club, he could discriminate in the matter of membership of that club in any way he wanted. I know, because I offered the amendment.

That is how it was in 1964. I recall that former Senator Hubert Humphrey, later Vice President of the United States, was managing the bill at the time. And the Justice Department attorneys thought it was all right. They helped to draft the amendment. They agreed with it

It is very difficult for me to see how we could have voted at that time unanimously to provide that it is perfectly all right to discriminate in any way one wants with respect to the activities of a private club, and now say that Judge Carswell should not be confirmed.

It seems to me that if we follow the same logic, it would mean that every Senator who participated in that action is not qualified to be a Senator today on the same basis, because he voted to legalize the very thing that he is accusing Judge Carswell of doing in 1956.

Mr. HARRIS. Mr. President, I would not have so voted had I been a Member of the Senate at the time. However, that is not the same situation.

Judge Carswell was not a private citizen. He was a U.S. attorney at the time of the so-called Tallahassee matter in 1956. He at that time joined with other citizens in a course of action, the result of which was to exclude black people from the use of a golf course which, up until the time of their action, had been a public municipal golf course.

That result was achieved by forming a private corporation to which that previously public facility was then transferred.

Judge Carswell, I understand, has disputed it was his intent by taking part in that course of action to deny black people the use of what had been up to that time a public facility; to deny them the use of it in direct contravention of and to circumvent the ruling of the Supreme Court which had held it unconstitutional for a city or State to segregate any of its public recreational faciilties. But Judge Carswell does admit having knowledge of similar practices occurring in other cities in the South for that purpose.

I would simply call the attention of the distinguished Senator from Louisiana to the fact that if Judge Carswell was ignorant that such was the intent or would be the result of the course of action in which he participated, I think that alone raises a very serious question about his qualification and his basic intelligence to serve in this kind of very important position. But I would go further and state on that same point, and say to the distinguished Senator from Louisiana, that it seems to me that questions in regard to that very incident have been raised, since Judge Carswell's appearance before the Committee on the Judiciary, with such seriousness that Judge Carswell himself should ask to come again before the Committee on the Judiciary and, if he can, clear up those objections.

If I were he, I would not want to begin upon my duties as a member of the Supreme Court with that and other serious objections still unanswered, and, as far as we know, never to be answered by the man who can answer them best.

I take it Judge Carswell is not just looking for a job. He has a job. I take it he would like to serve on the Supreme Court because he thinks that would be a place of honor and service to the general public. If that is so, which I assume it is, because there is no other reason he would want to serve, I would want to clear up these matters were I he.

Mr. LONG. Do I understand the Senator was not a Member of this body in 1964?

Mr. HARRIS. I came to the Senate, I remind the Senator from Louisiana, in the latter part of 1964, taking office too late to take part in the session of Congress that year.

Mr. LONG. May I say to the Senator that when we voted on that Civil Rights Act of 1964, the Senate—and it was by unanimous vote; there was no objection to it—accepted the amendment I offered to make clear that a private club was not subject to that act and that that private club, so far as the law was concerned, could discriminate in any fashion it chose. That has been the law since then. The amendment I offered made clear that the test would be not whether the club was organized in good faith; the words "bona fide" were used originally but there were substituted the words "in fact." The private club could discriminate in any way it wanted to discriminate. That could be Negroes organizing a private club for their own; it could mean Students for a Democratic Society if they wanted to organize a private club for their own. Any truly private group could do whatever they wanted with regard to whom they might accept as members and with whom they wanted to participate.

That action was taken by the Senate 8 years after the time the Senate was talking about. The House concurred. The President signed that bill into law, which stated that with regard to private clubs those people could do whatever they wanted to do.

I find it most difficult to understand how a Senator would object to a man being confirmed because he did something in 1956, just about 14 years ago, which not only was legal, but also there was nothing to censure that conduct at that moment; and with regard to which Congress placed its explicit stamp of approval at a date 8 years later.

So I say to the Senator that while he may say he was not a Member of this body at the time, the same thing would not be true of a great number of Senators. I think a majority of Senators now serving sat in this Chamber and made legal what they now would condemn Judge Carswell for having done. That being the case, those Senators should either go and tell their constituents they do not know what they are doing in this body and that they are not qualified, or in the alternative that Judge Carswell is qualified to be a Justice of the Supreme Court.

Mr. HARRIS. The Senator from Louisiana persists, it seems to me, in arguing the wrong kind of conclusion from a set of facts he sets forth. The situation which the distinguished Senator from Louisiana relates is not the situation here. The situation here is of an officer of the court, a U.S. district attorney, who entered upon a course of action, the result of which was to take what had previously been a publicly owned and operated municipal golf club and transfer it into the hands of a private corporation for the purpose of keeping black people—they being members of the taxpaying general public—from using what up to that time had been a public facility.

If that was not the intent, then the circumstances are very suspect. I would think someone would come forward, and, what would be better, as I said a moment ago, would be that Judge Carswell himself ask for the opportunity to come back before the Committee on the Judiciary and relate what his intent was at that time; and better than that, respond to questions from members of the Committee on the Judiciary in relation to it.

The Senator from Louisiana said that was a long time ago. It was in 1956. The President used an argument something like that, and I think erroneously, in referring to the late Ralph McGill, who was a friend of mine and, I think, one of the most distinguished and useful men in the history of this country. The President said that Ralph McGill changed his views during his lifetime in regard to segregation. But I point out to the Senator from Louisiana that, while I will not hold a man responsible forever for the follies of his youth, and while I would not automatically condemn Judge Carswell for the white supremacy speech he made in 1948, nevertheless, I would think that a rebuttable presumption arises because of those facts and that kind of speech, which Judge Carswell's record thereafter does not show has been changed. If one looks at Judge Carswell's opinions and at his actions, all of which are spread upon the plain record of the Committee on the Judiciary, I think he will find that the record certainly fails to demonstrate that he ever changed his mind on these issues.

If he did, it seems to me we ought to have stronger proof. I do not say that he did not. I believe every man has a right to change his views. As a matter of fact, if he had been in error, as I think Judge Carswell was, he was under a moral duty to change his views. But I do not think we ought to just come in here and say, "Well, it has been 14 or 16 years ago, and we will not still hold him responsible for that." I might agree if there was anything in the record to the contrary, but where is it?

Mr. LONG. Mr. President, if the Sen-

ator will yield further, when President Kennedy became President—perhaps the Senator from Oklahoma was not aware of this, but I was—President Kennedy refused to belong to some of the better men's clubs because no Negro members were allowed in them. He used his leverage to try to see that they were admitted. One could say that all those who were members in those clubs should not be permitted to be on the Supreme Court or in some other high positions in Government. The same argument could be applied to Judge Warren. He was a member of a club here that had no Negro members for a long period of time. I believed that is the case even now. Yet, we all recognize Judge Warren as being one of the great leaders of the liberal movement, and I would think one of the great heroes of the civil rights groups.

From the best information I have obtained with regard to Judge Carswell's record regarding the opinions the Senator mentions, I find that he has made a record of one who is not an extremist on one side or the other. He is not an extremist on the civil rights side. He is not an extremist on the other side.

I am sure the Senator would be willing to admit that, insofar as it serves the interests of civil rights, to appoint one who is an extremist on the civil rights side or civil rights advocates, about all that could be done in that direction has been done. After all, Thurgood Marshall was appointed to the Supreme Court, and there was no determined effort to defeat the confirmation of that nomination by those who thought he had extremist views on that issue.

Mr. HARRIS. Does the Senator think that that was the appointment of an extremist on that issue?

Mr. LONG. Was he not the attorney for the NAACP?

Mr. HARRIS. And the Senator thinks that proves he was an extremist on that issue?

Mr. LONG. I think he went about as far as he could go on behalf of integration. Could the Senator tell me of someone who could have gone further?

Mr. HARRIS. I think the decisions of the Supreme Court in favor of the innate worth and dignity of every human being and equality of opportunity for every child in America of every color, is not extremism. In a way, that is conservatism. It carries out what has been the intent of the Constitution of the United States to guarantee the dignity, value, and worth of every human being. I do not know of any religion or philosophy worthy of the name, if I may say to the Senator, which would allow us to distinguish between people on the basis of their color and still have any moral regard for our own rightness.

I do see it as a matter of "balance." Some persons have talked about balance. I certainly would not want to have even one person on the court who did not believe in the Constitution of the United States and the innate value and equality of every person, regardless of color. I think the possible dilution of constitutional principle is involved. It is not a matter of extremism to uphold the value of every person.

Mr. LONG. Mr. President, will the Senator yield?

Mr. HARRIS. I yield.

Mr. LONG. I think when the Senator talks about little white children and little black children, we should bear in mind that it involves busing a white child 30 miles away from his home to get him into a school so that we will have there what someone has determined is a proper quota of white children. It involves taking a little black child and busing him 30 miles away from his home to put him into a school which, by someone's judgment, has the proper quota of children of the opposite color in it. It also involves the parents of both children violently protesting this action. Thus, the Negroes oppose it and the whites oppose it. Anybody who imposes that system on them, in my judgment, is an extremist, and is denying both the Negro child and his parents and the white child and his parents their rights as they see them. I think a person who would impose that condition on our citizens is an extremist.

It is these same people who say, "No, no, that is not extremism at all. That is upholding the Constitution." Nowhere in the Constitution does it say that. Therefore, when some functionary in the Department of Health, Education, and Welfare says that that is a constitutional delegation of authority, I would call that extremism.

If the Senator feels that way, more power to him. I think a man should be true to his convictions. But it seems to me that the court has gone about as far as one would want to go to say the Constitution means just about everything the liberals on the civil rights issues would like to have it say. I think that Judge Carswell's views since he has been on the court have been very moderate, and I think impartial persons looking at that record would tend to think that. But it is not going to satisfy those of the view that we must appoint on the court someone who is going to vote the way Judge Marshall is going to vote all the time, for example.

Mr. HARRIS. I reply to the Senator from Louisiana: Who would have stood up for that little black child who did not have equal education in 1954 if it had not been for the Supreme Court of the United States? Nobody else did. Nobody else had, and nobody else would.

Just consider my home county, for example. I point these matters out to the Senator so that it may be noted that I do not come here with any assertion of special insight. If I can come to see these things, anyone can.

In my home county of Cotton County, the county seat is Walters, a town of about 2,000 population. No black people lived in that town, because in earlier days they had what was called a "sundown ordinance," the effect of which was that black people could not live there. Just south is the town of Temple, Okla., population 1,500. There were a few black people who lived in that town, but there were not sufficient black students to have a black high school. Prior to 1954, we had in Oklahoma, as was true in the Senator's State, and throughout America, particularly in the South, a dual school system by law.

By law, we had a black school system and a white school system. The white people in Temple went to a white high school, but there were not very many black students, so there was no black high school. Those black children who lived in Temple, Okla., did not go to the white school, although they could have walked a few blocks from the black section and could have gone to that school. Instead, by law, on taxpayer's money, including those taxes that black people themselves paid on their earnings from rather menial jobs, those eight or nine black students were bused out of Temple, were bused past Walters, Okla., and bused some 30 miles to Lawton, Okla., on a bus which was known as the tin can.

Who would have stopped that kind of inhumane, unconstitutional, degrading treatment of so many children in this country, if it had not been the Supreme Court in 1954? The Supreme Court said in effect, "You cannot have a dual school system under the Constitution. It is inherently unconstitutional to do so."

In my home county at that time, Comanche County, at Lawton, we had a superintendent of schools who stood up and said that the law was the law and that we in our town were law-abiding people, and that the Court had said that there cannot be dual school systems, and that there were not going to be dual school systems. The Court said that affirmative action had to be taken. In Lawton, we did that. We abolished the dual school system.

Now, in some areas of the country, people are saying, "Give us a little more time, and let us not have this extremist business of doing away with our dual school system." But I say to the Senator that objection comes 16 years following the case of Brown against Board of Education. Now is the time.

I tell the Senator that what we need in this country are people who are going to stand up and say, "The law is the law. Let us join together and see if we cannot work this matter out," instead of continuing an unconscionable delay which only makes matters worse and often results in harsher orders.

Mr. LONG. Let us just assume that the same child the Senator is talking about wants to go to that school right across the street from him, but he is still being put on that tin can and bused 30 miles to go to school somewhere else. Who is standing up for him now? Certainly not the Senator from Oklahoma. That is the kind of problem we are complaining about now in Loulsiana.

I thought that the 1954 decision meant that every child was entitled to go to the school nearest his home. But some people, perhaps the Senator is one of them, I do not know——

Mr. HARRIS. Does the Senator feel that, black or white, a child should be able to go to the school that is closest to him and that that should have been allowed all along for black children?

Mr. LONG. That is what the 1954 decision meant to me. Apparently, however, some people were disappointed to find that some of the Negro children

were proud to be like the people who made them, proud of their fathers and proud of their mothers, and wanted to be like them and go to school with people like them. Because some people seemed to feel that even though that little Negro child wants to go to that school next door, we are not going to let him go there, we are going to bus him 30 miles away, on that old tin can the Senator is talking about, where somebody in the Department of Health, Education, and Welfare thinks his presence would make for better racial balance.

Furthermore, in the school where I went to school, Louisiana State University, any Negro who wants to go there can show his high school diploma and go there, that is all there is to it.

But over on the north side of the same city where I live, is Southern University. It is the pride of all the Negroes of Louisiana. I am proud to say that the band from Southern University performed at the Super Bowl game—I hope the Senator was watching; 80 million other Americans were watching. They did a magnificent job, and I heard a Heisman Trophy winner sitting right behind me in the stadium say, "That is the best half-time show I have ever seen."

But those people are now being told that Southern University has to become a part of LSU, whether they want to or not. They are saying, "Please, won't you let us continue being Southern University, rather than being a part of Louisiana State University?"

They very well know that every last one of them is eligible for admission to LSU next semester. Why should they be discriminated against in that fashion? I say we are discriminating against both the white and the Negro, and I say that anyone who tries to do that is an extremist on the subject.

Mr. HARRIS. Mr. President, if the Senator from Louisiana feels that the black people in the South have not had equal opportunity for jobs, or equal opportunity for education, or an equal chance for a good house in a decent neighborhood, only because they chose not to, I say that the Senator from Louisiana has not been looking at the same country I have been looking at.

Mr. LONG. I asked the Senator a question. He can only yield for a question, and I am trying to ask him this question: Why should not those Negroes in Southern University be entitled to have and be proud of their own university, if the whites are willing to let them have it?

Mr. HARRIS. Mr. President, they are proud, and I am proud for them that they are proud of being black. I think the very fact that the term "black" is being used today is a good innovation.

But I would just say to the Senator from Louisiana that he knows and I know, as every person in America knows, that we have not done right by black people. We came along, after the Civil War, and there were Members of this body and distinguished people generally throughout the country who said that it is not enough to give the black man, at long last, his freedom, but we have got to help him toward the fullness of the meaning of freedom; and some of our wisest men advocated, among other things, that Congress enact a system of Federal aid to education, and that that money be divided up among the States on some ratio which involved the number and percentage of students whose families were poor.

The intent was particularly to give some compensatory attention to the education of black people, who until that time had been overtly held down and kept from education.

That was a measure of particular importance to the South, because the South at that time, as the Senator knows, did not have, by and large, in many of the States, the kind of strong system of education that it should have had.

Moreover, it was of vital importance to the country. There were people who said, "However Louisiana runs its school system is Louisiana's business. If Louisiana wants to discriminate against little black children, that is its business. If Oklahoma decides that it wants to give an inferior education to its students, black or white, that is Oklahoma's business."

Mr. President, as the distinguished Senator from Louisiana will, I am sure, admit, that was never true. It was always America's business how its young people were reared, what sort of chance they had, and what kind of education our system afforded them. We have now found out, much to our regret, Mr. President, how untrue it was. Because we have found that people do not stay in the same place. From Louisiana they move up to New York, or from Oklahoma, they move to Detroit; and we have found that if people were discriminated against anywhere, not only was that immoral, as we should always have known, but it was also going to be felt by all of us, to our detriment, in this country, and our country would be generally weakened by it.

So, the shams and dodges began to put into effect, after the Civil War, though not for a good while thereafter, when America made that awful mistake, and finally began, in the late 1800's, to pass all those Jim Crow laws, so that by the early 1900's even Washington itself, the Federal City, which most of all symbolized the American dream, became a segregated city. When that happened, Mr. President, America did something that was not only shameful, but something that has cost it dearly in blood and treasure and trouble with its conscience.

Now, Mr. President, it is time for us to move ahead. It is not, I submit, a time for "benign neglect." These problems will get worse if neglected. They are problems which demand the highest qualities in every one of us. The problems are difficult; the solutions are not easy. But what we need to insure in America, Mr. President, is that if a black person wants to live among black people alone, he ought to have that right, but if he wants to live in the previously all-white suburbs which, up to now, in most of the cities of America, has been the only place he could be near a good job and have a good house, he ought to have that right of individual self-determination.

Mr. President, that right has not been real. If a black person wants to go to an integrated school, he ought to have that right, Mr. President, and that has not been true. We have, in many of the States of this country, my own and the Senator's included, restricted some young people from doing what the rest of us in this country were allowed to do.

I say, Mr. President, that was unconscionable to do, and I agree with the Supreme Court of the United States, who has said and said repeatedly that affirmative steps are necessary to correct that terrible blot on the history of this country.

Mr. LONG. Mr. President, will the Senator yield?

Mr. HARRIS. I am happy to yield.

Mr. LONG. The Senator said we have done it by law. So far as I know, I have not voted for any law to do that, and so far as I know the Senator has not.

Mr. HARRIS. No, but I think, Mr. President, that our saying that the Senator and I have not, by our own voting on some law, held down little black children in this country, or black people generally, does not absolve us from the active responsibility to correct that kind of injustice.

Mr. LONG. Mr. President, may I say to the Senator, I know some things that we have done. I know a few things I have tried to do by law in the direction of trying to see to it that the Negro schools in my State and my community had that which was coming to them. I helped raise money in my State to provide facilities to see to it that Negro schoolteachers were paid every bit as well as white schoolteachers, even though, in many instances, they could not present the same credentials, that they were provided with all the wherewithal they needed to go to school, and that their schools were every bit as good as the white ones.

The Senator said one thing that interested me, because I did not know it reflected his views. He said that if a Negro citizen wanted to live among Negro citizens, he ought to have that privilege. Would the Senator be willing to say that if the Negro citizen wanted his children to go to school at the same school with other Negro children, and the white community had no objection to that, they should be permitted to do so?

Mr. HARRIS. Mr. President, I do not intend to answer that kind of theoretical question, which the Senator from Louisiana surely knows is exactly the kind of question which has so long been used as a subterfuge to keep people from realizing their constitutional rights.

Mr. LONG. Mr. President, will the Senator yield for a question?

Mr. HARRIS. I yield.

Mr. LONG. Is the Senator aware of the fact that that is a problem we have, right in my hometown, with two universities?

A considerable number of Negroes are going to Louisiana State University. But there are several thousand Negroes in Southern University who prefer to go there. That is a concrete fact and is not theoretical.

Incidentally, when they started the law school at Southern, they started by

borrowing LSU faculty. That faculty would teach by morning at Louisiana State and by afternoon at Southern. Those people had enough pride in their own rights that they wanted their own law professors, and they brought in some very fine Negro professors to teach there.

If that is how those people want it and prefer it, is the Senator here to tell them they should not be permitted to do so?

Mr. HARRIS. The distinguished Senator from Louisiana well knows that the "happy darky" syndrome was one that southerners used and people in my own State used for years. They said, "Leave them alone. They like it." I do not think the black people of America did like having menial jobs. I do not think they did like having indecent housing. I do not think they did like having inferior schools and colleges. I never did think that those people were correct who said, "If you will just leave our black people alone, if we will just not have some outside agitators stirring them up, they will be all right."

I believe that black people knew that the promise of the Constitution was not being delivered to them; and I, therefore, have been one of those who, at every opportunity, has tried to actively strike down those awful barriers which have tortured young people and helped to destroy children in this country for far too long.

Mr. President, I think we have an active responsibility here. If we want to see this become one country, where people have a chance to live together as citizens of one country, then all of us have the responsibility, in the way our conscience moves us to do so, to take active steps within the democratic system to see that opportunity is equal in America. And it has not been.

As the distinguished Senator from Louisiana knows, I served as a member of the National Advisory Commission on Civil Disorders, the Kerner commission. I walked the ghettos of this country; I walked the rural poverty areas of America; and what I saw made me awfully sick at heart. The facts were not that much new to me, because, like most Americans, I knew the basic facts. But when I finished the study on the Kerner commission, it was not just a matter of knowing it in my head. I felt it in the pit of my stomach.

We said, on the Kerner commission, quite as truthfully as we knew how that America was becoming two societies, separate and unequal. We said that not only is that unacceptable, not only is that morally indefensible, but, also, it is costing us in untold treasure and lives and has done so throughout the foot-dragging history of this Nation's compromising actions in regard to the central issue of race.

One year later, I served with Mayor John Lindsay and others on a committee sponsored by the Urban Coalition and by Urban America, Inc. We took another look at this country, and we said, 1 year later, following the Kerner commission, that the problems were just 1 year worse. I venture to say that the situation is not sufficiently improved since that time.

Now, Mr. President, here we consider the appointment of a man to be one of nine to serve for the rest of his life as a member of the U.S. Supreme Court, which is the last bastion of the safeguarding of what the Constitution promises to each of us; and if we would take a nominee whose qualifications fall far, far short of what they ought to be, and whose own record raises terrible suspicions about his feelings on the central issue of race, then it seems to me that we will commit grave error. This nomination surely ought not be confirmed; and with my vote, it will not be confirmed.

Mr. LONG. Mr. President, will the Senator yield for a question?

Mr. HARRIS. I yield.

Mr. LONG. The Senator has said he was not going to answer the question, so I assume that he is going to make another speech and decline to answer the question again.

Mr. HARRIS. Mr. President, I have all the time in the world, and the Senator from Louisiana is quite within his right—at my indulgence—to ask me whatever questions he wants. But it also is quite within my right to answer however I may please or as fully as I may please, since I have the floor, and since this is one of the matters of greatest importance which the Senate will consider in our lifetime.

Mr. LONG. May I ask the same question of the Senator, hoping to get an answer? What I am asking is this: There is a black community and at some distance a white community, and the black citizens want their children in the school located in the black community and the white citizens want their children in the school located in the white community. Does the Senator favor, against the will of those black parents, busing their children to the school in the white community and, against the will of the white parents, busing their children to the school in the black community?

Mr. HARRIS. If the distinguished Senator from Louisiana would like to be sworn in and testify in regard to a particular case he wants me to decide, I will do it. But I think what we are dealing with here is not the decision of some particular case. I dare say the Senator does not have a particular case in mind. If he does have a particular case in mind, surely he would present it in more detail, if he wanted a judge or jury to decide it.

Mr. LONG. Shall I detail it?

Mr. HARRIS. The distinguished Senator from Louisiana knows that principle is what is involved here. Are we going to take the tragic step we took after Reconstruction? Are we going to say, "Don't bother me any more with these basic human questions that are involved in the black-white crisis which still afflicts America?" Are we going to sort of put those questions out of our minds and get on to something a little more popular or a little easier to decide or a little less inflammatory and explosive? That is the question, Mr. President.

The question involved in the nomination of Judge Carswell is that one, and another. The first question is, Will we require the highest qualifications for those who would serve on the highest court of this land or not? The second question is equally basic, perhaps more so: Are we going to require that a man appointed to the Supreme Court of the United States believe in the promise and ideal of the Constitution to which each of us pledges our support?

Those are the questions, as I see it.

Senators may differ on how they see it, but that is the way I see it.

This nominee has given black people throughout the country, and a great many others, every reason to be fearful about what he holds in his heart in regard to them and in regard to full equality in this country. I do not know what is in his heart. All I know is what is in the record. The record, it seems to me, is one which does not clearly demonstrate that the white supremacy views which he voiced in 1948 have been changed.

Ralph McGill, whom the President alluded to—a great man—spent a lifetime trying to bind up the country's wounds, trying to help see that black people in America have an equal chance, trying to change this awful kind of immoral white supremacy that the Senator from Louisiana and I know has been a rampant and ugly ghost in our country.

We have not seen proved a change of heart since this nominee made that horrible speech in 1948. That is why it is necessary that we be awfully careful in our decision.

Mr. LONG. Mr. President, will the Senator from Oklahoma yield?

Mr. HARRIS. Yes; I yield.

Mr. LONG. I do not think our Negro citizens are ever going to achieve the full equality that they are entitled to, and that I want them to have, until they are willing to stand up and recognize themselves as being equal. A part of that has to do with pride in one's self, in one's mother and in one's father; with confidence, just as I am confident the case is, in his father and his mother, and his grandfather and his grandmother; until Negroes believe that they are just as good and worthy as anyone else and can take pride in themselves.

Unless we encourage them to have such confidence, we are discriminating against them, just as we discriminate against anyone else when he is made to believe that he is not worthy of having pride in his own mother and his own father, and of being proud to live in his own community, and proud to have a school that he can go to and have a teacher whom he likes, a teacher who comes from the same kind of people from whom he comes.

The Senator from Oklahoma may find something evil about that. I do not. The Senator has not answered my question. Is it not fine to see outstanding Negro citizens put on a plane that they can be proud of? Proud of wanting to learn? Proud of wanting to do their best? Proud of their fine performance in a band? Proud of wanting their own university, so that they can assert their racial identity?

If the Senator wants to see the pride of the Negro race, he can go to Southern University, where he will find Negroes who are proud of what they have achieved in the past and hope to achieve in the future.

Mr. HARRIS. Mr. President, I want to help see that black people can be as fully proud of this country as they are of themselves.

That is the issue here.

Pride in America. I want them to be able to be proud that America's promise is as real for them as it is for the distinguished Senator from Louisiana and myself.

That is the issue here.

The Senator says, "until they have pride in themselves, until they have pride in their mothers, until they have pride in each other."

I do not think that is the question at issue here.

I do not believe it was lack of black pride that built two school systems in America.

I do not believe it was lack of black pride which forced black people to endure that.

I do not believe it was lack of black pride which confined black people to the worst sections of the cities, towns, and rural areas of America to live in substandard, indecent housing, as the law and our actions did for so long, until this Senate, at long last—far too late—last year, with my active support—decided that we were going to say that a country which taxes everyone on an equal basis, and which drafts young men equally to fight for their country, will finally write into the law that a person in this country has a right to live wherever he wants to.

I do not blame black people for saying, "I am not going to say thank you, Senator HARRIS, for giving me the right to vote in 1965. I thought I already had the right in this country."

I do not think it was a matter of black pride which for so long excluded black people from the basic American right of voting in America.

I do not think it was lack of black pride that caused the awful discrimination and racism in this country from which, as I say, all of us have suffered so terribly.

Racism is the No. 1 mental health problem in America today. It cripples far more little children than does schizophrenia or mental retardation. I am not just talking about the victims of it. I am talking about the people who are taught it, as well.

There is a crippling kind of illogic in people who can stand up and profess to believe in the tenets of the Christian religion and, at the same time, somehow believe that black people are not as good as white people, or that Mexican Americans, or Indians, or any other minority in this country are not the same kind of full-fledged citizens.

Now, Mr. President (Mr. DOLE), there is no reason, at long last, at this late date, for any of us to say that we did not know any of that existed, or that we did not know any of that now exists, that suddenly the States which had a dual school system and those who upheld them have changed their minds, 16 years later, after Brown against Board of Education.

Mr. President, we are all grown men. We all know what the facts are. We can all read the Constitution and the cases. We can also, I trust, see how far short of that constitutional ideal this country has fallen in the past.

Mr. President, I see no other way. If one wants this country to continue to move ahead, if one wants to see the black-white crisis compromised again, or wants to see this country move on toward the things it says it believes in, then this is a terribly important decision facing the Senate today as to whether it will confirm the nomination of Judge G. Harrold Carswell.

It may be politically popular, for the short run, to say that what the issues need and what the black-white crisis needs is to be left alone.

If the "ideological eunuchs" or the "liberal intellectuals" of America manufactured the problems of the cities, why, then, we should leave them alone.

If we do not have a health crisis in this country, if it is not true that America is the richest and most medically knowledgeable country in the world but still stands 14th in infant mortality—a euphemism which means that your child is dead—then we should, indeed, ignore the problem.

If it is not a fact that the black-white crisis continues to worsen in America, if it is not true that 95 percent of black children continue to go to all black schools and that 95 percent of all white children continue to go to all white schools, and that that presents serious obstacles to binding up the Nation's wounds and allowing us to come together as one people in one country, and not as separate and unequal people living one country—if that is not a real problem, then we should, indeed, forget it.

If it is not a real problem that hunger continues in America, that 25 million Americans still live in poverty—if those are not real problems, then a little "benign neglect" is, indeed, the indicated treatment.

But, I say those problems are real, Mr. President.

And, since they are real, if they are not acted upon, if they are not moved against actively and vigorously, they will get worse. Leaving alone the black-white crisis in America, which is the central issue of our day, as it has been, for much, much too long, will make the problem worse.

I would say that those in charge, ourselves included, while those problems get worse during inaction, will be held accountable by the people of this country—and should be held accountable.

Mr. President, were we now considering the appointment of an Attorney General, we would have a chance to go to the people of the country in 1972 and say, as President Nixon did in his remarks to the Republican convention regarding Ramsey Clark, "Elect our candidate President, and we will have a new Attorney General."

Mr. President, what will we say in 1972 in regard to Judge Carswell? Should the Senate confirm him, he will not go out of office, as President Nixon goes out of office in 1972 or in 1976, but he will continue in office for life.

I want Members of the Senate to put themselves in the place of any black person in America who has read that supremacy speech of 1948. And I venture to say that a great many black people have had more cause to read it than do many of us who are white.

I would like to have Senators put themselves in the place of black people and look at that white supremacy speech and at the Tallahassee Golf Course matter in 1956, and then look at these decisions that the nominee has rendered as a judge, and particularly as a member of the Fifth Circuit Court of Appeals, and then ask, "Is that the kind of Supreme Court Justice America promises me? Is that the kind of man that the President should appoint and the Senate confirm to sit in judgment on basic constitutional questions involving human rights? Is that the kind of Supreme Court Justice that I am entitled to and that America should have?" I think the answer of the Senate would be "No."

EXCLUSION OF CERTAIN PERSONS FROM THE NUMERICAL LIMITATION OF WESTERN HEMISPHERE IMMIGRATION

Mr. ERVIN. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 2593.

The PRESIDING OFFICER laid before the Senate the amendment of the House of Representatives to the bill (S. 2593) to exclude executive officers and managerial personnel of Western Hemisphere businesses from the numerical limitation of Western Hemisphere immigration, which were to strike out all after the enacting clause and insert:

That (a) section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)), is amended to read as follows:

"(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him."

(b) Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) is amended by adding at the end thereof the following new subparagraphs:

"(K) an alien who is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying him or following to join him.

"(L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corpora-

[Fom the Washington Post, Mar. 22, 1970]

JUDGE CARSWELL: THE WRONG SIGNAL

It is a longish leap from the fun and games at the Gridiron Club last weekend to the Senate debate on Judge Carswell. But bear with us because there is a logical connection here between the appointment of a decidedly second-rate judge to the Supreme Court and the ease with which President Nixon and Vice President Agnew stole the Gridiron show. As you may have read, the two men joined in a piano duet, with the President playing a medley of the favorite tunes of his predecessors and the Vice President interrupting him by playing "Dixie." Doubtless you had to be there to get it into the right context, to hear the rough but good-natured jibes at the Administration on race issues that preceded the surprise finale, and thus to appreciate the joke. Almost everybody agreed it was a *tour de force* gracefully done and quite in keeping with the spirit of an affair at which the tensions and antagonisms of the real world are supposed to be set aside.

So it is with no intent to disparage the performance of the President and the Vice President that we take note of this event. Still, at the risk of sounding stuffy, it strikes us as a small piece of a bad scence, and a significant measure of how great is the power of the Presidency to influence a public attitude. All of a sudden, it is all right to joke about something that responsible people in high office used to handle with care and compassion and deadly seriousness.

In theory, a sense of humor is supposed to he a saving grace. So why not make sport of a Southern Strategy? The answer, of course, is that Southern Strategy is a euphemism for something that isn't funny. On its face it is no more than a cynical political tactic designed to innoculate the South against George Wallace for the sake of winning it for the Republicans, the better to secure a second term for President Nixon in 1972. As a political objective, this is fair enough—some people even see in it an admirable toughmindedness. But there is nothing admirable about the logical consequences of this strategy, for to bring it off it becomes necessary for the Administration to cultivate indifference, not to say hostility, toward the fundamental principle of human rights in general, and the equality of education available to black children in particular. Putting it another way, and bluntly, Southern Strategy means a form of racism, tacit or explicit, by people in high places, because there can be no successful effort to undercut George Wallace in the South that does not play the segregation game.

It is important to be clear in our minds about the issue here. We are well aware that the White House will be publishing next week what has been billed as the most complete, the most comprehensive, the most closely argued legal brief ever composed on school desegregation and it is not our purpose here to judge it in advance. For this is not what this is all about. We are not talking just about schools, or doubts held by responsible people about busing or other methods for dealing with the *de facto* segregation which occurs as a result of natural, geographic imbalances. We are talking about what a President or an Administration can do, or not do, to create an atmosphere that is conductive, not to miracles, but to continuing progress against racial discrimination all along the line. And this, in turn, is what is so troubling about the ease with which we now laugh at jokes about a Southern Strategy. It is what links the hijinks at the Gridiron with the nomination of Judge Carswell and a lot of other things—the abrupt removal of a Leon Panneta from HEW because he tried too hard; the effort to subvert Negro voting rights; the insensitivity, in tone and phrase, to black pride; the country club mentality.

Mr. Harry Dent, a presidential assistant, receives a written offer of campaign funds from a Georgia Republican leader in exchange for the restoration of Federal school aid in a Georgia school district. He casually passes it along to HEW—and nobody seems to mind. The Vice President brushes off the idea of quotas for black students by asking the crude question: "Do you wish to be attended by a physician who entered medical school to fill a quota . . .?" Mr. Jerris Leonard, the Justice Department's civil rights enforcer, thinks it clever, or something, to say that one reason blacks just out of law school are not attracted to Justice Department jobs is that they haven't yet bought their first cashmere coat. Confronted with a question about Judge Carswell's involvement with segregated clubs, the President thinks it an adequate defense to say, in effect, that everybody's doing it: ". . . if everybody in government service who has belonged or does belong to restricted golf clubs were to leave the service, this city would have the highest rate of unemployment of any city in the country."

And so it goes, right down to the vote on Judge Carswell, with the Administration's men telling Republicans who opposed Judge Haynsworth—in almost every respect a much superior choice—that they can't rebuff their President twice running. They can, of course, and they should, because this is nothing so narrow as a test of party loyalty. It is a test of policy and principle—a kind of Tonkin Resolution on race, if you accept the theory recently advanced in Life Magazine by Hugh Sidey that the race issue could be for President Nixon the disaster that Vietnam was for President Johnson.

The Tonkin Resolution on Vietnam was a fraud, and while that became clearer later, it might have been clearer at the time if the right questions had been pressed, if Congress had not closed its eyes out of misplaced deference to the President and waved him down a wrong road. Therein lies the analogy. Judge Carswell is a bad choice, and the Senate should reject him out of its obligation to safeguard the paramount interests of our highest court. In the process of refusing his confirmation, the Senate has an opportunity, not just to say *No*, but also to say *Enough*—of insensitivity and indifference, of legislative retrogression and of catering to racist tendencies for political gain, of talking about blacks as if there were no blacks in the room. The Senate, in this fashion, could broadcast from at least one seat of government a signal to all races—a signal which at this stage can no longer be broadcast, in a way that would be believable, by anybody else.

[From the New York Times, Mar. 23, 1970]

RATING JUDGE CARSWELL

The Senate, in its desultory debate over whether to confirm the nomination of Judge G. Harrold Carswell to the Supreme Court, is giving an uninspiring demonstration of its sense of responsibility on an issue of grave national concern.

President Nixon, in his weekend press conference, urged Senators to weigh, not the mail, but the evidence. It is precisely on the evidence that Judge Carswell emerges with a mediocre judicial record and with questionable attitudes toward social justice.

Senator Roman L. Hruska, Republican of Nebraska, in apparent contempt for excellence in American institutions, championed the right of all who are mediocre to be represented by mediocrity on the Supreme Court. Application of this view to the Senate is bad enough; to extend it to the highest court is intolerable. Yet, this appears to be the intent of those who deliberately spurn all honest assessment of evidence unfavorable to Judge Carswell.

For example, it has now become known that Elbert F. Tuttle, the retired Chief Judge of the United States Court of Appeals for the Fifth Circuit in the South, who originally backed the nomination, subsequently decided to withdraw his endorsement. But Judge Carswell's supporters let the impression of Judge Tuttle's approval be used as continuing support for him.

A group of distinguished lawyers, including Francis T. P. Plimpton, president of the New York Bar Association, as well as the deans of leading law schools, have charged that the "qualified" rating, given Judge Carswell by the Federal Judiciary Committee of the American Bar Association, is seriously misleading. They consider the issue sufficiently grave to demand that the committee reopen the case and provide a more explicit rating, as it does in the case of other Federal judges.

Judge Carswell's supporters have used the A.B.A. rating as a judgment of high merit, when it is little more than an evasive rubber stamp. Attorney General Mitchell, who undoubtedly knows the real meaning of the A.B.A.'s faint praise, has stated publicly that his nominee comes "highly recommended" by the association.

These misleading tactics amply justify the demand for a more enlightening reappraisal. An explicit rating would do much to help the Senators when they ultimately cast their vote on the dictates of both fact and conscience. The legal profession surely has a responsibility to offer credible guidance and, at the very least, make sure that its testimony cannot be abused in ways that might demean the Supreme Court.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. GURNEY. Mr. President, I have had several communications over the last few days during the debate on the nomination of Judge Carswell, many of which I put in the RECORD, others of which I wish to put in the RECORD now.

One of them is of particular interest, and I wish to bring it to the attention of the Senate. It is written by a woman lawyer, a member of a large law firm in Tallahassee, Fla.

KEEN, O'KELLEY & SPITZ,
Tallahassee, Fla., March 20, 1970.

Hon. EDWARD J. GURNEY,
Senator for the State of Florida,
U.S. Senate Office Building,
Washington, D.C.

DEAR SENATOR: I hope that I am not being presumptious in feeling that you might be interested in my views concerning the nomination of Judge Carswell since my background is not that of the typical Tallahassee lawyer now practicing before him. I was born and educated in Minnesota and have been exposed to judges in such diverse places as Minnesota, the District of Columbia, Arkansas and Florida. I also have taught in a law school: the University of Arkansas Law School. And I am a woman lawyer.

I graduated from the Law School of the University of Minnesota, class of 1941 and was a member of the editorial board of the Law Review and elected to Order of the Coif. I present this background to convince you that I have some basis for evaluating a judge.

I have been engaged in practicing law in Tallahassee, Florida, for the past four years and have had a fairly extensive practice in the District Court before Judge Carswell. He has always been eminently fair and courteous to all parties, he has displayed a deep learning in the law and his opinions have a clarity that is sadly lacking in many that

I must wade through in the course of my daily work. Perhaps they lack a degree of literary grace, as is deplored by Max Lerner and others of his ilk, but I am sure that Judge Carswell's opinions will gain in style when they are no longer the product of the heaviest case load of any judge in the federal system.

It has also been my observation that whatever reversals Judge Carswell has sustained at the hands of the Fifth Circuit have been the result of his being willing to use the summary judgment rule, a rule to which the Fifth Circuit is avowedly opposed.

I have been unable to see any racial bias in Judge Carswell and I am sure that I would see it if it existed: I spent my formative years in Minnesota and living in the South has not changed my attitudes as is attested by the fact that I am currently representing a black plaintiff in a civil righte case against a municipality and its officers. I can also refute the silly "sexist" charge levied against Judge Carswell. I have been treated with exactly the same degree of courtesy and consideration as any other advocate, no more and no less. I also know, of my own knowledge, that when Judge Carswell was elevated to the Fifth Circuit he selected as his law clerk a woman law school graduate.

I have no personal interest in Judge Carswell's nomination for I am not a social friend and professionally I would be better served by his being retained in the Fifth Circuit where I do practice but this feeling is outweighed by the duty I owe my profession.

I am of the unswerving belief that Judge Carswell would make an excellent Supreme Court judge and I earnestly request you to give real, and fair, consideration to his nomination.

Sincerely yours,

HELEN CAREY ELLIS.

Of course, this is just another instance of what I have said on the Senate floor again and again during this debate; namely, that these are the endorsements that impress me, not what a law school professor in the North may say or what a Wall Street lawyer may say or what their opinions may be about Judge Carswell.

Another thing of interest is that some credence has been given to the argument that some law school faculty members of Florida State University are opposed to the nomination of Judge Carswell. That is true. One of my lawyer friends addressed a letter the other day to the Senator from Iowa (Mr. MILLER). I ask unanimous consent that the text of the letter be printed in the RECORD in the course of my remarks.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

ERVIN, PENNINGTON,
VARN & JACOBS,
Tallahassee, Fla., March 20, 1970.

HON. JACK MILLER,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MILLER: I have read with a great deal of concern of the action of some nine members of the teaching staff at Florida State University College of Law. That teaching staff consists of eighteen; the nine who seem to have opposed Judge Carswell's nomination consisted of eight of the teaching faculty and one librarian. Of those who do not oppose Judge Carswell, most, including Dean Joshua Morse and former Dean Mason Ladd (now in a teaching position) have strongly endorsed Judge Carswell's nomination.

Because of that concern, I have tried to determine the basis for the action of the nine critics. I am, therefore, attaching a list of their names, their teaching positions, colleges attended and ages, and years on the teaching faculty at Florida State University, as well as their political affiliations if they are registered in Leon County, Florida.

It is quite significant that none of the nine critics is a member of The Florida Bar. Because The Florida Bar is an integrated bar, they are not allowed to practice before the courts in our state. I, therefore, respectfully suggest that none of the nine is qualified to speak as to Judge Carswell's abilities or qualifications.

I am enclosing for your further information a copy of the February 1970 issue of *The Florida Bar Journal*. Beginning on page 88 is an item concerning Judge Carswell and on page 73 is an apt comment on the courts and the criticism of Judge Carswell.

I have known Judge Carswell personally since 1952. In 1954 I became Assistant United States Attorney and served with him while he was United States Attorney for the Northern District of Florida. When he was elevated to the District Court bench, I became United States Attorney. Since February 1961, I have been engaged in the general practice of law in Tallahassee, which practice includes civil and criminal litigation in the Federal Court. Based on my personal knowledge of the man, on my personal experience as United States Attorney and as a practicing lawyer, I recommend his nomination to you and to the United States Senate and urge that his nomination be speedily confirmed.

Very truly yours,

WILFRED C. VARN.

Enclosures.

Name	Age	Years teaching FSU	Member of Florida bar	Political affiliation
Robert P. Davidow, associate professor, Dartmouth, Michigan, Harvard.	32	Less than 1 year	No.	Unknown.
Jarret Oeltjen, associate professor, Nebraska, Chicago	28	---- do	No.	Do.
Edwin M. Schroeder, Librarian, Tulane	33	---- do	No.	Do.
John W. Van Doren, associate professor Harvard, Yale	35	----do	No.	Do.
Kenneth Vinson, full professor, Texas, Yale	34	----do	No.	Do.
Raymond Maguire, assistant professor, Canisius, Harvard, Columbia.	31	Just short of 2 years	No.	Do.
John Yetter, assistant professor, Duquesne, Yale	30	---- do	No.	Do.
David F. Dickson, associate professor Princeton, Yale, FSU	37	4 years	No.	Republican.
Francis N. Millett, associate professor, Harvard, North Carolina, Alabama.	38	4 years	No.	Do.

Mr. GURNEY. The interesting thing is that these nine members of the faculty from Florida State University Law School who oppose the nomination of Judge Carswell are as follows:

Robert P. Davidow came from Dartmouth, Michigan, and Harvard, but has been teaching at Florida State less than 1 year.

Jarret Oeltjen, age 28, has been at Florida State University less than 1 year.

Edwin M. Schroeder is listed as a librarian. He does not even teach law. He has been at Florida State University less than 1 year.

John W. Van Doren went to Harvard and Yale. That does not surprise me. He is 35 years old and has been teaching at Florida State University less than a year.

Kenneth Vinson has been a teacher at Florida State University less than 1 year.

Raymond Maguire comes from Harvard and Columbia, is 31 years old, and has been teaching at Florida State University just short of 2 years.

John Yetter came from Duquesne and Yale, is 30 years old, and has been at Florida State University just short of 2 years.

David F. Dickson came from Princeton and Yale—there is a great background—is 37 years of age, and has been at Florida State University 4 years.

Francis N. Millett came from Harvard, is 38 years old, and has been at Florida State 4 years.

Not a single one of these members of the faculty are members of the Florida bar—not one. Though I do not know it, I doubt whether any of them has been in court; and, needless to say, they know nothing of Judge Carswell—again typical of the kind of opposition Judge Carswell is getting.

Here is another letter that I think is worthwhile bringing to the attention of the Senate. It is from a man named David L. Middlebrooks. I know him well, because I recommended his appointment to the U.S. district court to replace Judge Carswell. He is a longtime personal friend of mine, one of the outstanding lawyers in Florida.

As a matter of fact, he was one of the outstanding students of Florida University Law School. I wish I had his biography. I think he was first in his class, president of the student body, a member of the Law Review, and has other credentials like that. I called him up and asked him to write me a letter to explain what he knew about Judge Carswell, mainly because he probably practiced in Judge Carswell's court more than any other lawyer who came before him. This is what he said:

U.S. DISTRICT JUDGE,
Tallahassee, Fla., March 19, 1970.

HON. EDWARD J. GURNEY,
U.S. Senator, New Senate Office Building,
Washington, D.C.

DEAR SENATOR GURNEY: You inquired this date by telephone of my acquaintance with the Honorable G. Harrold Carswell whose nomination as Associate Justice of the United States Supreme Court is presently being considered by the United States Senate.

I have known Judge Carswell since my admission to the Bar of Florida in the year 1956. Since his elevation from the position of United States Attorney to the position of Judge of the United States District Court for the Northern District of Florida, I have had numerous occasions to be before Judge Carswell in many different capacities as a lawyer. I doubt seriously if many practicing attorneys in the Northern District of Florida have had a better opportunity to become acquainted with this man or to learn as much as I have as to his character and ability.

During my entire legal career I was a member of two of the largest law firms in west Florida and as can be expected these law

firms handled a large portion of the litigation in Federal Court. Being primarily a trial attorney I had the occasion to be before Judge Carswell in both civil and criminal cases. For approximately seven years prior to my being appointed as United States District Judge for the Northern District of Florida, I was a member of a committee who recommended a list of attorneys to Judge Carswell for appointment to represent indigent defendants charged with offenses against the United States and as a member of this committee I was almost always present when the criminal docket was sounded and attorneys were appointed to represent indigents. In addition I was a member of a three-man committee to examine applicants for admission to the Bar of the United States District Court as to their qualifications to practice before this Court. I was appointed by Judge Carswell as Chairman of the Admiralty Rules Committee to suggest possible revision of the existing admiralty rules.

There were few times when Judge Carswell hsld Court in Pensacola that I did not appear before him in a contested matter or as his representative in the selection of competent attorneys to represent persons accused of crime. In these capacities I was able to witness his courtroom appearance and his attitude toward members of the Bar, both black Americans and white Americans. It goes without saying that I also had an opportunity to see how Judge Carswell treated those persons appearing before him as defendants in criminal cases.

Long before Judge Carswell was appointed as a Judge of the Fifth Circuit Court of Appeals, I had made the statement to many of my lawyer friends and other friends that it was my opinion that he was one of the best trial Judges in the State of Florida. I wish that it were possible that a poll be taken of the hundreds of lawyers who appeared before Judge Carswell to determine from these lawyers their opinions of Judge Carswell's ability as a jurist. I am confident that the great majority of them would share my opinion of this man.

Judge Carswell always treated lawyers and litigants with the respect that all human beings deserve and was especially anxious and determined to see that all persons accused of crime in his Court received competent counsel to represent them. Not once did I observe Judge Carswell treat a lawyer or litigant unfairly or harshly. He is the type of Judge who always rose from his chair when lawyers and litigants would enter his Chambers and meet them with a ready handshake.

There has been some comment made that Judge Carswell's manner in his association with counsel was other than courteous. It should be pointed out that during most of the years that Judge Carswell was Judge of the United States District Court that he handled the entire case load in the Northern District of Florida with little assistance. He was the only Judge in the Northern District of Florida which stretches geographically from Pensacola to Gainesville, a distance of some 350 miles. Congress saw fit to add an additional Judge in the Northern District of Florida approximately two years ago. I am sure that the heavy case load and the distance Judge Carswell was required to travel influenced him in attempting to handle litigation in the Northern District of Florida as promptly as possible. This might account for some comment that he was brusque in manner at times in Court proceedings.

During these many years I have also had an opportunity to visit with Judge Carswell socially and firmly believe that if Judge Carswell had any feeling of superiority where black Americans were concerned I would have observed it. No one could convince me that G. Harrold Carswell is a racist.

I felt obliged to give you the benefit of my observations of Judge Carswell because of the many criticisms made by persons who could not possibly know Judge Carswell as I have known him through the years. In my opinion he would be an outstanding United States Supreme Court Justice.

Sincerely,

D. L. MIDDLEBROOKS.

This, again, is from one who is now a U.S. district judge in the northern district of Florida, and really one of the outstanding members of the Florida bar, a man of unimpeachable credentials, and a man who appeared in Judge Carswell's court, probably, more than any other lawyer in his entire district.

I ask unanimous consent to have printed at this point in the RECORD, in addition to the letters I have read, a letter from Robert T. Mann, judge of the district court of appeals, Lakeland, Fla.; a letter from Frank A. Orlando, judge of the juvenile court of Broward County, Fla.; a letter from James W. West, county judge of Sumter County, Fla.; and a letter from John W. Booth, judge of the fifth judicial circuit, Bushnell, Fla.; and many telegrams which I have received as well.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

LAKELAND, FLA.,
March 16, 1970.

Hon. EDWARD GURNEY,
U.S. Senate,
Washington, D.C.

DEAR ED: I am disturbed by the unfair and excessive criticism of Judge Harrold Carswell. I write to suggest to you that the prolongation of this controversy can only serve to discredit our judiciary.

Perhaps I am slightly biased by his recent citation with approval of one of my opinions, but I view Judge Carswell as a man of impeccable character and reputation. I do not know him intimately, but I know of nothing which would warrant his rejection by the Senate. It is, after all, the President's prerogative to nominate Justices. The Constitution contemplates that the Supreme Court will reflect a diversity of viewpoint.

The maintenance of a just and orderly society is a complex task in which we are all involved. It deserves our best efforts and our best men. I fully expect Judge Carswell to serve as Justice with far greater distinction than his detractors think possible.

I am pleased to hear that your wife is improving. Elizabeth and I join our prayers to yours for her speedy and complete recovery.

Sincerely,

BOB.

JUVENILE COURT OF BROWARD COUNTY,
Fort Lauderdale, Fla., March 20, 1970.

Re Judge G. Harrold Carswell.
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.

DEAR SENATOR GURNEY: This letter is in response to the attached newspaper article concerning the appointment of Judge G. Harrold Carswell to the United States Supreme Court. I feel my response is necessary since, in my opinion, many unwarranted and untrue statements are being made by members of the judiciary with reference to Judge Carswell's appointment to the Supreme Court.

Before becoming a Judge of the Juvenile Court for Broward County in March of 1968, I served for four years as an Assistant Attorney General for the State of Florida. During that time I appeared before Judge Carswell representing the State of Florida in several cases. All of these cases had to do with Civil Rights and desegregation of state institutions or local school systems. I can say without a doubt that Judge Carswell was fair, impartial and applied the law of the land as it was written at the time we were presenting our cases to him. In a specific case dealing with the desegregation of the State Training Schools, Judge Carswell struck down a Florida Statute which required these institutions to be operated on a segregated basis. However, in order to give the State of Florida a reasonable time to make an orderly transition, he allowed us approximately three months to prepare and implement a desegregation plan. This, in my opinion, showed great judicial discretion on his part and, at the time of the case, was satisfactory to all parties involved.

As one who has known Judge Carswell both professionally and socially, I am quite disappointed in the members of the judiciary who have chosen to speak out against Judge Carswell without really knowing what type of a man he is.

It is a shame because a man does not have pro-labor or pro-civil rights activities in his background he cannot, without going through great embarrassment and unreasonable criticism, become a member of the United States Supreme Court. I am hopeful you will be able to prevail upon members of the United States Senate to see that Judge Carswell will be a true representative of the feelings of the American People and interpret the Constitution as it is written—not as he thinks it should be applied.

If there is anything I can do as a member of the Florida State Judiciary to assist you in your attempts to have Judge Carswell confirmed, please do not hesitate to call.

Thanking you very much, I am,

Sincerely,

FRANK A. ORLANDO,
Presiding Judge, Juvenile Court of Broward County.

BUSHNELL, FLA.,
March 18, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senator,
Washington, D.C.

DEAR SENATOR: Please continue to do everything in your power to get a good man on the Supreme Court. Please keep pushing for Judge Carswell.

Respectfully,

JAMES W. WEST,
County Judge, Sumter County.

STATE OF FLORIDA,
March 17, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR GURNEY: The appointment of a conservative man such as Judge G. Harrold Carswell to the United States Supreme Court is long overdue, and now that we have the opportunity of securing such an appointment, I sincerely and earnestly urge that you, as our Senator, give your unqualified support to this appointment.

I am sure that the opposition will continue to raise smoke screens and attempt to defeat this selection by our President. The people of Citrus, Hernando and Sumter Counties, where I serve as presiding judge, are, in my opinion, solidly behind Judge Carswell and your part in assisting in his confirmation by the Senate would be well received.

Yours very truly,

JOHN W. BOOTH,
Circuit Judge.

PENSACOLA, FLA.,
March 19, 1970.

Hon. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.:

I respectfully urge your favorable consideration of Judge G. Harrold Carswell for the

United States Supreme Court. It could possibly be said that I am a member of a so-called minority group. I have had the privilege of trying cases before Judge Carswell on numerous occasions and found him to be fair, impartial, intelligent, and profound in his legal opinions. I would stake everything I own that Judge Carswell is not prejudiced against any person because of his race or religion and I feel that those who suggest such a thing are doing a terrible disservice to a great jurist and outstanding human being.

DAVID H. LEVIN.

VERO BEACH, FLA.,
March 19, 1970.

Senator EDWARD GURNEY,
New Senate Office Building,
Washington, D.C.:

As a practicing attorney in Vero Beach, Florida I would like to express to you that in my opinion that I and most lawyers in this area strongly support the nomination of Judge Harrold Carswell to the U.S. Supreme Court. The impression that the lawyers of Florida do not support Judge Carswell is in error.

CHER CLEM.

VERO BEACH, FLA.,
March 20, 1970.

Senator EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

As a practicing attorney and President of the Indian River County Bar Association in Vero Beach, Florida, I would like to express to you that in my opinion that I and most lawyers in this area strongly support the nomination of Judge Harrold Carswell to the U.S. Supreme Court. The impression that the lawyers of Florida do not support Judge Carswell is in error.

ROBERT JACKSON.

MARIANNA, FLA.,
March 19, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

Sincerely believe circus has lasted long enough. For sake of a strong court system commanding respect of all, urge your efforts to end farce involving Judge Carswell and press for immediate confirmation.

R. ROBERT BROWN,
County Judge, Juvenile Court Judge.

MONTICELLO, FLA.,
March 19, 1970.

HON. ED GURNEY,
U.S. Senator, U.S. Congress,
Washington, D.C.

DEAR SENATOR GURNEY: I have known Judge Harrold Carswell since he became US District attorney. I have practiced before his court when he was district judge. He is most eminently qualified to sit on the US Supreme Court especially when viewed from the standpoint of the qualification of some present and former Justices. I sincerely believe he will interpret the law rather than legislate. I urge that the verification and the defamation spawned by Senators Bayh et. al. cease, and the Senate get on with immediate confirmation.

Respectfully,
KENNETH E. COOKSEY,
Judge, Monticello, Fla.

DE FUNIAK SPRINGS, FLA.,
March 19, 1970.

HON. EDWARD GURNEY,
U.S. Senate, Washington, D.C.

SIRS: I have been a county judge in Walton County, Fla for 21 years. I wish to say that the Hon Harrold Carswell is qualified in every respect. I give him my unqualified support. All my friends also feel this way.

JOE DAN TROTMAN.

MIAMI, FLA.,
March 20, 1970.

HON. ED. J. GURNEY,
U.S. Senate Office Building,
Washington, D.C.

DEAR SENATOR GURNEY: Strongly support confirmation of Judge Carswell to the Supreme Court.

DAVID POPPER,
Dade County Courthouse.

FT. LAUDERDALE, FLA.,
March 20, 1970.

HON. ED GURNEY,
New Senate Office Building,
Washington, D.C.:

Judge Carswell is eminently qualified because of his record of many years on the bench and a record of many sound decisions.

STEWART F. LAMOTTE, JR.,
Circuit Judge, 17th Judicial Circuit.

PANAMA CITY, FLA.,
March 20, 1970.

Senator ED GUERNEY,
Senate Office Building,
Washington, D.C.:

Add my name to the growing list of Florida attorneys who without reservation endorse the nomination of Judge Harrold G. Carswell as justice of the United States Supreme Court. Based upon my practice before Judge Carswell I am of the opinion that he is a man of unusual ability, especially equipped for the responsibilities and demands of this high office.

DAYTON LOGUE.

PALM BEACH, FLA.,
March 20, 1970.

HON. EDWARD GURNEY,
U.S. Senator,
Senate Office Building,
Washington, D.C.:

First telegram transcribed in error. Corrected copy reads as follows: Judge Harrold Carswell is eminently qualified to serve as associate justice and I earnestly recommend immediate and favorable action on his behalf by the Senate.

GEORGE W. HERSEY.

PALM BEACH, FLA.,
March 20, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

Judge Harrold Carswell is eminently qualified to serve as associate justice and I fervently recommend immediate and favorable action on his behalf by the Senate.

GEORGE W. HERSEY.

PENSACOLA, FLA.,
March 20, 1970.

HON. EDWARD J. GURNEY,
Senate Office Building,
Washington, D.C.:

Considerable contact with Honorable G. Harrold Carswell while he was judge of the U.S. District Court for the Northern District of Florida has given me a very high regard for his character, mind and judicial abilities. I therefore strongly urge his approval by the Senate in his appointment to the United States Supreme Court.

WILLIAM FISHER, JR.

ST. PETERSBURG, FLA.,
March 20, 1970.

HON. EDWARD J. GUERNEY,
Senate Office Building,
Washington, D.C.:

I wish to record my wholehearted endorsement of Judge Carswell for elevation to the Supreme Court.

MARK R. MCGARRY, JR.,
Circuit Judge.

TAMPA, FLA., *March 21, 1970.*

Senator ED GURNEY,
Senate Office Building,
Washington, D.C.:

Having tried cases before Judge Carswell, winning and losing and having recently argued in the U.S. Supreme Court, I can assure that Judge Carswell would be a valuable member of that Court. Press reports that he is not competent or is not intelligent are simply not based on the facts. The truth is he is too intelligent and too incisive in his thinking to be taken in by inept analogy or loose argument and he has an instinct for doing justice. As for the argument that he has been reversed in civil rights cases, would it not be fair to ask "who has not". I hope you can make those who think they should vote against confirming Judge Carswell know that they are being misled by people who have never, or rarely, practiced before him or have little idea of what a judge's duty is. If I can help in any way I hope you will let me know.

DEWEY R. VILLAREAL, JR,
Flower White, Gillen Humkey and Kinney.

PANAMA CITY, FLA.,

HON. EDWARD J. GURNEY,
U.S. Senate,
Washington, D.C.

I would like to reaffirm my convictions in support of Judge Carswell as a candidate for the Supreme Court. I practiced before Judge Carswell for approximately seven years and selfishly regretted his elevation to the fifth circuit court of appeals because of his extreme competence as a jurist on the district court level. However, there is no doubt that his ability demanded such consideration of Judge Carswell based on Judge Carswell demonstrated abilities. I feel extremely earnest in stating that all citizens would be well served by him as a member of our Supreme Court and accordingly I urge you to influence your colleagues to confirm Judge Carswell for membership on the Supreme Court.

ROWLETT. W. BRYANT.

MIAMI, FLA., *March 21, 1970.*

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:

I wish to thank you for your support for Judge Carswell. He is highly qualified to serve on the U.S. Supreme Court. I am proud that President Nixon has nominated and that you will vote to confirm a Southern jurist who is gifted with common sense and practical experience as well as intellectual capability.

ROBERT W. RUST,
U.S. Attorney, Miami, Fla.

MIAMI, FLA.,
March 22, 1970.

Senator EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.:

I urge your support for confirmation of Judge Carswell.

THOMAS E. LEE, JR.,
Circuit Judge.

MIAMI, FLA.,
March 21, 1970.

Senator EDWARD J. GURNEY,
Washington, D.C.

I urge support for confirmation of Judge Carswell.

THOMAS E. LEE, JR.,
Circuit Judge.

WASHINGTON, D.C.,
March 20, 1970.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.

Telegram sent to Judge G. Harrold Carswell, New Orleans, Louisiana. Quote, as you may know, we of N.E.G.R.O. have spoken out

in support of your nomination to the United States Supreme Court. As we have neither met nor communicated it would seem useful on the eve of your confirmation by the Senate for me to explain to you why I consider that confirmation in the best interests of black America and the Nation.

Our country finds itself a cauldron of hatred and in the search for headlines and recognition too many of us can only throw more coals on the fire.

In this rush to self-destruction I * * * to tell which the participants hate more, their opponents or themselves. America needs to stop the shouting, to give iitself a second chance and in our view you, Judge G. Harrold Carswell, have become the symbol of that second chance. Blind forgetfulness and turning the other cheek may be attributes of saints and perhaps proper aspirations for men but for most of us your recent public recantation of views expressed in 1948 will do. We take you at your word. If at some instance we must believe that you are insincere, that man cannot grow in understanding that there is no personal redemption, then I would not be writing to you as a neurosurgeon, the president of N.E.G.R.O., or even as an American citizen but would be, as were my ancestors, a slave. Hopefully you are not the last, but certainly not the first, distinguished American to change his mind. But lest I be guilty of the naivete critics of my position claim for me, let me say that sincere or insincere your public recantation of racist views is a watershed in American history. It is a signal to all that your interest and those of any man who aspires to play a significant role in national life can no longer be served by the expression or practice of racism.

As an American I am aware of the need to give ourselves a second chance, but it is as a Negro that I must accept the censure of many to support your nomination as a symbol of the second chance my people need so desperately. For Negroes to insist on a national policy which precludes the concepts of rehabilitation and redemption of the individual is to close the door forever on our black brothers who, because they have been the victims of the very bigotry we decry are today chronic welfare recipients, drug addicts, alcoholics, and convicted criminals. To deny a Judge Carswell the chance to repudiate the task position that we abhor is to deny the black underprivileged as a group the hope that is implied in the principle of redemption. The cry from our people that all America must hear and need is the cry for a second chance.

In human history it has always been the best of us who have identified with the least of us. For you to serve as a symbol of the second chance for America's black forgotten is an opportunity hard one. I sincerely hope that history will record your career on the Supreme Court as distinguished service to that deeply human concept.

In the heat and rancor of national debate there seems little time or inclination today to concern oneself with the personal, human feelings of participants. May I now, regardless of past, present or future disagreement, take the opportunity to express to you as a fellow human being my own deep personal concern for your private self during this protracted period of intense public attention.

THOMAS W. MATTHEW, M.D.,
President, NEGRO.

PANAMA CITY, FLA.,
March 19, 1970.

Hon. EDWARD GURNEY,
U.S. Senator,
Washington, D.C.:

The following information relative to Marianna Civil Action No. M–572 Bay County, Florida, desegregation suit filed in January 1964. First counsel for Negro plaintiffs was Charles F. Wilson, Pensacola, Florida, who I understand, has filed a letter supporting Judge Carswell's nomination to Supreme Court. Present counsel, Theodore Bowers, is one of 14 different lawyers representing individual plaintiffs against school board in 7 years that this case has been pending. Judge Carswell was district judge for approximately 6 of those 7 years. During 6 years Judge Carswell actively encouraged and challenged the parties to pursue voluntary desegregation, failing which he entered numerous desegregation orders. He was constantly calling counsel together to determine desegregation progress. Voluntary efforts without court orders resulted in the total integration of high schools in 1967 by closing county's only all-Negro school. Presently there are no all black schools in Bay County, Florida. Indicative of Judge Carswell's fair play and fair rulings is that in 6 years of continuous desegregation litigation, plaintiffs and NAACP, thought it necessary to appeal his orders only one time and that in 1969 resulting in the Fifth Circuit Court of Appeals, en banc, saying of the Bay County desegregation efforts: "This system is operating on a freedom of choice plan. The plan has produced impressive results but they fall short of establishing a unitary school system." Page 23 of slip opinion—Sing Leton et al v. Jackson Municipal Separate School District et al, case No. 27863.

In 6 years I saw Judge Carswell patiently listen to all arguments of all counsel. No allegation made in any pleading anywhere or on appeal to higher court of mistreatment of any client or counsel by Judge Carswell at any time. No attorney in my 6 years before the court complained to the court of any alleged mistreatment, publicly or privately, prior to nomination of Judge Carswell to U.S. Supreme Court. Judge Carswell did request Justice Department representing USA to try to assign the same lawyer to our case for continuity in order to avoid the court having to review for new counsel old ground already covered and former rulings of the court on evidentiary matters. His patience and courtesy in bringing each new counsel up to date was remarkable to behold. All counsel were treated with respect and fairness. Judge Carswell constantly chided the school board to do better. He told us after Green v. New Kent County, that freedom of choice was out and that we must come up with some other plan. Presently school system operating on straight neighborhood zone plan with all black schools integrated with white students. Letter to follow.

JULIAN BENNETT.

Mr. GURNEY. Again I say to the Senate that it seems to me that if we are going to be fair in our judgment of this nominee to the Supreme Court, we certainly ought to weigh the evidence, as lawyers say—and many of us here are lawyers, including those who have made arguments on the floor of the Senate in the last few days—and in weighing that evidence, it seems to me that the best evidence which we have, certainly, is the evidence of men who know Judge Carswell, who practiced in his court, who met him socially, and who know him as a lawyer and as a judge, rather than the opinion of some law school professor, or some New York lawyer, or some other chap who is hundreds or thousands of miles away and who does not know the judge personally at all.

THE POSTAL STRIKE

Mr. GURNEY. Mr. President, great harm has been done to the Nation by the willful action of a small group of men who have engineered and led the walkout of postal employees.

They have hurt every segment of our society

They have done great damage to many firms depending on airmail to do business. They have made life more miserable for the poor and the elderly who get their pension or welfare checks through the mail. They have struck a harsh blow at the morale of our troops in Vietnam who are not getting letters. They have struck a blow at the morale of many thousands of mothers and fathers, sisters and wives, of servicemen—particularly our young men overseas—because the mail is not being delivered.

This they have done because, in the minds of many of these postal workers, they have grievances that go beyond reason and make the kind of illegal action they have taken preferable to continued inaction.

This postal strike would not have been necessary—from their point of view—had the Congress of the United States acted in good time. For nearly a year now there have been major postal reform bills before the Congress. And for all those months the leadership of this Congress has refused to meet its obligations and take the action necessary to enact those administration proposals into law.

Mr. President, I call upon the leadership of the Congress to respond as quickly and as firmly as the President has responded to this crisis.

I call upon the leadership to act with speed, and reason, to the needs of the Nation and the postal workers.

Mr. CASE. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the role.

Mr. HARRIS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AUTHORIZING CORRECTIONS IN THE BILL (H.R. 11959) TO INCREASE EDUCATIONAL ALLOWANCES TO VETERANS

Mr. HARRIS. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on House Concurrent Resolution 554.

The PRESIDING OFFICER. (Mr. DOLE) laid before the Senate House Concurrent Resolution 554, which was read by the bill clerk, as follows:

H. CON RES. 554

Resolved by the House of Representatives (the Senate concurring), That the Clerk of the House of Representatives is hereby authorized and directed, in the enrollment of the bill (H.R. 11959) to amend chapters 31, 34, and 35 of title 38, United States Code, in order to increase the rates of vocational rehabilitation, educational assistance, and special training allowance paid to eligible veterans and persons under such chapters, to make the following corrections, namely: In section 202 of the bill, delete the subsection designation "(a)" immediately after "SEC. 202."; and delete all of subsection (b) thereof; in section 1696(a) of the new sub-

chapter added by section 204(a)(4) of the bill, delete "section 1682(b) of this title" and insert in lieu thereof "subsection (b) of this section"; and in the parenthetical matter contained in section 242(a) of the new subchapter added by section 214(a) of the bill, insert "need for" immediately after "including their".

The PRESIDING OFFICER. Is there objection to the present consideration of the concurrent resolution?

There being no objection, House Concurrent Resolution 554 was considered and agreed to.

SUPREME COURT OF THE UNITED STATES

The Senate resumed the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. TYDINGS. Mr. President, I should like to address myself to the fitness of Judge G. Harrold Carswell to occupy a position on the highest court of our land.

My conclusion, after sitting through the hearings and studying the record, is that Judge G. Harrold Carswell has demonstrated neither the judicial temperment and fairness nor the professional competence commensurate with the high standard of excellence that must be demanded and should be demanded of a Justice of the Supreme Court. Therefore, I must oppose confirmation of the nomination.

As chairman of the Senate Subcommittee on Improvements in Judicial Machinery, I have been very much concerned with improving the operation of our Federal judicial system. I have chaired countless hearings over the past 5 years, initiated legislation, helped to draft legislation, modified and amended legislation—substantial legislation—dealing with the administration, practices and procedures of the Federal judicial system, including the creation of the Federal jury selection system now in operation, the complete overhauling—indeed, the abolition—of the U.S. commissioners system, setting up the new Federal magistrates system, the development of an effective approach to multidistrict litigation, the management of numerous omnibus judgeship bills, and involving many other legislative areas concerned with the improvement of the Federal judicial system.

Because of this legislative background as well as my personal inclinations and background, I feel a deep responsibility to my colleagues and to the Nation to delve deeply into the issues touching upon the effectiveness of Federal judiciary. Nothing is more relevant to that effectiveness than the process of assuring that the Federal bench and, in particular, the Supreme Court are manned by appointees of the highest quality. Men appointed to the Supreme Court have, for practical purposes, life tenure, with no effective means for discipline or removal. Their influence on our national life may very well transcend that of the President who appointed them.

The role of the Supreme Court in our society is too vital to be endangered by the appointment of men whose judicial temperament or professional qualifications are subject to serious doubt.

In considering those named by the President to vacancies on the Federal district and circuit courts over the past 5 years, and in considering previous nominees for the Supreme Court, I have consistently adhered to the position that, barring an unusual situation, the nomination of a man selected by the President for the Federal bench should be confirmed by the Senate if he has demonstrated a character beyond reproach, professional competency equal to the task set for him, and a proper judicial temperament.

As I stated earlier, the role of our Supreme Court in our society is far too vital to be endangered by the appointment of a man or of men whose judicial temperament or professional qualifications are subject to serious doubt. The notion that a Senator does not have an obligation to insist on a high degree of competence, ability, and judicial fairness runs completely contrary to the Constitution of the United States and to the entire history of our great Nation. There is only one reason why our Founding Fathers wrote into article III provisions requiring Senate advice and consent on Supreme Court nominees, and it is that they expected the Senate to exercise a high influence over the President—to, in the words of Alexander Hamilton, in Federalist Papers No. 76 or 77, put sufficient influence on the President of the United States in order to assure that:

> He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being, in some way or other, personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

Our Founding Fathers did not intend for the U.S. Senate to sit idly by and have that type of man nominated for the Supreme Court of the United States.

The man selected by the President for the Federal bench should have a character beyond reproach, professional competency equal to the task set for him, and a proper judicial temperament. By "proper judicial temperament" I mean at least the ability to put aside one's own prejudices and biases so as to be able to approach every case with a fair and open mind.

These criteria are not always easy to apply. I have made every effort to apply them in a consistent manner to those nominees whose names have been placed before the Senate.

In 1965, the first year I was in the Senate, I opposed the nomination to the district court of Massachusetts of Francis X. Morrissey, a man sponsored by two of my closest personal friends in the Senate, because I believed that his record did not demonstrate the legal ability requisite for a Federal judge. When the Governor of Mississippi, James P. Coleman, was nominated to the fifth circuit, I spoke in his favor on the floor of the Senate and voted to confirm, despite the firm opposition of many civil rights groups in my State. My examination of his record convinced me that he would make a fair and objective judge. Although I had supported the initial appointed of Mr. Justice Fortas, I took the lead in calling for his resignation when the unanswered questions surrounding his nonjudicial activities cast a cloud over the reputation of the Supreme Court. I also supported President Nixon's choice of Judge Warren Burger for Chief Justice, although I have not always agreed with him on substantive issues.

Now the Senate is asked to advise and consent to the appointment of Judge G. Harrold Carswell to be an Associate Justice of the Supreme Court.

I aproached the hearings on Judge Carswell's appointment seeking to learn not what he was when he delivered his infamous racial supremacy speech in 1948, but what he is in 1970, what kind of judge—what kind of man.

Unfortunately, some of the most revealing testimony was presented to the Judiciary Committee after Judge Carswell testified and the members of the committee were not able to review it with him. A request that he be recalled was rejected. Moreover, the short, general rebuttal letter that he submitted for the record was unresponsive and unenlightening. On the whole, however, the hearings were enlightening, indeed shocking, but hardly reassuring.

I will not dwell on Judge Carswell's willingness in 1965 to lend his name and the prestige of his office as U.S. attorney to an effort to circumvent the mandates of the Constitution by converting a public golf course into a private one. Nor will I attempt to analyze similar events that have come to light, such as his attempt, in 1969, to amuse the members of the Georgia Bar Association with a racial joke. These are serious matters, but not, I believe the keys to the case against Judge Carswell.

JUDGE CARSWELL'S LACK OF JUDICIAL TEMPERAMENT

Our judicial system must accord litigants a fair hearing. Justice is not dispensed when a judge's personal views and biases invade the judicial process. In Judge Carswell's court, the poor, the unpopular and the black were all too frequently denied their basic right to be treated fairly and equitably.

Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices. His hostility toward particular causes, lawyers and litigants was manifest not only in his decisions but in his demeanor in the courtroom.

Prof. Leroy Clark of New York University supervised the NAACP legal defense fund litigation in Florida between 1962 and 1968. In this capacity he was in charge of the entire civil rights litigation in the State of Florida. Professor Clark believes that there is not a lawyer in the country who has appeared before Judge Carswell on more cases involving civil rights matters. Professor Clark appeared before Judge Carswell in no less than nine or 10 civil rights cases. Testifying before the Judiciary Committee hearings on the nomination, Professor Clark called Judge Carswell—

(T)he most hostile federal district court judge I have ever appeared before with respect to civil rights matters. . . .

Judge Carswell was insulting and hostile. I have heen in Judge's Carswell's court on at least one occasion in which he turned his chair away from me when I was arguing. I have said for publication, and I repeat it here, that it is not, it was not an infrequent experience for Judge Carswell to deliberately disrupt your argument and cut across you, while according, by the way, to opposing counsel every courtesy possible.

It was not unusual for Judge Carswell to shout at a black lawyer who appeared before him while using a civil tone to opposing counsel. . . ."

* * * * *

(W)henever I took a lawyer into the State, and he or she was to appear before Carswell, I usually spent the evening before making them go through their argument while I harassed them, as preparation for what they would meet the following day.

Mr. President, a man with that sort of record, whether sitting as a police magistrate, a people's court judge, or a circuit court judge, is not fit to sit on any court, let alone the Supreme Court of the United States.

Another lawyer who has represented various clients in litigation before Judge Carswell in cases involving the civil rights of black people is Theodore R. Bowers. Mr. Bowers has been admitted to practice in all the courts of the State of Florida, the U.S. District Court for the Northern District of Florida and the U.S. Court of Appeals for the Fifth Circuit. He actively practiced before Judge Carswell from 1965 until 1969, when Judge Carswell was elevated to the U.S. Court of Appeals. Mr. Bowers prepared an affidavit in which he strongly reinforces the opinion of Prof. Leroy Clark that Judge Carswell was antagonistic toward rights of minority groups.

Mr. Bower's affidavit states:

Honorable G. Harrold Carswell was very antagonistic toward cases and parties seeking to secure and vindicate the civil rights of Negroes. . . .

Mr. President, I ask unanimous consent to have printed in the RECORD, Mr. Bower's affidavit in full.

There being no objection the affidavit was ordered to be printed in the RECORD, as follows:

AFFIDAVIT

STATE OF FLORIDA,
County of Bay:

Theodore R. Bowers being duly sworn deposes and says:

1. That he is an Attorney at Law admitted to practice in all the courts of the State of Florida, the United States District Court for the Northern District of Florida and the United States Court of Appeals for the Fifth Circuit.

2. That he has represented various clients in litigation before the Honorable G. Harrold Carswell, as District Judge, in cases involving the civil rights of black people; that he actively practiced before said judge from 1965 until 1969, when Judge Carswell was elevated to the United States Court of Appeals for the Fifth Circuit.

3. That the Honorable G. Harrold Carswell was very antogonistic toward cases and parties therein seeking to secure and vindicate the civil rights of Negroes.

4. That I am engaged in the practice of law, full time, in the state Courts in the northern part of Florida; that with the exception of a few Municipal Court Judges and judges of inferior state courts of limited jurisdiction (courts below circuit court jurisdiction—the principal trial courts in Flordia), Judge Carswell is, in my opinion, the most prejudice judge before whom I have had the honor to practice.

Dated this 5th day of February, 1970.

THEODORE R. BOWERS.

Sworn to and subscribed before me this 5th day of February, A. D. 1970.

_____,
Notary Public.

Mr. TYDINGS. Mr. President, another member of the Florida bar, Maurice Rosen, an attorney involved in various civil rights cases in northern Florida between 1963 and 1964, in an affidavit prepared under oath, states:

That the reputation of Judge Harrold G. Carswell among attorneys handling civil rights cases during that period was that he was not sympathetic to the civil rights movement and that they could not expect to win a civil rights related case before him.

Mr. President, I ask unanimous consent to have the entire affidavit printed in the RECORD.

There being no objection the affidavit was ordered to be printed in the RECORD, as follows:

AFFIDAVIT

STATE OF FLORIDA,
County of Dade, ss:

Before me, the undersigned authority, personally appeared Maurice Rosen, who, being duly sworn upon oath, deposes and says:

1. That he is an attorney and member of the Bar of the State of Florida.

2. That he was involved in various civil rights cases in northern Florida during 1963 and 1964 as an attorney.

3. That the reputation of Judge Harrold G. Carswell among attorneys handling civil rights cases during that period was that he was not sympathetic to the Civil Rights Movement and that they could not expect to win a civil rights related case before him.

Further, affiant sayeth naught.

MAURICE ROSEN.

SWORN TO AND SUBSCRIBED before me this 5th day of February, 1970.

THELMA KAROSHIK,
Notary Public, State of Florida.

My commission expires December 12, 1972.

Mr. TYDINGS. Mr. President, another Florida lawyer, representing clients asserting their constitutional rights before Judge Carswell, James B. Sanderlin, a member of the Florida bar, sent me a telegram which I received this morning, and I ask unanimous consent to have the entire telegram printed in the RECORD.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

ST. PETERSBURG, FLA.,
March 23, 1970.

Senator JOSEPH TYDINGS,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR TYDINGS: I am a member of the Florida bar and have practiced law in Florida for approximately seven years and have handled a number of civil rights cases. Whenever a colleague and I were discussing the filing of a civil rights case we always tried to avoid Judge Carswell because we could never be sure that we could get an unbiased ruling from him. In his orders in a couple of cases I had before him rather than give the relief asked for in an order he wanted us to accept the good faith of the defendant who we were having to bring into court to seek relief against. By reputation in the field among all the lawyers who handled civil rights cases the feeling was that Judge Carswell could not be relied on for a fair impartial and equitable disposition of civil rights matters.

JAMES B. SANDERLIN.

Mr. TYDINGS. Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. BAYH). The Senator from Massachusetts is recognized.

Mr. BROOKE. Mr. President, supporters of Judge G. Harrold Carswell have maintained throughout the debate that there is no reason, or at least no legitimate reason, to deny him confirmation to the Supreme Court. I confess that I have been intrigued by their arguments and would like at this time to deal with these issues briefly.

First, it has been pointed out that Judge Carswell was nominated by the President, he is the President's choice, and this fact deserves some weight in our deliberations. I agree. But I am also conscious of the fact that under the Constitution there is a dual responsibility involved in the selection of a judge. The President nominates, but the Senate must give its advice and consent.

At no time in our history has it been expected, even by the men who drafted the Constitution, that the Senate should defer to the President's choice against its own best judgment.

James Madison, in the famous Federalist Papers, emphasized the supremacy of the Legislature in this regard, and believed it would be a check upon "political appointments" by the Executive.

Thus, our congressional mandate is clear: We would not be true to ourselves or to the people we represent if we were to allow ourselves to be governed solely by the President's will.

Second, it has been held that Judge Carswell has earned the highest respect of those with whom he has worked over the years. The Judiciary Committee of the American Bar Association has twice recommended him for confirmation to the Supreme Court. His own colleagues on the Fifth Circuit Court of Appeals have warmly endorsed his nomination. Lawyers who have practiced before him have given him high ratings for his fair and judicial handling of their cases.

But let us look more closely at these supposed indications of support. The American Bar Association has chosen not to rate nominees for the Supreme Court in the same manner that they rate appointees to the lower court. A recommendation of "qualified" in this case, therefore, carries with it no qualitative reference. We do not know if the members of the committee who investigated Judge Carswell's record regard him as "highly qualified," "exceptionally well qualified," or just "barely qualified." There is no indication whatsoever as to what they really think of the man. My guess is that a man would have to be an exceptionally poor candidate for any post to receive an "unqualified" recommendation from the committee, especially after he had been chosen by the President himself to sit on the highest court of the land.

I believe, therefore, that the ABA's en-

dorsement of Judge Carswell has been evaluated by his supporters in a manner all out of proportion to its actual significance.

The ABA committee hearings were far from extensive. They did not have all the evidence before them at the time they made their recommendations. They were, in fact, simply giving their pro forma stamp of approval to the name already selected by the President.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. TYDINGS. Is it not a fact that the ABA committee declined to hear testimony from all of the lawyers who testified against the nomination before the Senate Judiciary Committee?

Mr. BROOKE. It is my understanding that is a fact.

Mr. TYDINGS. Is it not also a fact that they did not take time to receive a full statement from Mr. Lowenthal even after Mr. Lowenthal requested the opportunity to place a written statement before them?

Mr. BROOKE. It is my further understanding that is also a fact.

Mr. TYDINGS. Is it not a fact that they gave their endorsement before they even took the trouble to read the hearing or the testimony taken at the hearings before the Judiciary Committee of the Senate?

Mr. BROOKE. I understand that is true.

Mr. TYDINGS. I thank the Senator.

Mr. MATHIAS. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. MATHIAS. Mr. President, I am a member of the American Bar Association. Very frankly, the association's participation in the last two nominations to the Supreme Court have resulted in a great deal of controversy.

It is a long time since I went to law school, but perhaps the distinguished Senator from Massachusetts, a former attorney general, may be able to refresh my recollection.

As I recall it, there is a rule of law that if one sees a casualty on the highway, he is under no obligation to stop and render first aid. But if he does, he has to do it well.

Mr. BROOKE. The Senator is correct.

Mr. MATHIAS. I think this is a situation of that sort. If the American Bar Association injects itself into these proceedings, it ought to be well done, if it is done at all.

I must confess that I think there is something wrong with the system. There is nothing wrong with the men. I know a great many of the men who serve on that Judicial Selection Committee. They are fine men. They are excellent lawyers. It seems to me that the commission they have been given is improperly drawn or we would not be ending up with the kind of controversial situation we have.

Regardless of the outcome of the pending nomination, regardles of how any individual Senator may act upon it, I think this is a very regrettable development.

Mr. BROOKE. Mr. President, as the Senator has very rightly pointed out, I think it is a great misfortune that the American Bar Association entered into this deliberation in the first instance.

The American public has been led to believe that the American Bar Association has conducted a rather exhaustive study and extensive review of the nominee's qualifications for the position to which he has been appointed.

The proponents, those who have been debating in favor of Judge Carswell, have been using the American Bar Association's approval as the highest recommendation possible that this nominee could receive. And I think it has been with some justification that the American people have been relying upon the American Bar Association's recommendation and approval.

I am a member of the American Bar Association, as is the distinguished junior Senator from Maryland.

I see the distinguished senior Senator from New Jersey on the floor, the distinguished Senator from Maryland, the distinguished senior Senator from Michigan, and the distinguished junior Senator from Michigan, also. I think we all are or have been at some time members of the American Bar Association.

Mr. CASE. Mr. President, would the Senator admit the senior Senator from New Jersey to that hallowed circle?

Mr. BROOKE. Mr. President, I think I named the distinguished senior Senator from New Jersey first.

Mr. CASE. Mr. President, I am sorry. I was reading, and I did not hear the Senator mention my name.

Mr. BROOKE. I think there are others who are also members of the American Bar Association. It has always appeared to represent the pinnacle of the legal profession. Therefore, for a long period of time this association has been called upon to make investigations and make recommendations to the President of the United States relative to his appointments to the Supreme Court.

Let me back up for a moment, before the nomination of Clement Haynsworth, and the most recent nomination to the Supreme Court, to the promotion of Mr. Justice Fortas to the position of Chief Justice of the United States. It is my understanding—and some Senator may correct me if I am wrong—that when the American Bar Association was called upon to make its recommendation to President Johnson in connection with his elevation of Justice Fortas to the highest and most exalted position of Chief Justice of the United States, there was a conference phone call made at 7 o'clock in the morning to the members of the judiciary committee of the American Bar Association to solicit their approval. This is incredible to me. If this is a fact—and I understand it to be a fact—it is incredible that this constituted the full extent of the investigation and the examination into Mr. Justice Fortas that the American Bar Association's judiciary committee was performing at the time it was to make its recommendation to the President.

I know that Mr. Fortas was a member of the Supreme Court, so that his qualifications, at least to sit as a member of that body, had already been examined. He was a member of that body. But still, here the President was asking for a recommendation for a Chief Justice of the United States from this highly legal body, the American Bar Association, and they oblige with a conference telephone call at 7 o'clock in the morning in order to make recommendations. As the distinguished senior Senator from Maryland pointed out in colloquy on the floor of the Senate this afternoon, little or no investigation was made into qualifications of the nominee now before us.

Mr. TYDINGS. Mr. President, will the Senator yield at that point?

Mr. BROOKE. I yield.

Mr. TYDINGS. Did the Senator know that John Lowenthal, professor of law at Rutgers University, whose testimony was so tremendously persuasive before the Committee on the Judiciary—and which is found at page 139 of the record and thereafter in the hearings—was invited by this committee of the American Bar Association to give his opinion of Judge Carswell's competence to sit on the Supreme Court; that he asked for time to submit a written statement and certain documentation; that within a day or two, before he had a chance to submit the documentation he was told that the committee had already made up its mind?

I do not know whether the committee would have been influenced by the testimony Professor Lowenthal produced at our hearings before the Committee on the Judiciary, but as one lawyer, I was very impressed, and I cannot help but think some members of that American Bar Association committee would have been equally impressed. I say this because I know that the individual members of this committee are outstanding lawyers and gentlemen who would like to view this nomination with an open mind.

I cannot help but think also, as the Senator reflected on the American Bar Association custom of passing on justices for the Supreme Court, how very different their treatment for handling justices of the Supreme Court is from handling judicial nominations for U.S. district judges and judges for U.S. circuit courts of appeal. In the latter instances, the Attorney General, at least in recent cases, has submitted names of candidates for district judges or judges for the U.S. courts of appeal to the American Bar Association and their committee. In one instance a nomination brought up here, proposed by two of my closest friends in the Senate—which nomination I opposed and it later was withdrawn, Frank Morrissey—was opposed by the American Bar Association after careful screening. But when one comes to Supreme Court nominations this procedure is not followed. Rather the President expects his selection to be quickly rubber stamped without careful evaluation of the nominee. Thus, the whole system of the American Bar Association's approval or disapproval of Supreme Court nominations is broken down because it appears to be nothing more or less than confirming or almost rubberstamping a nomination already announced by the President.

Mr. BROOKE. Mr. President, will the Senator yield?

Mr. TYDINGS. I yield.

Mr. BROOKE. Does not the Senator feel that this is in fact a misrepresentation to the President, to the Senate, and to the American people? The President has every right to believe, the Senate has every right to believe, and the American people have every right to believe that when the American Bar Association gives approval or makes a recommendation, that judgment is based upon some extensive, if not exhaustive, examination of the total qualifications of the nominee.

Mr. TYDINGS. I think the Senator is absolutely correct. And because it is clearly not based on an exhaustive examination of the total qualifications of the nominee, something is wrong with the system. I do not see how it can be considered a fair examination.

Certainly, if ever there was an example that pointed out the failure of the Committee on Judicial Selections of the American Bar Association to do the job the lawyers of America have a right to expect of them, and which all of us who are members of the American Bar Association have a right to expect of them, that example is the nomination now pending before the Senate.

Mr. BROOKE. I have one comment on the point which the Senator from Maryland just raised relative to those judges who sat with the proposed nominee. I submit that the, supposed recommendation of those who practiced with Judge Carswell on the fifth circuit court of appeals is also open to question. There are 15 members of that court, of which he is one. Five letters of recommendation appear in the transcript of hearings, of which one, the letter of Judge Elbert B. Tuttle, has since been modified—and I might add by virtue of the investigation of the senior Senator from Maryland—it has been modified so significantly as to indicate a withdrawal of support.

According to Judge Tuttle, he indicated to Judge Carswell in a telephone conversation of January 28, 1970, while the confirmation hearings were still in progress, that: "I could not testify in support of his nomination."

Since then it has come to light, primarily through press reports that Judge Miner Wisdom, also of the fifth circuit, also withheld his endorsement. And that it was two other judges on the court who objected to the circulation of a joint letter endorsing the nominee.

Therefore, of the 15 judges on the court, the record stands at four and four with six judges, excluding Judge Carswell as an interested party, uncommitted. Given the natural reluctance of many members of the bench to comment on a matter that is constitutionally within the province of the legislative and executive branch to decide, this is a remarkable record.

Mr. MATHIAS. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. MATHIAS. I would like to make one thing clear. With reference to the participation of the American Bar Association in this proceeding, it is not only the senatorial members of the American Bar Association that are unhappy with the events that have evolved in connection with both the Haynsworth and the Carswell nomination. I hear from other members of the bar who are important members of the American Bar Association, that they are unhappy.

I think it also should be clear that it is apparently the system that is at fault because they are good men, strong men, and able and discerning men on the committee.

I think what we need to know is what commission that committee was given. Were they supposed to undertake a thoughtful evaluation of the kind that goes to the editors of Good Housekeeping, when they undertake to put the seal of approval on some product, which involves a thorough and comprehensive examination? Or is it just supposed to be like the medical examinations for draft boards during World War II; if the body was warm and breathed a little, they shot it through. What is the commission of that bar association committee?

Mr. TYDINGS. The Senator would agree that we need to know more about their mandate.

Mr. MATHIAS. I think we ought to know what job it was given, because I do not think we ought to be unfair to the members of the committee.

Mr. BROOKE. Mr. President, if the Senator will yield, we should know not only what job they were given, but what could be rightly expected by the Senate and by the Nation as to their recommendation.

Mr. MATHIAS. I think this is where every member of the American Bar Association assumes some responsibility, because I think the public, at least, thinks the commission given to it was the commission that Good Housekeeping is given in putting the seal of approval on something—evaluating the product, testing, checking the product's reputation, and everything else. That is where the bar association and where we in the Senate bear some responsibility.

Mr. CASE. Mr. President, will the Senator yield?

Mr. MATHIAS. Mr. President, will the Senator yield?

Mr. BYRD of West Virginia. Mr. President, who has the floor?

The PRESIDING OFFICER. The Senator from Massachusetts has the floor.

Mr. BROOKE. Mr. President, I had yielded to the Senator to ask a question. I thank the Senator from West Virginia for protecting my rights.

Mr. BYRD of West Virginia. I say to the able Senator, I may not continue to protect them very long.

If the Senator will yield further, may I ask how long this filibuster is expected to continue?

Mr. BROOKE. May I say to the distinguished Senator from West Virginia that even before coming to this august body I had always objected to filibusters, and certainly I have no intent of participating in a filibuster now. It was my understanding that this was a debate on the nomination of G. Harrold Carswell to be a member of the Supreme Court of the United States; that the proponents and opponents would be engaged in a debate which would be very helpful to the Senate in arriving at whatever decision it ultimately will come to in the days ahead. So I want to assure my very distinguished friend that, if this is a filibuster, I am not aware of it, and certainly not a party to it

The matter which I am discussing here with my colleagues is one, I think, of great importance, and obviously they think it is of great importance to be here this late in the evening discussing these matters.

Again, I thank the distinguished Senator for protecting my rights to debate the nomination of G. Harrold Carswell.

Mr. MATHIAS. Mr. President, will the Senator yield for one final observation?

Mr. BYRD of West Virginia. Mr. President, will the able Senator yield?

Mr. BROOKE. I think, in all fairness, I should certainly yield to the Senator from West Virginia.

Mr. BYRD of West Virginia. Mr. President, let me assure the distinguished Senator I have no objections to filibusters when they become necessary in the interest of a worthy purpose, but if we are going to have one, I think we ought to play by the rules, and a filibuster is a pretty tough, hard game. I think we ought soon to begin to apply the rules, and I think those who want to continue in this extended debate should be put on notice that there will come a time, if this is going to be a filibuster—I have no objection, as I say, to filibusters; there are times when I think filibusters are proper, and I have participated in them myself—but there are rules of the Senate which I think, when it becomes evident that a filibuster is in progress on this nomination, should be utilized and rigidly applied by Senators who wish to bring this matter to a vote in due time.

Mr. BROOKE. I am aware of the Senator's feelings about filibusters and the fact that he has participated in them, but I want to assure him that he and I disagree in this regard. I object to filibusters, as I have said, and, I repeat, I am not a party to a filibuster, if it is one. I spoke on this nomination before, and I said then I expected to speak on it further, because certain issues have come to mind that I would like to debate. But I have other matters to debate, and I am sure the Senator stands for my right to debate them, and debate them without their being characterized as filibusters.

Mr. BYRD of West Virginia. If the Senator will permit me to just say that I certainly want to hear him when he discusses these matters further, I certainly defend his right to say what he wishes and to speak as long as he desires. But if this is going to be a filibuster—and my remarks are not directed to the Senator solely—then I think there comes a time when we have to apply the rules, and one rule we are breaking right now, should any Senator wish to object, is that of yielding for other than a question. The able Senator yielded to me, and I thank him.

Mr. CASE. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. CASE. Does the Senator know—and this is to elicit information—whether in the course of our discussions the exact letter of the selection committee of the American Bar Association to the chairman of our Judiciary Committee of January 26, 1970, has been placed in the CONGRESSIONAL RECORD?

Mr. BROOKE. I do not know.

Mr. CASE. If not, would the Senator object if I asked at the appropriate time to do so, or if I asked him if he would insert that letter into the RECORD at this point, perhaps, together with a statement by the standing committee on Federal judiciary, which is the same committee to which I referred, which sets out precisely the considerations that were taken into account and those that were not taken into account?

Mr. BROOKE. I assure the Senator that I would not object, and would consider it a contribution if the Senator would have it printed in the RECORD at this point.

Mr. CASE. If the Senator will yield for that purpose, I wonder if the Senator from West Virginia would object if I asked permission to insert it in the RECORD at this time.

Mr. BYRD of West Virginia. Yes, I object.

Mr. CASE. Mr. President, if the Senator will yield further——

Mr. BYRD of West Virginia. Mr. President, I withdraw my objection.

The PRESIDING OFFICER. The Chair would like to be advised of what the will of the Senate is.

Mr. BROOKE. Mr. President, the distinguished Senator from West Virginia has withdrawn his objection, so the distinguished Senator from New Jersey can insert the matter into the RECORD.

Mr. CASE. Mr. President, I ask unanimous consent that I may have printed in the RECORD at this point the American Bar Association letter on the Judge Carswell nomination, and also a statement of the qualifications it considered in connection with the matter.

There being no objection, the statement and letter were ordered to be printed in the RECORD, as follows:

REPORT OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIARY, FEBRUARY 20, 1970

It is our pleasure to report that the relations between President Nixon's administration and our Committee continue to be excellent. Attorney General Mitchell and Deputy Attorney General Kleindienst have pursued an unbroken policy of recommending to the President for appointment to the Federal District Courts and Courts of Appeals only lawyers found by our Committee to be qualified, well qualified or exceptionally well qualified. President Nixon is the first President who has maintained this policy, unbroken, during his first year in office when political pressures upon a new administration are often most intense.

GENERAL ACTIVITY OF THE COMMITTEE

Since January 20, 1969 the Committee has submitted a total of 46 Informal Reports and 39 Formal Reports. Six Formal Reports and three Informal Reports are still in progress.

Of the Formal Reports submitted, 24 were for vacancies in the District Courts and 15 were for vacancies in the Courts of Appeals. Four of the candidates were found to be "Exceptionally Well Qualified", 20 were found to be "Well Qualified", and 14 were found to be "Qualified". One was found "Not qualified by reason of age".

Of these investigated informally, 40 were found qualified or better and six not qualified. Five names were withdrawn from consideration while an investigation was in progress.

The Committee has also reported favorably to the Judiciary Committee of the Senate as to the professional competence, integrity and judicial temperament of a nominee for the office of Chief Justice of the United States, Warren E. Burger, and of two nominees for the office of Associate Justice of the Supreme Court of the United States, Chief Judge Clement E. Haynsworth and Judge G. Harrold Carswell. The problem posed to the Committee by these nominations will be discussed at greater length at the end of this report.

The Committee deeply appreciates the ready cooperation which it has received from members of this Association.

PRESIDENTIAL APPOINTMENTS AND NOMINATIONS

Since January 20, 1969 President Nixon has nominated 31 persons for judicial office other than the Supreme Court. Of these, four have been found "Exceptionally Well Qualified", 15 "Well Qualified" and 12 "Qualified". Of these, 27 have been confirmed. In addition, four vacancies exist in Courts of Appeals and 12 in District Courts for which nominations have not yet been submitted. Three of these vacancies are over one year old, the others less than seven months.

Attached as Exhibit A is a list of vacancies in existence since January 20, 1969 and the President's action taken as to each.

APPEARANCE AT INDUCTION CEREMONIES

The Committee has continued the practice established several years ago of appearing through one of its members or authorized representatives at the induction ceremonies of judges. At such occasions, when appropriate under the procedures of the Court in question, the representative of the Committee has made a brief statement outlining its function, emphasizing the objective of the American Bar Association to encourage the appointment of qualified judges, and extending congratulations and best wishes to the new judge. We believe that these appearances are valuable to the Association and to the profession. We are grateful to all of the lawyers who have given their time to assist the Committee in this effort.

ANTICIPATED WORKLOAD

In addition to the usual vacancies arising from retirement, resignation and death, the Committee anticipates a large increase in its work as a result of the expected passage of pending bills which will add approximately 70 new federal judgeships.

AGE RESTRICTIONS

Since the last meeting of the Association, the Committee has reconsidered its guideline as to the maximum age at which persons under consideration for judicial nomination should be considered qualified. As to persons *not* already in the Federal judicial system, there has been no change: A person over the age of 64 will not be considered qualified for nomination to a United States District Court or Court of Appeals; a person over 60 will not be approved unless he would otherwise have been found well qualified or exceptionally well qualified. As to United States District Judges who are under consideration for appointment to a Court of Appeals, if they are over the age of 64 they will be approved only if they would otherwise have been well qualified or exceptionally well qualified; after reaching the age of 68, they will be considered not qualified by reason of age. This represents a liberalization of the rule as expressed in our last report in that the requirement for District Judges between the age of 64 and 68 has been dropped from exceptionally well qualified to well qualified and eligibility for retirement has been eliminated as a basis in itself for disqualification.

SUPREME COURT APPOINTMENTS

In his first year in office, President Nixon has nominated three lower court judges for vacancies on the Supreme Court. The first, Judge Warren E. Burger of the Court of Appeals for the District of Columbia was nominated and confirmed as Chief Justice of the United States. Chief Judge Clement E. Haynsworth of the Fourth Circuit Court of Appeals was nominated for the office of Associate Justice but was not confirmed by the Senate. Judge George Harrold Carswell, of the Fifth Circuit Court of Appeals was then nominated for this vacancy. His nomination is now awaiting action by the Senate.

All of these nominees were reported favorably by our Committee. President Nixon has followed his announced policy of not consulting the Committee with respect to the nomination of Supreme Court justices. In each case, however, the Senate Committee on the Judiciary has requested the Committee's views as to persons nominated for this Court.

In accordance with past practices, the Committee has restricted its comments to matters of professional qualification—integrity, judicial temperament, and professional competence. As to Judge Haynsworth, the Committee's view was expressed by the formulation in use for several years—"highly acceptable from the viewpoint of professional qualifications." At that time, however, the Committee decided to discontinue the future use of this obscure formulation and to limit its rating to "qualified" or "not qualified". Accordingly, in the case of Judge Carswell, the Committee responded to the inquiry of the Senate by letter and in more expanded form. A copy of this letter is attachted hereto as Exhibit B. In this letter the Committee expressly stated that its investigation was limited to the professional competence, integrity and judicial temperament of the nominee.

Notwithstanding the limitation which the Committee has expressed in one form or another as to the scope of its evaluation of Supreme Court nominees, critics from time to time have attacked its views as though they constituted full endorsement of the President's selection. Yet professional qualification was only one of a number of equally important factors properly considered by the President in making his selection which the Committee has never attempted to evaluate—and which it is accordingly in no position to explain or defend.

The minimum standards of integrity, judicial temperament and professional competence which the Committee traditionally applies to Supreme Court nominees are substantially the same as those applied for federal Courts of Appeals. The Committee has not attempted to suggest that these standards be different for the Supreme Court. This does not imply that added distinction is not to be sought in Supreme Court nominees but rather that this quality is not as readily measurable in the narrow terms of professional competence as in the case of the lower courts, because of the unique powers of the Supreme Court.

If the Committee adheres to its present practice, its evaluations will continue to be criticized at least in part on the basis of factors not within the relatively narrow scope of its investigation. On the other hand, if it were to depart from its previous policy and undertake to express its view as to a nominee's ideology, stature and distinction it would be drawn into areas involving nonprofessional matters and areas in which evaluation is extremely subjective.

The Committee has been and is continuing to review its procedures and scope of in-

vestigation with emphasis on its role as to Supreme Court appointments which, unlike those for other federal courts, are made without consultation with the Committee. It will welcome the suggestions of members of this House for its improvement.

Respectfully submitted.

Sumner H. Babcock, Albert R. Connelly, Harry G. Gault, Robert H. Harry, Charles A. Horsky, Richard E. Kyle, Norman P. Ramsey, Miles G. Seeley, John A. Sutro, Sr., Robert L. Trescher, Sherwood W. Wise, Lawrence E. Walsh, Chairman.

AMERICAN BAR ASSOCIATION,
New York, N.Y., January 26, 1970.

HON. JAMES O. EASTLAND,
Chairman, U.S. Senate Judiciary Committee, Washington, D.C.

DEAR SENATOR: Thank you for your telegram of January 21, 1970 inviting the comments of the American Bar Association Standing Committee on the Federal Judiciary with respect to Judge G. Harrold Carswell, who has been nominated for the office of Associate Justice of the Supreme Court of the United States. The Committee is unanimously of the opinion that Judge Carswell is qualified for this appointment.

This committee has previously investigated Judge Carswell for appointment to the District Court in 1958 and for appointment to the Court of Appeals for the Fifth Circuit in 1969. On each occasion Judge Carswell was reported favorably for these appointments. The Committee has now supplemented these investigations within the limits fixed by your telegram.

With respect to nominations for the Supreme Court, the Committee has traditionally limited its investigation to the opinions of a cross-section of the best informed judges and lawyers as to the integrity, judicial temperament and professional competence of the proposed nominee. It has always recognized that the selection of a member of the Supreme Court involves many other factors of a broad political and ideological nature within the discretion of the President and the Senate but beyond the special competence of this Committee. Accordingly, the opinion of this Committee is limited to the areas of its investigation.

In the present case the Committee has solicited the views of a substantial number of judges and lawyers who are familiar with Judge Carswell's work, and it has also surveyed his published opinions. On the basis of its investigation the Committee has concluded, unanimously, that Judge Carswell is qualified for appointment as Associate Justice of the Supreme Court of the United States.

Respectfully yours,
LAWRENCE E. WALSH,
Chairman.

Mr. MATHIAS. Mr. President, will the Senator from Massachusetts yield one further time to me?

Mr. BROOKE. I yield.

Mr. MATHIAS. Mr. President, as we entered the debate on this second controversial nomination, it appeared to me that it would be helpful to learn how much controversy there had been in previous confirmation debates in this century. I asked the Library of Congress to take a look into that question. The Library reports that, including the Haynsworth debate, there had been 13 prior rollcalls on confirmations in this century, the first being that of Justice McReynolds, in 1914.

As one reviews those rollcalls, he is compelled to note the absence of any high degree of controversy in most of the cases.

I think it is very instructive that although there were rollcalls in these 13 cases, in most of them the opposition which is recorded is very small; and of course in a number of cases there was approval of confirmation by voice vote—the roll was not even called—which is evidence that there was very little controversy on those matters.

My only point is that certainly the Senate was not any less aggressive, or any less concerned, or any less interested in the quality of the Supreme Court during those years than it is now. I think we have to assume that our predecessors were as vigilant in the public interest during this whole period as we are. But the point is that, I think, someone had done his homework in almost every one of these cases; and I think it is regrettable that the country is again in the situation in which we now find ourselves.

I ask unanimous consent to have these rollcalls printed at this point in the RECORD. I believe they are instructive and helpful, and outline the historical perimeter of the problem we now face.

There being no objection, the rollcalls were ordered to be printed in the RECORD, as follows:

[From the Journal of Executive Proceedings of the Senate, Vol. XLVII]

NOMINATION OF JUDGE MCREYNOLDS

SATURDAY, AUGUST 29 (LEGISLATIVE DAY, AUGUST 25) 1914

The Senate proceeded to consider executive business at 11 o'clock and 20 minutes a.m., with the Vice President in the chair.

Consideration of the nomination of James Clark McReynolds to be an Associate Justice of the Supreme Court of the United States was resumed.

After discussion, the question being, Will the Senate advise and consent to the said nomination? Mr. Norris demanded the yeas and nays, and the demand being adequately seconded, the Vice President directed the Secretary to call the roll. The call resulted, 44 yeas and 6 nays, as follows:

Yeas: Messrs. Bankhead, Brady, Bryan, Burton, Chamberlain, Chilton, Clarke of Arkansas, Colt, Culberson, Dillingham, Fall, Gallinger, Hughes, Lea of Tennessee, Lee of Maryland, Lewis, McCumber, Martin, Martine, Myers, Nelson, Newlands, O'Gorman, Overman, Perkins, Pittman, Pomerene, Ransdell, Reed, Shafroth, Sheppard, Shields, Simmons, Smith of Maryland, Smith of Michigan, Smith of South Carolina, Smoot, Swanson, Thomas, Thompson, Thornton, Townsend, White, and Williams—44.

Nays: Messrs. Clapp, Cummins, Jones, Norris, Poindexter, and Vardaman—6.

Accordingly, it was

Resolved, That the Senate advise and consent to the appointment of the said James Clark McReynolds to be an Associate Justice of the Supreme Court of the United States agreeably to his nomination.

By unanimous consent, Mr. Smith of Georgia, who had been unavoidably absent during the roll call, was permitted to state that if he had been present he would have cast his vote in favor of Mr. McReynolds' confirmation.

[From the CONGRESSIONAL RECORD—Senate, June 1, 1916, Vol. 53, p. 9032]

CONFIRMATION OF JUDGE BRANDEIS

EXECUTIVE SESSION

Mr. STONE. I move that the Senate proceed to the consideration of executive business.

The motion was agreed to, and the Senate proceeded to the consideration of executive business. After 30 minutes spent in executive session the doors were reopened.

NOMINATION OF LOUIS D. BRANDEIS

The injunction of secrecy was removed from the following proceedings in executive session:

UNANIMOUS-CONSENT AGREEMENT, MAY 28, 1916

That not later than Thursday, June 1, 1916, the majority members of the Committee on the Judiciary and the minority members thereof may file reports upon the nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, which reports shall forthwith be printed in confidence for the use of the Senate; that, on the said day—Thursday, June 1, 1916—at not later than 4:55 o'clock p.m., the Senate shall proceed to the consideration of executive business, and that at 5 o'clock p.m., on the said day, the Senate shall proceed to vote, without debate, upon the said nomination to a final conclusion.

It is further ordered that, after the said vote, the said reports and the proceedings upon the vote shall be printed in the RECORD, and the injunction of secrecy removed from all matters in relation to said nomination.

Vote on the question of advising and consenting to the appointment of Mr. Brandeis. Yeas and nays asked by Mr. CHILTON.

YEAS, 47

Ashurst, Bankhead, Beckham, Broussard, Chamberlain, Chilton, Culberson, Fletcher, Gore, Hardwick Hitchcock, Hollis.

Hughes, Husting, James, Kern, La Follette, Lane, Lea, Tenn., Lee, Md., Lewis, Myers, Norris, O'Gorman.

Overman, Owen, Phelan, Pittman, Poindexter, Ransdell, Reed, Saulsbury, Shafroth, Sheppard, Shields, Simmons.

Smith, Ariz., Smith, Ga., Smith, Md., Smith, S.C., Stone, Taggart, Thomas, Thompson, Underwood, Vardaman, Walsh.

NAYS, 22

Brady, Brandegee, Clark, Wyo., Cummins, Curtis, Dillingham, du Pont, Fall, Gallinger, Harding, Lippit, Lodge.

Nelson, Newlands, Oliver, Page, Smith, Mich., Sterling, Sutherland, Townsend, Warren, Works.

NOT VOTING, 27

Borah, Bryan, Burleigh, Catron, Clapp, Clarke, Ark., Colt, Goff, Gronna, Johnson, Me., Johnson, S. Dak., Jones, Kenyon, McCumber.

McLean, Martin, Va., Martine, N.J., Penrose, Pomerene, Robinson, Sherman, Smoot, Swanson, Tillman, Wadsworth, Weeks, Williams.

Announcing the vote, the Vice President stated that the resolution of confirmation had been agreed to, and announced that the nomination had been confirmed.

Mr. FALL. I have a general pair with the Senator from New Jersey (Mr. Martine). I transfer my pair to the Senator from Utah (Mr. Smoot) and vote "nay." If the Senator from New Jersey (Mr. Martine) were present and not paired he would vote "yea."

Mr. HOLLIS. I have a pair with the junior Senator from New York (Mr. Wadsworth). I transfer that pair to the Senator from Maine (Mr. Johnson). If the Senator from Maine were present he would vote "yea." If the Senator from New York (Mr. Wadsworth) were present he would vote "nay." I vote "yea."

I also desire to state that if the Senator from Minnesota (Mr. Clapp) were present he would vote "yea." He is paired with the Senator from Iowa (Mr. Kenyon), who would vote "nay."

Mr. JONES. I have a pair with the junior Senator from Virginia (Mr. Swanson) and therefore withhold my vote.

Mr. LA FOLLETTE. The Senator from Idaho (Mr. Borab) is paired with the Senator from North Dakota (Mr. Gronna). If the Senator from Idaho were present he would vote "nay,"

and the Senator from North Dakota would vote "yea."

Mr. THOMAS. The Senator from Virginia (Mr. Martin) is necessarily absent. If he were present he would vote "yea."

Mr. HUGHES. My colleague (Mr. Martine) is necessarily absent from the Senate. If present he would vote "yea." He is paired with the Senator from New Mexico (Mr. Fall).

Mr. OWEN. I have a pair with the Senator from New Mexico (Mr. Catron). I transfer that pair to the Senator from Florida (Mr. Bryan) and vote "yea."

Mr. JAMES. I desire to announce that the Senator from Ohio (Mr. Pomerene) is paired with the junior Senator from Massachusetts (Mr. Weeks). If present the Senator from Ohio would vote in favor of the confirmation of Mr. Brandeis and the Senator from Massachusetts would vote against the confirmation.

Mr. SAULSBURY. I am paired with the junior Senator from Rhode Island (Mr. Colt). I transfer that pair to the Senator from South Dakota (Mr. Johnson) and vote "yea." If the Senator from South Dakota were present he would vote "yea."

Mr. SUTHERLAND. I have a general pair with the senior Senator from Arkansas (Mr. Clarke), who is absent, but I am at liberty to vote on this question and I vote "nay."

Mr. THOMAS. I have a general pair with the Senator from North Dakota (Mr. McCumber). I transfer that pair to the senior Senator from Virginia (Mr. Martin) and vote "yea."

Mr. LODGE. I desire to announce that my colleague (Mr. Weeks) is paired with the senior Senator from Ohio (Mr. Pomerene). If my colleague were present he would vote "nay."

Mr. WILLIAMS. I have a general pair with the senior Senator from Pennsylvania (Mr. Penrose). If present he would vote "nay" and I would vote "yea," if I had the privilege; but I withhold my vote in consequence of my pair.

Mr. THOMPSON. I have a pair with the Senator from Illinois (Mr. Sherman), but under an arrangement with the Senator from Illinois, if his vote is not controlling, I am permitted to vote on this nomination. I therefore vote "yea." I am requested to announce that if he were present he would vote "nay."

Mr. TILLMAN. I have a pair with the junior Senator from West Virginia (Mr. Goff). If I were at liberty to vote I would vote "yea."

Mr. CURTIS. I have been requested to announce that the Senator from Maine (Mr. Burleigh) is paired with the Senator from Arkansas (Mr. Robinson).

Mr. NEWLANDS (after the result of the vote had been announced). Regarding my vote, I should like to say that I have great admiration for Mr. Brandeis as a propagandist and publicist, but I do not regard him as a man of judicial temperament, and for that reason I voted against his confirmation.

[From the CONGRESSIONAL RECORD—Senate, vol. 64, p. 813]

CONFIRMATION OF JUDGE BUTLER

EXECUTIVE SESSION

Mr. JONES of Washington, I move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business. After 3 hours and 40 minutes spent in executive session the doors were reopened.

CONFIRMATION OF PIERCE BUTLER

In executive session this day, following the confirmation of Pierce Butler to be an Associate Justice of the Supreme Court of the United States, on motion by Mr. NORRIS and by unanimous consent, the rules were suspended, and it was

Ordered, That the vote by which the Senate declined to rerefer the nomination to the Committee on the Judiciary and the vote by which Mr. Butler was confirmed be made public.

The vote, on the motion of Mr. LA FOLLETTE to recommit the nomination to the Committee on the Judiciary, resulted—yeas 7, nays 63, as follows:

YEAS, 7

Harris, Heflin, La Follette, McKellar, Norris, Sheppard, Trammell.

NAYS, 63

Ashurst, Ball, Bayard, Brandegee, Broussard, Bursum, Cameron, Caraway, Colt, Cummins, Curtis, Dial, Dillingham, Ernst, Fernald, Fletcher.

Frelinghuysen, George, Glass, Gooding, Hale, Harrison, Hitchcock, Johnson, Jones, N. Mex., Jones, Wash., Kellogg, Kendrick, Keyes, King, Lenroot, Lodge.

McCumber, McLean, McNary, Moses, Myers, Nelson, New, Nicholson, Norbeck, Oddie, Overman, Page, Pepper, Phipps, Poindexter, Reed, Mo.

Reed, Pa., Robinson, Shortridge, Smoot, Stanley, Sterling, Sutherland, Townsend, Wadsworth, Walsh, Mass., Walsh, Mont., Warren, Watson, Weller, Williams.

NOT VOTING, 26

Borah, Brookhart, Calder, Capper, Couzens, Culberson, Edge, Elkins, France, Gerry, Harreld, Ladd, McCormick, McKinley.

Owen, Pittman, Pomerene, Ransdell, Shields, Simmons, Smith, Spencer, Stanfield, Swanson, Underwood, Willis.

Mr. BROOKHART announced his pair with Mr. CALDER, and stated that if he were not paired he would vote "yea."

So the Senate refused to recommit the nomination to the Committee on the Judiciary.

The vote on confirmation resulted—yeas 61, nays 8, as follows:

YEAS, 61

Ashurst, Ball, Bayard, Brandegee, Broussard, Bursum, Cameron, Caraway, Colt, Cummins, Curtis, Dial, Dillingham, Ernst, Fernald, Fletcher.

Frelinghuysen, Glass, Gooding, Hale, Harrison, Hitchcock, Johnson, Jones, N. Mex., Jones, Wash., Kellogg, Kendrick, Keyes, King, Lenroot, Lodge, McCumber.

McLean, Moses, Myers, Nelson, New, Nicholson, Oddie, Overman, Page, Pepper, Phipps, Poindexter, Pomerene, Reed, Mo., Reed, Pa., Robinson.

Shortridge, Smoot, Spencer, Stanley, Sterling, Sutherland, Townsend, Wadsworth, Walsh, Mass., Walsh, Mont., Warren, Warson, Williams.

NAYS, 8

George, Harris, Heflin, La Follette, Norbeck, Norris, Sheppard, Trammell.

NOT VOTING, 27

Borah, Brookhart, Calder, Capper, Couzens, Culberson Edge, Elkins, France, Gerry, Harreld, Ladd, McCormick, McKellar.

McKinley, McNary, Owens, Pittman, Ransdell, Shields, Simmons, Smith, Stanfield, Swanson, Underwood, Weller, Wills.

Mr. BROOKHART announced his pair with Mr. CALDER, and stated that if at liberty to vote he would vote "nay."

So the nomination of Pierce Butler as Associate Justice of the Supreme Court of the United States was confirmed.

[From the CONGRESSIONAL RECORD—Senate, vol. 66, p. 3057]

NOMINATION OF JUDGE STONE

The PRESIDING OFFICER. The yeas and nays have been ordered on confirming the nomination of Mr. Stone, and the Secretary will call the roll.

The reading clerk proceeded to call the roll, and Mr. ASHURST responded "yea."

Mr. SHORTRIDGE. For the benefit of the RECORD, I ask unanimous consent that the report of the hearings before the Committee on the Judiciary be incorporated as a part of the proceedings of this day.

Mr. HEFLIN. Mr. President, does that contain the testimony of those who have appeared against Mr. Stone?

Mr. CURTIS. Mr. President, I will have to make a point of order against the request of the Senator from California. The roll call was commenced and there had been a response.

The PRESIDING OFFICER. The Chair sustains the point of order. The Secretary will proceed with the roll call.

The reading clerk resumed the calling of the roll.

Mr. CURTIS (when his name was called). I have a pair with the senior Senator from Arkansas (Mr. Robinson), who is absent, but on this vote I understand that were he present he would vote as I shall vote, and I therefore vote "yea."

Mr. NORRIS. (when Mr. La Follette's name was called). I was requested to announce that the senior Senator from Wisconsin (Mr. La Follette) is absent on account of illness. If he were present, he would vote "nay."

Mr. WALSH of Montana (when his name was called). In view of the fact that I am counsel for Senator WHEELER, I ask to be excused from voting.

Mr. WATSON (when his name was called). I have a pair with my colleague (Mr. Ralston). If he were present, he would vote as I intend to vote, and therefore I vote "yea."

Mr. WHEELER (when his name was called). Mr. President, I shall refrain from voting on this question, with the permission of the Senate.

The roll call was concluded.

Mr. CURTIS. I was requested to announce that the Senator from Illinois (Mr. McCormick) is unavoidably detained from the Senate. Were he present, he would vote "yea."

Mr. BROUSSARD (after having voted in the affirmative). I have a general pair with the senior Senator from New Hampshire (Mr. MOSES), who, if he had been present, would have voted as I have voted.

Mr. JONES of Washington. I desire to announce that the Senator from New Hampshire (Mr. Moses), the Senator from Missouri (Mr. Spencer), and the Senator from West Virginia (Mr. Elkins) are necessarily absent, and if present they would vote "yea."

Mr. JONES of New Mexico. I was requested to announce that the Senator from Maryland (Mr. Bruce) is necessarily absent, and that if present, he would vote "yea."

The rollcall resulted—yeas 71, nays 6, as follows:

YEAS—71

Ashurst, Ball, Bayard, Bingham, Borah, Brookhart, Broussard, Bursum, Butler, Cameron, Capper, Caraway, Copeland, Couzens, Cummins, Curtis, Dale, Dial.

Edge, Edwards, Ernst, Fornald, Ferris, Fess, Fletcher, George, Glass, Gooding, Greene, Hale, Harreld, Harrison, Howell, Johnson, Calif., Jones, N. Mex., Jones, Wash.

Kendrick, Keyes, Ladd, McKeller, McKinley, McLean, McNary, Mayfield, Means, Metcalf, Neely, Norbeck, Oddie, Overman, Pepper, Phipps, Ransdell, Reed, Mo.

Reed, Pa., Sheppard, Shields, Shortridge, Simmons, Smith, Smoot, Stanfield, Stanley, Sterling, Swanson, Wadsworth, Walsh, Mass., Warren, Watson, Weller, Willis.

NAYS—6

Frazer, Heflin, Johnson, Minn., Norris, Shipstead, Trammell.

NOT VOTING—19

Bruce, Dill, Elkins, Gerry, Harris, King, LaFollette, Lenroot, McCormick, Moses.

Owen, Pittman, Ralston, Robinson, Spencer, Stephens, Underwood, Walsh, Mont., Wheeler.

The PRESIDENT pro tempore. Upon the ques-

tion, Shall the Senate advise and consent to the nomination of Harlan Fiske Stone to be Associate Justice of the Supreme Court of the United States the yeas are 71 and the nays are 6. So the Senate advises and consents to the nomination.

Mr. CURTIS. I ask that the President be notified of the action of the Senate.

The PRESIDENT pro tempore. The President will be notified.

[From the CONGRESSIONAL RECORD—House, Feb. 13, 1930, Vol. 72, p. 3591]

NOMINATION OF JUDGE HUGHES

Mr. KEYES (when Mr. Moses's name was called). My colleague (Mr. Moses) is necessarily absent. If present, he would vote "yea."

Mr. FESS (when Mr. Reed's name was called). I desire to announce that the senior Senator from Pennsylvania (Mr. Reed) is detained at the Naval Arms Conference in London. If present, he would vote "yea."

Mr. SHEPPARD (when the name of Mr. Robinson of Arkansas was called). The senior Senator from Arkansas has been paired, at his request, in favor of the confirmation. He is paired with the junior Senator from Nebraska (Mr. Howell), who, if present, would vote "nay." The Senator from Arkansas is detained in attendance at the Naval arms conference in London.

Mr. THOMAS of Oklahoma (when his name was called). On this question I have a pair with the junior Senator from Indiana (Mr. Robinson). I understand that if he were present he would vote "yea." If I were permitted to vote, I would vote "nay."

Mr. WATSON (when his name was called). I have a general pair with the senior Senator from South Carolina (Mr. Smith), who is detained at home by reason of illness, and who, I am informed, would vote "nay" if present. I transfer my pair to the senior Senator from Pennsylvania (Mr. Reed) and vote "yea."

The roll call was concluded.

Mr. SHEPPARD. The senior Senator from Maryland (Mr. Tydings) is unavoidably detained from the Senate. If present, he would vote "nay." He is paired with the senior Senator from Rhode Island (Mr. Metcalf), who would, if present, vote "yea."

Mr. FESS. The junior Senator from Kentucky (Mr. Robsion), if present, would vote "yea."

The result was announced—yeas 52, nays 26, as follows:

YEAS, 52

Allen, Ashurst, Baird, Barkley, Bingham, Broussard, Capper, Copeland, Dale, Deneen, Fess, Fletcher, Gilbert.

Glenn, Goff, Goldsborough, Gould, Greene, Grundy, Hale, Harrison, Hastings, Hatfield, Hebert, Jones, Kean.

Kendrick, Keyes, McCulloch, McNary, Oddie Patterson, Phipps, Pine, Ransdell, Schall, Shortridge, Smoot, Steck.

Steiwer, Stephens, Sullivan, Swanson, Thomas, Idaho, Townsend, Trammell, Vandenberg, Wagner, Walcott, Walsh, Mass., Waterman, Watson.

NAYS, 26

Black, Blaine, Blease, Borah, Bratton, Brookhart, Connally, Couzens, Dill, Frazier, George, Glass, Harris, Hawes.

Johnson, La Follette, McKellar McMaster, Norbeck, Norris, Nye, Overman, Sheppard, Simmons, Walsh, Mont., Wheeler.

NOT VOTING, 8

Brock, Caraway, Cutting, Hayden, Heflin, Howell, King, Metcalf, Moses, Pittman.

Reed, Robinson, Ark., Robinson, Ind., Robsion, Ky., Shipstead, Smith, Thomas, Okla., Tydings.

So the Senate advised and consented to the nomination of Charles Evans Hughes to be Chief Justice of the United States.

The VICE PRESIDENT. The President will be notified.

[From the CONGRESSIONAL RECORD—Senate, Vol. 72, p. 8487]

NOMINATION OF JUDGE PARKER

The VICE PRESIDENT. Eighty-four Senators have answered to their names. A quorum is present. The question is, Will the Senate advise and consent to the nomination?

Mr. HARRISON and Mr. McKellar called for the yeas and nays, and they were ordered.

The VICE PRESIDENT. The clerk will call the roll.

The Chief Clerk proceeded to call the roll.

Mr. TRAMMELL (when Mr. Fletcher's name was called). I desire to announce the unavoidable absence of my colleague (Mr. Fletcher) on account of illness.

Mr. ROBINSON of Arkansas (when Mr. George's name was called). The Senator from Georgia (Mr. George) is absent. If he were present, he would vote "nay."

Mr. GLENN (when his name was called). On this matter I have a special pair with the senior Senator from Florida (Mr. Fletcher), who is unavoidably absent from the Chamber. I understand that if present he would vote "yea." If I were at liberty to vote, I should vote "nay."

Mr. BLACK (when Mr. Heflin's name was called). My colleague the senior Senator from Alabama (Mr. Heflin) is absent on important business. He is paired with the Senator from South Dakota (Mr. Norbeck). If my colleague were present, he would vote "nay," and if the Senator from South Dakota were present I am informed that he would vote "yea."

Mr. LA FOLLETTE (when Mr. McMaster's name was called). The junior Senator from South Dakota (Mr. McMaster) is unavoidably absent. If present, he would vote "nay."

Mr. MCNARY (when his name was called). On this question I have a pair with the senior Senator from South Carolina (Mr. Smith). If he were present, he would vote "yea." If I were at liberty to vote, I should vote "nay."

Mr. KEYES (when Mr. Moses's name was called). My colleague (Mr. Moses) is unavoidably absent. He is paired with the junior Senator from Oklahoma (Mr. Thomas). If present, my colleague would vote "yea."

Mr. PHIPPS (when his name was called). I have a pair with the Senator from Georgia (Mr. George), who is necessarily absent. If I were at liberty to vote, I should vote "yea."

Mr. STEIWER (when his name was called). On this question I have a pair with the junior Senator from Pennsylvania (Mr. Grundy), who is necessarily absent from the Chamber. I find that I can transfer my pair to the junior Senator from South Dakota (Mr. McMaster), and I transfer the pair and will vote. I vote "nay."

Mr. THOMAS of Oklahoma (when his name was called). On this question I have a special pair with the senior Senator from New Hampshire (Mr. Moses). As stated, if present he would vote "yea." If I were at liberty to vote, I should vote "nay."

The roll call was concluded.

Mr. HATFIELD. My colleague the senior Senator from West Virginia (Mr. Goff) has a special pair with the junior Senator from Iowa (Mr. Brookhart). If my colleague were present, he would vote "yea," and I am informed that if the junior Senator from Iowa were present he would vote "nay."

Mr. FESS. I desire to announce that the junior Senator from Kentucky (Mr. Robsion) is paired with the junior Senator from Utah (Mr. King). If the junior Senator from Kentucky were present and at liberty to vote, he would vote "nay," and the junior Senator from Utah would vote "yea."

YEAS—39

Allen, Baird, Bingham, Blease, Broussard, Dale, Fess, Gillett, Glass, Goldsborough.

Gould, Greene, Hale, Harrison, Hastings, Hatfield, Hébert, Jones, Kean, Keyes.

McCulloch, Metcalf, Oddie, Overman, Patterson, Ransdell, Reed, Shortridge, Simmons, Smoot.

Steck, Stephens, Sullivan, Swanson, Thomas, Idaho, Townsend, Walcott, Waterman, Watson.

NAYS—41

Ashurst, Barkley, Black, Blaine, Borah, Bratton, Brock, Capper, Caraway, Connally, Copeland.

Couzens, Cutting, Deneen, Dill, Frazier, Harris, Hawes, Hayden, Howell, Johnson, Kendrick.

La Follette, McKellar, Norris, Nye, Pine, Pittman, Robinson, Ark., Robinson, Ind., Schall, Sheppard, Shipstead.

Steiwer, Trammell, Tydings, Vandenberg, Wagner, Walsh, Mass., Walsh, Mont., Wheeler.

NOT VOTING—16

Brookhart, Fletcher, George, Glenn, Goff, Grundy, Heflin, King, McMaster, McNary, Moses, Norbeck, Phipps, Robsion, Ky., Smith, Thomas, Okla.

So the Senate refused to advise and consent to the nomination.

[From the CONGRESSIONAL RECORD—Senate, vol. 81, p. 9103]

CONFIRMATION OF JUSTICE BLACK

I further announce that the Senator from Connecticut (Mr. Maloney) is absent because of illness.

The Senator from Montana (Mr. Wheeler), the Senator from Nevada (Mr. McCarran), the Senator from South Carolina (Mr. Smith), and the Senator from Massachusetts (Mr. Walsh) are unavoidably detained.

The result was announced—yeas 63, nays 16, as follows:

YEAS—63

Adams, Andrews, Ashurst, Bankhead, Barkley, Berry, Bilbo, Bone, Brown, Mich., Brown, N.H., Bulkley, Bulow, Byrnes, Capper, Caraway, Chavez.

Clark, Connally, Dieterich, Donahey, Ellender, Frazier, George, Gillette, Green, Guffey, Harrison, Hatch, Herring, Hitchcock, Holt, Hughes.

Johnson, Colo., La Follette, Lee, Lewis, Logan, Lonergan, Lundeen, McAdoo, McGill, McKellar, Minton, Moore, Murray, Neely, Nye, Overton.

Pepper, Pittman, Pope, Radcliffe, Reynolds, Schwartz, Schwellenbach, Sheppard, Shipstead, Smathers, Thomas, Okla., Thomas, Utah, Truman, Van Nuys, Wagner.

NAYS—16

Austin, Borah Bridges, Burke, Byrd, Copeland, Davis, Gerry.

Glass, Hale, Johnson, Calif., King, Lodge, Steiwer, Townsend, White.

NOT VOTING—16

Bailey, Black, Duffy, Gibson, Hayden, McCarran, McNary, Maloney, Norris, O'Mahoney, Russell, Smith, Tydings, Vandenberg, Walsh, Wheeler.

So the nomination of Senator Hugo L. Black, of Alabama, to be Associate Justice of the Supreme Court of the United States, was confirmed.

Mr. NEELY. Mr. President, for friendly reasons which all will understand, I move that the Senate reconsider the vote by which it has just advised and consented to the confirmation of the nomination of Senator Black.

Mr. BARKLEY. Mr. President, I move to lay that motion on the table.

The VICE PRESIDENT. The question is on the motion of the Senator from Kentucky.

The motion to lay on the table was agreed to.

Mr. BARKLEY. Mr. President, I now move that the President be notified of the action of the Senate in advising and consenting to this nomination.

The VICE PRESIDENT. The question is on the motion of the Senator from Kentucky.

The motion was agreed to.

[From the CONGRESSIONAL RECORD—Senate, Apr. 4, 1939, vol. 84, p. 3788]

CONFIRMATION OF JUDGE WILLIAM O. DOUGLAS

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of William O. Douglas to be an Associate Justice of the Supreme Court of the United States?

Mr. BARKLEY. I ask for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk proceeded to call the roll.

Mr. BARKLEY (when Mr. Tydings' name was called). The Senator from Maryland (Mr. Tydings) is unavoidably detained. I am authorized to say that if he were present he would vote "yea."

The roll call was concluded.

Mr. BYRNES (after having voted in the affirmative). I have a pair with the Senator from Maine (Mr. Hale). I transfer that pair to the senior Senator from Illinois (Mr. Lewis), and let my vote stand.

Mr. AUSTIN. The Senator from Wisconsin (Mr. Wiley) and the Senator from Vermont (Mr. Gibson) are necessarily absent from the Senate. If present, both Senators would vote "yea."

I also announce that the Senator from Minnesota (Mr. Shipstead), who is necessarily detained, would, if present, vote "yea."

Mr. MINTON. I announce that the Senator from California (Mr. Downey), the Senator from Iowa (Mr. Herring), the Senator from Oklahoma (Mr. Lee), and the Senator from Florida (Mr. Pepper) are detained in Government departments. I am advised that if present and voting these Senators would vote "yea."

The Senator from Oklahoma (Mr. Thomas), the Senator from Missouri (Mr. Truman), the Senator from Illinois (Mr. Lucas), and the Senator from Idaho (Mr. Clark) are unavoidably detained. I have been requested to announce that if present and voting these Senators would vote "yea."

The Senator from Montana (Mr. Wheeler) is detained in a meeting of the Committee on Interstate Commerce.

The Senator from West Virginia (Mr. Holt) is absent because of a death in his family.

The Senator from North Carolina (Mr. Bailey), the Senator from iVrginia (Mr. Glass), the Senator from Indiana (Mr. Van Nuys), the Senator from Ohio (Mr. Donahey), and the Senator from Massachusetts (Mr. Walsh) are unavoidably detained.

Mr. MCKELLAR (after having voted in the affirmative). I inquire if the senior Senator from Delaware (Mr. Townsend) has voted?

The PRESIDING OFFICER. The Chair is informed the Senator from Delaware has not voted.

Mr. MCKELLAR. I have a pair with the senior Senator from Delaware, which I transfer to the junior Senator from Illinois (Mr. Lucas), and allow my vote to stand.

Mr. HILL. My colleague the senior Senator from Alabama (Mr. Bankhead) is detained from the floor on official business. I am authorized to say that if present he would vote "yea."

Mr. BARKLEY. The senior Senator from Illinois (Mr. Lewis) is absent on important public business. I am authorized to say that if present he would vote "yea."

Mr. OVERTON. The junior Senator from Louisiana (Mr. Ellender) is absent, attending a committee meeting. I am authorized to say that if present he would vote "yea."

The result was announced—yeas 62, nays 4, as follows:

YEAS—62

Adams, Andrews, Ashurst, Austin, Barbour, Barkley, Bilbo, Bone, Borah, Brown, Burlow, Burke, Byrd, Byrnes, Caraway, Chavez.

Clark, Mo., Connally, Danaher, Davis, George, Gerry, Gillette, Green, Guffey, Gurney, Harrison, Hatch, Hayden, Hill, Holman, Hughes.

Johnson, Colo., King, LaFollette, Logan, Lundeen, McCarran, McKellar, McNary, Maloney, Mead, Miller, Minton, Murray, Neely, Norris, O'Mahoney.

Overton, Pittman, Radcliffe, Reynolds, Russell, Schwartz, Schwellenbach, Sheppard, Smathers, Smith, Steward, Taft, Thomas, Utah, Wagner.

NAYS—4

Frazer, Lodge, Nye, Reed.

NOT VOTING—30

Bailey, Bankhead, Bridges, Capper, Clark, Idaho, Donahey, Downey, Ellender, Gibson, Glass, Hale, Herring, Holt, Johnson, Calif., Lee, Lewis.

Lucas, Pepper, Shipstead, Thomas, Okla., Tobey, Townsend, Truman, Tydings, Vandenberg, Van Nuys, Walsh, Wheeler, White, Wiley.

So the nomination of William O. Douglas, of Connecticut, to be Associate Justice of the Supreme Court of the United States was confirmed.

Mr. BARKLEY. Mr. President, I ask unanimous consent that the President be notified of the confirmation of the nomination of Mr. Douglas.

The PRESIDING OFFICER. Without objection, the President will be notified.

[From the CONGRESSIONAL RECORD—Senate, Mar. 16, 1955, vol. 101, p. 3036]

CONFIRMATION OF JUDGE HARLAN

The PRESIDING OFFICER (Mr. Frear in the chair). A quorum is present.

The question is, Will the Senate advise and consent to the nomination of John Marshall Harlan to be an Associate Justice of the Supreme Court of the United States?

The yeas and nays bave been ordered, and the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SCOTT (when his name was called). On this vote I have a pair with the senior Senator from Oregon (Mr. Morse), who is absent. If he were present and voting he would vote "yea." If I were permitted to vote I would vote "nay." I withhold my vote.

The rollcall was concluded.

Mr. CLEMENTS. I announce that the Senator from Georgia (Mr. George), the Senator from Michigan (Mr. McNamara), the Senator from Oregon (Mr. Morse), the Senator from Montana (Mr. Murray), the Senator from Alabama (Mr. Sparkman), and the Senator from Missouri (Mr. Symington) are absent on official business.

The Senator from Massachusetts (Mr. Kennedy) is absent by leave of the Senate because of illness.

I further announce that the Senator from Massachusetts (Mr. Kennedy), the Senator from Michigan (Mr. McNamara), and the Senator from Missouri (Mr. Symington) if present and voting, would each vote "yea."

Mr. KNOWLAND. I announce that the Senator from New Hampshire (Mr. Bridges), the Senator from Massachusetts (Mr. Saltonstall), the Senator from Kansas (Mr. Schoeppel), the Senator from New Jersey (Mr. Smith), and the Senator from North Dakota (Mr. Young) are absent on official business.

The Senator from Kansas (Mr. Carlson) is necessarily absent.

If present and voting the Senator from Massachusetts (Mr. Saltonstall) and the Senator from New Jersey (Mr. Smith) would each vote "yea."

The result was announced—yeas 71, nays 11, as follows:

YEAS—71

Aiken, Allott, Anderson, Barkley, Barrett, Beall, Bender, Bennett, Bible, Bricker, Bush, Butler, Byrd, Capehart, Case, N.J., Case, S. Dak., Chavez, Clements, Cotton, Curtis, Daniel, Dirksen, Douglas, Duff.

Dworshak, Ellender, Flanders, Frear, Fulbright, Goldwater, Gore, Green, Hayden, Hennings, Hickenlooper, Holland, Hruska, Humphrey, Ives, Jackson, Jenner, Johnson, Tex., Kefauver, Kerr, Kilgore, Knowland, Kuchel, Lehman.

Long, Magnuson, Malone, Mansfield, Martin, Iowa, Martin, Pa., McCarthy, Millikin, Monroney, Mundt, Neely, Neuberger, O'Mahoney, Pastore, Payne, Potter, Purtell, Robertson, Smith, Maine, Thye, Watkins, Wiley, Williams.

NAYS—11

Eastland, Ervin, Hill, Johnston, S.C., Langer, McClellan, Russell, Smathers, Stennis, Thurmond, Welker.

NOT VOTING—14

Bridges, Carlson, George, Kennedy, McNamara, Morse, Murray, Saltonstall, Schoeppel, Scott, Smith, N.J., Sparkman, Symington, Young.

So the nomination was confirmed.

The PRESIDING OFFICER. Without objection, the President will be notified forthwith of the confirmation of the nomination of John Marshall Harlan, of New York, to be an Associate Justice of the Supreme Court of the United States.

[From the CONGRESSIONAL RECORD—Senate, May 5, 1959, Vol. 105, p. 7472]

CONFIRMATION OF JUDGE STEWART

I also announce that the Senator from Missouri (Mr. Symington) is necessarily absent.

I further announce that, if present and voting, the Senator from Pennsylvania (Mr. Clark), the Senator from Utah (Mr. Moss), the Senator from Montana (Mr. Murray), the Senator from West Virginia (Mr. Randolph) and the Senator from Missouri (Mr. Symington) would each vote "yea."

Mr. KUCHEL. I announce that the Senator from Colorado (Mr. Allott), the Senator from Indiana (Mr. Capehart), and the Senator from Wisconsin (Mr. Wiley) are absent on official business.

The Senator from Nebraska (Mr. Curtis), the Senator from Iowa (Mr. Hickenlooper), and the Senator from New York (Mr. Javits) are necessarily absent.

If present and voting, the Senator from Colorado (Mr. Allott), the Senator from Indiana (Mr. Capehart), the Senator from Nebraska (Mr. Curtis), the Senator from New York (Mr. Javits), and the Senator from Wisconsin (Mr. Wiley) would each vote "yea."

The result was announced—yeas 70, nays 17, as follows:

YEAS—70

Aiken, Anderson, Bartlett, Beall, Bennett, Bible, Bridges, Bush, Butler, Byrd, W. Va., Cannon, Carlson, Carroll, Case, N.J., Case, S. Dak., Chavez, Church, Cooper, Cotton, Dirksen, Dodd, Douglas, Dworshak, Engle.

Frear, Goldwater, Gore, Green, Gruening, Hart, Hartke, Hayden, Hennings, Hruska, Humphrey, Jackson, Johnson, Tex., Keating, Kefauver, Kennedy, Kerr, Kuchel, Langer, Lausche, McCarthy, McGee, McNamara, Magnuson.

Mansfield, Martin, Monroney, Morse, Morton, Mundt, Muskie, Neuberger, O'Mahoney, Pastore, Prouty, Proxmire, Saltonstall, Schoeppel, Scott, Smathers, Smith, Williams, N.J., Williams, Del., Yarborough, Young, N. Dak., Young, Ohio.

NAYS—17

Byrd, Va., Eastland, Ellender, Ervin, Fulbright, Hill, Holland, Johnson, S.C., Jordan, Long, McClellan, Robertson, Russell, Sparkman, Stennis, Talmadge, Thurmond.

NOT VOTING—11

Allott, Capehart, Clark, Curtis, Hickenlooper, Javits, Moss, Murray, Randolph, Symington, Wiley.

So the nomination of Potter Stewart to

be an Associate Justice of the Supreme Court of the United States was confirmed.

Mr. DIRKSEN. Mr. President, I move that the vote by which the nomination was confirmed be reconsidered.

Mr. JOHNSON of Texas. Mr. President, I move to lay on the table the motion to reconsider.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Texas to lay on the table the motion to reconsider.

The motion to lay on the table was agreed to.

Mr. JOHNSON of Texas. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of this nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

[From the CONGRESSIONAL RECORD—Senate, Aug. 30, 1967, Vol. 113, p. 24656]

CONFIRMATION OF JUDGE THURGOOD MARSHALL

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination? On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. MANSFIELD (after having voted in the affirmative). On this vote I have a live pair with the distinguished Senator from Mississippi (Mr. Stennis). If he were present and voting he would vote "nay." If I were permitted to vote I would vote "yea." I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from Nevada (Mr. Bible), the Senator from Virginia (Mr. Byrd), the Senator from Alaska (Mr. Gruening), the Senator from Oklahoma (Mr. Harris), the Senator from Minnesota (Mr. McCarthy), the Senator from Maine (Mr. Muskie), and the Senator from New Mexico (Mr. Montoya) are absent on official business.

I also announce that the Senator from Indiana (Mr. Hartke), the Senator from North Carolina (Mr. Jordan), the Senator from Arkansas (Mr. McClellan), the Senator from South Dakota (Mr. McGovern), the Senator from Montana (Mr. Metcalf), the Senator from Wisconsin (Mr. Nelson), the Senator from Georgia (Mr. Russell), the Senator from Florida (Mr. Smathers), and the Senator from Mississippi (Mr. Stennis) are necessarily absent.

I further announce that, if present and voting, the Senator from Nevada (Mr. Bible), the Senator from Alaska (Mr. Gruening), the Senator from Indiana (Mr. Hartke), the Senator from South Dakota (Mr. McGovern), the Senator from Montana (Mr. Metcalf), the Senator from Maine (Mr. Muskie), and the Senator from New Mexico (Mr. Montoya) would each vote "yea."

On this vote, the Senator from Oklahoma (Mr. Harris) is paired with the Senator from Florida (Mr. Smathers).

If present and voting, the Senator from Oklahoma would vote "yea" and the Senator from Florida would vote "nay."

On this vote, the Senator from Wisconsin (Mr. Nelson) is paired with the Senator from Georgia (Mr. Russell).

If present and voting, the Senator from Wisconsin would vote "yea" and the Senator from Georgia would vote "nay."

On this vote, the Senator from Minnesota (Mr. McCarthy) is paired with the Senator from Arkansas (Mr. McClellan).

If present and voting, the Senator from Minnesota would "yea" and the Senator from Arkansas would vote "nay."

Mr. KUCHEL. I announce that the Senator from Iowa (Mr. HICKENLOOPER) and the Senator from California (Mr. MURPHY) are absent by leave of the Senate on official business.

The Senator from Arizona (Mr. FANNIN) is detained on official business.

If present and voting, the Senator from California (Mr. MURPHY) would vote "yea."

The result was announced—yeas 69, nays, 11, as follows:

[No. 240 Ex.]

YEAS—69

Aiken, Allott, Anderson, Baker, Bartlett, Bayh, Bennett, Boggs, Brewster, Brooke, Burdick, Cannon, Carlson, Case, Church, Clark, Cooper, Cotton, Curtis, Dirksen, Dodd, Dominick, Fong.

Fulbright, Gore, Griffin, Hansen, Hart, Hatfield, Hayden, Hruska, Inouye, Jackson, Javits, Jordan, Idaho, Kennedy, Mass., Kennedy, N.Y., Kuchel, Lausche, Long, Mo., Magnuson, McGee, McIntyre, Miller, Mondale, Monroney.

Morse, Morton, Moss, Mundt, Pastore, Pearson, Pell, Percy, Prouty, Proxmire, Randolph, Ribicoff, Scott, Smith, Spong, Symington, Tower, Tydings, Williams, N.J., Williams, Del., Yarborough, Young, N. Dak., Young, Ohio.

NAYS—11

Byrd, W. Va., Eastland, Ellender, Ervin, Hill, Holland, Hollings, Long, La., Sparkman, Talmadge, Thurmond.

NOT VOTING—20

Bible, Byrd, Va., Fanning, Gruening, Harris, Hartke, Hickenlooper, Jordan, N.C., Mansfield, McCarthy, McClellan, McGovern, Metcalf, Montoya, Murphy, Muskie, Nelson, Russell, Smathers, Stennis.

So the nomination was confirmed.

Mr. HART. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of this nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

[From Record Vote Analysis, Vote No. 27, June 9, 1969]

WARREN EARL BURGER—NOMINATION

Subject: Warren E. Burger—Nomination to be Chief Justice of the United States. Vote on confirmation.

Action: Confirmed.

Synopsis: Background—In June 1968, President Johnson accepted "effective at (his) pleasure" the resignation of Earl Warren as Chief Justice of the United States and he subsequently sent to the Senate the nomination of Abe Fortas, Associate Justice of the Supreme Court, to succeed Earl Warren as Chief Justice. After hearings, that nomination was reported to the Senate in September 1968, where it was debated at some length until October 1, 1968, when a motion to invoke cloture failed (see Vote No. 569, 90th Cong., 2d sess.). On the following day President Johnson withdrew the nomination. On May 14, 1969, Associate Justice Fortas resigned, following disclosures concerning certain of his financial activities while on the bench.

On May 23, 1969, President Nixon sent to the Senate the nomination of Warren E. Burger, a judge of the U.S. Court of Appeals for the District of Columbia to succeed Earl Warren as Chief Justice.

Those favoring confirmation contended:

Judge Burger was superbly qualified to serve as Chief Justice. He was educated at the University of Minnesota and at St. Paul College of Law (St. Paul, Minn.) where he received an LL.B. degree, magna cum laude, in 1931. He thereafter practiced law in St. Paul until he was appointed by President Eisenhower to be an Assistant Attorney General of the United States in 1953. Since 1956 he had served on the U.S. Court of Appeals for the District of Columbia.

While on the bench, Judge Burger had been a strict constructionist of the Constitution. He had counseled judicial restraint in his opinions. Apparently he felt the court should interpret the law, but not legislate. His record indicated he believed in strong enforcement of the law, and in equal treatment—with favoritism toward none.

As Chief Justice, Judge Burger would have the chance to be the leader in the reform of judicial philosophy. By example and by leadership, as Chief Justice he could exert a powerful force to restore the reputation of the Supreme Court and to make the Court once again the object of universal respect.

Judge Burger had been subject to the acid test of having to pass upon highly controversial matters. No other circuit court in the Nation had more such matters submitted to it than did the U.S. Court of Appeals for the District of Columbia.

The nominee had participated in 13 years of decisions, some written by him for the majority and some in which he agreed with the majority. However, a great many of them were dissenting opinions in which, without overstepping the bounds of decency and personal accommodation which must prevail on such a high court, he nevertheless was found speaking out fully and clearly for the high principles of constitutional law or of jurisdictional law. He had not hesitated to speak out strongly at times against decisions dominated by other members of the court. With him as Chief Justice one could look ahead to a time when the quality manifested by him so frequently in those 13 years would prove helpful to our country, to the restored strength of the meaning of the Constitution as it was meant to be interpreted, to law enforcement officers, to the lower courts, and to our whole people, in that the whole people would have greater confidence in our judicial processes.

It was a good thing at this juncture that the President had nominated as Chief Justice a person whose record as a lawyer and as a judge could be evaluated from objective information, from decisions he had rendered, and from his philosophy as illustrated by those decisions. His confirmation would have a stabilizing influence and would be welcomed throughout the United States. However, some speeches in favor of confirmation reflected upon the Court and upon the retiring Chief Justice. The Supreme Court, like other institutions, had made errors in decisions. But that Court, under the leadership of Chief Justice Warren had followed the spirit and intent of the Constitution. It had made notable strides to make the promise of the Constitution a living reality.

When a man had been nominated, admittedly for one of the highest offices in the land, he should be subjected to the closest scrutiny. But not one single cogent point had been raised during this debate why the Senators should not vote on this nomination.

With respect to criticism concerning procedure on this nomination, on May 26 a notice was placed in the Congressional Record giving public notice of the time and place at which the hearing would be held. Prior to that date one individual had requested the opportunity to testify. She was subsequently asked to submit a written statement to the commitee and she did so.

On the morning of June 3, the date of the hearing, the committee was open for business at 8 a.m. One individual sent a telegram to the committee counsel requesting a postponement for 3 days in order that he might testify on the nomination. The committee declined that request. Thereafter, committee counsel suggested he submit a statement to the committee but he failed to do so.

After the hearing started, a Mr. Randolph Phillips came into the committee office and complained that he had not been able to hear the testimony, but he did not request the opportunity to testify at any time.

Sixty or seventy witnesses were present in

favor of confirmation, among them five or six former presidents of the American Bar Association. The committee did not hear them but it would have heard this gentleman if he had made a timely request. One could not come in just before a committee meeting and expect to be heard. Under the rules, he would have had no right to testify if someone had invoked the rule.

The members of the committee were unanimously satisfied, 13–0, that this nomination should be approved. The committee could not manufacture testimony against the nominee nor could it manufacture witnesses against him. The committee had before it no grounds of objection to the appointment.

This matter was on the calendar by action of the majority party. If there were those who thought it should not have been brought up on this day, they missed their forum. They could have taken it up within their own caucus or their own steering committee.

Those opposing confirmation contended:

They were opposing the nomination not on the merits, but because the hearing record had been received only that morning and they had not had a chance even to read it. After the recent unfortunate affair on the Court, assurances were being given by everyone that there would be a careful review of any of the appointments. The Senators had a responsibility to read the record of the hearings before voting for a Chief Justice.

There was also the statement circulated among some Senators by Randolph Phillips, chairman of the Committee Opposed to the Confirmation of Judge Warren Earl Burger to be Chief Justice of the United States. When Mr. Phillips saw on the day of the hearing that he would not be admitted to the hearing, he asked the Secretary to the committee counsel to seek from Senator Mansfield office authorization for him to be admitted. The secretary refused, saying that he was at the head of the line and would be admitted as soon as there was a seat.

Only 1 hour and 45 minutes was given to a public hearing before the committee. When lawyers wished to testify, who apparently were not publicity seekers, consideration should be given to deferring the matter for a few days.

One Senator opposed confirmation because in 1952 the nominee was an active participant against him in his campaign for reelection. The Senator objected to the manner in which the issues were presented to the people of his district that year because he felt they misrepresented his position and they were designed to elicit an emotional if not prejudiced response.

Action: The nomination was confirmed.

The result was announced—yeas 74, Nays 3, as follows:

YEAS 74

Aiken, Allen, Allott, Anderson, Baker, Bayh, Bellmon, Bennett, Bible, Boggs, Brooke, Burdick, Byrd, Va., Byrd, W. Va., Cannon, Case, Cooper, Cotton, Curtis, Dirksen, Dodd, Dole, Dominick, Eagleton, Eastland.

Ellender, Ervin, Fannin, Goodell, Griffin, Gurney, Hansen, Harris, Hartke, Hatfield, Holland, Hruska, Jackson, Jordan, N.C., Jordan, Idaho, Kennedy, Long, Magnuson, Mathias, McClellan, McGee, McGovern, Miller, Mondale, Montoya.

Mundt, Muskie, Packwood, Pearson, Proxmire, Randolph, Russell, Saxbe, Schweiker, Scott, Smith, Sparkman, Spong, Stennis, Stevens, Symington, Talmadge, Thurmond, Tower, Tydings, Williams, N.J., Williams, Del., Yarborough, Young, N. Dak.

NAYS 3

McCarthy, Nelson, Young, Ohio.

ANSWERED "PRESENT" 1

Fulbright.

NOT VOTING 22

Church, Cook, Cranston, Fong, Goldwater, Gore, Gravel, Hart.

Hollings, Hughes, Inouye, Javits, Mansfield, McIntyre, Metcalf, Moss.

Murphy, Pastore, Pell, Percy, Prouty, Ribicoff.

	Republicans (43)	Democrats (57)
Analysis of vote:		
Yeas (74)	36	38
Nays (3)	0	3
Present (1)	0	1
Not voting (22)	7	15
Positions of Senators not voting:		
Not paired—Position "yea"	[1] 7	[2] 11
Not paired—No position	0	[3] 4

Note: Absent: Official business: Church, Fong, Hart, Inouye, Javits, Mansfield, Percy. Necessarily absent: Cook, Cranston, Goldwater, Gore, Hollings, Hughes, McIntyre, Metcalf, Moss, Murphy, Pastore, Pell, Prouty, Ribicoff. Because of a death in the family: Gravel.

[1] Cook, Fong, Goldwater, Javits, Murphy, Percy, Prouty.

[2] Church, Cranston, Gravel, Hollings, Hughes, Mansfield, McIntyre, Moss, Pastore, Pell, Ribicoff.

[3] Gore, Hart, Inouye, Metcalf.

[From the CONGRESSIONAL RECORD—Senate, Nov. 21, 1969, Vol. 115, p. 35396]

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

The question is, Will the Senate advise and consent to the nomination of Clement Haynsworth, Jr., to be an Associate Justice of the Supreme Court of the United States?

Mr. MANSFIELD. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The VICE PRESIDENT. The clerk will call the roll.

The VICE PRESIDENT. The Chair wishes to caution the gallery that there will be no outbursts at the announcement of this vote.

The legislative clerk called the roll.

The result was announced—yeas 45, nays 55, as follows:

[No. 154 Ex.]

YEAS—45

Aiken, Allen, Allott, Baker, Bellmon, Bennett, Boggs, Byrd, Va., Byrd, W. Va., Cook, Cotton, Curtis, Dole, Dominick, Eastland.

Ellender, Ervin, Fannin, Fong, Fulbright, Goldwater, Gravel, Gurney, Hanson, Holland, Hollings, Hruska, Jordan, N.C., Long, McClellan.

Mundt, Murphy, Pearson, Prouty, Randolph, Russell, Smith, Ill., Sparkman, Spong, Stennis, Stevens, Talmadge, Thurmond, Tower, Young, N. Dak.

NAYS—55

Anderson, Bayh, Bible, Brooke, Burdick, Cannon, Case, Church, Cooper, Cranston, Dodd, Eagleton, Goodell, Gore, Griffin, Harris, Hart, Hartke, Hatfield.

Hughes, Inouye, Jackson, Javits, Jordan, Idaho, Kennedy, Magnuson, Mansfield, Mathias, McCarthy, McGee, McGovern, McIntyre, Metcalf, Miller, Mondale, Montoya, Moss, Muskie.

Nelson, Packwood, Pastore, Pell, Percy, Proxmire, Ribicoff, Saxbe, Schweiker, Scott, Smith, Maine, Symington, Tydings, Williams, N.J., Williams, Del., Yarborough, Young, Ohio.

So the nomination was rejected.

Mr. BROOKE. Mr. President, I ask the distinguished Senator from Maryland whether he thinks that the American Bar Association has lived up to its responsibility in regard to the recommendation that has been received in the case of G. Harrold Carswell.

Mr. MATHIAS. As I have already indicated to the distingulshed Senator from Massachusetts, I think whatever the members of the American Bar Association judicial selection committee may have felt about their conclusion, we ought to be entitled to feel that it was plenary, comprehensive, complete, and final; and I do not believe that the results have fulfilled that definition which the public expected.

Mr. BROOKE. I asked the Senator what weight, if any, he feels the Senate should give to the recommendation of the American Bar Association in this matter of the nomination of G. Harrold Carswell.

Mr. MATHIAS. I had felt, as a new Member of this body, when I approached the first confirmation proceeding in which I was involved, that we should give very great weight to it, that it would be very helpful in a decision—not final nor determinative, but worthy of great weight. But I must confess that I have retreated somewhat from that position.

Mr. BROOKE. I certainly do not want to thrust the Senator to the wall, but the Senator is a very distinguished member of the Committee on the Judiciary, and, as has been pointed out in this colloquy, the American Bar Association committee apparently did not have the benefit of the hearings of the Judiciary Committee and apparently did not conduct an extensive inquiry into the qualifications of the nominee, G. Harrold Carswell. So I ask the Senator from Maryland what weight he will give to its recommendation. Does he feel that he is bound in any way by the recommendation of the American Bar Association of G. Harrold Carswell?

Mr. MATHIAS. Let me say immediately that I consider myself bound in no way whatever, and that I am extremely disappointed in the course that events have taken. That is why I again point out that I think there may be some dichotomy between what the members of that committee thought they were doing and what we and the members of the general public thought they did. I think it would be of value, both in this case and in any future case, to understand fully what that dichotomy may be, if one does exist.

Mr. BROOKE. Did the Senator know that the American Bar Association generally rates nominees "highly qualified," "exceptionally well qualified," and "qualified"; and that it is my understanding—I may be corrected if I am in error—that this is the first time that a person nominated to be Supreme Court Justice has been recommended simply as "qualified," without the use of the adjectives "highly qualified" or "exceptionally well qualified"?

Mr. CASE. Mr. President, if the Senator will yield, in its own report to our Committee on the Judiciary, the Bar Association Committee described exactly what it did. This is the first time that it has limited its judgment, or its expression of its judgment, on a Supreme Court Justice to the single word "qualified."

It had another formulation in regard to Judge Haynsworth, which, I am sorry, has been sent to the Office of the Official Reporters for inclusion in the RECORD; but it is obviously, as the Senator suggests, a much more comprehensive statement.

The thrust of the Senator's remarks is absolutely in the right direction. I personally have never seen a report which was so apologetic as the one which the American Bar Association committee,

headed by Judge Walsh, from New York, made in this case. One of the most significant statements in it is that the committee is unhappy, in effect, because its critics have thought that it was rendering a comprehensive judgment, and it expressly disclaims having done that. It expressly states it is not rendering a comprehensive judgment on Judge Carswell's qualifications.

(At this point Mr. HART assumed the chair as Presiding Officer.)

Mr. BAYH. Mr. President, will the Senator yield?

Mr. BROOKE. I yield.

Mr. BAYH. The Senator from Massachusetts, who has the floor, has been very kind, and I must say that while acting as Presiding Officer I listened with great interest to the point that has been raised here. I appreciate the Senator from Michigan (Mr. HART) making it possible for me to express a thought in this general direction.

As a relatively young Member of this body, and also a relatively young member of the American Bar Association, I must say very frankly that the exposition of the almost cavalier manner in which our professional association has treated these last two nominations to the Supreme Court is a matter of some significant concern to me, and I am hopeful that, because of the manner in which it is being discussed now, and because several learned members of the bar and legal scholars, I understand, have sent telegrams to the Bar Association asking that it be changed, the result of this discussion will be that greater attention will be given to this significant choice.

As Senators know, there was a considerable amount of concern over the approval given by the Bar Association committee to the Haynsworth nomination. At that particular time, the committee was called into an unusual second Sunday session, and they met most of the day. It seemed to me rather ironic that although there had been documented, at least to the satisfaction of the Senator from Indiana, several areas in which that nominee had violated specific canons of ethics that had been promulgated by the bar association itself, nevertheless, two-thirds of that committee still felt compelled to go ahead and endorse the nomination.

I just wonder if the members of the committee—and, indeed, all of us in the American Bar Association—realize that we are permitting this organization, of which we are all members, to more or less put the Good Housekeeping seal of approval on a nominee, with not the kind of attention that should be given to a decision of this consequence. I think the Senator from Massachusetts and the others who have participated in this colloquy have rendered a significant service, not just in permitting us to examine the nominee before us but, of greater consequence, in perhaps changing the approach to this by the bar association committee, to that in the future a greater degree of study will go into it before recommendation is made.

I salute the Senator from Massachusetts for bringing this matter to our attention.

Mr. BROOKE. I thank the distinguished Senator from Indiana.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD an article entitled "The American Bar: A Failure of Responsibility," written by the distinguished columnist Anthony Lewis, and published in today's New York Times.

There being no objection the article was ordered to be printed in the RECORD, as follows:

THE AMERICAN BAR: A FAILURE OF RESPONSIBILITY

(By Anthony Lewis)

LONDON.—Some of us have an instinctive respect for the legal profession. We believe with Holmes that "the practice of law, in spite of popular jests, tends to make good citizens and good men." But the performance of the organized bar of the United States is making it hard to sustain that view.

The constitutional rights and legal traditions that protect Americans from arbitrary treatment by authority are under intense attack these days. Lawyers, of all people, might be expected to understand and speak out. But with some honorable exceptions, the voice of the bar is unheard.

RIGHTS UNDER ATTACK

For example, it has long been a fundamental assumption that the police may not invade a man's house or his person without some notice and some showing of cause. Now, in the name of fighting crime, legislation is being pushed to let policemen break into homes, and take blood or fingerprints or other physical evidence from suspects without their consent.

The Nixon Administration has sought, and the House has passed, legislation authorizing the "preventive detention" of men accused but not convicted of crime. There may be good arguments for the idea. But at the least it faces weighty objections in a constitutional system based on the assumption of trial first, sentence after.

The American Bar Association might have discussed some of the pressing issues of official power and individual freedom at its meeting last month in Atlanta. Instead, the delegates debated genocide—and managed to find dangers in the notion of a stand against mass murder. A small majority opposed the Administration's request that the United States join every other major country in ratifying the 1949 treaty on genocide.

Twenty years ago Philip L. Graham, late publisher of the Washington Post and a lawyer himself, told a group of lawyers that their profession had "substantially failed to meet its proper obligation of supporting individual freedom." It had silently acquiesced, he said, in restrictions that not long before "would have raised the collective hairs of this association straight on end."

Mr. Graham happened to be speaking to one legal group that did and does take a serious view of its public duty: The Association of the Bar of the City of New York. But for most of the profession has judgment is even more painfully true now than when he spoke.

THE BAR'S RESPONSIBILITY

The bar surely should feel a special responsibility toward the Supreme Court of the United States. In Britain it would be unthinkable for the profession to stay silent in the face of a political assault on the judicial process, yet that is what in fact is now happening in the United States.

Worse yet, the American Bar Association is playing a supporting role in what must be taken as a calculated effort to demean the Supreme Court. That is the nomination of Judge G. Harrold Carswell to the Court.

The A.B.A.'s Committee on the Federal Judiciary has found Judge Carswell "qualified." This of a nominee whose supporters have been unable to find a single opinion, a speech, a professional activity to which they can point as evidence of the slightest legal distinction. While Judge Carswell sat on the Federal District Court, his decisions taken to appeal were reversed 59 per cent of the time. If he is "qualified" to sit on the Supreme Court, it would be simpler for the A.B.A. committee to do its work by keeping current a list of lawyers who would be "unqualified"—possibly about five.

The irony is that the president of the A.B.A., Bernard G. Segal, must know as well as anyone what an insult to the Court and to the American legal profession the nomination of Judge Carswell is. Mr. Segal is an enlightened man who was for years the dedicated chairman of the A.B.A. Judiciary Committee. One understands the restraints upon him but still wishes he would speak out.

In failing to fulfill its public function the organized bar is surely inflicting wounds upon itself. Bright young people already question the outlook of the legal profession; the big firms are having a very difficult time attracting the best law graduates. If lawyers want to retain their traditional place of honor and influence in American life, they will have to remember, and live by, those other words of Justice Holmes: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."

Mr. BROOKE. Mr. President, in view of this laxness on the part of the American Bar Association, I do not regard it as surprising that a number of outstanding legal scholars have recently petitioned the ABA to reconsider its recommendation, and to exercise its responsibility by applying to this nomination the same standards it would apply to nominees for lower courts. I concur in this request, and hope that another meeting of the ABA judiciary committee will be held in the near future.

At the same time that the view of the ABA judiciary committee is considered, attention should also be paid to the many hundreds of members of that organization who have openly expressed their strong opposition to the nomination. To cite but a few examples:

Four hundred and fifty-seven lawyers and legal scholars from all over the Nation signed a letter accusing Judge Carswell of having a "closed mind," and being unfit for service on the highest court in the land.

The entire faculty of the University of Iowa College of Law has let it be known, in letters to President Nixon and to Senator MILLER:

We are profoundly disturbed that you and others are willing to support apparent bias and proven mediocrity in order to find (a conservative justice).

The majority of the faculty at Florida State University School of Law in Tallahassee—the law school which Judge Carswell helped to found—has expressed their opposition to his confirmation.

The Washington State Trial Lawyers Association said a poll of its members showed 64 percent were opposed to the appointment of Judge Carswell to the Supreme Court.

A letter signed by over 50 percent of the students at the University of Colorado College of Law, future members of

the ABA, registered their opposition to Judge Carswell's appointment.

There are a multitude of other examples which could be cited. But these are representative of the widespread feeling of dissatisfaction and dismay among members of the legal profession with the present nomination. They throw considerable question on the value of the ABA committee's own unanimous endorsement.

The judge's own qualifications are often cited as reason for the confirmation of his nomination. He is a graduate of law school, a former district attorney, a district judge, and a member of the circuit court of appeals: Seventeen years of continuous public service, in which his nomination was three times confirmed by the Senate for the positions he held.

Mr. President, I have serious doubts about the efficacy of a system which would three times give a man its unqualified support for increasingly responsible posts without once looking into his record. I have read the transcript of his three previous hearings. The longest hearing took 15 minutes, and at no time was an issue of substance raised. I give no credence whatsoever, therefore, to the fact that he has thrice been confirmed by his body.

His record of public service over the last several years has been widely debated in this body, and I do not intend to reiterate the innumerable points which have been made in nearly 2 weeks of public debate on the nomination.

It is worth noting, however, that this "record of public service" includes active participation of then U.S. Attorney Harrold Carswell in a scheme to circumvent the law of the land which he was sworn to uphold. It includes repeated charges of abuse and rudeness directed toward plaintiffs and counsel in numerous civil rights cases, which some have suggested is a violation of the Florida canon of ethics for judicial procedure. It includes a record of 59 percent reversals in his written decisions which were appealed to a higher court—a reversal rate which is 2½ times that of the national average for Federal judges. It includes five reversals in a single year in habeas corpus cases where previous appellate rulings should have governed. And it includes the incorporation in a property deed in the late 1960's of clauses requiring the enforcement of "white only" provisions, a practice declared illegal by the Supreme Court in 1948. (Shelley v. Kraemer, 334 U.S. 1, 1948).

"Seventeen years of public service" says nothing about the quality of that service. Judge Carswell's record in my judgment, hardly qualifies him for higher judicial appointment.

I have no quarrel with the argument that we need a "strict constructionist" on the Supreme Court of the United States. Indeed, I would be willing to vote for such a man if I were convinced that he went to the Court with a reasonably open mind, and that he had the capacity to be fair in his judgments. But I have no such confidence in the case of Judge Carswell. As I said in my speech of February 25, announcing my opposition to his confirmation after the most exhaustive—and discouraging—review of his record:

> The law is ever complex, and a judge's decisions must necessarily include some contradictions and ambiguities. Nevertheless, the judge's decisions afford no sufficient reassurance that he has come to recognize his responsibilities to protect the equal rights of all those appearing before him.

Several highlights stood out in the record then; for me, they stand out even more clearly now:

The judge gives the appearance of having consistently moved at the slowest possible pace, stretching out judicial action and effectively delaying relief for those seeking reasonable compliance with the 1954 Brown decision.

The judge consistently dismissed habeas corpus hearings without even granting the evidentiary hearing which an increasing number of appellate reversals clearly indicated were required.

The judge dismissed a civil rights case in 1968 purely on the basis of a defendant's affidavit, which previous higher court rulings had shown had no probative value.

Are such decisions the mark of a true conservative, a "strict constructionist" of constitutional law and requirements, or do these and other cases more properly suggest a pattern of dilatory, minimal action which tended to frustrate rather than promote the cause of justice?

Mr. President, I have tried to deal today with some more of the arguments which have been raised in Judge Carswell's favor. I find them lacking in substance. I continue to oppose the nomination, and will work actively toward that end.

But my concern is far broader than the prospects of having one unworthy man sit among the other eight distinguished Justices of this Nation. My concern is with respect for the law which is the essential component of a government of laws; with confidence in the justness of Government which is one of the twin pillars of democracy.

Let us look to the Nation, to its needs and expectations. Let us look to the future, to its hopes and aspirations. Let us reject the nomination now before us, and find us a man who, whatever his political philosophy or ideology, is a man of breadth and scope, and wise impartiality in the handling of the law.

Mr. President, a majority of the professors at my law school alma mater, Boston University, recently expressed in a joint letter to me their opposition to the confirmation of Judge Carswell's nomination. In their letter, these professors of the law stressed the need for "outstanding professional and intellectual qualifications" on the Supreme Court, and the need to appoint only fair-minded individuals. On both counts, they believe Judge Carswell is lacking.

I ask unanimous consent that the text of the letter be printed at this point in the RECORD.

There being no objection the letter was ordered to be printed in the RECORD, as follows:

BOSTON UNIVERSITY,
SCHOOL OF LAW,
Boston, Mass., March 13, 1970.

HON. EDWARD W. BROOKE,
Senate Office Building,
Washington, D.C.

DEAR SENATOR BROOKE: As law teachers deeply concerned about the law and its administration, we oppose the appointment of Judge G. Harrold Carswell to the United States Supreme Court.

We believe that no one should be appointed to our highest tribunal whose qualifications do not meet the most exacting standards. An appointment to the Supreme Court is the highest honor our nation can bestow on a lawyer. If our judiciary is to remain respected, that honor must be earned by outstanding professional and intellectual credentials. It is our considered judgment that Judge Carswell's record falls to show that he meets these requirements.

We further believe that in the present times only someone whose record of fair-mindedness to all citizens is completely unblemished should be appointed to our highest tribunal. Judge Carswell does not meet this requirement. His racial statements in the past and the more recent charges of abuse to civil rights lawyers made against him by responsible members of the bar, inescapably cast doubt on his impartiality and fairness in civil rights cases. As we all know, in these matters it is more important than ever to avoid any grounds for suspicion of bias in our system of law.

A judiciary that can claim the respect of even those who disagree with its decisions is a foundation on which this nation has been built. We urge you not to undermine this foundation, for to do so will only fortify those disenchanted groups who claim that the courts and legal process offer no hope for meaningful justice.

We earnestly request that you vote not to confirm the appointment of Judge Carswell.

Respectfully yours,

David A. Rice, Daniel G. MacLeod, Paul McCarthy, Daniel G. Partan, Henry Paul Monaghan, Eugene C. Roemele, Phillip I. Blumberg, Leonard P. Strickman, Clarence R. Laing, Stanley Z. Fisher, Albert R. Beisel, Jr., Banks McDowell, Ernest M. Haddad, John P. Wilson, William E. Ryckman, Paul M. Siskind, Paul J. Liacos, Members of the Faculty of Law.

Mr. BROOKE. Mr. President, I yield the floor.

ORDER FOR RECOGNITION OF SENATOR HOLLAND TOMORROW

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that, at the conclusion of the remarks by the able senior Senator from Maine (Mrs. SMITH) on tomorrow, the able senior Senator from Florida (Mr. HOLLAND) be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER (Mr. BAYH). Without objection, it is so ordered.

PRESIDENT NIXON'S STATEMENT ON POSTAL STRIKE

Mr. HRUSKA. Mr. President, President Nixon today has made a clear and concise statement regarding the postal strike now affecting many of the major cities of this Nation. I commend the President's determination to meet his constitutional obligation, and insure that the mails will go through.

TABULATION OF DECISIONS ON EVERY APPEAL FROM EVERY DECISION OF EACH JUDGE IN THE DISTRICT COURTS OF THE FIFTH CIRCUIT—1958-69—Continued

Judge	Total number of decisions	Reversals	Affirmances	Affirmed in part, reversed in part	Reversal rate (percent)
Thornberry, Homer	21	4	17	0	19.0
Tuttle	2	0	2	0	0
Underwood, E. Marvin					
Vaught	7	6	1	0	85.8
West, E. Gordon	160	51	102	7	34.0
Whitehurst, George W.	78	28	47	3	37.8
Whitfield	3	0	3	0	0
Woodward, Halbert O.	6	1	5	0	16.6
Wilkin	7	5	2	0	71.5
Wright, J. Skelly	143	29	108	6	22.4
Wyche	10	7	3	0	70.0
Young, George C.	73	19	54	0	26.1
All others	54	11	40	3	23.2
Page total	127	30	94	3	
Grand total	6,942	1,943	4,719	280	30.0
Carswell (repeated)	122	46	70	6	40.2

LOW CASELOAD, HIGH BACKLOG FURTHER EVIDENCE OF CARSWELL INADEQUACY

The "Reversal Trend" Graph [not printed in the RECORD] presents the most striking evidence of Judge Carswell's lack of legal accomplishment. The following facts illustrate that this reversal trend is no fluke.

1. Judge Carswell's rate of reversal on cases appealed dramatically increased during his tenure as Federal District Court Judge in the Fifth Circuit. In his first 30 appeals he was reversed on 25%. In his last 31 appeals, before his appointment to the Fifth Circuit Court of Appeals, he was reversed on 53.2%.

2. Simultaneously, his caseload decreased and his backlog increased. His rate of appeals per thousand cases terminated rose almost parallel with the national average, and slightly more strikingly than the other judges of the Fifth Circuit District Courts.

A. CASELOAD (BASED ON NUMBER OF CASES COMMENCED)

Judge Carswell began with a caseload of 353 when he was appointed to the bench of the Northern District of Florida in 1958. In terms of caseload, he was 11th of 16 districts in that circuit. In 1966, he was 17th of 17 districts in the same circuit, and remained so through 1968, despite the fact that Winston G. Arnow was appointed as a second Federal District Judge in the Northern District of Florida. (In light of the consistently light caseload, it is interesting that another judge was appointed at all.)

B. APPEALS PER THOUSAND CASES TERMINATED

Judge Carswell's high reversal rate, it would seem, cannot be explained by any supposition that only his wrong decisions were appealed from. In fact, Judge Carswell was appealed from slightly more often than the average rate for all Fifth Circuit Districts from 1958 to 1969, and on a parallel with the national average during the same time period. It might be thought that with such a light caseload and with more time therefore to work on opinions, Judge Carswell's decisions would have been less frequently appealed.

C. BACKLOG (CASES APPROPRIATE FOR TRIAL AND PENDING)

In 1958, Judge Carswell inherited a backlog of 126 cases. By 1966, his caseload (353 in 1958) had shrunk to 193 (17th of 17 districts in the Fifth Circuit), but his backlog had risen to 282. By June 19, 1969, the date to the Fifth Circuit Court of Appeals, with the appointment of a second judge in his Northern District of Florida, Judge Carswell's caseload was 160, but the backlog for the Northern District had dropped to 120. Furthermore, while the average caseload in Fifth Circuit District Courts was substantially higher than in Judge Carswell's court, the average backlog was lower. While the average caseload in Fifth Circuit District Courts increased, Judge Carswell's caseload decreased. While the average backlog in Fifth Circuit District Court decreased, Judge Carswell's backlog more than doubled.

CONCLUSION

In fiscal 1968, his last full year on the District Court, Judge Carswell handled 38% fewer cases than the average Federal District judge and 45% fewer cases than the average Federal District judges in his own Fifth Circuit. Nonetheless, Judge Carswell's civil cases, taking the median, were 75% more delayed in reaching trial than the United States average, and 133% more delayed than civil cases in the Fifth Circuit District Courts. Examining the most serious cases (those 10% delayed the longest), Judge Carswell's docket averaged 21% more delay than the national average and 42% more delay than the other Fifth Circuit District Court cases.

In light of these statistics, the assessment of mediocre is perhaps a charitable one. The statistics developed by the Law Students Concerned For the Court clearly reflect negatively on Judge Carswell's qualifications for the Supreme Court. The Supreme Court docket is well known to be most burdensome in terms of both caseload and complexity of issues presented.

It might also be pointed out that Canon Seven of the American Bar Association Code of Judicial Ethics states:

"A judge should be prompt in the performance of his judicial duties, recognizing that . . . habitual lack of punctuality on his part justifies dissatisfaction with the administration of the fusiness of the court."

Moreover, bearing in mind that 10% of the civil cases in Judge Carswell's court were more than 47 months old (3 yrs. 11 mos.) before they reached trial, it should be noted that the declared policy of the Federal Judiciary is that "every case pending three years or more and appropriate for trial be regarded as a judicial emergency."

These facts are uniquely relevant now, when the issues of law and order and due process are so important to the fabric of American life, when it is so important to restore confidence in the legal process.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Is there further morning business? If not, morning business is closed.

EXTENSION OF PROGRAMS OF ASSISTANCE FOR ELEMENTARY AND SECONDARY EDUCATION—CONFERENCE REPORT

The PRESIDING OFFICER (Mr. CRANSTON). As in legislative session, the Chair lays before the Senate the pending question, which the clerk will state.

The ASSISTANT LEGISLATIVE CLERK. The report of the committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 514) to extend programs of assistance on elementary and secondary education, and for other purposes.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, will the Senator from Indiana yield for a unanimous-consent request?

Mr. BAYH. I yield.

SUPREME COURT OF THE UNITED STATES

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate proceed to the further consideration of the nomination of Mr. George Harrold Carswell.

The PRESIDING OFFICER. Without objection, it is so ordered.

In executive session, the Chair lays before the Senate the pending business which the clerk will state.

The ASSISTANT LEGISLATIVE CLERK. The question is, Will the Senate advise and consent to the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The Senator from Indiana is recognized.

Mr. BAYH. Mr. President, yesterday the Senate unanimously agreed to vote on April 6 on a motion to recommit the nomination of Judge Carswell, pursuant to the unanimous-consent agreement as set forth on page 9314 of the CONGRESSIONAL RECORD. Pursuant to that unanimous-consent agreement, where there is reference to a motion to be made by the Senator from Indiana, with the understanding that the vote will come on April 6 on the motion to recommit, at this time I do hereby move that the nomination of Judge G. Harrold Carswell be recommitted to the Committee on the Judiciary.

The PRESIDING OFFICER. The motion is in order.

Mr. DOLE. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. DOLE. Mr. President, would that still be subject to a motion to table?

The PRESIDING OFFICER. Under the same conditions as set forth in the unanimous-consent agreement. That is correct.

(The following proceedings, which occurred earlier today, are printed here by unanimous consent.)

Mr. FULBRIGHT. Mr. President, since the conclusion of hearings and the report of the Judiciary Committee on the nomination of Judge Carswell to be an Associate Justice of the Supreme Court, a number of additional questions have been raised concerning Judge Carswell's qualifications. These are questions which the Judiciary Committee did not have the opportunity to consider.

I refer particularly to the uncertainty which has arisen regarding the willingness—or lack of willingness—of Judge Carswell's colleagues on the Fifth Circuit Court of Appeals to endorse his nomination. The record, as we know, contains a

letter from former Chief Judge Elbert P. Tuttle offering to testify on the nominee's behalf. This letter is also cited on page 5 of the committee's report. On March 17, the senior Senator from Maryland informed the Senate that he had received three telegrams from Judge Tuttle indicating that he was no longer prepared to testify in support of Judge Carswell. It is not clear why Judge Tuttle has changed his mind, although it would be useful to the Senate to have this explained before the nomination is brought to a vote.

According to television and press reports, another of Judge Carswell's colleagues, Judge John Minor Wisdom, actively opposes the nomination. According to these reports, Judge Wisdom blocked a letter of endorsement from the entire fifth court bench by advising his colleagues that, if such action were taken, he himself would send a personal letter to the Judiciary Committee opposing the nomination.

Mr. President, I wish to emphasize that I have great respect for the President's prerogative in the nomination of high officials in the judicial and especially the executive branches of our Government.

Officials in the executive have a direct responsibility to the Chief Executive and generally hold office at his pleasure. On the other hand, Justices of the Supreme Court are appointed for life, they usually serve long after the President has retired, and they have a constitutional responsibility to support, to defend, and to interpret the Constitution and not necessarily support the policies of any Chief Executive. Therefore, the Senate has a special responsibility to exercise its independent judgment in confirming a Justice of the Supreme Court.

Other questions have arisen which the Judiciary Committee did not have the opportunity to consider. There have been several allegations of bias against certain attorneys on Judge Carswell's part. The meaning of the endorsement of the nominee by the Federal Judiciary Committee of the American Bar Association has been called into question by a group of distinguished lawyers, including the president of the New York Bar Association and the deans of leading law schools. In addition, the press reported yesterday, I believe, that the Philadelphia Bar Association—I think unanimously—opposes this nominee. These developments, I again emphasize, have all occurred since the Committee on the Judiciary considered this nomination.

Mr. President, it is no fault of the Judiciary Committee, or of the nominee, that the matters were not brought forth for orderly, thorough examination before the nomination was reported to the Senate. Nonetheless, they raise questions which I—and, I would guess, other Members of the Senate—wish to have clarified before voting on the nomination. I would think it unfortunate if Senators were forced to rely on press reports, television interviews, and an incomplete correspondence for highly pertinent information on the merits of this nomination.

I should like to make it clear that I myself am undecided, as of now, how I will cast my vote. I most emphatically do not share the lack of enthusiasm in some circles for the appointment of a southern judge. I applaud and appreciate the President's reported desire to nominate a judge who would give the Court regional balance. There are many eminent jurists in the southern part of the United States, and I have the fullest confidence in the ability of any of a number of them to serve with distinction on the Supreme Court.

Nor do I share the distaste which I have heard expressed for a "strict constructionist." I have, indeed, welcomed reports that the President sought a nominee who would practice judicial restraint. There is much to be said for a stricter construction of the Constitution than has been in favor in recent years—in both domestic and, I might say, in foreign affairs. In short, Mr. President, I consider myself a strict constructionist, especially in regard to the effect of the Constitution with respect to this body in our governmental system.

On these and other grounds, I thought the President's first nomination a satisfactory one and I cast my vote in favor of Judge Haynsworth. Before voting on the present nominee, I would very much like to have further information on the questions which have arisen since the nomination was reported on February 27.

This information can best be provided through the orderly procedures of the Judiciary Committee. I intend to support, therefore, Mr. President, the motion that the nomination of Judge Carswell be recommitted to the Committee on the Judiciary for such further consideration and action as the committee and its chairman may think appropriate.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. BAYH. I listened with a great deal of interest to the statement of the distinguished Senator from Arkansas; and I must say that, being a bit familiar with the currents that are running across the country, I salute him for such a courageous approach to this matter.

I thought the Senator from Arkansas made two salient points: First, to draw a distinction between the Presidential prerogative so far as appointing members of his administration—teammates, if you please—with whom he must work, on one hand, and the responsibility of initiating nominations to the Supreme Court of men who will be there long after any of us, either he or any of us in this body, have the opportunity to serve.

The second matter that I thought was appropriate was the fact that by recommittal, the Senator from Arkansas pointed out the fact that there is a continuing search right now to differentiate between fact and fiction, to try to find out what was said and what was not said, to try to refine into the most minute details all the facts involved in the judge's background and what his qualifications are.

I ask unanimous consent to have printed at this point in the RECORD an article by Mr. John MacKenzie relative to one of these facts, quoting a distinguished attorney from Washington, Charles A. Horsky, who is a member of the ABA panel, and an article by Mr. Fred Graham in the New York Times yesterday, about certain facts relative to the golf course case that I think would be important for us all to study.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, Mar. 25, 1970]

JUSTICE RUTLEDGE'S SON QUESTIONS CARSWELL STAND; VOICES DOUBTS ON HIGH COURT NOMINEE'S STATEMENT ABOUT FORMING OF PRIVATE CLUB

(By Fred P. Graham)

WASHINGTON, March 24.—The credibility of Judge G. Harrold Carswell's testimony about his role in the formation of a segregated private golf club has become a major issue in the battle over confirmation of his nomination to the Supreme Court.

Senator Birch Bayh, Democrat, of Indiana, released today a telegram from Neal P. Rutledge, a Miami lawyer who is the son of the late Justice Wiley Rutledge of the Supreme Court. Mr. Rutledge questioned Judge Carswell's testimony that he had not heard that a reason for forming the private club to take over Tallahassee's golf facilities was to prevent desegregation of the facilities.

Judge Carswell was United States Attorney for the Tallahassee area in late 1955 and early 1956, when the country club was formed and acquired the municipal facilities. He is now a member of the United States Court of Appeals for the Fifth Circuit.

CALLED "COMMON KNOWLEDGE"

His signing of the club's charter of incorporation, in his capacity as an incorporator and a director, has been construed by his critics as an indication of segregationist sentiment. He has told the Senate Judiciary Committee that the segregation motive "was never mentioned to me—I didn't have it in my mind, that is for sure."

Mr. Rutledge declared in his telegram that he lived in Tallahassee during much of this period and that "it was common knowledge in the community there at that time, and especially among the members of the bar," that the dominant motive for forming the private club was to prevent desegregation.

"It is impossible for me to believe that any prominent member of the Tallahassee community at that time, such as then United States Attorney Carswell, was not fully aware" of this motive, Mr. Rutledge said.

Charles A. Horsky, a Washington lawyer who serves on the American Bar Association committee that found Judge Carswell "qualified" for the Supreme Court, has told friends and associates here that some of the nominee's testimony on Jan. 27 seemed inconsistent with a discussion the two men had the previous night.

Mr. Horsky reportedly went to Judge Carswell's hotel room the night of Jan. 26 to ask about the nominee's role in forming the club, which was not disclosed in the press until the next morning.

QUESTIONED BY COMMITTEE

According to Mr. Horsky's associates, who would not be quoted by name, Judge Carswell at first insisted that he had only contributed $100 to help improve the club's facilities.

Then Mr. Horsky reportedly spread copies of the incorporation documents on the bed and pointed out Judge Carswell's signature on them. Judge Carswell then reportedly conceded that he had been an incorporator.

Before the Senate Judiciary Committee the next morning, when he was first asked about the club, Judge Carswell appeared uncertain about his role in it. He testified he had "hurriedly" read the news accounts that

morning and had asked someone to make a telephone call to get more facts.

"I can only speak upon my individual recollection of this matter," he said. He added, "I was never an officer or director of any country club anywhere."

Asked if he had served as a director, as alleged in the press, he answered, "No, sir; nor in any other official capacity."

Then Senator Roman L. Hruska, Republican of Nebraska, asked, "Were you an incorporator of that club, as was alleged in one of the accounts I read?"

"No, sir," Judge Carswell replied.

Later that morning, Senator Edward M. Kennedy, Democrat of Massachusetts, brandished what appeared to be a copy of a corporate charter and asked Judge Carswell, "Did you in fact sign the letter of incorporation?"

"Yes sir, I recall that," the nominee answered.

When Senator Kennedy asked what he recalled about it, Judge Carswell replied, "They told me when I gave them $100 that I had the privilege of being an incorporator. They might have put down some other title, as if you were potentate or something."

TESTIMONY OF JUDGE DISPUTED

(By John P. MacKenzie)

Supreme Court nominee G. Harrold Carswell told two American Bar Association representatives that he was an incorporator of a segregated Tallahassee country club on the night before he swore to the Senate that he had no such role.

The secret meeting in a Washington hotel on Jan. 26, which was acknowledged yesterday by authoritative sources in and out of the ABA, was followed within hours by a letter from the ABA's judiciary committee informing the Senate that Carswell was rated "qualified" for the court vacancy.

No one familiar with the meeting could account for Carswell's flat "No, sir" when he was asked under oath by Sen. Roman L. Hruska (R-Neb.) whether he had served in 1956 as an incorporator of the Capital City Country Club, thereby helping to convert a public facility to a private club at a time when the courts were ordering the desegregation of public golf courses.

The incorporation papers were uncovered by members of the Washington Research Project Action Council, a civil rights organization, Joseph L. Rauh Jr., co-chairman of the Leadership Conference on Civil Rights, which opposes Carswell, delivered copies to Charles A. Horsky, Washington lawyer and the District of Columbia member of the ABA's judiciary committee.

The full committee had met on Sunday, Jan. 25, but adjourned without announcing whether it rated the nominee qualified. The role of Judge Carswell in the country club episode reportedly was part of the committee's unfinished business.

Horsky and fellow committee member Norman P. Ramsey of Baltimore then located Carswell at a downtown hotel and showed him the documents.

Judge Carswell reportedly then acknowledged that he was one of the club's incorporators.

The committee's chairman, Lawrence E. Walsh of New York, confirmed yesterday that the meeting between Carswell and the two ABA representatives occurred. He refused to elaborate.

Reports of Carswell's involvement in the Tallahassee golf club's changeover from public to private facility were aired in the morning newspapers of Jan. 27, when Carswell's confirmation hearing began before the Senate Judiciary Committee.

Carswell told the senators he had "read the story very hurriedly this morning," adding "I had someone else make a phone call to get some dates about this thing." He then flatly denied to Hruska that he had been an incorporator of the golf course.

Pressed by Sen. Edward M. Kennedy (D-Mass.), who was holding a copy of the incorporation papers, about whether he ever signed letters of incorporation, Carswell replied:

"Yes, I recall that," and went on to give this explanation:

"They told me when I gave them $100 (to help build a clubhouse) that I had the privilege of being called an incorporator. They might have put down some other title, as if you were a potentate or something. I don't know what it would have been."

Throughout his testimony Carswell, a 50-year-old judge of the Fifth U.S. Circuit Court of Appeals, repeated that he was among many Tallahassee residents solicited for a club refurbishing project that, so far as he knew, had no racial aspect.

Asked whether he had "any idea that that private club was going to be opened or closed" to Negroes. Carswell replied, "The ma ter was never discussed."

"What did you assume?" asked Kennedy.

"I didn't assume anything," the nominee replied. "I assumed that they wanted the $100 to build a clubhouse."

Did he think blacks could belong?

"Sir, the matter was never discussed at all."

Kennedy tried once more. "What did you assume, not what was discussed."

Carswell replied, "I didn't assume anything. I didn't assume anything at all. It was never discussed."

It was learned yesterday that the question of Carswell's candor with the Senate Judiciary Committee was discussed last month when the ABA group again took up the case. After a secret meeting that lasted several hours, the ABA reaffirmed unanimously its opinion that Carswell was qualified for the high court.

Mr. BAYH. I salute the Senator from Arkansas for this very courageous statement.

Mr. HARRIS. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. HARRIS. Mr. President, I join in the comments of the distinguished Senator from Indiana about the statement just made by the distinguished Senator from Arkansas.

I, too, have felt very strongly, as the Senator knows, that there are certain matters in connection with this nomination which ought to be considered again by the Judiciary Committee; and I have therefore felt, as the Senator from Arkansas has stated, that that would be a proper course for the Senate to take.

I point out, as did the Senator from Indiana, that in addition to the matters which the Senator from Arkansas has mentioned, the matter of the Tallahassee golf course also has been of concern to me and I think might be considered further by the Judiciary Committee.

For those reasons, I hope that such a motion, when made, will prevail; and I agree with the Senator from Arkansas.

Mr. CRANSTON. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield.

Mr. CRANSTON. Mr. President, I, too, salute the Senator from Arkansas for his statement, for his cautious approach to this nomination.

As a westerner, I want to say that I wholeheartedly concur with the right of the South to be represented on the Court, and with the right of the President to nominate a strict constructionist. I agree that there are many men in the South who are eminently qualified to serve on the Court, and I would be glad to support such a nomination.

At one point in his remarks, the Senator from Arkansas referred to reports that the Philadelphia Bar Association had gone on record against Judge Carswell. I would like to verify that they have indeed done so. I have in my hand—I will place it in the RECORD—the statement of the Philadelphia Bar Association against Judge Carswell. It was unanimous. According to the Philadelphia Enquirer, this is the first time that the Philadelphia Bar Association has gone on record in regard to a Supreme Court nomination. The San Francisco Bar Association, likewise, went on record a few days ago against the nomination.

Mr. FULBRIGHT. I did not know that.

Mr. CRANSTON. These are two great American cities where the bar associations have joined the growing list of bar associations which have locally gone on record against the nomination.

Mr. President, I ask unanimous consent that the resolution of the Philadelphia Bar Association and the resolution of the San Francisco Bar Association against Judge Carswell be printed at this point in the RECORD.

There being no objection the resolutions were ordered to be printed in the RECORD, as follows:

RESOLUTION ADOPTED BY THE BOARD OF DIRECTORS OF THE BAR ASSOCIATION OF SAN FRANCISCO, FRIDAY, MARCH 20, 1970

Whereas the Bar Association of San Francisco has a policy of recommending and supporting for judicial office those judges and members of the bar who by their character, temperament and experience have demonstrated their special qualifications for judicial office, and opposing the selection for judicial office of those persons who do not possess these qualifications; and

Whereas the members of this Association, as lawyers, are particularly concerned with the status of the Supreme Court of the U.S. as an institution and as a symbol of justice particularly in this day of great scepticism about the ability of the judiciary to deal with current crises; and

Whereas the Directors of this Association recognize the right of the President of the U.S. to appoint to the Supreme Court of the U.S. persons of competence who reflect his judicial and political philosophy, but believe that standards of professional aptitude and experience should be maintained on that court as well as on others; and

Whereas the Directors of this Association have considered the qualifications of G. Harrold Carswell as a lawyer and judge;

Now therefore be it resolved that the Directors of the Bar Association of San Francisco recommend that the nomination of G. Harrold Carswell as an associate justice of the Supreme Court of the U.S. be withdrawn or disapproved on the basis of his lack of qualifications to sit on that court.

RESOLUTION UNANIMOUSLY ADOPTED BY THE BOARD OF GOVERNORS OF THE PHILADELPHIA BAR ASSOCIATION ON MARCH 23

Whereas, there is no more compelling occasion that calls for the public expression of informed opinion by the organized bar than the occasion of an appointment of a Justice of the Supreme Court of the United States.

Whereas, the testimony and statements of leading legal scholars and lawyers raise serious questions as to Judge Carswell's legal ability and judicial stature to serve upon the highest court of our land;

And whereas, the evidence raises serious questions as to Judge Carswell's sensitivity to human and individual rights;

Now therefore be it resolved that the board of governors of the Philadelphia Bar Association hereby urges the Senate of the United States to refuse its consent to the nomination of G. Harrold Carswell to be an associate Justice of the Supreme Court of the United States.

Mr. CRANSTON. I would like to add that the Vermont Bar Association also has gone on record against Judge Carswell.

Mr. FULBRIGHT. I thank the Senators from California, Oklahoma, and Indiana for their kind remarks.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I yield to the distinguished Senator from Nebraska.

Mr. HRUSKA. It was with interest that I listened to the statement of the Senator from Arkansas, and I appreciate the very deep interest and the deep thought that he has devoted to it.

I might say, in regard to the news story of Mr. MacKenzie, which has just been inserted in the RECORD, there has already been ample coverage of these facts. It was discussed thoroughly before the Judiciary Committee during the hearings:

On one occasion, the Senator from Nebraska asked the nominee a question, as follows:

Were you an incorporator of that club, as was alleged in one of the accounts I read?

Judge Carswell said:

No, sir.

I do not know whether he misunderstood the question or if he was asked whether he actually drew the articles or what the role was. The fact is that later in the testimony—I believe it was pages 32 and 33—there was a full explanation by the nominee Carswell. I shall go into this in greater detail at a later time. We are on limited time now, I understand.

A full analysis of Mr. MacKenzie's article has been furnished to the editor of the Washington Post in a letter which I, along with Senators GURNEY, ALLOTT, and DOLE, signed. I ask that the letter be printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, D.C., March 26, 1970.

The EDITOR,
The Washington Post,
Washington, D.C.

DEAR SIR: It is often said that the most desperate charges are made in the closing days of an election. If this has any application to Supreme Court nominees, then the article on your front page yesterday must be an indication that we are approaching a vote on the nomination of Judge Carswell.

We have no quarrel with the one half of the truth which you have told. It is true, as your article states, that Judge Carswell met with representatives of the American Bar Association on the night before his hearing and was shown (but did not examine) a copy of the articles of incorporation for the country club which had been prepared and signed fourteen years earlier. It is true that in the opening minutes of the hearings Judge Carswell responded to a question of Senator Hruska by stating that he was not an incorporator of the country club. It is true that this reply was in error.

The other half of the truth which you have carefully concealed from your readers is that Judge Carswell immediately corrected this misstatement. Less than five minutes later Senator Hruska asked, "Could the stock that you received on this occasion have borne the label, 'incorporator,' indicating that you are one of the contributors to the building fund for the clubhouse?" Judge Carswell responded, "Perhaps. I have no personal recollection." (Judge Carswell had not recently seen the stock certificate.)

Whatever confusion might have been created by his earlier reply was again laid to rest less than an hour later that same morning before the noon recess when the following exchange with Senator Kennedy took place.

"Senator KENNEDY. Did you in fact sign the letter of incorporation?

"Judge CARSWELL. Yes sir. I recall that.

"Senator KENNEDY. What do you recall about that?

"Judge CARSWELL. That they told me when I gave them $100 that I had the privilege of being called an incorporator." (See Hearings, p. 32.)

As if this were not enough, the earlier reply was again corrected that afternoon when Judge Carswell told Senator Bayh, "No. 2, what I have to say about the matter is that whatever the records show and whatever capacity it may be listed that I am in, whether it be director, president, incorporator, or potentate, as I tried to suggest earlier, I had no conversations with anyone about any activities of that organization in any manner at all."

In fact, the corporation whose charter Judge Carswell signed never functioned. It never operated at all. It was replaced by a non-profit corporation which was formed later.

This is brought out at pages 36 and 37 of the hearings:

"The CHAIRMAN. You bought a share of stock in a country club?

"Judge CARSWELL. Yes sir.

"The CHAIRMAN. Did that corporation ever operate a country club?

"Judge CARSWELL. Never operated at all.

"The CHAIRMAN. Never operated at all?

"Judge CARSWELL. Never operated at all.

"The CHAIRMAN. In fact, it was a corporation organized for profit, wasn't it?

"Judge CARSWELL. That is my understanding, Senator. It was organized for profit and then, later, a nonprofit Corporation was formed, in which I had no part as a director.

"The CHAIRMAN. That was a corporation that operated the country club?

"Judge CARSWELL. That is the one that got the title to the property that has been the subject matter for discussion.

"The CHAIRMAN. Yes."

Our criticism of your most recent attack on Judge Carswell, however, is much more fundamental. Since Judge Carswell first appeared before the Senate Judiciary Committee on January 27, everyone has known of the existence of his initial reply and his later clarification that day and the following day. Your reporters were there at the hearing on those days and, since the Post at that time did not suggest that Judge Carswell "misled" the Senate Judiciary Committee, it was doubtless conceded that Judge Carswell had merely made an inadvertent misstatement which he immediately corrected. The notion that Judge Carswell's conflicting statements about a transaction consummated fourteen years ago, based on memory and a glimpse at one of the documents the preceding evening, show an intent to deceive is one which most informed people would not share. Thus the only conceivable basis for the Post's rehashing this two-months-old story on page one simply won't wash.

The same members of the American Bar Association Committee who met with Judge Carswell the night before the hearing later voted to reaffirm their opinion that Judge Carswell was qualified for the Supreme Court. In continuing to support Judge Carswell, they obviously were aware that Judge Carswell had immediately corrected his initial reply and had continued to correct it throughout the rest of his testimony.

Now, however, the Post strenuously attempts to transform this two-months-old testimony into a news story. By referring to the initial reply in the leading sentence on the front page and by burying the one later clarification which you quote at the end of the article on page 12, you manage to leave an entirely inaccurate impression of Judge Carswell's testimony.

It is disappointing that you did not see fit to be more fair and honest.

Sincerely,

EDWARD J. GURNEY,
ROMAN L. HRUSKA,
GORDON ALLOTT,
ROBERT DOLE,
U.S. Senators.

Mr. HRUSKA. Mr. President, as is pointed out, all these things were laid before the American Bar Association committee. They were thoroughly considered in the light of his record, and they reaffirmed unanimously the initial decision of the committee.

Mr. FULBRIGHT. I did not insert that story in the RECORD.

Mr. HRUSKA. I know the Senator did not.

Mr. FULBRIGHT. I did not know about the story. But I did not believe that Judge Tuttle's position had been made clear.

I noticed a letter from the chairman of the Judiciary Committee a few days ago—I think it was Sunday—to the editor of the Post, in which he said that the record, so far as he knew and so far as the committee's records show, had only the letter from Judge Tuttle saying that he supported the nominee. Unless the Senator from Maryland is grossly misinformed, this no longer stands. So I think this is a matter on which the record is not at all clear. That is what I made reference to.

After all, Judge Tuttle is a key figure, having been the Chief Judge of this district, and a man of great reputation and prestige in the area. I think this is a matter of great importance, and it ought to be cleared up.

Mr. HRUSKA. Mr. President, we could go on ad infinitum if we are going to say, "Well, that story has been told; let us get another one."

The fact when the nomination was sent up, Judge Tuttle wrote a handwritten letter and that letter is in the record.

Mr. FULBRIGHT. That is correct.

Mr. HRUSKA. The committee has heard nothing from him since. It is to be presumed that, inasmuch as he has been in this picture by reason of telephone calls from both sides, and many people are involved in it, and if he does not express any indication of wanting to amend or revise his testimony, he does not intend to do so. Are we to hold this record open indefinitely for all the judges and all the witnesses, to give them a chance to change their minds? I do not think that is reasonable to expect.

The Supreme Court has had eight members on it since last May, and we are engaging in what is not a filibuster, to be sure. It is extended debate. Thank

goodness we have a date fixed for the vote on the motion to recommit and for a vote on the nomination.

Mr. AIKEN. Mr. President, will the Senator yield?

Mr. FULBRIGHT. I have the floor. I would like to make this comment.

I hope the Senator did not get the impression that the situation regarding Judge Tuttle is the only reason that has developed—that is, the indecision as to where he stands. It is only one of the more important ones. The Senator has confirmed the fact that the record of the committee stands as it was at the time they reported the nomination. But I must say that I have sufficient respect for the integrity of the Senator from Maryland that he would not say this on the floor, that he had received telegrams and information to the contrary, if it were not so. I think that should be cleared up, but let me make it clear, that it is one of the incidents which I think need clarifying.

The other developments, many of which have come since then, such as the expressions by the Philadelphia Bar and, as I am just told, by the Vermont Bar, and the San Francisco Bar, were not considered by the Judiciary Committee. In a matter of this kind, there is a great distinction between a judge being considered and a prospective Cabinet member.

The PRESIDING OFFICER. The time of the Senator from Arkansas has expired.

Mr. FULBRIGHT. Thus, I submit there is a great difference.

If I have any more time I yield to the Senator.

Mr. HRUSKA. Mr. President, I ask unanimous consent to yield 3 additional minutes to the Senator from Vermont (Mr. AIKEN).

Mr. AIKEN. Mr. President, referring to the position of the Vermont Bar——

Mr. FULBRIGHT. If the Senator will allow me to interject, the Senator from California (Mr. CRANSTON) stated to me a moment ago that he had the information that the Vermont Bar had come out against Judge Carswell.

Mr. AIKEN. May I make this explanation: The Vermont Bar, as I have been advised, had its annual meeting last Friday with 240 members present.

Early Friday afternoon, an attempt was made to bring up the Carswell nomination, but the motion to discuss the Carswell nomination failed.

By 4 o'clock, 140 of the 240 members had left, and the matter was then brought up and Mr. Carswell's nomination was disapproved by a vote of 70 to 30, with 140 absentees.

Mr. FULBRIGHT. That clarifies it.

Mr. AIKEN. I will say, however—I do not say I approve or disapprove of the action taken on Judge Carswell—but I will say that the conservative element of the Vermont Bar elected all the officers this year, whereas last year, it was just the opposite. Thus, the Senator from Arkansas can draw his own conclusion as to what the situation is in the Vermont bar.

But there were 240 good lawyers, and unfortunately——

Mr. FULBRIGHT. That was not stated by this Senator, but by the Senator from California.

Mr. AIKEN. I understand. But there were 140 of them who went home to do the milking, or something else, leaving behind 100 politically astute lawyers who then proceeded to bring the Carswell resolution up a second time. [Laughter.]

Mr. FULBRIGHT. I want it to be clear that this has become such a controversial matter, with so many communications coming in on the subject from my own State, that I believe it would be much wiser for the committee to take another look at it, and then for us to pass upon it. Without further consideration by the Judiciary Committee, it seems to me it would be unwise to conclude action on this nomination.

Mr. TYDINGS. Mr. President, earlier this week I addressed myself to the question of whether Judge Carswell has the ability to put aside his own prejudices and biases so as to be able to approach every case with a fair and open mind. Stated another way, the question is whether regardless of the color of one's skin or one's social or economic class, every man may expect and in fact has received a fair trial in Judge Carswell's court.

Mr. President, if the hallowed principle of equal justice under law is not to become an empty slogan, we cannot condone one single instance of overt judicial favoritism, intolerance, or hostility. Justice in every case must be, in actuality and appearance, even handed.

Thus, if but one lawyer had come forward to report a case in which Judge Carswell manifested from the bench an antagonism toward or bias against the rights of a litigant who was black or poor, this alone would have raised serious doubts as to whether he has the requisite judicial temperament to sit on any Federal court not to mention the highest court of our land.

The case against this nomination does not rest on only one instance of highly improper judicial conduct. No less than seven lawyers who were involved in civil rights cases before Judge Carswell have already spoken of his blatant inability to divorce himself from his personal bias.

Time and again lawyers have stated that Judge Carswell has comported himself in a matter which demeans the Federal judiciary and is totally at odds with the basic principles of fairness upon which our judicial system is founded. The regrettable experiences of Prof. Leroy Clark, Prof. John Lowenthal, Norman Knopf, Ernst Rosenberger, and Theodore Bowers evidence a pattern of conduct on the part of Judge Carswell that is deserving of censure, not reward; deserving of admonishment, not elevation to the Supreme Court.

It is indeed shocking to contemplate the statements of those members of the legal profession who have actually practiced before Judge Carswell in cases involving the rights of the poor, the blacks, and the disadvantaged.

Prof. Leroy Clark:

The most hostile federal district court judge I have ever appeared before with respect to civil rights matters.

Florida attorney, Theodore R. Bowers:

Judge Carswell is the most prejudiced judge before whom I have had the honor to practice.

Prof. John Lowenthal:

I can only describe (Judge Carswell's) attitude (in voter registration case) as being extremely hostile.

Justice Department Attorney Norman Knopf:

Judge Carswell made clear . . . that he did not approve of any of this voter registration going on.

Florida attorney, Maurice Rosen:

The reputation of Judge Carswell among attorneys handling civil rights cases . . . was that they could not expect to win a civil rights related case before him.

Florida lawyer, James Senderlin:

Judge Carswell could not be relied on for a fair, impartial and equitable disposition of civil rights matters.

Mr. President, yesterday I received telegrams from two more members of the Florida bar who, on the basis of their personal experiences in Judge Carswell's court, have decided to speak out against this nomination. The telegrams come from Judge James W. Matthews, associate municipal judge for the city of Opa Locka, and Judge Harold L. Braynon, municipal judge for the city of Miami.

Judge Matthews, who has been a member of the Florida bar for over 11 years and who has served as an assistant U.S. attorney for the southern district of Florida, states in his telegram:

I have practiced in Judge Carswell's court while he served as the United States District Judge. I believe that Judge Carswell has shown bias toward civil rights litigants on many occasions. While trying a particular case in Judge Carswell's court, it was quite evident to me that my client's were not accorded equal treatment. Judge Carswell gave every indication of his distaste for handling civil rights matters. I am of the opinion that Judge Carswell cannot be completely objected (sic) in the handling of civil rights cases, if his nomination to the Supreme Court is confirmed. I feel confident that most black lawyers practicing in the State of Florida would go on record as being opposed to his confirmation. Harrold Carswell is not the type or caliber jurist to serve as an Associate Justice on the Supreme Court of the United States. I strongly implore you to vote against his confirmation.

Judge Braynon, who has been a member of the Florida bar for 8 years and has served as an assistant to the attorney general of the State of Florida for 2 years, states in his telegram:

I have been present in the United States District Court, Northern Division, while Judge Carswell presided on many occasions. It is my firm belief that his attitude toward civil rights cases and the lawyers that handle those cases was indeed outright hostile. His reputation among black lawyers in the State of Florida is not at all good. I would urge you and other well thinking Senators to vote against his nomination to the Supreme Court of this great country.

Mr. President, the statements from these two judges together with the testimony and statements of others who have been treated unjustly in Judge Carswell's court, carry one clear message: Judge Carswell does not have the ability to divorce his personal bias from his judicial conduct, he does not possess the fair and

open mind which is an absolute prerequisite for a Justice of the Supreme Court, and his nomination should be defeated.

Mr. President, I ask unanimous consent that the complete telegrams from which I read portions be printed at this point in the RECORD.

There being no objection the telegrams were ordered to be printed in the RECORD, as follows:

MIAMI, FLA.,
March 25, 1970.

Senator TYDINGS,
U.S. Senator,
New Senate Office Building,
Washington, D.C.

SENATOR TYDINGS: I am a member of the Florida Bar and have been for over 11 years. In addition thereto, I have served as an assistant to the United States attorney for the Southern District of Florida for a period in excess of two years. I have practiced in Judge Carswell's court while he served as the United States District Judge. I believe that Judge Carswell has shown bias toward civil rights litigants on many occasions. While trying a particular case in Judge Carswell's court, it was quite evident to me that my client's were not accorded equal treatment. Judge Carswell gave every indication of his distaste for handling civil rights matters. I am of the opinion that Judge Carswell cannot be completely objective in the handling of civil rights cases, if his nomination to the Supreme Court is confirmed. I feel confident that most black lawyers practicing in the State of Florida would go on record as being opposed to his confirmation. Harrold Carswell is not the type or caliber jurist to serve as an Associate Justice on the Supreme Court of the United States. I strongly implore you to vote against his confirmation.

JAMES W. MATTHEWS,
Associate Municipal Judge for the City of Opa Locka.

MIAMI, FLA.,
March 25, 1970.

Senator TYDINGS,
U.S. Senator,
New Senate Office Building,
Washington, D.C.

SENATOR TYDINGS: The possible confirmation of Harrold Carswell as an Associate Justice of the United States Supreme Court makes it necessary for me to make my position known to the United States Senate. I have served as an assistant to the attorney general of the State of Florida for two years and have been a member of the Florida Bar for 8 years. I have been present in the United States District Court, northern division, while Judge Carswell presided on many occasions. It is my firm belief that his attitude towards civil rights cases and the lawyers that handle those cases was indeed outright hostile. His reputation among black lawyers in the State of Florida is not at all good. I would urge you and other well thinking Senators to vote against his nomination to the Supreme Court of this great country.

HAROLD L. BRAYNON,
Municipal Judge for the City of Miami.

Mr. HRUSKA. Mr. President, in connection with the nomination of Judge Carswell, I have received a letter from an eminent authority in jurisprudence and law. It comes from Prof. Charles Alan Wright, at the University of Texas at Austin, at the school of law there.

First let me read from the statement of Charles Alan Wright when he testified in the Haynsworth nomination, which is to be found at page 591 of the Haynsworth hearings:

For more than twenty years my professional specialty has been observing closely, and teaching and writing about, the work of federal courts. From 1950 to 1955 I was a member of the faculty at the University of Minnesota Law School and I have been at The University of Texas since that time. I was a visiting professor at the University of Pennsylvania Law School in 1959–60, at the Harvard Law School in 1964–65, and at the Yale Law School in 1968–69. I regularly teach courses in Federal Courts and in Constitutional Law, a seminar in Federal Courts, and a seminar on the Supreme Court. Since 1964 I have been a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and prior to that time was a member of the Advisory Committee on Civil Rules. I was Reporter for the recently-completed Study of Division of Jurisdiction between State and Federal Courts made by the American Law Institute.

My writings include a seven-volume revision of the Barron and Holtzoff Treatise on Federal Practice and Procedure. That set of books is now being supplanted by a new treatise on the same subject. Publication of the new treatise began in February of this year with my three volumes on criminal practice and procedure, and the first of the volumes on civil litigation, which I am writing in collaboration with Professor Arthur R. Miller, was published in April. In addition I am the author of a one-volume hornbook, *Wright on Federal Courts*, a second edition of which is now at the publisher's, and, in collaboration with two others, am the author of the Fourth Edition of *Cases on Federal Courts*.

Professor Wright is an eminent and highly respected figure in the practice and teaching of law. He is a legal scholar. He sent me a letter on March 18, 1970, which I received 2 or 3 days later.

I ask unanimous consent that the full text of the letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, the letter states in part:

I have known Harrold Carswell for eight years and argued a case before him prior to that time. I have also had the benefit—as I suspect many of the professors who oppose him have not—of reading every word of the hearings with regard to his nomination as well as the Report of the Judiciary Committee and the statements of individual views that accompany it. I studied with particular care the testimony of Dean Pollak and Professor Van Alstyne. They are good friends of mine for whose judgment I have the utmost respect. In this particular instance however their views do not persuade me that there is any sufficient reason for refusing to confirm Judge Carswell.

The critical comments about Judge Carswell's ability have rested almost entirely on a reading of his opinions. I do not think that this is a fair measure of a judge and especially not of a district judge who writes opinions in only a tiny proportion of the matters he hears. As I have read these criticisms of Judge Carswell I have been reminded of Justice Frankfurter's comments about Chief Justice Morrison R. Waite in Frankfurter's book *The Commerce Clause* (1937). At page 76 Professor Frankfurter, as he then was, said of Waite that "to deny him significance is to allow the pedestrianism of his opinions to obstruct understanding of a great judge. History ought not to reflect contemporary misjudgment, due in no small degree to Waite's lack of the grand manner, his total want of style. The touch of the commonplace about him was, indeed, the key to his appointment as Chief Justice." and Frankfurter said:

Then he goes on to say, later in his letter:

I read with care in the Congressional Record for March 13th the name of those who had signed the statement urging rejection of the nomination. After twenty years of law teaching I know how easy it is to get law professors to sign petitions and statements. My expectation is that most of the law professors who signed the statement did not support Richard M. Nixon for President. I further believe that most of them based their judgment entirely on what they read in the press and that they have not studied Judge Carswell's work or the record of the hearings.

I hope that the nomination will be confirmed.

Respectfully yours,

CHARLES ALAN WRIGHT.

Mr. President, I think he says much in this two-page letter. It is my hope that our colleagues in this body will read the letter thoughtfully and be inspired by it.

EXHIBIT 1

THE UNIVERSITY OF TEXAS AT
AUSTIN SCHOOL OF LAW,
Austin, Tex., March 18, 1970.

Hon. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: I have followed with interest and concern the controversy that has developed about the nomination of Judge Carswell for the Supreme Court. I was asked to testify before the Judiciary Committee on his behalf. Unfortunately the hearings came at a time when I was sick in bed and in any event I doubted whether my support would be useful after the vigorous role I had taken—and am still taking, see my letter to the editor in the March issue of the American Bar Association Journal—about Judge Haynsworth.

I have recently had called to my attention an article that appeared in *The Washington Post* a month or more ago. In it the following sentence appeared: "Opponents point out that of three legal educators who testified in favor of Haynsworth, one made a special trip to Washington to testify against Carswell and the other two have made no public comment on the nomination. It is plain that I am one of the "other two" referred to and I should be very unhappy if my silence were thought to mean that I do not support the nomination.

I have known Harrold Carswell for eight years and argued a case before him prior to that time. I have also had the benefit—as I suspect many of the professors who oppose him have not—of reading every word of the hearings with regard to his nomination as well as the Report of the Judiciary Committee and the statements of individual views that accompany it. I studied with particular care the testimony of Dean Pollak and Professor Van Alstyne. They are good friends of mine for whose judgment I have the utmost respect. In this particular instance however their views do not persuade me that there is any sufficient reason for refusing to confirm Judge Carswell.

The critical comments about Judge Carswell's ability have rested almost entirely on a reading of his opinions. I do not think that this is a fair measure of a judge and especially not of a district judge who writes opinions in only a tiny proportion of the matters he hears. As I have read these criticisms of Judge Carswell I have been reminded of Justice Frankfurter's comments about Chief Justice Morrison R. Waite in Frankfurter's book *The Commerce Clause* (1937). At page 76 Professor Frankfurter, as he then was, said of Waite that "to deny him significance is to allow the pedestrianism of his opinions to obstruct understanding of a great judge. History ought not to reflect contemporary misjudgment, due in no small degree to Waite's lack of the grand manner his total want of style. The touch of the commonplace about him was, indeed, the

key to his appointment as Chief Justice." Again at pages 110 and 111 Frankfurter said:

"No doubt Waite had neither the power nor the subtlety of Marshall and Taney. He was not of their flight. Yet he belongs to the great tradition of the Court. For he was true to De Tocqueville's admonition against confounding the familiar with the necessary, and thereby escapes inclusion among those to whom Mr. Justice Holmes referred when he wrote, 'It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.' Waite's temperament was staid, and his imagination was never ignited by the spark of genius. But he did not confine the Constitution within the limits of his own experience, nor did he read merely his own mind to discover the powers that may be exercised by a great nation. The disciplined and disinterested lawyer in him transcended the bounds of the environment within which he moved and the views of the clients whom he served at the bar. He brought to the Court no emotional commitments compelling him to translate his own economic or political convictions into constitutional commands."

(This marks the end of the proceedings which were ordered to be printed at this point by unanimous consent.)

Mr. HARRIS. Mr. President, I join in the motion just made by the distinguished Senator from Indiana. I think it is a worthy motion, as I stated earlier this week in the Senate and earlier today in connection with the statement of the distinguished Senator from Arkansas.

I hope that even those who have been proponents of this nomination will now, as I said when I first suggested this course last week, join in this motion because I think there are matters which deserve consideration again in connection with this nomination by the Committee on the Judiciary.

I commend the distinguished Senator from Indiana for the very excellent leadership which he has shown in regard to this entire matter and for making the motion which he has just placed before the Senate.

Mr. BAYH. Mr. President, I appreciate the kind remarks of my colleague and good friend from Oklahoma.

I would like to point out that, indeed, it was the Senator from Oklahoma who had expressed earlier concern about this nomination and who suggested this vehicle as one which might come closer to solving the problem of this nomination than other parliamentary vehicles available to us.

I appreciate the Senator's comments on my leadership. I am frank to say that this is leadership which is not at the top of the priority list as far as the various opportunities we have in the Senate. If one believes in the advice and consent responsibility of the Senate, as the Senator from Indiana does and, as I think most Members of this body do, I do not believe we should rubberstamp nominations from the President. That is why I have felt it necessary on two occasions to help in some small way to suggest to the President that we could get a better man.

I would like to make one further observation. It seems to me that this motion to recommit, although it can be interpreted in a number of ways, indeed, does give us an opportunity to express deep reservation and concern to the President about this nomination to the Supreme Court. This motion to recommit gives us an opportunity to say to the President, "Mr. President, take another look. Voluntarily remove us and yourself from this very controversial and questionable position. Find us another man on whom we can readily agree and who most of us will feel is qualified to serve on the highest court of our land."

I think this can be realistically interpreted as a good-faith effort to get the President, on his own initiative, to solve this problem before the Senate has to speak generally on it.

I yield the floor.

Mr. ALLEN. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. ALLEN. Mr. President, as the junior Senator from Alabama understands, even though the motion to recommit has been made, in no event will there be a vote on that motion prior April 6, after the argument for that day has been concluded.

The PRESIDING OFFICER (Mr. CRANSTON). As provided in the unanimous-consent agreement, that is correct.

Mr. ALLEN. Also, since a motion to table is not debatable, and since debate is guaranteed under the unanimous-consent agreement, no motion to table would be in order until the debate has been concluded.

The PRESIDING OFFICER. The Senator is correct.

Mr. ALLEN. I thank the Presiding Officer.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the nomination of Judge Harrold Carswell be laid aside now and the Senate proceed in further consideration of the conference report on H.R. 514, as in legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

EXTENSION OF PROGRAMS OF ASSISTANCE FOR ELEMENTARY AND SECONDARY EDUCATION—CONFERENCE REPORT

The Senate, as in legislative session, resumed the consideration of the report of the committee of conference on disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 514) to extend programs of assistance for elementary and secondary education, and for other purposes.

AUTHORIZATION TO SIGN DULY ENROLLED BILLS DURING ADJOURNMENT OF THE SENATE

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Vice President, the President pro tempore, or the Acting President pro tempore be authorized to sign duly enrolled bills during the adjournment of the Senate.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER FOR RECOGNITION OF SENATOR YOUNG OF OHIO ON TUESDAY, MARCH 31, 1970

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that on Tuesday next, immediately following the disposition of the reading of the Journal, the able Senator from Ohio (Mr. YOUNG) be recognized for not to exceed 30 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virignia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD of West Virignia. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BYRD of West Virginia. Has the requisite time under paragraph 3 of rule VIII, the so-called germaneness rule, now expired for today?

The PRESIDING OFFICER. The Senator is correct.

Mr. BYRD of West Virginia. I thank the Chair.

SALUTE TO PAUL H. DOUGLAS ON HIS 78TH BIRTHDAY

Mr. PROXMIRE. Mr. President, today is the 78th birthday of Paul H. Douglas, our friend and former colleague who brought to the Senate of the United States a massive intellect, courageous action, and incisive judgment. He was the noblest Athenian of them all.

Allen Nevins said of him:

Of all our Senators, none has written a more consistently elevated record of public service; none has so clearly combined intellectual distinction—technical expertness—with practical legislative power; none has set so high a moral tone.

Paul Douglas was the LaFollette and Norris of our time. Those men were his two senatorial heroes, and the inspiration Paul drew from them served the Nation well. Along with portraits of Abraham Lincoln, Jane Addams, John Peter Altgeld, and Clarence Darrow, they graced the walls of his senatorial office.

While most men are fortunate to distinguish themselves in a single career, Paul Douglas has distinguished himself in many.

He first of all was a teacher and economist. Along with Charles W. Cobb he produced a unique and seminal contribution to economics in the work "The Theory of Production"—the Cobb-Douglas Production Function—which first appeared in the American Economic Review in March 1928. His book, "The Theory of Wages" won for him an international prize and is one of the classic works in the literature. It graces the Oxford syllabus on economics along with the works of Keynes, Marshall, Pigou and Hicks, and Joan Robinson. His teaching career at the University of Illinois, Reed College, and the University of Chicago

"in light of the Supreme Court's recent pronouncements indicating that greater speed in implementing the Brown decision is now required." The Fifth Circuit added, "The necessary conclusion to be reached . . . is that for a school system which is beginning its plan of desegregation 10 years after the second Brown decision, more speed and less deliberation is required."

In the Jacksonville case, Mr. Rehnquist properly rebukes us for regarding the Supreme Court's decision not to review as a ruling on the merits of the matter. This error, however, is somewhat irrelevant since Judge Carswell was bound just as fully by decisions of the Fifth Circuit as he was by those of the Supreme Court. In this instance, the Fifth Circuit had been asked to rule that federal courts neither could nor should order desegregation of teachers in school cases. It refused to do so, saying that they could and that they always should consider doing just that. A few months later, nevertheless, Judge Carswell reserved decision on teacher desegregation in Bay County. Whether he was, as we said, "apparently ignoring" the Jacksonville case is a matter of opinion on which we and Mr. Rehnquist apparently disagree. As for the rest of Mr. Rehnquist's critique, it appears to deal largely with our motives, the colors we are flying, as he put it. About all there is to be said about that is that we are not now questioning the administration's *motives* in appointing Judge Carswell and so we see no purpose in answering questions about ours. We might add, in passing, that although we had some reservations in varying degree about the ideological or judicial coloration of both of President Nixon's previous nominees to the Supreme Court, Chief Justice Burger and Judge Haynsworth, this did not lead us to urge the Senate that they not be confirmed.

[From the Baltimore Sun, Mar. 18, 1970]

JUDGE CARSWELL

The most important question before the Senate as it considers President Nixon's nomination of Judge G. Harrold Carswell to the Supreme Court is this: is he well qualified? The answer, in the opinion of this newspaper, is No. The record of the committee hearings shows nothing of private financial dealings of the kind that caused the Senate to reject the nomination of Judge Haynsworth. But there is nothing in the record to support a finding that Judge Carswell is well qualified for this post, or that the Nixon administration made a serious search for a well qualified man. Judge Carswell may meet the minimum standards, but an appointment to the Supreme Court resting on his slender credentials can be taken only as a reflection on President Nixon, Attorney General Mitchell and, ultimately, on the Supreme Court.

Let us underscore the point here that we do not take exception to Mr. Nixon's effort to turn the Supreme Court toward a more conservative "constructionist" course. We do not in any way find fault with the appointment of a conservative Southerner. We object, however, to the appointment of mediocre men to the nation's highest court, and mediocrity is the word that most accurately characterizes Judge Carswell's record.

In the sensitive area of race, which seems likely to be before the Supreme Court for years, Judge Carswell's record shows no more than a typical Southern conformity. In 1948 he made a political speech in which he asserted a "vigorous belief in the principles of white supremacy." He says now that this view is obnoxious to him and that he no longer holds it. In 1953 as an attorney in Tallahassee he drew up a "white only" charter for a college football booster organization and in 1956 he joined a plan to lease the Tallahassee municipal golf course to a private, white club.

This is enough to create a considerable mistrust in this appointment, and to raise a question as to the nature of the Justice Department's research before Judge Carswell was recommended to the White House. Beyond this, moreover, is the fact that in more than a decade on the bench in federal district and appellate courts Judge Carswell made no mark of distinction. His reversal rate as a trial judge was high. He is about as nearly a nonentity as a federal judge can be.

* * * * *

[From the Trenton (N.J.) Sunday Times Advertiser, Mar. 15, 1970]

SENATOR CASE'S EXAMPLE

New Jersey's Clifford P. Case has become the fourth Republican in the U.S. Senate to announce he will vote against confirmation of G. Harrold Carswell for the Supreme Court. His decision is a welcome one.

Senator Case based his decision on Judge Carswell's lack of sympathy for civil rights, as evidenced by both private and courtroom performances, and his utterly undistinguished record as a legal scholar and jurist—including the achievement of having been reversed by higher courts nearly three times as often as the average district judge.

"On all the evidence, Judge Carswell does not measure up to the standard we have rightly come to expect of members of the Supreme Court," Senator Case said.

On the same day, 457 lawyers, law deans and law professors urged the Senate to reopen hearings on the Carswell nomination—but added that on the basis of what is known already, the nomination should be rejected.

Elevation of Judge Carswell to the nation's highest court would have two deplorable effects. It would dilute the quality of a body whose very essence demands men of the highest quality. And it would be a cruel blow to minority-group Americans who are constantly being urged to rely on the workings of the law to obtain justice.

We hope other Republican senators join Clifford Case in placing duty to country over duty to a President of their own political party. This includes Senators Scott and Schweiker of Pennsylvania, who have indicated they favor Judge Carswell's nomination—but who voted against the confirmation of Judge Haynsworth, whose qualifications, modest as they were, were excellent compared to Judge Carswell's.

EXECUTIVE SESSION

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the Senate return to executive session.

The PRESIDING OFFICER. Without objection, it is so ordered.

THE PENDING BUSINESS

Mr. BYRD of West Virginia. Mr. President, what is the pending business?

The PRESIDING OFFICER (Mr. COOK). The pending business is the nomination of G. Harrold Carswell to be an Associate Justice of the Supreme Court.

Mr. BYRD of West Virginia. Mr. President, what is the pending question?

The PRESIDING OFFICER. The pending question is the motion to recommit the nomination.

Mr. GRIFFIN. I would like to inqulre, for the information of Members of the Senate, following the vote on the motion to recommit, which is the pending motion, and assuming that the motion to recommit should fail, what then should be the business before the Senate?

Mr. BYRD of West Virginia. Mr. President, the Senate would still be in executive session. The business then before the Senate would be the nomination of G. Harrold Carswell to be an Associate Justice of the Supreme Court.

Mr. GRIFFIN. I thank the Senator from West Virginia.

The PRESIDING OFFICER. The Chair might state to the Senator from Michigan that, under the order of the Senate, the nomination would be the pending business until such time as it would be set aside, and on that nomination, under the previous order, a vote would take place on Wednesday at 1 o'clock

Mr. GRIFFIN. I thank the Chair.

Mr. BYRD of West Virginia. Mr. President, of course the able majority leader could at any time move to return to legislative session, in which case the resolution (S. Res. 211) would again become the pending business.

Mr. GRIFFIN. He could do that.

Mr. BYRD of West Virginia. Or the majority leader could move, while in executive session, to take up legislative business, as in legislative session.

In specific answer to the Senator's specific question, once the vote on recommittal has been had, and if the motion to recommit is not sustained—or if a motion to table the recommital motion should carry—unless the majority leader moves to go into legislative session or to proceed to something else as in legislative session, the pending business then before the Senate would be the question of confirming or rejecting the nomination of Mr. Carswell.

Mr. GRIFFIN. I thank the distinguished acting majority leader.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the unanimous-consent agreement of March 25, 1970, be printed in the RECORD, so that Senators may be reminded of the order for Monday, April 6, 1970.

The PRESIDING OFFICER. Without objection, it is so ordered.

The unanimous-consent agreement is as follows:

UNANIMOUS-CONSENT AGREEMENT

(In executive session)

Ordered, That, effective on Monday, April 6, 1970 (with the Senate convening in executive session at 10 a.m.), further debate on the nomination of G. Harrold Carswell to be Associate Justice of the United States Supreme Court, with the pending question on the motion of the Senator from Indiana (Mr. Bayh), to recommit the nomination to the Committee on the Judiciary, be limited to 3 hours to be equally divided and controlled by the Senator from Indiana (Mr. Bayh) and the Senator from Nebraska (Mr. Hruska), or whomever they may designate, with the vote coming at 1 o'clock, or following a vote on a motion to table the motion to recommit if such a motion should first be offered. Following the above vote or votes the Senate will proceed to vote on the confirmation of the nomination at 1 o'clock on April 8, 1970, or following the vote on a motion to table the nomination should such motion be made, and if the nomination is still before the Senate. [WEDNESDAY, MARCH 25, 1970.]

RECESS TO 10 A.M. MONDAY, APRIL 6, 1970

Mr. BYRD of West Virginia. Mr. President, if there be no further business to

Mr. McGOVERN thereupon took the chair as Acting President pro tempore.

THE JOURNAL

Mr. MANSFIELD. Mr. President, as in legislative session, I ask unanimous consent that the Journal of the proceedings of Friday, April 3, 1970, be approved.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, as in legislative session, I ask unanimous consent that all committees be authorized to meet during the session of the Senate today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SUPREME COURT OF THE UNITED STATES

The Senate resumed the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the nominations on the Executive Calendar under New Reports.

The ACTING PRESIDENT pro tempore. Without objection, the nominations will be stated.

AMBASSADORS

The bill clerk proceeded to read the nomination of Arthur K. Watson, of Connecticut, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to France.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Ambassadors listed be considered en bloc, but before the Chair rules, let me say that I am delighted with the appointment of Arthur K. Watson of Connecticut to be Ambassador Extraordinary and Plenipotentiary of the United States of America to France.

I have known Mr. Watson for many years. He has a strong and abiding interest in the welfare of this country and in its relations with France. I think his is an extraordinarily good appointment.

The ACTING PRESIDENT pro tempore. Without objection, the nominations are considered and confirmed en bloc.

ASSISTANT SECRETARY OF STATE

The bill clerk read the nomination of David M. Abshire, of Virginia, to be an Assistant Secretary of State.

The ACTING PRESIDENT pro tempore. Without objection, the nomination is confirmed.

U.S. ARMS CONTROL AND DISARMAMENT AGENCY

The bill clerk read the nomination of Vice Adm. John Marshall Lee, U.S. Navy, of Virginia, to be an Assistant Director of the U.S. Arms Control and Disarmament Agency.

The ACTING PRESIDENT pro tempore. Without objection, the nomination is confirmed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the President be immediately notified of the confirmation of these nominations.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum, with the time to be taken out of both sides.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The pending question is the motion to recommit the nomination of Judge Carswell, offered by the Senator from Indiana. Who yields time?

Mr. MANSFIELD. Mr. President, has any business been transacted?

ADDRESS BY SENATOR MILLER BEFORE THE COLORADO GRAIN AND FEED DEALERS ASSOCIATION

Mr. HRUSKA. Mr. President, I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks a speech made recently by the Senator from Iowa (Mr. MILLER) before the Colorado Grain and Feed Dealers Association. The Senator from Iowa is a member of both the Joint Economic Committee and the Committee on Finance. During the course of his remarks he treats with the material that has to do not only with various farm plans as they bear upon the economic status of this country, but also on the plans of experts of various agricultural products.

Mr. BYRD of West Virginia. Mr. President, I object.

The ACTING PRESIDENT pro tempore. Objection is heard.

CALL OF THE ROLL

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum and in view of the fact that there seems to be a lack of speakers, it will be a live quorum, with the time to be taken from both sides.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. The clerk will call the roll.

The bill clerk called the roll, and the following Senators answered to their names:

[No. 114 Ex.]

Allen	Bellmon	Cranston
Allott	Boggs	Dole
Baker	Byrd, W. Va.	Dominick
Bayh	Cotton	Gurney
Hansen	McCarthy	Schweiker
Harris	McGovern	Scott
Hatfield	Murphy	Smith, Ill.
Hruska	Nelson	Sparkman
Hughes	Packwood	Spong
Javits	Percy	Stennis
Jordan, N.C.	Prouty	Yarborough
Kennedy	Proxmire	Young, N. Dak.
Mansfield	Ribicoff	Young, Ohio

Mr. KENNEDY. I announce that the Senator from New Mexico (Mr. ANDERSON) is necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) is absent on official business as observer at the meeting of the Asian Development Bank in Korea.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness.

The ACTING PRESIDENT pro tempore (Mr. McGOVERN). A quorum is not present.

Mr. KENNEDY. Mr. President, I move that the Sergeant at Arms be directed to request the attendance of absent Senators.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the motion of the Senator from Massachusetts.

The motion was agreed to.

The ACTING PRESIDENT pro tempore. The Sergeant at Arms will execute the order of the Senate.

After some delay, the following Senators entered the Chamber and answered to their names:

Aiken	Goldwater	Muller
Bible	Goodell	Mondale
Brooke	Gore	Montoya
Burdick	Gravel	Moss
Byrd, Va.	Griffin	Muskie
Cannon	Hart	Pastore
Case	Hartke	Pearson
Church	Holland	Randolph
Cook	Hollings	Russell
Cooper	Inouye	Saxbe
Curtis	Jackson	Smith, Maine
Dodd	Jordan, Idaho	Stevens
Eagleton	Long	Symington
Eastland	Magnuson	Talmadge
Ellender	Mathias	Thurmond
Ervin	McClellan	Tower
Fannin	McGee	Tydings
Fong	McIntyre	Williams, N.J.
Fulbright	Metcalf	Williams, Del.

The ACTING PRESIDENT pro tempore. A quorum is present.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. KENNEDY. Mr. President, I yield 5 minutes to the Senator from Maine.

The ACTING PRESIDENT pro tempore. The Senator from Maine is recognized for 5 minutes.

Mr. MUSKIE. Mr. President, it is almost 2 months since I first announced my intention to vote against the confirmation of the nomination of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court. Since that time, tens of thousands of words have been written and spoken on the nomination. They have not changed my position, because the facts have not changed, but they have deepened my conviction

that Judge Carswell should not be a member of the Supreme Court.

I do not intend to prolong the debate today, Mr. President; but I do have a few observations which were triggered by the President's assertion that he has the prerogative to appoint, and that the Senate's role is limited to offering advice and consenting to his decision.

As a constitutional theory, Mr. President, that assertion is novel, but it is not sustainable. As a statement of the President's view of the federal system, it has an ominous ring.

Presidents may fret at the resistance of the Senate to certain of their proposals and nominations, but the authors of the Constitution knew what they were doing when they established our system of checks and balances. We tamper with that system at our peril.

The immediate question, however, is not the President's constitutional theories. The question each of us must answer is whether Judge Carswell meets the standards we believe should be met by a member of the highest court of the land. What we decide on this nomination, Mr. President, will hold not merely for the remainder of President Nixon's term, it will hold for many years, and it cannot be recalled by a change of political sentiment or a shift of political power.

Whenever an appointment to the Court becomes controversial, there is discussion of the respective roles of the President and the Senate. What does advise and consent mean? Does it impose a positive or a negative responsibility on the Senate? Does it limit the Senate's role to consideration of technical competence? Does the Senate have any responsibility or, indeed, any right to consider the quality of an appointee's background, experience, performance, understanding, judgment, insight?

Such discussion and debate, Mr. President, is useful in the long run, to shape and sharpen our understanding of the responsibilities of the President and the Senate in connection with these appointments.

However, Mr. President, I have no doubt as to the intent of the Founding Fathers in framing the applicable provisions of the Constitution. The result hoped for by them, I am sure, was a Court whose competence, judgment, and wisdom would inspire confidence among all Americans that the quality of justice to be dispensed by the Court would be the highest attainable quality. I am also sure that it is the responsibility of the President and the Senate to so interpret their respective roles under the Constitution as to contribute to that result.

Such a result, at any given point in our history, may well raise different questions as to specific nominees, as well as some obviously recurring questions relating to character, competence, and capability.

What questions are raised by this appointment? Was it the President's intent, in making this appointment, to bring the Nation together, having in mind the ugly divisiveness in the land? If so, he has failed to meet that objective.

Was it the President's intent, in making the appointment, to apply the test of highest judicial competence to nominees for the Supreme Court, in the tradition of Holmes, Cardozo, Brandeis, and Frankfurter, who have held this seat? If so, he has clearly failed to meet that objective.

Was it the President's intent to continue the Supreme Court as the honored place of last resort, in the protection of liberty, privacy, and freedom of all Americans? If so, then he has failed to reassure millions of Americans that the record of this nominee shows a genuine concern or commitment to the cause of equal rights and equal justice for all Americans.

Was it the President's intent to provide the South with a representative on the Supreme Court of the United States worthy of the highest traditions of that region? If so, then again he has failed.

Was it the President's intent to strengthen the federal system of checks and balances? If so, then he has failed both in the candidate he has submitted to the Senate and in the approach he has taken to the Senate on the issue of confirmation.

Mr. President, I support the motion to recommit the nomination of G. Harrold Carswell to the Judiciary Committee, and I will vote against confirmation of Judge Carswell. I do so because I do not believe this nomination to be consistent with the needs of our country and our people in this divisive time.

Mr. PASTORE. Mr. President, will the Senator from Indiana yield me a minute or 2?

Mr. BAYH. I yield 2 minutes to the distinguished Senator from Rhode Island.

Mr. PASTORE. First of all, I want to congratulate the Senator from Maine for a very lucid and rational observation on this appointment.

I think, without casting any aspersions upon the President, and saying this in the most kindly fashion one can, facing the historical situation that presents itself now and also accepting the realities of life, the fact still remains that beyond the opportunity, possibly, or beyond the responsibility given to most Presidents, President Nixon will end up at the completion of his term with a so-called Nixon court. This in my humble opinion, points up the necessity and the responsibility on the part of Congress to be especially careful in the consideration of each nominee who comes before us.

Much has been said about our indulging in politics, so to speak, on this appointment. The senior Senator from Rhode Island as well as the junior Senator from Maine, I know, having had the right of appointment ourselves when we were Governors, would be the last two persons to play politics with an official Executive appointment.

I have spoken about the realities of life—the reality that the span of life will determine the makeup of the Supreme Court—its departures and its replacements. Here we are: We have a Justice Black, who is advanced in years. It is only a question of time before nature will necessitate his retirement from the Court. Then we have Justice Harlan and Justice Douglas. Three appointments will be coming up, with an existing vacancy.

In the case of Chief Justice Burger, we had no trouble. That appointment received almost the unanimous approbation of this body. There were only three "nays"—and that was a Nixon appointment. That was for the Chief Justice of the United States, the court of last resort. Then we were confronted with the Haynsworth appointment, which was repudiated by the Senate. Now we have this appointment. I do not know how this body is going to vote today or on Wednesday, but it is going to be a cliffhanger. I wonder if it is good for the country that we should be so extremely divided on this particular issue, as we are on many, many issues which confront the people of this country.

I think the time has come when there ought to be greater care in the matter of nominations. The thing that has mystified me in both the Haynsworth appointment and the Carswell appointment is that there have been so many developments during the progress of the hearings before the Judiciary Committee and in the Senate debate that apparently were not known at the time the appointment was made. It strikes me that they could be a little more careful in research in the first place, and in the next place, these questions and doubts should go back to the committee for confrontation and consideration. That would be fairer to the nominee and to the Senate.

Frankly, I find it extremely difficult to vote against an official appointment. I said that at the time of the Haynsworth appointment. I think the first time I ever voted against an official appointment was in the case of Mr. Hickel, and the Senator from Maine knows why. He knows the oil situation in my State. The declarations that had been made by Mr. Hickel gave me cause to doubt whether or not he was the right man for the office. Since then he has adequately proved himself and I am very happy to know that.

Take the Haynsworth appointment. The President stood behind him to the end. I suppose that may be a mark of courage of one's convictions. I would like to be the first to give a helping hand to the President of the United States. I have said time and time again, whether it was an Eisenhower or a Nixon, I want to give the President of the United States the benefit of the doubt in any case because of the heavy burden he carries at this time.

The thing that frightens me at this time—and I use the word advisedly—is that here are two appointments to the court of last resort, and they say that beyond the Supreme Court of the United States, your only appeal is to God, Himself.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. I yield 1 additional minute to the Senator.

Mr. PASTORE. It strikes me that here we are confronted with a very, very sensitive, very soul-searching situation. This is nothing against the integrity of Mr. Carswell. I forgive him for the things he said as a youth. What kind of men are we, when we do not forgive a young man

for having said something in his twenties that he repudiates in his older years? I do not hold that against him. But much doubt has been raised as to the competence of the man. Associates of his who at first agreed to recommend him then withdrew their endorsement, and we do not yet know why. Certain responsible members of the committee have asked that the nomination be brought back for further hearing, and we got from the Senator from Arkansas——

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. PASTORE. If I have the time.

Mr. GURNEY. The Senator made the statement that colleagues of Judge Carswell seconded his nomination and then withdrew it.

Mr. PASTORE. No, I did not say that.

Mr. GURNEY. What did the Senator say?

Mr. PASTORE. How did the Senator interpret what I said? I did not say that at all.

Mr. GURNEY. I thought the Senator was talking about the judge colleagues of Judge Carswell.

Mr. PASTORE. Yes. Judge Tuttle.

Mr. GURNEY. All right.

Mr. PASTORE. Does the Senator from Florida dispute that?

Mr. GURNEY. Let us set the record straight and see what he actually did.

Mr. PASTORE What did he do?

Mr. GURNEY. He wrote a letter to the Judiciary Committee, offering to testify.

Mr. PASTORE. And then——

Mr. GURNEY. And the Judiciary Committee never asked him to testify. And he has never contacted the Judiciary Committee to this day. He did have an exchange of telegrams with the Senator from Maryland (Mr. TYDINGS).

Mr. PASTORE. Why does not the committee call him before the committee and have him testify?

Mr. GURNEY. I do not know why.

Mr. PASTORE. Is it not strange to the Senator from Florida——

Mr. GURNEY. Let me complete this. I know why he did not testify. It was because he was confused about the Tallahassee golf club incident. I would rather expect that if you could get into the judge's mind today, you would find that he was very embarrassed about the fact that he did misunderstand the golf club incident. That is what the thing was all about. He never did give this endorsement and then withdraw it. That is the point I am trying to correct, because there has been too much representation and misrepresentation of that by a great many Senators.

Mr. PASTORE. I do not know about that.

Mr. GURNEY. When the Senator says he gave——

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. I yield 5 additional minutes to the Senator from Rhode Island.

The PRESIDING OFFICER. The Senator from Rhode Island is recognized for 5 additional minutes.

Mr. PASTORE. The fact still remains that we are talking about confusion. More than 35 Senators——

Mr. GURNEY. There certainly is confusion——

Mr. PASTORE. I permitted the Senator from Florida to speak. Now I ask that he give me a chance to make an observation on his observation.

The fact still remains that more than 35 Senators are still confused about what Judge Tuttle did or did not do. I, for one, am like the Senator from Arkansas, who said, "Let it go back to committee, and let us find out what Judge Tuttle did say."

If anybody can prove to me that a nominee has the competence to serve on the Supreme Court of the United States, I do not care whether he comes from Florida or Alaska, this is one country where if the President of the United States wants a constructionist, if he wants a southerner, of course he has a perfect right to nominate anyone from any part of the country. But what I am saying is that there has been almost a deliberate attempt—I do not know on the part of whom, but one can almost smell it—a deliberate attempt to keep Judge Carswell away from that committee.

I ask the question, Why? Why?

If this man has an explanation about that golf club, then let him come in here and tell us about it.

The point he made—as I read it in the newspapers—was that he came before the committee, and when they asked him whether he was a charter member of that golf club, he said, "No."

Then an affidavit or a memorandum has been produced on the floor of the Senate by two members of the American Bar Association who claim that only the night before, he admitted that he was a charter member.

These things have not cleared up. We are not talking about a minor ward committee. We are not talking about an executive committee in city or State. We are talking about the Supreme Court of the United States of America.

I think we have a right to know all the facts. I repeat, I wish that something would transpire so that I could find it in my heart to hold up the hand of Richard Nixon. I have nothing against him. I have supported him when many of my colleagues found it necessary not to do so.

I have said to the President of the United States that any time there is a doubt in my mind, I will resolve it in his favor.

But, this is more than a doubt. This is a factual situation. I think that we should have an explanation.

They say this is a question as between liberals and conservatives. That is not so at all. They talk about politics. My goodness gracious, there are half a dozen Republicans who want to stand behind the President and who are going to campaign with the President, yet they are going to vote against this appointment.

I ask the question, Why? Why?

Mr. AIKEN. Mr. President, will the Senator from Rhode Island yield?

Mr. PASTORE. I yield.

Mr. AIKEN. I noticed that the Senator looked in my direction, and I am quite flattered. I stand for law and order, and it is about time we had a little more of it. It is time to stop apologizing to every criminal that gets hauled into court. That is the issue today. It is time to face it squarely.

Mr. PASTORE. It is. I am the first one who said just that. I am the first one who criticized the Supreme Court on pornography. I am the first one who said that the Court went way out on the question of pornography. I am against that. I stood up for Burger. I will stand up for any Nixon appointment, provided it is proved to me that he should be the man.

The allegation of playing politics is poppycock. Any reasonable man on that side of the aisle knows it.

Let us cut out the subterfuge. Let us stand up and look at the facts.

That is all I have to say, and, Mr. President, if my 5 minutes have not been used up, I yield back the remainder of my time.

The ACTING PRESIDENT pro tempore. The time of the Senator from Rhode Island has expired.

Mr. PASTORE. Has it expired again?

Mr. KENNEDY. Mr. President, I yield 5 additional minutes to the Senator from Rhode Island.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island is recognized for 5 additional minutes.

Mr. GORE. Mr. President, will the Senator from Rhode Island yield?

Mr. GURNEY. Mr. President, will the Senator from Rhode Island yield?

Mr. PASTORE. I yield to the Senator from Tennessee and then I will come back to Florida. I will come back to Florida [Laughter.]

Mr. GORE. Mr. President, the Senator has just said that we should look at the facts.

Should we not first have the facts to look at?

Mr. PASTORE. That is what I mean. That is certainly what I mean. As a matter of fact, the Senator from Tennessee has used reverse English. But, it is plain either way. It is very plain.

Now I am glad to yield to the Senator from Florida.

Mr. GURNEY. Mr. President, again I want to set the record straight. Does the Senator from Rhode Island know—I know he did not do it intentionally—but I believe that he made a misstatement——

Mr. BAYH. Mr. President, will the Senator from Florida yield?

Mr. GURNEY. No; not at this time.

Mr. BAYH. The Senator will recall——

Mr. HRUSKA. Mr. President, I yield 2 minutes to the Senator from Florida——

Mr. PASTORE. They have given me 5 minutes. We should be generous and let him speak. Let us be generous here.

Mr. BAYH. Yes, but we do not want to use all the Senator's time——

Mr. PASTORE. We do not want to be picayunish here. Let us stand up like men. Let us discuss this thing openly.

Mr. GURNEY. That is what I want to do about the golf club incident. The Senator stated that Judge Carswell denied he was a charter member of the corporation. He never did any such thing

at all. As a matter of fact, he admitted or readily answered a question of the Senator from Massachusetts (Mr. KENNEDY) that he signed the charter of incorporation.

What he did say, so as to keep the record straight, in answer to a question of the Senator from Nebraska (Mr. HRUSKA), whether Judge Carswell was an officer or a director, and he said "no"—which is true. Senator HRUSKA asked him if he was an incorporator and he said that he was not. That is a technical point, but it is an interesting thing that the charter of incorporation says nothing about the incorporator, but it does talk about subscribers.

But the point made in this business about the golf club is that what the judge was testifying to during that testimony on the first day—and a little on the second day, too—was that he was not one of the originators of the golf club and never had anything to do with it beyond putting in $100 which was returned to him a few months later. That was the whole of the business. That is what the argument is about.

We should check the record and get it straight, that he never denied that he was a charter member of the corporation.

Mr. PASTORE. That is not the way I read it. But, if that is all there is to the case, why can he not come before the committee and explain it, and that will make everyone happy.

I wonder why this resistance not to allow him to do it? That is what mystifies me, because this is the one place we should be open and aboveboard, in the case of a Supreme Court nomination.

If a Senator is in doubt among the people, they can take care of him at the next election.

If a Congressman is in doubt with the people, they can take care of him at the next election.

If a President is in doubt with the people, then the people can take care of him at the next election.

But a member of the Supreme Court, once confirmed, if the people become in doubt about him, cannot be touched as to his qualifications—only as to his conduct. Even the question of his salary cannot be touched. That is, we can raise it, but we cannot lower it.

Mr. GURNEY. Mr. President, will the Senator from Rhode Island yield further?

Mr. PASTORE. Yes, I yield further.

Mr. GURNEY. On the point of not sending the nomination back to committee, if the Senator will read the record carefully, he will note that all the events which happened and all the testimony surrounding the golf course incident shows nothing to be cleared up. It is all in the record as plain as day—every bit of it.

The answers were candid and honest. Why replow the ground all over again, just for the sake of turning over new earth? There is no point in doing that.

Mr. PASTORE. I have the highest respect for the Senator's point of view. I have the highest respect for those who differ with what the Senator has just said and their doubts should be resolved in committee with the judge before them.

The ACTING PRESIDENT pro tempore. The time of the Senator from Rhode Island has expired.

Mr. HRUSKA. Mr. President, I yield 10 minutes to the Senator from Mississippi (Mr. STENNIS).

The ACTING PRESIDENT pro tempore. The Senator from Mississippi is recognized for 10 minutes.

ORDER OF BUSINESS

Mr. JORDAN of North Carolina. Mr. President, will the Senator from Mississippi yield me 1 minute to take care of a little item?

Mr. STENNIS. I yield for that purpose.

ESTABLISHMENT OF AN INTERNATIONAL QUARANTINE STATION

Mr. JORDAN of North Carolina. Mr. President, as in legislative session, I ask the Chair to lay before the Senate a message from the House of Representatives on S. 2306.

The ACTING PRESIDENT pro tempore laid before the Senate the amendment of the House of Representatives to the bill (S. 2306) to provide for the establishment of an international guarantine station and to permit the entry therein of animals from any country and the subsequent movement of such animals into other parts of the United States for purposes of improving livestock breeds, and for other purposes which was to strike out all after the enacting clause, and insert:

That the Secretary of Agriculture is authorized, in his discretion, to establish and maintain an international animals quarantine station within the territory of the United States. The quarantine station shall be located on an island selected by the Secretary of Agriculture where, in his judgment, maximum animal disease and pest security measures can be maintained. The Secretary of Agriculture is authorized to acquire land or any interest therein, by purchase, donation, exchange, or otherwise and construct or lease buildings, improvements, and other facilities as may be necessary for the establishment and maintenance of such quarantine station. The Secretary of Agriculture, on behalf of the United States, is authorized to accept any gift or donation of money, personal property, buildings, improvements, and other facilities for the purpose of conducting the functions authorized under this Act. Notwithstanding the provisions of any other law to prevent the introduction or dissemination of livestock or poultry disease or pests, animals may be brought into the quarantine station from any country, including but not limited to those countries in which the Secretary of Agriculture determines that rinderpest or foot-and-mouth disease exists, and subsequently moved into other parts of the United States, in accordance with such conditions as the Secretary of Agriculture shall determine are adequate in order to prevent the introduction into and the dissemination within the United States of livestock or poultry diseases or pests. The Secretary of Agriculture is authorized to cooperate in such manner as he deems appropriate, with other North American countries or with breeders' organizations or similar organizations or with individuals within the United States regarding importation of animals into and through the quarantine station and to charge and collect reasonable fees for use of the facilities of such station from importers. Such fees shall be deposited into the Treasury of the United States to the credit of the appropriation charged with the operating expenses of the quarantine station. The Secretary is authorized to issue such regulations as he deems necessary to carry out the provisions of this Act.

SEC. 2. The provisions and penalties of section 545 of title 18, United States Code, shall apply to the bringing of animals to the quarantine station or the subsequent movement of animals to other parts of the United States, including Puerto Rico and the Virgin Islands.

SEC. 3. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

Mr. JORDAN of North Carolina. Mr. President, I move that the Senate concur in the amendment of the House of Representatives to the bill, S. 2306, with an amendment, which I send to the desk at this point and ask for its immediate consideration.

The ACTING PRESIDENT pro tempore. The amendment will be stated.

The BILL CLERK. It is proposed to strike out "and the Virgin Islands" where it appears before the period at the end of section 2 and insert the following: ", Guam, and the Virgin Islands, contrary to the conditions prescribed by the Secretary in regulations issued hereunder".

Mr. JORDAN of North Carolina. Mr. President, this amendment would restore to the bill, language which was in the bill when it passed the Senate and which is necessary to the bill's clarity. It would also extend the penalties provided by the bill to the importation of animals into Guam contrary to the provisions of the bill.

Both of these amendments were recommended by the Department of Agriculture, and I ask unanimous consent to have the letter from the Department making these recommendations printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., April 1, 1970.

Hon. ALLEN J. ELLENDER,
Chairman, Committee on Agriculture and Forestry, U.S. Senate.

DEAR MR. CHAIRMAN: This is in reply to your request for a report on S. 2306, as amended and passed by the House. The bill is entitled "To provide for the establishment of an international quarantine station and to permit the entry therein of animals from any other country and the subsequent movement of such animals into other parts of the United States for purposes of improving livestock breeds, and for other purposes."

The House amended S. 2306 by striking out all after the enacting clause and substituting the text of H.R. 11832 as previously passed by the House. The text of H.R. 11832 differs in certain respects from that of S. 2306, as passed by the Senate. Our comments are directed toward those differences.

We recommend the restoration of the language deleted by the House from Section 2 of H.R. 11832 (Union Calendar No. 349), page 3, lines 11–13 which reads as follows: "contrary to the conditions prescribed by the Secretary in regulations issued hereunder". This language, included under the Senate-passed version of S. 2306, is intended to make

the provisions and penalties of 18 U.S.C. 545 applicable to the bringing of animals to the quarantine station or the subsequent movement of animals therefrom to other parts of the United States when such actions are contrary to the conditions prescribed in the regulations which Section 1 of the bill would authorize the Secretary of Agriculture to issue. The deletion of the language makes the bill ambiguous. The bill would be susceptible of being construed as applying the penalties of 18 U.S.C. 545 even when the prescribed conditions are met, which is clearly not the intent. Such deletion, in the light of the House Report on the bill (H. Rept. 91-776, page 9), leaves a question whether these penalties are to apply in case of a failure to comply with the conditions. We believe that it is essential that clear provision be made for the application of such penalties to the bringing of animals to the quarantine station or the subsequent movement of animals therefrom to other parts of the United States contrary to the conditions prescribed in the regulations under the bill.

We concur in the addition by the House on page 3, lines 13 and 14 of the bill, of the phrase "including Puerto Rico and the Virgin Islands" but also suggest that a reference be added to Guam so as to protect all the areas within the definition of the term "United States" in the Act of July 2, 1962 (21 U.S.C. 134).

There is no objection to omission of the commas in lines 13 and 14 on page 2 of the bill after "including" and "to".

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

J. PHIL CAMPBELL,
Under Secretary.

Mr. JORDAN of North Carolina. Mr. President, this bill provides for an international quarantine station and the bringing into the United States through the quarantine station under proper proposed safeguards of animals which might otherwise be excluded from the United States by the quarantine laws. The necessary safeguards are provided in the bill by making the penalties of the Anti-smuggling Act applicable to animals brought into the quarantine station, or through the quarantine station into other parts of the United States, "contrary to the conditions prescribed by the Secretary in regulations issued" under the act. The House amendment omitted from this provision the words "contrary to the conditions prescribed by the Secretary in regulations issued hereunder". Since the entire purpose of the provision is to prohibit the importation of animals brought in contrary to the regulations, the omission of the quoted language leaves the meaning of the provision in doubt. The amendment I have just proposed would restore this language and eliminate this ambiguity.

The House amendment extended the penalty provision of the bill to cover the bringing of animals through the station into Puerto Rico and the Virgin Islands. The Department of Agriculture has recommended that this part of the House amendment be extended to cover animals brought through the quarantine station into Guam, and the amendment just proposed would make this extension. This would conform the definition of "United States" used in section 2 of the act with that in the act of June 2, 1962, entitled "An act to provide greater protection against the introduction and dissemination of diseases of livestock and poultry, and for other purposes"—21 U.S.C. 134.

Mr. HRUSKA. Mr. President, I rise to support the motion of the Senator from North Carolina regarding S. 3206.

The amendment will make restoration of language which is necessary to clarity of the bill; and extend the bill's penalties to importation of animals into Guam contrary to provisions of the bill.

The amendment will not adversely affect the amendments of the other body—but will make them more clearly effective.

Approval of the amendment is in order. I urge its approval.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the motion of the Senator from North Carolina.

The motion was agreed to.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. STENNIS. Mr. President, I thank the Senator from Nebraska.

I support, with great confidence, the nomination by President Nixon of the Honorable G. Harrold Carswell for membership on the Supreme Court.

My reasons for doing so are clear, to me, and simple.

When Judge Carswell's name was proposed for membership on the court of appeals, I went over his entire record and discussed him with several colleagues, in this Chamber, and in their offices. I also discussed him with several personal friends of long standing of mine who now live in Florida and know the gentleman intimately.

I went around to see him when he was here for the hearing as I wanted to get a personal impression of him. All of the things that I learned and observed and the impression I gained of him were good. He was later confirmed to the court of appeals unanimously by this body.

Furthermore, since the present nomination, which is a highly important one, came before the Senate, I have gone over the record again. I have closely examined his services as a member of the court of appeals, checking on him there through people I know.

I have gone through a great deal of the debate that has occurred here. And I have followed the rest of it in the record. I have examined the high points of the hearings in the matter. I have watched and observed the man at those hearings. I got the impression one gets of a man that is on television. He impressed me all the way through as being honest and straight and wanting to tell the truth. And I believe he did tell the truth about everything when he was asked.

A man's memory is not altogether perfect all the time as to small transactions over years past. But I have no doubt about the basic, fundamental character and qualifications of this man.

There has been a very active and legitimate opposition to him by able men, encouraged and supported by an active and vigilant press, that has been very thorough. They have used all their resources, but they have not found one single circumstance of any substance to discredit Judge Carswell or his record or that mitigates against his qualifications.

Several points on the positive side of the nomination are outstanding. Those Members who personally know Judge Carswell and his record approve him and his record in a very firm, solid way. There are a few exceptions, but very few.

The opposition comes largely from those who do not know him and do not have personal knowledge of his record. Their opposition is based on what they have been told. I do not believe they have obtained the true facts throughout all of Judge Carswell's services.

Through all the record of the hearings and the record of the debates and the discussion, there is not one single fact or allegation that reflects on his character, his honor, or his integrity. For a judge, these qualities are the essentials.

On the other hand, his entire conduct, his record, his appearance, his outlook on life show in a positive way that he does have these qualities and this integrity. They reflect sturdy character. Further, these qualities are fully and admirably reflected in his official record as a practicing lawyer and as a judge over a number of years.

Those are the qualities that will guide him and sustain him when he becomes a member of the Court.

Mr. President, the President of the United States has gone to the marketplace, so to speak, and picked a judge for our highest court. He went to the place where lawyers and judges are made—the courtroom. The administration of justice is not a theory. It is not an academic matter. It is not just a matter of the cold learning of the law. It is not a matter of academic rating.

The administration of justice involves the day-to-day application of a set of facts from real life to the law of the subject matter. And this is what Judge Carswell has been doing now for years. And his record shows that he has been doing it well. This is the area where Judge Carswell has special valuable knowledge and experience. This is the area where many who have been criticizing him do not have knowledge or experience.

Law professors and law school deans have opposed him. No one honors law professors and law school deans more than I do. No one owes them any more than I owe those I had the privilege of attending law school under. But their points are not the questions to be decided by a judge. A judge must take the hard facts of a case as he finds them and apply these facts to the law.

Those who have criticized Judge Carswell are valuable to the profession, but their field is limited to learning. And the exercise of responsibility by a judge on an important court, especially the highest court in our land, requires an additional quality that I will mention now.

I have not heard it mentioned heretofore in the debate.

A good judge must have an abundance of commonsense. He must have, to use an old, homely word, gumption. He must be practical, and he must have reasoning ability and an understanding of life as it is—rather than as it should be.

Judge Carswell has these qualities and he possesses the character that will sustain him in his work on the Court.

I believe his nomination will be confirmed and that he will be of special value to the Supreme Court, where I believe he will render fine services.

Mr. President, I thank the Senator from Nebraska, and I yield back such time, if any, as I have remaining.

Mr. HRUSKA. Mr. President, I yield 2 minutes to the Senator from California.

The PRESIDING OFFICER (Mr. TALMADGE in the chair). The Senator from California is recognized for 2 minutes.

Mr. MURPHY. Mr. President, I thank the distinguished Senator from Nebraska for yielding.

I would like to say that I have been pleased to be here to listen to the discussion and the indication is that there is a difference of opinion here.

I think that is proper. I think it is up to the Members of the Senate to decide and to sift out the values with respect to the differences of opinion that exists.

I have been concerned for some time about the difference of opinion that exists on the Court itself where we have so many very important decisions made on the basis of 5-to-4 opinions. They are determined many times by the decision of one man. The Court itself has been uncertain on many occasions. A remark was made about political considerations. I can remember when that started. I can remember years ago when there was a definite, designed attempt to pack the Supreme Court in order to achieve certain considerations and plans of the Chief Executive. I lived through that. Maybe some of our younger colleagues have forgotten that phase of our history.

I point out that in this case I have read the long document consisting of the hearings that went on for 5 days. And I have looked at the resulting vote of the members of the committee. And I must say that this is a very impressive group. They saw fit to approve the nomination not by a cliff-hanger, but by quite a majority.

I have reread the record, and I have listened to the debate. And I have seen all sorts of attempts, I believe, to create the impression of impropriety and to create the appearance that there may be a lack of quality in this candidate. I am not impressed.

This morning I listened to the "Today" show, and I am going to do something that I do not think is customary here. I will ask the distinguished minority leader if he will do the Senate a favor and repeat some of the things he said this morning.

I think it was one of the most conclusive presentations of the facts that has been made in this case that I have heard. There was some historical background which might bear repetition.

I would respectfully request that the Senator from Michigan repeat for the Senators present and for the RECORD some of the things he mentioned this morning with respect to this nomination.

The PRESIDING OFFICER. The time of the Senator has expired. Who yields time?

Mr. HRUSKA. Mr. President, I yield 5 minutes to the distinguished Senator from Michigan.

Mr. GRIFFIN. Mr. President, I appreciate the very kind words of the distinguished Senator from California. I am not altogether sure what the Senator might have reference to.

Those who have bandied about very freely and loosely the word "mediocre" with respect to this nominee, in many cases have not read the record.

I have said before, and I repeat on the floor of the Senate, that this nominee is among the best qualified ever to be nominated to the Supreme Court. I say that because in terms of his judicial experience and training, his qualifications far exceed many who have been appointed to the Court and confirmed in the past

Judge Carswell, at the age of 33, after graduating from Duke University, which I believe is the university the President of the United States attended, and also receiving his law degree after attending the University of Georgia and the Mercer University Law School, was designated and appointed district attorney and served in that capacity for 5 years with distinction. At a very early age he was made a district judge and served in that capacity for 11 years. More than one-half of the trials he conducted, I understand, were criminal trials.

There has been something made of the fact that he has been reversed in a number of his decisions. I would offer the comment that it may be too bad that many of his criminal decisions were reversed; the Nation would be better off if we had somebody on the Supreme Court with the kind of experience he has had in criminal trials, someone who might see that such decisions were not reversed in the future. He also served for nearly 1 year on the court of appeals. This is more judicial experience than anyone now sitting on the Supreme Court had when he appointed, other than Chief Justice Burger. If one were to exclude Chief Justice Burger and Justice Brennan from consideration, it can be said that Judge Carswell has more judicial experience than all the other sitting justices of the Supreme Court put together; I refer, of course, to their judicial experience at the time of appointment.

I know that some in this body disagree with his philosophy, but I do not think he should be rejected on that ground.

I do not agree with those who say he is not qualified. I believe he is well qualified, and that there is more likelihood with respect to his appointment that he will develop into a great and distinguished justice than was the case with respect to many appointments in the past.

Mr. MURPHY. Mr. President, will the Senator yield briefly?

Mr. GRIFFIN. I yield.

Mr. MURPHY. Is it not true that a precept laid down by the Nixon administration has been to look for experience in these appointments?

Mr. GRIFFIN. That certainly was true in the case of Chief Justice Burger and also with respect to Judge Carswell.

Mr. MURPHY. Is it not true there has been no indication here of pals, cronies, or good friends; that the attempt has been made to go to the legal profession to find out their selection and feeling in these matters before nominations are sent up?

Mr. GRIFFIN. I cannot answer all the Senator's questions, but the fact that the President has sought out those with extensive judicial experience is obvious in the nominations so far.

Mr. MURPHY. The three things which I have heard mentioned here have been, first, mediocrity. The Senator from Michigan has taken care of that very well.

The PRESIDING OFFICER (Mr. MONDALE). The time of the Senator has expired.

Mr. MURPHY. Mr. President, will the Senator yield to me for 1 additional minute?

Mr. HRUSKA. I yield 1 minute to the Senator from California.

Mr. MURPHY. The Senator from Michigan has taken care of the matter of mediocrity. Another matter seems to be a statement which was made some 22 years ago, which I understand Judge Carswell has completely repudiated; he said he was sorry it had been made and that he does not feel that way now. The third point has something to do with the lease on a golf club, which has turned into a great deal of confusion, as I listened to my distinguished friend from Florida and the Senator from Rhode Island (Mr. PASTORE). Outside of that, there seems to be no objection whatever. If these are the three points, as far as I am concerned, they seem to be very sketchy, indeed, and it seems to be an attempt, once again, to give an appearance of validity to something that does not exist.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. I yield 5 additional minutes to the Senator from Michigan.

Mr. GRIFFIN. Mr. President, I yield to the Senator from Tennessee (Mr. BAKER).

Mr. BAKER. Mr. President, I thank the Senator for yielding to me so that I may join the Senator from California in paying just and richly deserved praise to the distinguished minority leader for his appearance this morning on the "Today" show. I thought the Senator handled himself with his typical calm and accuracy. I was also impressed with the blunt portion of the colloquy between the commentator on that sector of the program and the distinguished Senator from Michigan, dealing with forces of change.

It has been pointed out on the floor of the Senate and in the press that Judge Carswell made a speech in 1948 which dealt with racial concern. Judge Carswell has totally indicated he no longer entertains any such views. The Senator from Michigan pointed out very correctly that 1948 was a long time ago and that things do change, even as this Senate has changed.

As I recall from that program this morning, the U.S. Armed Forces were segregated in 1948; public facilities in the city of Washington, the city of New York, the city of Los Angeles, as well as throughout the South, were segregated by law at that time; and in the fateful year of 1948 there was an amendment to a bill before the Senate to desegregate the Armed Forces and that amendment, seeking to desegregate the Armed Forces, failed by 70-odd votes to a handful of votes, less than 10.

The point of these observations, so appropriately made by the assistant minority leader, in my opinion, is that if we seek to judge this nominee on the basis of a static situation, we would exclude everyone who has any sense of compassion and decency and who wants to move forward from that day to the present. This country has moved forward just as Judge Carswell moved forward.

Mr. President, I commend the Senator from Michigan for his eloquent and accurate statement this morning on the "Today" show.

Mr. GRIFFIN. I thank the Senator. I yield to the Senator from Kansas.

Mr. DOLE. Mr. President, let me say briefly that I will make comment later, but there has been an abundance of attention paid to those who may disagree with Judge Carswell. I speak of the list of some 457 lawyers and law professors. We read about and heard about that list clearly on the floor of the Senate. It might be well to point out that 126 of these 467 are practicing attorneys. We have 300,000 attorneys in America. Of the 354 law professors, we have 4,500 law professors in America from some 150 law schools.

But more important, yesterday was another example where people who know Judge Carswell best support him. There was a telegram released yesterday from the White House endorsing Judge Carswell. It came from 57 judges who know him and his work, and who know him personally. I fail to understand, frankly, why so much attention is paid by the media to such a small fragment of three-tenths of 1 percent of the lawyers in America who probably never voted for President Nixon, or never would.

Mr. GRIFFIN. Mr. President, will the Senator yield to me very briefly?

Mr. DOLE. I yield.

Mr. GRIFFIN. Very few of whom helped the Senator from Michigan when he was waging a battle against the nomination of Mr. Justice Fortas.

Mr. DOLE. The Senator is correct. This is the point I make. It is fine to oppose. That is the right we have in America. We have a right also to support. I cannot understand why disproportionate attention was paid to 457 as compared with 300,000. Those who know him best support him; perhaps as high as 85 to 95 percent support him.

Mr. GRIFFIN. While I am impressed that almost all of his fellow district judges in the fifth circuit endorsed him for nomination over the past weekend, I am even more impressed by the fact that in 1968, before he was nominated, the same fellow judges elected him as their representatives to the Judicial Conference, the highest administrative council in our judicial system.

And it seems to me obvious that this man could not be mediocre. Those judges would not pick somebody for whom they did not have high regard and high respect to serve them on this council.

Mr. GURNEY. Mr. President, will the Senator yield?

Mr. GRIFFIN. I yield.

Mr. GURNEY. During the colloquy between the Senator from Tennessee and the Senator from Michigan, the Senator from Tennessee made the observation that the armed services——

The PRESIDING OFFICER. The time of the Senator has expired. Who yields time?

Mr. HRUSKA. Mr. President, I yield 5 minutes to the Senator.

Mr. GURNEY. The armed services were segregated back in 1948. George Carswell had some interesting attitudes on segregation while he served in the Armed Forces, which were brought out in a letter by Allan Levine. Allan Levine was a young officer who served with George Carswell in the Navy. Incidentally, Judge Carswell served for 4 years in the Navy in World War II.

George Carswell and Allan Levine were bunkmates on a ship for a whole year. I do not know how anyone can get to know a man any better than to serve on a ship with him at sea. Here are some excerpts from that letter from Allan Levine:

> During all that time, I never heard George utter any point of view that could be described as racist or illiberal. His attitude was a truly humanistic and liberal one in that he reacted to people as individuals and not as stereotypes. This was especially apparent in his behavior toward black sailors. At that time Navy policy was segregationist, and black sailors afloat could only serve in the wardroom mess as stewards mates. There were other officers who were outspokenly antagonistic to the steward's mates for racial reasons, but George Carswell was always pleasant and considerate to all.

Then there came a time when a question arose as to whether steward's mates should be given additional duties serving as other sailors did, actually manning guns, in addition to their wardroom jobs. George Carswell, so Mr. Levine said, was most enthusiastic about this and advocated that those who were steward's mates be given additional regular sailor duties.

What I am saying is that I think the record shows that George Carswell was in favor of desegregating the Navy away back in World War II and was actively in support of such a thing.

Mr. GRIFFIN. I thank the Senator.

I yield now to the distinguished minority leader.

Mr. SCOTT. Mr. President, I want to thank the assistant minority leader very much and commend him for his appearance on the "Today" show, and I want also to commend the distinguished Senator from Florida for his appearance yesterday and his logical and effective presentation of his views in this matter.

I served in the Navy in World War II, and I think one of the most depressing situations existing in those days was the clear discrimination against those who were black and wore the uniform of the U.S. Navy.

Following that experience, I take a great deal of pride in making a flat statement that it was my representation to General Eisenhower in the summer of 1951, conveyed to him by Arthur Vandenberg, Jr., that, in my judgment, his first act as President, if elected, should be to desegregate the Armed Forces and to do it fully and thoroughly, and to desegregate those areas under executive authority, the District of Columbia. This was done.

I began my service in the House of Representatives by supporting the Fair Employment Practices Commission. Since I assumed the present responsibilities which I hold, there have been 14 amendments on civil rights legislation, and I think I have been of some help in securing a successful outcome on all 14 of those 14 amendments—a 100-percent record made possible by the recent Senate decision in effecting certain changes in the so-called Stennis amendment.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. Mr. President, I yield 5 minutes to the Senator.

Mr. SCOTT. Therefore I can take certain pride in that.

If I thought Judge Carswell were a racist, I would be against him. If I thought he had ethical, fiscal shortcomings, I would be against him, as indeed the actions of the distinguished acting minority leader and myself demonstrated on another occasion.

The influential and vigorous support that the nomination of Judge Carswell has received in this last week has served, in my judgment, to remove all reasonable doubt as to the fitness of Judge Carswell to serve on the U.S. Supreme Court.

I am, therefore, confident that the Senate today will deny attempts to return this matter to the Judiciary Committee and on Wednesday will vote to confirm President Nixon's nomination.

The support has come both from Members of the Senate who until last week had remained silent while they studied all the charges and countercharges, and from outside of this body.

I agree with the statement of the assistant minority leader that the Senate does have a right to reject nominations. The Senate does have an important function in the advise and consent procedure. I am not entirely in agreement with other statements on that matter. I do not regard this as a vote on a civil rights issue. If I did, my vote would probably be otherwise. But I am not at all convinced that a case has been made against Judge Carswell.

I think it began to become evident to large numbers of Americans as early as last Saturday a week ago that much of the sound and fury about Judge Carswell was politically inspired and had nothing to do with whether or not Judge Carswell is qualified to sit on the Supreme Court.

In the previous nomination, I was very much influenced and very much affected by the statements of the distinguished Senator from Kentucky (Mr. COOPER)

and the distinguished Senator from Delaware (Mr. WILLIAMS), and I grounded a good deal of my reasoning on the same approach used by those distinguished Senators. They, too, like myself, do not find here a parallel to warrant their action against this nomination by the President.

Last Sunday, the distinguished senior Senator from Kentucky, JOHN SHERMAN COOPER, announced his unqualified support of the nomination of Judge Carswell. At that time, he said:

My announcement in the Senate in 1968 that I would vote against the confirmation of Justice Fortas to be Chief Justice, and my vote against the confirmation of Judge Haynsworth, were based on the tangible grounds of violations of the Canons of Judicial Ethics. I consider that the absence of such claims against Judge Carswell and his experience as a trial and Appeals judge are positive factors supporting his confirmation.

The argument against Judge Carswell rests upon subjective judgments concerning his ability and capacity for growth, which are a matter of speculative opinion.

I shall vote against the motion to recommit the nomination, and for confirmation.

On Sunday, March 29, 10 of the 14 active judges of the U.S. Court of Appeals for the Fifth Circuit, other than Judge Carswell, sent a telegram to the President, urging confirmation of Judge Carswell as an Associate Justice of the Supreme Court. Judges Walter Gewin, Griffin Bell, Homer Thornberry, James P. Coleman, Robert A. Ainsworth, Jr., David W. Dyer, Bryan Simpson, Louis R. Morgan, Charles Clark, and Joe Ingraham, all joined in sending this telegram to the President. I think my colleagues will agree that more than one judicial philosophy is represented among this group.

Last Monday, Judge Carswell's opponents renewed their attack with a press conference called by a Senator. He charged that a black lawyer who had tried many cases in Judge Carswell's court, Charles F. Wilson, had been "pressured" by the administration into sending a letter to the Judiciary Committee stating that he had been treated fairly by Judge Carswell.

It shortly appeared, however, that the information furnished to the Senator in the form of hearsay affidavits had been wholly misleading, and that his conclusions were entirely in error. Mr. Wilson stated that the sentiments expressed in the letter had been his at the time it was written, and were his as of last Monday. He said he had "absolutely not" been pressured by the administration.

Charges based on uncorroborated hearsay can fairly be described not only as reckless, but also as desperate. It should be a lesson that they were so quickly refuted.

I know some of the distinguished judges who have announced their support of Judge Carswell, and I hold them in high regard. I think the charges made against him have fallen short in the burden of proof which must fall upon those who oppose a President's nomination.

On Tuesday, March 31, the Carswell cause added two strong supporters in the persons of the senior Senator from Vermont and the senior Senator from Delaware. Senator AIKEN made some telling points when he announced his support for Judge Carswell:

I do not know Judge Carswell and I do not know for sure how good a Justice of the Supreme Court he would make, he said. Neither do those who so enthusiastically condemn him.

Certainly, if the same microscopic scrutiny had been applied to all nominees to this court over the last 30 years as is being applied to Mr. Carswell, I fear that the Court might have a quite different complexion today.

In fact, we might not have any sitting judges at all if each one had to qualify under the strict requirements for brilliance and purity demanded by Judge Carswell's critics.

And yet, strangely enough, most of these Justices who for one reason or another might have been disqualified have turned out to be very good judges.

There is no man in this Senate who does not have the highest regard for Senator JOHN WILLIAMS. It is not for nothing that he is called "the conscience of the Senate." He is not only a man of impeccable character, but also he believes that honesty and morality are not too much to ask of others in high office. On Tuesday, Senator WILLIAMS stated that Judge Carswell "is a man of high integrity, well qualified to be a member of the Supreme Court, and I shall vote for his confirmation." The Senator pointed out that some oppose Judge Carswell only because they do not want a Conservative on the Supreme Court. Senator WILLIAMS rejected this argument, saying:

As I have stated on earlier occasions, in my opinion, agreement or disagreement with a man's political philosophy is not a valid basis for support or opposition to the confirmation of a Presidential appointment.

He pointed out that if philosophy were a valid basis for opposing a nomination, then all conservatives would have voted against such men as Justice Goldberg. Yet, he and many others supported Justice Goldberg's confirmation when he was nominated by President Kennedy.

On Wednesday, the President gave a ringing reaffirmation to his support of Judge Carswell in his letter to the junior Senator from Ohio. The President wrote that he considered the charges of racism, mediocrity, and lack of candor on the part of Judge Carswell to be wholly without support, and urged that the Senate confirm him. Since the President's letter was set forth in full in most of the metropolitan dailies, as well as in the CONGRESSIONAL RECORD, I will not repeat its contents further.

However, it is important to note that the President's interpretation of the Constitution has the support of most constitutional authorities, and even the Washington Post used this argument in support of both Judge Haynsworth and Justice Fortas.

On Thursday, Senator BENNETT, of Utah, pointed out in a statement on the floor another aspect of the misleading campaign which has been carried on by some of Judge Carswell's opponents. He pointed out that he had received mail postmarked Logan, Utah, purporting to be statements of residents of Logan opposing Judge Carswell.

Upon checking the city directory, it was discovered that no such names as those appended to the post cards lived in the city of Logan at all. Who knows how many such fraudulent communications may have been placed in the mail in an effort by the Carswell opponents to win their case?

In a similar vein, some Senators have been sent anti-Carswell mail which originated outside of their States and was sent to their home States for remailing.

Another case of deception is the effort to make anti-Carswell petitions from law schools seem spontaneous. Yet, in at least two instances, the wording of the petitions was identical.

Likewise, on Thursday, the junior Senator from Illinois, Senator SMITH, announced his support for Judge Carswell. He made what I thought was a very cogent point, and one that we may all bear in mind in further debate and voting on this nomination. He said:

Mr. President, it is one thing to say that you have not heard of a man, or that you do not agree with him. It is quite another to argue from your failure to have met a person or to have seen him published in scholarly journals, or to have read of him as a champion of one cause or another, that he lacks distinction. This is especially true of a federal judge, whose time and principal attention should belong to the work of his court, not to socializing, or writing for the journals, or leading public crusades.

On Friday, 10 members of the Judiciary Committee—a majority of the full committee of 17—sent a letter to all Senators stating that no useful purpose would be served by recommitting the nomination to that committee, and urging their colleagues to vote against the motion for recommittal. When Senator GRIFFIN made this letter public, he commented that some Carswell opponents "are frantically, desperately, trying to find something that would justify recommittal."

The address on Friday by the assistant Republican leader was a most significant one, in my view. He pointed out that during his campaign for President, Richard Nixon had defined the kind of men he expected to nominate to the Supreme Court if he were elected. The people voted for Richard Nixon's philosophy and thereby clearly indicated a preference to have him, rather than a candidate of a different philosophy, nominate Justices to the Court.

I was especially interested in Senator GRIFFIN's discussion of his conversation with Mason Ladd, who served as first dean of the law school at Florida State University. Judge Carswell is one of those who had a major part in establishing that law school. Dean Ladd speaks highly of the role of Judge Carswell in establishing a school "free of all racial discrimination."

Senator GRIFFIN has followed this nomination perhaps as carefully as any Senator, and I trust his judgment when he declares:

There is much evidence in the record, most of which has been ignored, that Judge Carswell not only abhors racial bias but, in fact, has been sympathetic and, at the very least, moderate in his views on this subject

To carry on the chronology of events, on Friday, 50 of the 58 district judges in the fifth circuit, and seven out of nine of the senior district judges of that circuit, wired the President that Judge Carswell is "well qualified to serve as Associate Justice of the Supreme Court."

To me, this is an overwhelming number, especially when we consider that most of these judges are appointees of Democratic Presidents.

And we know, of course, that 79 lawyers who have practiced before Judge Carswell have endorsed him, compared to 10 whom the opposition found who would not.

This is typical. As we add up the evidence, the sound and fury have been all on the side of those who oppose Judge Carswell for reasons of their own. The facts have clearly been on the judge's side.

The fact that so much effort has been made to seek out and magnify even the most trivial charges against Judge Carswell, the fact that so much effort has been made to twist and distort and make much of his every word and action over 22 years, and the fact that despite this all-out effort, so little of any substance has been found, testifies better than I can to the merits of Judge Carswell.

He has a solid and unsullied record in his professional and personal life. He is quite well equipped by experience.

He is a man who meets the President's philosophic requirements.

Nowhere in the record do I find that he has attempted to distort the law in catering to the times, nor sought to curry favor with the pressure groups of either side. He has ruled against civil rights groups when the law required, but he has desegregated the barber shops of Florida and he integrated the Florida State University Law School. Neither his whims nor his prejudices have been his guide; only the Constitution has guided him.

Mr. President, I have stated before, quite candidly, that I would not have agreed with some of Judge Carswell's decisions. I have no doubt that I would not agree with some of his decisions as a Justice on the Supreme Court. I doubt if any Justice could please me all the time, any more than I could please any Justice all the time, either as a practicing lawyer or as a Senator.

I think his philosophy, in all probability, is to some degree different from mine. But I think that is not the issue. This is a difficult decision for me, as it seems nowadays almost all of them are. The same people who urged me to vote against Judge Haynsworth have urged me to vote against Judge Carswell.

This I cannot do, and this I will not do, because, in this case, as a lawyer and as a Senator, I do not believe a case against the nominee has been made.

If it were, I would have no question whatever, and no hesitation, in voting against the wishes of the President of the United States. I have had to do so before, though I have regretted it every time. I hope such occasions in the future will be fewer. I expect them to be fewer. I expect my influence to be heard.

This time, Mr. President, I am satisfied that, since no case has been made against Judge Carswell, his nomination should be confirmed.

He is a man whose record on the bench indicates clearly that, like the umpires at the baseball game, he calls them as he sees them.

We need that kind of man on the Supreme Court today. I am certain that my colleagues will give him the opportunity to serve that he so clearly deserves.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I yield myself 10 minutes.

Prof. Felix Frankfurter in his landmark lectures on "Mr. Justice Holmes and the Supreme Court," just a year before Frankfurter himself became a Justice, said, "There is no inevitability in history except as men make it."

Today we in the Senate are destined to make history.

In narrow terms we are to decide whether or not George Harrold Carswell is unqualified or disqualified for Supreme Court service. I believe that, partisan political and regional loyalties aside, the Senate would decide overwhelmingly that Mr. Carswell is both unqualified and disquallfied for one of the nine seats on our highest tribunal.

But over the course of 2½ months, the questions we must answer have been recast and reframed by the nominee's supporters. And in history's terms, our decision today will respond to much broader issues:

First. Should the qualifications for Supreme Court service include a requirement of eminence and excellence in the law, or may any lawyer no matter how pedestrian or marginal his talents, aspire to a justiceship as long as his politics and sponsorship are adequate?

Second. May the President and the Senate ignore the fact that a substantial proportion of the bar and of the populace considers the nominee incapable of offering fair and impartial justice to all citizens?

Third. Shall the Senate renounce its constitutional power and responsibility of advice and consent, and become a rubberstamp for all presidential nominations, no matter how inferior, and regardless of what insights the Senate's own inquiries add to the information available to the President?

To me the answers are clear and compelling and controlling.

Appointment to the Supreme Court should be a reward for outstanding qualities as a legal advocate, scholar, or jurist. The Court must be a place of honor for the best the American legal community can produce, and not a happy hunting ground for the worst which a majority of the Senate might accept. The bar and the bench must see clearly that an appointment can stand on its own merits, that the person chosen ranks at the top of his profession, and that he will contribute to the growth of the law, the stature of the Court, and the work of the Justices.

We need only look at the history of the seat which now lies vacant to appreciate the target for our efforts. All the seats on the Court are important, but this one carries special significance. This is the revered "Holmes" seat, occupied by Oliver Wendell Holmes for the first third of this century.

With the possible exception of John Marshall, Holmes was probably the greatest Justice ever to serve. And even before his nomination he had served with distinction on the Massachusetts Supreme Judicial Court for 20 years. Taken together, his 1,300 opinions on that court would have constituted, according to Felix Frankfurter, "the most comprehensive and philosophic body of American law for any period of its history." Holmes had been a brilliant scholar and professor, and the author of "The Common Law," an incisive exposition of American legal history.

And the same seat had been in the 19th century, the "Story" seat, the seat of Joseph Story, probably the most outstanding early American legal scholar. His decisions helped lay the groundwork for all of American law, and his "Commentaries on the Constitution" became a classic legal text in his time.

Holmes was followed by Benjamin Cardozo, universally acknowledged as the most distinguished jurist in the Nation, and author of one of the basic works of American jurisprudence: "The Nature of the Judicial Process."

And Cardozo was replaced by Felix Frankfurter, a superior teacher, scholar, author, and Government official, who brought to the Court an insight and intellect which made him one of its most forceful members.

Story, Holmes, Cardozo, Frankfurter—that is the standard of excellence to which all Presidents must strive. And if, as one Senator argued, "we can't have all Brandeises and Frankfurters and Cardozos and stuff like that there," then the least we can do is to seek to come as close as possible. The fact that we cannot find a Frankfurter is no excuse for nominating a Carswell. There are certainly dozens of distinguished lawyers and judges and professors who stand out above the crowd. They deserve nomination to the Court and the Nation deserves that such men be nominated.

To reach down into the crowd and arbitrarily pick a man with no national stature, with a reversal rate much higher than his peers, a man who does not have the endorsement of judges in his own court, let alone around the Nation, whose only distinction seems to be that he has a worse record on human rights cases than any judge in his State, to make such a choice is to downgrade the Supreme Court of the United States, dilute its authority and credibility, and render it less equal among the branches of Government.

I cannot imagine that the Senate will be a party to such an effort. I cannot believe that we will allow the standard for Supreme Court service merely to be the same as that for membership in the bar. I cannot accept the proposition that nomination is itself proof of eminence and distinction requiring no further burden of proof to be met.

Is the Supreme Court to be the repository of mediocrity or the repository of excellence? That is the first question which history asks us today.

The second is perhaps more difficult. Whether or not each of us agrees on the merits, the fact is that a substantial proportion of our Nation's citizenry and legal profession believes that George Harrold Carswell is unfit for the Supreme Court, and that he will be unable to deal fairly and evenly with the cases presented to him. There is certainly substantial evidence to support their position, at the very least, and to some of us that evidence is overwhelming and irrefutable. Some of it is old, and some recent, some documented, and some subjective, some major, and some minor. But it is all there, and even when the nominee's supporters finish explaining and distinguishing and justifying and minimizing, it is still there. Perhaps some of the nominee's supporters can in their own minds reject the evidence. But can they really overlook the fact that millions of citizens and thousands of lawyers do not reject the evidence? Can they say: "You do not count, and it does not matter to us that you will lose faith in the Court and the law if this nominee is confirmed?"

The other day, I passed on to appropriate Senators about 200 letters which I had received from poverty lawyers all over the country. The words differed but the same theme echoed through them all: We have been trying to demonstrate to the poor and the black and the brown, to the illiterate and the deprived and the discriminated against, that the system can respond to their needs, that legal institutions can provide relief from injustice, that the law is their tool and not just a tool for use against them. We have tried to convince them that the courts are the best forum for resolving conflicts that lawyers and briefs and reason and logic are more useful in the long run than fire and guns and violence and anarchy. But our efforts well be set back starkly if the Carswell nomination is approved. There can be no confidence in the responsiveness of legal institutions if at their apex sits a man who has proven he does not respond. There can be no belief in justice if the man chosen to be raised to the pinnacle of justice is a man who has denied and delayed justice. The Senate, these lawyers for the people say, will strike a stronger blow against law and order than any criminal could, if it places political expediency above conscience by confirming Judge Carswell.

I cannot answer this argument. I hope those who feel this nomination is supportable can. For if it drives our people further apart, and weakens respect for law, and corrodes faith in government, then they will be the ones responsible.

I am not saying that any minority group should have a veto power over any nomination. But I do believe that when a cross-section of the American people and the American bar feels as strongly about a nomination as they do about this one, and especially when the nomination is a lifetime one to the Court from which there is no appeal, and particularly when the nominee has no special eminence which might offset this antagonism, then the Senate must not only look within, but must also look outside. We have a responsibility to keep this Nation peaceful and stable and unified. We must meet that responsibility at every possible opportunity.

History's third question to us is a direct one: Is the President correct in saying that Supreme Court choices are his alone to make, and that the Senate should not butt in? Coming from a man who purports to be a constitutional strict constructionist, the suggestion is almost ludicrous. The Constitution is very clear as to our responsibility—we must give our advice and consent as to any nominee who is presented for our consideration. Only then, may the President appoint him.

Our responsibility is a serious one. It was thought through very carefully by those who drafted the Constitution. They did not consider it safe to leave the appointment of the members of the judicial branch solely in the hands of the executive branch, and so they gave the Senate a substantial role.

The President's now famous "Dear Bill" letter of last week, seems to imply that by rejecting Judge Carswell we would be challenging the President's power to choose Supreme Court Justices. Of course, that is nonsense. We are not contesting his power to choose. We are contesting his choice in this instance. And the reason we do so proves the need for the advice and consent power. The information available to us was not available to the President when he made his choice. He, unfortunately, for his own reasons, is stuck with his choice. We are not.

We might possibly have doubts about our freedom of action if the President offered us facts to rebut the new information. But his letter, if anything, adds to the feeling that there is no rebuttal. Basically, he offers two items of evidence. To rebut the unbroken chain of proof of Carswell's personal and official insensitivity to human rights, he refers to a letter from a man who served with young Carswell on a ship in the early forties. Surely after the vituperation leveled at the Carswell critics for even considering an item of evidence dating to 1948, it is shocking to hear the Carswell supporters cite a 1943 matter, and a "subjective impression" at that. But the substance of the item is even more overwhelming in its irrelevance. The gist of the letter is that Carswell did not abuse the black mess boys on his segregated ship and that he did not object to their being assigned to gun positions during emergency drills.

The other piece of evidence which the President considered strong enough to rebut the case against Carswell was the testimony of Prof. James Moore, a veteran legal teacher and writer. Professor Moore's endorsement of the nominee was based on his contact with him 5 years ago in the establishment of a law school in Tallahassee. What the President does not mention is that a majority of the teachers of that law school oppose the nomination, along with 23 law school deans, substantial faculty groups from 37 law schools, hundreds of prominent members of the American Bar Association, and uncounted thousands of individual lawyers from all over the country. Of course, no one wants to play the numbers game, but it is surprising to see someone play it when his number is only one.

Our votes this week then will very clearly delineate our concept of the division and separation of powers among the branches of Government. The President has been elected for 4 years, with a possible maximum of eight. Each of us has been elected for 6 years and some of us have served the people of the United States in this body for decades. Supreme Court Justices serve for life. Five of them can decide cases. Four of them can make the Court hear a case. Each one of them when sitting as Circuit Justice, makes life and death decisions alone. Under these circumstances, can we accept the proposition that the appointment of Supreme Court Justices is the President's own to make, unfettered by the Senate's review? The Constitution says no; logic says no; history says no; past Senates have repeatedly said no; and I believe this Senate will say no today.

The PRESIDING OFFICER. Who yields time?

Mr. DOLE. I yield myself 3 minutes.

Mr. President, there is probably nothing new that can be said either for or against Judge Carswell at this stage. We have debated the nomination off and on for more than 3 weeks, and I suspect most of the Senate has its mind made up one way or the other. I doubt that any more purpose would be served by those of us who favor confirmation of Judge Carswell marshaling the argument in his favor, than would be served by the opponents marshaling their arguments against him. We have had dinned into our ears time and again the names of members of law faculties, former Supreme Court law clerks, and even law students, who have signified their opposition to Judge Carswell. The common bond between virtually all of these opponents is that they do not know, and very likely have never laid eyes upon, Judge Carswell.

On the contrary, the lawyers who know Judge Carswell and have practiced before him, the district judges of the Fifth Circuit who knew him for more than a decade as one of their fellows, and the circuit judges who are now his colleagues, have signified their endorsement of him. Let me read just a few of the names from the list of these supporters:

PARTIAL LIST OF PEOPLE SUPPORTING JUDGE CARSWELL

Malcolm B. Johnson, Editor, Tallahassee Democrat, C.R. E-201, January 21, 1970.

Georgia State Senate by Resolution, C.R. S-662, Jan. 27, 1970.

(See editorials inserted by Sen. Gurney, C.R. S-914, Jan. 30, 1970).

Allan L. Levine, Executive Vice President, Towers Motor Parts Corp., Lowell, Mass., C.R. S-1175, February 4, 1970.

(See editorial inserted by Sen. Gurney, C.R. S-1785, Feb. 17, 1970).

Thomas W. Matthew, M.D., President, Negro, C.R. S-1545, Feb. 10, 1970.

Mike Krasny, former law clerk, C.R. S-2427, Feb. 26, 1970.

William Vandercreek, law professor, SMU, Fla. State U., C.R. S-2427, Feb. 26, 1970.

Richard H. Merritt, Att'y, Pensacola, Fla., C.R. S-2428, Feb. 26, 1970.

William T. Corrouth, bailiff, Tallahassee, Fla., C.R. S-2428.

Winston E. Arnow, U.S. Dist. Judge, Pensacola, Fla., C.R. S-2428, Feb. 26, 1970.

Robert A. Ainsworth, Jr., Judge, U.S. Court of Appeals, New Orleans, La., C.R. S-2428, Feb. 26, 1970

Joe Isenberg, former member Ga. Gen. Assembly, St. Simons Island, Ga., C.R. S-2428, Feb. 26, 1970.

Lewis R. Morgan, Curcuit Judge, 5th Cir. Court of Appeals, Newnan, Ga., S-2428, February 26, 1970

Harry C. Duncan, Att'y, Alachua County, Fla., C.R. S-2428, February 26, 1970.

Joseph H. Lesh, former U.S. Attorney, Huntington, Ind., C.R. S-2428, February 26, 1970.

J. Edwin Holsberry, Att'y, Pensacola, Fla., C.R. S-2428, February 26, 1970.

C. Graham Carothers, Att'y, Tallahassee, Fla., C.R. S-2429, February 26, 1970.

Julian Bennett, Att'y, Panama City, Fla., C.R. S-2429, February 26, 1970.

Charles F. Wilson, Att'y, Deputy Chief Conciliator, U.S.E.E.O.C., Washington, D.C., C.R. S-2429, February 26, 1970.

Lawrence E. Walsh, Chairman, ABA Standing Committee on the Judiciary, New York, N.Y., C.R. S-2600, February 27, 1970.

Resolution of Governor and cabinet of the State of Florida, C.R. S-3809, March 16, 1970.

Pat Thomas, Chairman, Democratic Party of Florida, Quincy, Fla., C.R. S-3810, March 16, 1970.

W. May Walker, Circuit Judge, Tallahassee, Fla., C.R. S-3810, March 16, 1970.

D. C. Smith, Circuit Judge, Vero Beach, Fla., C.R. S-3810, March 16, 1970.

Wallace Sample, Circuit Judge, Vero Beach, Fla., C.R. S-3810, March 16, 1970.

Tom Barkdull, Judge, Dist. Court of Appeals, Miami, Fla., C.R. S-3810, March 16, 1970.

B. C. Muszynski, Circuit Judge, Orlando, Fla., C.R. S-3810, March 16, 1970.

Roger F. Dykes, Judge, Cocoa, Florida, C.R. S-3810, March 16, 1970.

Ben C. Willis, Circuit Judge, Tallahassee, Fla., C.R. S-3810, March 16, 1970.

John T. Wigginton, Donald K. Carroll, Dewey M. Johnson, John S. Rawls, Sam Spector, all Democratic judges, 1st Dist. Court of Appeals, State of Florida, Tallahassee, Fla., C.R. S-3810, March 16, 1970.

Guyte P. McCord, Jr., circuit judge, Tallahassee, Fla., C.R. S-3810, March 16, 1970.

John A. H. Murphree, Presiding Judge, 8th Judicial Court of Florida, Gainesville, Florida, C.R. S-3811, March 16, 1970.

George L. Patten, Circuit Judge, 8th Judicial Circuit, Gainesville, Florida, C.R. S-3811, March 16, 1970.

Hugh M. Taylor, Circuit judge, Tallahassee, Florida, C.R. S-3811, March 16, 1970.

John J. Crews, Circuit Judge, 8th Judicial Circuit of Fla., Gainesville, Fla., C.R. S-3811, March 16, 1970.

Charles Alan Wright, McCormick Prof. of Law, University of Texas, Austin, Texas, C.R. S-3845, March 17, 1970.

Lawrence E. Walsh, Chairman, ABA Standing Committee on the Federal Judiciary, New York, New York, C.R. S-3847, March 17, 1970.

Bryan Simpson, Judge, 5th Cir. Court of Appeals, C.R. S-3847, March 17, 1970.

Robert A. Ainsworth, Jr., Judge, 5th Circuit Court of Appeals, C.R. S-3848, March 17, 1970.

David W. Dyer, Judge, 5th Circuit, C.R. S-3848, March 17, 1970.

Warren L. Jones, Judge, 5th Circuit, C.R. S-3848, March 17, 1970.

Homer Thornberry, Judge, 5th Circuit, C.R. S-3848, March 17, 1970.

Griffin B. Bell, Judge, 5th Circuit, C.R. S-3848, March 17, 1970.

Mason Ladd, Prof. and former Dean, Fla. St. U; Dean Emeritus, U. of Iowa, C.R. S-3850, March 17, 1970.

William Vendercreek, Prof., SMU, C.R. S-3851, March 17, 1970.

Joshua M. Morse III, Dean, Fla. St. U. Law School, Tallahassee, Fla., C.R. S-3851, March 17, 1970

Frank E. Maloney, Dean, U. of Fla. Law School., Gainesville, Fla., C.R. S-3851, March 17, 1970

Murry M. Wadsworth, Att'y, Tallahassee, Fla., S-3862, March 17, 1970.

Marion D. Lamb, Jr., Vice President, Tallahassee Bar Association, Tallahassee, Fla., C.R. S-3862, March 17, 1970.

Steve M. Watkins, Att'y, Tallahassee, Fla., C.R. S-3862, March 17, 1970.

John D. Justice, Lynn N. Silvertooth, Robert E. Willis, Robert E. Hensley, All circuit judges 12th Circuit of Fla., Sarasota, Fla., C.R. S-3862, March 17, 1970.

Philip H. Logan, A. Edwain Shinholser, Att'ys, Sanford, Florida, C.R. S-3882, March 17, 1970.

John A. H. Murphree, Presiding Judge, 8th Judicial Circuit of Fla., Gainesville, Fla., C.R. S-3862, March 17, 1970.

Stanley R. Andrews, Att'y, Titusville, Fla., S-3863, March 17, 1970.

Thomas D. Wood, Att'y, Miami, Fla., S-3863, March 17, 1970.

John F. Miller, Jr., Att'y, Tallahassee, Fla., S-3863, March 17, 1970.

Kike Krasny, Att'y, Melbourne, Fla., S-3863, March 17, 1970.

Robert Eagan, State Attorney, Orlando, Fla., S-3863, March 17, 1970.

B. C. Musynski, Circuit Judge, Orlando, Fl.., S-3863, March 17, 1970.

T m Rumberger, Circuit Judge, 18th Judicial Cir., Fla., Eau Gallie, Fla., S-3863, March 17, 1970.

Tom Barkdull, Judge, Coral Gables, Fla., S-3863, March 17, 1970.

Welch, Ernest W., Att'y, former chairman of the Florida Board of Bar Examiners, Panama City, Fla., S-3863, March 17, 1970.

Martin Sack, Gerald Tjoflat, Lamar Winegeart, Charles Luckie, Albert Graessle, Henry Martin, Marion Gooding, Thomas Larkin, Judges, Jacksonville, Fla., S-3863, March 17, 1970.

H. John Moore, Circuit Judge, Ft. Lauderdale, Fla., S-3863, 3-17-70.

Lyn Gerald, Archie M. Odom, Circuit Judges, Fort Myers, Fla., S-3863, March 17, 1970.

F. Perry Odom, Att'y, Tallahassee, Fla., S-3863, March 17, 1970.

Keith Young Mateer, Att'y, Orlando, Fla., S-3863, March 17, 1970.

Charles F. Isler, Jr., Att'y, Panama City, Fla., S-3863, March 17, 1970.

James A. Nance, Att'y, Eau Gallie, Fla., S-3863, March 17, 1970.

Sammy Cacciatore, Att'y, Eau Gallie, Fla., S-3863, March 17, 1970.

Lynn C. Higby, Att'y, Panama City, Fla., S-3863, March 17, 1970.

David W. Cunningham, Winter Park, Fla., S-3863, March 17, 1970.

(See editorial from the Sun-Sentinal (Fla.) quoting letter written by Chester Gillespie, former president of the Cleveland, Ohio, chapter of the NAACP, S-4464, March 25, 1970.)

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H. M. Voorhis, Atty, Orlando, Fla., letter dated March 18, 1970, S4035.

R. F. Maguire, Jr., Atty, Orlando, Fla., letter dated March 18, 1970, S4035.

L. Pharr Abner, Atty, Winter Park, Fla., letter dated March 17, 1970, S4035.

C. Douglas Brown, Atty, Panama City, Fla., letter dated March 17, 1970, S4035.

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Davis W. Duke, Jr., Atty, Ft. Lauderdale, Fla., letter dated March 17, 1970, S4035.

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James D. Camp, Jr., Atty, Ft. Lauderdale, Fla., letter dated March 18, 1970, S4036.

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J. Hardin Peterson, Sr., J. Hardin Peterson, Jr., Eugene W. Harris, George C. Carr, Attys, Lakeland, Fla., letter dated March 18, 1970, S. 4036.

Ben F. Overton, Circuit Judge, St. Petersburg, letter dated March 18, 1970.

L. Clayton Nance, Circuit Judge, St. Petersburg, letter dated March 18, 1970, S. 4036.

W. Troy Hall, Jr., Circuit Judge, Tavates, Fla., letter dated March 17, 1970, S. 4036.

Enrique Esquinaldo, William V. Arbury, William R. Neblett, Allan B. Cleare, Jr., W. C. Harris, M. Ignatius Lester, J. Lancelot Lester, Jack A. Saunders, Paul E. Sawyer, Jr., Tom O. Watkins, Hillary U. Arbury, Members Monroe County Bar Assn., Key West, Fla., letter dated March 18, 1970, S. 4036.

W. M. Smiley, Atty, Brandenton, Fla., letter dated March 18, 1970, S. 4036.

R. H. Wilkins, Orlando, Fla., letter dated March 18, 1970, S. 4036.
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Mark Hulsey, Jr., President, Fla. Bar, letters to Senators Bayh and Holland, S. 4160–61.

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Richard W. Ervin, Chief Justice, Florida Supreme Court for members, Tallahassee, letter dated March 16, 1970, S. 4280.
Fred O. Dickinson, Jr., Comptroller of Florida, Tallahassee, letter dated March 17, 1970, S. 4280.
Woodrow M. Melvin, Presiding Judge, First Judicial Circuit, Milton, Fla., letter dated March 18, 1970, S. 4280.
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W. Troy Hall, Jr., Circuit Judge, Leesburg, Fla., Tavares, Fla., letter dated March 17, 1970, S. 4280.
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H. John Moore, Circuit Judge, Fort Lauderdale, Florida, S. 4281.
O. Edgar Williams, Circuit Judge, Fort Lauderdale, Florida, S. 4281.
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Lynn Gerald, Archie M. Odom, Circuit Judges, Fort Myers, Florida, S. 4281.
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Monroe E. Treiman, Hernando County, Brooksville, Fla., S. 4282.
R. R. Brown, Jackson County, Jun. Ct., Marianna, Fla., S. 4282.
James W. West, Sumter County, Bushnell, Fla., S. 4282.
NOTE.— Each of the above sent in a separate letter.
Robert W. Rust, United States Attorney, Miami, Fla., S. 4282.
Robert Eagon, State Attorney, Ninth Circuit, Orlando, Florida, S. 4282.
J. M. Morse III, Dean, College of Law, Florida State University, Tallahassee, Florida, S. 4283.

As I have pointed out before, virtually none of those who have opposed Judge Carswell have had the benefit of knowing him personally. Indeed, one is bound to wonder just what some of the opponents do know about Judge Carswell; whether they have themselves made a painstaking search of the record, or whether they have simply, like lemmings, joined the brigade which the liberal establishment has marshaled for this occasion. Let me call attention to a couple of interesting portions of the communications that have been received in opposition to Judge Carswell. The statement of the former Supreme Court law clerks contained the phrase, and I quote:

There is widespread lack of confidence in many of our institutions, including the Court.

I have heard this expression from the Chicago conspiracy defendants, and from others of the new left. But can it be fairly said that the great majority of American people lack confidence in many of our institutions? I suspect if a poll were taken, those who lack confidence in the courts because they were too lenient with criminals might be found to be a good deal more numerous than those who lack confidence in the courts for some other reason. What is the meaning of this vague phrase that is found in the ex-law clerks' statement? Do they subscribe to the same view of the courts as Abbie Hoffman, Jerry Rubin, Mark Rudd, and others of their ilk?

Further along in this learned document, we find this sentence regarding Judge Carswell:

His performance on the lower courts—and as United States Attorney—reflects the absence of the quality which, we believe, all Supreme Court nominees should possess.

I am curious to know just what it is in Judge Carswell's 5-year record as U.S. attorney which these distinguished ex-law clerks would fault. Throughout all of these debates I have not heard one suggestion from any of the opponents that there was anything in Judge Carswell's service as U.S. attorney which could be criticized. The information I have about his tenure in that office is that he was uniquely successful in prosecuting and convicting a Mafia ring operating out of Phenix City, Ala., across the State line from Florida. Does a vigorous career as prosecutor somehow disqualify Judge Carswell as Supreme Court material in the eyes of these ex-law clerks? If not, what is it about his service as U.S. attorney that they fault?

The truth of the matter is, I believe, that this is a blanket indictment, drawn not to fit any known facts in the hands of the signers of the document, but drawn instead to have its maximum effect on potential readers. Any citizen has a right to communicate with his Senator, and urge him to vote one way or another on any issue, for good reason or bad reason, or no reason. But this letter is not of that sort. Its ponderous introduction, announcing that all of the signers are former law clerks, with the usual disclaimer that they are of various political persuasions, is meant to be treated not just as a registration of opinion by these 200-odd signers, but as the pronouncements of a distinguished collection of scholars of the law. I would be curious to know whether any one of the 200-odd signers had any familiarity whatsoever with Judge Carswell's career as a U.S. attorney. And if none of the signers did, why is this phrase inserted in their communication?

We then come to a statement signed by 86 members of the graduating class of the University of Virginia School of Law. This statement is headed, and I quote:

Act now against the nomination of G. Harrold Carswell.

Here is the text of their statement:

The integrity of the Supreme Court is a matter of concern to all citizens. Evidence overwhelmingly shows that G. Harrold Carswell is unqualified to sit on the nation's

highest court. As third-year students of the Law School we urge all opposed to the nomination to express their views to their Senators and to urge their relatives and friends to do the same.

This would be a perfectly acceptable approach for a political handbill in a campaign for sheriff, or for a pamphlet in opposition to some referendum or initiative proceeding. But is this the atmosphere in which we wish to decide whether to advise and consent to the President's nomination of a man to be an Associate Justice of the Supreme Court?

Another interesting communication in opposition to Judge Carswell is that of Prof. Charles R. Nesson, professor of law at Harvard Law School. He states his reasons for opposing Judge Carswell, and then concludes with this paragraph:

In a time when law and courts are seen increasingly as instruments of political repression, it is particularly important that judicial appointees be men of legal and moral distinction.

The question that comes to my mind, after examining a few of these letters, is what sort of views do the letterwriters have of the judicial process? Does Professor Nesson feel that the courts are increasingly becoming instruments of political repression? Does he disagree with the decision to apply the law passed by Congress prohibiting the movement in interstate commerce for the purpose of starting riots to people who violate that law? I think this is a factor that the Senate is entitled to take into consideration in its deliberations regarding Judge Carswell. I think this is one of the many small pieces of evidence that suggests that the outpouring of anathemas on Judge Carswell is coming from a portion, and rather a small portion at that, of the entire political spectrum. Certainly a great majority of the people of this country do not view courts as an instrument of repression. Those who do are entitled to have their voices heard, but I rather seriously question whether their voices would prevail in this body if properly identified.

At this point I might mention that one witness who has been quoted frequently by Carswell supporters is Leroy Clark, professor of law at New York University. He is the witness who testified before the Judiciary Committee that prior to trial he would instruct civil rights lawyers and harass them the night before so they would be prepared for abuses the next day in Judge Carswell's court. It is interesting to note that this Leroy Clark sat through the first portion of the Black Panther trial in New York and gave informal advice and counsel. He also represented the defendants in habeas corpus proceedings in New York. In that case the New York Supreme court said:

'VILE' BEHAVIOR CITED

"The conduct and language of the petitioners . . . the unending vilification heaped upon the Court, the almost uninterrupted flow of vile, demeaning, vicious, base and threatening language shouted by the petitioners in open court must be unparalleled in court history," he wrote.

"It is very apparent from an examination of the minutes of the pretrial hearings that these defendants, with the knowledge and silent acquiescence of their counsel, indulged in a course of conduct for the sole purpose of disrupting this trial, with the ultimate view of depriving the People of the State of New York of trying these defendants for the crime which it is alleged they have committed," Justice Leahy asserted.

Today, together with the Senator from Florida (Mr. GURNEY), I have sent a telegram to the Attorney General, asking the Justice Department what they know about Leroy Clark, and what his association may be with the Black Panthers, if any, other than being one of their defense attorneys. Of course, he has that right to associate with and represent the Black Panthers or anyone else. But he is the one who has been quoted in the papers and on the networks as a most damaging witness in the Carswell hearings and we have the right to know his background.

Professor Leroy Clark has been quoted by approximately 15 Senators on this floor, and by some three or four times. He was quoted day after day on this floor. Let us learn more about Leroy Clark and other opponents of Judge Carswell. We have heard about 457 professors and lawyers opposing Carswell. There are 300,000 lawyers in America. What do they say about Judge Carswell? But above all, what do the people say about Judge Carswell who know him best, nearly all endorse him and support his confirmation.

Mr. President, the long and often bitter debate over Judge Carswell's nomination has made him, and the issue of whether the Senate shall advise and consent to the nomination, into something symbolic of a larger issue. The President, fortified by the mandate he received in the 1968 presidential election, has exercised his constitutional power to appoint a Justice of the Supreme Court. The President's opponents, disliking the political philosophy of the nominee, but realizing that they cannot successfully oppose him on that ground, have contrived numerous other cloaks for their opposition. The two principal ones, of course, have been the charge of "racism" and the charge of "mediocrity." But beneath these charges, the real opposition to Judge Carswell is that he is a conservative. The liberal establishment has marshaled its forces to defeat his confirmation. The nominal reasons they assign, in the hopes of appealing to as wide a spectrum of opinion as possible, are demonstrably without any real support in the evidence. On those issues, and on the political issue as well, they deserve to fail.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

The PRESIDING OFFICER. The Senator from Nebraska is recognized for 3 minutes.

Mr. HRUSKA. Mr. President, very soon we shall vote on a motion to recommit Judge Carswell's nomination to the Judiciary Committee. This motion raises several questions in which the American people are interested. First, of course, is the question whether Judge Carswell will be confirmed to the Supreme Court. I believe strongly that he should be, but I realize that some of my colleagues sincerely hold the contrary view. I suggest, however, that the position one takes on the ultimate question of confirmation should not be determinative of his vote on the motion to recommit. I do not oppose the motion because I support Judge Carswell's confirmation. I oppose it because the American people have a right to expect this body to discharge its constitutional responsibilities directly and forthrightly. A vote for recommittal cannot, in my judgment, be squared with directness and forthrightness.

Judge Carswell was nominated by the President in mid-January, nearly two and a half months ago. Hearings were held by the Judiciary Committee at the end of January, and they extended over 5 days, terminating on February 3. More than 20 witnesses personally appeared before the committee. The hearing record covers nearly 500 pages. At the conclusion of the hearings, the nomination was voted out of committee by a vote of 13 to 4. Reports were filed by the majority and minority. Several members of the committee prepared individual views. Each of the reports is of high quality and reflects great care in its preparation. The committee report runs nearly 40 pages.

I have recounted the committee's actions regarding the nomination to indicate why I regard the committee hearings as extensive and thorough, not superficial or perfunctory. Judge Carswell testified before the committee for a day and a half. Examination of the hearing record reveals the searching nature of the inquiries addressed to him. The questioning was as wide ranging as it was penetrating.

Members of the academic community appeared before the committee. Attorneys who had litigated cases in Judge Carswell's court appeared. Representatives of civil rights groups, women's rights groups, and organized labor appeared. Each was afforded a full opportunity to state his or her views on the nomination. In addition, numerous communications were received by the committee—from the Judge's colleagues, educators, court personnel, and attorneys who had appeared in his court. No one was denied the opportunity to make his views known to the committee.

Debate on the nomination did not begin until nearly 3 weeks after the filing of the committee's report. We are now completing the third week of debate.

The Senate, in discharging its advise and consent function, may either accept or reject the President's nominee. I believe that it is our duty to do either one or the other. We should not be derelict in this duty. The American people have come to look to their elected representatives for candor, not evasion, and for decisive and responsible action, not shirking, irresolute inaction. They should not be disappointed. Judge Carswell's nomination has excited wide public interest. This, of course, is understandable, for the question of who will sit on the Supreme Court is one of immense importance. For nearly 3 months, the public

eye has been focused on this body. The people want to know how we stand on the Carswell nomination. They want to know if we are for it or against it. They are not interested in a wishy-washy resolution of the issue.

The reasons stated by those who support recommittal are not persuasive. Some take the position that material questions have arisen subsequent to the public hearings which necessitate further inquiry by the committee. The distinguished Senator from Arkansas, in recording his support for recommittal, stated his belief that additional investigation should be made with respect to the positions of Judge Carswell's colleagues on confirmation and the claim that Judge Carswell has been discourteous to civil rights attorneys appearing in his court.

None of these issues requires additional consideration by the committee. During the hearings, several witnesses who had appeared as attorneys in Judge Carswell's court testified that he had been hostile to them and to their clients' claims. The committee carefully weighed this testimony, but found the evidence to the contrary clearly preponderating. Moreover, anyone who now wishes to come forward to testify could have done so at the committee hearings. Plainly this is not a case of newly discovered evidence. There may well be numerous persons who now desire to testify before the committee, either in support of or against confirmation. I, for one, however, believe that at some point information gathering must end. It is always possible to get more information, for it exists in an inexhaustible supply. However, our processes would grind to a halt if we refused to act on anything less than total knowledge. Our judgment should be informed; it need not be omniscient.

I say, then, that we have the information necessary to permit us to take final action. The facts have been fully developed and widely disseminated. The hearings were exceedingly thorough, and our debate has been lengthy. We have lingered long enough in resolving this critical issue.

In sharp contrast to the plenary consideration given this nomination was the senatorial inquiry into the nomination of Justice Black in 1937. In that instance, a subcommittee of the Judiciary Committee recommended favorable action on the nomination after a short meeting and without holding public hearings. The committee immediately reported the nomination to the floor of the Senate, again without hearings. During debate of the nomination, as is now well known, several Senators raised the question whether the nominee had been a member of the Ku Klux Klan. Since no hearings had been held, this question had never been asked of the nominee himself. A motion to recommit the nomination for inquiry into the matter was made, but it was decisively defeated and the nomination was quickly approved. How much stronger is the case against recommittal here, where exhaustive hearings have already been held?

Others support recommittal in the present instance on the ground that it will permit either the President or the nominee to withdraw the nomination gracefully and avoid the embarrassment to both of outright rejection of the nomination. I reject this argument as patently fallacious. It will be no less crushing to Judge Carswell and no less embarrassing to the President for the nomination to be defeated indirectly by recommittal than directly by senatorial rejection. The result is the same in either case—President Nixon's nominee to the Supreme Court will have been denied confirmation. If that be the will of a majority of this body, we should say so forthrightly. I am confident that such is not the will of the majority, but, whatever the result, we should act finally and decisively.

In summary, Mr. President, I believe that we have sufficient information to afford the opportunity for an informed judgment. I reject out-of-hand the suggestion that this is a "nice way" to defeat the nomination. Finally, our duty to the American people requires us to take a position, one way or the other, either for or against confirmation.

I am ready to cast my vote. I urge my colleagues to oppose recommittal. Proper performance of our advise-and-consent function permits no other course.

Mr. DOLE. Mr. President, will the Senator from Nebraska yield?

Mr. HRUSKA. I yield.

Mr. DOLE. Mr. President, as a matter of interest, a history of recommittal motions is contained in this week's Congressional Quarterly, pointing out that there have been only two successful recommittal motions, both by unanimous consent, and five others, which were defeated.

I would guess that the argument, which goes back to 1870, 1922, 1930, 1937, and 1949—the other two I do not have—was very much the same, that we in the Senate have a responsibility to vote the nomination up or down.

We have the same responsibility today in 1970 that we had in 1870, when President Grant's nomination of Joseph P. Bradley was before the Senate.

Mr. KENNEDY. Mr. President, I yield 4 minutes to the Senator from New York.

The PRESIDING OFFICER. The Senator from New York is recognized for 4 minutes.

Mr. JAVITS. Mr. President, on the subject of the nomination of Judge G. Harrold Carswell, about which there has been so much debate recently, there are a few points to which I should like to refer in summing up.

It seems that the argument made and the opinions expressed, regarding the capacity of the judge, are critically important, and are points which have not been refuted except by the fact that various judges are alleged to be in his favor and many others are the other way, many of them law school deans. I think it is fair to say that the law school deans preponderate in terms of expressing themselves the other way.

I am very much impressed with the fact that relatively conservative members of the New York bar of great distinction, men such as Judge Rosenman, and Bruce Bromley—a former judge of the New York State Court of Appeals—do not think Judge Carswell should be confirmed to the Supreme Court.

Now, that might be an area which the committee would want to go into again if the nomination were to be recommitted.

The other aspect of the matter is the famous 1948 speech of his. There also seems to have been raised serious questions of fact as to whether Judge Carswell did or did not belong to the golf club, based upon the conference alleged to have taken place the night before the hearing, and as to the continuance of that state of mind through his activities in respect to a segregated golf club. I think that is important. In my judgment, a case can be made out for recommittal and the consideration of these facts, and perhaps others.

I shall vote to recommit; but, Mr. President, I should like to deal with one major argument that I have heard time and again, that is, the prerogatives of the President, the prerogatives of the Senate, and what the Senator from Michigan (Mr. GRIFFIN) called the power of the people.

Now, Mr. President, this is very important because I have heard it said time and again by Senators, especially on my side of the aisle, that they are unhappy about turning down the President for a second time.

It seems to me that we have to be equal to our responsibility. That is what we are here for. Our responsibility is to turn down the President as many times as the conscience of any Member of this body dictates he should be turned down in respect to an appointment.

We must not be afraid to do that. If we are, then we automatically forfeit the responsibility which the Constitution has given us.

I deeply believe and rise to assert again, that the Constitution gives us the authority and the responsibility to examine the same criteria the President does for a lifetime appointment. If we are not satisfied, then we turn the man down. This responsibility has been exercised in good faith by this Congress, and I think has been shown irrevocably by what happened on the Burger nomination, that it is possible to get a conservative and a strict constructionist from any part of the country, including the South.

If the President has to try twice or three times, that is the essence of our democracy. Perhaps by that kind of attrition, by that experience, he makes an even better President, whatever may be his party.

I believe that, just as solemn, is the responsibility of a President, and the responsibility of the people. The people can be heard only through us. That is the essence of our republican form of government. But, if we are to slough off that responsibility by some kind of specious reasoning that we are really not "it" in any given situation like that, then we are not favoring the strength of our institutions but are very materially weakening them.

Therefore, I hope very much that Senators will set that criteria as they do

their duty today, and when they vote for confirmation.

I thank the Chair.

Mr. TYDINGS. Mr. President, will the Senator from Massacushetts yield me 7 minutes?

Mr. KENNEDY. I yield 7 minutes to the Senator from Maryland.

The PRESIDING OFFICER. The Senator from Maryland is recognized for 7 minutes.

Mr. TYDINGS. Mr. President, I should like to speak for a few moments about the record of Judge Carswell as a judge.

The point was made earlier today that Judge Carswell has had experience on the bench.

One of the incredible parts of his record is that the longer he has been on the bench the more he has been reversed.

During the 11 years Judge Carswell sat on the Federal district court, 58.8 percent or more of all cases where he wrote printed opinions and which were appealed resulted ultimately in reversals by higher courts. That is over double the average of his own circuit and double the average of the United States. And Judge Carswell's rate of reversal for all of his printed cases was 11.9 percent. That is also double the national average and double the average of his own fifth circuit.

Moreover, to my knowledge there has been no judge nominated for the Supreme Court of the United States in this century who was a sitting judge on a bench who did not have every member of the bench sign a letter in support of his nomination.

Six members of the first circuit have declined for one reason or another to support Judge Carswell's nomination.

The point has been made that the lawyers in Florida, including those who practice before Judge Carswell, support him. That is not the fact of the matter.

Mr. President, I have received this morning a telegram from 35 black lawyers in the State of Florida. Mr. President, I shall ask unanimous consent to have the telegram printed in the RECORD. However, I will read part of it first.

The telegram reads:

MIAMI, FLA., *April 4, 1970.*

HON. JOSEPH TYDINGS,
Senate Office Building,
Washington, D.C.

SENATOR TYDINGS: Although the Board of Governors on the Florida Bar went on record as supporting Harrold Carswell's nomination to the U.S. Supreme Court, there are many lawyers in Florida unalterbly opposed to this nomination. A recent poll of 37 black lawyers residing and practicing in this State showed 35 of them to be steadfastly opposed to the Carswell's nomination. The black lawyers poll, in addition to considering Judge Carswell unqualified for this position, were extremely critical of his attitude toward civil rights lawyers and litigants.

Although all of the lawyers opposing this nomination has not had the misfortune of having practiced before Judge Carswell, they are acutely aware of his reputation, as being less than cordial to black litigants.

Two of the thirty-seven black lawyers contacted did not express support for this nomination, but did not desire to have their names used in this it is noteworthy that not one black lawyer contacted favored Harrold Carswell's appointment to Supreme Court. We strongly urge you to vote against the Carswell nomination. To confirm this nomination would be a great tragedy.

Mr. President, I ask unanimous consent that the entire telegram from which I have read, including the signatures, be printed at this point in the RECORD.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

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James W. Matthews, Norris Woolfork, James Collier, J. Best, Edward Duffie, James Sanderlin, T. J. Cunningham, Ralph Flowers, William Holland, Jessie McQuarry, L. E. Thomas, Arthenia Joiner, Delano Stuart, Leo Adderley, John Lee, Ernest Jackson, R. W. Gray, Earl Johnson, Reese Marshall, D. W. Perkins, Calvin Mapp, Theodore Bowers, Alcee Hastings, T. J. Reddick, W. George Allan, Rowley Rawles, Benjamin Lamplins, Gwendolyn Cherry, Wilkie Gergusen, Horace Goode III, Henry Adame, Perry Little, Edward Rogers, Malcolm Cunningham, and Harold L. Braynon.

Mr. TYDINGS. Mr. President, I point out that of the 35 lawyers listed, two are sitting judges in the State of Florida.

I further point out that a majority of the full-time faculty of four of the greatest law schools in the South, including the law school which is in Judge Carswell's hometown in the State of Florida, oppose the nomination because he is unfit.

Those law schools are the University of Virginia—one of the great law schools in the South and, indeed, in the Nation; Washington and Lee Law School; the University of North Carolina Law School; and Judge Carswell's own hometown law school, the Florida State Law School at Tallahassee.

I might add that for those professors from his own hometown to go on record took a considerable amount of courage.

Let me read some of the statements now contained in the record that were made by Florida lawyers, including Judge Braynon, municipal judge for the city of Miami and former assistant to the attorney general of the State of Florida; James W. Matthews, associate municipal judge for the city of Opa Locka, and former assistant U.S. attorney for the southern district of Florida; and one member of the Florida bar who practiced before Judge Carswell for almost 7 years. I have already put the entire statements of each one in the RECORD. They are highly opposed to the nomination of Judge Carswell.

Here are some excerpts from their statements:

I have practiced in Judge Carswell's Court . . . Judge Carswell has shown bias toward civil rights litigants on many occasions.

That is from Judge Matthews.

Judge Braynon says in part:

His attitude toward civil rights cases and the lawyers that handle those cases was indeed outright hostile.

Mr. James Senderlin says in part:

Could not be relied upon for a fair, impartial and equitable disposition of civil rights matters.

Mr. Theodore Bowers said in part:

The most prejudiced judge before whom I have had the honor to practice.

Mr. Tobias Simon said in part:

A hostile opponent of all civil rights matters brought before him.

These are Florida lawyers. We know what the record states with respect to the lawyers who testified before the Judiciary Committee. But these are Florida lawyers and that is what they have to say about the fairness of Judge Carswell on the central issue before the Senate today and on the central issue that was before the Senate Judiciary Committee.

When Judge Carswell was U.S. attorney, the chief Federal law enforcement officer in the northern district of Florida and one sworn to uphold the Constitution, he cooperated in the evasion of a court decision requiring all municipal golf courses to be kept open for all taxpayers, regardless of their color.

The evidence before the Senate now is that Judge Carswell did not tell the truth before the Judiciary Committee and before the U.S. Senate when he testified with respect to those facts.

Let me refresh the recollection of my colleagues as to what the circumstances were. On the morning that Judge Carswell appeared before the Judiciary Committee, a newspaper report in a leading national newspaper was entitled, "Carswell is Linked to a Segregated Club." The report indicated that he had joined as an incorporator in a successful attempt to put Tallahassee's only public golf course into private hands in order to evade a mandate of the Supreme Court.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. Mr. President, I yield 3 additional minutes to the Senator from Maryland.

The PRESIDING OFFICER. The Senator from Maryland is recognized for 3 additional minutes.

Mr. TYDINGS. Mr. President, when Judge Carswell was before our committee, Senator HRUSKA, who has been the principal supporter of Judge Carswell from the beginning of the hearings and

throughout the Senate debates, interrogated him. I read from page 11:

Now, this morning's paper had some mention that you were a member of a country club down in Tallahassee.

Then Senator HRUSKA put the specific question to him:

Were you an incorporator of that club . . .?

And under oath, Judge Carswell said, "No."

Then Senator HRUSKA said again:

Are you and were you at that time familiar with the bylaws of the articles of incorporation?

Again under oath, Judge Carswell said, "No, sir."

Now, I believed Judge Carswell when he said that under oath, and I am sure the other members of the committee did also. He had a good memory. As a matter of fact, only about 3 minutes before, he had corrected his biographical sketch to reset the date when he entered the Navy some 28 years before.

I had no cause to disbelieve him, and neither did anyone else.

Last Thursday, 2 months after those committee meetings, we were informed in the Senate of a memorandum from two of the members of the ABA Committee on Nominations, that the night before the hearing—the night before—Judge Carswell testified that he was not an incorporator and that he never had spoken to anyone about this matter—Judge Carswell was advised by these two men of this matter and was shown the articles of incorporation and his signature.

Judge Carswell that evening even said that he remembered some of the other names of those who actually asked him to become an incorporator.

The very next morning, under oath, Judge Carswell denied familiarity with the articles of incorporation and flatly denied that he was an incorporator.

So, we had a man under oath who could remember the very day he went into the Navy 28 years before but could not remember what happened the night before in his own hotel room on a central issue that was before the committee.

He either has an extremely convenient and flexible memory or he was deceiving the Senate committee.

I think the Senate ought to take this into consideration when it votes today.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I yield 3 minutes to the Senator from Oklahoma.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized for 3 minutes.

Mr. HARRIS. Mr. President, I believe that the administration has made a tactical error in so strongly opposing the motion to recommit this nomination.

The distinguished Senator from Michigan (Mr. GRIFFIN) quoted, I believe, 10 of the 17 members of the Senate Judiciary Committee, who said that if this nomination were referred back to the committee, the majority of that committee would vote to report it back to the Senate.

Mr. President, it seems to me that the administration, from a tactical standpoint, would have been far better advised to have agreed gracefully to this motion.

Otherwise, it seems to me, Mr. President, those of us who have opposed the nomination of Judge Carswell must say that this record is incomplete and those Senators who have doubts about the nomination now should resolve those doubts against confirmation. I can assure the Senate that will be our position should the motion to recommit be rejected.

More than that, and more importantly for the country, I believe the administration made a very substantive error in disagreeing with the motion to recommit. I know there are Senators who opposed the last nomination to the Supreme Court who worry about possibly appearing to be partisan if they oppose the nomination. However, I am afraid that Senators do not realize how terribly depressed black people in America are, as a result of the President sending to the Senate a man who is demonstrably less qualified than a man should be to serve on the highest court in the land, a man who by his own background and judicial record is suspect in the field of basic and fundamental human rights.

We have seen the serious objections which have been raised to this nominee by lawyers, jurists, and law school faculties throughout the Nation. It seems to me that, based on these objections alone, the Senate would want to have the Committee on the Judiciary again consider this nominee's qualifications.

Confidence in the Supreme Court is at stake in the consideration of this nominee, and we must be very careful to preserve this confidence for all segments of our society.

I believe black people in this country are depressed by this nomination. I do not believe Senators understand how depressed they are.

I believe questions raised in regard to the treatment of civil rights lawyers who appeared before Judge Carswell are important. Opponents have tried to respond to that by attacking personally one of those who testified in that regard.

Mr. President, that is not an answer. That is what the Romans called an "ad hominem" argument and it was not used by quality debaters in Roman times and it should not be raised in the Senate.

The PRESIDING OFFICER (Mr. YOUNG of Ohio). The time of the Senator has expired.

Mr. HARRIS. Mr. President, will the Senator yield to me for 1 additional minute?

Mr. KENNEDY. I yield 1 minute to the Senator from Oklahoma.

Mr. HARRIS. Mr. President, those who raise that kind of argument attacking those who testified about the treatment by Judge Carswell of the civil rights lawyers should want the matter looked into again by the Committee on the Judiciary.

The Tallahassee golf course case raises very serious questions. I just learned a few moments ago from a reporter of a national newspaper who was a resident of Tallahassee at the time that golf course was transferred from a public to a private corporation, that at that time, according to this reporter, a new golf course was being built for black people. Under these circumstances it would have been terribly difficult for Judge Carswell or anyone else not to know the course of action engaged in by him and others was for the purpose of denying black people their right to use a public facility.

These are issues which must be answered and they demonstrate why Senators should support the motion to recommit this nomination.

Mr. HRUSKA. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The Senator is recognized for 2 minutes.

Mr. HRUSKA. Mr. President, on April 2 there was directed to the Attorney General a letter signed by the Senator from Maryland, the Senator from Massachusetts, the Senator from Indiana, and the Senator from California. That letter was released to the press on the day it was written. For that reason, the Attorney General, in formulating and transmitting a reply thereto, distributed the letter and made it available to the remaining Senators of the Senate as well.

I will read only two pertinent parts of the letter and then, I ask unanimous consent that the entire text of the letter addressed to the Honorable JOSEPH D. TYDINGS be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, the paragraphs I wish to read are as follows:

The instructions issued in 1965 regarding investigation of the racial views of judicial nominees remain in effect. The same procedures were followed in the case of Judge Carswell as have been followed in the case of anyone else in his position.

The 1948 speech made by Judge Carswell was not unearthed as a result of these procedures, nor were any of the other allegations which you describe in paragraph (4) of your letter. While you refer to this information as "easily discovered", I think that this is the judgment of hindsight. The speech, for example, was carried twenty-two years ago in a small town newspaper long since defunct, and with no "morgue" any longer in existence. Consequently, it does not surprise me that the strong interest and motivation stimulated in countless citizens by the announcement of a Supreme Court nomination should turn up information not found in the normal investigative process.

Sincerely yours,

JOHN MITCHEL,
Attorney General.

EXHIBIT 1

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., April 6, 1970.

HON. JOSEPH D. TYDINGS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR TYDINGS: I am happy to furnish to you, and to Senators Brooke, Bayh, and Cranston, such information as is appropriate in response to your letter to me of April 2. Since I notice that you released that letter to the press on the day it was written, I am taking the liberty of making this letter available to the remaining members of the Senate as well. Several of your questions relate to the methods employed by the Department or the FBI in conducting an investigation; in the past, both the Department and the FBI have consistently de-

clined to reveal this type of information, and I intend to adhere to that policy.

The instructions issued in 1965 regarding investigation of the racial views of judicial nominees remain in effect. The same procedures were followed in the case of Judge Carswell as have been followed in the case of anyone else in his position.

The 1948 speech made by Judge Carswell was not unearthed as a result of these procedures, nor were any of the other allegations which you describe in paragraph (4) of your letter. While you refer to this information as "easily discovered", I think that this is the judgment of hindsight. The speech, for example, was carried twenty-two years ago in a small town newspaper long since defunct, and with no "morgue" any longer in existence. Consequently, it does not surprise me that the strong interest and motivation stimulated in countless citizens by the announcement of a Supreme Court nomination should turn up information not found in the normal investigative process.

Sincerely yours,

JOHN MITCHELL,
Attorney General.

Mr. DOLE. Mr. President, will the Senator yield for a unanimous-consent request?

Mr. HRUSKA. I yield.

Mr. DOLE. Mr. President, at this point I ask unanimous consent to have printed in the RECORD representative opinions of Judge Carswell as a district judge and as a circuit judge.

There being no objection the opinions were ordered to be printed in the RECORD, as follows:

[U.S. Court of Appeals for the Fifth Circuit, No. 27117]

FERDINAND HENRY SCHUTTEN, ET AL PLAINTIFFS-APPELLANTS *v.* SHELL OIL COMPANY, DEFENDANT-APPELLEE

(Appeal from the U.S. District Court for Eastern District of Louisiana, January 30, 1970)

Before Wisdom, Goldberg and Carswell, Circuit Judges.

CARSWELL, Circuit Judge: Appellants filed suit in the District Court seeking to evict the appellee, Shell Oil Company, and seeking an accounting for the removal of oil, gas, and other minerals from land in Plaquemines Parish, Louisiana. Appellants, who are not in possession, claim ownership of the land and demand an accounting from Shell because of its failure to deal with appellants in removing the minerals.

Appellee filed a Motion to Dismiss on the ground that its lessor, the Board of Commissioneers of the Orleans Levee District, who also claims title to the land in question, is an "indispensable party" who cannot be joined since such action would destroy the District Court's diversity jurisdiction. The District Court granted the appellee's motion and dismissed the case.

Both parties agree that if the Levee Board is indispensable to the action the suit would have to be dismissed since both appellants and the Levee Board are citizens of Louisiana and diversity jurisdiction under 28 U.S.C. § 1332 would not be obtainable. Thus the sole issue before this Court is that of the indispensability of the Levee Board.

In deciding this issue it is clear that the provisions of Rule 19 of the Federal Rules of Civil Procedure control. *Provident Trademens Bank & Trust Co.*, v. *Patterson*, 390 U.S. 102 (1967). Rule 19 provides in pertinent part:

"(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If he joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination by the Court Whenever Joinder not Feasible. If a person described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be aequate; fourth, whether the plaintiff will have an adequate remedy, if the action is dismissed for nonjoinder."

The reformation of Rule 19 in 1966 was the result of judicial inequities which had slowly but steadily grown under the concept of the "indispensable" party. The reform of Rule 19 was preceded by more than a decade of scholarly inspection and debate.[1] Under its predecessor, it was often held that absence of an "indispensable" party deprived the court of any power to render relief to the parties before it. See *Young* v. *Powell*, 179 F. 2d 147 (5th Cir. 1950). The 1966 revision of Rule 19 sought to give the courts greater latitude in deciding whether a case should be dismissed for nonjoinder of a supposedly "indispensable" party. Before discussing Rule 19, and the present controversy, a look at the origin and development of the doctrine of "indispensability" is required in order to properly assess the scope and effect of the 1966 amendment of Rule 19.

Prior to the Federal Rules the biggest problem in litigation over joinder of parties stemmed from the distinction which was required to be drawn between "necessary" and "indispensable" parties. This distinction is set forth in the hoary case of *Shields* v. *Barrow*, 58 U.S. 130, 139 (1854):

"The court here points out three classes of parties to a bill of equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (Footnote omitted).

The *Shields v. Barrow* formula was a concerted attempt to formalize the joinder doctrines which had arisen in the courts of equity. Up until the eighteenth century equity required joinder of all interested parties, but recognizing that practical difficulties and obstacles often made this impossible, relaxed its standard of complete adjudication of a controversy when faced with compelling equity.[2] As noted by Professors Kaplan and Hazard, supra n. 2, equity's attitude changed during the 1700's when the concept of "complete adjudication" gained the upper hand. On the other side of the aisle, the common law had developed joinder criteria which paralleled the parties substantive rights and obligations. The essence of the common law joinder doctrine was that joint rights or obligations demanded joint adjudication.[3] The common law's approach, to say the least, lacked the flexibility of the earlier equity practice.

The rise of the concept of the "complete decree" encroached upon the flexible and rather pragmatic approach to joinder problems which the earlier equity practice had enjoyed and fostered. It was this encroachment which Professor Hazard believes gave rise to the "indispensable" party concept[4] which was formalized in this country in *Shields* v. *Barrow*, supra.

In its most favorable light *Shields* v. *Barrow* states the proposition that "if a court can proceed to a meaningful decree without affecting the interest of the absent person, that absent person is at most a necessary party; if the circumstances are such that the court cannot so proceed, then the absent one is an indispensable party."

Reed, supra n. 1 at 343. While this formulation, as an abstract proposition, is consistent with the present Rule 19, any flexibility or pragmatism envisioned by the Supreme Court in Shields was soon eliminated by courts which latched upon such unguarded words as "separable" and ". . . without affecting that interest. . ." in an attempt to devise a mechanical test to apply to joinder problems.[5] Thus the concept of "severability" arose in equity joinder decisions. As under the common law the substantitive rights of the parties became paramount.[6]

To a great extent, the severability test was carried over with the adoption of the original Rule 19. Though those drafting the rule envisioned a more flexible approach akin to that which existed under the "earlier" equity practice, they lost all hope of achieving that end when they resorted to the use of the terms "indispensable" and "joint interest" without redefinition. As pointed out by the Advisory Committee on Rules,[7] the use of these terms "directed attention to the technical or abetract character of the rights or

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[1] See eg.g., Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961); Reed, Compulsory Joinder of Parties in Civil Actions (pts. 1–2), 55 Mich. L. Rev. 327, 483 (1957).

[2] Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 359 (1967); Hazard, supra n. 1 at 1256–62. In his article Professor Hazard has done an excellent job of documenting the rise of the indispensability doctrine and its application under equity, common law and the precedessor of the present Rule 19.

[3] See Clark, Code Pleading § 56 (2d ed. 1947).

[4] Hazard, supra, n. 1 at 1271–82.

[5] See Provident Tradesmens Bank & Trust Co. v. Patterson, supra at 123–125.

[6] For applications of the severability test see Halpin v. Savannah River Electric Co., 41 F. 2d 329 (4th Cir. 1930); Washington v. United States, 87 F. 2d 421 (9th Cir. 1936).

[7] See Notes of Advisory Committee on Rules, 28 U S.C.A. F.R. Civ. P. 19 (as amended 1966)

obligations of the persons whose joinder was in question, [an approach which characterized the decisions prior to the original rule 19] and correspondingly distracted attention from the pragmatic considerations which should have been controlling."

The 1966 amendment of Rule 19 attempts to remedy this situation by conditioning a finding of "indispensability" upon "pragmatic considerations." *Provident Tradesmen Bank and Trust v. Patterson*, supra, at 106–107.

Subdivision (a) of Rule 19 categorizes those persons whose joinder is desirable from the standpoint of complete adjudication and elimination of relitigation. If there are no procedural or jurisdictional bars to joining such a party, Rule 19 requires that he be joined. It is to be noted that subdivision (a) eliminates reference to the "abstract" or "substantive" interests involved by avoiding such terms as "joint" and "separable."[8]

Subdivision (b) of Rule 19 requires a court to examine four "interests" before deciding whether "in equity and good conscience" the court should proceed without a person whose joinder is impossible. The distilled essence of these "criteria" of subdivision (b) is the attempt to balance the rights of all concerned. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, supra. The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

As pointed out by the Advisory Committee, supra n. 7, the term "indispensable" as utilized in the present Rule 19 is not "definitive" but "conclusionary." The term simply denotes a conclusion reached upon due consideration that the person is one who should be joined but whose joinder is impossible and that it is preferable to dismiss the case than to proceed without him. It is to be stressed that the criteria set forth in Rule 19 are not to be applied mechanically nor are they to be used to override compelling substantive interests. As pointed out in *Provident Tradesmens Bank & Trust Co. v. Patterson*, supra at 119, 125, Rule 19 does not foreclose consideration of substantive interests, it simply acts as a guide to enlightened consideration of those interests. Stated otherwise, substantive rights are no longer the be all and end all of the joinder question.

In applying Rule 19 the courts must refrain from taking a view either too broad or too narrow in determining "prejudicial" effect of a judgment. The watchwords of Rule 19 are "pragmatism" and "practicality." The court must, however, always consider the possibility of shaping a decree in order to adjudicate between the parties who have been joined. In this vein the court must guard against the formulation of "paper" decrees which neither adjudicate nor, in the end, protect rights.

Considering the present case in the light afforded by Rule 19 we cannot say that the district court erred in dismissing the action and declaring the Levee Board an "indispensable" party.

Under subdivision (a) the Levee Board is clearly a party "to be joined if feasible." Its joinder is impossible, however, since it would destroy the District Court's diversity jurisdiction. Appellants argue that under Louisiana substantive law their action is merely personal against Shell for trespass and that the Levee Board has no "interest" in the action. As pointed out above, the concept of substantive severability is no longer the guiding star of the joinder problem. Nevertheless, a review of the relevant statutory provisions and their interpretation by the Louisiana courts leads us to reject the appellants' argument that the interests of the lessor and lessee of mineral rights are "severable" under Louisiana law. See *Le Sage v. Union Producing Co.*, 184 So. 2d 727 (La. 1966). It cannot be denied that appellants' action in trespass is based upon its claim of ownership of the land overlying the mineral deposits. This claim is directly opposed to the Levee Board's claim of ownership which is "backed up" by its possession in fact. This question of actual ownership must necessarily be adjudicated before the trespass and accounting issues are reached. There is no doubt that the Levee Board has an interest in this litigation and is a "party to be joined if feasible." Since it is not feasible to join the Levee Board we must now consider what alternatives are available under the "equity and good conscience" standard. To do this we must apply the pragmatic criteria of subdivision (b) of Rule 19.

The first factor that must be considered is the extent to which a judgment might prejudice the unjoined Levee Board or those already parties. Appellants argue that the Levee Board would not be prejudiced because it would not be bound, in the res judicata sense, by any judgment which might be rendered. Nor would the Board be precluded from asserting its rights in another action presumably in Louisiana state courts. We decline to accept the appellants' narrow and technical view of what would constitute prejudice to the Levee Board. It is clear that courts should not proceed simply because the unjoined party is not "bound" in the technical sense. *Provident Tradesmens Bank & Trust Co. v. Patterson*, supra at 110. Furthermore, one of the purposes, though not the sole purpose, of Rule 19 is the avoidance of multiple litigation of essentially the same issues.

The possibility of prejudice to the Levee Board is most certainly not superficial. First, if Shell is ousted the Levee Board's royalty interest would cease in practically the same manner as if the court had decreed a cancellation of the lease. This would happen despite the fact that the Levee Board's claim of ownership would be technically unimpaired by the judgment in the sense that it would not be bound by the judgment.

Second, though not technically bound a judgment would most assuredly create a cloud on the Levee Board's title and greatly diminish the value of the property. This result would be adverse to both appellants and the Board and would require yet more litigation. A judgment in favor of the appellants would in effect adjudicate the Levee Board's claim of ownership without giving them the right to present their defense and assert their own claim on its merits. While Shell does have a substantial interest in the Levee Board's claim this "interest" would not justify placing the burden of proving the Levee Board's ownership on Shell.

Third, a judgment might result in inconsistent obligations for the defendant Shell Oil Company. Furthermore, a judgment in appellant's favor might render the Levee Board liable to Shell for loss or damage for the peaceable possession of mineral rights. See La. Civ. Code Arts. 2692, 2696. Again all of this could come about without affording the Levee Board the opportunity to defend its interests even though the Board would not be bound by the judgment.

A conclusion that as a practical matter the Levee Board would be prejudiced by a judgment rendered in their absence leads us to consider the second and third "factors" of Rule 19: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided," and whether a judgment rendered in the Levee Board's absence will be adequate. Appellants have suggested no way in which these objectives could be accomplished and we are unable to discover any ourselves. Since the litigation revolved around the conflicting claims of ownership, we are unable to envision a decree which would effectively settle any controversy between the appellants and the present defendant, Shell, without doing substantial practical injury to the Levee Board's unassertable claims. Any attempt to fashion a judgment which would lessen this harm would result in a meaningless decree.

A judgment rendered at this time and without the Levee Board would simply result in additional costly litigation no matter how such judgment was formulated. This fact leads us to consider the fourth and final criteria of Rule 19: whether the appellant has an adequate remedy elsewhere. The answer to this question is that appellants will by no means be prejudiced themselves if forced to pursue their remedy in the courts of the State of Louisiana. Both the Levee Board and Shell are amenable to process in Louisiana. This litigation concerns land situated in Louisiana, is governed by Louisiana law and involves a claim of ownership asserted by an agency of the State of Louisiana. Appellants cannot be heard to complain about the competence of the courts of Louisiana in such matters. There is, however, an even more compelling reason for appellants to seek relief in the Louisiana courts. Even if the district court below could fashion a judgment which was adequate while at the same time protective of unassertable rights, additional litigation would most assuredly develop later in the Louisiana courts. By dismissing the case now and directing the appellants to proceed in the Louisiana courts most if not all issues can be settled in one bout of litigation. As noted above, the expeditious and effective disposition of litigation is desirable if not always obtainable. In the present case it is not only desirable but obtainable and is indeed made necessary under the circumstances.

We therefore conclude that under Rule 19, Federal Rules of Civil Procedure, the present case in all "equity and good conscience" should not proceed without joinder of the Orleans Levee Board. Moreover, this decision is made easier by the knowledge that the courts of the State of Louisiana offer a forum in which a complete adjudication of all interests can be obtained without fear of needless multiple litigation.

The order of the District Court dismissing the complaint for nonjoinder of the Orleans Levee Board is

AFFIRMED.

[U.S. District Court, Northern District of Florida, Pensacola Division, Aug. 14, 1959]

LOCAL UNION NO. 1055, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, AND LOCAL UNION NO. 624, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, PLAINTIFFS, *v.* GULF POWER COMPANY, DEFENDANT

(Civ. A. No. 1016)

Action by union for a declaration of its contractural rights with employer, and for mandatory injunctive relief. The United States District Court, Carswell, Chief Judge, held that where employer entered into a collective bargaining agreement with union, wherein union, through employer recognition of foremen along with other employees in the wage scale agreement, was made the bargaining representative of such foremen, and such agreement provided that after expiration of five years it would run from year to year for the purpose of termination, but in the absence of termination the agreement was

[8] See Notes of Advisory Committee, supra n. 7.

binding on the parties until notice of alteration was given, and employer did not give union notice of termination of the contract in its entirety, and contract did not provide for partial termination, such contract was enforceable in regard to union representation of foremen, notwithstanding statute providing that no employer shall be compelled to deem supervisors as employees for the purpose of collective bargaining, and notwithstanding fact employer seasonably notified union that it would no longer recognize it as bargaining agent for foremen.

Order in accordance with opinion.

1. COURTS—289

Specific Performance—80:

Grievances arising under a collective bargaining agreement, when arbitrable, are unequivocally enforceable through specific performance in the United States District Courts.

2. LABOR RELATIONS—411

Private arbitration in the labor management field is to be afforded broad liberalities.

3. LABOR RELATIONS—510

While an act may be both an arbitrable contract violation and an unfair labor practice, the former is nevertheless enforceable in the courts, for parties may agree in the collective bargaining agreement to submit matters involving unfair labor practices to private arbitrators, and the District Court should retain jurisdiction over the contract violation until the National Labor Relations Board in the exercise of its discretion elects to effectuate the statutory policy of the National Labor Relations Act. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. LABOR RELATIONS—248

Labor contracts may contain severable portions which are unenforceable.

5. CONTRACTS—217

A contract is terminable in the manner agreed to, although, usually, a partial termination is not favored unless the parties have expressly agreed thereto.

6. LABOR RELATIONS—261

Where a collective bargaining agreement between a union and an employer provided that it was terminable from year to year after its fifth anniversary by giving notice at least 60 days prior to August 15 of year in which termination was desired, such contract was capable of having a definite duration, and therefore did not expire in a reasonable time.

7. LABOR RELATIONS—510

Only the National Labor Relations Board has the policy making power and machinery to settle representation grievances.

8. CONSTITUTIONAL LAW—89(1)

The principle of freedom of contract renders bargains freely made enforceable unless the law makes the subject matter thus bargained for illegal.

9. LABOR RELATIONS—176

Statute providing that no employer shall be compelled to deem supervisors as employees for the purpose of collective bargaining, does not make it illegal for management to bargain collectively or to contract with supervisors as employees, if it chooses to do so. National Labor Relations Act, §§ 2(11), 14 (a) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 152(11), 164(a).

10. LABOR RELATIONS—249,261

Where employer entered into a collective bargaining agreement with union, wherein union, through employer recognition of foremen along with other employees in the wage scale agreement, was made the bargaining representative of such foremen, and agreement provided that after expiration of five years it would run from year to year for the purpose of termination, but in the absence of termination the agreement was binding on the parties until notice of alteration was given, and employer did not give union notice of termination of the contract in its entirety, and contract did not provide for partial termination, such contract was enforceable in regard to union representation of foremen, notwithstanding statute providing that no employer shall be compelled to deem supervisors as employees for the purpose of collective bargaining, and notwithstanding fact employer seasonably notified union that it would no longer recognize it as bargaining agent for foremen. National Labor Relations Act, §§ 2(11), 14(a) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 152(11), 164(a).

11. LABOR RELATIONS—433

Where there is a genuine dispute arising from a collective bargaining contract, the agreement itself is controlling as to provisions for arbitration.

12. LABOR RELATIONS—434

Where a collective bargaining agreement between a union and employer provided that all questions and grievances that might arise between the parties during the life of the agreement be handled through certain successive steps, and that any grievances under the agreement or any violation of the employees' rights under the agreement which could not be settled by employer and union should be submitted to an arbitration board, attempted withdrawal by employer, of foremen, from their prior coverage under the contract, and purported working of supervisory personnel contrary to the express prohibitions of the contract, were arbitrable grievances under such agreement.

Louis Sherman, Washington, D.C., Philip D. Beall, Pensacola, Fla., Poole Pearce & Hall, Atlanta, Ga., for plaintiffs.

Bert Lane, Yonge, Beggs & Lane, Pensacola, Fla., for defendant.

CARSWELL, Chief Judge.

This suit was initiated under 29 U.S. C.A. § 185 for a declaration of contractual rights by the plaintiffs, hereinafter called the Union, against the defendant, a public utility, hereinafter called the Company. Assuming a determination in its favor, the Union seeks a mandatory injunction to compel compliance therewith, or in the alternative an injunction requiring the Company to submit any grievances arising out of those contract rights to arbitration. There are two breaches of the contract alleged, from which the Union asks declaration and specific performance: (1) the Company refuses to negotiate with the Union as the collective bargaining representative of certain "foremen" and to afford such "foremen" any rights under the collective bargaining contract, as is alleged, the Company agreed to do under the contract, and (2) certain "supervisory" personnel are being required by the Company to work contrary to the contract.

The factual backdrop surrounding this dispute appears as follows: The Union and Company entered into the present collective bargaining contract on October 27, 1953. That instrument, while silent as to recognition of "foremen" per se, nevertheless included "foremen" along with other employes in the wage scale agreement which was appended to the contract. The contract was to remain in effect for five years unaltered and thereafter would run from year to year for the purpose of termination, but, absent termination, the agreement was binding on the parties until notice of alteration was timely given and agreed to by both Union and Company. In June, 1958, just prior to the five year anniversary date of the covenant, the Company gave notice to the Union that it would no longer recognize the Union as the collective bargaining agent for "foremen", since they were supervisory personnel. The Union did not agree to this action, whether it be denominated a proposed alteration or termination of the contract. Demand was subsequently made by the Union to submit this question to arbitration, since it took the position that the Company had voluntarily agreed under the contract to recognize it as the bargaining agent for the "foremen" as well as employee personnel, and, further, having agreed to submit all grievances arising from the contract to arbitration that the Company had a duty to live up to the contract, or at least abide by it until changed by arbitration agreements. This the Company refused, with the contention that since it could not be compelled under the law (29 U.S. C.A. § 164(a)) to recognize individuals defined as supervisors under such law for the purpose of collective bargaining, then such contractual provisions had been effectively terminated by its notice or that such provisons were unenforceable against it.

The Company assigns some seventeen grounds by motions to dismiss for failure to state a claim or, in the alternative, to strike. The legal questions with merit thus raised are grouped and will be discussed separately.

JURISDICTION

[1–3] When it appeared on the pleadings that unfair labor practices were prospectively lurking in the identical contract violations alleged, the Court examined jurisdiction. The existence of such is no bar to the jurisdiction of this Court for grievances arising under a collective bargaining contract when arbitrable are unequivocally enforceable through specific performance in the United States District Courts (24 A.L.R. 2d 752). Such private arbitration in the labor management field is to be afforded broad liberalities. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L. Ed. 2d 972, and Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 5 Cir., 257 F.2d 467, 474. While an act may be both an arbitrable contract violation and an unfair labor practice, the former is nevertheless enforceable in the courts, for parties may agree in the collective bargaining agreement to submit matters involving unfair labor practice to private arbitrators, and the District Court should retain jurisdiction over the contract violation until the National Labor Relations Board in the exercise of its discretion elects to effectuate the statutory policy of the National Labor Relations Act. Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 5 Cir., 257 F.2d 467, certiorari denied 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed.2d 110.

WAS THE CONTRACT TERMINATED?

[4, 5] As a bar to the arbitration of this alleged breach of contract, the Company contends the collective bargaining agreement was a divisible one under which provisions relative to recognition of the foremen were terminated. Labor contracts may contain severable portions which are unenforceable (14 A.L.R.2d 346). It is elementary that a contract is terminable in the manner agreed to (17 C.J.S. Contracts § 385). Usually a partial termination is not favored unless the parties have expressly agreed for such provisions. 17 C.J.S. Contracts § 403; Oil Workers International Union, Local No. 463, v. Texoma Natural Gas Company, 5 Cir., 146 F.2d 62, certiorari denied 324 U.S. 872, 65 S.Ct. 1017, 89 L. Ed. 1426.

The contract states that it is terminable after its fifth year of operation by giving notice "* * * at least sixty (60) days prior to August 15 of the year in which termination * * *" is "* * * desired * * *". It is silent as to partial termination. The first purported notice of termination was seasonably given on June 14, 1958, and it provided:

"Since Foremen are supervisory employees and the Company is not required to bargain with any Union for supervisory employees, we advise you that effective August 15, 1958, the anniversary date of our Agreement, the

classification of Foremen will no longer be included in coverage under our Agreement and the Company will no longer recognize the Union as bargaining agent for these supervisory employees."

Thereafter, on August 15, 1958, the Company again gave identical notice extending the projected date for termination to November 15, 1958. And again on November 17, 1958, identical notice was given extending the operative date for termination to January 1, 1959.

The question of termination then is resolved by a construction of the Company's letters. If they were a partial termination, it was a nullity for partial termination was not agreed to. It was not a complete termination, because no indication was given to cease recognition of the Union altogether, and, indeed, the Company has recognized the Union as the representative of the employees to date.

IS THE CONTRACT VOID AS BEING ONE FOR AN INDEFINITE DURATION?

[6] The contract was plainly terminable from year to year after its fifth anniversary by giving notice "* * * at least sixty (60) days prior to August 15 of the year in which such termination * * *" is "* * * desired * * *". Since the contract in its entirety was terminable, likewise its recognition of foremen vel non was not in perpetuity. Upon cancellation of the entire contract, the unambiguous language of 29 U.S.C.A. § 164(a) would completely insulate the Company from any attempt whatsoever to insist upon the inclusion of bona fide foremen in any subsequent contract or negotiations therefor.

Because the contract was one capable of having a definite duration, it does not expire as the Company contends in a reasonable time.

CONTRACT BAR RULE AND REPRESENTATION

It is urged on behalf of the Company that because the policy of the National Labor Relations Board prevents the operation of any collective bargaining contract from extending the duration of appropriateness of the agency to represent the bargaining unit of the composition of the same beyond a period of two years (Pacific Association of Pulp & Paper Workers, 121 N.L.R.B. 134) that accordingly the Union should receive certification as to the foregoing (since the contract has on its face exceeded a period of five years) from the National Labor Relations Board and thus exhibit its authority to sue here (42 A.L.R.2d 1415).

[7] It is apparent that such argument preoccupies itself with a remedy available through another route of redress, 29 U.S.C.A. § 159; Franks Brothers Co. v. National Labor Relations Board, 321 U.S. 702, at pages 705 and 706, 64 S.Ct. 817, at page 818, 88 L.Ed. 1020, for only the National Labor Relations Board has the policy making power and machinery to settle representation grievances.

It should be carefully noted that no question is raised concerning the agency or duration of the Union's authority to represent the statutory employees, rather the thrust of the Company's argument only reaches the agency of the Union to represent foremen.

Such petition ignores the obvious that the Company has recognized the Union as the bargaining agent for employees and we are now only concerned with what the parties contracted for as comprising the bargaining unit. Under 29 U.S.C.A. § 185 the District Courts are given jurisdiction over labor contracts by a "labor organization representing employees".

The real question here is did the Company agree under the contract to recognize the Union as the collective bargaining agent for foremen (notwithstanding that they might be statutory supervisors) with employees as comprising the bargaining unit. Our problem then is one of contract rather than representation, for if there is appropriate agency to represent employees, then it likewise extends to foremen as well.

Nor does the declaration of such legal question here on the contract preclude either party from later raising the question of representation, at the appropriate time and place, for denial of that right then would give rise to an unfair labor practice.

IS THE CONTRACT WITH FOREMEN ENFORCEABLE?

[8–10] The Company takes the position that under 28 U.S.C.A. § 164(a), it cannot be compelled to bargain collectively with a worker bearing the statutory definition of a supervisor under 29 U.S.C.A. § 152(11), and, hence, the contract thus entered is unenforceable against it. The principle of freedom of contract renders bargains freely made enforceable unless the law makes the subject matter thus bargained for illegal. Corbin on Contracts, Vol. 6, Sections 1373–1376. What is the meaning of Section 164(a), supra? Stripped of its qualifying verbiage, the nub of its substance is "* * * no employer * * * shall be compelled to deem * * * supervisors as employees for the purpose of * * * collective bargaining." This section has received a literal interpretation and application. L. A. Young Spring & Wire Corp. v. National Labor Relations Board, 82 U.S. App.D.C. 327, 163 F.2d 905, certiorari denied 333 U.S. 837, 68 S.Ct. 607, 92 L. Ed. 1121. This decision came on the heels of the Taft-Hartley Amendment to the Wagner version of the National Labor Relations Act. It had formerly been held that there was compulsion in the Wagner Act requiring employers to deal collectively with supervisors. Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040. The Taft-Hartley Act specifically holds to the contrary, but even the latter left supervisors free to join labor organizations. See 29 U.S.C.A. § 164(a). Because of the correlative rights and immunities afforded supervising labor and management, it cannot be said that Congress intended it to be *illegal* for management to bargain collectively or to contract with supervisors as employees. Nor can it be said that compulsion will result in requiring the Company to arbitrate with the Union relative to foremen, where the Company has, in fact, so contracted. While collective bargaining is to some extent a continuing process (see the quotation in Corbin on Contracts, Vol. 6, Section 420, Pocket Part), it has for the present purposes been concluded. Since the present contract was not terminated, it was automatically renewed, thus passing over "the contract opening date", leaving the parties to abide by the terms of the agreement thus renewed. The obligation of the contract does not impair the right of either party to reopen rights guaranteed by the National Labor Relations Act at the appropriate time; for the contract specifically provides a fixed, determinable annual date on which it can be terminated in its entirety by proper notice.

ARE THE GRIEVANCES ARBITRABLE UNDER THE CONTRACT?

By this motion the Company raises the question of whether private arbitration was contemplated by the agreement with the Union. This question is foreclosed by certain articles of the contract: Article VIII reads in part, "* * * all questions and grievances that may arise between the parties hereto during the life of the Agreement shall be handled through the successive steps as follows: * * * That article thereafter enumerates details for private conciliation." Article IX then follows: "* * * (A)ny grievances under this Agreement, or any violation of the employees' rights under this Agreement that cannot be settled by * * * Company and * * * Union * * * shall be submitted to an Arbitration Board * * *".

[11] Where there is a genuine dispute arising from a collective bargaining contract, the agreement itself is controlling as to provisions for arbitration (24 A.L.R.2d 752) and the law favors such arbitration. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, and Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 5 Cir., 257 F.2d 467, 474.

[12] Plainly, the withdrawal of "foremen" from the coverage of the contract was an arbitrable grievance; as is likewise the working of supervisory personnel contrary to the express prohibitions of the contract.

Appropriate order in conformity with this Memorandum-Decision will be entered.

[In the U.S. District Court, Northern District of Florida, Pensacola Division, April 18, 1960.]

LOCAL UNION NO. 1055, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL UNION NO. 624, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PLAINTIFFS, *v.* GULF POWER CO., DEFENDANT

(Civ. A. No. 1016.)

Action by union for declaration of its rights under collective bargaining contract and for injunctive relief requiring employer to recognize contract and comply with the terms therein. The District Court, Carswell, Chief Judge, held that where employer agreed under collective bargaining contract to include supervisory personnel in the bargaining unit, subsequent unilateral declaration by employer of its refusal to recognize union as bargaining agent for foremen was unjustified and refusal to submit question to arbitration was a partial breach of contract, but such partial breach did not justify union in calling a strike in violation of "no strike" clause in contract rather than seeking aid of court in enforcing union's rights under the contract or bringing matter before National Labor Relations Board, and union was not entitled to injunctive relief nor was company entitled to injunctive relief on its counterclaim.

Ordered accordingly.

1. LABOR RELATIONS—264, 291, 600, 816

Where employer agreed under collective bargaining contract to include supervisory personnel in bargaining unit, subsequent unilateral declaration by employer of its refusal to recognize union as bargaining agent for foremen was unjustified and refusal to submit question to arbitration was a partial breach of contract, but such partial breach did not justify union in calling strike in violation of "no strike" clause in contract rather than seeking aid of court in enforcing union's rights under contract or bringing matter before National Labor Relations Board, and union was not entitled to injunctive relief nor was company entitled to injunctive relief on its counterclaim. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act §§ 2(3), 8(d), 14(a) as amended 29 U.S.C.A. §§ 152(3), 158 (d), 164(a).

2. LABOR RELATIONS—244, 252

Prevention of strikes is one of principal purposes of labor contracts and of the National Labor Relations Act.

3. DECLARATORY JUDGMENT—147

Specific Performance—62:

Where an employer has been guilty of a partial breach of collective bargaining agreement, relief by declaratory judgment and specific performance are available to union.

4. EQUITY—65(1), 66

One who seeks equity must do equity and must come into equity with clean hands.

5. SPECIFIC PERFORMANCE—88

Equitable relief will be denied to one who seeks to enforce rights under a contract which he himself has breached.

Philip D. Beall, Pensacola, Fla., Louis Sherman Washington, D.C., John S. Patton,

Poole, Pearce & Hall, and Edwin Pearce, Atlanta, Ga., for plaintiffs.

Bert Lane, Yonge, Beggs & Lane, Pensacola, Fla., for defendant.

CARSWELL, Chief Judge.

This suit was initiated pursuant to 29 U.S.C.A. § 185 for a declaration of contractual rights by the plaintiffs, here called the Union, against the defendant, a public utility, here called the Company. Jurisdiction to hear this cause was raised by the Company in a motion to dismiss. This Court disposed of the jurisdictional question in a memorandum-decision filed on August 17, 1959. 175 F.Supp. 315. Other point raised in the motion to dismiss were also decided in that decision, and the Court will refer to that decision as a basis for some of the findings which follow.

[1] The Company and the Union were operating under a collective bargaining agreement wherein the parties agreed to arbitrate matters arising under the contract, when any dispute arose. There was a "no strike" clause wherein the Union and its members agreed that during the continuance of the agreement there would be no authorized or sanctioned strikes, sitdowns or walkouts, or any other concerted cessation or delay of any work of any kind by the Union. The Company agreed that there would be no lockouts.

The Union and the Company had been operating under this agreement satisfactorily since October 1953. There was the usual 60 day "notice to terminate" clause in the contract. Early in 1959 the Company, in streamlining its operations, installed new methods of operation and new type equipment. This new operation resulted in the necessity of fewer employees. The Company offered certain employees supervisory positions, which were accepted. On June 14, 1958, the Company notified the Union that as of August 15, 1958, the Company would no longer recognize the Union as collective bargaining representatives of foremen. The Union subsequently took issue with the Company's right to refuse unilaterally to recognize the Union as bargaining agents for certain foremen, and demanded that the Company arbitrate the matter. The Company contended that under 29 U.S.C.A. § 164(a) it could not be compelled to bargain collectively with a worker bearing the statutory definition of a supervisor under 29 U.S.C.A. § 152(3), and that, therefore, the collective bargaining agreement as to supervisors was unenforceable against the Company.

It must be noted that the Company and the Union had settled most of their problems with respect to wages and working conditions without serious controversy. They were working on a nsw contract and had, except for the question as set forth above, agreed as to the terms of a new contract which would take the place of the one now under consideration.

The testimony taken shows that the Company's attitude with respect to collective bargaining on the question of foremen was clear. The Company refused to arbitrate the question, contending a legal basis for its action, and seeking to have the National Labor Relations Board take jurisdiction and settle the controversy. The Union, however, was not certified, and the Board, at the instance of the Union, refused to take jurisdiction.

Upon refusal of the Company to arbitrate this question, the Union sent out ballots to its members requesting that they vote to strike. The members voted in favor of the strike, and a work stoppage resulted.

The Company notified the Union that the strike would be deemed by the Company to constitute an abrogation of the existing contract, and has since refused to recognize the Union's rights thereunder.

The Union seeks a declaration of its rights under the contract, as well as injunctive relief requiring that the company recognize the contract and comply with the terms therein. The Union also seeks a declaration that the Company by refusing to arbitrate as to supervisory personnel violated the contract, and prays that injunction issue requiring the Company to recognize the Union as bargaining agents for the Company's employees, as well as for the foremen; that the foremen be declared as part of the Union's bargaining unit; and to prohibit the Company from assigning work to these foremen which had heretofore been their work as employees under the contract. Alternatively, the Union prays that the Company be required to arbitrate on the unilateral withdrawal of foremen from the bargaining unit.

The Company denies the existing of ths contract, by virtue of the strike, which it considers an abandonment of the contract. The Company also counterclaims praying for injunctive relief.

In the previous memorandum-decision filed in this cause, this Court held that the contractual obligations of the Company were enforceable with respect to the Company's refusal to submit to arbitration the question of representation. The Company had by contract agreed to include supervisory personnel in the bargaining unit, though there was no statutory compulsion to do so. A unilateral declaration by the Company of its refusal to recognize the Union as bargaining agent for the foremen was unjustified, and their refusal to submit the question to arbitration was a breach of their contract. In view of the other settled questions between the Company and the Union, this breach was not so material as to constitute a total breach. The Union contends that this breach by the Company justified its action in calling the strike, that arbitration was an alternative remedy to their right to strike, and that "no strike" clause was operative only so long as the Company would submit to arbitration. The Company's refusal to arbitrate, it argues, left no other course open, except to strike.

The Court cannot agree with the Union's contention. The president of the local testified that the Union did not seek the aid of the Courts in enforcing the Union's rights under the contract, although it was considered, because the judicial processes were too slow. Testimony of the Union officials shows that there was no effort to bring the matter before the National Labor Relations Board, although that course was also open. In fact, the Company's attempt to have the question of supervisory personnel brought before the Board was thwarted by the fact that the Union was not certified before the Board, and would not seek certification. The Union unquestionably had the power to bring the question before the Board had it so desired. The Courts were open. It appears from the testimony that the Company, although guilty of a breach, acted in good faith in seeking proper determination of the issue through its unsucessful attempt to utilize remedies which were created by Congress for this purpose. The Union contends that the economic retaliation through strike was not an abandonment of the contract, but merely an alternative method to enforce arbitration. It cites as its authority for such action Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 76 S. Ct. 349, 100 L.Ed. 309. This is distinguishable from the Mastro case, in that the company there was guilty of interfering with the determination of the bargaining unit, through manipulation of its employees in direct violation of the Labor Act Section 8(d), 29 U.S.C.A. § 158(d), and was also guilty of bad faith through unfair labor practices. This case concerns a breach of a labor contract by a Company not acting in bad faith and attempting to act for the purpose of reconciling the problem through proper channels. While this breach is not condoned, the action of the Company was insufficient to justify the course of action taken by the Union in arbitrarily calling a strike. The position asserted by the Company could not be considered an unfair labor practice.

[2, 3] The Union takes a position inconsistent with the rights it seeks to enforce under the contract. The "no strike" clause is "The chief advantage which an employer can reasonably expect from a collective labor agreement". S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947). In cases where a breach is a strike in violation of a collective bargaining agreement, application of the rule excusing performance by the other party is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the National Labor Relations Act. United Electrical Radio and Machine Workers of America v. National Labor Relations Board, 1955, 96 U.S.App.D.C. 46, 223 F.2d 338. The call to strike is a material breach of the contract, and not justified in the face of a partial breach which could be enforced through proper judicial or administrative action. The Union cannot and does not contend that the strike route was the only course open. Declaratory judgment and specific performance were available. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. Administrative procedures available under the Taft-Hartley Act could have been employed had the Union been disposed to invoke them.

The Union failed to consider the most elementary purposes for having contracts, this purpose being to invoke the Courts' aid to enforce or provide remedies for the breach of rights and duties owing under such contractual relation. The use of "self-help" for enforcement of rights under a contract would negate the benefit of contractual relationships. Where disputes arise as to the meaning of terms in a contract, the parties are prone to interpret ambiguities to suit their own purposes. The Courts must, therefore, define the terms in accordance with established legal guides. This is a judicial function, done with due deliberation. Although such deliberation may at times seem slow, such course cannot be replaced by hasty independent action without suffering the consequences. The Union had it in its power to avert the strike by means of Court order. It chose instead to strike and thus violate the contract.

[4, 5] It is an elementary proposition of equity jurisprudence that one who seeks equity must do equity; that one who comes into equity must come in with clean hands. Equity Courts have historically declined to grant equitable relief to one who seeks to enforce rights under a contract which he, himself, has breached.

The prayer for injunctive relief by the Union is hereby denied, and because of the Company's breach the prayer for injunctive relief in the counterclaim is hereby dismissed with prejudice.

[U.S. District Court, Northern District Florida, Marianna Division, May 28, 1964]

JEAN CAROLYN YOUNGBLOOD ET AL., PLAINTIFFS, *v.* BOARD OF PUBLIC INSTRUCTION OF BAY COUNTY, FLA., ET AL., DEFENDANTS

(Civ. A. No. 572)

School desegregation case. The plaintiffs moved for summary judgment. The District Court, Carswell, Chief Judge, held that plaintiffs wers entitled to summary judgment requiring school authorities to submit a plan for receiving applications and assigning children to public schools without regard to race or color, where school authorities admitted that race was considered in assigning children and no assignments had been made without regard to factors of race or color.

Motion granted.

1. SCHOOLS AND SCHOOL DISTRICTS—154

Schcol authorities would be required to submit a plan for receiving applications and

assigning children to public schools without regard to race or color, where school authorities admitted that race considered in assigning children and no assignments had been made without regard to factors of race or color. F.S.A. § 230.232.

2. FEDERAL CIVIL PROCEDURE—2545

Statistics and analyses which purportedly disclosed that there are inherent racial differences in intelligence, in aptitude, and in rate of intellectual attainment at various ages and which were offered by school authorities to justify use of racial index as one criteria in making assignment of pupils to specific schools were totally irrelevant to issues raised on plaintiff's motion for summary judgment in school desegregation case. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.

3. SCHOOLS AND SCHOOL DISTRICTS—154

There is no constitutional prohibition against assignment of individual students to particular schools on basis of intelligence, rate of achievement, or aptitude upon uniformly administered program so long as race itself is removed as a factor in making individual assignments

4. SCHOOLS AND SCHOOL DISTRICTS—154

Any school plan which embodies a universal testing basis for assignment of pupils may not be administered in a manner which would defeat essential requirement that factors of race are not to be considered.

5. SCHOOLS AND SCHOOL DISTRICTS—155

Federal district court retained jurisdiction in school desegregation case for the entry of such further orders and decrees as would be deemed proper and according to the law.

Charles F. Wilson, Pensacola, Fla., Constance Baker Motley, New York City, for plaintiffs.

Davenport, Johnston, Harris & Urquhart, Logue & Bennett, Panama City, Fla., for defendants.

CARSWELL, Chief Judge.

This cause came on to be heard pursuant to notice on motion of plaintiffs for summary judgments, and counsel for the respective parties were present and heard.

This class action was brought by minor children of the Negro race through their parents seeking, basically, in their own behalf and for others of the Negro race, establishment and enforcement of reasonable procedures by the Board of Public Instruction of Bay County, Florida, for their applications to attend schools under the jurisdiction of the subject Board to be considered and assignments made without regard to race in accordance with Brown v. Board of Education of Topeka et al., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1953), and subsequent cases.

[1] Plaintiffs base this motion for summary judgment upon the defendants' answer to the complaint and upon defendants' answers to certain interrogatories which show that the standards employed by the Board in acting upon applications for admission to schools under jurisdiction for the first time and in assignment to schools by promotion are "set forth in the Florida Pupil Assignment Law, F.S. 230.232, 1963, including the child's race." (Defendants' answer to interrogatories 8a–7, inclusive.)

This Court concludes that this admitted fact, in addition to a plaint showing that there have been no assignments to the subject schools without regard to factors of race or color entitles plaintiffs to summary judgment on that portion of its prayer requiring the Board to submit for the consideration of this Court "a plan whereby the plaintiffs and the members of the class represented by them are hereafter afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race, color, and to have that choice fairly considered by the enrolling authorities." See Gibson v. Board of Public Instruction of Dade County, Florida, 272 F. 2d 763, 767 (5th Cir., 1959). The defendants urge that there is no showing that pupils are assigned to schools *solely* on basis of race or color, that its procedures with reference to applications as assignments merely use race as one indicia. The Board cites as authority for its contention here that this motion for summary judgment should be denied on these grounds the case of Stell et al. v. Savannah-Chatham County Board of Education et al., 220 F. Supp. 667 (S.D. Ga. 1963), currently pending on appeal before the Fifth Circuit. Considerable testimony was received in the Stell case on the contentions asserted by the defendant Board here to the effect that there is a reasonable factual basis for concluding that children receive a better education when they attend schools with pupils of their own race. The defendant Board here is plainly correct in contending that that is the holding of the Stell case, which made such findings of fact and concluded that the class action, similar, if not identical to the one before this Court, should be dismissed accordingly.

This Court concludes that Stell, supra, is not in accord with the requirements of the United States Court of Appeals, Fifth Circuit, opinions in Gibson v. Board of Public Instruction of Hillsborough County, Florida, et al., 5 Cir., 277 F. 2d 370 (1960); Augustus v. Board of Public Instruction of Escambia County, Florida, et al., 5 Cir., 306 F. 2d 862 (1962). Nor is the defendant Board's contention here in accord with the holding of this Court in Augustus v. Board of Public Instruction of Escambia County, Florida, et al., 185 F. Supp. 450 (N.D.Fla., 1960), or in the unreported case of Steele v. Board of Public Instruction of Leon County, Florida, et al., Tallahassee Civil Action No. 854 (1963). See also Brown v. School District Number 20, Charleston, S.C., D.C.S.C., 226 F. Supp. 819, affirmed per curiam by the Fourth Circuit in 332 F. 2d 618.

[2–4] In opposition to plaintiffs' motion for summary judgment, defendants have proffered a considerable volume of statistics, and a number of analyses, tending to establish, basically, that there are inherent racial differences in intelligence, in aptitude, and in rate of intellectual attainment at various ages, all of which, it is urged, justifies the use of a racial index as one criteria in making assignment of pupils to specific schools. Without assessing or weighing this data, this contention simply ignores the plain requirement that individual pupils must be assigned to a school without regard to racial consideration. To be sure, there is no Constitutional prohibition against assignment of individual students to particular schools on a basis of intelligence, rate of achievement, or aptitude upon a uniformly administered program so long as race itself is removed as a factor in making individual assignments. By the same token, any plan which does embody a universal testing basis for assignment may not be administered in a manner which would defeat the essential requirement that factors of race are not to be considered.

This Court concludes, therefore, that the factual data proffered by defendant is totally irrelevant to the issues raised on this plaintiff's motion for summary judgment. The determination of this motion, therefore, rests upon defendants' answer to the complaint, its answers to interrogatories and a plain showing that there have been no assignments to the subject schools without regard to racial factors.

With respect to plaintiffs' prayer for establishment of a plan for receiving applications and assigning children to the public schools under the Board's jurisdiction without regard to race or color, plaintiffs are entitled to summary judgment under the provisions of Rule 56, Federal Rules of Civil Procedure, since there is no genuine issue as to any material fact in this regard and the moving party is entitled to judgment as a matter of law.

Minimal requirements of any plan to be approved by this Court must be at least the equivalent of, although not necessarily identical to, plans previously approved by this Court in Augustus v. Board of Public Instruction of Escambia County, Florida, et al., supra, and Steele v. Board of Public Instruction of Leon County, Florida, et al., supra, and such plan shall be made operative by the beginning of the 1964–1965 school year.

It is, therefore, upon consideration, hereby Ordered:

1. Partial summary judgment is hereby granted plaintiffs as herein provided:

(a) The Board of Public Instruction of Bay County, Florida may submit for the consideration of this Court "a plan whereby the plaintiffs and members of the class represented by them are hereafter afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race or color and to have their choice fairly considered by enrolling authorities," on or before June 30, 1964, with copies thereof being served by mail upon opposing counsel.

(b) Hearing on the proposed plan, if filed, and objections thereto, if any, is hereby set for 11:00 A.M., Eastern Standard Time, Wednesday, July 8, 1964, Federal Courtroom, Tallahassee, Florida.

In the event no proposed plan is filed by the Board on or before June 30, 1964, as provided above, then hearing will be held at 11:00 A.M., Eastern Standard Time, Wednesday, July 8, 1964, Federal Courtroom. Tallahassee, Florida, for consideration of such plan or directive as the Court deems in accordance with law.

[5](c) The Court reserves ruling with reference to all issues raised by the complaint and answer concerning teachers, administrative personnel, school system, etc., in accordance with Augustus v. Board of Public Instruction of Escambia County, Florida, et al., 306 F.2d 862 (5th Cir., 1962), and retains jurisdiction for the entry of such further orders and decrees as deemed proper and according to the law.

[U.S. District Court, Western District Missouri, May 27, 1964]

SPRINGFIELD WHITE CASTLE CO., PLAINTIFF *v.* EUGENE P. FOLEY, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION, DEFENDANT

(No. 14763–2)

Action for declaration that decision by Small Business Administration holding that plaintiff, engaged in business of furnishing custodial and janitorial services, was not a small business within purview of Small Business Act. The District Court, Gibson, Chief Judge, held that susbtantial evidence sustained the finding of the Administrator that the plaintiff was not a small business within purview of the Act.

Determination of administrator affirmed.

1. UNITED STATES—53(6)

If determination of Administrator under Small Business Act is supported by substantial evidence then that decision is final unless erroneous as a matter of law. Small Business Act, § 2(2–18, 5), 15 U.S.C.A. §§ 631–647, 634 and §§ 648–651; Administrative Procedure Act, § 10, 5 U.S.C.A. § 1009.

2. UNITED STATES—53(6)

While court might, if making original determination, reach a result different than that reached by Administrator under Small Business Act that a company was not a small business, if finding of Administrator was supported by substantial evidence the finding must stand as final. Small Business Act, § 2 (2–18, 5), 15 U.S.C.A. §§ 631–647, 634 and §§ 648–651; Administrative Procedure Act, § 10, 5 U.S.C.A. § 1009.

3. UNITED STATES—53(6)

In ascertaining whether finding of Administrator under Small Business Act that a certain company was not a small business was supported by substantial evidence court would not look at evidence of administrator in a vacuum, but would look at all of evidence on both sides. Small Business Act, § 2(2–18, 5), 15 U.S.C.A. §§ 631–647, 634 and §§ 648–651; Administrative Procedure Act, § 10, 5 U.S.C.A. § 1009.

4. UNITED STATES—53(6)

Substantial evidence supported finding of Administrator of Small Business Act that a corporation engaged in business of furnishing custodial and janitorial services was not a small business within purview of Act. Small Business Act, § 2(2–18, 5), 15 U.S.C.A. §§ 631–647, 634 and §§ 648–651; Administrative Procedure Act, § 10, 5 U.S.C.A. § 1009.

Neale, Newman, Bradshaw, Freeman & Neale, Springfield, Mo., for plaintiff.

F. Russell Millin and John L. Kapnistos, Kansas City, Mo., for defendant.

GIBSON, Chief Judge.

This is an action brought by Springfield White Castle Company seeking a declaration that the decision by the Small Business Administration holding * * *.

[U.S. District Court, Northern District of Florida, Tallahassee Division, Aug. 13, 1964]

UNITED STATES OF AMERICA *v.* SIDNEY W. LEVY

(Crim. No. 2519)

Prosecution wherein defendant moved for dismissal of indictment on grounds of double jeopardy. The District Court, Carswell, Chief Judge, held that defendant, who had asserted mental incompetence to stand trial after swearing of jury, had not been put in jeopardy and could later be tried on the same indictment although court of its own motion had called for hearing on issue of competence.

Motion denied.

1. MENTAL HEALTH—432

Persons incompetent in legal sense are not triable before our courts for alleged crimes.

2. CRIMINAL LAW—740

Affirmative defense that defendant was mentally incompetent at time of acts alleged in indictment was for jury alone.

3. CRIMINAL LAW—625

Question of mental competency of defendant at time of trial was for court. 18 U.S.C.A. § 4244.

4. MENTAL HEALTH—432

Purported effort to try a person who is mentally incompetent is void ab initio, the entire process of calling the case for trial, selecting jurors, etc., being a complete nullity.

5. CRIMINAL LAW—172

Defendant who had asserted mental incompetence to stand trial after swearing of jury had not been put in jeopardy and could later be tried on the same indictment although court of its own motion had called for hearing on issue of competence. 18 U.S.C.A. § 4244.

Clinton Ashmore, U.S. Atty., Tallahassee, Fla., for plaintiff.

Julius F. Parker, Tallahassee, Fla., for defendant.

CARSWELL, Chief Judge.

The issue presented to the Court here is whether the indictment against defendant should be dismissed on the asserted grounds of double jeopardy.

The factual situation giving rise to this matter is as follows:

Following the return of the indictment by the grand jury it was suggested by counsel for this defendant that the defendant was mentally incompetent to understand the nature of the proceedings against him or to cooperate with counsel in his defense. Acting upon this suggestion the Court directed that he be examined by competent psychiatrists and a full hearing was held to determine his competency. Upon the testimony there adduced the Court determined that the defendant was, in fact, competent to stand trial, that he understood the nature of the proceedings against him and was able to cooperate with counsel in his own defense. Thus the matter stood until the case was called for trial some months later.

Pursuant to previous notice the case was called for trial and the respective parties announced that they were ready to proceed. In the normal course of events a jury was called from the general venire, individual jurors examined by the Court and counsel, and twelve jurors acceptable to the parties were sworn to try the factual issues presented by the indictment and the defendant's plea of not guilty. Witnesses were called and sworn. Counsel for the Government made a brief opening statement.

All proceeded normally until counsel for the defendant stated in his opening statement that the defendant was at that very moment mentally incompetent. The Court at this point interrupted counsel in his statement and excused the jury to look into the matter further. It was made clear that counsel for defendant was, in fact, making the contention that the defendant was then and there mentally incompetent in the legal sense that he was unable to understand the nature of the proceedings against him or to cooperate with counsel in his defense. Counsel for defendant announced that he was ready to proffer testimony by a competent psychiatrist to this effect. Thereupon the court on its own motion called for a hearing on the issue of the defendant's mental competence under the provisions of 18 U.S.C. § 4244. The United States offered no objection to this procedure, stating that it would only ask that the Court consider the testimony and record of the previous hearing, to which there was no objection by counsel for defendant.

Counsel for defendant now moves for dismissal of the indictment on grounds of double jeopardy contending that when the jury was sworn on February 27, 1964, his client was placed in such jeopardy under the law that he could not now be tried again.

Both defendant and the Government cite the case of Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), as authority for their respective positions. In that case Justice Douglas wrote the majority opinion for a Court divided 5–4, and reversed a conviction obtained at a second trial on grounds of double jeopardy. The factual situation in this case was strikingly different from the one at hand. In Downum a mistrial was declared by the trial judge shortly after the jury had been sworn at the request of Government counsel upon his announcement that one of the chief prosecution witnesses had not been served with a summons and because no other arrangements had been made to assure his presence. After a full review of earlier decisions, including Cornero v. United States, 9 Cir., 48 F.2d 69, the majority in Downum reversed the conviction on a second trial, making it clear that the discretion to discharge the jury before it reached the verdict is to be exercised "only in very extraordinary and striking circumstances" citing these words of Mr. Justice Story in United States v. Coolidge, 25 Fed.Cas. p. 622, No. 14,858, and saying further that the prohibition of the Double Jeopardy Clause is "not against being twice punished; but against being twice put in jeopardy." Justice Douglas notes however that "[e]ach case must turn on its facts."

[1–3] It is clear that the situation here cannot be equated with Downum. In Downum it was the unexcused negligence of the Government attorney in announcing his readiness for trial, when, in fact, he had not subpoenaed a necessary witness that was the basis of the Court's holding of double jeopardy. In the case before this Court the first suggestion that something was awry occurred upon the suggestion of defense counsel when he addressed the jury. It was at this point that the attention of the Court was first called to the fact that the defendant before it was possibly incompetent in a legal sense. Since such persons are not triable before our courts the matter was necessarily clarified before any further steps could be taken. It should be made explicit that the question presented to the Court here was whether or not the defendant, Sidney W. Levy, was at that moment mentally incompetent. Conversely, it should be made clear that the asserted affirmative defense of the defendant, Sidney W. Levy, that he was mentally incompetent at the time of the acts alleged in the indictment was not before the Court. The affirmative defense, of course, was properly a question for the jury and the jury alone to determine. By like token, under the provisions of 18 U.S.C. § 4244 et seq., the question of mental competency of the defendant then and there was one for the Court.

A very careful reading of the cases cited in Downum both by Justice Douglas and in the dissenting opinion of Justice Clark, and the very recent case of United States v. Tateo, 84 S.Ct. 1587, decided June 8, 1964, makes it clear that the factual situation presented to this Court was certainly of such imperious and "urgent necessity" as to require a declaration of mistrial without barring a second prosecution. In Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), the Supreme Court said:

"We are asked to adopt the Cornero rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the Perez decision [United States v. Perez, 9 Wheat. 579, 6 L.Ed. 165 (1824)] to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances, without injury to the defendants or to the public interest."

[4, 5] There can scarcely be any argument that there was an urgent and imperious necessity for the Court to declare a mistrial where the defendant before the Court was determined to be mentally incompetent. Any purported effort to try such a person is void *ab initio*, the entire process of calling the case for trial, selecting jurors, etc., being a complete nullity. This is a far cry from the circumstances of failing to subpoena necessary witnesses without excuse.

Accordingly, defendant's motion to dismiss the indictment against him is denied and the case is set for trial at the next ensuing term.

[U.S. District Court, Eastern District of Pennsylvania, Aug. 17, 1964]

UNITED STATES OF AMERICA, *v.* ALUMINUM CO. OF AMERICA, ANACONDA WIRE AND CABLE CO., GENERAL CABLE CORP., KAISER ALUMINUM AND CHEMICAL SALES, INC., OLIN-MATHIESON CHEMICAL CORP., REYNOLDS METALS CO.

(Crim. No. 21243)

Defendants in criminal antitrust case made a motion for the discovery and inspection of all books, papers, documents, or objects which were obtained from a competitor of the defendants by the government by seizure or process. The District Court, Joseph S. Lord, III, *J.*, held that defendants were not entitled to discovery and inspection of all

documents but only those documents which the Government intended to use at the trial.

Motion granted in part.

1. CRIMINAL LAW—627½

Federal Rule of Criminal Procedure dealing with discovery and inspection is discretionary. Fed. Rules Crim. Proc. rule 16, 18 U.S.C.A.

2. CRIMINAL LAW—627½

On motion by defendant for discovery and inspection under Federal Rule of Criminal Procedure, there is no true privilege against discovery of confidential business information. Fed. Rules Crim. Proc. rule 16, 18 U.S.C.A.

3. MONOPOLIES—29

Gist of offense in criminal antitrust case is conspiracy, and proof of its success is unnecessary for conviction

4. CRIMINAL LAW—627½

Defendants in criminal antitrust case were not entitled to discovery and inspection of all competitors' books, papers, documents, or objects, obtained by government by seizure or process, and discovery and inspection would be limited to documents which government intended to use at trial. Fed. Rules Crim. Proc. rule 16, 18 U.S.C.A.

Donald G Balthis, John E. Sarbaugh, John J. Hughes, Richard M. Walker and Stewart J. Miller, Dept. of Justice, Antitrust Div., Philadelphia, Pa., for plaintiff.

Philip H. Strubing, Philadelphia, Pa., for Aluminum Co. of America.

Joseph W. Swain, Jr., Philadelphia, Pa., for Anaconda Wire & Cable Co.

H. Francis DeLone, Philadelphia, Pa., for General Cable Corp.

Edwin P. Rome, Philadelphia, Pa., for Kaiser Aluminum & Chemical Sales, Inc.

George P. Williams, III, Philadelphia, Pa., for Olin-Mathieson Chemical Corp.

Thomas D. McBride, Philadelphia, Pa., for Reynolds Metals Co.

[U.S. District Court, Northern Distrct of Florida, Tallahassee Division, Nov. 18, 1963]

PATRICIA STEPHENS DUE AND RUEBEN RUSHEN KENON, PLAINTIFFS, *v.* FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY, BOARD OF CONTROL FOR THE STATE OF FLORIDA, AND DR. GEORGE W. GORE, JR., PRESIDENT OF FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY, DEFENDANTS

(No. 947)

Proceeding on application for preliminary and permanent injunction requiring reinstatement of suspended students as students of tax-supported university. The District Court, Carswell, Chief Judge, held that contempt convictions of students constituted "misconduct" within student handbook provision that disciplinary action would be taken against students for misconduct, including conviction by university officials or city, county, or federal police for violation of criminal and/or civil law, and that disciplinary committee of university had authority to suspend students for their circuit court convictions for contempt.

Application denied.

1. COURTS—282.2(3)

In view of allegations to effect that suspended students seeking preliminary and permanent injunction requiring their reinstatement as students of state supported university had had no notice of hearing prior to their suspension and had no opportunity to be heard, federal question was presented for decision by federal District Court. U.S.C.A. Const. Amend. 14.

2. COURTS—298(3)

Not every allegation of denial of some constitutional right alone and automatically impels exercise of United States District Court jurisdiction without reference to some framework of established remedy and sound procedure.

3. ADMINISTRATIVE LAW AND PROCEDURE—229

Where tribunals of review are readily available and standards and procedures clearly defined, some recourse to them must be made or at least attempted before courts abort that normal process.

4. CONSTITUTIONAL LAW—318

Student expelled from tax-supported institution has been denied due process if he has not received notice of charges against him or has not had opportunity for hearing. U.S.C.A.Const. Amend. 14.

5. CONSTITUTIONAL LAW—318

Students who were telephoned and asked to come to campus and contact chairman of state supported university disciplinary committee conducting proceedings at normal hours in easily accessible room and who were read text of letter, which they had denied receiving and which advised them of charge, and were permitted to respond to the charge until they had no more to say had not been denied due process. U.S.C.A.Const. Amend. 14.

6. COLLEGES AND UNIVERSITIES—9

Contempt convictions of students of tax-supported university constituted "misconduct" within student handbook provision that disciplinary action would be taken against students for misconduct, including conviction by university officials or city, county, or federal police for violation of criminal and/or civil law.

"See publication Words and Phrases for other judicial constructions and definitions."

7. COLLEGES AND UNIVERSITIES—9

Disciplinary committee of tax-supported university had authority to suspend students for their circuit court convictions for contempt.

8. CONSTITUTIONAL LAW—318

Stenographic or mechanical recording of proceedings before university disciplinary committee is not necessary to due process. U.S.C.A.Const. Amend. 14.

Herbert Heiken, Tobias Simon, Howard Dixon and S. George Albion, Miami, Fla., for plaintiffs.

Ralph E. Odum, Asst. Atty. Gen., and Joseph C. Jacobs, Asst. Atty. Gen., State of Florida, Tallahassee, Fla., for defendants.

CARSWELL, Chief Judge.

STATEMENT

Complaint was filed by plaintiffs on October 24, 1963 alleging that they were each indefinitely suspended from Florida Agricultural and Mechanical University, a State supported institution of higher learning by order dated October 19, 1963. They seek in this proceeding a preliminary and permanent injunction requiring their reinstatement as students on the grounds that they have been denied the guarantees of due process established by the 14th Amendment of the Constitution.

Hearing was held November 1, 1963 at which time counsel for each of the named defendants appeared, waived service and filed motion to dismiss on the grounds: (1) There is no substantial Federal question; (2) The complaint fails to allege that plaintiffs have exhausted their administrative remedies provided by Florida Statutes; and (3) "The complaint shows on its face that defendants were convicted after trial by the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, of contempt of court.

Following rather extensive preliminary consideration of the issues of fact and law thus presented, counsel for plaintiffs and defendants stipulated with reference to certain basic facts, all disclosed by the record, and testimony was taken of the two plaintiffs at their own behest and of two members of the University disciplinary committee who were called by the defendants, most of which relates to the events of October 17, 1963 and which culminated in the indefinite suspension of the plaintiffs as students that day. Plaintiffs' request for time to file memorandum brief within four days was granted with defendants to respond within three days. After preparation of the transcript of this hearing and careful review thereof and consideration of the briefs submitted, the following Findings of Fact and Conclusions of Law are entered pursuant to the Federal Rules of Civil Procedure. The record is virtually devoid of disputed fact, but since the disposition of this case here rests on the facts themselves they are set forth in full detail.

FINDINGS OF FACT

1. Plaintiffs were students at Florida Agricultural and Mechanical University, a State supported institution of higher learning located in Leon County, Florida.

2. On October 3, 1963 in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida plaintiffs Patricia Stephens Due and Reubin Rushen Kenon were adjudged guilty of contempt of that court and each was sentenced to pay a fine of One Thousand Dollars, or, in default thereof, to be confined in jail for a term of six months.

The full text of this order is attached to the complaint here.

Each plaintiff paid the fine under protest and filed notice of appeal to the appropriate reviewing court.

With reference to this order, and for purposes of this litigation before this Court, counsel for plaintiffs has stipulated as follows:

"I will stipulate that they were guilty of criminal contempt and were so held." (TR.)

3. On the morning of October 17, 1963 the Acting Dean of Students telephoned each of the plaintiffs individually, asked if they had received a letter from the University calling for their appearance before the Disciplinary Committee. Each replied they had not received such letter. The Acting Dean then advised each of them to return to the campus and contact Mr. J. Luther Thomas, Chairman of the University Disciplinary Committee.

4. That same day plaintiffs returned from their respective pursuits, Kenon from Marianna, Florida, and Mrs. Due from Jacksonville, and presented themselves, separately, to Mr. Thomas, Chairman of the Disciplinary Committee, in the faculty lounge on the first floor of Tucker Hall, the main classroom building on the campus, sometime between three and five o'clock in the afternoon.

5. The full Disciplinary Committee was present and in the process of considering matters before it with its Chairman, J. Luther Thomas, presiding. Committee members in attendance were:

A. A. Abraham
Mrs. L. B. Clarke
G. W. Conoly
T. A. Jackson
T. M. Jenkins
A. L. Kidd

The Student Handbook states that the Disciplinary Committee shall consist of five members, although by practice established for at least six or seven years this committee has actually consisted of seven members appointed by the University President.

All seven of the members of the committee and its Chairman had been duly designated for such responsibility by the President of the University sometime prior to these events. There was no change in the composition of this committee at any time shortly prior to the pertinent events.

6. Some thirty-seven students appeared before the Disciplinary Committee that day including these two plaintiffs. All the affairs of the committee were conducted in the faculty lounge of Tucker Hall, the main classroom building of the University. Mrs. Due and Kenon appeared separately sometime between three and five o'clock in the afternoon, Mrs. Due for approximately fifteen or twenty minutes and Kenon for a somewhat

longer period of time. Kenon testified that the two doors leading to the hall were locked, while Chairman Thomas and T. M. Jenkins, Dean of the School of Law and also a member of the Disciplinary Committee, contradicted this, each noting that there was intermittent entering and leaving of the room throughout the proceedings with no evidence or suggestion of a locked condition.

The evidence shows that all the proceedings with reference to these plaintiffs were conducted at normal hours, in an easily accessible room. Although the point has not been belabored, the plaintiffs' development of testimony about the general physical arrangements of the hearing room requires a specific finding in this regard. That finding is here made: There is no evidence indicating unusual or oppressive inconvenience to plaintiffs or anyone else in the physical appointments and general atmosphere of the hearing.

7. The hearings followed substantially an identical course. Kenon appeared before the committee first and his hearing lasted approximately forty-five minutes. Mrs. Due's hearing lasted approximately fifteen or twenty minutes. Upon entering the lounge each plaintiff wae asked if he or she had received the letter from the Disciplinary Committee referred to above. When each denied having received the letter, the Chairman of the Committee then read the text of the letter to them advising them, individually, of the charge which had been made against them by the Acting Dean of Students, The substance of this charge was that each had been convicted on October 3, 1963 in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida of contempt of that Court.

This conviction was the stated and sole basis for the charge that these plaintiffs had violated item 6 of the provisions of the University's established rules and regulations as set forth in the Student Handbook which reads:

"Disciplinary action will be taken against students for: * * *.

"6. Misconduct while on or off the campus. This includes students who may be convicted by University officials, or city, county, or Federal police for violation of any of the criminal and/or civil laws."

Following the reading of the charge the plaintiffs were interrogated about the charge of contempt conviction and matters leading to conviction. Each was given opportunity to respond, and each, in fact, did respond.

The fact of conviction for contempt of court was not denied, but each plaintiff stated to the committee their respective views and attitudes about conviction, and gave their version of the events which led to their conviction. Essentially they stated their position before the committee to be that the contempt conviction was the result of the Circuit Court's erroneous findings that they were leaders of student demonstrations and that they had violated the Court's earlier restraining order. They insisted they were not leaders but merely part of a group, and, therefore, they should not have been singled out, in effect, for more severe punishment than was accorded others also charged and convicted in like circumstances.

The secretary of the disciplinary committee testified that "* * * Mr. Kenon talked to us fifteen or twenty minutes about his various ideas and his different abilities and things that he might have done here and there in connection with demonstrations."

There was no indication expressed by either plaintiff that they did not understand the nature of the charges against them, nor was there any request by plaintiffs or comment by the committee with respect to calling witnesses or securing counsel. There was no recording of the proceedings, either by stenographer or mechanical device.

The hearings of Kenon and Mrs. Due were closed in the same manner as all others then conducted. The Secretary, who is also Dean of the School of Law, described it thus: "He (referring to Kenon) was asked if he had any statement, summarizing statements, or anything else that he might like to say to the committee, and when he had completed his final statement he was told he might be excused."

The committee voted to suspend Kenon and Mrs. Due on the charge as stated. On October 19, 1963 the following letter was sent to each of the plaintiffs:

"You are hereby advised that pursuant to the regulations in the Student Handbook, relating to students 'convicted by * * * city, county, or Federal police for violation of any of the criminal and/or civil law,' you are suspended indefinitely from this institution."

Sincerely yours,

A. B. ABRAHAM,
(MRS.) L. B. CLARKE,
G. W. CONOLY,
T. A. JACKSON,
T. M. JENKINS,
A. L. KIDD,
/S/ J. LUTHER THOMAS,
Chairman, University Discipline Committee.

8. The rules and regulations of the Board of Control of the State of Florida, the State's governing board of its educational institutions including Florida Agricultural and Mechanical University, include the provision:

"4. *Appeals by Students—*

"a. The constitutions of the various institutions shall provide for the procedure of appeal by students within the respective institutions on all matters the student feels he has been aggrieved. If after a hearing before institution officials, a student believes a decision is unfair, he may appeal to the Board.

"b. The appeal to the Board shall be in writing and shall be submitted to the Executive Secretary with a copy to the President of the institution concerned within thirty days after the decision is rendered by the institution, and shall cite all reasons for dissatisfaction with the previous decisions. The Board shall investigate the matter thoroughly and make its decision thereon which shall be final and binding for all purposes."

9. Both plaintiffs knew on or before November 1, 1963 of their right to appeal the decision of the disciplinary committee to the Board of Control.

10. The following telegram was sent sometime prior to 10:36 P.M., Octoher 17, but the undisputed testimony of the Disciplinary Committee is to the effect that it has not received the telegram, and from the legend on its face it could not have been received by the addressee President of the University until many hours after the conclusion of the subject hearing.

"TALLAHASSEE, FLA.,
"October 17, 1969

"DR. GORE,
"President,
"Florida A. and M. University:

"Notice is hereby served upon you, of our demand on behalf of Patricia Due, of all her rights under the 14th Amendment to the United States Consitution (sic), in the Florida A and M University disciplinerary (sic) proceedings now pending against her including without limitation an open and public hearing on specific charges made known in advance with the right to council (sic), the ability to produce witnesses on her behalf, to be confronted with the witnesses against her and the right to cross examine same, a substantial adherence to rules of evidence, and a determination by a fair and impartial tribunal goverened (sic) by standards promulgated in advance. Failure to provide the foregoing constitutes a denial of due process of law and an affront to the American ideal of fair play which should not be forthcoming from you.

"HERBERT HEIKEN and TOBIAS SIMON,
"Attorneys at Law."

CONCLUSION OF LAW

Both plaintiffs and defendants cite the case of Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961) as authority in point on the determinative issues of law presented by these facts, and this Court concludes that Dixon is, indeed, the most current, explicit and applicable statement of the law governing the disposition of this case. Judge Rives, speaking for the majority there said succinctly: "The question presented by the pleadings and evidence, and decisive of this appeal, is whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct. We answer that question in the affirmative."

[1] This is language so unequivocal that it can scarcely be denied that there is inherently a substantial Federal question involving the due process clause of the 14th Amendment to the Constitution of the United States. Defendants' motion to dismiss on the ground that there is no Federal question here is untenable in view of the allegations of the complaint to the effect that there was no notice of hearing and no opportunity to be heard.

[2, 3] This is not to say, however, that every allegation of denial of some Constitutional right alone and automatically impels the exercise of United States District Court jurisdiction without reference to some framework of established remedy and sound procedure. Confusion of jurisdiction with the proper exercise of jurisdiction is not novel in the law. Where tribunals of review are readily available, and standards and procedures clearly defined, it has long been held that some recourse to them must be made, or at least attempted, before the Courts abort that normal process.

From concepts of orderliness, itself a vital requirement of fairness and due process, our Courts do not, and should not, lightly dismember this structure of government by short-circuiting fixed responsibility at initial or intermediate stages.

Were all the practical difficulties of step-by-step judicial supervision and review soluble, there is sound reason to recognize and encourage those charged with immediate responsibility in their special field to police their activities with a measure of confidence that their judgment has at least some immediate, though latently reversible authority.

All asserted wrongs may be tested, and we pray, ultimately righted in the Courtrooms of our country after full-scale judicial review, but the sheer diversity and complicity of our society, and the needs for its growth, has produced through necessity a multitude of supervisory and reviewing tribunals in virtually every area of our national life. Some operate under specific legislative authority, state or Federal, with precisely defined powers and procedures. A list of such quasi-judicial bodies would include the National Labor Relations Board, state boards of barbering and cosmeticians, Fish and Game Commissions, regulatory agencies in the broad fields of commerce, medicine, public utilities, and countless others.

No matter how ancient their origin, no matter how specific their power or from what generative source, none of these are islands of autocracy. The immense power to revoke the barber his license to carry on his livelihood, to fix fares, to compel reinstatement of an employee, is subject always to Constitutional requirements of due process and challengeable in an appropriate Court.

Plaintiffs here argue correctly that our appropriate Courts do, and should step in promptly at any point upon certain condi-

tions, among them showing of immediate and irreparable harm to one party without a commensurate jeopardy to the other, or where the action taken is on its very face invalid or taken by a body invalidly constituted. This is equated with violation of due process which demands an immediate staying, a quick remedy.

[4] Applied to the educational field, the Dixon case, as already noted, has made it clear that a student expelled from a tax-supported institution has been denied due process if he has not received notice of the charges against him or if he has had some opportunity for hearing.

Judge Rives went further lest this bare holding on the facts presented in Dixon be misconstrued. His opinion at pages 158–159 for the majority in that case states the minimum criteria of due process governing disciplinary bodies of tax-supported institutions:

"For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witness. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

It is against this criteria that facts of the plaintiffs' cases here fail.

[5] The facts here simply do not support plaintiffs in their premise. The disciplinary committee was duly established and organized by standard, well-defined procedure. It functioned in a normal manner. Its action is not invalid on its face. Nor can it be said that the order of conviction of contempt of Court, upon which the suspension was predicated, is invalid on its face. What has been said earlier about the wisdom of giving some imprimatur of at least immediate authority to those concerned with disciplinary matters at educational institutions applies especially to orders of duly constituted Courts.

[6, 7] Plaintiffs' argument that their conviction for contempt in the Circuit Court cannot be equated with "misconduct" as stated in the Student Handbook is without merit. At the very least such conviction is a violation of law, civil or criminal. The basis of the suspension on this clearly-stated charge is supported fully by the evidence. The disciplinary committee was not bound to suspend, but it plainly had the authority to do so after notice and an opportunity to be heard. Considerations leading the decision of the disciplinary committee obviously involve a whole range of factors affecting the institution, respect for rules and regulations as well as the needs of the plaintiffs themselves.

Its judgment in its field should not be lightly disturbed, especially in view of a quick and ready method of administrative review.

There was notice to each of these plaintiffs, the charge was made explicit, and each was afforded full opportunity to be heard, and, in fact, was heard to the point where each said he had nothing more to say.

[8] A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings.

Procedures are subject to refinement and improvement in the never-ending effort to assure, not only fairness, but every semblance of fairness. More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become so ritualistic, dogmatic, and impractical as to itself be a denial of due process. The touchstones in this area are fairness and reasonableness.

These hearings were not precipitously or secretively convened "Kangaroo" courts stripping one of a fair and reasonable chance to give account of his version of the case.

There are no magic words of incantation which will guarantee this, but, by the same token, the difficulty cannot be the excuse for not making every effort to see that fairness is accomplished.

This is the standard by which this cast must be decided. We are not here testing the legality of students' activities prompted by whatever view of the status of the law with respect to use of theater facilities, which was the background of the Circuit Court's order of contempt conviction. We are not here testing the legal sufficiency of that conviction. On its face it is unquestionably valid, and the action of the Disciplinary Committee bears a like mark of validity.

Nothing in this opinion is intended to be construed as tending to control or direct the actions of the Board of Control upon any appropriate review by that body. Its authority to affirm the suspension or to reinstate both or either of these students is governed by its Rules and Regulations and by the requirements of due process.

Plaintiffs have made reference to a case entitled Woods v. Wright filed in the United States District Court for the Northern District of Alabama (Southern Division) which neither counsel nor court have found reported. Accepting, however, plaintiffs' statement on brief about this case that "there appears to be good law * * * that where a person stands to be irreparably harmed by action taken by an administrative body which is invalid on its face," such is not the case before this Court.

Appropriate order is entered in accordance herewith this date.

[U.S. District Court, Southern District of Florida, July 24, 1964]

JAMES F. JONES AND BAKER-ALDOR JONES CORPORATION, PLAINTIFFS, *v.* TUCKER ALUMINUM PRODUCTS OF MIAMI, INC., AND MORTON TUCKER, DEFENDANTS

(Civ. No. 63–471)

Suit for infringement of claims 1, 2 and 3 of patent No. 3,030,671 for awning-type windows and locking means therefor. The District Court, Choate, J., held that the claims were invalid.

Judgement for defendants.

[U.S. District Court, Northern District of Florida, Tallahassee Division, May 21, 1965]

WILLIE EUGENE PINCKNEY, IRA SIMMONS AND ANTHONY IRVING, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS, PLAINTIFFS, *v.* I. R. MELOY AS OWNER, OPERATOR OR MANAGER OF BILL CLARK'S BARBER SHOP, DEFENDANT

(Civ. A. No. 1024)

Negroes brought action under Civil Rights Act against barber who had refused them service. The Negroes made a motion to strike those portions of the barber's answer which asserted that he was not subject to the provisions of the Civil Rights Act. The District Court, Carswell, Chief Judge, held that barber, who was lessee of space in basement of hotel which was place of public accommodation within meaning of Civil Rights Act, was covered by Civil Rights Act and was required to cut hair of Negroes, though about 95% of his customers were local residents.

Motion granted.

1. CIVIL RIGHTS—4

Essential purpose of Civil Rights Act is to remove discrimination in places of public accommodation with respect to all services rendered within its physical confines by those holding themselves out as serving patrons. Civil Rights Act of 1964, §§ 201 et seq., 201(a), (b) (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000a(a), (b) (1, 4).

2. CIVIL RIGHTS—4

Relative percentages of local cutomers as compared to transient customers at place of public accommodation may not be used as criteria to determine coverage under provisions of Civil Rights Act that all persons shall be entitled to enjoyment of facilities of place of public accommodation without discrimination or segregation on ground of race, color, religion, or national origin. Civil Rights Act of 1964, §§ 201 et seq., 201(a), (b) (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000a(a), (b), (1, 4).

3. CIVIL RIGHTS—4

Barber, who was lessee of space in basement of hotel which was place of public accommodation within meaning of Civil Rights Act, was covered by Civil Rights Act and was required to cut hair of Negroes, though about 95% of his customers were local residents. Civil Rights Act of 1964, §§ 201 et seq., 201(a), (b) (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000a(a), (b) (1, 4); F.S.A. §§ 476.01, 476.05–476.07.

4. CIVIL RIGHTS—2

Civil Rights Act was not unconstitutional as applied to barber who leased space in basement of hotel which was place of public accommodation within meaning of Civil Rights Act. Civil Rights Act of 1964, §§ 201 et seq., 201(a), (b) (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000a(a), (b) (1, 4); F.S.A. §§ 476.01, 476.05–476.07

5. CIVIL RIGHTS—13

Defense asserted by barber, who leased space in basement of hotel, which was place of public accommodation within meaning of Civil Rights Act, that he was not qualified by training or experience to cut hair of Negroes because their hair was different in texture and growth pattern from that of his regular white customers was not responsive to issues raised by complaint of Negroes, who brought action under the Civil Rights Act, and could not be made basis of affirmative defense. Civil Rights Act of 1964, §§ 201 et seq., 201(a), (b) (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000a(a), (b) (1, 4); F.S.A. §§ 476.01, 476.05–476.07.

6. CIVIL RIGHTS—4

Civil Rights Act does not purport to cover all barber shops, but it does cover those barber shops which are located within physical premises of place of public accommodation, such as hotel or motel, and which are held out as serving patrons of hotel or motel. Civil Rights Act of 1964, §§ 201 et seq., 201 (a), (b), (1, 4), 42 U.S.C.A. §§ 2000a et seq., 2000(a), (b) (1, 4).

Tobias Simon, Miami, Fla., for plaintiffs.

Weldon G. Starry, of Starry & Thompson, Tallahassee, Fla., for defendant.

Carswell, Chief Judge.

Plaintiffs, members of the negro race, brought this action under Title II of the Civil Rights Act of 1964 (Public Law 88–352) against defendant barber who has refused them service. The issue before the Court is raised by motion of plaintiffs to strike those portions of the answer which assert that defendant is not subject to the provisions of the Act on grounds of: (1) professional exemption, under the Statute itself, and (2) nonqualification of defendant to perform the services requested.

Arguments have been heard and briefs have been filed and considered.

With respect to the professional exemption defense the defendant contends first, that he, as a "professional," is exempt from the operation of the Civil Rights Act, and secondly, that, in the absence of statutory exemption, the Civil Rights Act of 1964 is unconstitutional as applied to him because he has a constitutional right to select his customers. The Court concludes that the Civil Rights Act of 1964, as applied to this defendant, is constitutional under the rulings of the Supreme Court of the United States, and, further, that the Civil Rights Act of 1964 does not afford him statutory exemption.

Counsel for the respective parties have stipulated to the essential facts as follows:

The Duval Hotel is located in the City of Tallahassee, County of Leon, State of Florida, is a place of public accommodation as defined by the Civil Rights Act of 1964, to-wit: a hotel and is covered by the Civil Rights Act.

That the defendant, I. R. Meloy, is the lessee of certain space in the basement of the Duval Hotel under a written lease that does not grant a concession to defendant and does not specify or restrict the use to which the defendant can put the leased space, as shown by Exhibit 1 to defendant's answer. That the defendant owns certain barbering equipment located in said leased space, namely: 4 barber chairs. That defendant uses one barber chair to perform his services upon his clients or customers. That each of the other three barber chairs is leased to a licensed registered barber under a written lease which said sub-lessee uses to perform his personal services on his clients or customers, using his own barber tools, as shown by Exhibit 2 to defendant's answer. That said leases were executed several years before the enactment of the Civil Rights Act. That said sub-leases have been approved by the Bureau of Internal Revenue as to withholding taxes, by the Social Security Administration as to social security taxes, and by the Industrial Commission as to Workman's Compensation and Unemployment Compensation. That each of said sublessees are independent, self-employed individuals and have been so recognized by the above named governmental agencies. The defendant has no control over said sublessees, cannot tell them when to come to work, when to quit, or on whom to perform their services, and the said leased space is reached either by elevator or stairs from the street level of the hotel to the basement, or by an outside entrance at the basement level. There are signs in the hotel elevators listing the various services located in the hotel, including defendant's

The defendant is a master barber and has been a barber for more than forty (40) years, has been a registered licensed barber in Tallahassee, Florida, ever since the enactment of the first barber commission law in 1931. He has been a member of the State Barber Board under two governors. He does not solicit interstate travellers or guests of the Duval Hotel as his clients, although he does not refuse to render services to them, and 95% of his clients are local Tallahassee residents. He cannot delegate any of his services to anyone not a licensed registered barber under the laws of Florida.

All of the Florida Statutes and regulations of administrative boards pertaining to barbering and the services rendered by barbers may be utilized by the court or counsel for any purpose.

That on or about August 5, 1964 the plaintiffs, being members of the negro race, requested the defendant to cut their hair which the defendant refused to do on the ground he was an independent professional individual, to-wit: a registered barber, and thus was not subject to the Civil Rights Act of 1964, and that he had the right to refuse his services to anyone he desired, and further that he was not qualified by training or experience to cut hair of plaintiffs because their hair was different in texture and growth pattern from that of his regular customers. Plaintiffs were neither interstate travellers nor registered at the Duval Hotel. It is further stipulated that defendant would have refused to render other barbering services to plaintiffs, had they requested them, on the same basis as stated above.

Defendant maintains that barbering is a profession under the laws of the State of Florida; that he is a professional person, to-wit: a registered barber who merely leases space in the Duval Hotel and as such has the right to refuse his personal services to anyone he chooses or the right to select his clients or customers.

Plaintiffs maintain that because defendant leases space in the Duval Hotel, and for this reason only, he is required by the Civil Rights Act of 1964 to perform his personal services as a registered barber upon every person who requests his services, and that defendant's claim of inability to cut plaintiff's hair is not a legal or sufficient defense and have moved to strike said claim.

Neither the State of Florida, Leon County, or the City of Tallahassee, have any law, statute, or ordinance prohibiting a registered barber from performing his services on any person or establishing or authorizing a state or local authority to grant or seek the relief prayed for in the Complaint.

It is further stipulated and agreed that in order to practice barbering in the State of Florida, it is necessary that a person meet the requirements of Section 476.05, Florida Statutes [F.S.A.], have the course of study required by Section 476.07, Florida Statutes, pass an examination as prescribed by Section 476.06, Florida Statutes, and be licensed as a registered barber as required by Section 476.01, Florida Statutes.

The legislative history of this Act is one of the longest in the annals of our national history, and leaves little doubt that the language of Title II ultimately adopted by the Congress applies to this defendant under the stipulated facts.

Section 201(a) of Title II states the broad policy as follows:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

The parties have stipulated here that the Duval Hotel is a place of public accommodation as defined by the Civil Rights Act and that it is covered by the Civil Rights Act. (Sec. 201(b) (1) of Title II).

Section 201(b)(4) provides coverage of "any establishment * * * which is physically located within the premises of any establishment otherwise covered by this subsection * * * and * * * which holds itself out as serving patrons of such covered establishment. * * *"

Prior to the adoption of this section it was noted in U.S. Code Cong. and Ad. News (1964), p. 2358:

"The term 'integral part' is defined * * * as meaning physically located on the premises of an establishment subject to subsection 3(a) [substantially similar to 201 of the final bill] * * *. Thus, in all instances, to be an integral part, the establishment would have to be physically located on the premises of an included establishment or located contiguous to such an establishment. A hotel barbershop or beauty parlor would be an integral part of the hotel, even though operated by some independent person or entity."

The ultimate language of Section 201(b)(4) reading "physically located within" is, if anything, more specific than the phrase "integral part." In a discussion of this matter on the floor of the House on January 31, 1964, Representative Celler, Chairman of the House Judiciary Committee, stated:

"* * * barber shops, beauty parlors and other establishments are not covered unless they are contained within a hotel or are intended for the use of the patrons of the hotel, if the hotel is covered." CCH Civil Rights Act of 1964, p. 25.

[1–3] The essential purpose of the Act as reflected by both its language and history was to remove discrimination in places of public accommodation such as the Duval Hotel and with respect to all of the services rendered and operated within its physical confines which hold themselves out as serving patrons of the hotel. Defendant asserts, and it is not disputed, that about 95% of his customers are local residents, leaving the clear inference that a relatively small percentage of his customers are transient guests of the hotel itself. From a reading of the Act it is clear that relative percentages of local as compared to transient customers may not be used as criteria to determine coverage. The location of the barber shop within the physical premises of the hotel, a place of public accommodation, and its holding itself out to patrons of the hotel being within a place of public accommodation places this defendant under the coverage of the Act.

[4] Defendant's claim that the Act was unconstitutional as applied to him has been answered and denied by the Supreme Court of the United States. The same rationale applicable to restaurants, hotels and motels was applied in Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964); and with respect to restaurants in Katzenbach v. McClung, et al., 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed. 2d 290 (1964).

[5] Finally, the defense asserted by defendant that he is not qualified to perform the requested services is not responsive to the issues raised by the complaint and may not be made the basis of an affirmative defense. The degree of skill or proficiency in any occupation or profession which is covered by the Act is irrelevant in this litigation. By the rationale of the legislative history leading to the Act, the Act itself, and the rulings of the Supreme Court of the United States with respect to this Act it is equally clear that only those establishments which are found to be places of public accommodation as specifically set forth in the Act, such as the Duval Hotel admittedly is, are subject to its provisions.

[6] The Civil Rights Act of 1964 does not purport to cover all barber shops, but it does cover those barber shops which (1) are located within the physical premises of a place of public accommodation such as a

hotel or motel and (2) hold themselves out to serve patrons of the hotel or motel. These essential facts are undisputed, and the motion to strike subject portions of defendant's answer is granted by order of this same date.

[U.S. District Court, Northern District of Florida, Tallahassee Division, May 15, 1969]

LAMAR BELL, PETITIONER, *v.* LOUIE L. WAINWRIGHT, DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA, RESPONDENT

(Civ. A. No. 1434)

Habeas corpus proceeding. The District Court, Carswell, Chief Judge, held that refusal to allow court reporter to report closing argument of a counsel during indigent's trial was a violation of due process and equal protection clauses of United States Constitution.

Order accordingly.

1. CONSTITUTIONAL LAW—256, 268(2)

Refusal to allow court reporter to report closing argument of counsel during indigent's trial was a violation of due process and equal protection clauses of United States Constitution. U.S.C.A. Const. Amend. 14.

2. HABEAS CORPUS—45.3(7)

Florida rule allowing preparation of a paraphrased stipulation as to contents of record on appeal did not offer an equivalent report of events at trial, and availability of remedy afforded by rule did not prevent habeas corpus attacking trial court's refusal to allow court reporter to report closing argument of counsel during indigent's trial. 32 F.S.A. Florida Appellate Rules, rule 6.7, subd. f.

Lamar Bell, in pro. per.

Earl Faircloth, Atty. Gen. and James Robert Yon, Asst. Atty. Gen., State of Florida, Tallahassee, Fla., for respondent.

ORDER

Carswell, Chief Judge.

This case comes before the Court on petition filed by a state prisoner for writ of habeas corpus and under response to rule to show cause filed by the Attorney General of the State of Florida. The petition and the response set forth fully the facts upon which the petitioner bases his allegations and further hearing is not necessary.

[1] At issue is whether it was a denial of due process and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution for the trial court to refuse to allow the court reporter to report the closing argument of counsel during an indigent's trial. This Court is of the view that petitioner's allegations are meritorious and that he is entitled to relief.

The issues raised by the petition and the response were presented to the First District Court of Appeal of Florida which affirmed the trial court's ruling. Bell v. State, 208 So.2d 474 (1st Dist.Ct.App. 1968). Petitioner then sought and was denied certiorari in the Supreme Court of the United States, Bell v. Florida 393 U.S. 928, 89 S.Ct. 263, 21 L.Ed.2d 264 (1968).

The petitioner, Lamar Bell, was arrested, tried and convicted in the Circuit Court of Leon County, Florida, for the offense of robbery. The petitioner was adjudged insolvent and the public defender was appointed to represent him. At the conclusion of the evidence, and in the absence of the jury, the public defender orally moved the court to instruct the court reporter to report the closing argument of counsel. In denying this motion the trial court stated: "* * * in the absence of any showing of necessity or good reason, the motion to report closing arguments is denied. If anything comes up during the closing arguments that counsel feels should be made a matter of record, the court will attend to it at that time."

Thereafter certain remarks of the prosecutor were objected to by the public defender. The objections were overruled but were not recorded,

Petitioner alleges that the trial court's refusal to grant his motion was a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution as interpreted by the Supreme Court of the United States in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 691, 65 A.L.R.2d 1055 (1955), resulting in a denial of effective appellate review. The respondent urges this Court that petitioner has failed to show or allege that he was prejudiced by the trial court's ruling in that petitioner has failed to adequately preserve the record of his specific objections and the trial court's ruling. Respondent also urges that petitioner failed to avail himself of the remedy afforded by Rule 6.7(f), Florida Appellate Rules, 32 F.S.A.

In Griffin v. Illinois, supra, the Supreme Court held that an indigent convicted of a crime in a state which affords appellate review as a matter of right is entitled to be furnished at state expense a transcript of the trial proceedings and denial of such a transcript of the record is a deprivation of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

The rule adopted by the Supreme Court in *Griffin* was subsequently followed by the decisions of Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 76 S. Ct. 1061, 2 L. Ed. 2d 1269 (1958), and Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963), which struck down a Washington State Statute which permitted a trial judge to deny an indigent defendant's motion for a free transcript of trial proceedings if the judge was of the opinion that the trial was fair and the appeal frivolous.

For the purposes of an appeal the right to have a full adequate record is an absolute in the case of an indigent defendant as it is in the case of a defendant who can afford to purchase the transcript.

The present case is readily distinguishable from the case of Mack v. Walker, 5 Cir., 372 F. 2d 170 (1966). In the *Mack* case the petitioners simply objected to the fact that they were not given a verbatim transcript of the trial proceedings, witbout showing that such a transcript was necessary for their appeal. In the present case the First District Court of Appeal of Florida concedes that:

"* * * the full impact of alleged remarks of counsel made in closing argument to a jury cannot be recaptured, nor can their full impact and prejudicial effect when considered in context with the total argument of counsel be accurately weighed, if the only record of such remarks consists of an effort by the trial judge to reconstruct or paraphrase the remarks for the record after objection is made." 208 So. 2d at 468.

To deny petitioner relief on the grounds that the record does not show prejudicial comments and objections, when it is necessary to have a full transcript of the arguments in order to determine prejudice in the first place and that transcript does not exist due to the order of the trial court is a complete non sequitur.

[2] Respondent's contention that petitioner has foregone a remedy afforded by Rule 6.7(f), Florida Appellate Rules, is equally without merit. Rule 6.7(f) allows the preparation of a paraphrased stipulation as to the *contents of the record* on appeal. In the first place, because of the trial court's ruling there is no record from which the parties could accurately stipulate. While it is true that alternative methods of reporting trial proceedings are permissible, such methods can be used only "if they place before the appellate court an *equivalent report* of the events at trial from which the appellant's contentions arise." (Emphasis added.) Draper v. Washington, supra, 372 U.S. at 495, 83 S.Ct. at 779; Mack v. Walker, supra, 372 F.2d at 172. In light of the District Court of Appeal's assessment of the character of the error presented in this case, an assessment to which this Court subscribes, it cannot be said that Rule 6.7(f) offers an "equivalent report" of the events at trial.

The respondent's position places an undue burden upon the petitioner and his counsel to attempt to reconstruct an argument in order to show what might otherwise be isolated remarks by the prosecution were prejudicial. This burden would not have been placed upon petitioner had he been able to purchase the reporter's time himself. Such a burden is in direct conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States as interpreted in Griffin v. Illinois, supra.

It is, therefore, upon consideration, hereby

Ordered:

1. Unless satisfactory evidence is filed by Respondent with the Clerk of this Court on or before June 2, 1969 that petitioner's judgment of conviction of May 26, 1967 has been set aside and the petitioner arraigned anew of the subject charges and a new trial thereon granted and scheduled within a reasonable time (if petitioner pleads not guilty on his re-arraignment), then, in that event, this Court upon application of petitioner here will at that time grant this petition for writ of habeas corpus. This Court does not attempt to determine whether bail should be allowed pending trial, or the amount thereof if allowed, but petitioner shall be afforded all rights of counsel and bail pending trial as any other person so charged, the matter of bail, its allowance and/or amount to be determined by the appropriate trial court by applicable standards of law.

2. Upon Respondent's filing on or before June 2, 1969 such satisfactory evidence as indicated in paragraph one above, this Court will dismiss this petition.

[U.S. Court, Second division, April 29, 1969]

J. M. EVANS & Co. *v.* UNITED STATES

(C.D. 3809; Protest Nos. 65/19874–2024 and 66/1475–2027)

Protest against decision of collector of customs at Port of Pittsburgh. The Customs Court, Donlon J., held that inferior used wool dryer felts in large rolls were dutiable at four percent ad valorem as waste or scrap, not specifically provided for, rather than at nine cents per pound as wool rags.

Protest sustained.

1. CUSTOMS DUTIES—34(3), 52

Under Tariff Schedules pertaining to classification of materials as rags which are "fit only" for described uses, it is not chief use which determines whether materials are to be classified as rags, since schedules employ term "fit only," and, therefore, a party protesting such a classification need not rebut each and every one of uses described in schedules in order to overcome presumption of correctness that attaches to classification. Tariff Schedules, Item No. 390.40, 19 U.S.C.A. § 1202.

2. CUSTOMS DUTIES—34(3)

Even if use by steel mills of used wool dryer felts as protective floor coverings was a fugitive use, such use proved that felts were not "fit only" for use as wiping rags within Tariff Schedule defining rags dutiable at nine cents per pound as worn out fabrics, furnishings and other textile articles fit only for use as wiping rags. Tariff Schedules, Item No. 390.40, 19 U.S.C.A. § 1202.

"See publication Words and Phrases for other judicial constructions and definitions."

3. CUSTOMS DUTIES—40

If merchandise is fairly described in one of enumerated tariff clauses, then one may not resort to classification under nonenumerated provisions.

4. CUSTOMS DUTIES—40

Inferior used wool dryer felts in large rolls were dutiable at four percent ad valorem as waste or scrap, not specifically provided for, rather than at nine cents per pound as wool rags. Tariff Schedules, Item Nos. 390.40, 793.00, 19 U.S.C.A. § 1202.

Reed, Smith, Shaw & McClay, Pittsburgh, Pa., (Jerold I. Horn, Pittsburgh, Pa., of counsel), for plaintiff.

William D. Ruckelshaus, Asst. Atty. Gen., (Brian S. Goldstein and Owen J. Rader, New York City, trial attorneys), for defendant.

Before Rao and Ford, Judges, and Donlon, Senior Judge.

Donlon, Judge:

These two protests, consolidated for purposes of trial, litigate once again the issue, previously litigated several times, as to whether used wool dryer felts are or are not dutiable as wool rags. The new factor here is that the issue arises now under the tariff schedules whereas earlier cases were decided under the Tariff Act of 1930. The new provision for wool rags in the tariff schedules is different. It also is more precisely worded.

Following earlier decisions under the 1930 Act, used wool dryer felts in large . . . .

[U.S. District Court, Northern District of Florida, Tallahassee Division, July 7, 1969]

FRED HALES, PETITIONER *v.* LOUIS L. WAINWRIGHT, DIRECTOR, DIVISION OF CORRECTIONS, STATE OF FLORIDA, RESPONDENT

(No. 1461)

Habeas corpus proceeding on petition of state prisoner. The District Court, Carswell, Circuit Judge, held that petitioner's account of events of his arrest and search of his house following killing of victim established that such search was lawful as one incident to and contemporaneous with lawful arrest.

Petition for writ of habeas corpus denied.

1. ARREST—71.1(6)

Petitioner's account of events of his arrest and search of his house following killing of victim established that such search was lawful as one incident to and contemporaneous with lawful arrest. F.S.A. § 901.15(2); U.S.C.A.Const. Amend. 4.

2. ARREST—63(4)

Florida law permits lawful arrest without warrant and upon probable cause in felony cases. F.S.A. § 901.15(2).

3. COURTS—100(1)

Federal Supreme Court decision requiring exclusion by state courts of evidence obtained in violation of Fourth Amendment standards is not retroactively applicable to search occurring before such decision. U.S.C.A.Const. Amend 4.

4. CRIMINAL LAW—412.2(3)

Warning of constitutional rights to counsel at time of arrest was not required for 1942 arrest.

5. ARREST—63(4)

Probable cause for arrest of defendant for murder in first degree was not lacking by virtue of fact that defendant was indicted for second-degree murder where defendant's own account of facts of killing established probable cause for his arrest on first-degree murder charge.

6. HABEAS CORPUS—54

Defendant's allegation that he was arrested without warrant failed to state grounds for issuance of writ of habeas corpus absent a showing or allegation that such arrest deprived him of a fair trial.

7. HABEAS CORPUS—85.5(14)

Alleged suppression by state of evidence of self-defense and alleged denial of right to prove defendant's story by bringing witnesses into court was not ground for habeas corpus relief where records showed that such witnesses were in court under subpoena at time of trial and available to testify for either state or defendant.

8. HABEAS CORPUS—54

Allegations respecting incompetency of defense counsel, retained by defendant's relatives, were no more than conclusions and failed to state grounds for habeas corpus relief.

9. HABEAS CORPUS—25.1(6)

Where a defendant has an attorney of his own choosing, any shortcoming of his counsel cannot be attributed to state, but must be imputed to defendant, and do not constitute denial of due process authorizing federal habeas corpus relief.

10. HABEAS CORPUS—35.5(2)

Evidence, in federal habeas corpus proceeding, failed to establish that there was a systematic exclusion of Negroes from grand jury which indicted defendant on theory that Negroes qualified by local authorities to serve on juries were not proportional to number of Negroes residing in circuit.

11. GRAND JURY—8

Use of voter registration lists in selecting grand jury, absent showing of systematic exclusion of Negroes, is not illegal per se.

12. HABEAS CORPUS—25.1(3)

Defendant's failure to raise issue of grand jury's composition at time of his trial precluded raising of such issue in federal habeas corpus proceeding.

13. HABEAS CORPUS—85.3(1)

Fact that prosecutor, defense counsel and trial judge were dead, together with fact that habeas corpus petitioner waited for more than twenty-five years to raise questions as to allegedly coerced confession, were facts relevant to merits of such questions.

14. HABEAS CORPUS—85.5(7)

Evidence, in federal habeas corpus proceeding, failed to establish existence of alleged coerced confession.

15. HABEAS CORPUS—92(1)

Claim that defendant's plea of self-defense was ignored by police, defense counsel, prosecutor, and court relates to efficiency of evidence and is not subject to review by way of writ of habeas corpus.

16. HABEAS CORPUS—85.1(2)

Federal district court will not presume for purposes of habeas corpus relief, that state court would prevent assertion of any competent defense.

17. HOMICIDE—112(2)

Even if trial court absolutely refused to hear defendant's self-defense plea, no error was committed where defendant and victim had argument during card game after which defendant went home, got his gun, then sought out victim and killed him during another argument, in view of rule that one may not provoke difficulty and, having done so, act under necessity thereby produced in killing an adversary and then justify such homicide under plea of self-defense.

Fred Hayes, in pro. per.

Earl Faircloth, Atty. Gen. of Fla., Raymond L. Marky, Asst. Atty. Gen., Tallahassee, Fla., for respondent.

ORDER DENYING WRIT OF HABEAS CORPUS

Carswell, Circuit Judge.*

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*Sitting by designation as United States District Judge for the Northern District of Florida.

This cause comes before the Court upon petition for writ of habeas corpus, supplemental response to rule to show cause filed by the Attorney General of the State of Florida and petitioner's rebuttal. Petitioner has complied with the Rules of this Court and is entitled to proceed in forma pauperis pursuant to this Court's order of December 18, 1968.

Petitioner raises several allegations relating to his sentence of November 30, 1942 for the crime of murder in the second degree.

Because no appeal was taken by petitioner from his judgment and sentence, no transcript of the trial proceeding was made. Furthermore, the official court reporter has since died and there is no way to obtain a transcript of said proceedings at this time. However, certified copies of the minute entries from the Circuit Court in and for Jackson County, Florida and the documents appearing in the case file of State of Florida v. Fred Hayes are on file in this court as exhibits.

[1–4] The first of petitioner's many allegations involve an alleged illegal search and seizure without a warrant. Petitioner's own account of the events of his arrest and the search of his house following the killing of Clarence Godwin shows that the search was incident to and contemporaneous with a lawful arrest. Florida law permits a lawful arrest without a warrant and upon probable cause in felony cases. § 901.15(2), Florida Statutes (1967), F.S.A. Assuming, arguendo, that the search of petitioner's house contravened Fourth Amendment standards, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1960) which requires exclusion by state courts of evidence obtained in violation to Fourth Amendment standards, is not retroactive. Leal v. Beto, 378 F.2d 8 (5th Cir. 1967).

Petitioner alleges that he was denied counsel at his arrest and subsequent interrogation. To the extent that he was not warned of his rights it need only be stated that at the time of his arrest, 1942, such warning was not required. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

[5, 6] Petitioner alleges that because he was indicted for second degree murder there was a lack of probable cause for his arrest for murder in the first degree. As pointed out above petitioner's own account of the facts of the killing establish probable cause for his arrest on first degree murder charges. An allegation by a State prisoner that he was arrested without a warrant fails to state grounds for the issuance of the writ of habeas corpus absent a showing or allegation that such arrest deprived him of a fair trial. United States ex rel. Fletcher v. Wainwright, 269 F. Supp. 276 (S.D.Fla. 1967).

[7] According to the petitioner, the "evidence" of self defense which he, the *petitioner*, related to the Sheriff and others was never disclosed during trial by the State and he was denied the right to prove his story by bringing witnesses into court. The records and exhibits on file disclose that the witnesses petitioner refers to were in court under subpena at the time of his trial. These people were available to testify either for the State or for petitioner. Furthermore, all information alleged was within petitioner's knowledge and thus available for his defense. The allegations and facts of petitioner's case simply do not present a "suppression of evidence" question as contemplated by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963).

[8, 9] Petitioner alleges that his defense counsel who was retained by petitioner's relatives was incompetent, tried to make him plead guilty and that counsel's capabilities in the criminal law "* * * turned out to be nil! * * *" (sic). These allegations amount to nothing more than conclusions which fail to state grounds for relief. Williams v.

Beto, 354 F.2d 698 (1966). Petitioner's defense counsel, Benjamin L. Solomon, of Marianna, Florida, died in 1963. In memorializing Mr. Solomon the Jackson County Bar Association noted that he "* * * was a thorough and skillful lawyer and always a vigorous advocate of the cause of the client he represented. He was one of the outstanding trial lawyers of the Marianna and Fourteenth Judicial Circuit bars * * *." In light of this tribute to Mr. Solomon by his peers little credence can be given to the petitioner's conclusionary allegations. In the second place as petitioner himself admits he had an attorney of his own choosing. In such a case any shortcomings of counsel cannot be attributed to the State. See Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941), cert. den. 314 U.S. 617, 62 S. Ct. 110, 86 L.Ed. 496 (1941), Howard v. Beto, 375 F.2d 441 (5th Cir. 1967). Failings of retained counsel must be imputed to the defendant and not to the State, and such failings do not constitute a denial of due process which would authorize federal habeas corpus relief.

[10, 11] Petitioner claims that Negroes were systematically excluded from serving on grand juries. Petitioner alleges no facts to support his allegation nor does he show that a challenge was made to the composition of the grand jury that indicted him. Petitioner recognizes that there were Negroes qualified by local authorities to serve on juries and his real complaint is that they were not proportional to the number of Negroes residing in the circuit. The minutes of the Circuit Court, on file in this court, reflect that the grand jury was called from the voter registration list "* * * in open court. * * *" Petitioner's allegations and the facts simply do not show that there was a systematic exclusion of Negroes. The use of voter registration liste, absent such showing of exclusion, is not illegal per se. See Chance v. United States, 322 F. 2d 201 (5th Cir. 1963).

[12] In any event, petitioner having failed to raise an attack upon the grand jury's composition at the time of his trial cannot now raise the issue. Perez v. United States, 303 F. 2d 441 (5th Cir. 1962); Jackson v. United States, 394 F.2d 114, 115 (5th Cir. 1968).

Petitioner alleges that a "confession" was extracted from him by coercion which was not used at his trial. An examination of the certified file of the case of State of Florida v. Fred Hayes in the Circuit Court of Jackson County, Florida failed to reveal the existence of a confession or any other statement taken from the petitioner. Furthermore, as pointed out by respondent, petitioner's own allegations are inconsistent. Petitioner alleges that the State never disclosed petitioner's story in court and yet in this point he claims that the Sheriff took his statement and introduced it into evidence.

[13, 14] In this case the prosecution, defense counsel and trial judge are dead. All available evidence of ths trial, including petitioner's allegations, are before this Court. This, together with the fact that petitioner waited for more than twenty-five years to raise these questions, is relevant to their merits. See Tyler v. Beto, 391 F.2d 933 (5th Cir. 1968). After a thorough review of all available evidence, this Court having found no evidence of the existence of any confession can give no credit whatsoever to petitioner's allegations.

[15] Petitioner's final allegation is that he was refused the opportunity to present his claim of self defense. To the extent that petitioner alleges that his plea of self defense was simply ignored by the police, the defense counsel, the prosecutor and the court such allegations go solely to the sufficiency of the evidence which is not subject to review by way of writ of habeas corpus. Fulford v. Dutton, 380 F. 2d 16 (5th Cir. 1967).

[16] Insofar as the claim of denial of the right to present his self defense case goes, petitioner has failed to allege facts which would support the allegation. As pointed out above the only available records show that the witnesses upon whom petitioner would have relied were in court and available to testify. This Court cannot and will not presume, for the purpose of habeas corpus relief, that a State court would prevent the assertion of any competent defense.

[17] Florida follows the substantive rule "* * * that one may not provoke a difficulty and having done so act under the necessity produced hy the difficulty, then kill his adversary and justify the homicide under the plea of self defense * * *" Mixon v. State, 59 So.2d 38 (Fla.1952). Under petitioner's own version of the facts he and the deceased had an argument at a card game, the petitioner went home and got his gun. Thereafter he sought out the deceased, another argument ensued and petitioner killed Godwin. Petitioner alleges that Godwin attacked him with a knife. Thus, even assuming that the Court absolutely refused to hear the self defense plea, no error was committed under the substantive law as announced in Mixon v. State, supra.

It is, therefore, upon consideration, hereby Ordered:

Petition for writ of habeas corpus is denied.

Mr. HRUSKA. Mr. President, I yield 5 minutes to the Senator from Florida.

Mr. HOLLAND. Mr. President, it is not impressive to see these crocodile tears being shed on this side of the aisle, because these Senators know they are going to lose this vote which we will have in a few minutes. This Senate has too much respect for its Judiciary Committee and it has too much respect for judges of the South, where 57 of the district judges have endorsed Judge Carswell and 11 of his associates on the circuit court of appeals have endorsed him.

In my State, every supreme court judge has endorsed him and 38 circuit court judges have endorsed him by wires to me. Other endorsements have been placed in the RECORD. All district court of appeals judges from the district in which Tallahassee lies support him, many other judges in Florida, and all of the Federal district judges in the Miami district, six of them, endorse him, and so on.

Has the time come when the Senate pays no attention to men such as the president of our State bar association, and three immediate past presidents, who referred the matter to the governors of that association and 40 of 41 of them stated in the RECORD, "We want you to endorse this man"? The only one who did not endorse said, "I just do not happen to know him and, therefore, I would prefer not to endorse him." Has the time come when the Senate pays no attention to men of that character and judges of that caliber?

I am sorry so many of my associates on this side of the aisle have taken this position of no confidence in the Committee on the Judiciary and no confidence in the judiciary of the State of Florida and the South. I am sorry to see them take a position which seems so highly prejudiced.

Mr. President, in closing, on the question of civil rights, I want to place in the RECORD a letter I received from the Honorable Earl Faircloth, attorney general of the State of Florida, strongly endorsing Judge Carswell. I read from the letter only this:

As to the charge of his racial prejudice, I believe the attacks upon him are undeserved. When I became Attorney General in 1965, Judge Carswell voluntarily wrote to me a strong recommendation for the employment of Mr. Charles Wilson, a black attorney from Pensacola, who had practiced law before him. Largely on the strength of Judge Carswell's recommendation as to Wilson's professional ability, he was hired and served with distinction on my staff for several years. In talking with Judge Carswell about this and related matters, I gained the impression that he was genuinely interested in the reconciliation of the races in Florida and that he felt it was a step forward; at least it had his hearty approval and encouragement.

I ask unanimous consent to have the entire letter printed in the RECORD at this point.

There being no objection the letter was ordered to be printed in the RECORD, as follows:

STATE OF FLORIDA,
Tallahassee, Fla., March 31, 1970.

HON. SPESSARD L. HOLLAND,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HOLLAND: Please accept my sincere congratulations upon the valiant fight you, Senator Gurney and numerous others have waged on behalf of the confirmation of Judge Carswell. It is my hope, as I know it is yours, that the Judge will be confirmed. I would like to relate several of my experiences with him over the years, which might be helpful.

First, as President of the Young Democrats of Leon County in 1952, I participated in a heated debate with the Judge during the Presidential election. He, of course, was supporting General Eisenhower and I was supporting Governor Stevenson. He was a gentleman in the debate and in all respects fair. We later became very good friends. Subsequently, I tried criminal cases in the Federal Court when he was the United States District Attorney. I tried cases before him after he became a United States District Judge. On all occasions he was a worthy and fair opponent and always a fair-minded Judge.

As to the charge of his racial prejudice, I believe the attacks upon him are undeserved. When I became Attorney General in 1965, Judge Carswell voluntarily wrote to me a strong recommendation for the employment of Mr. Charles Wilson, a black attorney from Pensacola, who had practiced law before him. Largely on the strength of Judge Carswell's recommendation as to Wilson's professional ability, he was hired and served with distinction on my staff for several years. In talking with Judge Carswell about this and related matters, I gained the impression that he was genuinely interested in the reconciliation of the races in Florida and that he felt it was a step forward; at least it had his hearty approval and encouragement.

On three grounds, therefore, I could endorse Judge Carswell without reservation: first, as a competent and fair Judge; second, as a man without prejudice as established in his relationship with me as indicated above; and, third, because he is my friend, in whose honor and integrity I have the greatest confidence.

Very truly yours,

EARL FAIRCLOTH,
Attorney General.

Mr. HOLLAND. Mr. President, then I want to quote from a letter to the Senator from Indiana (Mr. BAYH) from the present president of our bar association—just two brief paragraphs:

As I indicated to you earlier, it is certainly ironic that Judge Carswell is charged with being a racist. My experience with him and

his reputation in the Northern District of Florida are just to the contrary.

Then this further from the president of our bar association, Mark Hulsey, Jr., who seems to be a good friend of the Senator from Indiana (Mr. BAYH):

Professor Van Alstyne said he did not know Judge Carswell. Perhaps if he had known him in Tallahassee, had heard him cursed, had listened to the harassing telephone calls and practiced law in his Court, he would not have been so quick to condemn him.

Mr. President, I just wanted to say I appreciate the admission or concession made by the distinguished Senator from Maryland (Mr. TYDINGS) yesterday in his appearance on TV when he admitted that some of the case made by the opponents of Judge Carswell was "nit-picking." He gave only two examples. I could enlarge the number of those examples, but the time does not permit now.

I just want the record to show that for the Senate to show no confidence in its own committee, no confidence in practically the entire judiciary of the State of Florida and, for that matter, of the six States that include the fifth circuit, to show no realization of the fact that the voting rights bill did not even apply to the State of Florida, because we have been letting our colored citizens vote and encouraging them to vote for years, is a sort of tragedy. I hope the Senate will defeat the effort to send this nomination back to committee.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I yield 5 minutes to the Senator from Michigan (Mr. HART).

Mr. HART. Mr. President, one's definition of "nit-picking" depend on what dictionary he uses. What may be nit-picking to the Senator from Michigan may be a matter of very serious concern to the Senator from Florida. What may be nit-picking to the Senator from Florida may appear to the Senator from Michigan as so overriding as to take the flat position that the Senate dishonors itself if it concurs in the appointment to the Supreme Court of a man who would go to the Court with the appearance of a conflict of interest far graver in my mind than confirmation of Judge Haynsworth would have carried with it.

The record of the Senate in the Haynsworth case, as I read it, is this: We assume that Judge Haynsworth was not nor would have been influenced one iota by his investment portfolio.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. BAYH. I would like to ask unanimous consent that we have a live quorum, the time for the quorum call not to be charged to either side, so that Members of the Senate will have an opportunity, during the remaining 25 minutes, to hear the issue being discussed and the arguments of both sides. I have been listening carefully to the Senator from Michigan and the Senator from Florida, but they have been speaking with only a handful of Senators listening.

I ask unanimous consent that there may be a live quorum call under the conditions I have stated.

Mr. DOLE. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard. The Senator from Michigan will proceed.

Mr. HART. The Senate said, with respect to Judge Haynsworth:

Look, we do not believe you would be influenced by these investments, but the appearance is such that litigants and the people of America ought not be submitted to the possibility that there might have been an influence which would not be reflected in the record.

That would be unfair to the litigants and to the Court and the country. If Judge Carswell is confirmed we would concur in putting on the Court one who pledged:

I believe in the principle of white supremacy and I shall always be so governed.

The appearance of conflict is not with something in his portfolio; it is in the pledge he made.

The Senate should not permit one with such a conflict to go on that Supreme Court bench. Now, again, to some this may be nit-picking. To me, and I respect the sincerity of such a view. This bears on the problem which is more basic to our society than any other of the many problems we have.

It was not nit-picking for candidate Richard Nixon to pledge in his speech to his party's convention at Miami, when he was nominated, that—

Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights.

I think that was a very thoughtful observation, and the fact that the President has apparently forgotten that as a rule of thumb with respect to a nomination ought not dull our sense of responsibility—at least those of us who think this is not nit-picking. How can we ask our 20 million black Americans who believe as I am prepared to believe——

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HART. May I have 1 more minute?

Mr. KENNEDY. I yield 1 minute to the Senator from Michigan.

Mr. HART. How can we ask them to believe with us that the nominee has changed his mind; that if he ever meant it, he is sorry, or should not have meant it and he will be objective? We said no to Judge Haynsworth on the same theory. I suggest we are obliged to say "no" to Judge Carswell for the same reason.

That symbol on the Supreme Court of the United States in the 1970's is something that none of us ought to stand still for. To name at this time to the Nation's highest court one whose views on racial equality are open to question—on his own words—would be a grave error. It could bring tragic consequences. Forget the business of mediocre or not mediocre. Forget the business of how many law schools say "yes" and how many say "no." Forget the record of reversals by his own circuit court.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. I yield 1 minute to the Senator.

Mr. HART. Just think of this one symbol. If we have not learned by now that this is the wrong thing to do in a nation which seeks desperately to bridge a gulf that increasingly grows, we have not learned very much. This nomination ought not to be consented to.

Mr. CASE. Mr. President, will the Senator yield?

Mr. HART. I yield.

Mr. CASE. Mr. President, I associate myself completely with what the Senator from Michigan has said. How can we hit the black community, and particularly its moderate leadership, with this blow between the eyes without being rightly charged with irresponsibility in these times?

Mr. HART. I agree.

The PRESIDING OFFICER. The time of the Senator from Michigan has expired. Who yields time?

Mr. HRUSKA. Mr. President, I yield 5 minutes to the Senator from Illinois.

Mr. SMITH of Illinois. Mr. President, I intend to vote against the motion to recommit the nomination of Judge Carswell to the Judiciary Committee. It seems to me there is only one thing to be gained by recommitting Judge Carswell's nomination and that is to provide sanctuary for those who would rather hide behind delay of the issue than to vote it up or down on the merits.

As the newest Member of the Senate I consider my duty more demanding than that. The people of Illinois are entitled to know that I support the nomination of Judge Carswell and they are entitled to see my vote—on the record—and not hidden behind debate and a roll-call on some collateral parliamentary issue.

We have heard much during the past weeks about the individual responsibilities of Senators in a matter on which the Senate must advise and consent. And yet, the very Senators who urge upon us the highest kind of personal responsibility and personal scrutiny of the candidate's qualifications, character, philosophy, ability, and capacity for growth, would return the nomination to the Judiciary Committee, thus allowing themselves to skirt the very responsibilities they urge upon the rest of us.

This motion to recommit is obviously nothing but a parliamentary gambit, aimed not only at letting Senators off the hook on a final vote, but also at depriving Senators who would vote for Judge Carswell the opportunity of doing so. Well, I for one, am not about to give up my vote so easily. I could imagine no greater infidelity to duty than to let my voice in the Senate be stilled now by parliamentary maneuvering.

Mr. President, last Thursday I did a bit of on-the-record reflecting about the whole manner in which the Senate has considered this nomination. At that time I said I had some serious doubts about the handling of this confirmation process. Following so closely upon the Haynsworth nomination, the Carswell matter cannot fail to leave a bad taste in the mouth of anyone researching the history of Senate "advise and consent" proceedings. It cannot fail to have an inhibiting effect upon men of stature whom the President and the Nation might call to public office in the future. I have heard one of my colleagues say that, "there is not a man alive who does

not have a skeleton in his closet." That may be true. But it seems to me that even a man who did not have such a skeleton might shrink from a process such as that we have seen on and off the Senate floor in recent months. Apparently, the rule in advise-and-consent proceedings has become "anything goes." If that in fact has become the rule, we must renounce it. If it has not, then it is up to each and every Senator to demonstrate to his constituents that he has not embraced it—by voting against recommital.

Through 15 years in public service, it has been my firm conviction that every man who aspires to an office of responsibility and public confidence ought to be able to stand the test of public scrutiny of his character, qualifications, and personal conduct. But that does not mean that a nominee for public office should have to run the gauntlet of personal villification. Yes, we have a right to examine carefully the professional qualifications of nominees—to discover whether a man is respected by his professional colleagues, whether he has a reputation for integrity among those who know him and work with him, to review the manner in which he has exercised any public trust or confidence that he may have won in the past.

In the Carswell matter, the Senate has in fact accomplished each of these legitimate inquiries. In letters addressed to the chairman of the Judiciary Committee, and to individual Senators, and to the Senate at large, Judge Carswell's professional colleagues, Federal judges of the district and circuit benches in the Seventh Circuit, have written, literally by the score, to endorse Judge Carswell's nomination. They know him; they have worked with him. They say he is fit to be a Justice of the Supreme Court of the United States. And what of his reputation for integrity? Again, the record is filled with testimony, oral and written, of attorneys who have practiced before him, of leaders of the bar, of litigants and counsels before his court. The record clearly reflects that the vast majority of litigants and counsel before Judge Carswell's court—those who came to the court seeking justice and willing to accept its arbitration—have taken it as a matter of faith that Judge Carswell was a man of integrity.

Finally, what of the manner in which he has exercised the public trust and confidence that he has held for close to 20 years, as U.S. attorney, as U.S. district judge, and as judge of the U.S. Court of Appeals for the Fifth Circuit? We know that Judge Carswell's record on the bench and at the bar were the subject of careful scrutiny by the Committee on the Federal Courts of the American Bar Association. And we have the unanimous endorsement of that committee of distinguished attorneys that Judge Carswell is "qualified for appointment as an Associate Justice of the Supreme Court of the United States." These are good enough for me. And I hope Senators will join with me in disposing of this motion so that we may attend to the many other important problems facing our Nation.

I think that we have lost sight of our true objective in this whole matter. That objective should be a positive one: Building a Supreme Court of high-quality jurists worthy of the trust and confidence of the entire American people. With that objective in mind, it is hard to see how a nominee's personal philosophy of the law should be the sticking point of his confirmation—unless that philosophy is abhorrent to the Constitution of the United States. Judge Carswell's views are not inconsistent with the Constitution; in fact, what seems to be at the very heart of the opposition to him is that his views conform rather completely with those written in the Constitution. He is what is called a strict constructionist—and, in my mind, that philosophy of law is what is behind all of the detractions, untruths, and smears being leveled at him.

Fairminded observers will, I believe, recognize that Judge Carswell's strict constructionism would be an appropriate component to the general philosophies of the Justices presently sitting on the Supreme Court. It would also be a philosophy responsive to the will of the majority of the American people. I have said it before: Judge Carswell is not my selection. But he is the selection of the President of the United States, who has the constitutional duty to make the selection. The President was recently elected by the American people, elected after a campaign in which he promised to restore stability and dignity in the law of our land. His constitutional power to appoint is broad and clear. Ours to advise and consent is less so. If our duties were as broad as some Senators have suggested, we might never advise and consent to a nomination. On the question of our duty, I join with those Senators who believe that it is rather narrow. We should vote to advise and consent to the President's nominee unless some good and sufficient reason arises to move us otherwise. No such reason has arisen in this case, in my judgment, despite the petty and unfair efforts of some to conjure it up.

Two principal charges have been leveled against Judge Carswell: First, he is not "distinguished," and second, he is a "racist."

Mr. President, it is one thing to say that you have not heard of a man, or that you do not agree with him. It is quite another to argue from your failure to have met a person, or to have seen him published in scholarly journals, or to have read of him as a champion of one cause or the other, that he lacks "distinction." This is especially true of a Federal judge, whose time and principal attention should belong to the work of his court, not to socializing, or writing for the journals, or leading public crusades. It is one thing to say that you do not agree with a man or that some others you deeply respect do not, but it is quite another to conclude that he is "insensitive" to an issue, simply because you disagree with him philosophically.

The question of "distinction" is an interesting one, going to the very heart of one's views of a judge's role. In my mind, Judge Carswell is certainly not a part of the "establishment" of the bench and bar. Members of that establishment, I think, tend to measure "distinction" in jurists by the number of lectures they give or roundtables they attend, by their writings on a variety of issues in scholarly journals, by a certain style of judicial opinion that renders it quoteworthy, by an interest in public affairs that prompts one to extrajudicial associations with public officers or national figures. Each of these activities is in itself good, and many distinguished judges participate in one or more of them. Judge Carswell is not a "distinguished jurist' in this narrow, limited sense.

But I believe, and the great majority of his colleagues on the courts that he has served believe, the Committee on the Federal Judiciary of the American Bar Association believes, attorneys across the Nation believe, and the President of the United States believes, that Judge Carswell is "qualified for appointment as an Associate Justice of the Supreme Court of the United States." That in itself is no mean distinction.

Only one other important question has been raised about Judge Carswell's fitness for the Supreme Court; whether he is or is not a "racist" or one insensitive to racial justice. As a youthful candidate for office, some 22 years ago, Harrold Carswell uttered clearly racist statements. They were sentiments that illbefitted a man seeking public office at that time or at any time. I do not condone them. He has repudiated them.

As to the other matters alleged to constitute racism on Judge Carswell's part, they are all either unfounded or trivial. When hearsay and speculation and no direct evidence are weighed in the balance against the word of a public officer who has candidly submitted to cross-examination on a question, he must indeed be given full credibility. The opposition has clearly failed to sustain its burden on this issue.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield 3 minutes to the Senator from Kansas.

Mr. DOLE. Mr. President, earlier I indicated that a motion to table the motion to recommit might be offered. Since my initial statement, and on reflection, I believe most Americans understand that the motion to recommit is primarily an effort to dodge the issue. It also occurs to me that a motion to lay on the table the motion to recommit might also be construed as a devious tactic.

I happen to believe, as stated before, that we have certain responsibilities, one of which is to stand up and be counted.

I, therefore, announce at this time, Mr. President, that I shall not offer a motion to table. That does not, of course, preclude some Senator from offering a motion to table the motion to recommit.

Let me add, in response to the senior Senator from Michigan, that if there has been any feeling of depression in the black community of America, it may not be because of G. Harrold Carswell, but because of statements made by those who oppose the nomination and efforts to turn the black community against G. Harrold Carswell and President Nixon.

There has been nitpicking with reference to this nomination day after day here on the Senate floor. There are those who say there is no redemption for a man's past conduct if he is nominated for the Supreme Court. The inference is that

we should judge each other by one standard, and nominees to the Supreme Court by another. Perhaps. But I do not believe so. I prefer the position of those who suggest that we should adopt the Biblical adage of letting those who are without sin cast the first stone.

As the Senator from Delaware (Mr. WILLIAMS) suggested last week, we could probably find a better judge than Judge Carswell, but the question now is whether the Senate should advise and consent, or, more immediately, whether we should recommit the nomination to the Committee on the Judiciary.

As pointed out last Friday, a majority of the members of the Judiciary Committee stated in writing that they felt there was no reason to recommit; that there had been adequate hearings.

I suggest they have chosen the wise course. We know the facts. We have heard the same exaggerated charges day after day. They amount to nothing. Judge Carswell is qualified, he is experienced, and is recommended by those who know him best. Those who know him least, those in the liberal establishment, those who are against Richard Nixon, and those who are against a balanced court, are naturally against him. They were against Judge Haynsworth, and may be against the next Nixon nominee.

I urge my fellow Senators to adopt the same spirit and the same attitude with reference to Judge Carswell as has been demonstrated with reference to Supreme Court nominees in the past.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, may I inquire how much time remains on either side?

The PRESIDING OFFICER (Mr. YOUNG of Ohio). The Senator from Nebraska has 6 minutes remaining, and the Senator from Indiana has 6 minutes remaining.

Mr. HRUSKA. I yield the remainder of my time to the Senator from Florida (Mr. GURNEY).

Mr. GURNEY. Mr. President, it is a great honor to me to have the privilege of concluding this debate on Judge Carswell, I suppose I am more responsible for the fact that his name is before the Senate than any other Member of this body. I suggested his name to the President for appointment to the Fifth Circuit Court of Appeals last year, and his nomination was confirmed unanimously by the Senate, as was the case when he was appointed a district judge, and when he was appointed a U.S. attorney—three times before this occasion today.

Mr. President, this man spent 5 years as a U.S. attorney. When he was appointed to that position, he was the youngest U.S. attorney in the entire United States. He spent 11 years as a Federal district judge, and when he was appointed he was the youngest Federal district judge in the United States.

He served with distinction as a U.S. attorney. He served with distinction as U.S. district judge for the northern district of Florida. He has been examined and unanimously recommended to the Senate by the American Bar Association Committee on the Federal Judiciary, not once but twice, because those in opposition to the nomination question whether their judgment the first time was correct.

The Florida Bar Association Board of Governors, 41 in number, who represent the sixth largest integrated bar association in the United States, have recommended him unanimously to the U.S. Senate. These are men who have known him, who have worked with him, who know him as a judge, as a man, as a lawyer, and as a person.

I have received an outpouring of support for him, as has my senior colleague from Florida (Mr. HOLLAND), from people all over Florida—judges, lawyers, and ordinary citizens.

Fifty Federal judges in his circuit have unanimously seconded his nomination. Eleven circuit judges have backed his nomination. So far as law school professors are concerned, the dean of the University of Florida Law School has done so. The dean of the Florida State University Law School has done so. So has the past dean, and so have other professors.

The case against Judge Carswell is twofold. One is that he is a racist. Most of those charges have already been knocked down as straw houses that will not stand up. As a matter of fact, in my debate yesterday with the distinguished Senator from Maryland (Mr. TYDINGS), he admitted that two of the charges were not worth the paper they were written on.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. GURNEY. No; I will not yield. I am winding up this argument.

Mr. TYDINGS. The Senator mentioned my name.

Mr. GURNEY. I do not yield.

The other argument against the nomination is that the judge was hostile. This argument is based upon a few civil rights lawyers who appeared in Florida from the North, and the chief one who has been trotted up and down the Senate floor as saying he was hostile was one Professor Clark of New York University, who today is one of the lawyers representing the Black Panthers in the trial in New York, which had to be called off because they vilified the court in such a fashion. They were there on charges of murder and arson and carrying weapons. During the course of the trial there were tossed three gasoline bombs—one at the front door of the judge, one underneath his car, and one on a window ledge. And Professor Clark, who claims that Judge Carswell was hostile, not only was there during the trial, when these Black Panthers vilified the court, but also, he later argued the habeas corpus proceedings to get them out of the jail they are now in because they would not maintain order in the court.

That is the kind of lawyer charging the hostility that we have heard about here.

Yet, none of the lawyers in the State of Florida who practiced in his court, scores and scores in number, and in civil rights cases, who know him personally, have come up here and made these charges.

Then there is the charge of mediocrity. It is hardly worth examining here, because not a shred of evidence has been advanced that the man has been mediocre. There have been self-serving statements by Senators, yes, and by the Washington Post and the New York Times and the rest of the liberal media—self-serving, but no shred of evidence at all.

The judges, his colleagues, who served with him and the lawyers who practice in his court said he was a lawyer with an excellent mind, a fine judge, an outstanding lawyer as a U.S. attorney, an outstanding Federal judge, an outstanding appellate judge. These are from men who know him, not from the people who are scattered throughout the country who have never seen Judge Carswell, have never appeared in his court, and know nothing about him.

In summation, I hope the Senate does not retreat in this century to the methods that it used in the last century, when judges were discarded and were turned back on the issue of politics. We avoided that for 75 years, until we came to Judge Haynsworth, and now Judge Carswell, and perhaps Judge Parker. I would hope that the United States is not going back to the business of politics in deciding whether a judge should be confirmed if he be a liberal or whether he should be rejected if he is a conservative, because that is what went on with respect to Judge Haynsworth, and I fear that is what is going on with respect to Judge Carswell.

President Nixon has offered us an excellent nominee. We should vote for him.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BAYH. I yield 3 minutes to the distinguished Senator from Massachusetts.

Mr. BROOKE. Mr. President, we are not here to consider Mr. Clark or the Black Panthers. We are not here to consider conservatism or liberalism. We are not here to consider the President of the United States. We are here to consider the qualifications of G. Harrold Carswell, and that alone.

Much has been made about the issue of the loyalty to the President. The President is not a nominee for the Supreme Court of the United States. Those of us who are Republicans and are opposed to the nomination of G. Harrold Carswell are not disloyal because we vote against G. Harrold Carswell. We are voting according to the dictates of our hearts and our minds and our consciences, and we are basing our opinion solely on the qualifications of Mr. Carswell. To do otherwise would be to shirk our responsibility.

The man we send to the Supreme Court of the United States will be there for many years. If Mr. Carswell's nomination is confirmed, he could serve as many as 30 or more years on the Supreme Court—long after Mr. Nixon has been the President, and let me add I hope he serves for 2 terms. Long after most of my colleagues have left the Senate, this man will still sit on the Supreme Court of the United States.

We have to ask ourselves the question, "Is G. Harrold Carswell qualified to sit on the Supreme Court of the United States?" Nothing else. Whether he comes from the North, whether he comes from the South, whether he comes from the East, or whether he comes from the West, whether he is a Republican or whether he is a Democrat, whether he is a liberal or whether he is a conservative, is unimportant. It is irrelevant. The only relevant issue goes to the qualifications of this man to serve as a Supreme Court Justice. There is very little in the record which would indicate that this man has the requisite legal qualifications, even though he has served as a district court judge and has served on a circuit court of appeals.

All the people who testified did so not on the basis of political philosophy or ideology. They testified on the basis of the qualifications of this man and this man alone.

I do not say that this man is a racist. All I say is that if he meant what he said in 1948, I, for one, could not vote for him to sit on the Supreme Court of the United States. I have searched and searched the record to find any evidence of any change in this man, either in act or in deed, and I have searched in vain. I have found no change. To the contrary, I have found evidence which would indicate that he has not made a change and did not make a change until he came before the Committee on the Judiciary.

At the time of his appearance before the committee, the question of his credibility was raised. Do we want a man to sit on the court whose credibility is put in question? I think this issue has not been resolved.

If we want respect for law, if we want to have respect for the Supreme Court of the United States—and we all do—we certainly cannot, in good conscience, vote for a man to sit on the Supreme Court who came before the Senate Judiciary Committee and did not tell the truth. He said he made a mistake. All right, we all make mistakes. But he did not voluntarily change that mistake.

Mr. PASTORE. Mr. President, why cannot we have order? Why cannot the Senators take their seats and be silent?

The PRESIDING OFFICER. Senators will please take their seats.

Mr. BROOKE. He did not change the record at all until questioned by my distinguished colleague from Massachusetts (Mr. KENNEDY), when the latter showed him the papers of incorporation. And then Judge Carswell made a change. He realized he had made a mistake, after the night before. He knew, and certainly knew well, that he was an incorporator of this club. If he is so naive that he did not understand what it was all about, he is too naive for the Court.

The Boston Globe has run a series of well argued and closely reasoned editorials on the Carswell nomination.

On April 1, the newspaper presented a powerful argument summing up their reasons for opposing this nomination. I know that all the Members of the Senate and particularly those Senators who have not made up their mind as to how they will vote on the nomination will read this editorial with much profit.

I ask unanimous consent that it be printed in the RECORD together with my remarks.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

NEW ENGLAND CAN SAVE THE COURT

With the defection of St. George Aiken (R-Vt.), it now appears that the Senate vote to recommit to the Judiciary Committee the nomination of Judge G. Harrold Carswell to the Supreme Court could hinge on the votes of three New England senators—Sens. Winston Prouty (R-Vt.), Margaret Chase Smith (R-Me.), and Thomas J. Dodd (D-Ct.). Seven others, including Sens. Edward M. Kennedy, Edward W. Brooke, and Thomas McIntyre (D-N.H.) will vote to recommit, as they should. Sen. Norris Cotton (R-N.H.) earlier had committed himself to Judge Carswell.

The vote is scheduled for Monday. And if recommital is voted down, Mrs. Smith and the Messrs. Prouty and Dodd, it is indicated, may be the determining factors in the vote to confirm or reject, a vote scheduled for Wednesday. They can save the day—and the Court.

By voting for recommital, or, this failing, against confirmation, they will be demonstrating their awareness of conclusive evidence that Judge Carswell, as his own Chief Justice in the Fifth Circuit has put it, "just isn't up to the job." By voting to confirm "the least qualified nominee in a century," they would be affirming the most demeaning and irrational assessment yet heard of the highest court's proper place in the American political system. This is the preposterous assessment by Sen. Roman L. Hruska (R-Neb.), a supporter of Judge Carswell, that a nominee's mediocrity should not be held against him and might even be in his favor. This would be an astounding affirmation for them to make, just as it was astounding for Sen. Aiken so to affirm.

Sen. Aiken's stated reason for his surprise support of Judge Carswell is that "President Nixon has a good record, and I will not be a party to embarrassing or downgrading him either at home or abroad." But this reason is as shallow as the reason given by the Senate Republican Leader, Hugh Scott. Mr. Scott will vote for Mr. Carswell "because the President nominated him." But neither Mr. Nixon nor the presidency is the issue. The issue is the downgrading of the Court. No senator owes the President blind allegiance. They do owe allegiance to the Court's integrity. They have sworn, as Sen. Brooke so ably has argued, to exercise their own best judgment under the advise and consent provisions of the Constitution. They cannot uphold their oath and at the same time consent to a demeaning of the highest court in the land. At the very least, the Carswell nomination should go back to committee.

This is not only because recommitment is a legitimate and honorable device through which Republican senators can be spared reprisals for voting against the President's wishes, or, perhaps, White House orders. Sen. J. William Fulbright (D-Ark.), himself a Southerner, has advanced other reasons which govern him and should govern others as well. These are the sundry allegations of racial bias and questions of competency raised since the earlier committee hearings. Sen. Fulbright wants these clarified. Considering their nature, it is a puzzle that Sen. Aiken could not wait for clarification, too. They include not only new evidence of the nominee's racial bias and incompetence, but even more alarming confusion between facts, as others have reported them, and Mr. Carswell's testimony under oath.

Even with important unanswered questions dogging the nomination, some Republican senators hesitate to reject Mr. Nixon's second consecutive nomination. But there are precedents for it. It has happened twice before, and, once, three successive nominations were rejected. The fault now, as in the prior instances, is the President's, not the Senate's. There are competent men including Southerners from whom he could choose. Judge Carswell is not one of them. The Senate's duty is to the Court and its survival as a respected branch of government.

New England senators especially should remember that the seat to which Mr. Carswell has been nominated was once graced by one of the area's (and the nation's) most estimable citizens, the legendary Oliver Wendell Holmes. Then they should vote their conscience.

Mr. WILLIAMS of New Jersey. Mr. President, an editorial in the Bergen Sunday Record of April 5, very cogently sets forth the right and responsibillty of the Senate to exercise its independent judgment regarding the qualifications of G. Harrold Carswell for appointment to the Supreme Court. As the editorial makes clear, the President is wholly mistaken in asserting that the Senate has a duty to acquiesce to his wishes in this regard. On the contrary, the Senate has the power and obligation, under the Constitution, to make its own review and decision regarding the qualifications of this nominee. And, as the editorial further makes clear, the record in this instance leaves no doubt that our choice should be put to not approve the nomination.

Mr. President, I ask unanimous consent that this excellent editorial be printed at this point in the RECORD.

There being no objection, the editorial was ordered to be printed in the RECORD, as follows:

[From the Bergen (N.J.) Sunday Record, Apr. 5, 1970]

NO PLACE FOR MEDIOCRITY

And [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court . . .

President Nixon in a letter made public last week advanced the preposterous proposition that unless the United States Senate approves his nomination of Judge G. Harold Carswell to be a justice of the Supreme Court it will have substituted its judgment for his. It is the duty of the President to appoint. It is the duty of the Senate to advise and consent. It can vote any way it pleases as long as it votes yes. This is his thesis. It should be firmly rejected.

The Senate can reject it by voting tomorrow to recommit Judge Carswell's nomination to the Judiciary Committee for decent interment. It should do so.

More than a constitutional question is involved in the Carswell nomination, but the constitutional question is important. Since the Senate first rejected a nomination, that of Roger B. Taney in 1834 to be Secretary of the Treasury, the language has been understood to mean that only, only with the advice and consent of the Senate shall the President do the things enumerated in Article II. Mr. Nixon's construction of the language is precisely what was dreaded in the Constitutional Convention itself. "It was argued that this authority to appoint would invest [the President] with power leading toward monarchy," says Thomas James Norton in "The Constitution of the United States." "Benjamin Franklin was of this belief. However, in practice the plan has worked very well."

It has worked very well because the Senate has exercised ite power to review the qualifications of nominees and to decide in its collective conscience whether they meet its, not any President's, standards of excellence.

The standards Judge Carswell meets have been defined with charming candor by one of his hoarsest supporters, Sen. Hruska of Nebraska. He is a mediocre fellow, Mr. Hruska acknowledges, but we need mediocre people in high places. He has some bizarre theory about proportional representation.

Judge Carswell may be the kind of mediocrity Mr. Nixon, his Attorney-General, and the Southern strategy need. He has entered in the law reviews no evidence whatever that he has thought about law or anything else; his opinions are a gray desert of print in which contorversial issues are settled on narrowly technical grounds; he has been reversed frequently. Setting aside his campaign speech of 1948 in favor of white supremacy as a youthful indiscretion, yet his accounting of the part he played in incorporating a Tallahassee municipal golf course in danger of desegregation has been various and disingenuous enough to raise a grave question respecting either his intelligence or his integrity.

The Supreme Court is not a representative body. It is not a legislature in which persons who have no use for equal justice under law are entitled to representative parity with persons who believe in it.

It is the final arbiter. What it decrees is the law of land. It is no proper place for mediocrity. Mediocrity and the Southern strategy can be paid off in less guileful, corrosive ways.

The Senate has been asked, not bidden, to give its consent to the Carswell nomination. On the merits it should refuse.

Mr. DODD. Mr. President, as a rule I do not announce how I will vote, particularly on Executive nominations, before the vote is taken on the floor of the U.S. Senate.

But because of the parliamentary situation concerning the nomination of Judge G. Harrold Carswell, I believe that, in the interest of a clear understanding by the public, I should announce my decision before the vote is taken.

As a member of the Senate Judiciary Committee, I voted to send the nomination of Judge Carswell to the floor because I believe the full Senate must pass on an issue of this kind.

The matter has been debated pro and con for many weeks and I believe the Senate should vote promptly on the merits of the nomination.

Because I believe that recommittal is an evasion of responsibility and a back door excuse for some who do not wish to face up to the situation, I shall vote against recommittal.

If the motion to recommit fails, and I trust it will, I shall vote against confirmation of Judge Carswell.

Most black people and many working people do not feel that they will get a fair shake if Judge Carswell is on the Supreme Court. This goes to the very heart of the matter. It is a question of faith in our system. If the people of this country are to have faith in our system, we must put men on the Court in whom they can have confidence.

I shall vote, therefore, against confirmation.

Mr. MATHIAS. Mr. President, it ill behooves any member of the Judiciary Committee to oppose recommittal of the nomination of G. Harrold Carswell to be an Associate Justice of the Supreme Court. The events of the last 30 days indicate that the record that the committee has made to date has raised more questions than it has answered and has caused more confusion than it has cured. I, for one, as a member of the committee, feel a sense of responsibility for improving the record and expanding the information available to the Senate and to the country.

With this in mind, I requested the Justice Department on March 10 to provide me with some additional information and an opportunity to talk with Judge Carswell. The first of these requests was promptly granted, but to date the second has not been acknowledged. I regret that the opportunity to meet with Judge Carswell either on or off the record has not been considered to be in the interest of the Senate, the Court, the country, or even Judge Carswell himself. I made the request in an attempt to conscientiously discharge my duties in this connection. I had previously joined in an effort to recall Judge Carswell to the committee, but this attempt was defeated by majority of the committee.

The best service that could be rendered to President Nixon in connection with the Carswell nomination is to resolve some of the troubling questions that remain unanswered. It does not help to say that the President should have been better served by those upon whom he has depended. It does not help to say that the White House staff, the Attorney General, or the Federal Bureau of Investigation should have found out all the facts before the President sent Judge Carswell's name to the Senate. This experience should be of some value when the next vacancy occurs on the Supreme Court, but it does little to help the President, Judge Carswell, or the Senate today. The only thing that will truly be of value is the further exposition of the facts on the record, including those that should have been known before the nomination was made. The only way to place the accumulating body of fact on the record and to distinguish it from rumor and innuendo is by recommittal to the Judiciary Committee with the understanding that the committee will do a responsible job.

Mr. HOLLINGS. Mr. President, the U.S. Senate has been characterized as the most deliberative body in the world. This distinction was demeaned by the Senate's unstudied consideration of the appointment of Judge Clement F. Haynsworth to be an Associate Justice of the Supreme Court. Before the debate commenced on the Senate floor, over two-thirds of the Members had publicly declared their decision. As the leader for Judge Haynsworth, I expressed concern and chastised my colleagues for making up their minds before the debate, for failure to go behind the headlines and discover the truth. I sincerely believe that this is the reason Judge Haynsworth is not a member of the High Court at this moment.

When the debate commenced on the nomination of Judge G. Harrold Carswell, I reminded the news media of this position I had taken during the Haynsworth debate. I told them I was undecided and that I would listen and study the record. This position immediately opened a Pandora's box of editorial nonsense in many of the South Carolina newspapers.

While it is the President's duty to propose, it is the Senate's duty to dispose. I believe the Senate's duty of disposition goes beyond the mere appraisal of integrity, judicial temperament, and professional competence. I believe it goes to the whole man. Specifically, I believe that a Senator has a duty to consider the nominee's philosophy and can and should question a nominee's decisions so long as they are not matters pending. I realize the honored precedent of the Senate that a nominee's philosophy and certainly his decisions should never be questioned. However, this precedent time and again has been debauched by an oblique attack on honor and propriety. Disagreeing with Judge Haynsworth's philosophy, the opposition in a transparent attempt to adhere to the time-honored precedent turned to attack his integrity. Realizing this was unassailable, each opposing Senator would say in no uncertain terms that he believed Judge Haynsworth was honest but it was the apperance of impropriety that was disturbing; and as a result of the appearance, they could not support his confirmation. This is a charade and does injustice to the nominee. We should candidly investigate the whole man. In doing so, we should not fall into the trap of only supporting those philosophically atuned to our thinking, but determine whether the nominee's philosophy is so extreme as to forbid objectivity.

The nature of the office of a Supreme Court Justice is one of awesome power in our society. Since the Justices hold office for life, a most thorough and objective review should and must be made by the Senate in the exercise of its confirmation powers. To the point—President Nixon is mistaken when he challenges the Senate's exercise of this power. Were it not for the deliberate review given President Johnson's appointee, there would be no vacancy for President Nixon to act on at this time.

Judge Carswell has been subjected to the serious charge of being a racist and the superficial charge of mediocrity. I have studied his record and decisions and feel certain that he is not a racist. To the superficial charge, I find that anonymity cannot be equated with mediocrity. The very role of a district or circuit judge is that of anonymity. From the standpoint of experience, Judge Carswell has far more prior judicial experience than any of the present Supreme Court Justices, save one. Judge Carswell has the judicial and professional competence to serve as an Associate Justice of the Supreme Court, and I intend to vote for his confirmation and oppose any attempt to recommit the nomination to the Judiciary Committee.

Mr. GURNEY. Mr. President, there has been a vast outpouring of support for Judge Carswell from the Florida bar, lawyers who have practiced in his court, who know well his qualities as a judge.

I offer for the RECORD various telegrams in support of Judge Carswell.

There being no objection, the telegrams were ordered to be printed in the RECORD, as follows:

ST. AUGUSTINE, FLA., *April 3, 1970.*
Honorable ED GURNEY,
New Senate Office Building,
Washington, D.C.:
St. Johns County Bar Association overwhelmingly endorses Carswell nomination confirmation.
JOHN J. UPCHURCH,
Secretary-Treasurer.

PALM BEACH, FLA., *April 4, 1970.*
Senator EDWARD J. GURNEY,
Washington, D.C.:
Urge you use your great influence insure confirmation of Judge Carswell to the Supreme Court.
CLIFFORD F. HOOD.

WEST PALM BEACH, FLA., *April 5, 1970.*
EDWARD J. GURNEY,
U.S. Senator,
Washington, D.C.:
Mr. GURNEY: Agree with your views on Carswell. How can I help?
GEORGE KANE.

TARPON SPRINGS, FLA., *April 4, 1970.*
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
Appreciate your support of Carswell. Caliber of opposition leadership should justify his appointment.
JOHN A. TOMLINSON.

WINTER PARK, FLA.,
April 4, 1970.
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
Approve your stand on Carswell. Continue the good fight.
JAMES R. and GENEVA PAGE.

MIAMI, FLA.,
April 4, 1970.
Senator EDWARD J. GURNEY,
Washington, D.C.
SIR: In behalf of Judge Carswell blackball recommittal his appointment. Vote yes.
Thank you.
Respectfully,
GLADYS E. WINNE,

JACKSONVILLE, FLA.,
Apil 4, 1970.
Senator GURNEY,
Washington, D.C.:
As Floridians we are counting on your vote for Judge Carswell and your influence on other dissident Senators.
Mr. and Mrs. WILLIAM L. REED.

CASSELBERRY, FLA.,
April 4, 1970.
HON. ED GURNEY,
Senate Office Building,
Washington, D.C.:
I have known the Carswell family forty years. They are dedicated Americans. I resent the lobbying of NAACP and labor against the appointment of a dedicated intelligent Southern gentleman to the Supreme Court. It is appauling they would tolerate Douglas and Black, and vote against Carswell.
MRS. JAMES MATTHEWS.

ORLANDO, FLA.,
April 4, 1970.
Senator ED GURNEY,
Washington, D.C.:
As concerned citizens we wholeheartedly support the nomination of Judge Carswell to the supreme court.
Mr. and Mrs. HUNTER C. KELLEY.

VERO BEACH, FLA.,
April 4, 1970.
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
I urge you to use all effort possible to execute final confirmation Judge Harold Carswell. Our supreme Court needs this man of integrity and ability.
ALMA LEE LOY.

ORLANDO, FLA.,
April 4, 1970.
Senator ED GURNEY: We heartily approve your continued support of Carswell nomination.
DOROTHY and BILL APPELBERG.

PENSACOLA, FLA.,
April 4, 1970.
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
We completely support Carswell nomination.
HOLLIDAY and MARY VEAL.

PENSACOLA, FLA.
April 6, 1970.
Senator EDWARD GURNEY,
Washington, D.C.:
We urge your full support for Carswell. Also we oppose guaranteed income as contrary to free enterprise system.
CARL and GRACE SEVERIN.

CLEARWATER, FLA.
April 4, 1970.
Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
Please continue your hard work and support for Judge Carswell for the Supreme Court.
Respectfully,
Mr. and Mrs. FRANK P. FLICK.

JACKSONVILLE, FLA.
April 4, 1970.
Senator ED GURNEY,
Senate Office Building,
Washington, D.C.:
We want and need Judge Carswell.
Mr. and Mrs. W. J. ATWOOD.

FORT LAUDERDALE, FLA.,
April 4, 1970.
Senator EDWARD GURNEY,
Senate Office Building, Washington, D.C.:
Prevent a hyprocritical Senate from accepting a Douglas and denying a Carswell.
I. J. STRUMPF.

Senator EDWARD GURNEY,
Senate Office Building,
Washington, D.C.:
Support confirmation of Carswell nomination for Supreme Court Justice.
Mr. and Mrs. ADOLPH K. MILLER.

Senator ED GURNEY,
Washington, D.C.:
We need Carswell.
THOMAS SUDDATH.

Mr. BAYH. Mr. President, I feel that little remains to be said at this late hour relative to the merits and qualifications of the man whose name has been submitted. I think all of us know in our own minds that the final test is not going to come on the motion of the Senator from Indiana but, rather, will come on an up or down vote as to whether or not this man's nomination to the Supreme Court should be confirmed.

Perhaps, in about a minute and a half, it might be a little hopeful to look at a broader purpose rather than just the qualifications of the nominee. We are dealing with the nomination of a Supreme Court Justice who, as the distinguished Senator from Massachusetts just pointed out, is going to be on that Court long after most of us no longer have the honor to serve in this body.

With all due respect to our friend from Florida, the name of the man before us is not Clark; it is Carswell.

I have been deeply concerned about the erosion of faith that many people in this country have so far as the institutions of our democracy are concerned. It seems to me that the one bastion that stands today head and shoulders above all others in the minds of those who have the greatest concern about the ability of the institutions of this country to maintain their solidarity is the Supreme Court of the United States.

It seems to me, Mr. President, that the only question we should ask ourselves, when we cast this vote and the succeeding vote, is: Are we doing what must be done to shore up the institutions of our democracy, to shore up the Supreme Court of the United States, by placing Judge G. Harrold Carswell on that Court?

I think, in addition, that we also have to meet the test of whether the Senate, indeed, considers that this is the place to advise and consent.

The VICE PRESIDENT. All time has expired.

SEVERAL SENATORS. Regular order, Mr. President.

Mr. GRIFFIN. Mr. President, a parliamentary inquiry.

The VICE PRESIDENT. The Senator from Michigan will state it.

Mr. GRIFFIN. Have the yeas and nays been ordered on the pending motion?

The VICE PRESIDENT. The yeas and nays have not been ordered.

Mr. GRIFFIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The VICE PRESDIENT. All time has now expired.

The question is on agreeing to the motion of the Senator from Indiana (Mr. BAYH) to recommit the nomination of Judge G. Harrold Carswell, of Florida, to be an Associate Justice of the Supreme Court of the United States.

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. AIKEN (when his name was called). Mr. President, a parliamentary inquiry.

The VICE PRESIDENT. The Senator from Vermont will state it.

Mr. AIKEN. May I ask, what is this vote on?

The VICE PRESIDENT. The question is on agreeing to the motion of the Senator from Indiana (Mr. BAYH) to recommit the nomination of Judge G. Harrold Carswell, of Florida, to be an Associate Justice of the Supreme Court of the United States.

Mr. GRIFFIN. Mr. President, a further parliamentary inquiry.

The VICE PRESIDENT. The Senator from Michigan will state it.

Mr. GRIFFIN. If a Senator wishes to have the nomination recommitted to the Judiciary Committee, he will vote "yea"; if he wants not to have it recommitted, he will vote "nay"; is that correct?

The VICE PRESIDENT. That is correct.

Mr. AIKEN. Mr. President, I vote "no."

The assistant legislative clerk resumed and concluded the call of the roll.

Mr. KENNEDY. I announce that the Senator from New Mexico (Mr. ANDERSON) is necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL), is absent on official business.

On this vote, the Senator from Rhode Island (Mr. PELL) is paired with the Senator from Utah (Mr. BENNETT). If present and voting, the Senator from Rhode Island would vote "yea" and the Senator from Utah would vote "nay."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) is absent on official business as observer at the meeting of the Asian Development Bank in Korea.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness, and, if present and voting, would vote "nay."

On this vote the Senator from Utah (Mr. BENNETT) is paired with the Senator from Rhode Island (Mr. PELL). If present and voting, the Senator from Utah would vote "nay" and the Senator from Rhode Island would vote "yea."

The result was announced—yeas 44, nays 52, as follows:

[No. 115 Ex.]

YEAS—44

Bayh	Hughes	Moss
Brooke	Inouye	Muskie
Cannon	Jackson	Nelson
Case	Javits	Pastore
Church	Kennedy	Prouty
Cranston	Magnuson	Proxmire
Eagleton	Mansfield	Ribicoff
Fulbright	Mathias	Schweiker
Goodell	McCarthy	Spong
Gore	McGee	Symington
Gravel	McGovern	Tydings
Harris	McIntyre	Williams, N.J.
Hart	Metcalf	Yarborough
Hartke	Mondale	Young, Ohio
Hatfield	Montoya	

NAYS—52

Aiken	Ellender	Pearson
Allen	Ervin	Percy
Allott	Fannin	Randolph
Baker	Fong	Russell
Bellmon	Goldwater	Saxbe
Bible	Griffin	Scott
Boggs	Gurney	Smith, Maine
Burdick	Hansen	Smith, Ill.
Byrd, Va.	Holland	Sparkman
Byrd, W. Va.	Hollings	Stennis
Cook	Hruska	Stevens
Cooper	Jordan, N.C.	Talmadge
Cotton	Jordan, Idaho	Thurmond
Curtis	Long	Tower
Dodd	McClellan	Williams, Del.
Dole	Miller	Young, N. Dak.
Dominick	Murphy	
Eastland	Packwood	

NOT VOTING—4

Anderson	Mundt	Pell
Bennett		

So Mr. BAYH's motion to recommit the nomination was rejected.

Mr. DOLE. Mr. President, I move that the Senate reconsider the vote by which the motion to recommit was rejected.

Mr. GRIFFIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. MANSFIELD. Mr. President, the vote to recommit the nomination has been defeated by a rather substantial margin. I personally would like to see this matter brought to a head rather than to wait until Wednesday to decide. I would hope that Senators would give some consideration to the request I am about to make, because I think it will speed up the business of the Senate and allow us to get on with other work. It will not change the final result in any way, to my knowledge.

I ask unanimous consent that at the hour of 3 o'clock this afternoon, the final vote on the nomination of Judge Carswell takes place.

Mr. HRUSKA. Mr. President, reserving the right to object—and I shall object—this is the first time there has been brought to the attention of the Senate in its official capacity any indication that there would be an effort to change the order of business that was arrived at on March 25, when the present unanimous-consent agreement was fashioned and when it was fully approved.

It would seem to me that a hurried consideration of a change of an order of this kind would not be in order. And, in fact, it would be indicated that it would be unwise to do so.

Mr. President, I object.

Mr. BAYH. Mr. President, reserving the right to object——

Mr. MANSFIELD. Mr. President, may I say that I did discuss this possibility an hour and a half ago with the distinguished minority leader.

I did so only to keep the other side informed of something which I thought of alone, and it was my thought that with all the Members possible present, it might be well to face up to this issue and get it disposed of once and for all, rather than to prolong it for the next day or so.

Mr. President, I realized that an agreement had been made to vote at 1 o'clock on Wednesday on the confirmation of Judge Carswell.

I thought that this might be one way of speeding up the procedure without unarming anyone and with the possibility that the Senate could get on to other business and thereby keep up to its schedule so that it might be possible, all things considered, to adjourn by Labor Day. However, objection has been entered, and that is about the size of the situation.

Mr. SCOTT. Mr. President, will the distinguished majority leader yield?

Mr. MANSFIELD. Yes, indeed.

Mr. SCOTT. Mr. President, I would simply like to make it clear that the distinguished majority leader did make such a suggestion to me a short time ago. I interposed no personal objection to it. But I did advise him that objection would be heard and perhaps more than one. And I believe that that correctly states our conversation.

Mr. MANSFIELD. Mr. President, the Senator is correct. I made the unanimous-consent request in spite of the advice given by the distinguished minority leader. I did it on my own personal initiative and with the idea of speeding up the business of the Senate as a whole.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. HRUSKA. Mr. President, this is the first time, I repeat, that the matter has been brought before the Senate on an official basis. I am aware that there has been a conference between the respective leaders of the two parties here.

I just wonder, however, if it would not serve some purpose, now that objection has been made, for the leader to consider perhaps renewing the request later this afternoon, say in the middle of the afternoon, and thereby give us a little chance for discussion and consideration and deliberation.

Mr. MANSFIELD. Mr. President, that is a reasonable request.

Mr. HRUSKA. And if it is agreeable with the leader, at any time say at 3 or 3:30, or something of that kind, the request may be renewed.

Mr. MANSFIELD. Mr. President, I will be delighted to renew the request at that time.

I appreciate the advice of the distinguished Senator.

Mr. BAYH. Mr. President, will the distinguished majority leader yield?

Mr. MANSFIELD. I yield.

Mr. BAYH. I do not want anyone who heard me rise a moment ago and reserve the right to object to think that, as far as I am concerned, I was going to object to this procedure.

We have heard from the distinguished Senator from Nebraska, the distinguished Senator from Kansas, and the distinguished Senator from Florida.

I watched with great interest as the distinguished minority whip made a very excellent presentation on the Today Show this morning about the importance of bringing this matter before the Senate and how ridiculous it was for some of us to feel that we ought to study the matter more and answer some of the questions that have been raised.

I would like to salute the majority leader for trying to bring this matter to a vote at this time.

I am hopeful that the Senator from Nebraska will reconsider later this afternoon and that we can get down to the business of determining whether Judge Carswell will be confirmed for the Supreme Court.

Mr. HRUSKA. Mr. President, the memory of the Senator from Nebraska goes back to the afternoon of Wednesday, March 25, when it was the thinking of the leadership and others on this side of the aisle, as well as many Senators on the other side of the aisle, that the vote just taken this afternoon be followed by a vote on the nomination proper.

There was objection at that time, and the leading objector was the Senator from Indiana.

He must have had some reason for objecting. There was some discussion of the matter and the Senator from Indiana insisted that the vote not come on until Wednesday next following the vote to be had on today.

Now, having an impromptu and immediate proposal to dislocate what we have

agreed upon is a little different situation than appeared before, which was the basis of the decision last March 25.

The VICE PRESIDENT. The Senate will be in order.

Mr. MANSFIELD. I have discussed this matter with no one except the distinguished minority leader, so the record will be straight.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. DOLE. Would it be well for us to stay around this afternoon?

Mr. MANSFIELD. Yes. At the hour of 3 o'clock it is my intention to renew the request again.

Mr. YOUNG of Ohio. Mr. President, reserving the right to object, I report to the leadership, and I report to you, Mr. President, that Loyola University of Chicago is honoring me and bestowing an honor upon me this evening at a banquet. I am leaving for the airport within a very few minutes. Therefore, I report that if a vote on this important matter is taken today, I cannot be present to vote.

Mr. MANSFIELD. Mr. President, I yield the floor.

Mr. HRUSKA. Mr. President, will the Senator yield for a parliamentary inquiry?

Mr. MANSFIELD. I yield.

Mr. HRUSKA. Some suggestion has been made that perhaps a motion to lay on the table would be applied to the pending nomination. It is my recollection that this matter was brought up before, and that a motion to lay on the table would be eligible at any time to be laid before the Senate but the vote on that motion could not occur before the conclusion of debate, or prior to 1 o'clock on Wednesday, pursuant to the unanimous-consent agreement.

Is my recollection correct?

The VICE PRESIDENT. The Chair construes the intent of the unanimous-consent agreement to be that a vote on a motion to table the nomination would not be in order until 1 o'clock on April 8, 1970.

Mr. HRUSKA. And that no vote would occur on it until the conclusion of the debate and immediately prior to the vote on the motion to confirm.

The VICE PRESIDENT. Unless the Chair hears some disagreement, that would be the construction of the Chair.

Mr. HRUSKA. Unless modified by a new unanimous-consent request.

The VICE PRESIDENT. Yes.

Mr. MANSFIELD. Mr. President, I think I should say publicly that if a motion is made to table, after the vote which has just been conducted in the Senate, I would feel encumbent to vote against such a motion because I think the Senate had a reasonable chance to stand up to the question of recommital and the next role should be on an up-and-down basis as to whether Judge Carswell should or should not be confirmed.

Mr. HRUSKA. Mr. President, the majority leader speaks good sense.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. HOLLAND. Mr. President, I want the RECORD to show I have no objection to the speeding up of this vote. However, I would not want to preclude my distinguished friend from Ohio from voting. I wonder if he will be back by tomorrow.

Mr. YOUNG of Ohio. Yes, indeed.

Mr. HOLLAND. I suggest that possibility to the distinguished majority leader.

Mr. MANSFIELD. The vote would not come tomorrow because there will be other Members who have commitments. If there is an objection I hope it will be made now so I will not go through the charade at 3 o'clock to make a motion with no meaning.

Does the Senator object to a vote later this afternoon?

Mr. YOUNG of Ohio. Mr. President, I wish to inform the distinguished majority leader that I hope to take a plane at 2:40 p.m. If I were present this afternoon I would be compelled to object because I desire my vote to be counted.

Mr. MANSFIELD. That is enough for me. There will be no further request made today.

ORDER OF BUSINESS—LEGISLATIVE SESSION

Mr. MANSFIELD. Mr. President, if no one intends to speak further on the nomination of Judge Carswell at this time, I ask unanimous consent that it be laid aside temporarily and that the Senate return to legislative session for the purpose of resuming work on the unfinished business, Senate Resolution 211.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. CANNON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The VICE PRESIDENT. Without objection, it is so ordered.

SUSPENSION OF FURTHER DEPLOYMENT OF OFFENSIVE AND DEFENSIVE NUCLEAR STRATEGIC WEAPONS SYSTEMS

The VICE PRESIDENT. The Chair lays before the Senate the unfinished business, which will be stated by title.

The ASSISTANT LEGISLATIVE CLERK. A resolution (S. Res. 211) seeking agreement with the Union of Soviet Socialist Republics on limiting offensive and defensive strategic weapons and the suspension of test flights of reentry vehicles

NASA DISPLAY OF NEW PRODUCTS FROM THE SPACE PROGRAM

Mr. CANNON. Mr. President, this morning the Committee on Aeronautical and Space Sciences held a hearing on the benefits that the Nation has received as a result of the space program. In the absence of the esteemed chairman of the committee, Senator CLINTON P. ANDERSON, it was my privilege to preside over that meeting.

It was a remarkable hearing and even those of us who have followed the space program for many years were somewhat surprised, I think, at the scope of these benefits and the broad effort that NASA is undertaking to make these benefits available to the public. I shall not bother you here with the details as the committee is printing this hearing as a separate document, which I hope all Senators will read. This document will be available in 2 or 3 weeks, well before the consideration of this year's NASA authorization bill.

Among the benefits are a multitude of new products which have come directly from the space program or have been stimulated by materials and techniques developed by the space program.

A number of these products were shown to the committee as a part of Dr. Paine's testimony. It is such a fascinating display that we have persuaded NASA to leave it in the committee hearing room, room 235 in the old building, today until 3 p.m. Tomorrow, April 7, the display will be open from 10 a.m. to 3 p.m. NASA experts will be available to describe the products and to provide help to Senators and staffs on how constituents, particularly manufacturers, businessmen, and educators, can be assisted in getting information which would be useful to them.

A RAY OF LIGHT ON UNITED STATES-JAPAN TEXTILE AGREEMENT

Mr. JAVITS. Mr. President, late last week, some rays of light penetrated the increasingly dark clouds settling over United States-Japanese relations and the world's international trading pattern because of the textile situation. First, the spokesman of the State Department denied an earlier statement by an administration official that the United States was on the point of abandoning ongoing talks between the United States and Japan regarding the textile situation and deciding to seek quota legislation from Congress. In response to a press question Mr. McCloskey stated:

> Only that the Administration is on record wanting to solve some of the problems through international agreement. We've had discussions with the major exporters, principally Japan, looking towards agreements on this subject. So far it has not been possible to reach negotiated solutions, *but contact has not been broken off.*

A spokesman of the Japanese Embassy, later in the afternoon, according to press reports, gave a qualified endorsement to the Kendall proposal, whose elements reportedly include a temporary 1-year freeze on textile imports thus allowing time for a Presidential Commission to review the whole textile import question and to make findings as to "injury." In making this reported qualified endorsement the Japanese Government apparently was overriding the Japanese textile industry which rejected the Kendall proposal. I placed the press reports of this Japanese industry rejection in the CONGRESSIONAL RECORD on April 2. I believe that the Japanese Government has now

United States relative to equal rights for men and women; to the Committee on the Judiciary.

PRIVATE BILLS AND RESOLUTIONS

Under clause 1 of rule XXII, private bills and resolutions were introduced and severally referred as follows:

By Mr. BELCHER:

H.R. 16856. A bill for relief of M. Sgt. George H. Jennings, Jr.; to the Committee on the Judiciary.

By Mr. GUBSER:

H.R. 16857. A bill for the relief of Soon Ho Yoo; to the Committee on the Judiciary.

By Mr. MORSE:

H.R. 16858. A bill for the relief of Joseph A. Coan; to the Committee on the Judiciary.

By Mr. ROGERS of Florida (by request):

H.R. 16859. A bill for the relief of Uhel D. Polly; to the Committee on the Judiciary.

By Mr. THOMSON of Wisconsin:

H.R. 16860. A bill for the relief of Song Han Kyou; to the Committee on the Judiciary.

MEMORIALS

Under clause 4 of rule XXII,

349. The SPEAKER presented a memorial of the Legislature of the State of South Carolina, relative to insuring continued operation of the U.S. Coast Guard Reserve, which was referred to the Committee on Merchant Marine and Fisheries.

PETITIONS, ETC.

Under clause 1 of rule XXII,

436. The SPEAKER presented a petition of the Florida State Chamber of Commerce, Jacksonville, Fla., relative to designating Cape Kennedy as the operational base for the space shuttle system, which was referred to the Committee on Science and Astronautics.

SENATE—*Wednesday, April 8, 1970*

(Legislative day of Tuesday, April 7, 1970)

The Senate, in executive session, met at 10 o'clock a.m., on the expiration of the recess, and was called to order by Hon. WILLIAM B. SPONG, Jr., a Senator from the State of Virginia.

The Chaplain, the Rev. Edward L. R. Elson, D.D., offered the following prayer:

O Thou supreme judge, to whom men and nations are accountable, help us to walk uprightly, to work diligently, to contend fairly, and to judge wisely here that in the final judgment we may not be found wanting. Help us this day and every day to be obedient to conscience, the silent sentinel of the soul, and to be guided by the inner light of Thy truth. May Thy spirit sustain us without blemish or regret to the end. Then in Thy mercy grant us a safe lodging, a holy rest, and peace at the last. Through Him whose name is above every name. Amen.

DESIGNATION OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will read a communication to the Senate.

The bill clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., April 8, 1970.

To the Senate:

Being temporarily absent from the Senate, I appoint Hon. WILLIAM B. SPONG, Jr., a Senator from the State of Virginia, to perform the duties of the Chair during my absence.

RICHARD B. RUSSELL,
President pro tempore.

Mr. SPONG thereupon took the chair as Acting President pro tempore.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I ask unanimous consent that I may proceed, with the time to be taken equally out of both sides.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that all committees be authorized to meet during the session of the Senate today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

PROGRAM

Mr. MANSFIELD. Mr. President, for the information of the Senate, there will be a number of votes today—and I ask the distinguished minority leader to confirm this, because we have discussed this matter jointly. After the Carswell nomination is disposed of, the Senate will proceed to the consideration of Calendar No. 761, Senate Joint Resolution 190, a joint resolution to provide for the settlement of the labor dispute between certain carriers by railroad and certain of their employees; and that will be followed, hopefully, after its disposition this afternoon, by Calendar No. 767, S. 3690, a bill to increase the pay of Federal employees.

Mr. SCOTT. Mr. President, will the distinguished majority leader yield?

Mr. MANSFIELD. I am delighted to yield to the Senator from Pennsylvania.

Mr. SCOTT. I should like to point out that today will be one of the most important days in this session of the Senate.

I hope that all Senators and attachés will be particularly careful to be here because, as has been said, we have not only a vote on the confirmation of the nominee to the Supreme Court, but we have also the extremely difficult problem of what to do on settlement of the railroad labor dispute. We also have the Federal employee pay raise bill and that, in turn, will be a prelude to what I hope will be a further carrying out of the agreement reached among the heads of the various postal unions and the administration, whereby, as the first step in the act of good faith, the administration agrees to support the postal pay raise which will be before us today; and, in turn, the administration and the union leaders have agreed that before there shall be any additional pay raise to the postal unions as distinguished from the general pay raise, there will be a tie-in with postal reorganization and reform, which is a very much needed development, in my opinion, and a bonanza, if it is properly structured, in that we can save the budget about $1 billion a year.

Therefore, I think, if we are going to keep the faith all around, it should be remembered that the pay raise bill today, which applies to virtually all Federal employees, is only step No. 1 in a good faith commitment which involves two more steps, a further postal raise, a restructuring of the postal organization into a new kind of unit and, of course, the final phase, how to pay for it. That is the responsibility of the administration and Congress. The President has spoken out on that. We will have our opportunity here to work out the way in which it is to be paid.

Essentially, the money will have to be found for the fiscal 1971 budget, but if certain postal rates are approved later, then other budgets will, more or less, take care of themselves as regards this problem, but there will be a shortage in the fiscal 1971 budget unless we find some way to make it up.

I do thank the majority leader for yielding to me.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent, as in legislative session, that the Journal of the proceedings of Tuesday, April 7, 1970, be approved.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. BIBLE. Mr. President, will the Senator from Montana yield?

Mr. MANSFIELD. How much time does the Senator require? Is his speech on Judge Carswell?

Mr. BIBLE. Yes; it will not be too long.

Mr. MANSFIELD. Mr. President, I yield 5 minutes to the Senator from Nevada or, if the Senator needs it, more time.

Mr. BIBLE. I do not know whose time I shall speak on. I believe it will be apparent in a few moments, though.

I think I would ask the Senator from Michigan to allow me 5 minutes to proceed.

Mr. GRIFFIN. Mr. President, I yield 10 minutes to the Senator from Nevada.

The ACTING PRESIDENT pro tem-

pore. The Senator from Nevada is recognized for 10 minutes.

Mr. BIBLE. Mr. President, as the debate on President Nixon's nomination of Judge G. Harrold Carswell to be an Associate Justice of the Supreme Court nears its end, I want again to state my position on the nomination.

Some time ago, the press in my State of Nevada asked me for a statement. That was on February 17, if my memory serves me correctly. I responded that unless disabling evidence developed bearing on the nominee's judicial qualifications, I intended to vote for confirmation. I expressed the view that Judge Carswell's experience as a trial judge, and his extensive background in the day-to-day application of the law should be genuine assets. I also stated that as a strict constructionist of the law, this nominee would bring needed balance to the deliberations of the Supreme Court.

Generally, I applaud the actions the Supreme Court has taken over the past 20 years to define and effectuate constitutional rights. However, I have long felt, and said so many times, that some of its decisions—particularly in the area of criminal law—have gone too far, and have unnecessarily impeded the processes of law enforcement and criminal justice all across the land. I feel that the addition of a thoughtful conservative is needed to enable the Court to take a more balanced view of this and other problem areas.

Mr. President, I have studied the testimony before the Judiciary Committee, the committee's report—including the individual views—and I have followed both sides of what has been a long and exhaustive debate. In the Senate's best tradition of free and open debate, the nominee's life and work have been spread on the public record and broadcast across the land—as it should be.

I have weighed the evidence. I have carefully evaluated the arguments for and against the nominee, and I came away from the task satisfied that the President's nomination should be confirmed.

On the question of his qualifications, I join those of our colleagues who have pointed out that the Senate has on three prior occasions unanimously confirmed Judge Carswell's appointment as a U.S. attorney, a U.S. district judge, and as a U.S. circuit judge.

In 1953 the nominee was appointed U.S. attorney for the northern district of Florida—with unanimous Senate approval. In 1958, after some 5 years of service in that office, he was appointed U.S. district judge for the northern district of Florida—and was again unanimously confirmed. In June 1969—less than 1 year ago and after some 11 years on the trial bench—he was elevated to his present position on the U.S. Court of Appeals for the Fifth Circuit. Again with the unanimous approval of the Senate.

On each occasion, the nominee's qualifications and record were carefully considered, and on each occasion he received the Senate's unanimous endorsement. At no time was any question raised as to his qualifications, his honesty, or his integrity.

Judge Carswell comes before the Senate on this nomination with the support and full confidence not only of the President of the United States. Eleven of his fellow judges on the Fifth Circuit endorsed his appointment, as have 50 of the 58 active Federal district judges and seven of the retired district judges in the Fifth Circuit. He has been found qualified for appointment by the Standing Committee on the Federal Judiciary of the American Bar Association, and there has been an impressive demonstration of support by attorneys who have practiced regularly in Judge Carswell's court.

Mr. President, these are impressive credentials. I view previous judicial experience as a positive factor in support of any nominee for the Supreme Court. One may certainly disagree with certain of this judge's decisions. Indeed, it would be amazing if a judicial career as extensive as this one raised no disagreement. On the record as a whole, I am satisfied that Judge Carswell is a man of honesty and integrity, and that his 17 years of public service in the law qualifies him to be a member of the Supreme Court.

Throughout my deliberations on this nomination, I have been very much aware that a good deal of the opposition to Judge Carswell has come from those concerned over civil rights. The charge has been made and broadcast across the Nation that this judge is a racist. And the charge has alarmed many thoughtful citizens, including citizens in my State.

I would not be supporting this nomination if I thought there was any substance to this charge. I have felt it to be my obligation to assess equitably all of the evidence of record, and I do not believe Judge Carswell can be fairly considered an extremist or a racist. A conservative and strict constructionist, yes. A racist, no.

These charges apparently had their roots in words spoken more than 20 years ago at a time when segregation was rampant across much of the Nation.

The distinguished Senator from Delaware set this in perspective in his statement last week reminding us that at about the time of the Carswell speech the Senate voted overwhelmingly against desegregation of the Armed Forces. Who today would want his fortunes to depend on that vote? And by the same token, why should this nominee—who has publicly repudiated his words—be vilified at this late date?

I think our colleague hit the mark when he asked how many Members of the Senate have made speeches, cast votes, or done something during the past 25 years that he would not be too proud of today.

Indeed, I have reviewed a number of historical writings in connection with my consideration of this nomination—words spoken or written by Thomas Jefferson, Abraham Lincoln, Theodore Roosevelt, Franklin D. Roosevelt, and Harry S Truman. Based on certain of their utterances, I daresay some might raise a question whether these great Americans would be suitable for appointment to the Court.

I say again, Mr. President, I have carefully weighed the evidence. The case sought to be made against the nominee has been good headline material, but it is not persuasive. In my judgment, the most credible evidence—that provided by his colleagues on the bench and others who have been close to the nominee and his work over the years—effectively rebuts the racist charge. Respected jurists such as Judge Bryan Simpson and Judge Robert A. Ainsworth, Jr., of the Fifth Circuit are acknowledged by opponents of the nomination as eminent constitutional lawyers who have demonstrated that they are judicious men, able to give any man a fair and impartial hearing. Both recommend Judge Carswell very highly. Judge Simpson has described the nominee as a man of "superior intelligence, patience, a warm and generous interest in his fellow man of all races and creeds." In his letter to the Judiciary Committee, Judge Simpson states that Carswell is a man of judgment with an openminded disposition to hear, consider and decide important questions without preconceptions, predilections or prejudices. On the basis of long experience with the nominee and his work, Judge Simpson states that he "always found him—Carswell—to be completely objective and detached in his approach to his judicial duties."

Judge Ainsworth's endorsement is equally laudatory, and the record is replete with many other comparable endorsements by knowledgeable judges and lawyers.

Throughout the debate we have been told repeatedly that the President could have selected any one of a number of better qualified men for this appointment. Many Senators obviously feel this way, and on any given day 100 Senators might well be able to produce 100 different recommendations. However, I think such argument loses sight of the role of the Senate in these matters. It is neither the right nor duty of this body to nominate Supreme Court Justices. That is the right and duty of the President of the United States. Our task is to advise and consent. Certainly, the Senate never hesitates to advise. And we have withheld our consent at times. In my judgment, however, our refusal to consent should never be based on a desire to seek out a nominee more to our liking. Only when we are convinced a nominee is clearly lacking in the required abilities, qualifications, and personal integrity, or when we feel the stature of the High Court is clearly at stake should we take the drastic step of rejecting the President's selection.

The Senate should never become a rubberstamp. I reject out of hand the argument that careful consideration in prolonged Senate debate and rejection of a nominee impinges on the appointing authority of the President. At the same time, I also reject the argument that the Senate's right to advise and consent should be applied in such a manner as to bind the President's selection to the will of the Senate.

We are not here to bargain for another, perhaps better nominee. We are here to consider the qualifications of the present nominee. Our consideration should be directed to the nominee's legal

and judicial qualifications and to his ethical conduct—not to his political or legal philosophy. Only a serious lack of experience and qualifications, or a very damaging breach of ethical conduct, can give grounds for rejecting the nominee.

I have looked very closely without finding these disqualifying elements. I have gone through all of these exercises of judging a man and agonizing as each of us does. In looking at those qualifications, I find nothing that, in my judgment, disqualifies him. I find him qualified, and I fully intend to vote for his confirmation.

Mr. GRIFFIN. Mr. President, will the distinguished Senator yield?

Mr. BIBLE. I yield.

Mr. GRIFFIN. Mr. President, I commend the distinguished Senator from Nevada for what I think is a very excellent statement.

It was a very thoughtful statement, a well-reasoned statement. And whether one agrees with his conclusions or not, the senior Senator from Nevada has made an excellent contribution to the debate and the dialog.

In doing so, I wanted to comment that he certainly has earned the respect of the Members of the Senate on both sides of the aisle.

Mr. BIBLE. Mr. President, I thank the distinguished Senator from Michigan very much. I want to say that I think we all have to use objective judgments on these matters. We all judge the problems a little differently. However, I do not want the RECORD to show that I always vote on a nonpartisan basis. I have on occasion voted on a strictly partisan basis, and I have been proud to do so. I do draw a line when it comes to judicial nominations. I do not view appointments to our courts as partisan issues.

In this case which involves a man's reputation and the Supreme Court, I am very satisfied with the judgment which I have finally reached. Although I did reach it a little earlier, it has not been disturbed.

I quarrel with no one as to how he reaches his decision.

Mr. GRIFFIN. Mr. President, I yield myself 5 minutes.

The ACTING PRESIDENT pro tempore. The Senator from Michigan is recognized for 5 minutes.

Mr. GRIFFIN. Mr. President, there has been talk in the newspapers and other quarters criticizing some Republicans because they are not supporting their President on what many people see as a political issue.

I think what the distinguished senior Senator from Nevada has just said about the grave responsibility and the role of the Senate in advice and consent on something as important as that of an appointment as a Supreme Court Justice points up that any Senator on either side who would cast his vote on a political basis on something as important as this would not be fulfilling his responsibilities.

Whatever they might do on other legislative issues, legislation can be amended, repealed, or changed.

Certainly, it seems to me that on the nomination of one of the nine justices of the Supreme Court, an independent third branch of the U.S. Government, we have an obligation that cannot have any party loyalty involved on either side of the aisle. I think that is an important consideration. It is a greater obligation than almost any other vote we cast in the Senate, in my humble opinion.

Mr. BIBLE. Mr. President, I appreciate the sentiments of the Senator from Michigan.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, will the Senator yield to me for 3 minutes?

Mr. BAYH. I yield to the Senator from Montana.

The ACTING PRESIDENT pro tempore. The Senator from Montana is recognized.

TRIBUTE TO SENATOR BIBLE

Mr. MANSFIELD. Mr. President, first, may I say that as far as the distinguished senior Senator from Nevada is concerned, he has the affection and respect of all of us on both sides of the aisle. He always votes as he thinks best. He is a man of independent judgment, and I say that would apply to all other Members of this body as well. But at this time I wish to pay special tribute to the Senator from Nevada (Mr. BIBLE).

CRIME IN THE DISTRICT OF COLUMBIA

Mr. MANSFIELD. Mr. President, whatever is done about the nomination of Judge Carswell today, we do hope the courts will enforce the law and that the perpetrators of crime will be punished.

I am sorry to inform the Senate that two of our pages in the last 2 weeks have been assaulted, mugged, and in one instance, robbed. The first would have been robbed if he had not been fleet of foot. He was able to get away. It happened in the vicinity of the Capitol. One of the pages had his clothes torn and lost $10 after being roughed up.

The joint leadership has directed a letter to the U.S. attorney asking for an investigation of these matters because we feel it is encumbent on us to protect those who work here as well as the people of the District of Columbia as a whole.

I think it is a tragedy and a shame that within the shadow of this Nation's Capitol incidents of this kind can be inflicted on youngsters who are far away from home, carryng out responsible duties in relation to the conduct of the Senate.

I intend to see that something is done about it. One of the things I would like to see done right now is for the House to name its conferees—the Senate already has done so—so that the District of Columbia crime bill can be given the most expeditious consideration.

This is not my first confrontation with a situation of this kind because, as the Senate well knows, two Montanans, one a young Marine from Fishtail, Mont., the other Harry Gelsing, from Helena, Mont., both entirely innocent, were gunned down in this capital of the United States of America.

I think it is about time that this question of crime is shifted—shifted away from rhetoric and into action. I think it is about time that the law is enforced, and that criminals are apprehended and that crime is punished. If we go on in this way much longer I think the Republic will stand on very, very shaky foundations.

Mr. HANSEN. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. HANSEN. Mr. President, I would like to associate myself with remarks of the distinguished majority leader. I could not agree with him more than I do.

I think it is high time that the Senate and House conferees get together.

Mr. MANSFIELD. The Senate is ready.

Mr. HANSEN. I am well aware of that. I think it is high time that they get together on the District of Columbia crime bill.

I listened to the Martin Agronsky television show a few days ago and I was appalled at the lack of understanding and some lack of interest or enthusiasm for the District of Columbia crime bill. One of the persons on the panel, Carl Rowan, a very distinguished columnist, in my opinion, and a person who is ordinarily well informed on most issues seemed to reflect the feeling that there is some racial bias in this District of Columbia crime bill. Nothing could be further from the truth.

The facts are that most of the victims of crime in the District of Columbia are black people. If the statistics I read are correct, three out of every five persons who are assaulted, robbed, mugged, or otherwise attacked, are black people.

Further, as his comment reflected, I think there is some lack of understanding on that particular issue. He questioned, Why does not the Congress pass a law trying to stamp out crime in Phoenix, Ariz.? To which James Kilpatrick in effect said, precisely for this reason: It happens that the responsibility for law enforcement in the District of Columbia is the exclusive responsibility, and the form of government of the District of Columbia is the responsibility of Congress. That is precisely what the facts are.

To those who try to say that we are getting too tough with too many people—and I refer to civil rightists and the entire group of people who feel that way—all I can say is the victims of these crimes, as the distinguished Senator, my distinguished leader, so well knows, are black people. When I say "my distinguished leader" I do not mean to imply that I am a Democrat; I have great respect for the senior Senator from Montana, and I believe he does an admirable job of laying down the work and laying out the program to control the Senate.

It is in that frame of reference I used the appellation that I did.

It is high time people understood that the good, decent, and law-abiding citizens—and that is about 95 percent of the people in this country—are sick and tired and fed up with the whole breakdown of

law and order. I think part of that responsibility has to be laid at the door of the courts. We have made it possible for every wrongdoer to take advantage of the law, in the way of getting out on bail, being released, being able to recommit crimes, one time after another simply because we have gotten mixed up with a lot of different ideas, and one is that if you are tough on crime you are against black people, and that certainly is not true.

Mr. MANSFIELD. Mr. President, I appreciate the remarks of the distinguished Senator from Wyoming.

Again, I want to reiterate that these youngsters who serve us so well come from long distances, live under unusually difficult circumstances, put in long hours, and I think they are entitled to a good deal of consideration.

I think the law is meant to apply to all people. I do not care what their color happens to be. I do not care what their ethnic background is. And I do not care what their religion may be or the status of their financial condition. This Republic is based on law and on its just application. That means it must apply to all of our citizens equally.

Again I state that the joint leadership has directed a letter to the U.S. attorney asking for a complete investigation of these two incidents, just as there was requested by the Senator from Montana a complete investigation of the Lesnik and Gelsing incidents. As far as the former incident is concerned, the culprits were apprehended, tried, convicted and sentenced. As far as the Gelsing affair is concerned, that investigation is still underway. I hope it, too, is completed with the guilty ones convicted and punished. In short, all criminals must be apprehended and punished and the tools and enough law enforcement officers must be provided for the job. I hope the District crime bill is enacted into law just as soon as possible.

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. BAYH. Mr. President, how much time is remaining?

The ACTING PRESIDENT pro tempore. The Senator from Nebraska (Mr. HRUSKA) has 74 minutes remaining and the Senator from Indiana (Mr. BAYH) has 79 minutes remaining.

Mr. HANSEN. Mr. President, will the Senator yield to me?

Mr. GRIFFIN. Mr. President, I yield 10 minutes to the distinguished Senator from Wyoming.

Mr. HANSEN. Mr. President, I would like to express my appreciation to my good friend, the junior Senator from California. We are in executive session in the Committee on Interior and Insular Affairs this morning and I am needed there to try to help resolve some problems that concern the natives of Alaska.

Mr. President, I have but one question to ask today: What is candor? I ask it because perhaps the decision as to whether this body will confirm Judge G. Harrold Carswell for a seat on the Supreme Court rests on whether or not he has been candid in his dealings with the Senate Judiciary Committee.

Webster's new 20th Century Dictionary, published in 1968, says candor is "openness."

As its first definition it refers to "openness of heart; frankness, sincerity, honesty in expressing oneself."

Second, it defines candor as "a disposition to treat others with fairness, freedom from prejudice or disguise."

The question then, regarding the judge is, Did he deal with the committee in the openness of his heart, frankly, with sincerity and honesty?

What are the charges? First, we are told that when Judge Elbert Tuttle decided not to testify on his behalf Judge Carswell should have asked for Judge Tuttle's letter on his behalf to be withdrawn from the Judiciary Committee. But should he have?

After the first unfair and rather scurrilous charge against Judge Carswell made headlines, the fact came out that Judge Carswell was never informed by Judge Tuttle as to why he had decided not to testify. Even more important, it is clear that it was not Judge Carswell's place to seek to have the letter withdrawn. And finally, Judge Tuttle himself did not ask to have it withdrawn. There is no lack of candor here. At most, there is confusion, largely on the part of Judge Tuttle.

The second charge implies that Judge Carswell read in detail the night before he testified, the articles of incorporation of the country club that he helped reorganize. We know now, however, that despite the rumors printed in the Washington Post as fact, this is not the case. Judge Carswell was shown the papers briefly the night before, but in another context. There was no reason for him to look to see how he was identified in them.

Are we to assume that Judge Carswell read the articles of incorporation closely the night before, then came to the committee, knowing it had access to those papers, and deliberately lied to it? It strains the credulity—even of those who might want to believe the worst. It is obvious to any fairminded person that in his testimony Judge Carswell was still searching his memory, still trying to remember just what he had signed 14 years earlier.

Mr. President, in all candor, who here could have done better?

Mr. President, in their efforts to defeat any candidate President Nixon might put forth who does not meet their philosophical standards, the President's political enemies have gone to great lengths to make mountains where no molehill exists.

So the real question we have to ask today is, Where does the lack of candor lie?

Mr. President, I would like to know: Are those who are charging mediocrity being frank, open, forthright?

Are they free from prejudice, free from disguising their real purpose?

Mr. President, are those who are charging racism being candid? Are they disposed to treat Judge Carswell with the same fairness they treat other Members of this body who have been involved in all-white organizations or who have had restrictive covenants on their homes?

Are they being candid, Mr. President? Are they free from prejudice and disguise? Are they frank? Are they sincere?

Mr. President, I cannot answer these questions. But those who seek to deny him a seat on the Supreme Court can.

I would hope, Mr. President, that they would rise to the occasion. I would hope that every Member of this body would observe the kind of candor he demands from Judge Carswell.

I yield the floor.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. CRANSTON. Mr. President, I yield myself such time as I may need.

There were many, many reasons that led me to the conclusion that I could not support Judge Carswell for the Supreme Court vacancy. It was with regret that I came to that conclusion, for I would like to support the President, I would like to support his nominees, I would like to support a southerner, I would like to support a strict constructionist and a conservative on that Bench, if that is the will of the President in submitting nominations to this body. And I believe he could, with ease, find a southerner, a strict constructionist, a conservative, who could win unanimous, or virtually unanimous, support from this body. But he has failed to do so in the case of Judge Carswell.

Among the many matters that gave me concern in considering this nomination was the record in regard to Judge Carswell's racial views as manifested in his past.

There was the 1948 speech, now not famous, but notorious, expressing his segregationist views and asserting that they would be forever held throughout his life.

I recognize that many men undergo changes. However, the subsequent record shows that Judge Carswell did not undergo any change in regard to those views. There was never any evidence in any facet of his life of any change until he was confronted with that speech in the course of the consideration by the Senate and the country of his qualifications for service on the Supreme Court.

I am greatly disturbed that one part of that evidence of no change in his views shows that while he was U.S. attorney, sworn to uphold the law, he participated in a scheme to avoid the law of the land as laid down by the Supreme Court. That is the golf course incident, where he was an incorporator of a golf course. The story appears on page 352 and page 353 of the hearings held by the Judiciary Committee.

The device of selling a public facility to a private corporation for the purpose of avoiding the integration of that public facility was being used by diehard segregationists throughout the South.

A description of this actual operation makes plain the fact that the private club was a true sham.

The sequence of events were as follows:

First. A public golf course which had been supported by taxpayers' dollars—black and white—was threatened with integration.

Second. A private club was set up in the corporate form—profit or nonprofit.

Third. The city officials sold or leased for $1 the golf course to the private club.

Fourth. At this point the heretofore public facility was now a private club with all the restrictions of a private club.

Fifth. In order to make sure that the private club retained all of the attributes of the previously segregated public facility, the facility was open to all whites and closed to all blacks.

That, I believe, is a fair description of the scheme that Judge Carswell participated in as an incorporator.

Judge Carswell's performance, when quizzed on his part in all this by the Judiciary Committee, was hardly reassuring as to his qualifications and capacity. A study of the facts in the case and the committee transcript can lead to only two conclusions.

The most charitable conclusion is that he has a terrible memory, so terrible that I wonder how he could perform adequately in any court. How, for example, could he sit on the bench and remember the precedents well enough to make a fair and wise ruling in the heat of a trial on the admissibility of evidence? If his memory was so faulty on a matter of vast importance to himself personally, who could rely on his memory on matters of great importance to them personally?

The least charitable conclusion is that he was not candid with the committee, that he was not straightforward about his actual deeds.

Either conclusion adds to the case against Judge Carswell.

The evidence is overwhelming that Judge Carswell is not a man of talent, not a distinguished man who would bring grace and greatness to our highest court. The word "mediocre" has affixed itself so firmly to Judge Carswell, and has become so large a part of the debate over the qualities requisite for service on the Supreme Court, that a constituent of mine, complaining that he cannot get his kids to study any more, says, "I think they are aiming for the Supreme Court."

This morning the Washington Post, in a fine editorial, made this comment:

> For this place, at this time, the court and the nation need not just a run-of-the-mill man, but a very good man, very strong man, a very wise man, a man who has or soon will have widespread respect and admiration, won not so much by the way he votes but by the force of his intellect and his personality.

I have been most disturbed by Judge Carswell's showing of bias and hostility to civil rights attorneys and civil rights litigants while serving as a district court judge.

My staff and I, between us, have spoken personally with 10 civil rights attorneys who appeared before him. They were Shella Rush Jones, Ted Bowers, Leroy Clark, John Lowenthall, Earl Johnson, Jerome Borstein, James Sanderlin, Reece Marshall, Maurice Rosen, and Tobias Simons. Some are black; some are white.

The overwhelming opinion of these civil rights attorneys—an opinion expressed, in one way or another, by every one of them—is that he demonstrated bias when they were before him on civil rights cases.

They report that he had a reputation among those working on civil rights matters before him in his court of being anti-civil rights and antiblack. It was said by many of them that they had the feeling the moment they entered his court that he was prejudiced against them. One of them said it was like being in a court where there were two opposing counsels and no judge present. I believe that the courtroom bias shown by Judge Carswell was violative of canons 5, 10, and 34 of the Canons of Judicial Ethics.

The evidence to the contrary on the matter of his prejudice regarding civil rights is based solely, in the words of President Nixon's letter of March 31, first, on a letter from a World War II shipmate of Judge Carswell; second, on the testimony of one professor; and third, on Judge Carswell's belated repudiation of his own notorious segregation speech.

It is noteworthy that President Nixon did not mention the now discredited letter of Charles F. Wilson. Yet, the Committee on the Judiciary and Senate supporters—including some key supporters of the Judge—at one time in the past based a great part of their case for Judge Carswell on that Wilson letter.

Finally, Mr. President, I should like to read from an article published in this morning's issue of another fine newspaper, the New York Times. The article is entitled "The Hypocrisy of Power," and is written by the eloquent and analytical James Reston. He made the following statements this morning on the editorial page of the New York Times. I shall read two excerpts from his column:

> Behind all the questions of politics, ideologies and personalities in the Carswell case lies the larger issue of public confidence and trust in the institutions of the nation. This is the issue President Nixon overlooked. That trust does not exist now. The authority of the Government, of the church, of the university, and even of the family is under challenge all over the Republic, and men of all ages, stations and persuasions agree that this crisis of confidence is one of the most important and dangerous problems of the age.
>
> The President recognizes it in theory. The Attorney General is determined to restore discipline by every means at his command. The Congress reminds us every day that liberty cannot survive without authority, but the gap between their moral lectures and their political actions is wider than the Mississippi Valley.
>
> The central issue in this country is whether we are to settle our disputes by legal and peaceful means or by illegal coercion and violence; whether our institutions, in short, are to deserve our respect or merely to demand it, without deserving it.
>
> If you doubt that this is the central issue, all you have to do is look around.

Reston concludes his articles as follows:

> If a conservative Administration is not going to earn as well as demand respect for the institutions of America and put up distinguished men for the highest court in the land, who is?

The PRESIDING OFFICER. Who yields time?

Mr. GRIFFIN. Mr. President, I yield 5 minutes to the distinguished Senator from Kansas.

Mr. DOLE. Mr. President, before the debate ends and the voting begins, I would like to say a few kind words about Judge G. Harrold Carswell.

Too often in the last few days the judge's supporters have been so busy defending him against the innuendos, half-truths, and misstatements and misleading conclusions that we have not remembered that there is much merit to the judge, and much to be said in his favor.

Let us first point out that despite the desperate searching and combing of his past for signs of moral turpitude, unethical conduct or racial bias, not one single thing of substance has been found.

Mr. President, Judge Carswell is obviously and beyond a doubt a good man, a good American, an ethical and moral man.

Mr. President, Judge Harrold Carswell has been a lawyer in private practice, a U.S. District Attorney, a Federal circuit judge, and a Federal district judge. He is an experienced man and a competent man and a qualified man, else he would not have been appointed to succeedingly higher positions, else this body would not have confirmed him three times.

Mr. President, Judge Carswell is a patient man and a strong man and a man sure of his own conduct. Only this kind of a man could sit by patiently, quietly and endure the vilification and humiliation some have sought to bring on him in order to further their own aims.

Mr. President, he is a man who believes in the equality of the races.

There is an interesting concept these days that a judge must always rule in favor of a minority, unless he is willing to be judged a racist.

Judge Carswell has resisted that temptation. But he has ruled, for instance, to desegregate Florida's barber shops, he has ruled in favor of civil rights groups on many occasions.

The interesting thing is, he also wrote a letter of strong recommendation for a black attorney, and for this act of ordinary decency and recognition of competence, both he and that attorney have been pilloried and accused of doing something for motives that were less than honest.

Mr. President, I ask, who is better fit to sit on the Supreme Court—the man who wrote the letter of commendation or those who attempt to smear him with it?

Mr. President, Judge Carswell is a decent man, an upright man, a moral man, and a qualified man.

I recognize that at this late hour Judge Carswell's fate is in the balance. We all recognize that perhaps one Member of this body will determine whether or not Judge Carswell will become a member of the U.S. Supreme Court. We recognize the right of Senators to differ. We recognize our responsibility under the Constitution concerning the advice and consent process.

I recognize, as a Republican, that since the inception of the Carswell nomination, the arguments have been about 99 percent political and 1 percent factual; and I would hope that, in the event Judge Carswell's nomination is not confirmed by this body today, President Nixon would withhold any further nominations

until after the November election. Let him take his case to the American people, give them the facts, Republicans and Democrats and independents, and let the American people decide by a referendum in November whether or not the Court should have balance.

The question is no longer G. Harrold Carswell. It has not been G. Harrold Carswell, in this body, for at least a month. The question is how to defeat President Nixon, how to embarrass President Nixon, and above all, and even more importantly in the minds of those liberals who oppose him today on this floor and across the country, is how to prevent having balance on the Supreme Court. They do not want to change the Court. I would add that President Nixon ran on a platform of balancing the Court. He will make that effort today, and he will make it again if necessary. But I would recommend again to the President that if the nomination of G. Harrold Carswell is rejected, he withhold any further nomination until after the November elections.

We have heard a great deal of talk in this Chamber about those who oppose Judge Carswell. We have read, heard, and have seen a lot in the media, because there has been a calculated effort by those who oppose and by many in the liberal press and the media to paint him a racist, a man of mediocre ability, and unfit to sit on the Supreme Court. The facts do not bear it out, but a case has been made. The case has been made day after day on network television. The case has been made day after day in newspapers like the Washington Post and the New York Times. This is their right. As liberals, they have a right to judge a man, to endorse and to recommend anyone they wish without regard to the public interest.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. GRIFFIN. I yield the Senator from Kansas 5 additional minutes.

Mr. DOLE. Let me point out a few facts that have not been brought to the attention of the American people. I hearken back to the advertisement which appeared in the Washington Post. One would think the earth had caved in because 457 liberal lawyers and law professors said they opposed Judge Carswell. I would ask the same question the junior Senator from Michigan asked the other day on the floor: I wonder how many of these 457 voted for President Nixon. Perhaps one, perhaps two, perhaps three. Probably none.

But let me go one step further. There are approximately 4,500 law professors in America. There are approximately 300,000 practicing attorneys in America. As I am told, there are 126 practicing attorneys whose names appear in this advertisement which has been widely heralded on this floor as proof that Carswell is unfit. That represents three-tenths of 1 percent—three-tenths of 1 percent—of all the attorneys in America; and I would say—I might be contradicted—that perhaps not one of these voted for President Nixon in November 1968.

Yes, there has been much talk about those who oppose Judge Carswell, but very little attention, unfortunately, in the media about those who support G. Harrold Carswell, about the 57 judges who know him best, who signed a telegram to the President; about the 24 attorneys general who yesterday, in a telegram to the President, indicated their support of G. Harrold Carswell—23 State attorneys general, including the one from Kansas, the one from Vermont, the one from Pennsylvania, the one from Delaware, and others.

Mr. President, I ask unanimous consent to have the telegram printed at this point in the RECORD.

There being no objection the telegram was ordered to be printed in the RECORD, as follows:

WILMINGTON, DEL.,
April 7, 1970.

THE PRESIDENT,
The White House.

DEAR MR. PRESIDENT: A quick telephone survey of the State Attorneys General of the United States reveals that the following support your nomination of Judge Carswell to be a Justice of the Supreme Court of the United States.

Jeffords, Vermont; Woodall, Montana; Johanneson, North Dakota; Blankenship, Oklahoma; Mydland, South Dakota; Turner, Iowa; Summer, Mississippi; Meyer, Nebraska; Dunbar, Colorado; Faircloth, Florida; Brown, Ohio; Bolton, Georgia; Martin, Texas; Frizzel, Kansas; Gallion, Alabama; Nelson, Arizona; Gremillion, Louisiana; Barrett, Wyoming; Buckson, Delaware; Sennett, Pennsylvania; Romney, Utah; Robson, Idaho; and Sendak, Indiana.

Not every Attorney General could be reached on such short notice, however, those who support you by this telegram represent all areas of the United States and both major political parties. 39 Attorneys General were contacted and 11 took no position. Of the 28 who took a position 24 in number or 85 percent support you in this matter.

Hon. DAVID P. BUCKSON,
Attorney General, State of Delaware.

Mr. DOLE. So I would say, Mr. President, the die is cast. I am not certain whether the vote will be 51 to 45 or 49 to 48, but I would guess that one of those figures may prevail. In the one event, he will be rejected. In the other event, for the first time in history, the Vice President would decide whether or not a judge sits on the U.S. Supreme Court.

Let me say, in fairness to Judge Carswell, that he has been the subject of heated debate; he has been the subject of innuendo, of half truths, of misstatements. I would hope that when the vote is cast today, the Senate would, upon reflection, recognize the right the President has—yes, with the advice and consent of the Senate—but recognize the right the President has to appoint members of the Supreme Court.

In the event the nomination is rejected, let me repeat that I would suggest to the President that he make no further nomination; that he take his case to the people; that the people decide, perhaps by referendum indirectly in November, whether or not there should be balance on the Court, because that is the question. The question is not the nomination of G. Harrold Carswell, because there is nothing in the record—not one thing in the record—that could lead us to believe his nomination should be rejected.

I yield the remainder of my time.

Mr. CRANSTON. Mr. President, will the Senator yield?

Mr. DOLE. I yield.

Mr. CRANSTON. I will be restrained and not comment on many matters——

Mr. DOLE. The Senator has not been restrained before.

Mr. CRANSTON. I would like to say, on one point, that neither I nor anyone else opposed to Judge Carswell look for a judge who would always rule pro-civil rights. We ask a judge who will judge civil rights cases on their merits, who will not prejudge, but who will enter into the case looking for the facts and for what the law requires him to do. It is our concern that Judge Carswell has a record indicative that he would not do that which leads me and others to oppose him.

Mr. DOLE. That is a fine statement to make as to what we should look for in a Justice, and I certainly share it. I would also say, as a lawyer, that I assume the Senator would also give the judge credit for knowing what the precedents were, what the Supreme Court had ruled, and what may be the law at that time.

I would guess that there are some who do not want a judge—they want a legislator on the U.S. Supreme Court. They want the U.S. Supreme Court to become a supreme legislative body. They do not want a judge. They do not want someone to read the Constitution and interpret it. They want someone to expand it and extend it. That is the issue today.

The PRESIDING OFFICER. Who yields time?

Mr. CRANSTON. If I may, I yield myself whatever time I may need. I should like to continue briefly the colloquy with the Senator from Kansas.

I indicated a number of times in the course of this debate, and so have others opposed to Judge Carswell, that we are quite prepared to support a strict constructionist and a conservative who would be a Justice and not a legislator on the Court.

This leads me to comment upon one other point made by the distinguished Senator from Kansas. I would differ with him in the feeling that if the Carswell nomination is defeated, the President should then wait until after the election to make a new nomination. We should have a full Court. It is my feeling and my hope and my prayer that if the Carswell nomination is rejected—and I also hope and pray that it will be—that the President will then come forward with a nominee I can gladly and wholeheartedly support, a nominee any other Senator can gladly and wholeheartedly support, and that we can resolve the differences which have become so deep, and make plain our desire to support the President and to support a man of quality and capacity for the Court. I believe that he can find a southerner, a strict constructionist, a conservative who fits that description—a man whom I, for one, and others opposed to Judge Carswell could happily support for nomination to the Supreme Court—long before the election.

Mr. DOLE. I happen to believe that there may be such a man. As the Senator from Delaware, Mr. WILLIAMS, said

a week ago, there are better men than those of us who represent our States. There probably are better candidates for the U.S. Supreme Court than Judge Carswell. Perhaps such a man could be found. But I gave my own opinion; it may not have any weight. It seems that we have been a long time without a ninth judge on the Supreme Court. We have had extended debate, if not a filibuster, on the floor of the Senate with reference to Judge Carswell. I would guess the same accusers could dredge up something against the next nominee. Why not wait until after November? Perhaps then there would not be quite the problem we have today in the Senate.

The PRESIDING OFFICER. Who yields time?

Mr. CRANSTON. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time be charged to both sides.

The PRESIDING OFFICER. Is there objection? The Chair hears none and it is so ordered.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. HOLLINGS). Without objection, it is is so ordered.

ORDER FOR ADJOURNMENT UNTIL 10 O'CLOCK TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 10 o'clock tomorrow morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

(Later in the day the above order was modified to provide for the Senate to convene at 9:30 a.m. tomorrow.)

ORDER FOR RECOGNITION OF SENATOR THURMOND AND SENATOR TYDINGS TOMORROW

Mr. MANSFIELD. Mr. President, I ask unanimous consent that after the Chaplain has delivered the prayer, the Senator from South Carolina (Mr. THURMOND) be recognized for not to exceed 25 minutes; and, following that, the Senator from Maryland (Mr. TYDINGS) be recognized for not to exceed 30 minutes.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Montana? The Chair hears none, and it is so ordered.

SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. HRUSKA. Mr. President, I yield 20 minutes to the Senator from Kentucky (Mr. COOPER).

The PRESIDING OFFICER. The Senator from Kentucky is recognized for 20 minutes.

Mr. COOPER. Mr. President, just over a week ago, I stated publicly that I would vote to confirm Judge Carswell to be an Associate Justice of the Supreme Court. I made the statement after reading the report of the Committee on the Judiciary, the record of the hearings, and some of the opinions which were rendered by Judge Carswell and which were cited in the record which is before the Senate. I came to the conclusion that I would vote for Judge Carswell's confirmation.

Since that time, however, I have been so amazed by the nature of the attacks upon Judge Carswell, which do not reflect the record of the hearings, but made, perhaps, by some persons who have never seen the hearings, let alone read them, that I have felt I could not vote against Judge Carswell without being guilty of the bias and prejudice which has been so freely charged against him.

While it is a late hour, I want to provide as succinctly as I can my reasons for supporting Judge Carswell.

I assume, and I believe, that the primary quality of an appointee to the Supreme Court is integrity and common honesty. I know that an appointee must have judicial competence in addition, and I will address myself to that proposition later, but I assert that the primary attribute of a judge must be his integrity and honesty.

While the cases differ, I announced in the Senate in 1968 that I would vote against Justice Fortas to be Chief Justice and, in 1969, I voted against Judge Haynsworth because I had found in the record concrete, open evidence of their failure to obey the judicial canons of ethics. In sharp contrast, there is no proof in the record to challenge the honesty or ethical conduct of Judge Carswell except the argument—very thin when the facts are closely examined—that he was evasive or attempted to mislead the committee upon his connection with Capital City Country Club transaction.

His basic honesty and integrity as a man and in the trial of cases is attested in the record by judges of the district court, judges of the circuit court of appeals—courts on which he has served—by lawyers, and by outstanding citizens such as former Gov. Leroy Collins, men among whom he has lived and worked.

Mr. President, I ask unanimous consent that there be printed in the RECORD a list of the members of the circuit court of appeals supporting his nomination and a copy of the telegram sent by the district judges of the fifth circuit to the President supporting Judge Carswell.

There being no objection, the list was ordered to be printed in the RECORD, as follows:

CIRCUIT COURT OF APPEALS JUDGES

Walter Gewen, Griffin Bell, Homer Thornberry, James Coleman, Robert Ainsworth.

David Dyer, Ryan Simpson, Lewis Morgan, Charles Clarke, Joe Ingraham, Warren Jones.

DISTRICT JUDGES OF THE FIFTH CIRCUIT

APRIL 3, 1970.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: The undersigned United States District Judges of the Fifth Circuit endorse your nominee, Circuit Judge Harrold Carswell, as being well qualified to serve as Associate Justice of the Supreme Court.

Respectfully,

Seybourn H. Lynne, Clarence W. Allgood, Frank H. McFadden, Frank M. Johnson, Jr., Daniel H. Thomas, Virgil Pittman, Winston E. Arnow, David L. Middlebrooks, Jr.

Joseph P. Lieb, William A. McRae, Jr., George C. Young, Charles R. Scott, Ben Krentzman, Charles B. Fulton, William O. Mehrtens, C. Clyde Atkins.

Ted Cabot, Joe Eaton, Sidney O. Smith, Jr., Newell Edenfield, Albert J. Henderson, Jr., William A. Bootle, J. Robert Elliott, Alexander A. Lawrence.

Elmer Gordon West, Herbert W. Christenberry, Edward J. Boyle, Sr., Lansing L. Mitchell, James A. Comiskey, Ben C. Dawkins, Jr., Edwin F. Hunter, Jr., Richard J. Putnam.

William C. Keady, Orma R. Smith, William Harold Cox, Dan M. Russell, Jr., Walter L. Nixon, Jr., Joe Ewing Estes, Leo Brewster, Halbert O. Woodward.

Ben C. Connally, Allen B. Hannay, Raynaldo G. Garza, James L. Noel, Jr., Joe J. Fisher, Adrian A. Spears, Dorwin W. Suttle, Jack Roberts.

Ernest Guinn, Guthrie Ferguson Crowe, Harlan H. Grooms, Emett C. Choate, George W. Whitehurst, Frank A. Hooper, T. Whitfield Davidson, Robert E. Thomason, Allen Cox.

Mr. COOPER. These judges, the Florida Bar Association and many lawyers have testified to the committee, to the Senate, and the country that Judge Carswell is a competent judge and they have recommended him for confirmation to the Supreme Court.

Mr. President, I would say at this point that the recommendations of the lawyers and judges who know him, who have been in his court, who have observed his work professionally and who have tested the bias or prejudice or lack of it, must be entitled to weigh and respect unless there is a biased belief in the Senate of the United States and among deans and faculties of law schools against these men, that because they live in the district of Judge Carswell, or because they come from the South, they cannot give a true and unbiased recommendation of Judge Carswell.

No one challenges his lifelong record of integrity, except some members of the Committee on the Judiciary and some members of the bar, deans and faculties of some law schools, who do not know him, and had not practiced before him, with the exception of a miniscule few who testified before the committee.

His lifelong record integrity is important. It stands to support a judge in time of sudden attack. If a judge is basically honest and possesses the integrity which is joined with conscience, it will prevail against the human bias and emotions which test a trial or appellate judge. It sets aside in my mind the efforts to discredit Judge Carswell.

Unable to make a case of unfaithfulness to the Canons of Judicial Ethics which many had ignored in the cases of Fortas and Haynsworth, the fight against him shifted to the arguments that he is not competent to be an Associate Justice of the Supreme Court, that he is prejudiced and biased toward our black citizens and, as I have noted, to the claim of evasiveness before the Judiciary Committee. In the last case, all of the facts adduced in the hearings have

not been stated in the debate by those who oppose him.

As to his competence, he has had more experience, and a very varied experience as a U.S. district attorney, as a trial district judge and as a member of the circuit court of appeals than any judge now sitting on the Supreme Court prior to appointment with the exception of Chief Justice Burger. The record shows that as a district judge he presided in approximately 4,500 cases. About 2,500 were criminal and 2,000 were civil. In a letter to the chairman of the committee, it is stated that 7,000 to 8,000 motions and judgments were ruled upon by Judge Carswell, and it is a fair judgment, I believe, that perhaps one-fourth of these could have been subject to appeal. The fact that only 44 appeals from his decisions were made in 2,500 criminal cases and I understand 63 civil appeals attest to the fact that lawyers who practice before him believe that his decisions were fair and were rooted in the law. Lawyers appeal cases when the presiding judge is recognized as a poor judge, but this was not the case with Judge Carswell.

It is said, and correctly so, that Judge Carswell was reversed in 40 percent of his civil cases, as compared to the average of 20 percent reversals of other judges of the fifth circuit, and that he was reversed in eight decisions of his criminal cases. This is not necessarily conclusive as to his competence considering the large number of cases he tried and considering the evolving status of civil rights law since the Brown decision, and the Civil Rights Acts enacted by the Congress. Do the dissenting opinions of Justices Frankfurter, Holmes, Harlan, and Potter prove them to be mediocre judges? I do not think so.

The views of deans and faculties of law schools are entitled to respect, but they have had little experience in the courts, and in the trial courts where a multiplicity of issues arise.

In the Fifth Judicial District, the overwhelming majority of district judges of the circuit court of appeals, the Florida bar and the appropriate committees of the American Bar Association have believed that his decisions were fair and rooted in the law.

What then stands in the way of his approval? It is a charge that the patently racist speech he made in 1948, at the age of 28, as a candidate for the Georgia Legislature, still directs him and that he is biased and prejudiced. He has repudiated unequivocally this racist statement of 1948. But inquiry has been made, and properly so, whether the prejudice that animated his 1948 speech continues to direct Judge Carswell. I must say, in reading the record, that I have found nothing to support such a claim. The claim itself has been expanded and exaggerated to extremes which are not supported by the facts brought before the Senate.

The chief argument that Judge Carswell is prejudiced, is racially biased, rests upon two propositions. The first concerns his participation in the incorporation of a country club in Tallahassee, Fla., in 1956. The second is that his decisions in cases heard by him, were racially prejudiced.

I shall deal with the country club case first. The dissenting views of committee members and the speeches of his opponents do not lay before the Senate all of the facts concerning the country club case. The Tallahassee Country Club, a private club, was conveyed to the city in the depression years of the thirties.

Under a clause in the deed, it was reconveyed to the private club in 1956, when it was failing financially. The Capital City Country Club, Inc., was formed. A citywide drive was promoted to achieve a membership of 300 to 350. Judge Carswell became a subscriber and was listed as an incorporator and a nominee-director to serve until the club's first annual meeting. Later the property was conveyed to another club—a nonprofit club which Judge Carswell joined in 1963–66 so that his sons could play golf. He resigned from the club in which he had been an incorporator a few months afterward.

The charge is made that Judge Carswell participated in the establishment of the Capital City Country Club for the purpose of excluding black members and circumventing the decisions of the courts. While that may have been the purpose of some, Judge Carswell said again and again that he did not do so and that he never discussed such a purpose with anyone. Former Gov. Leroy Collins, and a former Director of Community Relations—dealing with the problems of minority citizens to which he was appointed, I believe, by the late President Kennedy—and there is no more respected, unbigoted man in our country than Leroy Collins, who became a subscriber like Judge Carswell, and he too testified before the committee that he had no purpose of discrimination in joining the club.

The critics that seemed to abandon the substantive issue of racial discrimination in regard to the country club and quickly shifted to an effort to prove Judge Carswell was evasive, and attempted to mislead the committee about the fact that he was an incorporator of the Capital City Country Club Inc. It is true that Judge Carswell had seen some photostatic copies of papers tendered him by Mr. Charles Horsky and Mr. Ramsey the evening before the commencement of hearings, showing him an incorporator and that his first response to a question by Senator HRUSKA was that he was not an incorporator. But in statement after statement the first day of the hearings and in the first session of the hearings as well as in the second day, Judge Carswell said he was an incorporator, that the records would indicate the position that he held and he asked the committee to place in the record of the hearings the complete records of the country club deed and transaction, and that these official records would accurately describe his complete connection in this matter.

This statement appears on page 49 of the hearing record, when he said to the chairman:

> Judge CARSWELL. Yes, sir; I would like to make this one etatement: Whatever the records show about that, of course, is the highest and best evidence. I testified here purely from memory.
>
> No. 1, I had absolutely no discussion with anyone at any time about this matter having anything to do with discriminatory practices, if there were any.
>
> No. 2, what I have to say about the matter is that whatever the records show and whatever capacity it may be listed that I am in, whether it be director, president, incorporator, or potentate, as I tried to suggest earlier, I had no conversations with anyone about any activities of that organization in any manner at all.
>
> Now, what the details of the corporate transactions are as to when one was formed and what name appears on what piece of paper, those records would be the best evidence. I respectfully request that I be afforded the opportunity to get them in the record as fast as they get here, and they are already on the way.

I am rather surprised that none of his opponents in the Judiciary Committee placed in the record the statement I have just read, which Judge Carswell made during the course of these hearings.

Whatever the cause of his first answer before the committee, whether because of confusion between his status in the two clubs, or the desire to await the accurate records which he had requested, I think it absurd to believe that Judge Carswell was consciously and deliberately misleading the committee when the story had been published in the newspapers, when the records were public and published for all to see and when he himself was saying to the committee, that he desired that the complete public documents be placed in the record of the hearing. The documents were placed in the hearing record and they make up a rather voluminous record amounting to 43 pages.

The final charge is that Judge Carswell showed bias in the cases he heard and determined.

I consider the analysis placed in the record by the Senator from Nebraska (Mr. HRUSKA) on pages 311 to 319, the best reasoned and fairest analysis of the civil rights cases tried by Judge Carswell.

I may say that while I have not read all of these opinions, I have read the opinions which have been questioned by those who oppose his nomination. I would agree he was not an innovator or leader in the field of civil rights; yet in fairness to him it must be reported for the record in this debate that:

He was the first to enter orders directing school desegregation in Florida.

He ordered desegregation of a barbershop located in a hotel, and I believe he was the first to enter such orders of such a facility and properly so, following the Civil Rights Act of 1964.

While this case is termed not important by critics, I am informed that it was the first case decided in the United States dealing with a barber shop located in another public facility. I remember that during the debate on the Civil Rights Act of 1964, interpretation was provided that the Civil Rights Act would cover such a facility even if it were located as a part of another building rather than as a separate enterprise. The point is, he was the first who followed that interpretation.

He issued, and without delay, desegregation orders of airport facilities.

In a recent case, *Robinson* v. *Coopwood*, 292 Fed. Supp. 926, he joined in a decision in the circuit court of appeals reversing the decision of the district court and holding under the first and 14th amendments that local officers could not require unreasonable notice—and the notice here was only 1 hour of demonstrations and marches undertaken to protest the denial of civil rights.

Considering his record in the trial of 2,500 criminal cases, in which questions of civil liberties arise constantly, considering the few appeals from his 2,000 civil cases and the full record of his decisions in civil right cases, I do not believe that it can be said that they show an inherent bias or prejudice against the civil rights of minorities.

The PRESIDING OFFICER. The time of the Senator has expired

Mr. COOPER. Mr. President, will the Senator yield to me for 2 additional minutes?

Mr. ALLOTT. I yield 2 minutes to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized for 2 minutes.

Mr. COOPER. Mr. President, I can only say that I approached this case exactly as I did the Fortas case and the Haynsworth case. I did not announce my decision until after reading the hearings and a great number of the cases cited and reading, if not hearing, the speeches of the chief supporters and opponents of Judge Carswell.

I am aware that his statement in 1948 offends our black fellow citizens as it offends me. But if the spirit is not harbored by him, and I believe the evidence shows that it is not, then, as I said in the commencement of this statement, I would be prejudiced and biased if I should allow anything other than the facts to control and direct my decision to vote for or against Judge Carswell.

It is upon these grounds that I have made my decision to vote for his confirmation.

Mr. CRANSTON. Mr. President, will the Senator yield to me?

Mr. COOPER. I yield to the Senator from California on his time.

Mr. CRANSTON. I wish to say that I differ with the Senator only with great reluctance because he is one of the most admired and respected Members of this body. That admiration and respect is held on both sides of the aisle, and I would add my personal affection for the truly great Senator from Kentucky.

I was distressed when I read in the newspapers that Senator COOPER had taken the position he has taken in this matter, primarily because in his statement the Senator said that no questions had been raised regarding violations of the Canons of Judicial Ethics. I wonder if the Senator was aware that I had raised questions in that regard?

Mr. COOPER. I did not hear the Senator.

Mr. CRANSTON. I wondered if the Senator was aware that I had raised questions of violations of the Canons of Judicial Ethics by Judge Carswell.

Mr. COOPER. I read of the Senator's concern about a letter written in support of Judge Carswell by Mr. Charles Wilson, a lawyer now in the employ of the Government. If the Senator has raised questions specifically about violations of certain canons, I would like him to tell me what they are.

Mr. CRANSTON. Canons 5, 10, and 34 of the Canons of Judicial Ethics say, among other things, that a judge should be temperate, attentive, patient, impartial, and courteous to counsel, especially to those who are young and inexperienced.

Quite apart from the matter of the letter from Charles F. Wilson, my staff or I talked with 10 civil rights attorneys, black and white, who appeared in Judge Carswell's court in Florida. All 10 recounted to me experiences in his court tantamount to—and I charge they amount to—violations of the Canons of Judicial Ethics.

Among other things, these 10 people unanimously told me or my staff that Judge Carswell had paid no attention to them, that he seemed to have prejudged their cases, that he turned his back on them when they were presenting their cases, that he lost his temper, and that his voice rose. One told me that he felt he was not in a court where there was a judge present, but where he was facing two attorneys who were on the other side.

It would seem to me to be very plain that this raises very serious questions in regard to the judicial conduct required by the Canons of Judicial Ethics. I am sure the Senator agrees with me that ethics relate not only to money matters, as in the case of Judge Haynsworth, they relate to other matters and touch upon other interests.

No money matter has been brought to the Senate's attention in terms of any negative charges regarding Judge Carswell, but ethical questions relating to other matters have come to the attention of the Senate. They have certainly come to the attention of the Senator from California.

These ethical questions do not necessarily reach Judge Carswell's decisions in civil rights cases. My comments—indeed my judgment—goes directly to the behavior of Judge Carswell while on the bench or in chambers when civil rights matters were before him.

Mr. COOPER. Let me respond to the distinguished Senator by saying I agree with him fully that questions of conduct are not related solely to money matters. But I must say money matters are very important. But to get to the question of the Senator from California, I have read the statements——

Mr. CRANSTON. Mr. President, may I understand that the time of the Senator from Kentucky is being charged to his side, as he asked that my time be charged to my side?

Mr. COOPER. Yes.

I have read the statements in the record dealing with those charges. I believe at least four witnesses testified to the fact that Judge Carswell was not courteous to them; more that he was rude and oppressive to them. It is very interesting that one witness testified that Judge Carswell granted the relief he sought for his clients but continued to say he just did not like Judge Carswell. As to the others the Senator has interviewed, I would have to consider their testimony, and give to it the weight it properly should have, in relation to the fact that dozens of lawyers and judges testified personally, or through their associates that Judge Carswell was courteous and fair to lawyers and litigants before him.

The American Bar Association Committee, after its investigation, testified to and approved Judge Carswell's competence, integrity, and judicial temperament. Judicial temperament, of course, would concern directly the question of conduct, demeanor, and fairness on the bench, and also lack of bias and prejudices.

Mr. TYDINGS. Mr. President, will the Senator yield on that point?

Mr. COOPER. Yes, in just a minute. One other point: One lawyer addressed a letter to the committee which is in the record. I think it is one of the most sensible and reasonable ones bearing on the Senator's point. He said that at times Judge Carswell showed irritation, but the irritation arose when these lawyers continued to persist in raising questions on legal points upon which he had ruled.

Lawyers know that is a common occurrence particularly by very aggressive lawyers before the court.

I have practiced in the Federal district courts and before the circuit courts of appeals. I have observed judges who seemed to be discourteous to lawyers, to district attorneys, and officers of the court, but they were not actually discourteous but strict judges.

I considered after reading the evidence, that the charges have slight weight as bearing upon his judicial temperament. One would have to strain at the record in this case to find a reason to attack Judge Carswell's judicial temperament and, as I have said, his integrity.

The PRESIDING OFFICER. Who yields time?

Mr. TYDINGS. Mr. President, will the Senator yield to me, on our time?

Mr. COOPER. Yes. I yield.

Mr. TYDINGS. I would like to ask the Senator from Kentucky, since he mentioned the American Bar Association committee, whether or not he was present in the Chamber about a week and a half ago when three of us, including the Senator from Massachusetts (Mr. BROOKE) and the Senator from Maryland (Mr. MATHIAS), engaged in a colloquy about the mechanics of the American Bar Association endorsement.

Mr. COOPER. Yes.

Mr. TYDINGS. Was the Senater here?

Mr. COOPER. I was not in the Chamber. I read the RECORD. I would know the procedures even if I had not read it.

Mr. TYDINGS. Does the Senator realize that the American Bar Association Committee, for reasons with which I am not familiar, gave their endorsement or approval not only before reading the record, but before hearing any of the testimony of those who testified in the hearings before the Senate Judiciary Committee? Does the Senator know that?

Mr. COOPER. Yes; I know that, and

then I know that later, after the hearings were concluded, the committee affirmed its first recommendation.

Mr. TYDINGS. Does the Senator know that the full testimony of John Lowenthal, professor of law at Rutgers, who was one of those attorneys involved in civil rights cases before Judge Carswell, was not before the American Bar Association Committee when they gave their original endorsement?

Mr. COOPER. No; I do not know that.

Mr. TYDINGS. Does the Senator know that he asked them for 1 day to make a complete written statement, and they would not even wait for him?

Mr. COOPER. I do not know what occurred between the Bar Association Committee and Mr. Lowenthal. He testified before the Senate committee and I know that it is reported in the hearings that the American Bar Committee interviewed leading lawyers who had practiced before Judge Carswell, and were acquainted with him.

Mr. TYDINGS. Certainly, the leading lawyers, the blue ribbon lawyers in the top law firms. But they did not interview any of the lawyers who had represented poor clients, or black clients, or civil rights clients before Judge Carswell.

How does the Senator account for the fact that we have a telegram here, signed by 35 black lawyers in the State of Florida, two of whom were judges, one a former assistant U.S. attorney, and one a former assistant attorney general of the State of Florida, who stated that they were steadfastly opposed to the Carswell nomination because of his antagonistic attitude toward black and civil rights litigants? What sort of analysis is that of the American Bar Association?

Mr. COOPER. The Senator is challenging their analysis, and I am sure there is some merit to what he says. The committee ought not to make a decision until the records were closed. But the committee did make a second decision confirming its first recommendation. Does the Senator know whether any of the lawyers he has referred to tried cases before Judge Carswell?

Mr. TYDINGS. I have statements in here from seven Florida lawyers who tried cases before him, and from two who are now judges.

Mr. COOPER. How many?

Mr. TYDINGS. Seven. The point is, the American Bar Association checked with the top lawyers of the top firms who appeared before Judge Carswell, without any type of examination in depth, and once the ABA Committee was on record, without having heard the testimony, they did not have enough courage to reverse themselves.

Does the distinguished Senator realize that in the Florida State law school in Judge Carswell's own hometown, a majority of the full-time faculty said he was unfit to go on the Supreme Court? How could the American Bar Association ignore the law school in his own hometown?

Mr. COOPER. The Senator will have to address his question to the American Bar Association.

Mr. TYDINGS. I was just pointing out that the American Bar Association endorsement, does not have much weight, because of the manner in which it was derived.

Mr. COOPER. As the committee was required to give an opinion as to his competence, his integrity and his judicial temperament, does the Senator say that they were dishonest in what they said about him?

Mr. TYDINGS. I say that their judgment was poor, that their examination was incomplete, and that they could not possibly render a fair decision, without examining the facts and interviewing counsel who appeared before him, other than a few lawyers from the top law firms.

As the distinguished Senator well knows, having been a judge and a practicing lawyer himself, in every community there are certain lawyers who are, generally speaking, at the top of the bar association social echelon.

But when you consider a man for the the Supreme Court, you ought to consider more than just the word of one or two lawyers or one or two judges who sit with him. How is it that the American Bar Association Committee did not even bother to interview Judge Tuttle, the former chief judge of his circuit? Why did they not call him before their committee when they reviewed their decision?

Mr. COOPER. I do not know. Perhaps they——

Mr. TYDINGS. I mean, he is the distinguished former chief judge of the circuit, a distinguished former chairman of the Georgia State Republican Committee, a fair man. How is it they did not call on Judge Wisdom?

Mr. COOPER. As to the Senator's rhetorical questions, let me say this, and I can make my case: The Senator can ask why did they not call X, Y, and Z from now until 1 o'clock, but the record shows that the American Bar Association Committee did—now, listen to me, please, because it is in the record—that its members did inquire of lawyers in Florida who practiced before him and knew his record. In addition, there are a number of statements in this record written by lawyers saying that they have been in his court when civil rights cases were being tried, and they found him unbiased and fair toward clients and litigants.

Let me finish please. Furthermore—Judge Carswell's opponents did not comment in their speeches in the Senate on the full record. I believe in fairness that the whole story should be told. There was no comment on the critic's part that Professor Moore, one of the distinguished teachers at Yale Law School, or Professor Ladd, a former dean of the Iowa Law School, had worked with Judge Carswell in the establishment of an integrated law school at Florida State University. Both said he was unprejudiced and unbaised. The Senator did not report this to the Senate.

Mr. TYDINGS. But neither of them had ever tried a case before him.

Mr. COOPER. His critics did not place in the RECORD the full facts, and I think they should have.

One further statement, and I shall close. It is my understanding from the CONGRESSIONAL RECORD—and I do not say these things personally, becasue I respect the judgment and the motivations of the Senator from Maryland and of Senators who oppose Judge Carswell—the Senator from Indiana (Mr. BAYH) had written the president of the Florida Bar Association, Mr. Mark——

Mr. TYDINGS. Mr. Hulsey.

Mr. COOPER. Mark Hulsey, Jr., a man the Senator from Maryland said was one of the finest lawyers in this country.

Mr. TYDINGS. He is; and he is a personal friend of mine.

Mr. COOPER. And asked Mr. Hulsey to comment on the various civil rights cases that Judge Carswell had tried, and upon his judicial temperament. The Senator from Indiana did not put the response of his inquiry in the RECORD.

Mr. TYDINGS. The testimony of Mr. Hulsey is to be found right here in the hearings transcript.

Mr. COOPER. Oh, his testimony is in the hearings, but the Senator from Indiana who had written Mr. Hulsey, did not place the answer in the RECORD.

Mr. President, I ask unanimous consent that Mr. Hulsey's reply of February 17, to Senator BAYH, which had previously been placed in the CONGRESSIONAL RECORD by the distinguished senior Senator from Florida (Mr. HOLLINGS) be included in the RECORD at this point.

There being no objection, the reply was ordered to be printed in the RECORD, as follows:

THE FLORIDA BAR,
OFFICE OF THE PRESIDENT,
Jacksonville, Fla., February 17, 1970.

Re nomination of Judges G. Harrold Carswell for Associate Justice of the U.S. Supreme Court.

Hon. BIRCH BAYH,
U.S. Senator,
Washington, D.C.

DEAR BIRCH: I regret that an unexpected travel schedule has prevented an earlier reply to your letter of February 3, 1970.

You have asked for my rehuttal on the statement made on behalf of the National Conference of Black Lawyers and the testimony of Professor William Van Alstyne. While it is now probably moot, I hope it will give you cause to reflect again on the entire subject and vote to confirm Judge Carswell when the matter is considered by the full Senate.

As I indicated to you earlier, it is certainly ironic that Judge Carswell is charged with being a racist. My experience with him and his reputation in the Northern District of Florida are just to the contrary.

The statment made by the National Conference of Black Lawyers is replete with mistaken assumptions and premises. It argues rather than states facts. Understandably, the National Conference would have difficulty in being objective.

The testimony of Professor Van Alstyne is a different matter. His credentials are impressive. Conspicuous by its absence is his lack of trial practice. Professors are qualified to critique. Appellate decisions but it takes the trial lawyer to evaluate the trial Judge. Professor Van Alstyne expected your committee to give his criticism of Judge Carswell greater weight because he supported Judge Haynsworth. Apparently, he did not appreciate tbe difference between the atmosphere in the trial arena and the serene Appellate Court.

No useful purpose will be served by a complete rehash of the various causes cited. In passing, however, I will comment on them:

1. *Due v. Tallahassee.* The real issue in this

case was when is a summary judgment proper and also what states grounds for relief under the Civil Rights Act.

2. *Singleton* v. *Board.* This mootness issue was scarcely raised below. The issue boiled down to credibility. A trial judge who saw the parties thought one way, the Appellate Court disagreed.

3. *Dawkins* v. *Green.* The District Court found there was no material issue of fact to be resolved and granted summary judgment. The Circuit Court disagreed.

4. *Steele* v. *Board.* This case was remanded because of a new decision, *U.S. and Linda Stout* v. *Jefferson County Board of Education,* rendered by the Fifth Circuit *after* the District Court Order.

5. *Augustus* v. *Board.* The Fifth Circuit Court of Appeals held it was error to grant a motion to strike the allegations relating to the assignment of teachers, principals and other school personnel because this was not a matter that had "no possible relation to the controversy". The Circuit Court also stated that:

"In the exercise of its discretion, however, the district court may well decide to postpone the consideration and determination of that question until the desegregation of the pupils has either been accomplished or has made substantial progress."

Thus, it appears that the Circuit Court recognized that the issue of assignment of school personnel was not one that must be decided immediately, it was only an issue that must not be disposed of by a motion to strike.

Professor Van Alstyne did mention the *Brooks* and *Pinkney* cases as being favorable to civil rights plaintiffs. Other civil rights cases where the Judge's action was sustained include:

Robinson v. Coopwood, 415 F. 2d 1377 (1969).

Baxter v. Parker, 281 F. Supp. (1968).

Steele v. Taft (July 19, 1965).

Ball v. Yarborough, 281 F. 2d 789.

Knowles v. Board of Instruction of Leon County, 405 F. 2d 1206.

Presley v. City of Monticello, 395 F. 2d 675.

Professor Van Alstyne said he did not know Judge Carswell. Perhaps if he had known him in Tallahassee, had heard him cursed, had listened to the harassing telephone calls and practiced law in his Court, he would not have been so quick to condemn him.

I appreciate very much your asking for my comment. Please call on me again if I may be of service to you.

Sincerely yours,

MARK HULSEY, Jr.

Mr. TYDINGS. The Senator from Maryland introduced Mr. Hulsey to the committee.

Mr. COOPER. I close by saying that in my view, the complete record, and these cases do not support the critical statements that have been made by the opposition, statements which have been repeated in the news media, and they had the right to repeat them, and use them in editorials.

Mr. TYDINGS. Will the Senator yield for one further question?

Mr. COOPER. I yield.

Mr. TYDINGS. I would like to ask the Senator another question.

If the Senator had been a member of the Committee on the Judiciary, and had been initially predisposed to be neutral——

Mr. COOPER. I have been neutral.

Mr. TYDINGS. Had he had a personal friend of his who was the president of the Florida bar, whom he introduced, as I introduced Mr. Hulsey, and that friend testified in favor of Mr. Carswell, and then late one afternoon the Senator had had a young lawyer working for the Department of Justice come down to see him and give him the following set of facts, I ask the Senator whether he could maintain that neutral position.

This was the situation: I had never heard of the young lawyer, and had never set eyes on him. He was a graduate of a major law school in the East. As a matter of fact, he was on the board of editors of that school's law review.

While awaiting the bar examination results, he served as a law clerk to various lawyers who were serving in the South on a voluntary basis, generally for 7 days or 2 weeks, to defend voter registration workers who were being arrested for various reasons and who were being harrassed in various areas of some States, including northern Florida.

The young lawyer then proceeded to tell me of his first experience with Judge Carswell. Bear in mind, now, that up to that date I was neutral.

He said that his first case was one involving some seven or eight voter registration workers who were engaged in registering black sharecroppers in the vicinity of Tallahassee. Of the group, a majority were Floridians and blacks.

The particular case in issue involved a farm, unposted, located on a public road. The aunt of one of the registration volunteers lived on the farm. The voter registration workers went on the farm, endeavoring to register the black sharecroppers——

Mr. COOPER. Is this case not in the record?

Mr. TYDINGS. Some of it, but not the circumstances involved. What I want to get across to the Senator is the fact that this Justice Department man, risking his job, came to me and told me a story. I want to relate it all to the Senator and ask how, after hearing this and then bringing in the witnesses and having them testify, the Senator could, in my position or any other neutral position, not feel that Judge Carswell was completely lacking in judicial temperament.

The story is one that was not unusual in that time period. The manager of the farm accosted the workers and inqulred why the young workers were on private property. They said it was not posted. They offered to get off. But they were not allowed to get off. They were arrested.

When they went before the local court, the local court refused to permit them out-of-State counsel. Finally, they were thrown into jail, where their physical well-being was threatened.

The young law clerk, Mr. Knopf, worked some 12 or 14 hours on a writ of habeas corpus petition to get them their just due—namely, to get them released and brought before Judge Carswell's court.

The Senator knows what a writ of habeas corpus is. If Senator X is being held by somebody improperly, or a Member of the House of Commons has been thrown into the Tower of London improperly or if anyone were incarcerated illegally, each would have the right to file the writ and expect to be released by court order. But that is not what happened in Judge Carswell's court. He turned down that long, well-prepared writ of habeas corpus and told the young man he had to find another special forum. Finally, he found the forum, and when he prepared his paper, he was told it did not have as much material as the original one. Then he was brought into the judge's chambers.

The bar association committee would not wait 1 day to get his statement. What is Mr. Knopf's recollection? The judge was so belligerent, so outspoken in his hostility to voter registration drives and out-of-State lawyers representing the workers, that Mr. Knopf was fearful he was going to be thrown into jail. The judge said, "I'm not going to honor your case. I'm not going to hear you. You don't have a case."

Finally, they prevailed upon him to sign a writ of habeas corpus. And what does the judge do? He immediately remands the case back to the local court, denies them the right of a hearing, denies them a stay pending appeal. When the sheriff releases the workers, he immediately throws them back into jail.

How can any fair-minded lawyer, on the basis of that sort of testimony, stay neutral, I ask the Senator?

The PRESIDING OFFICER. Who yields time?

Mr. COOPER. May I have 2 minutes?

I will answer the rhetorical question. The Senator has painted a very vivid and dramatic picture of wrongdoing. I have read the account in the record. But the Senator does not finish the record. The end of this story is that Judge Carswell granted the relief asked for, and the action was later approved by the courts.

Mr. TYDINGS. That is not the end of it.

Mr. COOPER. It is the end of it.

Mr. TYDINGS. He signed the writ of habeas corpus——

Mr. COOPER. I yield to the Senator from Tennessee.

Mr. BAKER. Mr. President, a point of order. Will the Chair inform me who has the floor?

Mr. COOPER. I yield to the Senator from Tennessee. I know other Senators wish to speak.

I have studied the Senator's rhetorical questions, and they are in the record. People have hung on these statements—some hearsay, some of them contradicted—as reasons for being against this nominee.

Mr. HRUSKA. Mr. President, I yield 3 additional minutes to the Senator from Kentucky.

The PRESIDING OFFICER. The Senator from Kentucky is recognized.

Mr. BAKER. Mr. President, do I correctly understand that the Senator from Kentucky has yielded to the Senator from Tennessee?

Mr. COOPER. Yes.

The PRESIDING OFFICER. The Senator from Kentucky has the floor.

Mr. COOPER. I yield to the Senator from Tennessee.

Mr. BAKER. Mr. President, I thank the Senator from Kentucky for yielding so that I may do two things.

First, I wish to praise him for an eloquent statement in defense of the nomination of Judge Carswell to the Supreme

Court of the United States, and to point out that it is more than just the ordinary observations of any of us who are peers in this group on a Presidential nomination. The statement comes from one who, as the Senator from Maryland has pointed out, is universally respected in this body, who has been a distinguished attorney in the Commonwealth of Kentucky, who has been a jurist of that State and an active trial judge, who has been in the forefront of Republicanism in the South, in Kentucky, and in surrounding States and areas, and who was educated in the East, who has a wide vision of all the issues that confront this troubled Nation and have confronted it since virtually after the close of the Civil War.

I commend him on his scholarly approach to his determination of how his vote will be cast on this issue.

Then I observe, Mr. President, that in the last 20 minutes or so prior to my putting this point of order, it has been impossible for me to tell who had the floor and to determine whether or not the debate was on this record or upon representations allegedly made to the Senator from Maryland. I do not know.

I make a second point: I was in the vanguard, in the forefront, of those who opposed the nomination of Justice Fortas to become Chief Justice of the United States. I stood on this floor long hours and long days opposing that nomination on the ground of the Justice's insensitivity to financial matters, to the canons of legal ethics, to his judicial career, pointing out the inadequacy, in my view, of the observations of the American Bar Association about Justice Fortas. I must comment, in closing, that I do not recall that the Senator from Maryland had any such caustic and critical remarks to make about the American Bar Association's review procedures at the time we were trying to prevent the nomination of Justice Fortas. I ask only for equal treatment at this time.

I thank the Senator from Kentucky for yielding.

Mr. COOPER. I want to say, as I said before, that my judgment is based on the record.

Before I close, I would like to say that as a border State representative, and as one who before he came here was a lawyer and a judge in a small community, that we dealt with civil rights matters before they became urgent throughout the country.

I am very glad that throughout those years I have voted and have done everything I could to insure the equal rights of all our citizens before I came to the Senate and during my service here. But I do not want to be biased or prejudiced against another man against the nominee unless there is cause for such bias. I have not found it in the facts in the record. I yield the floor.

Mr. CRANSTON. I yield 1 minute to the Senator from Maryland.

Mr. TYDINGS. Mr. President, first on the point raised by the Senator from Tennessee with respect to whether or not I was critical of the American Bar Association review of the Fortas nomination, the Senator will see in the RECORD that several evenings ago, in a colloquy with Senator COOPER, I pointed out that I think the American Bar Association's procedures in respect to Judge Fortas' nomination were as weak as they were with respect to the Carswell nomination. I do not think the American Bar Association should endorse candidates for the Supreme Court of the United States unless they perfect their procedures so that they examine completely the record of the nominees in the same manner in which they examine the records of nominees for the district and circuit courts.

Mr. BAKER. If the Senator will yield, since he made particular reference to me, I will comment that I agree with him. I think the American Bar Association has not done an especially good job in reviewing this nomination.

My point is that at the time of the Fortas nomination—not in this debate, but at the time of the Fortas debate—I heard no such criticism of the American Bar Association by so many who supported Justice Fortas, including the distinguished Senator from Maryland.

Mr. TYDINGS. I might add, we were never able to vote on Mr. Justice Fortas because the fillbuster was successful.

Mr. BAKER. I must point out that we debated the issue for 22 days.

Mr. TYDINGS. Yes, we debated.

Mr. BAKER. So there was no shortage of time to have brought up that point.

Mr. TYDINGS. As to the point made by the distinguished Senator from Kentucky (Mr. COOPER), let me say that my quarrel with the conduct of Judge Carswell was his refusal, at the time Judge Carswell finally signed the writ of habeas corpus, to allow these young men, these workers, to be released from jail. Instead, he immediately remanded the case to the State court at once on his own motion, without any request from the State, without notice, without a hearing, and without granting a stay pending an appeal. He remanded it at once, so that the sheriff could arrest the young men and put them right back in jail. He denied them even the right to a hearing on the issue of the remand. That is what is so patently unfair and, in my judgment, so biased and prejudiced.

Mr. President, I yield the floor.

Mr. CRANSTON. Mr. President, I suggest the absence of a quorum with the time to be taken out of both sides equally.

The PRESIDING OFFICER (Mr. RIBICOFF). Without objection, it is so ordered; and the clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. ALLOTT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. Mr. President, I yield 10 minutes to the Senator from Colorado.

The PRESIDING OFFICER. The Senator from Colorado is recognized for 10 minutes.

Mr. ALLOTT. Mr. President, a roll call of members of the Supreme Court who have distinguished themselves on the bench would show that many were the subject of attack when nominated to compare with that launched against the nomination of George Harrold Carswell to be a Justice of the U.S. Supreme Court.

My remarks will be directed to two of these objections as to his qualifications.

The first is that in a portion of a speech which he gave about 21 years ago, while running as a candidate for the Georgia State Legislature, he is quoted as stating that segregation of the races is proper. On this point, Judge Carswell has already stated specifically that he renounces the words themselves, and the thoughts they represent, as abhorrent.

Another basis for opposition is that he is not of that greatness of stature required of a Supreme Court Justice, and that his opinion writing is "pedestrian."

Such objections are not new in our history. Many nominees with such a background have served with distinction and honor, and have made important contributions to the Court's history and development.

A notable example is John Marshall Harlan, who sat on the Court from 1877 to 1911. He was the object of an attack on his integrity which parallels that made on Judge Carswell. As a younger man, Harlan had been a slaveholder, an opponent of the Emancipation Proclamation, a bitter foe of the Civil War Amendments and a severe critic of Federal civil rights legislation. In running for Congress in 1859, at the age of 26, Harlan campaigned as a devoted defender of property rights in slaves, supported the Dred Scott decision, and expressed the view that Congress had the authority and should pass laws for the protection of slave owners in the territories. In 1863, at the age of 30, Harlan ran for Attorney General of the State of Kentucky on a platform which included the defense of slavery. As Attorney General of the State, he took positions which reflected his convictions and political views about Negroes. Harlan was, moreover, violently opposed to the 13th amendment and urged his State not to ratify it.

However, beginning in 1871, at the age of 38, Harlan began to change his political views. About this time, he moved from the Democratic Party to the Republican Party, becoming that party's candidate for Governor. In his campaign, he championed the war amendments whose ratification he had once opposed, and gave his support to Negro civil rights. Because of this shift in views, Harlan came under fire from his former democratic associates who branded him as a "political weathercock," and charged that he was advocating "social equality" between whites and Negroes. Harlan denied this charge during the campaign, asserting that "social equality can never exist between the two races in Kentucky." He said that while he favored full legal equality of Negroes with whites, distinctions had to be drawn. In this connection, he expressed the view that in the public schools it was obviously "right and proper" to keep "white and blacks separate."

In 1877, President Hayes looked for a successor to Justice David Davis who had resigned from the Court to become U.S. Senator from Illinois. Hayes, determined

to appoint a "southern man," selected Harlan and sent his name to the Senate. In the hearings on his suitability, it was said that a man who opposed all the late constitutional amendments would be dangerous to trust on the Bench. It was also claimed that Harlan was a political opportunist, and there were other allegations challenging his integrity. The Senate Judiciary Committee was troubled as to whether Harlan's prior statements would impair his fidelity to the war amendments and the Reconstruction Acts of Congress. Finally, after his nomination had remained in committee for 41 days, it was reported favorably, and Harlan was confirmed by the Senate.[1]

This was the same Harlan who dissented from the "separate but equal" doctrine established in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and it was this dissent which the Supreme Court, in effect, adopted in 1954 in the school segregation cases—particularly the Brown against Board of Education case.

Speaking in 1896, Justice Harlan said:

> Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The arbitrary separation of citizens on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds. (163 U.S. at 559, 562.)

As has been pointed out in the debate, the nomination of John J. Parker to the Supreme Court in 1930 also involved an incident such as has been raised respecting Judge Carswell's nomination.

There were, it may be recalled, two main objections to Judge Parker's appointment. One is better known—his so-called "red jacket" or "yellow dog" contract decision, from which it was claimed that he betrayed a judicial bias in favor of powerful corporations and against union organization. The other principal objection to him came from the National Association for the Advancement of Colored People. It was alleged that when Judge Parker ran for Governor of North Carolina in 1920, he said:

> The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.[2]

Walter White, for the NAACP, declared that Judge Parker's statement was an "open, shameless flouting of the 14th and 15th amendments of the Federal Constitution," and that no man who entertained such ideas "is fitted to occupy a place on the bench of the United States Supreme Court."[3]

The Senate Judiciary Committee reported the nomination adversely. The Senate, after lengthy debate, voted against confirmation, 41 to 39. In this case, the Negro opposition was based on a single speech made by Judge Parker when he was about 30 years old in the midst of a political campaign conducted about 10 years prior to the nomination. As the Senate debates showed such opposition was well organized, 72 Cong. Rec. 8337–8339 (May 5, 1930)—as it has been here. Here, as in the case of Judge Haynsworth, there has been a well organized campaign to smear and besmirch the character and integrity of a man. Although Judge Parker went to great lengths to show that he never intended to deny the individual Negro any of his civil rights, and that his statement, taken out of context, had been grossly misinterpreted, apparently this single incident was enough to swing a few crucial votes against him, losing the confirmation.

If there was any single decision respecting a nomination to the Supreme Court which the Senate was later to regret, it was its rejection of Judge Parker. For years thereafter, he continued to serve with highest distinction as chief judge of the Court of Appeals for the Fourth Circuit. In many cases, he defended justly and impartially the black man's rights as the Constitution and the laws of Congress intended. I do not think that this body would want to repeat the grievous mistake which it made 40 years ago. A similar injustice would have deprived the Nation of the distinguished services of John Marshall Harlan.

I believe that this body has recently made a mistake comparable to the rejection of Judge Parker; and I am referring to the nomination of Judge Clement Haynsworth.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. Mr. President, I yield 3 additional minutes to the Senator from Colorado.

Mr. ALLOTT. Mr. President, another major objection to Judge Carswell's nomination to the Supreme Court is that his opinions do not reflect sufficient legal scholarship and insight to suggest that he is qualified to sit on the Court—in short, that his opinions are too "pedestrian," and that he displays no great talent for expounding the law.

Mr. President, I want to say this about "pedestrian" opinions and about court opinions. I certainly would not, if I were a judge, feel in the least downgraded if the Supreme Court, as it has been constituted in the last 10 years, reversed me many times.

I have seen Senators stand on the floor of the Senate, and I have read magazine and news editorials from people who have no legal background, but who talk about the mediocrity of this man's decisions and talk about the pedestrian quality of his ability.

No one is better qualified to evaluate a judge's ability than are the judges with whom he sits or the great preponderance of the lawyers who appear before him.

It is not difficult to find a dissatisfied lawyer who has lost a case and is willing to say anything about the judge who tried it. So, the remarks made on the floor a while ago about the dissatisfied lawyers who have appeared before him carry no weight with this lawyer who practiced law for 25 years before he came to the U.S. Senate. I know courts and I know lawyers and I know the great emotion that can arise from these conflicts.

Some seem to think that ability depends more upon flowery language than upon clear thought and the ability to analyze the Constitution and to analyze the precedents—an ability which has unfortunately been lost in the Supreme Court in the last 10 years.

All of these qualities go to make a great Justice of the Supreme Court.

> Greatness in the law is not a standardized quality, nor are the elements that combine it.

Some judges may excel in analysis; some in a view forcefully expressed over a long period on the bench; some may speak with brilliance; some may reflect special experience in a given field; some may write incisively and with unusual clarity; as Chief Justice Fuller described Justice Lamar's contributions, some are "especially valuable at the conference table"; and some, like Chief Justice Taft, may leave their mark in modernizing the judicial machinery.

Further, there is a tremendous diversity in writing style, not only among the nine Justices in any one term but in the marked changes displayed by their opinions over a period of years. There are a few exceptions to be sure—such as those opinions written by Cardozo, Holmes, or Frankfurter, but these are rare, by no means true of the vast majority of Justices whose performance has also been rated highly in retrospect.

Significantly, no one has suggested that Judge Carswell shirks his work, or that he lacks industry or that his opinions are unclear. These are exceedingly important attributes of a Justice on the Court.

Rather it is said that his opinions lack the luster, the literary polish, perhaps the scholarly analysis which mark the writing of some judges.

Here again, history demonstrates how unfair such an objection can be.

One case that comes to mind, in particular, is David Davis, who was nominated to the Supreme Court by President Lincoln in 1862. Davis had played an important role in Lincoln's campaign strategy in 1860, and remained close at hand as his adviser. His appointment was viewed as a reward for his service. Davis was a modest man, however, and harbored doubts about his fitness for the Supreme Court Bench. On his arrival in Washington, he admitted to his wife:

> Writing opinions will come hard to me. I don't write with facility.[4]

Yet in a few years, it was Davis who was to write the landmark decision for a unanimous Court in Ex Parte Milligan, 4 Wall. 2 (1866), that even in wartime Congress lacked the power to provide military trials for civilians in areas where the civil courts were still func-

[1] See, Document, *The Appointment of Mr. Justice Harlan*, 29 Ind. L. J. 46 (1953); Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 Yale L. J. 637 (1957).

[2] Harris, *The Advice and Consent of the Senate* (1953), p. 129.

[3] *Ibid.*

[4] *The Justices of the United States Supreme Court* (Friedman & Israel, Editors), Vol. II, p. 1048 (1969).

tioning. In this decision Justice Davis wrote (4 Wall. at 120–121):

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

Now it may be granted that some legal scholars might describe this unadorned language as "pedestrian"; others, on the other hand, might view the same language as undeniably forceful. But for a man who did not write with facility, this was the kind of blunt language that marked out plainly the rights of our citizens, in war and in peace, when the constitutional guarantees of indictment and jury trial were involved.

Another example may be cited. It is Morrison R. Waite, seventh Chief Justice of the United States. It has been said of him:

> Most agree on the 'mediocrity' of his talents, his commonplace style of expression, and his limited legal experience.[5]

Yet, it is also said that "this quiet, dutiful Justice, who drew up more than a thousand opinions in 14 years on the Court, may have created a body of law with deeper ultimate effects than that of more spectacular incumbents whose views and personalities have taken the fancy of publicists and reformers from time to time." Ibid. It was this Justice—who had been dubbed with "mediocrity"—that Harlan Fiske Stone later described as "the greatest Chief Justice after Taney." Ibid. Now what were the qualities he displayed in his writing? Merely "clarity, succinctness and directness." Id., 1244. We could use other Justices of this caliber on the Court today so that those who read an opinion can readily understand what it means.

So, too, speaking of Justice Brewer, who served on the Court from 1890–1910, it has been said that "the literary caliber of his writings was often pedestrian and the ideas conventional, but the sheer stream of output" placed "his productivity somewhere near the top of Supreme Court Justices."[6] It was Justice Brewer's opinion for a unanimous Court in 1895 in the *Debs* case (158 U.S. 564) that laid down principles that still control in protecting the public against the obstruction of interstate commerce and the free passage of the U.S. mails.

On the basis of these precedents, I challenge Senators to predict with any assurance what history will record as a "pedestrian" opinion. We need only take stock of our own manner of speaking and writing to realize that there is no one way to expound a position—and this is as true in this Chamber as it is in the courtroom. Flowery language may have its place. It is no prerequisite to sound judicial thought and decision.

Many other cases may be cited to prove the point that objections such as I have just discussed respecting Judge Carswell's fitness for the position of Justice are wholly unworthy of our consideration.

Finally, I may recall Justice Holmes' opening passage in his great work, The Common Law, where he said:

> The life of the law has not been logic; it has been experience.

So, too, as we in this Senate body now prepare to vote on Judge Carswell's nomination, we will do well to consider the Nation's long experience with other Justices whose decisions are now the law of the land. On the basis of this experience, we may properly cast our vote in favor of Judge Carswell's nomination.

Mr. President, I urge the Senate not to make the mistake that has already been made once in the last year, not to make the mistake that was made with Justice Parker, but to confirm Judge Carswell, who, I think, will make an outstanding Justice without any of the prejudices that some Senators on the floor of the Senate and the people in the news media and other places have attributed to him. He will make a great Justice.

Mr. HRUSKA. Mr. President, I believe that more time remains on the other side. I suggest that perhaps some time might be taken at this time by the opponents.

Mr. BAYH. Mr. President, I yield 3 minutes to the distinguished Senator from New York.

Mr. JAVITS. Mr. President, as we come to the close of this debate, one thing we know very well, and that is that the arguments which have been made from the highest quarters that the Senate's responsibility are somewhat less than that of the President, have fallen on deaf ears, because in the debate they stated that the merits of Judge Carswell are made on this record and made with reference to the segregationist speech in 1948, but that he has the ability to rate a Supreme Court judgeship.

I deeply felt that when this question was raised by the President in his letter to the Senator from Ohio (Mr. SAXBE) and by our minority leader who quite properly desired to make every argument that he thought was pertinent on his side of the case that what should be our responsibility under the Constittuion and under the prerogative of the Senate was being attacked.

I think this is critically important to the future of our country. The fact is that we do have a right, in my judgment, to judge the capacity of Judge Carswell.

At the very least, in my judgment, the defense does not try to tell us anything about the fact that he is a judge of unusual ability. They tell us that he may turn out to be a judge like Justice Black. However, I do not think we ought to be called upon to do this on the basis of a record supported so very completely by legal scholars and judges, by liberal as well as conservative members of the bar.

To me, the most single impressive piece of evidence of this question of competence, quite apart from the other issue which has been raised, is the eloquent and moving statement of Bruce Bromley, Samuel I. Rosenman, Francis Plimpton, and Bathuel Webster, of the New York bar—four of the most eminent lawyers in the country—backed by 450 distinguished lawyers and the heads of law schools of the United States.

They say in their statement:

> We believe that, in the exercise of that duty, the Senate should confirm an appointment to the Supreme Court only if the nominee is of outstanding competence and superior ability. Judge Carswell does not, in our opinion, meet that test.

That seems to me to be ample basis for any Senator of the United States to vote against confirmation.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BAYH. Mr. President, I yield 1 additional minute to the Senator from New York.

Mr. JAVITS. Mr. President, this is a great aspect of the making of a President, as far as the President of my party is concerned. If this nomination is turned down, it will be the second of the two nominations for the same position which will have been rejected.

The fact that this is not any retaliatory activity on our part is made very clear by the way we acted on the nomination of Justice Burger.

We have the right to consider every nomination that is sent to us until we get one that is worthy of being a Supreme Court Justice.

It is my judgment that that kind of action on the part of the Senate will make a better President. Also, the Senate will have asserted its constitutional authority and its prerogative.

For that reason, I hope that the Senate will reject the nomination.

The PRESIDING OFFICER. Who yields time?

Mr. BAYH. Mr. President, I yield 10 minutes to the Senator from Illinois.

Mr. PERCY. Mr. President, if I were to vote "aye" for the confirmation of Judge Carswell as an Associate Justice of the Supreme Court, it would go against the grain of many things that I have worked and fought for throughout my lifetime.

When we consider a man's qualification to assume this high office. It has been said that if a man does not have compassion by the age of 21 and if a man does not have wisdom by the age of 50, there is not much hope. This must be especially true when we consider a man's qualification to assume this high office.

I think that in this case it is our responsibility to look deeply into the life of the man who is a nominee of the President and determine whether in our individual judgment we can see fit to

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[5] *The Justices of the United States Supreme Court, supra*, p. 1243.

[6] *Id.*, at p. 1520.

Justice Brewer, writing in his best "Pedestrian" style, said in the *Debs* case (158 U.S. at 598–599):

> A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defence of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanyings acts of violence.

confirm his nomination to the Supreme Court.

Mr. President, first of all, I simply cannot lightly dismiss the speech that was given on August 13, 1948, by G. Harrold Carswell. I simply cannot dismiss this speech as the rash words of a young man because I think at the age of 28 it is time we be held accountable for our thoughts and words. After all, G. Harrold Carswell by that date had served in the U.S. Navy leaving the service as a lieutenant senior grade. He had returned to his home, he was a practicing lawyer, he was married, and he was the head of his family. He had had the opportunity in the Navy to see that men must fight and die together, whether they be black or whether they be white, side by side, when fighting for the freedom of all of our people. He had worked under an Executive order issued by the President of the United States to remove discrimination in the armed services.

Yet, he went back to his home community apparently feeling that it was all right for men in the Navy to fight and die together, black and white, but it apparently was not all right to go back home and work together and have equal opportunity for gainful employment. To fight for freedom for all the people was all right, but to fight for the right to have a job and to have equal employment opportunities apparently was not all right. Because in his speech of August 13, 1948, at the age of 28, when he was a candidate for the State legislature of the State of Georgia, G. Harrold Carswell looked upon equal opportunities in this way: he considered a fair employment practices commission a "foolish measure," not to be tolerated by him as a candidate for the State legislature; he considered civil rights programs as "civil wrongs programs," and he said that he would yield to no man in white supremacy, and that he "shall always be so governed."

Let me quote some of his exact words from the speech that he gave to the American Legion and that he caused to be reprinted in a Georgia newspaper:

> Foremost among the raging controversies in America today is the great crisis over the so-called Civil Rights Program. Better be called, "Civil-Wrongs Program."
>
> I am a Southerner by ancestry, birth, training, inclination, belief and practice. I believe that segregation of the races is proper and the only practical and correct way of life in our states. I have always so believed, and I shall always so act. I shall be the last to submit to any attempt on the part of anyone to break down and to weaken this firmly established policy of our people.
>
> If my own brother were to advocate such a program, I would be compelled to take issue with and to oppose him to the limits of my ability.
>
> I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.

Mr. President, if this speech had been given with the same sentiments expressed about the Jews, or about the Catholics, or about Protestants, there is no question in my mind that the Department of Justice, if they had known of the speech never would have dared to put forward this G. Harrold Carswell name as a nominee for the Supreme Court. Yet those words were said about blacks, about Negroes. The Attorney General said that it is unfortunate that because of it Judge Carswell is criticized. The Attorney General excused this speech because of its being given in the heat of a political campaign. I think it was unfortunate the speech was ever given. I think it is unfortunate that the Justice Department in its research on this nominee did not discover the speech. I think it unfortunate we could ever take so cynical an attitude that we could excuse anything that is said because it is said in the heat of a political campaign. A political campaign is the forum where potential public servants are saying what they stand for and believe in, and by what standard they will be judged. Judge Carswell just simply cannot duck the impact of those words. I simply cannot forget them, as much as I have tried. Millions of Americans will never be able to forget them, and they will look, of course, at his words, actions, and decisions to see whether or not in the intervening years his has repudiated these racist sentiments.

It would have been a much different story if we could have found words by which he denounced what he had said before or by his subsequent pattern of actions he clearly showed he has renounced what he once held so dearly. But I cannot find such words and I cannot find such a pattern of action until, as a candidate for nomination to the Supreme Court he was confronted with the speech and, of course, then he denounced the speech, as he should have.

I cannot support the nominee because of several other reasons. I cannot support him because of the times in which we are living. I believe we have today a crisis of confidence in American institutions, and our first order of priority at every level of government should be to restore confidence in the established great institutions of this country.

If Judge Carswell were confirmed I think it would not contribute to confidence in our institutions. The extremists are saying that the system is not working, that the institutions are stacked and rigged, and that you do not have a chance if you are black, or underprivileged if you are not backed by powerful and well financed interests.

If we were to put a man with this stain on his record on the Supreme Court, we simply hand a hatchet to those extremists who are trying to wreck the system, a hatchet which undercuts the ground of those who have begged and pleaded with minorities all over the country to have faith in the system and to work with the system, that the system is responsive, fair, and just.

We must understand that the problem of the moderate leadership is to try to convince people to seek justice in the courts and not on the streets. I am fearful that if affirmative action were taken today, we would be adding one more piece of ammunition to those who say the system is not working.

Furthermore, I feel excellence in leadership is required in all three branches of Government—the executive, the legislative, and the judicial. I think there are certain standards that must be established for Associate Justices of the Supreme Court and these include wisdom, compassion, and understanding.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. PERCY. Mr. President, will the Senator yield me 3 additional minutes?

Mr. BAYH. I yield 3 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. PERCY. Mr. President, these standards include wisdom, compassion, and understanding. The standards must also include, in my judgment, superior scholarship, legal distinction, and adherence to the principle that justice and equality before the law is guaranteed to all Americans. I find Judge Carswell to be deficient in meeting these reasonable and imperative standards.

Lastly, the responsibility of the Senate has been the subject of considerable discussion. It deserves mention here as I explain my position. I think the President has aptly put it when, in a discussion with him about Judge Haynsworth, he said, and rightly so, "A Senator has the responsibility to vote his own conscience and his own judgment."

We have that responsibility, particularly in confirming nominees to a third branch of government, the judiciary. The electorate has control over the executive and the legislative branches of Government. Those two branches through combined efforts appoint and confirm the judiciary in the federal system. We, the President and 100 Senators, have the power to put a man on the Court for life. We must take that power exceedingly seriously. It is in lieu of the votes of tens of millions of citizens whose decisions elect the other two branches. We in the Senate must vote our own conscience and judgment, exercising our judgment in light of all the new information we have which was not available to the Department of Justice or the President at the time of their nomination.

Mr. President, it is not a matter of liberalism or conservatism with me and I am sure it is not with my colleagues who feel as I do. We had no question or problem in confirming Chief Justice Burger and we will not have in the future when someone else is nominated to the Court who does not present to the country and the Senate the problems that this nomination does.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BAYH. Mr. President, I yield 1 additional minute to the Senator from Illinois.

Mr. PERCY. Mr. President, we must look at the pattern of personal decisions of G. Harrold Carswell, including his Tallahassee golf course decision. In my own birth city of Pensacola, Fla., the preceding year, an order by the court had been issued against it to desegregate the municipal golf course. Following this, various attempts to circumvent or subvert the law were made throughout the South. Yet, G. Harrold Carswell, at a time when he was U.S. attorney, sworn to uphold the Constitution and the law of the land, participated as a shareholder and director in a scheme which would keep segregated the municipal golf course of Tallahassee.

When I look at his decisions as a Federal district judge in voting rights cases, in writ of habeas corpus cases, in school desegregation cases, and the number of reversals he has had time after time, many unanimously, by the court of appeals I can only say thank heaven for the process of appeal and reversal that put justice to work in place of the decisions that were rendered by Judge Carswell.

For these reasons I cannot vote, and it is with great reluctance that I say I cannot vote, to confirm the nomination of Judge Carswell. It is with great reluctance because the Nation can ill afford the Fortas, Haynsworth, Carswell succession; reluctance because the man himself must have suffered in the light of the debate over his nomination; reluctance in opposing the President, the leader of my own party. Yet the final test must always be what a man believes is right in his own judgment and in his own conscience. I have concluded that I cannot vote for Judge Carswell. To do so would be to betray my own convictions.

Mr. BAYH. Mr. President, I yield 3 minutes to the distinguished Senator from Idaho (Mr. CHURCH).

Mr. CHURCH. Mr. President, the Senate is about to pass judgment on the appointment of Judge Carswell to the Supreme Court of the United States. I think it is altogether fitting that we reflect for a moment upon the moving tribute of one of the supreme jurists of our time, Judge Learned Hand, himself a man who did not suffer mediocrities gladly, paid to Mr. Justice Cardozo shortly after Justice Cardozo's death in 1938. Of Cardozo, Judge Hand wrote:

> In all this I have not told you what qualities made it possible for him to find just that compromise between the letter and the spirit that so constantly guided him to safety. I have not told you, because I do not know. It was wisdom: and like most wisdom, his ran beyond the reasons which he gave for it. And what is wisdom—that gift of God which the great prophets of his race exalted? I do not know; like you, I know it when I see it, but I cannot tell of what it is composed. One ingredient I think I do know: the wise man is the detached man. By that I mean more than detached from his grosser interests—hia advancement and his gain. Many of us can be that—I dare to believe that most judges can be, and are, I am thinking of something far more subtly interfused. Our convictions, our outlook, the whole makeup of our thinking, which we cannot help bringing up to the decision of every question, is the creature of our past; and into our past have been woven all sorts of frustrated ambitions with their envies, and of hopes of preferment with their corruptions, which, long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man; his gentle nature had in it no acquisitiveness; he did not use himself as a measure of value; the secret of his humor—a precious gift that he did not wear upon his sleeve—lay in his ability to get outside of himself, and look back. Yet from this self-effacement came a power greater than the power of him who ruleth a city. He was wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill will. I believe that it was this purity that chiefly made him the judge we so much revere; more than his learning, his acuteness, and his fabulous industry. In this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire, it was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene. He is gone, and while the west is still lighted with his radiance, it is well for us to pause and take count of our own coarser selves. He has a lesson to teach us if we care to stop and learn; a lesson quite at variance with most that we practice, and much that we profess.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield 5 minutes to the Senator from Florida (Mr. HOLLAND).

Mr. HOLLAND. Mr. President, as one who, for years in his early political life, supported the poll tax and later saw its inequities and did as much as any American to do away with it, I cannot agree with the Senator from Illinois and others who do not think a young man can, as he gains a little stature, change his mind. I could not be here to try to deceive my brother Senators. I think this young man is a fine young man, a good judge, a clean one, and not a racist.

I note the statement of Mr. Mark Hulsey, president of our bar association, in a very recent letter, in which he states:

> As I indicated to you earlier, it is certainly ironic that Judge Carswell is charged with being a racist. My experience with him and his reputation in the Northern District of Florida are just to the contrary.

Then he goes on to say:

> Professor Van Alstyne aaid he did not know Judge Carswell. Perhaps if he had known him in Tallahassee, had heard him cursed, had listened to the harassing telephone calls and practiced law in his Court, he would not have been so quick to condemn him.

In addition to Mr. Hulsey, the present president of the Florida State bar, the record shows that the following recent, former presidents of the State bar are actively supporting Judge Carswell, namely: Mr. Marshall Criser, of West Palm Beach; Mr. Delbridge L. Gibbs, of Jacksonville; Mr. Fletcher G. Rush, of Orlando; Mr. J. Lewis Hall, of Tallahassee. Furthermore, the record shows a tremendous endorsement of Judge Carswell by numerous sitting judges in Florida as follows:

First. All members of our Florida State Supreme Court.

Second. All members of the District Court of Appeals for the Northern District of Florida and other individual members of the two other district courts of appeals.

Third. A large number of our circuit judges. I placed in the RECORD myself the endorsement of Judge Carswell by 38 of our Florida circuit judges and my colleague, Senator GURNEY, has placed others in the RECORD.

Fourth. Both of the sitting Federal district judges of the Northern District of Florida and all six sitting Federal district judges of the Southern District of Florida.

Fifth. Also appearing in the printed RECORD is the endorsement by the Governor and all six of the statewide elected cabinet members of Florida.

Sixth. The endorsement of 50 sitting Federal district judges in the entire fifth judicial circuit of the Nation, including the six States of Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida, and seven of the retired district judges of that area.

Seventh. The endorsement of the present eminent deans of the law schools of Florida State University at Tallahassee, and of the University of Florida at Gainesville, as well as the endorsement of the eminent former dean of the law school at FSU, Dr. Mason H. Ladd, who was formerly the dean at Iowa State Law School.

Eighth. The endorsement of 11 of the sitting associates of Judge Carswell on the circuit court of appeals.

All of these men whom I have mentioned, most of whom sit in high judicial positions, know Judge Carswell and know him well, just as the two Senators from Florida know him well.

The question which will soon be submitted to the Senate on the confirmation of Judge Carswell will give to all Senators the opportunity to show whether they have confidence in sitting judges and other high officials who know Judge Carswell well and in many instances intimately, and in their brother Senators who are members of the Senate Judiciary Committee and had the chance to see Judge Carswell, hear him, and appraise his answers to their questions.

I am sure, also, the fact that former Gov. Leroy Collins of Florida, who is known throughout the Nation as being anything but a racist, testified as to his support of Judge Carswell and as to his conviction based upon intimate knowledge and association of years with Judge Carswell that Judge Carswell is not a racist.

I note in the record strong statements made by the Senator from Indiana (Mr. BAYH), and the Senator from Maryland (Mr. TYDINGS), as to their estimate of Governor Collins. I will note them briefly.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. HOLLAND. I ask for 1 more minute.

Mr. HRUSKA. I yield the Senator from Florida 1 additional minute.

Mr. HOLLAND. Senator BAYH stated:

> I would like to say for the record . . . that of all the public servants I have had the good fortune to become familiar with, I know of no man I respect more than the witness who is presently before us.

Senator TYDINGS said:

> Gov. Leroy Collins of Florida, in my judgment, is one of the great public servants of this generation. I would like for the record to make that comment for my brother members of this committee . . . "My every experience with Governor Collins has shown me that he is a man of the highest integrity and, a great American."

And Governor Collins says, based on his longtime record, which certainly is not that of a racist, that Judge Carswell is known to him to be not a racist. It will be interesting to see whether my brethren

from Indiana and Maryland show by their votes their intimate confidence in Governor Collins, as expressed in the record from which I have quoted.

Mr. President, speaking for myself, I simply say that I hope the Senate will, in its judgment, confirm the appointment of Judge Carswell, whom I believe to be eminently qualified and a decent, humane, commonsense American.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield 1 minute to the Senator from Iowa.

Mr. MILLER. Mr. President, in today's New York Times there appears a letter to the editor written by Francis William O'Brien, professor of constitutional law, of Rockford College.

Mr. O'Brien refers to the criticism against Judge Carswell, and recalls similar criticism in the case of the late Louis Brandeis, nominated by Woodrow Wilson in January 1916 and confirmed after several weeks of debate.

He points out that the New York Sun wrote that Brandeis was "utterly and even ridiculously unfit." The New York press called the nomination "an insult to members of the Supreme Court." A petition signed by 55 Bostonians, including the president of Harvard University, asserted they did not believe Mr. Brandeis had the judicial temperament and capacity which should be required of a judge of the Supreme Court. The American Bar Association charged that the "reputation, character, and professional career" of the nominee proves he is "not a fit person to be a member of the Supreme Court."

Nevertheless, Mr. Justice Brandeis was confirmed by the Senate and served with great distinction for 21 years. I think this is a good time to point this out.

I ask unanimous consent that the entire letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

CRITICS OF COURT CHOICE

TO THE EDITOR:

The criticism leveled against Judge Carswell recalls that made against Louis Brandeis, nominated by Woodrow Wilson in January 1916, and confirmed several weeks later after much bitter debate. The New York Sun wrote that Brendeis was "utterly and even ridiculously unfit." The New York Press called the nomination "an insult to members of the Supreme Court." Opposition was also voiced by The Boston Transcript and The New York Times.

Former President Taft, Chief Justice from 1921 to 1930, suffered "a fearful shock" in learning of the Brandeis nomination.

A petition signed by "Fifty-five Bostonians" urged the Senate to reject Brandeis. The distinguished list included A. Lawrence Lowell, President of Harvard, and Charles Francis Adams.

Among other objections, the petitioners asserted that they did not "believe that Mr. Brandeis has the judicial temperament and capacity which should be required in a judge of the Supreme Court" and that his "reputation as a lawyer is such that he has not the confidence of the people."

The American Bar Association lent its lungs to the swelling chorus of dissent. "A painful duty," the lawyers lamented, compelled them to charge that "the reputation, character and professional career" of the nominee proves that he is "not a fit person to be a member of the Supreme Court." Among those who signed this petition were seven past presidents of the Bar Association.

In spite of such formidable opposition, Brandeis won confirmation and served for 21 years on the high tribunal. Many knowledgeable students of the Court would rank him alongside of the two or three most distinguished Justices of this century.

FRANCIS WILLIAM O'BRIEN.

Mr. HATFIELD. Mr. President, in a short time, I shall vote against the nomination of Judge G. Harrold Carswell to the Supreme Court. I do this as a result of my study of the hearing record, my listening to and participation in debate here on the Senate floor, my discussions with my colleagues, and my consultation with others interested in this matter. I also have discussed this in conversations with my constituents in Oregon.

When I sent a message to the President, asking that he withdraw the nomination, I did so in hope that he would avoid this divisive vote today. In my opinion, the Court, and the entire judicial process, suffers as a result of this vote.

As is sometimes the case with matters of great public interest before this body, the particular question—as each of us sees it—gets obscured in rhetoric. Supporters and opponents both fill the air with innuendo, inference, and allusion. When this is viewed by our constituents, the Senate gains nothing in the eyes of the country when it strays from the pertinent points regarding Supreme Court nominations.

Currently, we are in a time unique in our country's history. Questions are being raised regarding our basic institutions, and our judicial system has been subjected to new pressures, with which it was not designed to cope. Recent events in Chicago and New York are evidence of these strains, and we must focus our attention on shoring up our judicial system in all respects.

These unique times require men uniquely qualified for service in the U.S. Supreme Court. Nominees must represent the best that is within our judicial system. Certainly there are conservative judges and strict constructionists who fulfill the requirement of excellence.

In this issue, a central concern should be the Supreme Court as an institution. The old adage, "without purse or sword," means that the Court must stand alone, and that the public is the guardian of its sanctity. The responsibility of the Senate should be to guard against unwarranted attacks on the Court, be they from those who think it too "liberal," or from those who see it as "irrelevant," in the jargon of the far left. We should not give ammunition to those who fault our judicial system.

We should examine a nominee in this light: first, considering only the pertinent questions, and second, not adding to the discord already directed at the Court.

I have said this as a prelude to my comments regarding the Carswell nomination.

I ask unanimous consent that, at that point in my remarks, a copy of my message to the President be printed, for it sets out my basic reasons for opposing the Carswell nomination.

There being no objection, the telegram was ordered to be printed in the RECORD, as follows:

THE PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: I shall vote yes on the motion to recommit the nomination of Judge Carswell to the Judiciary Committee and I am prepared at this point to vote the nomination up or down.

I write you as one of your early supporters for the Presidential nomination and as one who has remained publicly uncommitted on Judge Carswell. I write also as reflecting my own evaluation of the mood of the Senate and the thinking of many of my close colleagues.

You and I share the common goal of restoring the needed balance to the Supreme Court. We share a common concern about the need to restore confidence in our entire judicial process. I was a strong supporter of Chief Justice Warren Burger and would welcome the nomination of a man of his stature.

I stand ready to support a nominee from any geographical area of the country. Just as every section should be open for consideration for an appointment, so should any nominee represent the best in professional excellence and personal integrity. There are men within the Southern States who represent these composite traits and who do justice to the best and to the future of that region.

As I spoke very recently with my constituents and with many others from throughout the country, I have become more deeply concerned with the crisis of confidence that confronts our governmental process. In all such discussions I continually urge the full utilization of our constitutional and judicial process in seeking the orderly redress of grievances. Yet, the name of G. Harrold Carswell has become a symbol of the despair, distrust, and disillusionment that beguiles our admonitions to work peacefully within our democratic institutions.

You and I share the commitment to promote a national reconciliation between the polarized factions in our land. We can do no better than to give our words the ring of authenticity by granting to our institutions the assurance of complete credibility.

Therefore, I respectfully urge you to withdraw the nomination of G. Harrold Carswell.

Sincerely,

MARK O. HATFIELD.

Mr. HATFIELD. Mr. President, to those who say that Judge Carswell has been victimized, I say only that a judge's reversal rate, compared to that of his fellow judges from his judicial circuit, stands alone, without comment from his supporters or opponents.

To those who say we need a conservative judge on the Court, I merely ask that he be one of the best conservatives in the country. We owe this much to the institution of the Supreme Court.

To those who say that Judge Carswell has no racial prejudices, I ask that they improve on their past demonstrations on this floor to show that he professes the degree of racial tolerance needed on the highest court in the land. I share the sentiments of some of my colleagues that he appears to have shown no demonstrable change from his earlier derogatory statements. We owe this much to those who have relied on unbiased courts for the redress of their grievances.

To those who say that the Senate

would oppose any southerner, I say let us examine the best that the South offers, and not merely consider the present nominee as the best from that geographic area. As I have said earlier, just as any geographical area should be eligible for consideration, so should that nominee represent that which is best from that area. We owe this much to the new, emerging South we all respect.

To those who say this is a partisan issue, and that Republicans always should support the President, I say that the U.S. Supreme Court is not a partisan arm of the Government. It is a coequal branch with this body, the legislative, and with the executive. Partisan politics should not be considered, either in support or opposition of a nominee. We owe this much to our country.

Those in the executive and legislative branches of our Government are involved in decisionmaking for relatively short times, and are subject to periodic review by the electorate. A Supreme Court Justice, however, is appointed for life, and his influence can be far reaching and long lasting.

In conclusion, let me issue a plea to all who follow this matter. This would include the administration, the entire Senate, and the country as a whole.

Let us consider nominees who represent the best in our judicial system. Let us consider men from any philosophical viewpoint and from any geographical area. Let us consider the merits alone, and not enter the rhetoric race. Let us focus instead on the central issue: Is he the best qualified person to sit on the highest court in the land? And how will he affect the stature of the highest court in the land?

As I have stated earlier, the Carswell nomination has become a symbol of the despair, distrust, and disillusionment that beguiles our admonitions to work peacefully within our democratic institutions. The Supreme Court symbolizes the hope of justice through due process of law. It is the embodiment of the trust which our Nation places in the effectiveness of our judicial system. It must symbolize to all Americans, therefore, the highest and the very best that our democratic system has to offer. It deserves unmatched excellence in its nominees. If our judicial system is to be worthy of the respect and support which is essential for it to function, then it must be led by those individuals who can best represent these ideals. It is the responsibility of this body to insure that our courts are worthy of such faith.

Mr. MATHIAS. Mr. President, the Republican Party has contributed to the quality of service on the Supreme Court through respected men, such as William Howard Taft, Charles Evans Hughes, and Oliver Wendell Holmes. The State of Maryland has contributed to the quality of service on the Supreme Court through respected men such as Thomas Johnson and Roger Brooke Taney. The excellence to which these men aspired and, in large measure attained, must, of necessity, be a benchmark in considering appointments to the Supreme Court. To acquiesce in a lesser standard of quality would be unfaithful to the present, unfair to the future, and a reproach to the past.

In the current debate there has been some question as to the constitutional limit of senatorial discretion in the confirmation of Justices to the Supreme Court. Alexander Hamilton commented on this question in the Federalist No. 76 when he said:

> To what purpose then require the cooperation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters.

Thereafter enumerating the possible reasons by which a President might be tempted to make an unsuitable appointment. It is notable that throughout most of the 20th century the Senate's exercise of its duty of confirmation has been, as Hamilton predicted, "a silent operation." On only 13 previous occasions in this century has there been enough controversy to require a rollcall vote in the Senate on appointments to the Supreme Court and on only two of those occasions has the nominee been rejected. I wish with all my heart that in the instant case the Senate could passively concur and that this would be "a silent operation." The nature of the case and the nature of the times will not permit the Senate to be silent and it should not be silent.

To the President the Constitution gives the power of nomination. To the President and the Senate, it gives the power of appointment. Between nomination and appointment lies the key phrase, advice and consent. The Senate, basing its response on investigation and debate, shall give its advice on the nominee and shall consent—or withhold the same—to the appointment.

The Senate is thus forced to address itself to that quality of the nomination which Alexander Hamilton has characterized as "fitness."

As I observed in the report of the Senate Judiciary Committee on the nomination of Judge Carswell, I regret to see decisions of a sitting judge scrutinized individually so that there would be some apparent invasion of the principle of judicial independence. I do not, however, feel that the Senate either can or should be precluded from a broad overview of a nominee's judicial record as one of the factors in ascertaining "fitness." It has been pointed out during this debate that over half of the opinions rendered by Judge Carswell which were subject to appellate review were reversed. While there might be considerations which could be used to explain this high rate of judicial error, they seem inadequate when it is considered that Judge Carswell's rate of judicial error is more than twice as high as that of the average U.S. district court judge. While such a relatively high rate of judicial error may be tolerated at lower court levels where further appeal provides a remedy, it is a rate of error which casts considerable doubt upon the appropriateness of his nomination to the Court of last resort.

I have studied some of Judge Carswell's opinions and conclude that many of them can be considered routine and unexceptional. This would be expected from the calendar of a U.S. district court judge. In fairness and candor, it must be said that most of Judge Carswell's opinions which are available in published form cannot be considered to be incorrect. None of them, however, seem to belong in the great tradition of Anglo-American jurisprudence in which judges over the years have contributed to the growth and understanding of the law. Some of them are marked by basic errors. I am appending hereafter a memorandum prepared at my request which sets forth some of the illustrative cases which emphasize these points; and I ask unanimous consent that the memorandum be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. MATHIAS. There is a scholarly side of the law and there is a human side of the law. I hope that I am not blind to either. In an attempt to make some judgment on both aspects of Judge Carswell's fitness, I requested an opportunity to meet and talk with him. This request was made to the Justice Department and to others who were vitally interested in Judge Carswell's nomination. I regret that this request was not acknowledged until less than 24 hours before the vote.

I am not insensitive to the impact of this vote on Judge Carswell as a man. I am very much aware of the sentiments of many American who would like to see Judge Carswell appointed to the Court in spite of the misgivings that I have enunciated. I feel very deeply the obligation that I owe to the President of the United States to respect his judgment and his leadership. It is, therefore, with a very deep sense of sadness that I feel that my oath as a Member of the U.S. Senate requires me to vote against confirmation of G. Harrold Carswell to be an Associate Justice of the Supreme Court.

EXHIBIT 1

MEMORANDUM

To begin with, there is a series of cases in which Judge Carswell refuses to grant hearings on habeas corpus petitions in the face of federal statutes and higher judicial authority to the contrary. The case of *Harris v. Wainwright*, 399 F.2d 142 (5th Cir. 1968) is reasonably typical.

In that case, the indigent petitioner had a past record of mental illness serious enough to warrant commitment. He sought to attack his state court conviction collaterally on the ground, *inter alia*, that he had been incompetent to stand trial at the time of his conviction. (There had been no pre-trial psychiatric examination, despite petitioner's history.) He brought his first collateral attack in the state courts; he was not represented by counsel at this proceeding, nor was he himself produced. The court simply denied the petition.

He then sought federal habeas in Judge Carswell's court. Carswell did not even appoint counsel to represent this indigent, mentally ill petitioner. He did not order a hearing, as required by federal statute (28 U.S.C. § 2255). He simply denied the petition summarily, stating that petitioner had been represented by "able" counsel at trial and that "the alleged constitutional defect simply does not exist."

The Court of Appeals unanimously reversed and remanded to the district court to reexamine the issue. The Court of Appeals held that defendant's allegations of incompetency raised a federal constitutional issue, which Carswell should have known, since he had relied on that rule to the detriment of another petitioner in a prior case, *U.S. v. Levy*, 232 F. Supp. 661 (1964). Very similar cases are *Meadows* v. *United States*, 282 F.2d 942 (1960) (claim of incompetency by a petitioner previously discharged by the Army as a psychoneurotic) and *Dickey v. United States*, 345 F.2d 508 (1965) (claim of incompetency by petitioner alleging a previous head injury). These repeated denials without hearing by Carswell in very similar cases followed by unanimous reversals backed by Supreme Court authority suggest a persistent determination to refuse hearings without any apparent legal basis.

In a similar vein, see *Barnes v. Florida*, 402 F.2d 63 (1968) where Judge Carswell denied a writ of habeas corpus without a hearing despite allegations of coercion of a guilty plea and inadequacy of counsel (whom petitioner allegedly saw for only a few minutes prior to trial). Judge Carswell was unanimously reversed by the Court of Appeals. Still another case is *Baker v. Wainwright*, 391 F.2d 248 (1968) where a petition for habeas corpus was again denied without hearing despite an allegation that petitioner was not granted counsel on appeal in a criminal case. Again, the Court of Appeals reversed, citing a Supreme Court decision, *Entsminger v. Iowa*, 386 U.S. 748 (1966) where the Court declared: *"As we have held again and again* an indigent defendant is entitled to the appointment of counsel on his first appeal."

This section states: "Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . ."

Judge Carswell seems very quick to denominate cases as "frivolous". Such language permeates a number of his opinions. In a recent case, for example, he denied bail pending appeal in a free-speech, contempt case. No indication was adduced that petitioners were dangerous, but Carswell apparently thought the bail issue was frivolous. He was reversed and directed to grant bail by a unanimous per curiam opinion, *Dawkins v. Crevasse*, 391 F. 2d 921 (5th Cir. 1968).

The fact that some of Judge Carswell's criminal law decisions have not been reversed does not indicate that they were correct. A significant number of them may not have been appealed because Carswell has made it difficult to effect an appeal. When Carswell rules against an indigent petitioner, he often denies him the right to proceed further in forma pauperis; see *e.g., Baxter v. State of Florida*, 295 F. Supp. 1164; he does not appoint counsel; and he frequently denies bail. To be sure, the Court of Appeals can—and sometimes does—reverse these orders; but a great many indigent petitioners simply cannot overcome these hurdles and get the case up for review.

Judge Carswell's unwillingness to apply the law in a manner favorable to criminal defendants seeking their freedom can be contrasted with his reluctnace to limit an employer by enjoining future violations of the Fair Labor Standards Act. Despite past violations and what the Court of Appeals described as "a history . . . of delay and obstruction to the investigation of reliance on spurious legal defenses, Judge Carswell denied an injuction, *Mitchell v. Blanchard*, 168 F. Supp. 689. This decision was reversed unanimously, 727 F.2d 574, and the order denying the injuction was declared "not supportable."

In quite a different field of law, one might refer to *Polar Ice Cream v. Andrews*, 208 F. Supp. 899 (1962), *reversed* 375 U.S. 361 (1964). That case involved a Florida regulation of the supply and distribution of milk. The challenged regulations required that a Florida company like Polar pay to his local Florida suppliers the premium Class I price of 61¢ for all Class I milk which Polar sold in his Pensacola market, regardless of where he bought the milk, provided that the local Florida suppliers could provide him with the amounts he needed. The effect of the regulation was to make it uneconomical for Polar to pay the premium price for milk from out-of-state producers so long as such milk could be purchased from his local Florida suppliers. Instead, out-of-state producers could only sell to Polar for the less-remunerative uses at prices which apparently would not even cover their costs of production. Polar challenged the regulations as constituting a burden on interstate commerce by, in effect, limiting out-of-state producers from competing for the lucrative Class I business in Polar's Florida market.

Judge Carswell upheld the Florida regulations. He first announced a general standard of highly dubious applicability to a case such as the one before him: i.e., "in order to justify a pronouncement that a legislative act is unconstitutional the case must be so clear as to be free from doubt." He then declared—in very general, conclusory terms—that the regulations did not burden interstate commerce. Nowhere in his opinion is there any appreciation of the actual economic effects of the regulations and their impact on the feasibility of interstate sales to Polar.

The Supreme Court reversed unanimously, finding that the burden on commerce was clearly evident. In reaching the result, the Court declared that the principles laid down in an earlier Supreme Court case, *Baldwin v. Seelig*, 294 U.S. 511 (1935): "justify, indeed require, invalidation as a burden on interstate commerce." Judge Carswell had dismissed the *Baldwin* case because the surface facts were different without recognizing that the *principle* set forth in *Baldwin* (and other cases) seemed plainly applicable to overturn the Florida regulations. Leaving aside the enunciation of a seemingly erroneous legal standard, Judge Carswell's opinion reveals, not a difference of policy or philosophy, but a failure to probe beneath the surface to expose the underlying principles of existing precedents and the economic effects of regulatory schemes such as those in the *Polar* case. In this connection, one might also note another regulatory case decided by Judge Carswell and reversed on appeal, *First National Bank v. Dickinson*, 274 F. Supp. 449, reversed, 400 F. 2d 548, affirmed, 90 S. Ct. 337 (1969).

In *John P. Maguire Co.* v. *Herzog*, 2 CCH Bankruptcy Law Rep. ¶ 63,355 (5th Cir. 1970), an officer of insolvent corporation used some of its assets to prefer corporate creditors to whom he was also personally liable by indorsement or guaranty. Thereafter, the corporation filed petition for an arrangement under Chapter XI of the Bankruptcy Act and the officer went into straight bankruptcy and received a discharge. Another of the corporation's 175 creditors then sued the corporate officer for misappropriation of corporate assets, contending that his claim was exempt from the bankruptcy discharge by an exception in the Bankruptcy Act for debts "created by his . . . misappropriation . . . while acting as an officer." In an opinion by Carswell the creditor's claim was ruled within the exception. There was no indication that Judge Carswell realized the full import of his ruling. Instead of preserving a corporate asset for the benefit of corporate creditors, he ruled that the act of the corporate officer in preferring some corporate creditors entitled another corporate creditor to prefer himself. In reaching this seemingly odd and unprecedented result, there was no inquiry into whether the exception should be available only to the corporation or its liquidator rather than to a single corporate creditor. There was no inquiry into whether Ga. Code Ann. § 22-709 upon which the action is based (and which forbids officers of insolvent corporation to use their powers for obtaining personal preference or advantage) should be available only to the corporation or its liquidator. In fact, there was not even a reference to the Georgia statute in the opinion.

In *Dawkins* v. *Green*, 285 F. Supp. 772 (1968), *reversed*, 412 F. 2d 644 (1969), Judge Carswell gave summary judgment to defendants, before any evidence was heard. The plaintiffs in this action had sought to enjoin certain defendant public officials from enforcing criminal statutes against the plaintiffs, alleging that the defendants were acting in bad faith, in that they were using the machinery of the criminal law in order to punish plaintiffs for their exercise of First Amendment rights. In moving for summary judgment, defendants filed affidavits, setting forth various facts, but on the critical issue of "bad faith," the officials simply denied so acting. Carswell's grant of summary judgment pointed to these affidavits and emphasized that plaintiffs had not filed counter-affidavits. Carswell's ruling seems plainly wrong. As the Court of Appeals pointed out in unanimously reversing him, summary judgment cannot be based on affidavits containing conclusory assertions that simply repeat the pleadings. This procedural doctrine is universally applied in the federal courts. For a similar case, see *Due* v. *Tallahassee Theatres*, 333 F. 2d 630 (1964) where Judge Carswell is again reversed by a unanimous Court of Appeals.

Running through these procedural cases as well as the criminal law—habeas corpus opinions is a tendency to dismiss cases summarily without giving adequate opportunity to explore the facts of the case. Similar tendencies exist in tort cases where Judge Carswell is reversed for resolving as matters of law issues that should have been submitted to the jury as questions of fact. See *Shirey* v. *L. & W. R.R.*, 213 F. Supp. 574 (1963), reversed 327 F. 2d 549 (1964); *Atlanta & S.A.B. R.R.* v. *Chilean Nitrate Sales Corp.*, 277 F. Supp. 242 (1967), reversed, 415 F. 2d 393 (1969).

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, how much time remains on either side?

The PRESIDING OFFICER. The Senator from Nebraska has 5 minutes remaining, and the Senator from Indiana has 12.

Mr. BAYH. Mr. President, I yield myself 8 minutes.

Mr. KENNEDY. Mr. President, could we have order?

The PRESIDING OFFICER. The Senate will be in order.

Mr. BAYH. Mr. President, on the 26th of March I received a letter that had been written 3 days earlier by Arthur E. Sutherland, who was a law clerk of the late Honorable Oliver Wendell Holmes. At that time, as some of us might remember, they were not called clerks, they were called secretaries. But I thought that it would be appropriate to share the contents of this letter with the Senate, because of the message it conveys, at this particular moment in our decisionmaking progress. It reads:

DEAR SENATOR BAYH: Some friends have suggested to me that an expression of opinion concerning the appointment of Judge Harrold Carswell to the Supreme Court, might appropriately be made by former Secretaries of Justices of that Court. As such a Secretaryship, for Justice Oliver Wendell

Holmes, Jr., was my high privilege in 1927-1928, I write this letter.

I admit to just a slight tremor in my voice when I realize that here is a man who was the clerk to Justice Oliver Wendell Holmes in the year of the birth of the Senator from Indiana—some time ago.

Mr. Sutherland continues:

While I am reluctant to express an adverse opinion concerning any member of the federal judiciary, I feel obligated in good conscience to say that I consider Judge Carswell's appointment a regrettable mistake.

The country is entitled to see chosen for its Supreme Court the best prospective Justice to be found on the American Bench or among other American lawyers. On the evidence before the Senate Judge Carswell unfortunately falls short of that rank. His appointment should not be confirmed.

Respectfully yours,

ARTHUR E. SUTHERLAND,
Member of the Law Faculty, Harvard University, Cambridge, Mass.

Investigation shows, Mr. President, that in addition to the facts related in the letter, here is a man almost 70 years of age, a man who is a member of the Republican Party, and a man who can easily be considered a distinguished and highly reputable conservative legal mind. I have read this letter, here in the final moments of the debate, because it seems to me that it symbolizes, really, a voice from the past, describing the past greatness of our country, a past greatness which all too many of our younger citizens have overlooked and do not fully appreciate.

Today, the past, indeed, is prolog; and there is not a Member of this body who is not reminded all too often how tenuous the present is.

Mr. KENNEDY. Mr. President, the Senate is not in order.

The PRESIDING OFFICER (Mr. RIBICOFF). The Senate will be in order. The Senator from Indiana will suspend. Senators will please take their seats. Conversations will cease in the Chamber. Senators will please cease their conversations and take their seats.

The Senator may proceed.

Mr. BAYH. Today indeed is a tenuous moment for each and every one of us. Each of us in this body has a rare privilege that, in my judgment, cannot be surpassed, in our efforts and our opportunities to serve our country, and I think it is this call that compels us to risk the rigors of political life.

The unique thing about this great opportunity to serve in the U.S. Senate is the fact that, as great as this responsibility, this honor, and this opportunity are, and as long as we may serve in this body, seldom does the vote of one Senator or the effort of one individual Member of the U.S. Senate directly affect the outcome of the broad scope of history. Opportunities for individual contribution to the common destiny are really rare.

Today we have such an opportunity. Today we have the opportunity, not just to vote for ourselves, not just to vote for the Senate, but, in deed, we have the opportunity to speak for future generations, and to set them an example.

Today we have the opportunity to tell our children and their children that the advice and consent responsibility given to us by our Founding Fathers nearly two centuries ago still has meaning today. It is just that—a responsibility, which the U.S. Senate is not going to shirk. We have the opportunity, and will accept it, of reminding our children that their forefathers had courage, just as ours did. We have the opportunity to say what we believe is important—not just for the Senate and the Court, but for the country.

Perhaps the greatest opportunity of all, which surpasses the duty that we have as Senators to shore up the advice and consent provisions and responsibilities that are ours, is the opportunity we have to speak to the young and to the old, to all ages, so eloquently described by the Senator from Illinois a moment ago—to speak to those across this country who are asking questions that cause one to have deep concern about the future stability of this country. I ask anyone who wants a capsulization of this problem to look, in the recent issue of Newsweek, at an article written by Stewart Alsop which deals forthrightly with this question. The article states that it is not overly dramatic to suggest that America is at a crossroads, because increasingly large numbers of our young people are wondering if our society has what it takes. Do we have the courage? Do we have the determination that we are going to make tomorrow a little better than it is today?

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. BAYH. I yield myself 2 additional minutes.

It seems to me, Mr. President, that in addition to determining who is going to sit on the Supreme Court of the United States, we have the opportunity with this vote to say to the prophets of doom who say that America is about to tumble of its own weight that this system still is, in the words of Abraham Lincoln, the best last hope of all mankind. We have the opportunity to say that this Senate and this country is still seeking excellence, to say that a better America will be the result of our combined efforts.

We have the opportunity to say, in a very personal way, that we are determined to demand the best of ourselves and the best of this body. We are now in a position of saying to the members of our respective parties, whoever they may be, whether at the precinct level or on the highest rung of the ladder, that we want to do better, that we want to make this great Nation, as great as it is, even better tomorrow.

Mr. President, I think the Senate will make the right determination. We will then have the opportunity to get the best man we can find, the best conservative, the best strict constructionist, the best Southerner, and in the future the best Northerner, the best Westerner, the best man who can make the greatest contribution on the highest judicial bench, the court of last resort for each American citizen.

The VICE PRESIDENT. Who yields time?

Mr. DOLE. What time remains, Mr. President?

The VICE PRESIDENT. Five minutes.

Mr. DOLE. Do the opponents have any time remaining?

The VICE PRESIDENT. They have 2 minutes remaining. Who yields time?

Mr. BAYH. I yield the remainder of my time to the distinguished Senator from Massachusetts.

The VICE PRESIDENT. The Senator from Massachusetts is recognized.

Mr. BROOKE. Mr. President, we are now just some 8 minutes before the vote will be taken on this very important matter. I do not know that any more arguments on either side of this issue can be made at this late hour. I think that all of our colleagues, Democrat and Republican, conservative and liberal, have studied the record and have made their decision. Frankly, I do not think that anything that I may say or that anyone else may say at this late hour will change any of the votes of any other Members of this body.

I believe I should say that in making this decision, all of us remembered our great responsibility in the matter of advice and consent to the President's nomination for the Supreme Court of the United States. Many arguments have been made about the qualifications, about credibility, about racial views, and about a myriad of other things concerning this man. I have spoken out in opposition to him. It is somewhat of an unnatural role for me, because all my lifetime I have preferred to be for something rather than against something. It is a very painful duty for me to be so strongly opposed to this man's nomination. I do not know him. I have no personal animosity against him. I wish him well and his family well.

The VICE PRESIDENT. The time of the Senator has expired.

Mr. HRUSKA. Mr. President, I yield the balance of the 5 minutes to the Senator from Kansas.

The VICE PRESIDENT. The Senator from Kansas is recognized for 5 minutes.

Mr. MURPHY. Mr. President, may we have order?

The VICE PRESIDENT. The Senate will be in order.

Mr. DOLE. Mr. President, this is the Court of last resort for G. Harrold Carswell. This is the end of an ordeal for G. Harrold Carswell. It has been said day after day in this Chamber, judge him by today's standards and judge us not at all. That has been the message loud and clear day after day.

The Senator from Indiana stated the opponents argument a few minutes ago. He said we should confirm the best man we can find. I would remind the Senator from Indiana the power to nominate still resides with the President of the United States, whether he be Republican or Democrat—a power that, of course, the Senate should not take lightly. We have a great responsibility in the advice and consent process. But today—in fact, in a few minutes—we will decide the fate of Judge G. Harrold Carswell.

I would guess that whatever the Senate may do, Judge Carswell will survive. Whatever the Senate may do, our country, of course, will survive, and President Nixon will survive.

But let me say a word to my fellow Republicans, because I believe that the

issue now is approximately 99 percent politics and 1 percent factual. This is the second nomination we are considering for this vacancy in a matter of months. First, the Haynsworth nomination was rejected. He was insensitive. Now we are told Judge Carswell is mediocre and a racist. But let me say, with all the earnestness I can muster, as a junior Member of this body, the fate of G. Harrold Carswell does not rest on the other side of the aisle. The fate of G. Harrold Carswell rests on this side of the aisle. We will make the decision as our votes will make the difference.

I would remind my Republican friends—I quarrel with no one; I question no one's motives—but remind my friends on this side that Richard Nixon was elected President in November 1968, and that with that election came the right and duty to nominate Justices of the Supreme Court. That right has been once denied; perhaps soon twice denied, we have the responsibility, as Republicans; it is our responsibility, not the responsibility of the Senator from Indiana—and I do not question his motives. Let me repeat, in conclusion if this nomination should be rejected, I suggest to the President of the United States take his case to the people and that he leave the seat vacant until November. It may be easier to change the Senate than the U.S. Supreme Court—in fact it may be a prerequisite.

The VICE PRESIDENT. Who yields time

Mr. DOLE. I yield back the remainder of my time.

Mr. MANSFIELD. Mr. President, I respectfully request that the Sergeant at Arms be directed to clear the Chamber of all excess personnel, which does not include Representatives from the other body, fellow parliamentarians from France, I believe, or attachés who have official business on the floor.

Mr. SCOTT. Mr. President, I ask unanimous consent that the attachés attached to my office may be permitted to remain who have business in the Chamber.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. BAYH. Mr. President, I make a similar request relative to my staff.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. McCLELLAN. Mr. President, if exceptions are to be made, let us have exceptions for all the staff. I ask unanimous consent that any staff member of any Senator who is present in the Chamber may be permitted to remain on the floor. [Laughter.]

Mr. MANSFIELD. Mr. President, I object.

The VICE PRESIDENT. Objection is heard.

Pursuant to the unanimous consent request, the Chamber will be cleared of all unnecessary personnel, except those mentioned in the unanimous-consent agreement.

The Sergeant at Arms is directed to carry out this order.

The Chair would mention to the galleries that, due to the tremendous interest in this vote, there will probably be great attention on the part of everyone to follow it closely. The Chair would caution the galleries, please, to be courteous and let the vote proceed without demonstrations.

The question is, Will the Senate advise and consent to the nomination of Judge G. Harrold Carswell to be an Associate Justice of the Supreme Court of the United States?

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. KENNEDY. I announce that the Senator from New Mexico (Mr. ANDERSON) is necesarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

On this vote, the Senator from Rhode Island (Mr. PELL) is paired with the Senator from Utah (Mr. BENNETT). If present and voting, the Senator from Rhode Island would vote "nay" and the Senator from Utah would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT) is absent on official business as observer at the meeting of the Asian Development Bank in Korea.

The Senator from South Dakota (Mr. MUNDT) is absent because of illness and, if present and voting, would vote "yea."

On this vote, the Senator from Utah (Mr. BENNETT) is paired with the Senator from Rhode Island (Mr. PELL). If present and voting, the Senator from Utah would vote "yea" and the Senator from Rhode Island would vote "nay."

The yeas and nays resulted—yeas 45, nays 51, as follows:

[No. 122 Ex.]

YEAS—45

Aiken	Ellender	Murphy
Allen	Ervin	Pearson
Allott	Fannin	Randolph
Baker	Goldwater	Russell
Bellmon	Griffin	Saxbe
Bible	Gurney	Scott
Boggs	Hansen	Smith, Ill.
Byrd, Va.	Holland	Sparkman
Byrd, W. Va.	Hollings	Stennis
Cooper	Hruska	Stevens
Cotton	Jordan, N.C.	Talmadge
Curtis	Jordan, Idaho	Thurmond
Dole	Long	Tower
Dominick	McClellan	Williams, Del.
Eastland	Miller	Young, N. Dak.

NAYS—51

Bayh	Hartke	Moss
Brooke	Hatfield	Muskie
Burdick	Hughes	Nelson
Cannon	Inouye	Packwood
Case	Jackson	Pastore
Church	Javits	Percy
Cook	Kennedy	Prouty
Cranston	Magnuson	Proxmire
Dodd	Mansfield	Ribicoff
Eagleton	Mathias	Schweiker
Fong	McCarthy	Smith, Maine
Fulbright	McGee	Spong
Goodell	McGovern	Symington
Gore	McIntyre	Tydings
Gravel	Metcalf	Williams, N.J.
Harris	Mondale	Yarborough
Hart	Montoya	Young, Ohio

NOT VOTING—4

Anderson	Mundt
Bennett	Pell

The VICE PRESIDENT. On this question, the vote is 45 yeas and 51 nays. The nomination is not agreed to.

[Loud demonstrations in the galleries.]

Mr. MANSFIELD. Mr. President, if there are any further demonstrations in the galleries, I shall ask that the galleries be cleared.

Mr. CURTIS. Mr. President, I ask that the galleries be cleared.

The VICE PRESIDENT. The galleries will be cleared. The Sergeant at Arms will enforce the order.

Mr. MANSFIELD. Mr. President, I ask that the Chamber be cleared of all unnecessary personnel.

The VICE PRESIDENT. The Chamber will be cleared. The Sergeant at Arms is instructed to carry out the order. The galleries will be cleared.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the President be immediately notified of the action of the Senate.

The VICE PRESIDENT. Without objection, it is so ordered.

Mr. CURTIS. Mr. President, I suggest that the galleries be cleared.

The VICE PRESIDENT. The Sergeant at Arms has been instructed to clear the galleries and the floor of all unnecessary personnel.

Mr. MANSFIELD. Mr. President, I wish to take this opportunity to thank each and every Member of this body on both sides of the aisle who contributed to the consideration of this nomination. Those who were in the forefront particularly may be singled out for their forthright and forceful presentations. I speak of those on both sides of the issue.

Notable, for example, was the effort of the distinguished Senator from Nebraska (Mr. HRUSKA). Clearly, he demonstrated the same strong and able advocacy on this matter that has characterized his many years of public service. The Senator from Mississippi (Mr. EASTLAND), the able and distinguished chairman of the committee and the rest of the members of the Committee on the Judiciary all handled themselves in such a manner as to assure a debate of the highest order.

The Senator from Indiana, the Senator from Massachusetts (Mr. BROOKE), the Senators from Michigan (Mr. HART and Mr. GRIFFIN), the Senator from Kansas (Mr. DOLE), the Senator from Florida (Mr. GURNEY), and many others deserve the highest commendation of the Senate. Their cooperative efforts were responsible for providing such a high-level discussion. We are most grateful.

LEGISLATIVE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate go into legislative session.

The VICE PRESIDENT. Without objection, it is so ordered.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Bartlett, one of its reading clerks, announced that the House had passed the bill (S. 980) to provide courts of the United States with jurisdiction over contract claims against nonappropriated fund activities of the United States, and for other purposes, with amendments, in which it requested the concurrence of the Senate.

The message also announced that the House had passed the following bills, in which it requested the concurrence of the Senate: