GEORGE HARROLD CARSWELL

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

NOMINATION OF GEORGE HARROLD CARSWELL, OF FLORIDA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

JANUARY 27, 28, 29, AND FEBRUARY 2 AND 3, 1970

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NOMINATION OF GEORGE HARROLD CARSWELL

TUESDAY, JANUARY 27, 1970

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:35 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Hart, Kennedy, Bayh, Burdick, Tydings, Byrd of West Virginia, Hruska, Fong, Scott, Thurmond, Cook, and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. The committee will come to order.

The hearing this morning has been scheduled for the purpose of considering the nomination of George Harrold Carswell to be Associate Justice of the Supreme Court of the United States.

Senator Holland and Senator Gurney of Florida have approved the nomination.

Notice of the hearing was published in the Congressional Record on January 19, 1970.

I shall place in the record a letter from the American Bar Association, dated January 26, 1970, which holds the nominee qualified.

(The letter from the American Bar Association follows:)

AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
New York, N.Y., January 26, 1970.

HON. JAMES O. EASTLAND,
Chairman, U.S. Senate Judiciary Committee,
New Senate Office Building,
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. Harold 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.*

The CHAIRMAN. Senator Holland.

STATEMENT OF HON. SPESSARD L. HOLLAND, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HOLLAND. Thank you, Mr. Chairman, and members of this honorable committee.

I am glad to appear in strong and unlimited support of the nomination of Judge Harrold Carswell to be an Associate Justice of the Supreme Court.

My distinguished colleague, Senator Gurney, recommended Judge Carswell to the Justice Department and to the President. I am glad to join him strongly in his recommendation, that this nomination be confirmed.

I did not know Judge Carswell as a boy and as a young man, though I do know something of his distinguished family background and something of his splendid fighting record as an officer of the U.S. Navy in World War II.

He came to our State about the time that he married one of the lovely Tallahassee girls, and began the practice of law there. I have known him since a few weeks or a few months after his coming to our State.

I may say that his wife is not only a member of a family which has always, for nearly 40 years, been very dear to me but was a classmate of our oldest daughter, and we were frequently visiting back and forth during the 4 years that I served in Tallahassee as Governor and the earlier 8 years that I served as State senator. And of course, through that connection, I speedily became acquainted with Harrold Carswell when he came to our State.

I was glad to join in supporting his confirmation later as District Attorney for the Northern District of Florida, in which position he must have served well, because I never received from any member of the bar or any citizen of our State any comment concerning him except in complimentary terms. Later on—I believe it was 1958—he was nominated to be district judge for the Northern District of Florida. Again, I was happy to support his confirmation.

I may say that I had a rather good chance to observe his conduct as a trial judge by sitting as a witness in his court in an all-day session from early morning until nearly dark in a rather famous case, *Crummer* v. *Ball*, which I am sure some of you have heard about. In that case, 10 or 12 of the leading lawyers of our State were arrayed on each side and took part actively in the trial.

I was impressed not only by the demeanor of Judge Carswell and the dignity of his court, but by the way his rulings were received and accepted by those lawyers who were so intimately involved in that

case. And, incidentally, I approved each of his rulings as a lawyer of some years practice myself.

My feeling is that coming onto the Supreme Court as a young man and with credentials of active experience in the Federal courts as a judge, and then more recently in the Fifth Circuit Court of Appeals—and I was glad to support his promotion at that time, when he was named to the Fifth Judicial Circuit—he has had direct connection with the functioning of the Federal courts. It should be most helpful to him. I think that his performance in these two Federal judicial jobs and in the Federal law enforcement job which he earlier held should be of great value to him and to the court and our country.

In closing, I might say that not only do I strongly support his nomination and hope for his early confirmation, but I anticipate a splendid record to be made by him as a Justice of our highest judicial body.

I feel I would be remiss at this time if I did not, for the State of Florida, of which I am a native, express our appreciation of the fact that after having been a State since 1845 we have at least had one of our citizens, whom I regard as highly qualified, nominated by the President of the United States to be a member of the U.S. Supreme Court.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Any questions by the Senators?

(No response.)

The CHAIRMAN. Senator Gurney.

STATEMENT OF HON. EDWARD J. GURNEY, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GURNEY. Mr Chairman and distingiushed members of the Judiciary Committee, my senior colleague in Florida, Senator Holland, has done his usual excellent job in presenting the nominee to the committee. I shall not repeat nor go into the biographical background of the nominee, but rather I shall confine my presentation to just a few general observations about this nomination which I think perhaps I ought to do as the Member of the U.S. Senate who brought his name to the attention of the President.

It seems to me that one of the great obligations of a U.S. Senator, among his many duties, is the recommending of names to the President for nomination to the Federal bench. I think it is probably true to say that as far as the Federal district court is concerned and the court of appeals the Senators play almost the entire role at least in presenting the name to the President for the nomination.

As far as the Supreme Court is concerned, the highest in the land, they certainly have a good deal to do in the process of name selection. And, of course, they share an equal burden with the resident in the confirmation of a nominee to the Supreme Court. So I indeed view this as an obligation of the highest sort; a U.S. Senator probably has no higher duty.

It was with this in mind that I first approached the job, when I was first elected, of selecting a name for the Fifth Circuit Court of Appeals vacancy. As you may realize, this was a most-sought-after post. I consulted members of the bar, members of the judiciary, and

members of the community, leading members in the Northern District of Florida.

Without any question in my mind, I presented to President Nixon for nomination the most qualified man in the Northern District of Florida for this vacancy, Harrold Carswell. I can say here with all candor that the nomination was unanimously and favorably received in Florida and subsequent to that, I think, in the entire area of the fifth circuit.

Now, then, let me say a word about the probable issues of this nomination. I do not expect that the ethical issue will be before us as it has been in the past. I do not think there is any question about the judicial excellence of the nominee; his record proves that. There will be an issue; we know what it is. It is before us—the civil rights issue.

I would like to make a comment about that which perhaps I, as the man who presented his name, am best able to make.

Of course, the rallying point will be around a speech made 22 years ago by a young man in his first and only venture in politics. I read about the story in Western Germany, where I was attending a conference a few days ago. The thing that struck me about it was this, and I think this is the most important thing before the U.S. Senate in this particular matter, and I would like to comment on it. It was the judge's reaction when confronted with the words he said 22 years ago, and I quote what he said on CBS television.

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.

The important thing to me, I think is this: The judge had other avenues to follow which might have been very human. He might have been tempted, any one of us might have done the same thing, he might have explained it away. But he did not do that. He rejected this as his personal philosophy. Now, I think that shows forthrightness, candor, integrity, and strength of character that we need in members of the Supreme Court of the United States of America.

That sheds a whole lot of light upon this issue that is going to be before this committee and before the U.S. Senate.

I shows one other thing that I want to talk about very briefly. It shows an important quality of ability and willingness to change one's mind. Now, this is a nation now in process of great change. I suppose it is like a yeast at work. It is a volcano of restless lava. It is a kaleidoscope of changing color. And even though our legal system is based upon one of English jurisprudence and one of precedent, the law is also a living thing, and it is subject to change with passage of time. And if this Georgia political speech of 22 years ago reveals anything to us in the U.S. Senate, it certainly proves that, along with the subsequent decisions of Judge Carswell in the civil rights field, which this committee will explore in full, it shows that he has the quality of change.

And, certainly, that is what we are looking for in a possible nomination of the Supreme Court of the United States.

So, Mr. Chairman, and distinguished colleagues of the Judiciary Committee, as perhaps the Senator who had most to do with the presentation of this name, it certainly gives me great pleasure and great

honor to second the name of Judge Harrold Carswell for nomination to the Supreme Court of the United States.

The CHAIRMAN. Any questions?

(No response.)

The CHAIRMAN. Mr. Congressman.

STATEMENT OF HON. DON FUQUA, A REPRESENTATIVE IN CONGRESS FROM THE SECOND CONGRESSIONAL DISTRICT OF THE STATE OF FLORIDA

Representative FUQUA. Thank you very much, Senator Eastland and distinguished members of the committee. As the Congressman representing the district which Judge Carswell resides in, it is a great pleasure to be here today and to concur wholeheartedly in the recommendation of the President for the nomination of Harrold Carswell as an Associate Justice of the Supreme Court.

I have known Judge Carswell for many years. While I am not an attorney and have never appeared in his court, I know him as a man. We shared offices in the same Federal building in Tallahassee, Fla. We have talked over many issues confronting this Nation of ours and I know his feelings. I think he is an eminently qualified man, a man of honesty and integrity, and one who will add a great deal to the U.S. Supreme Court and one that this committee can be proud to approve.

Thank you, Mr. Chairman.

The CHAIRMAN. Any questions?

(No response.)

The CHAIRMAN. I will place in the record letters endorsing the nominee from Judge Homer Thornberry, Judge Warren Jones, Judge Elbert P. Tuttle, Judge Robert A. Ainsworth, Jr., and Judge Bryan Simpson, all of the fifth circuit.

(The letters referred to follow:)

UNITED STATES 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,
Jacksonville, Fla., January 23, 1970.

Hon. JAMES L. 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,
FIFTH JUDICIAL CIRCUIT,
New York City, January 22, 1970.

Re Nomination of Hon. Harrold Carswell.

Hon. JAMES EASTLAND,
Chairman, Senate Committee on the Judiciary,
Senate Office Building,
Washington, D.C.

MY DEAR SENATOR EASTLAND: I am here attending some trustee meetings of my university and thus must apologize for writing longband.

My purpose in writing is tbat 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 intimatley 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.

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.

Beginning Sunday evening, Jan. 24, I shall be with our daughter, Mrs. John J. Harman, 41 Winthrop St., Roxbury, Mass. 02119. The telephone is area code 617 GA 7-2993, if the committee should care to get in touch with me.

Respectfully yours,

ELBERT B. TUTTLE.

U.S. COURT OF APPEALS,
FIFTH CIRCUIT,
New Orleans, La., January 23, 1970.

Hon. JAMES O. EASTLAND,
Chairman, and Members of the Committee on the Judiciary,
U.S. Senate, Washington, D.C.

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.

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Jacksonville, Fla., January 22, 1970.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

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 visitng 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 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 tbat the Judiciary Committee will act promptly and favorably npon his nomination. It is a privilege to recommend him to you without reservation.

With kind personal regards, I am

Sincerely,

BRYAN SIMPSON.

The CHAIRMAN. Please stand up, Judge Carswell.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF HON. GEORGE HARROLD CARSWELL, NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge CARSWELL. I do.

The CHAIRMAN. Judge, you have a biography there. Is it correct? If so, it will be placed in the record.

(Biographical sketch follows:)

GEORGE HARROLD CARSWELL

Born: 12-22-1919, Irwinton, Georgia. Education: 1937-1941, Duke University, Durham, North Carolina, B.A. degree. 1941-1942, University of Georgia Law School, Athens, Georgia. 1946-1948, Mercer University Law School, Macon, Georgia, LL.B. degree.
Bar: 1948, Georgia. 1949, Florida.
Military Service: 8-9-42—11-28-45 (U.S. Navy, Lieutenant when discharged.
Employment: 1949-1951, Ausley, Collins & Truett, Tallahassee, Florida, Associate. 1951-1953, Carswell, Cotton & Shrivers, Tallahasse, Florida, Partner. 7-11-53—4-17-58, United States Attorney, Northern District of Florida. 4-18-58—6-27-69, United States District Judge, Northern District of Florida. 6-27-69—present, U.S. Circuit Judge.
Marital Status: Married, 4 children.
Office: Tallahassee, Florida.
Home: 833 Lake Ridge Drive, Tallahassee, Florida 32301.
To be an Associate Justice of the Supreme Court of the United States.

Judge CARSWELL. Yes, Senator, there is one small error in date. My present memory is that my military service should read 8-9-42 instead of 8-27-42, because I entered on active duty with the Navy in South Bend, Ind., Notre Dame University, on August 9, 1942.

The CHAIRMAN. With those changes, it will be admitted.

Senator HRUSKA. Mr. Chairman, I would like to ask permission to make a few observations and ask a few questions at this time. There is a bill on the floor of which I am manager on our side and the Senate is in session. If I could be accorded that privilege, I would be very grateful.

The CHAIRMAN. Yes, I will yield to you.

Senator HRUSKA. Mr. Chairman, by way of introductory——

Senator KENNEDY. Mr. Chairman, would the Senator yield for just a brief inquiry prior to the time of questioning, on that very point you have raised; that is, the pending floor situation? As I understand, Mr. Chairman, there is an amendment that is pending by the distinguished Senator from Michigan to an amendment of the distinguished Senator from North Carolina on a piece of legislation in which this committee has prime interest and responsibility. We went in at 10:30. There was no objection, with the understanding, at least as I understand, that the distinguished Senator from Louisiana was going to talk until noontime, and then we would begin the debate on the bill. I would like to know——

Senator SCOTT. If the Senator will yield on that, there will also be a 30-minute morning hour, which carries us until 12:30.

Senator KENNEDY. If we could find out what is the intention of the chairman in terms of proceedings. I would imagine that after the distinguished Senator from Nebraska makes introductories, I would think probably the Senator from Michigan and the Senator from North Carolina and the Senator from Connecticut are interested in proceeding. I would like to find out what we are going to do and the way we are going to proceed.

The CHAIRMAN. We will see the condition on the floor after the vote. I would like to have an afternoon session.

Senator KENNEDY. You mean we are going to continue to sit through the——

The CHAIRMAN. No, the vote is at 1 o'clock. I thought we would quit at 12:30 and come back at 2:30 unless we are going to have votes

on the floor. If we are going to have votes on the floor, of course, we can't do that.

Senator KENNEDY. As I understand, then, it is the present intention that we will continue to sit until half past 12.

The CHAIRMAN. That is right.

Senator HRUSKA. Well, Mr. Chairman, this is the fourth time we find the Judiciary Committee considering the qualifications of Judge Carswell. In succession, they were first as U.S. attorney, then as U.S. district judge, then as U.S. circuit court judge, and today as the nominee of the President for an associate justiceship of the U.S. Supreme Court. Now, the Nation is entitled to have a man who is a man of wide experience and of proper preparation both academically and professionally. I do not know that there is any record of any present member of the Supreme Court that is as wide and as deep as the experience of this nominee in the field of the jurisprudence. He has experience on three levels of our judicial system.

I have been told that there has been a careful consideration and study of his record, apart from what was done last June when he was considered for the court of appeals, and the conclusion was drawn that his record as a judge is a sound one, that he is competent, practical, knowledgeable, and fair.

Now, I would have these three observations to make concerning any judge who is before us regarding his rulings and decisions. All are equally important. One is that any consideration of his judicial record should not be on a selected basis. His record must be examined in total and individual cases must not be singled out and held up as representative. There may very well be other rulings which go exactly the other way. So, to get an accurate picture, his record must be considered in totality.

Second, any analysis of a judicial ruling must be based on the situation, legal or otherwise, that prevailed at the time the ruling or decision was made. The law is a fast-moving and dynamic field of endeavor. This is certainly true in the field of civil rights. Certainly, what is the law today was not the law in some respects a year ago. It is increasingly true of the state of the law 5 years ago or 10 years ago.

Finally, the role of the district judge is somewhat limited, inasmuch as he is not a policymaker and he is bound to the decisions and the rulings of the superior courts, more particularly the circuit court and the Supreme Court. He has little flexibility. This fact should certainly be taken into consideration.

In addition to the survey and study of Judge Carswell's record as a judge, as a U.S. attorney and as a lawyer, there has been inquiry into his personal, financial, and nonjudicious activity. The President decided he was qualified. I am satisfied this committee will find that this man is fully competent and qualified.

Now, the records submitted by the judge to the committee include a property statement and his income tax returns. They will show, among other things, that while he is not an impoverished man, he is far from well off. He is far from affluent. And who could be after 17 years of public service with a large family, all of whom are alive and healthy and going to school and trying to get educated?

I have one final observation, Mr. Chairman. We witnessed not long ago in this room, and also in the Chamber of the Senate, the disposition of the nomination of another nominee. There, too, the issues transcended the individual. On that occasion, as well as on this occasion, there was an effort on the part of the President to impart and restore balance to the Supreme Court. Without judging what the Supreme Court has done by way of its decisions these last 15 years, I think everyone will agree that it has been an activist Court. There are some who feel there should be less activism 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. I believe he indicates it again in the choice we have before us this morning.

It is obvious that the country wants balance on the Court. Mr. Dooley was a great political philosopher. Everybody remembers that great quotation of his: "No matter whether the Constitution follows the flag or not, the Supreme Court follows the election returns." Of course, I do not mean this literally. However, what Mr. Dooley said a long, long time ago, has a grain of truth in it. The appointees should reflect the mood of the country. The mood of the country is reflected in election results. The mood of the country demands balance.

Judge Carswell, there are some questions I should like to ask of you in regard to some press reports that have preceded your appearance here today. Senator Gurney has referred to one of them already. That has to do with a speech you made as a candidate for public office 22 years ago, in 1948. You are familiar with the press accounts, I am sure, of those speeches. Would you have any comment in that regard?

Judge CARSWELL. Yes, Senator Hruska. Before answering that, however, I would like to make one brief statement.

Senator HRUSKA. We would be happy to have you make it.

Judge CARSWELL. Certainly, I had no earthly notion that I would be back before the consideration of this committee when my record was before you some 7 months ago. I am probably the most astonished man in the United States that I am; but I am happy to be here and submit to your examination.

Specifically in answering your question, 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. And I mean that utterly sincerely. I had to see it to utterly believe that I had. Someone said that the statement which I had made to the television cameras as quickly as I could do so, and which I repeat here verbatim and stand upon fully, had elements of queasiness in it or evasiveness in it, as if I were suggesting that I might not have made the statement. I think I said something about "attributed" to me. Well, at the time, I did not have the text of the paper before me. I had to see it. I saw it. I make no equivocation about it; I made the statement without a doubt, although I have not independent recollection of it at the moment.

I stated then and 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. If there be any thought that this be now a matter of convenience rather than conviction, I can only let you be the judges of this

on the basis of my record as a public servant of 17 years, and my private life as well.

Senator HRUSKA. Judge Carswell, you were a U.S. district attorney from 1955 until 1958. During that time, do you recall any instance where you could have taken any action or resolved any matters or engaged in any activities that would indicate that you were a racist in the terms and within the scope of the speech which you made back there in 1948?

Judge CARSWELL. No, sir.

Senator HRUSKA. Would any such incident occur to you in connection with any rulings of the courts upon which you have served since that time?

Judge CARSWELL. Senator, I could not fathom such a thing; no.

Senator HRUSKA. The decisions and the rulings, of course, will speak for themselves, and I am sure we will get to those at a later time.

Now, this morning's paper had some mention that you were a member of a country club down in Tallahassee. I am confident that you read the account. I would be safe in saying all of us did. You are entitled to tell your side of the story and tell us just what the facts are.

Judge CARSWELL. I read the story very hurriedly this morning, Senator, certainly. I am aware of the genuine importance of the facts of that.

Perhaps this is it now. I was just going to say I had someone make a phone call to get some dates about this thing.

This is not it. (Noting a paper on the desk.)

I can only speak upon my individual recollection of this matter.

I was never an officer or director of any country club anywhere. Somewhere about 1956, someone, a friend of mine—I think he was Julian Smith—said, we need to get up some money to do something about repairing the little wooden country club, and they were out trying to get subscriptions for this. If you gave them $100, you would get a share in the stock in the rebuilding of the clubhouse. I did that. Later—I have had this confirmed; I do not have the records with me, but it can be confirmed, without a doubt—I was refunded $75 of that $100 in February of the following year, 1957. We were not even members of the country club. I am not a golfer. It is a golf-playing organization.

So years later, when my elder son, George, became quite interested in golf, his mother suggested primarily, and I concurred with the thought, that it would be a fine thing for him, a young boy, to play golf. So we rejoined the club on a family basis and were active members of this club—I say active members; dues-paying members. I don't think I went there more than twice a year, but my son went there frequently and played golf until, I—I am advised and the records show, and I have no reason to question them, that we resigned in 1966 entirely from this club. That concludes the matter. I do not know any more that I could say about this.

The import of this thing, as I understand it, was that I had something to do with taking the public lands to keep a segregated facility. I have never had any discussion with any human being about the subject of this at all. That is the totality of it, Senators. I know no more about it than that.

Senator HRUSKA. Judge Carswell, it was sought to make of you a director in that country club. Did you ever serve as a director?

Judge CARSWELL. No, sir; nor in any other official capacity.

Senator HRUSKA. Did you ever attend any of the directors' meetings?

Judge CARSWELL. Never.

Senator HRUSKA. Were you an incorporator of that club as was alleged in one of the accounts I read?

Judge CARSWELL. No, sir.

Senator HRUSKA. The stock certificate which you got, how was that designated, do you remember?

Judge CARSWELL. I really do not remember, Senator. It was one share of stock. I just really don't have any independent recollection of this, in 1956. We paid $100 for it and when we saw we were not going to continue to be active because it was primarily a golf club—the only privilege you got otherwise was going there for a meal and frankly, it wasn't commensurate with what we thought was sound policy for us at the time. So we dropped out of the club. That is all there was to it.

Senator HRUSKA. Have you from time to time used the facilities of the club by way of public meetings or board meetings or anything of that type?

Judge CARSWELL. Have I?

Senator HRUSKA. Yes.

Judge CARSWELL. I have been there, Senator, as guest of other people on many occasions, yes, sir, but not for any functions of my own, no.

Senator HRUSKA. Not for any functions of your own?

Judge CARSWELL. No, sir.

Senator HRUSKA. On occasions when you were a guest, was there any indication of segregation within the meetings that you attended?

Judge CARSWELL. Well, I didn't attend any meetings, Senator, as such.

Senator HRUSKA. Well, the social functions?

Judge CARSWELL. There are a number of functions there. Tallahassee is the capital of Florida. It is practically the only facility where one may have a large entertainment function. I have been there on many occasions where the president of the State senate, for example, or the speaker of the house would have a party, or other friends. I have been there many times. There has certainly been no racial discrimination among the guests. I have personally attended there several times when there were integrated functions.

Senator HRUSKA. And were there members of the Negro race present on any of these occasions?

Judge CARSWELL. Yes, sir, I specifically recall one or two. I don't recall any details.

Senator HRUSKA. Has Mrs. Carswell attended any functions or social activities or other activities in the country club?

Judge CARSWELL. Of course, I can't speak exactly where she has attended on any specific date, but she has been a member of the Leon County, which is the Tallahassee City, Board of Red Cross, which is an integrated board and they have had functions or meetings of some activities of such nature that I really don't know, because I wasn't privy to them, but I know that has occurred at the club.

Senator HRUSKA. Did you participate in the management of the club or the writing of its bylaws or any of the background concerning the corporation?

Judge CARSWELL. None whatsoever.

Senator HRUSKA. Are you or were you at the time, familiar with the by laws or the articles of incorporation?

Judge CARSWELL. No, sir.

Senator HRUSKA. My safe deposit box has some of those country club stock certifications, too. One of them has a very fancy designation on it, "incorporator." I paid my fee. I am sorry to say it was much more than $100, and it was an honorary thing. I could have gone along just as well without the honor, because I don't play golf either. Could the stock you received on this occasion have borne the label, "incorporator," indicating that you were one of the contributors to the building fund for the clubhouse?

Judge CARSWELL. Perhaps. I have no personal recollection.

Senator HRUSKA. Do you still have the stock certificate?

Judge CARSWELL. No, I don't have it at all.

I don't remember or have any personal recollection of any such thing as a piece of paper saying it was such a stock.

Senator HRUSKA. Judge Carswell, you filed with the committee a financial statement and copies of your income tax returns. Were those individual returns, or were they joint with Mrs. Carswell?

Judge CARSWELL. They were joint returns.

Senator HRUSKA. That is the way you file your income tax returns. It it also the way you reflected your property statement?

Judge CARSWELL. Yes, sir.

Senator HRUSKA. Would you mind telling the committee so we in turn, can inform the Senate, in general what your property holdings consist of, to the best of your recollection, of course?

Judge CARSWELL. I don't have that right before me here. I can get it if somebody would give me my briefcase, but I believe I can speak without it, because it is a rather simple story.

I own three-sixteenths interest in approximately 1,290 acres—this is not 12,000 acres as has been reported somewhere—of unimproved land, which was owned by my grandfather and in turn by my father, who died in 1955. I have one sister who owns a fourth interest in this. Another sister has deeded her portion to her three children. That gives them a 12th each in interest in it. And I have deeded one-fourth of my one-fourth—that is, one thirty-second—each to my two sons, George Harrold, Jr., and Scott Carswell. This is located in Wilkinson County, Ga. The best offer we have ever received for it on a firm basis is about $100 an acre on a total, outright sale. It is difficult, however, to put a fair market value upon this property because of one factor: Within that area of the State, there is a vein of kaolin and other bauxitic ores which permeate the hillsides, and surrounding property owners have had a good deal of luck in mining clay. From time to time, my father, and since his death, through my lifetime, we have tried to get people to come in and prospect this thing, hoping it would be worth something. We went through quite a bit of this. Recently, we had one collapse on us, as a matter of fact, December 1, 1969.

Senator HRUSKA. What is the value of this clay and its usage?

Judge CARSWELL. It is used as a coating, as I understand it, Senator—I don't have the technical knowledge to go into the details of it.

Senator HRUSKA. Industrial use of some kind?

Judge CARSWELL. Yes.

It goes into plastics, some of the microphones here, for example, used in the plastics industry. There are many uses and the market has gone up.

Senator HRUSKA. When did this interest in this land vest in you?

Judge CARSWELL. When I became 21 years of age.

Senator HRUSKA. If clay of the proper kind is located, that would make the property pretty valuable, wouldn't it?

Judge CARSWELL. Yes, sir.

Indeed, we did enter into a prospecting lease arrangement with a large corporation in December of 1968, a little over a year ago, and gave them an option to purchase no less than 450—or either 425 acres—at $1,000 an acre. They took that option with the right to so prospect and see for a year whether they wanted to purchase it at that price. Unfortunately we got a report last December 1 that they didn't want the option. They let it expire, so that is completely a dead horse.

Senator HRUSKA. Judge Carswell, what other holdings have you by way of general description?

Judge CARSWELL. My wife and I are tenants in common under the Florida law of our residence. It is mortgaged to the Tallahassee Federal Savings & Loan Association for approximately $50,347.20. I would think that the current market value of that particular property might be $90,000 today. We have, I would say, an equity of perhaps $35,000 or $40,000 in my home. That is what I am trying to say here. The monthly payments are $469.45.

I do own, I have in my statement here——

Senator SCOTT. Before you leave that, the mortgage is secured, is it not?

Judge CARSWELL. Oh, yes, the loan from Tallahassee Federal Savings & Loan is secured by a mortgage on this particular property.

Senator SCOTT. Is it further secured by the deposit of collateral?

Judge CARSWELL. Not any additional other than a personal note on the mortgage.

Senator SCOTT. I just wanted to know.

Judge CARSWELL. Yes, sir.

I have on my statement which was submitted to this committee 1½ acres of unimproved property. I have since been informed that it is six-tenths of an acre. They widened the road or something, and it is not quite that. I have offered it for $2,000 for some time and have had no takers.

The other items mentioned on the report—I don't know whether they are really in the nature of information the committe is interested in—but I have several life insurance policies. I see no reason to detail those. They are the standard policy. GI policy, the Government insurance policy running from my service days, one or two other small policies totaling approximately $10,000.

I have no stocks, I have no bonds whatsoever.

Senator HRUSKA. During your tenure as U.S. attorney or on the bench, have you had any corporate stock?

Judge CARSWELL. Never.

Senator HRUSKA. On listed or unlisted corporations?

Judge CARSWELL. Never in my life.

Senator HRUSKA. During the same period, have you ever served on any board of directors or as an officer of any corporation in which you had an investment?

Judge CARSWELL. No, sir.

Senator HRUSKA. Now, mention has been made of some stock in a box and crate company. Could you tell us something about that?

Judge CARSWELL. Yes, sir, I will. Before I leave this previous line of questioning, I want to make one other statement. You have asked for my holdings and ownerships. I have noted for the committee, and frankly put it before the record—I am not chest-beating about this, but I think it should be full and clear—that I have a loan with the Capital City Bank, a personal loan, that we have there, secured by certain notes of my wife and my own. The amount of that—I don't have that before me here, but it is about $48,000. Those notes are secured by my wife's stock. I own none of it. I have submitted an addendum to the report. It wasn't requested, as I understand it, by this committee for me to divulge my wife's financial affairs. She has authorized me, however, to disclose before this committee that she does own by inheritance 78 shares of common stock in Elberta Crate & Box Co., which is a small corporation held by her family. She inherited, speaking from memory now, but I think this is accurate, 55 shares following the death of her mother, who died October 13, 1953—I am sure of that. It was subsequently probated and she got her 55 shares thereafter.

Then her father gave her a few shares until it came up to 78 shares. Those 78 shares, as I understand it, and her divulgence is they have a book value of $954 today. At the time she inherited these things, or was given to her by her father, they had a lower book value of several hundred; I don't know what, but say $600 up to $900.

The CHAIRMAN. That is a share?

Judge CARSWELL. Yes, sir.

Senator HRUSKA. Aside from that, there isn't any other stock that is in your joint property statement?

Judge CARSWELL. No, sir.

Senator HRUSKA. Or any shares of stock?

Judge CARSWELL. No, sir.

Senator HRUSKA. Anything else my way of holdings, aside from your household furnishings? I imagine you have an automobile?

Judge CARSWELL. Yes, sir; we have two teenage sons, each of whom has a car, which is mortgaged and I am responsible for the payments on them. I have an automobile which my wife and I share. It is a Pontiac.

Senator HRUSKA. Now, in our system of jurisprudence, we have a review of the actions of every court but one. You were on the district court for some 11 years plus. I imagine that some of your decisions were reviewed in the circuit court and perhaps later in the Supreme Court. Do you have any idea of the percentage of your rulings appealed to the circuit court?

Judge CARSWELL. Senator, I have not, personally, no. I don't know. I haven't attempted to keep a scoresheet on myself. I have decided the cases on an individual basis. Perhaps someone else has done that in the context of this matter here, but I personally have not done so, no.

Senator HRUSKA. In the district court which you have served and over which you have presided, that was the Western District of Florida, was it——

Judge CARSWELL. Northern District.

Senator HRUSKA. Geographically, what did it consist of?

Judge CARSWELL. There are 23 counties. You might think of it as former President Eisenhower always referred to it, as the panhandle part of Florida. He said the part that sticks out under Alabama.

Senator HRUSKA. What is the general nature of litigation in that district?

Judge CARSWELL. 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 worse 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.

Senator HRUSKA. On a comparative basis, is the caseload in that district heavy, light, or moderate?

Judge CARSWELL. Well, at the moment, since 1969, I would say it is an average caseload. On weighted caseload per judge, it would come out about even with the national average. Prior to that time, it was extremely heavy. We had one judge and then we got a second judge authorized by the Congress and he actually entered onto duty 2 years ago. Since that time, the two judges of that district, I would say, have an average weighted caseload factor, according to the Judicial Statistics Committee on standards.

Senator HRUSKA. Some time ago, Judge Carswell, the Senate and the House, with the concurrence of the President, and his signature, passed a law in which we undertook to revising jury selection procedures whereby there would be a representation of all segments of the population on the venire. What has been the experience in your former district in connection with the selection of juries?

Judge CARSWELL. Shortly before the passage of that legislation, when it became perfectly clear that this was what was going to have to be done to get a more representative cross section of any community in the jury box, on my own initiative, I directed the clerk of the court at Pensacola, Fla., which is our heavier population area in the district, to immediately take affirmative steps to get the jurors selected from the voter registration rolls—not from those actually voting, but from the total of the registration rolls, to be sure we had a fair cross section of jurors.

Senator HRUSKA. Is that similar to the provision in the legislation?

Judge CARSWELL. It is almost precisely. We had it in operation for a while before the law became effective. We had to make one or two little modifications in it, but it was already in effect before the law became effective.

Senator HRUSKA. But the input into that jury wheel located in the courtroom was derived from the same source that is now authorized and directed by the Federal law, is it not?

Judge CARSWELL. Yes, sir, a random selection of jurors from all the total voters on the roll, yes, sir.

Senator HRUSKA. And you put this into practice before the enactment of the Federal law?

Judge CARSWELL. Yes, sir, and I think it was done in one other district; I know one other district in the South. I am not sure which one. But I discussed it with one of my fellow judges at the time and we immediately put it into effect before this became law.

Senator HRUSKA. Judge Carswell, we have had before us for confirmation, consideration, and reporting to the Senate here from time to time nominees who have come from more or less of a specialized area of the law. I recall one who devoted the bulk of his life and professional career to labor law. I recall another who devoted his efforts as a practicing lawyer to the advocacy of the cause of civil rights groups. Somewhere along the line, in the hearing we asked all nominees a question. That question is usually phrased this way "Can you, in the light of the fact that you have advocated one cause for so long, whether it is the labor law or whether it is civil rights law, can you, Mr. Nominee, if you were sitting on the Supreme Court, view and consider the cases before you in an impartial, unprejudiced, and judicial fashion, and be fair in rendering your decision in accordance with the law and evidence of the case?" In each instance, the answer was "Yes, we believe we can."

Now, I do not believe that you come from a special category. You have had a very broad experience. Nevertheless, let me ask you that question on my own and direct it to you. Considering your experience and your career as a public official, and particularly as a judge, considering your origin in Georgia, your native State, and Florida, where you have practiced law and engaged in the public career to which you have devoted the last 15 years of your life——

Judge CARSWELL. 17 years, Senator.

Senator HRUSKA. 17 years. Can you, if you are sitting on the Supreme Court, hear cases before you and consider the evidence and consider the law on the briefs and the arguments, and without reference to where these petitioners come from, without reference to their background and the nature of the controversy before you, do you feel that you could render a fair and just decision?

Judge CARSWELL. I certainly do, Senator. I have certainly tried to do so in all of my activities on the bench since I have been there, and then before, as U.S. attorney, not rendering judgments but taking the same sense of responsibility to the work. No man should be there unless he can do so.

On the second part of your question, I have not had a specialty. This court work is across the field, it is across the board. We have virtually the same problems in the courts of the South, with a large area of each State being in the district, that you have anywhere else. The

same type of problems generally arise; not always. They are concentrated in some areas, certainly. Cases of a certain variety are concentrated in a certain area. This has not been the case in the Northern District of Florida, nor is it the case now. It is a rather broad matter. About half the cases are criminal, about half are civil, generally across the board—general, run of the mill cases, which as you know, now covers virtually everything in the books.

Senator HRUSKA. Thank you very much, Judge Carswell. You have been very helpful. From my personal observations and from a study of the file, you have been very cooperative in giving us the information we have asked for and even more.

Judge CARSWELL. Thank you, sir.

Senator HRUSKA. I am sure I am right in assuming that if there is any further request for information about any of your affairs, you will continue to cooperate in a similar fashion, so long as the request is reasonable and is for information that is both material and relevant.

Judge CARSWELL. I will be very glad to do so.

Senator HRUSKA. Mr. Chairman, I am very grateful to you for your courtesy and with your permission, I will now withdraw for a while.

The CHAIRMAN. Senator McClellan.

Senator MCCLELLAN. Thank you, Mr. Chairman.

Judge Carswell, I think I tendered to you yesterday my congratulations upon receiving this nomination. I renew those congratulations today. It had never been my pleasure to meet you until yesterday, at which time we did engage in a general conversation. I don't recall that we went into any specific philosophies or any specific questions or interrogation with respect to your qualifications and background.

I have listened this morning with a great deal of interest to the recommendations and the support given you by your two Senators and by your Congressman. I also noted with considerable satisfaction the report of the American Bar Association and its endorsement of you, specifically with respect to your qualifications, your competence, ability, and judicious temperament.

I have also listened to your responses to the interrogation by the distinguished Senator from Nebraska. Based upon the information and record to date, I know of no reason now why I cannot support your confirmation. I hope that in due course, it will be my pleasure to congratulate you upon your confirmation.

I find now that a very strong prima facie case has been made in support of your confirmation. Based upon your replies, the property you and your wife hold together is approximately $100,000. If it should happen that that land should prove to be worth more, and I hope it does, and I also hope that you will then be on the Supreme Court, because I don't think it disqualifies you at all.

Judge CARSWELL. Thank you.

Senator MCCLELLAN. Thank you very much. I will withhold any further questions, pending any developments that may occur.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. I have to confess that recent proceedings in the Judiciary Committee and the Senate in respect to nominations to the Supreme Court remind me of an observation I heard a North Carolina lawyer make about 1924. There was a vacancy on the U.S. circuit court of appeals in my circuit, and some of the bar suggested that Mr.

Tom Rollins of Asheville would make a fine judge of the circuit court. And my father, with whom I practiced, and Mr. Rollins had a case together at that time. My father said to Mr. Rollins, "Tom, if you are interested in becoming a circuit judge, I will be glad to get the local bar here to endorse you for the appointment."

Tom Rollins thanked my father, but said "I don't care for you to do that." He added, "I had a friend down in Alabama that was foolish enough to allow his friends to recommend him for appointment as a Federal judge. The President intimated he was going to appoint him. The next day this lawyer disappeared, and he has never been heard of since. The only clue they unearthed for his disappearance was the fact that just before he disappeared, he received a telegram saying, 'all is discovered, flee at once'."

That would be the course of action I would be tempted to follow if the President should be so foolish as to nominate me for a Federal judgeship.

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 posed upon a Supreme Court Justice is to accept the Constitution as the rule for his official actions.

My only question to you is, if you are confirmed as a Supreme Court Justice, will you carry out what Chief Justice Marshall said is the duty of the Supreme Court Justice and accept the Constitution of the United States as the rule for your official conduct?

Judge CARSWELL. Senator, I think that would almost inevitably have to be answered and I do so answer it with the word "Yes."

Senator ERVIN. Thank you.

The CHAIRMAN. Senator Dodd?

Senator DODD. Mr. Chairman, I have no questions.

The nomination looks good to me. I expect and hope that I can vote for it. Like Senator McClellan, I have not heard everything, and I will wait until everything has been heard. But I hope to vote for it.

The CHAIRMAN. Senator Hart.

Senator HART. I, too, join in congratulating you on your nomination, but——

Judge CARSWELL. Thank you, Senator.

Senator HART. To ease the tension, if possible, we are not to understand by reason of the fact that you own no stocks or bonds that you are opposed to the basic concept of a free competitive society? [Laughter.]

Judge CARSWELL. Certainly not.

Senator HART. The President who has nominated you made very clear his notion as to what he would seek in men, and I hope women, who are sent to the Court. As I recall it, both in the campaign and since then, he has said there would be two factors—I am not sure I have them in order, but I will suggest that on one of them it would not be fair for me to ask your judgment on it at all. He said that he

wanted a strict constructionist and he wanted an eminent figure. Of course, it would not be appropriate for me to ask you how you measure your eminence. But it is fair to ask you, what do you understand the President means when he said he is looking for and thinks he has found in you a strict constructionist?

Judge CARSWELL. Senator, I cannot and do not propose to speak for what the President has in mind. If you are asking me what I conceive the term "strict constructionist" to mean, I am not surprised, Senator Hart, that you would ask this question, and I would confess that I have given it some thought. I don't have for you a pat answer, because I don't think it is pat answerable.

We are dealing here with a complex matter. If one is to be polarized as a loose constructionist at one point and a strict constructionist at another, and then to take yourself as a judge of 12 years on the record and say where you fall in the peg or the spectrum of that, it would be very difficult for me to do. Others are far better qualified to make that analysis on the basis of my public record.

If we are speaking in terms here, for example, of strict constructionist as those who believe in reading the Constitution and statutes by the book, as the expression is, by the black letter of the law, in the most limited and rigid, confining interpretation, that is one thing. There is inevitably, as former Justice, deceased Justice Cardozo noted in a tract on this thing—I reread it recently—"The Nature of the Judicial Process." He went into this very thing very thoroughly, in a very scholarly work. I will not attempt to spread all that upon the record, but he pointed out that no matter what one's views are about the responsibility of administering laws under justice as judge, there is a grain, almost inevitably, of law-making power in the judge. To be intellectually honest about it, this is inescapable.

On the other hand, and I say again if we are speaking in terms of other things, if what we are talking about is the separation of powers as delineated under the Constitution, I think with great confidence and clarity we can only go back to such source materials as the Constitution itself and the Federalist Papers. Particularly to No. 47 by James Madison, where he has done a very fine thing to make clear the intention of the Founding Fathers in this very sensitive area of relationships of the three branches of the Government.

I do not think that having said all this and recognizing an inevitable judge lawmaking power—there needs to be the power—but there is also the sense of duty to act or not to act depending upon the circumstances as they arise.

I also think, and would not want any Senator here to think that I think otherwise, that the Supreme Court should not be a continuing constitutional convention.

That is the best answer I can give you.

Senator HART. That is a good answer, Judge. It is a very good answer.

I think specifically I should thank you for having the knowledge that there is an answer.

Senator BYRD. Would the Senator yield?

Did I understand the distinguished judge to say he thought the Supreme Court should be a continuing constitutional convention?

Judge CARSWELL. No, Senator, the word "not" preceded that.

Senator BYRD. I thank the Senator for yielding.

Senator HART. I wanted specifically to thank the judge for including in his answer the acknowledgement of what I think is inescapable, that there is indeed a thread of lawmaking in the court.

Judge CARSWELL. Yes. Intellectually, conceptually, Senator Hart, I didn't think anyone could answer otherwise. This is getting into the field of academics in many ways. I don't mean by that that it isn't a viable, real thing, and I am aware of the sensitive nature of the matter to which you address yourself. I think we could write treatises on this. I will just have to stand by my previous statement on the matter. It is there, coupled with the final statement that I made, that I have just made, and that Senator Byrd has so kindly clarified in case there was any doubt.

Senator HART. The only other thing in this preliminary stage of our committee consideration that I would like you—or perhaps I will not even wind up by asking you to clarify your comment on it. I should address myself to it, I guess.

Is there in the record the 1948 newspaper statement, reference to which was made by Senator Hruska?

Judge CARSWELL. I assume you are addressing Senator Eastland, the chairman. I don't know what is in the record, Senator.

Senator HART. Mr. Chairman, the Senator from Nebraska raised with the nominee a statement that he had made in 1948——

Judge CARSWELL. Yes.

Senator HART. I would think in fairness to all that that statement should be made a part of the record.

The CHAIRMAN. Sure.

(The statement referred to follows:)

[From the New York Times, Jan. 23, 1970]

EXCERPT FROM CARSWELL TALK

(Following are excerpts from a speech by G. Harrold Carswell that appeared in The Irwinton Bulletin on Aug. 13, 1948; Judge Carswell's statement to the Columbia Broadcasting System Wednesday night, and a statement by Attorney General John N. Mitchell.)

CARSWELL'S 1948 SPEECH

I am happy to be a guest of the great patriotic organization, the American Legion. I'd like to discuss with you briefly some of the significant issues in our affairs in 1948.

Those of us who participated in the recent world struggle for existence remember only too well the years shortly before that fateful Sunday in December, 1941, when our nation was plunged into the caldrons of war. We remember Pearl Harbor. And we remember that there were those in our own land who even at that moment were calling for a reduction in armaments, for a general termed "this silly war talk." There were those who said, "Oh, this is a European matter, those people over there are always scrapping about their boundary or something or other. Let them have it out alone." Some could not hide their open admiration for Hitler's bold and successful demands upon his smaller neighbors.

There were those who said, in the words of the late and beloved Will Rogers, "Good old Atlantic, good old Pacific." They tried to lull this nation into a sense of false security. They were blasted forever into the camp of the misguided and the mistaken on that December morn when the good old Pacific turned into a sea of flame and the good old Atlantic suddenly swarmed with underwater vessels of destruction.

BROTHER UNDER THE SKIN

Yes, we all know now that they were wrong. But the saddest and most ironic part of it all is that there are those in our land today, this very hour, who would start this nation on a downward spiral into weakness and defeat by the very same methods. The defeatist and the isolationist of 1941 is a brother under the skin of the Communist front party of Henry the Treacherous Wallace today, who plays Stalin.

Some said the same thing about Hitler in 1941.

Those of us who lost members of our family in the service, those who have been fortunate enough to return home without mishap, will never willingly and of our own accord foment any situation which would lead to war. But by the eternal stars in the folds of Old Glory, we shall not ever sit idly by while the sneaking and persistent efforts of the Communist snake slithers its way into the vitals of our nation. Our answer to them is and will always be, "Keep your hands out of the American Eagle's nest."

The American Legion has long been noted for its advocacy of a strong, prepared ready America. We must not go weak in the knees.

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 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."

An attempt to regulate the internal affairs of a state is an open abrogation of state's rights as provided by the 10th Amendment. Tbese 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.

FEDERALIZATION ATTEMPT

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.

CARSWELL C.B.S. STATEMENT

I've read a summary of what is attributed to me as a young candidate some 22 years ago. Specifically and categorically, I denounce and reject the words themselves and the ideas they represent. They're obnoxious and abhorrent to my personal philosophy. 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. Incidentally, I lost that election because I was considered too liberal.

MITCHELL'S STATEMENT

Judge Carswell has been the subject of a most extensive background investigation by the Department of Justice that included a complete review of his judicial philosophy and personal background. The remarks attributed to Judge Carswell were made in the heat of a political contest more than 20 years ago.

All of the available evidence indicates that Judge Carswell is firmly committed to the constitutional and moral philosophy of racial equality. His judicial record on civil rights issues is highly commendable. I think it is unfortunate that a judge of Judge Carswell's high qualifications could be subjected to criticism based on political remarks made 22 years ago.

Senator HART. I don't have it in front of me, but I would suspect, with others in this room, that everybody on the committee read it at the time it was carried in the press. It is an assertion of acceptance and support of the concept of white supremacy. Do you want to address yourself to it any further?

Judge CARSWELL. Senator Hart, I repeat with all the conviction that I have, as I did incidentally when this was brought to my attention, that these views are obnoxious and abhorrent to me. I do not harbor any racial supremacy notions. These are insulting notions to anyone of any race, any notion of superiority in either direction. I do not. I reject them out of hand, as I have done before. This is a matter, I realize, of conviction.

Senator HART. Well, Judge, are you saying that at the time you made the statement you didn't believe it or that you have changed your opinion?

Judge CARSWELL. Senator Hart, I can only answer this way: I made the statement in 1948. I make my statement today to this committee as I made it immediately to the Nation when it first came up and was called to my attention. It came to me like something out of the disembodied past, almost. I am utterly sincere in my statement to you here today, sir. I am not weaseling with you on it at all, because I don't know any way that I can put it more emphatically than I have. If I did, I would do so.

Senator HART. Maybe you could make it clearer, though, as to whether you believed it then and changed or never believed it.

Judge CARSWELL. 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.

Senator HART. Well, if you probably, as you say now, believed it then, bringing it up more recently, what events would have caused you now to disbelieve it?

Judge CARSWELL. The course of 22 years of history. There have been vast changes, not only in my thinking, but in the country and in the South particularly. There is a good deal more that needs to be done. Perhaps there has also been a vast change elsewhere. This is quite a different day from 1948. This was 6 years prior to the Supreme Court itself holding in *Brown* v. *Topeka.*

Senator HART. I think all of us understand that we are, each of us, a chapter of history and the accident of geography. We are all affected by what was, whether we lived or happened to be born later. I understand that. But if Senator Ervin were here, he could give us another maxim that bothers me. Nonetheless I forget how he gives it to us. It is one of those North Carolina friends of his that he is always quoting. The story goes this way—part of what we are is what we were and part of what we shall be is what we are—something like that. It is really the resolution of this problem. I think some of us on the committee will have to compel ourselves to reach on that one. You have been a very fluent—I don't mean that in a glib sense—your ability to express yourself has impressed all of us.

Judge CARSWELL. Thank you, Senator Hart.

Senator HART. I have no further questions at this time, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, Judge Carswell. Let me also join my colleagues in expressing a word of welcome to you before this committee this morning.

One of the questions which I am very much interested in, and to the extent that you feel you can make any comment, it would certainly help me, is your view of some of the pressing questions and problems that we are facing as a people in this Nation. I feel that the Supreme Court has played an extremely important and significant role in the extremely delicate balance which exists between the various branches of the Government. It has been a positive role, a constructive role, and I think many of us feel that there will be tremendously important questions which affect the basic rights and liberties and equalities of our citizens over a period of the next several years. Without in any way trying to ask you to prejudge any question or attempt to make any kind of decision, I would be interested, to the extent that you feel comfortable, in hearing from you what you consider to be perhaps the four or five most pressing questions and issues which are before the country today.

Judge CARSWELL. That is a very difficult question, Senator. My experience, of course, has been that of a professional man in the law, as a judge primarily. I have not been in the forum or the fulcrum of the events of the day. I would certainly think that any man who was to have any exercise of power in the Supreme Court of the United States should certainly be aware of the great problems that face our country. If the past is history and the present is prologue, to that extent, certainly one must know that we have great issues in this country and many problems, as I would safely characterize them here, but I don't think it is appropriate for me to be speaking on issues per se. These would be matters more properly within the Congress in the United States to hammer out in legislation.

Senator KENNEDY. That is certainly true, but I would like to hear what you have to say in terms of identifying the problems, not so

much in terms of trying to reach any determination of the solution to these problems. Once again, I press at this point, because I think that regardless of your views on these questions—and they might fall into what might be considered a conservative or liberal kind of position on it—what I would be interested in is to see if there is a recognition of these kinds of problems.

Judge CARSWELL. Oh, yes, Senator.

Senator KENNEDY. Again I am interested to see if you could, at least attempt to identify some of these areas.

Judge CARSWELL. Well, certainly I would not here and now draw up my own private list of priorities of how to run the Nation. I don't think I am here in that capacity. That is executive or legislative. I don't mind commenting, though, and I can't see any possible difficulty that could be created for one on the Supreme Court, if I am so honored, to state that I am aware of the fact that we have poverty in this country, that we have great problems with dope, we have great problems with the criminal situation. I think it is front page news every day. These are serious problems. I am thoroughly aware of them.

I am aware of the frustrations of many young people. I don't understand them sometimes, and sometimes, I do. I have four of my own. They run the gamut and there are some that may be less fortunate than those.

Yes, Senator, I think anybody on the Supreme Court should have empathy with these problems or at least be aware of them. He would be in some secluded monastery if he were not. He should know what is going on in the world around him. But this should not, in my judgment, impair or infest itself with his responsibilities as a member of the Supreme Court of the United States in his primary function of interpreting the Constitution of the United States and the laws in individual cases and controversies that come before the Court. That is about the best I can do.

Senator KENNEDY. As you mentioned, many of the young people—and I realize these are obviously personal responses and opinions—are disillusioned and they are discouraged in many instances. Just once again, from your own personal experience, do you understand this phenomenon and do you see the reasons for such frustrations among young people today?

Judge CARSWELL. Some yes and some no, quite frankly. I can understand some of the frustrations of some of them and others, I just don't understand at all, to be honest with you. To the extent they are saying whether they are frustrations or explanations of their behavior, we have many problems in this country, certainly. We have also problems of education, problems of job training, problems of employment. These are vast problems, tremendous problems. Again, my statement to you of recognition of these problems in no way, I think, and certainly I don't want it to be so interpreted, that this has gotten into any area of affecting the judicial process. This is the grist mill from which cases arise. This is perhaps the oven where the bread is first cooked. I think, and I believe I understand your concern about this, as they come out: do you realize where they came from and why they came from there? This sort of thing. I think I can answer your question that I do have an understanding, I think, of these issues in the country. We have these problems in the South just as

you have them in Massachusetts and Michigan and many areas; perhaps in some instances, with a great deal more intensity.

Senator KENNEDY. Could I ask you, directing your attention to the biography that you have, you mention that you went to Mercer University Law School at Macon, Ga., from 1946 to 1948. I have seen reports during that period of time that you worked for a newspaper and you also formed a telephone company. Could you give us any information on this?

Judge CARSWELL. Yes, sir.

Actually, I worked with the Macon Telegraph for 2 months. When I took off my uniform, it was in Jacksonville, Fla., on November 28, 1945. I went home and got my civilian clothes and started to go to law school, which didn't open until January. I worked a brief interval, perhaps 2 months—December 1945 and January 1946, covering the courthouse beat for Macon, Ga., for the Macon Telegraph. I think I got one byline. That is my total claim to fame from that job.

Incidentally, I nearly got the school superintendent fired for something I reported about his saying, which he said. But that was all there was to that. That was my total employment there.

In 1946, the little county, Wilkinson County, 20 miles, approximately, 30 miles, east of Macon where the law school is located—my wife and I lived in Macon and I went back to Wilkinson County to see if we could get a telephone business established. All they had in the little county in those days following World War II was the old magneto type telephone at the corner where you crank the thing to make it ring. I thought we needed a telephone business. So I went over and got with the communities there and asked them to let me have a franchise to bring the telephone business into each of these little communities. One was 1,200 people here, 600 or 700 there, 400 here. So we organized the Wilkinson County—I say we did. I did. An aunt of mine had some $2,000 interest in it and I borrowed, I think $7,000, to get up the thing and both the existing exchange, Lord precinct and Gordon.

I handled that part of it after I was admitted to practice. That was about the only thing I did in the way of practice. I got the franchise, got the rates established.

After my now famous defeat for the legislature in 1948 and as a liberal candidate, by the way, I then moved to Florida, sold the telephone business, and have had nothing much whatever to do with it since.

Senator KENNEDY. Did you receive some compensation for working for the newspaper and the telephone company?

Judge CARSWELL. My gasoline expenses and a small salary, as I recall. I don't know what it was. A very nominal amount.

Senator KENNEDY. In terms of your biography, from 1949 to 1951, you had a relationship with the Collins, Truett & Ansley law firm in Tallahassee, Fla., is that right?

Judge Carswell. That is correct. I was an associate with that law firm during that period of time. We moved to Tallahassee New Year's Day or something like that, 1949.

Senator KENNEDY. In your previous biography of 1958, it lists you in that biography as being a law partner.

Judge CARSWELL. A law partner of whom?

Senator KENNEDY. Of Ausley, Collins & Truett.

Judge CARSWELL. That is erroneous if it were so listed. I was an associate of the firm on a salaried basis. I was a law partner—when I left the firm, we organized our own firm with two others, John Cotten and Douglas Shivers. The three of us had a firm of Carswell, Cotten & Shivers from 1951, I think it was, until I was appointed U.S. attorney by President Eisenhower in July of 1953.

Senator KENNEDY. As to the biography which is part of the record in 1958, the chairman had asked whether it was accurate and you responded that it was completely accurate; yet it had "law partner." Do you want to say for the benefit of this record that that should have read "associate"?

Judge CARSWELL. The one that I have before me does read "associate," Senator. The one from which I was speaking.

Senator KENNEDY. That is the 1958 biography I am reading from.

Judge CARSWELL. Oh, you mean the one when I was before the Senate in 1958?

Senator KENNEDY. That is correct.

Judge CARSWELL. If it states partner, that is just wrong, because I was never anything but an associate, never a partner in that firm. That was just an error.

Senator KENNEDY. Then from 1951 to 1955, you were a partner in Carswell, Cotten & Shivers?

Judge CARSWELL. Yes, I do note now in that connection—I am glad you called my attention to it—it has been misspelled here. It has Shrivers and it happens to be Shivers, S-h-i-v-e-r-s.

Senator KENNEDY. I imagine during that period of time when you were both associate in the one law firm and a partner in the other, that there were some clients that used both law firms, were there not? Or were they entirely different clients that those law firms had?

Judge CARSWELL. Yes, we had clients, Senator.

Senator KENNEDY. Later on, after you were appointed to the bench and during the time that you served on the Federal bench, were there any decisions that you made involving any of those clients that you know of?

Judge CARSWELL. Offhand, no, but it would almost be inevitable that they did, having been there for 11 years and the only judge in about 250 miles, with the total responsibility. It is quite a different thing, of course, from where you have a number of judges in one building. There is no question but what that must be true, and I would say so in a number of instances. Who they would be, I would not now recall. Certainly, I never had anyone who I had any interest in practicing before me at all.

Senator KENNEDY. Well, I was wondering if you could perhaps submit to the committee a list of those decisions that you made involving any of the clients that you had during your period of private practice.

Judge CARSWELL. I want to be quite sure I understand, Senator, what you are talking about.

Senator KENNEDY. What we are trying to get at is whether you presided over any cases in which there were involved law clients that you had previously served.

Judge CARSWELL. I am certain that there would be a number of them. But offhand, I couldn't possibly say who they would be. If so, and if

there were any significant or substantial matter about it, and I tried the case in any capacity, it was a matter that was made public and was fully known to all counsel. I don't think I ever had a case in Tallahassee, Fla., where the lawyers didn't know everybody on the other side of the case and knew fully who I was and who my associations were and where I banked and everything about me.

There has never been any suggestions made to me by anyone that I ever sat on a case of any ex-client or anyone or anything else that had any impropriety about it.

The CHAIRMAN. Well, there was a lapse of 5 years. You were a U.S. attorney for 5 years.

Judge CARSWELL. That is correct, Senator Eastland. I completely severed by law practice in 1953 and I haven't been in the private practice of law since then.

Senator KENNEDY. If you could provide for the committee a list of such cases in which you did sit, pointing out each case which involved a former client——

Senator GRIFFIN. Mr. Chairman, I believe that under the circumstances, that is a ridiculous request to make of this witness.

Senator KENNEDY. Well, what we really ought to do, to meet our responsibility, having gone through, Senator, in great depth and with substantial impact this whole question with a previous nominee, is to have similar information available to us here.

Senator GRIFFIN. This looks like a fishing expedition.

Senator KENNEDY. Well, this is in no way trying to prejudge the question. There have been cases which have been brought to my attention as at least needing checking, and rather than raising them at this time before we have checked them, I think it appropriate if we could have them submitted to the committee and then we could check them and talk about it if necessary. As I understand it, in 202 Federal Supplement there appears the case of *Bonnanno* v. *Seaboard Airline Railroad Co.* I understand the Seaboard Airline Railroad Co. was a client of the firm that you were associated with.

What I would like to do is, rather than getting into the list of cases——

The CHAIRMAN. Let him answer.

Senator KENNEDY. Could I just——

The CHAIRMAN. Yes, but you have——

Senator KENNEDY. I would like to proceed in a way that is agreeable to the witness.

The CHAIRMAN. I know, but you asked him a question about the Seaboard Airline Railroad.

Senator KENNEDY. No, I was explaining to my friend from Michigan the purpose of the question.

I would like to tell the nominee that there have been some cases which have been brought to my attention and perhaps to the attention of others, which involve clients of the law firms in which you served. I would rather not get into the question here, since I start off with the supposition that there was absolutely no reason why there is not a very adequate and reasonable explanation for your action in each case. Your contact might have been incidental. It might have been as an associate not working with the client. There could have been any one of a number of reasons for your decision to sit. What I was asking

for previously is a list of those cases in which you did sit and in which there were clients of yours and any explanation that you might give, so that at least we would be able to understand the criteria you applied, and perhaps at a later time, raise any questions; but to give you a full opportunity to explore that yourself rather than raising these questions this morning, in which you wouldn't have an opportunity to prepare and would have to make offhand responses.

Now, I am glad to proceed in anyway which you think will provide you with the fullest degree of fairness on it. That is the reason this line of questioning is being pursued in the way it is.

Senator GRIFFIN. Would the Senator from Massachusetts yield very briefly in light of my comment?

Senator KENNEDY. Yes.

Senator GRIFFIN. Obviously, if the Senator from Massachusetts has some information or some case that disturbs him, it would be perfectly proper to call it to the attention of the committee. I urge and invite him to do so.

But it seems to me that without any groundwork and without any basis at all, it is irrelevant to make such a request of the judge. It is not enough that he was a district attorney for some 5 years before he went on the court and, subsequently, was the only judge within some 200 miles. Is there some case that was decided that bothers the Senator from Massachusetts? If there is, let's bring it up.

Senator KENNEDY. Well, there have been cases which have been brought to my attention. We could examine those at some length now, but I would prefer not to since, as you indicate, I would prefer to check them out first. But I was interested in trying to find out, rather than getting into a detailed kind of public discussion on these cases, just to find out if there are some easy explanations, some rational criteria which the judge applied in such cases. It seems to me that the fairest way to proceed is to let him make a written presentation to us. I have two cases which have been brought to my attention now. I haven't had a chance to see whether there are others as well. There are other things which came into the paper this morning that raise some questions in my mind.

The point that I am trying to get at is that I think that it would weigh extremely heavily in terms of fairness to the nominee to have him provide for the benefit of this committee the cases in which he did sit which did involve his former clients, and with a very brief explanation of the relationship, incidental or otherwise, that he might want to give. At such time, then we can decide whether that ought to be a part of the record or not. It seems to me at that time, we would have a better basis for getting into the kind of detailed questioning which may in fact bear on any possible questions which might arise.

It was certainly not my intention to try, just out of the blue, to try to raise any degree of suspicion which would be unfair in the treatment of the nominee. I have heard of such cases but I'm not willing to say whether they raise any problem at all.

So I would hope, Mr. Nominee, that you would be able to give us a review of any of those cases which might have involved any law clients, a brief description of any relationship or any association that you might have had with those cases when you were sitting, or any other comment. It seems to me we would be in a stronger position.

The CHAIRMAN. I think that is a decision that this committee is going to have to make.

Senator KENNEDY. I would be glad to bring that up in the committee as well.

The CHAIRMAN. How long were you the only judge in the northern district of Florida?

Judge CARSWELL. For 10 years, from 1958 until January 18, 1968, when I got a colleague.

I don't mind saying, Senator Kennedy, at all, that the totality of my private practice was from some time in April, as I recall, 1951, until July 1, 1953. What area of the time you are discussing here would have to be inevitably within that framework, because that was it.

Now, I became U.S. attorney on that date, July 11, 1953. If I understand your question correctly, you are asking for all the clients that my partner, John Cotten and Douglas Shivers, and I had during that period of time. I certainly could not give you a list of them. I would not want you to think that it would be an exhaustive matter, but I would be happy to respond to any case. It would not in any way bother me to answer your questions about any of them.

Certainly, I didn't sit as a judge in any capacity with respect to anybody's business who had been an ex-client for a period of time, of about 5 years that lapsed between. In other words, we are talking here about ex-clients of 5 years' lapse between that there could have possibly been any connection between my judicial function and my work as an attorney.

So I would unhesitatingly tell you now, I don't need to refer or to go back and get a list. We didn't have a great many.

Senator KENNEDY. I suppose you could respond to this: When a former client shows up, what are your standards?

Judge CARSWELL. Yes, sir, I will say this: I can distinctly recall one or two cases. Before I address myself to that, Seaboard Railroad has been mentioned. I have never represented myself as a lawyer, as a partner in any firm representing that or any other railroad. I am sorry I didn't, but I didn't. But I did do some work with former Governor Collins, who represented the railroad, and he was a partner in the firm, and I was an associate. He and I tried a number of cases in all parts of Florida together, as attorneys in this regard. Now, Seaboard Railroad, I suppose, has been in Federal court—I don't recall—yes, I recall several cases where they have been in my court. This perhaps was some 8 to 10 years later. I had no connection with Seaboard at all. My salary was not dependent upon the success or failure of my performance with the partners in the firm in that regard. I got not direct benefit out of any fees that Seaboard might have paid to my partner—not my partners, my employers.

Now, there were clients, of course, that I did represent, a number of them, I suppose. I wish we had had more. But this was a just struggling along proposition there in those days. I would have no hesitation in telling you, sir, anything about any of that without violating any client relationships. Certainly there is nothing secretive or furtive about my answer.

The standards you asked me about, and I can recall with specificity one or two now, for example. Recognizing one as an extremely sensitive and hard fought case, the case that Senator Holland has just re-

ferred to that he was a witness in, I brought out and called it to the attention of counsel that many years before, a partner of mine had done some title work for one of the litigants in that case. This was called to the attention of every one of the lawyers—there were some 30 lawyers there, including former Attorney General McGranery, who was one of the counsel in that case, former Senator Russell of South Carolina was counsel in that case. It is all spread on the record in that very hard fought litigation that had been pending for some 10 years. To avoid any possible thought of impartiality or my ability to sit on that case—it was a jury case—I divulged this. I don't think there was anything to divulge, but I called their attention to it and nothing was ever objected to about it. As a matter of fact, there was an affirmative response: that it was all right to proceed and it did proceed. That is the standard I would apply to any in that type of decision.

Senator KENNEDY. This is the point which I think is important, the standard which was used in these cases by you in deciding to sit.

Judge CARSWELL. Yes, sir.

Senator KENNEDY. Is there anything more precise? You have given us the factual situation to some extent in that case. I would be just interested in sort of a general response.

Judge CARSWELL. I mean that across the board, Senator. I can't say that in each and every case, where any client or possible association of a client or a relative of a client came into the Federal district court. I have dealt with a multitude of problems and I would recall that I once represented this facet or that facet of their problems. I acted as an attorney upon occasion for the adoption of children. Perhaps later on, they came in and had litigation in court. I thought I had a duty, and I would still say I would have the duty, to try these cases, rather than to bring some other district judge from Jacksonville or Miami or some other area. I have never had this questioned. If it has been, I have disqualified myself, and I have disqualified myself in a number of cases.

Senator KENNEDY. Earlier today, you responded to the inquiries of the Senator from Nebraska on the golf course down at Capital City Country Club. This was, as I understand it, in regard to a newspaper report that was in this morning's paper, and you responded to him, to the question of the Senator from Nebraska, that you thought it was principally an effort to build a clubhouse.

Judge CARSWELL. My sole knowledge of that matter had to do with a conversation with a friend named Julian Smith in Tallahassee, who approached me and virtually anyone else, as I recall. He was trying to get the $100 apiece from anyone to build a new country club. I gave him $100. I then received some kind of message that I had a share or stock in this thing. I did receive it, and some several months later, as I have already stated, I sold it and got out of the thing entirely and got $75 back. 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 hands for a discriminatory purpose. I have not been privy to it in any manner whatsoever.

Senator KENNEDY. By receiving that share, you became either a director or subscriber of that club?

Judge CARSWELL. No, sir; I never became a director, Senator Kennedy, at all. I don't know how it appears in the label there, but I never attended a meeting with anybody. I don't think I ever talked to anybody about it but Julian Smith. I don't think there was ever even one other human being with whom I ever had a conversation about it.

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. They might have put down some other title, as if you were potentate or something. I don't know what it would have been. I got the one share and that was it.

I found later, since we were not golfers, neither my wife nor me, that at that point, our four children were preschool age or school age, the club meant very little to us. It meant virtually nothing to us. It was only a privilege of going there to get a meal. So we dropped out very shortly thereafter, although we rejoined after an interval of time when my boys got up to 14 or so and wanted to play golf. Then we dropped out of that after a while and I haven't been a member since 1966.

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 am sure I must have. I would read anything before I put my signature on it, I think.

Senator KENNEDY. Do you remember that it talked about the purchasing and leasing and acquiring and operating a golf course and tennis courts and swimming pool, clubhouse, club facilities, lake; maintain and operate the same; purchase lease, and represent all or any real or permanent property necessary for said purposes, to do all the things incident to and in furtherance of a private country club, for the recreation, health, amusement and pleasure of the members thereof, to operate any business or facility incident to or in pursuit of these objectives? Would this lead you to believe that their only interest was just in the building of a clubhouse?

Judge CARSWELL. Oh, no. I certainly was aware that there would be things going on around the clubhouse that normally do. I didn't mean to imply that. If I did, I correct it.

Senator KENNEDY. You weren't, at least in your——

The CHAIRMAN. Let's recess now until 2:30.

(Whereupon at 12:30 p.m., the hearing was recessed to reconvene at 2:30 p.m. of the same day.)

AFTERNOON SESSION

The CHAIRMAN. Come to order, please.

Senator Kennedy is recognized.

Senator KENNEDY. Mr. Chairman, I want to make just a very brief statement. Then I want to return to the floor. I hope I shall have an opportunity at a later time to get into the areas of inquiry which I started this morning. But I wanted to clear up doubts about the exchange that I had with the nominee and with the Senator from Michigan this morning.

Our job here is to obtain a complete record on the basis of which we can perform our duty to advise and consent. The most serious

problem we had during the last confirmation proceeding was the question of standards for a judge's disqualifying himself in certain cases. I would think, for their own protection, Members on both sides of the aisle would want to get this question on the table now to assure themselves in advance that there is no problem in this instance, rather than ignore the issue and take the risk that it will arise later, perhaps when the nomination is on the floor or when the judge has become a Justice.

Rather than engaging in a public fishing expedition, I thought the best way to approach this was to have the judge give us quietly and with any explanation he wishes a list of cases involving former clients of his law firms on which he sat. Since we do not have access to a list of his clients, or even to a list of his cases, other than reported ones, there is no easy way for us to determine how frequently the judge was faced with the situation.

I had assumed that the list would involve only a handful of cases, which would be easy for the nominee's staff to compile from his own records.

The judge, however, indicated that because of the length of time involved and the nature of his practice, and the factor of his being a single judge in the districts, such instances would be numerous. He also indicated that in all such cases, his practice was to inform the parties and, in some cases, he disqualified himself. He was not too clear on the criteria by which he made his decision to disqualify himself. I hope he will clear that up.

As I indicated, we do not have readily accessible means for finding examples of such cases. I had not intended to mention the case that was brought to my attention, since I have not had a chance to determine whether it was significant or not. At the prodding of one of the Members, I did make reference to it, and the judge's response demonstates what I was trying to get at.

The nominee indicated that as a private attorney, he went around the State arguing cases in different courts in behalf of the Seaboard Air Line Railroad. He also indicated that the railroad was a party in many cases argued before him when he went on the bench.

Those two facts are not necessarily embarrassing or even suggestive of impropriety. The judge may well have informed the party in each case, or he may have had other reasons for considering it proper to sit. All we want to know is exactly what standards he applied. There is no implication at all of impropriety by my asking that question.

If submitting a list of cases is too onerous a burden, then certainly a few such examples with explanations would meet our needs, and we shall certainly accommodate the nominee in any way we can. We just want to have his thoughts clear in the record so that if and when, later on, people come to us with allegations, we can have a basis for placing him in the proper context. This is for the nominee's protection and for our own.

Mr. Chairman, I would like to pass at the present time and come back.

I do not know whether the nominee wanted to make any comment on what we discussed this morning, I want to afford him that opportunity.

TESTIMONY OF GEORGE HARROLD CARSWELL—Resumed

Judge CARSWELL. Thank you, Senator Kennedy.

I have a brief comment I want to make.

I regret if there has been any confusion about my standards. No. 1, I have tried no cases whatsoever with any form of clients for a period of nearly 5 years—that is to say, I went out of private practice entirely and absolutely on July 11, 1953.

I didn't try any cases as a judge whatsoever until April 18—really, it was a little later than that; that is when I took the oath of office—1958, a period of almost 5 years.

Now, the list of cases that I have participated in as a judge would be extremely lengthy, obviously, spanning 11 years until June of 1969. The number of our clients, on the other hand, when I was in private practice with the firm of Carswell, Cotten, and Shivers, is a rather small list. I can say unequivocally that I think that because of the length of time between those two incidents in my work, there is not a U.S. district judge probably in the country who was so insulated, unless he be U.S. attorney or in some governmental position and entirely removed from private practice, who would have had a similar experience.

The standards I would use in my case—in any case—if there were any suggestion whatsoever of any impropriety in my sitting, or that I had an interest in the case beyond even what the statute requires, which is substantial interest, I would not sit and I have not so sat.

I shall be glad to respond fully as to any particular case or any group of cases that may be of interest to the Senator or anyone else on this committee, or that the committee would feel would be appropriate.

I do want to comment on one thing. You mentioned the Seaboard Railroad, for example. I was not an attorney practicing in a private capacity as a partner in a firm whatsoever with those. I was in associate with the firm of Ausley, Collins & Truett during those years. As such, the outcome of the case meant absolutely nothing to me other than maintaining a standard of professional performance, of course.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Mr. Chairman. Judge Carswell.

Judge CARSWELL. Senator Bayh.

Senator BAYH. Inasmuch as in my judgment, the seat which you have been nominated to fill was created by rather unique circumstances—it is the first time in history that a Justice felt compelled to resign because of ethical questions—I felt and this committee felt, that we should take a closer look at standards. Before the session is over, I hope we will take a closer look of Justices, and of ourselves.

Relative to your qualifications, sir, my questions break down into a couple of areas as I have heard your testimony and read some of the pros and cons. One would be philosophical, and then, two, I would like to ask some questions about this whole business of ethics. Where do we need to go? Where do you feel we should go? Perhaps what standards you have set for yourself in this question we have spent so much time dealing with in the Haynsworth matter—namely, the ethics standards.

In the philosophy area, let me say, before I approach this, you and I may have differences in philosophy and that would not compel me to say you are not qualified. I think the President has a great deal of

leeway on this. But I did say in the Haynsworth discussion that if a nominee had a philosophy that was so out of step with the mainstream and the direction the country appears to be headed, in that it would present a clear and present danger, then I think philosophy would enter into my thinking. As I say, I hope your philosophy doesn't come into that category.

If, indeed, I thought you stated today what that statement said in 1948, I think it would fall in that category. I think you said to the Senators whom you paid the courtesy of visiting, and now to the press and the whole country, that this in no way encompasses your views today on the subject. Is that right?

Judge CARSWELL. That is absolutely correct, Senator.

Senator BAYH. Could you give us some idea, when you changed your mind, or was that just sort of inserted in the high spot of the campaign, where something had to be said to turn the election around?

Judge CARSWELL. I couldn't do it. I, of course, can't pinpoint a moment in my life—I doubt if any of us could really—when we really make a basic conviction about such a matter on anything of that importance. I have been in public life now since July of 1953. I certainly have not got a record that would support any conclusion that I have racist sentiments or that I harbor any notion of racial superiority. I do not.

I know this in my inner self. I know this as a man and as a human being.

Now, as far as judgment to be passed upon that statement, it will have to be up to the good sense of this committee. I wouldn't want any member of this committee to vote for me if they thought I secretly harbored some notions along those lines. I would not expect them to.

I remember something that Justice Stewart said, when he was in a similar position some years back, he made the remark that I paraphrase, that he wouldn't want any member of the committee to vote for him if he had any notions that he was going on the Court to undo all that had been done or that he was not going on the Court to pass his own honest judgment as to what matters would be there before him in the interpretation of the Constitution with a free and clear mind and conscience.

I have to submit it to you not as a matter of convenience but as a matter of conviction.

Senator BAYH. I hope you understand that this matter would not have assumed the prominent place it has if it were not for the importance of that statement. I think you understand we feel duty bound to ask such a question and get your answer on it.

Judge CARSWELL. I thoroughly understand.

Senator BAYH. Would you say that all citizens of all races should be given equal rights to enjoy the privileges of public accommodation in public places? I am trying to get some definition here so we can see exactly what we're facing.

The CHAIRMAN. You are asking him a question that he might have to pass on if confirmed.

Senator BAYH. He certainly may have to pass on it now.

Judge CARSWELL. Insofar as that general question, you have put it under the general statutes and the Constitution. It is already in the law, and I intend to follow it, and have so done.

Senator BAYH. I just wanted to hear you say that. I don't want you to deal with any case or any specific set of facts.

Judge CARSWELL. Under the present law and the Constitution and the decisions of the Supreme Court, I follow them as a judge.

Senator BAYH. Do you feel, in regard to education, educational opportunities, equal housing treatment that the Congress has given, there is nothing about your background or your philosophy that would cause you to want to revoke the present status of the law of the land as it is now?

Judge CARSWELL. I would take the facts as they come before me in an individual case and apply the law as reflected in the Constitution and apply them honestly, with my best judgment, without any mental block or anchor or tug on my mind in this area, Senator.

Senator BAYH. Now, in Senator Kennedy's questioning, the matter of the golf club, social club, or whatever it was apparently, that had segregated membership, came up. Rather than go over that line of questioning, I would like to get your thoughts, if you please, about whether you feel that this effort, which has been used by a number of areas, to go from a public facility to a private facility to avoid the law which requires them to integrate, whether you believe that this type of practice as a facade to escape what the Supreme Court has said, has any place in our society today?

Judge CARSWELL. First of all, I have to say there is nothing I have done about this defunct corporation. I never served to operate as a director at all in any way. The name on the paper says, "director." I never met as a board of directors. It went defunct in 1956. The title to this particular property went into a subsequent corporation for which I was not a director at all.

It was formed in August 1956, and I was out of it on February 1, according to my present record.

Senator BAYH. I take you at your word, that which you said to Senator Kennedy and say again. I think most of us realize this has become a common practice, utilized in many places, and a man sitting on that bench has to recognize, it seems to me, that this is a facade some people try to hide behind.

Judge CARSWELL. Senator, I did not hide behind any facade.

Senator BAYH. Not you, sir, but some clubs try to use this means, some public facilities are assumed by private ones in an effort to escape the law that says to integrate. Does this practice concern you?

Judge CARSWELL. If you're asking me to pass judgment on a set of facts prematurely, I respectfully submit that I can't answer them. It would be highly improper to answer such a question. There may be cases just in the category that you describe, probably are, on their way to the Supreme Court of the United States. In all likelihood, there may be some before the court on which I now sit. In this area, without attempting to be evasive about it at all, I just simply have to take the position of other nominees, the traditional stance, and, I think, the proper one, that you cannot get into this. I would box myself in in such a manner that I would probably then be disqualified to sit on that case that arose under that situation.

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.

Senator BAYH. Mr. Chairman, I'm willing to accept the witness' description of the activity or inactivity of the club, and indeed his nonparticipation.

But I think it would make it much easier for some of us who would like to vote in support of your nomination to know that in those communities where a calculated effort is made to create, out of a public accommodation—a park, whatever it might be—a private accommodation for the sole purpose of avoiding the necessity of integration, that your vote would be cast against this obvious subterfuge.

Now, this is said with complete leeway to adjust to facts. If you feel you cannot answer this, I will not pursue it further. I am not trying to say what you did was wrong or right that many years ago. What I am trying to determine in my own mind is how we are to vote here.

Judge CARSWELL. I would just have to repeat what I said and give one further example why. I have not read the paper carefully today in this regard, but I heard something somewhere that an opinion has been rendered by the Supreme Court recently, in the last day or so, that touches into this area. I think it would be highly improper for me to opine anything about that at all.

I think I'll have to stand on my record and the statement I have given you.

Senator BAYH. Fine. You have a right to do so.

Is it too specific to ask you to give your opinion on—I think I would probably get the same answer.

Let me deal with another area, because you have every right to answer or not answer our question, and we don't want to get you in a situation where you box yourself in.

Some have made the statements that in civil rights cases, you have used every possible method to delay these decisions or to avoid assuming Federal jurisdiction over matters which were previously State jurisdiction.

Would you care to comment on that, or send us an example in advance to rebut this allegation?

Judge CARSWELL. Senator, I'll stand on my record in that regard. I have not delayed or attempted to delay rendering judgment in this field or any other field of cases whatsoever.

I think that that is the only answer that I can give you.

Senator BAYH. Senator Hart and Senator Kennedy earlier talked about the place of the Court and the vote on the Court in the whole area of social change, what indeed is the responsibility of the Court. Not to repeat those, I noticed that last Thursday, Fred Graham, who

used to serve as counsel for one of the subcommittees of this committee, wrote a rather lengthy article in the New York Times in which he had one paragraph that I would like to ask if you feel is an accurate interpretation of your feeling as to the role you would like to assume on the Supreme Court.

In analyzing your opinions, he felt that these opinions reveal a jurist who hesitates to use judicial power unless the need is clear and demanding, one who finds few controversies that cannot be settled by invoking some well-settled precedent and who rarely finds the need to refer to some social conflicts outside the courtroom that brought this case before him.

Is that an accurate interpretation?

Judge CARSWELL. I think I would be the last one that would be able to render a judgment on my own opinions. They would have to speak for themselves. I think I would have to simply leave that to others to make the analysis.

Senator BAYH. You said earlier today that you didn't think the Supreme Court should be a continuing constitutional convention. Do you believe that as a Federal court judge, a Supreme Court Justice, you nevertheless have to take into consideration the social conflicts to which Mr. Graham referred as repeatedly whirling around us in trying to apply the Constitution and the facts of the situation today?

Judge CARSWELL. I don't see how they can escape doing so. That is the grist that grinds the mill there. That is where your cases come from, from controversies arising among the people across the whole spectrum.

Senator BAYH. It has come to our attention that back in 1958, before I had the good fortune of being on this committee, our distinguished chairman asked you to take the following oath, and I would like to get your thoughts on this. He said:

> Do you, George Harrold Carswell, in contemplation of the necessity of taking an oath to support and defend the Constitution of the United States, understand that such oath will demand that you support and defend the provisions of Article I, Section 1, of the Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives," and that, therefore, you will be bound not to participate knowingly in any decision designed to alter the meaning of the Constitution or any law passed by the Congress and adopted under the Constitution?

Would you want to take such an oath here now, as you are preparing to go on the Supreme Court of the United States?

Judge CARSWELL. Senator, I took that oath before the committee, as the record shows, at the time the subcommittee consisted of the present chairman, Senator Eastland, Senator Dirksen, and Senator O'Mahoney. Shortly prior to that time, there was a bill pending in Congress, either by Senator Jenner or one of your predecessors from your State, and Senator O'Mahoney was also interested in it.

They wanted to have such an oath administered to all nominees at all levels in the Federal judiciary.

As it was explained to me by the chairman of this committee prior to that time, this oath was being requested of me. My response to him then and my response to you now would be this. I distinctly remember paraphrasing something that President Eisenhower said when somebody asked him if he would get up and salute the flag. There was

something going on about the flag at the time, as to whether it was appropriate to salute the flag. I stated that I would have no objection taking an oath to support and defend the Constitution of the United States of America in its parts and in its totality, that in taking an oath as to recognize article I, section 1, I did so with the full knowledge that the ultimate oathtaking in the office required me, as it did, and as it has twice subsequently, to protect and defend the Constitution in all of its parts.

Senator BAYH. I salute you for reaffirming your support for what I think would be a normal oath given a judicial officer. But the matter that I thought we ought to lay to rest here, without trying to verify the reality of whether that was a conservative or a liberal effort in 1958—I have heard both sides argued—rather than try to put the record straight right now with you going on the Court, whether you think the last part of that is not a matter of some concern, in which we perhaps ought to redefine what we mean when we say, "not to participate knowingly in any decision designed to alter any laws passed by the Congress?"

Now, if the Congress of the United States comes up with an unconstitutional law, it seems to me whether you call it altering or ruling it unconstitutional, that is a pretty strict responsibility. Am I in error in suggesting that?

Judge CARSWELL. Is that your question?

Senator BAYH. Yes.

Judge CARSWELL. No; I don't think you would be in error in suggesting that at all.

Senator BAYH. You would suggest that perhaps at least part of that oath would not be appropriate right now?

Judge CARSWELL. Without any doubt, I think that a Justice of the Supreme Court of the United States has an obligation to declare unconstitutional a law that he finds to be so under the Constitution.

Senator BAYH. Thank you. I won't pursue that.

The CHAIRMAN. I want to give the facts about the oath.

Senator BAYH. I think all interested parties ought to be heard.

The CHAIRMAN. Senator O'Mahoney and Senator Hennings were opposing the Jenner bill, which was aimed at the jurisdiction of the Supreme Court in subversive matters. Now, the record shows that in a committee meeting, Senator O'Mahoney dictated this oath and Senator O'Mahoney—the committee lost a quorum and couldn't vote. Senator O'Mahoney and Senator Hennings and others requested me, as chairman, to ask or to require any nominee to subscribe to that oath. In fact, we had requests from other members of the Judiciary Committee that that be done. And that oath was propounded to every nominee that year.

I think Judge Carswell was the first.

I remember that there was an appointment to the judiciary from Alaska and one from Hawaii, and I was instructed by the committee, since these nominees were not coming here for hearing, that the oath be mailed and that they bs required to sign it before the committee would act.

Now, as far as Judge Carswell was concerned, and all other nominees, my judgment is that none of them would have been cleared by the Judiciary Committee unless they had subscribed to that oath. It

was Senator O'Mahoney's idea and, as I recall, it was supported by Senator Hennings and others.

Those are the facts about the oath. This gentleman happened to be the first one, and it was requested, it was required of every other nominee that year. I am informed of that by the staff, who have checked.

Senator BAYH. I appreciate that explanation. I take the chairman's word and am pleased to have the record made complete. The previous public record, which is available to us, shows the oath being addressed to the nominee and Mr. Carswell saying, "I do," and the chairman saying, "Is there anything else," and Senator Dirksen saying, "I think that is all," and the chairman saying, "Thank you very much."

And that was the end of the hearing. So I think it is important. I admit to a legislative prejudice. Maybe that is bad, in front of a prospective Supreme Court Judge, but I would like to think the Congress has infinite wisdom. Under our tripartite form of government, that has not always been the case, and I feel that it is important that we not have a judge who is timorous in the responsibility he has to knock down a law which Congress may pass with all good intentions, which is not, indeed, within the province of the Constitution.

You said you would not have this hesitancy, and that is all I want to get into the record.

Do you have anything you want to add to this? I do not want to muddy the record, but I wanted to clear that up. I think we have pretty well done it.

Judge CARSWELL. If you're satisfied with the answer. If not, I can only say again that I would not have any hesitancy, if I felt a law were unconstitutional, to so declare.

The CHAIRMAN. It would be your duty, would it not?

Judge CARSWELL. An absolute duty under the Constitution.

Senator BAYH. That is why I asked the question. There seemed a real inconsistency between that oath—and that has been explained now—and the duties, as I see it, of any judge.

Now, let me ask one question that I mentioned to you yesterday, in passing. I have still not had the opportunity to look into it as fully as perhaps we should, but I mentioned this matter which has been of some significant concern to various women's rights organizations. I have subsequently found out that that case is *Phillips* v. *Martin Marietta*, 416 Fed. 2d 1257, which was a case of last October, in which, as I recall, the issue was whether an employer refusing to hire mothers that had preschool children was a violation of 42 United States Code 703, which made it incumbent upon everyone to treat women equally.

Now, in that case, when a petition was made for review by the entire panel, as I recall, you voted no, which has given some people the impression that you are not in favor of equal rights for women.

Would you care to address yourself to that question?

Judge CARSWELL. Senator, I did not write that opinion of the court. There was a dissent, as I recall. It is improper for me to comment on any of the particulars about the facts of that particular case. I simply cannot do it, with no attempt to be evasive about this at all. I simply cannot answer it, because here, again, we would get into a situation where I simply couldn't decide cases under this particular statute.

The record shows how the vote went; how each judge on our court voted, I suppose, is recorded. It shows how my vote is recorded on the petition en banc. I do not have immediately the case before me; I was not on that particular panel. You have stated what my vote was and I assume it is stated correctly. I have no reason to question it at all.

It speaks for itself, the opinion there, and the dissenters speak for themselves. Judges, you know, disagree among themselves sometimes, and obviously there was some disagreement here within the court itself. That is another reason why it would be highly improper for me to delve into this area.

Senator BAYH. Fine. I think you can also see why it would be highly proper for this committee to make certain that we are not putting on the bench a man who, for some reason or other, feels that women should be not treated equally with men. Some people have this feeling without dealing with the specifics of a case.

Inasmuch as a moment ago you dealt with civil rights in somewhat of a black versus white situation, is it also fair to say that you believe the Code of the United States relative to equal rights for women should be enforced?

Judge CARSWELL. The law of the land should be enforced, yes, sir.

Senator BAYH. I just will read one section of the law specifically referred to in the case. It says that it shall be an unlawful employment practice for an employer to fail to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or type of employment because of race, creed, color, sex, or national origin.

Now, let me, if I may, deal with this question of ethics, because I think it is important that we let the country know that we are searching for a higher ethical standard. As I said, I hope we can apply this to judges and apply this to Members of Congress, myself included.

It is fair to say, is it not, Judge Carswell, that after having heard your recitation of the property that you own, you have not sat on a case in which you had a direct pecuniary interest?

Judge CARSWELL. That is certainly true.

Senator BAYH. You have mentioned your wife's interest in this—was it Elberta Crate? Have you ever sat on any cases involving Elberta Crate?

Judge CARSWELL. No.

Senator BAYH. Or any other pecuniary interests involving your wife?

Judge CARSWELL. No.

Senator BAYH. Have you sat on any cases involving major customers of Elberta Crate?

Judge CARSWELL. I didn't even know who the major customers of Elberta Crate are. We have a close family, but they don't tell me all their business.

Senator BAYH. In the controversy surrounding the previous nominee and one Supreme Court Justice—there has been a great deal of controversy surrounding the issue of standards of ethical conduct for a judge. I would like to explore this area and briefly get your feeling, if you feel you can do this without dealing with the specific factor or matter of a case.

The general law of the land, as you know, is cited in 28 United States Code 455 which, just to refresh my memory, if not yours, says any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or attorney as to render it improper in his opinion for him to sit on the trial, appeal, or other proceeding therein.

The key question is "substantial interest." There is no specific definition in the law of the land. There have been several efforts to do this, and we hope we can be successful finally. The jurisdictions of the United States are not unanimous. The fourth and the fifth circuits have different standards of what a substantial interest shall mean, and the majority of the opinions, as Judge Frank pointed out, when he testified here in support of Judge Haynsworth, is another matter.

Would you care to give this committee the benefit of your thinking relative to "substantial interest" and how you think it should be defined?

Should it be defined pursuant to the fourth circuit, the fifth circuit, or the preponderance of circuits which say that if you have any interest, you should disqualify yourself?

Judge CARSWELL. That makes it necessary to respond in two ways. No. 1, there is an opinion of the fifth circuit that speaks to this point. In the case of *Kannear-Weed*—I can give you the citation—it attempts to define in specific terms what "substantial interest" means.

This opinion was rendered by the Court before I participated in it. I was a district judge when it came down. I am aware and have had many discussions, many times, with many judges, across this land about this very matter.

This was one of the major discussions at the National Judicial Conference that was held here in Washington last June 10, when I was district judge representative for the fifth circuit we explored this whole area.

They came forth with that resolution that was then adopted. It was adopted into this general area. I voted for that resolution as it was then adopted in June of 1969. Subsequently, it had some modification placed upon it in September of 1969.

I am aware of the fact that Chief Justice Traynor of the California Supreme Court has a committee of the bar that are working very diligently at this to come to grips with it. This is a most difficult area, as to what is the interest that should be there, what are the proper standards.

I personally, Senator, can tell you this, and put it in this record, concerning the areas of compensation of judges. Perhaps I am volunteering, but I would just answer, perhaps speak to both of them at the same time. I have never received any fee for any outside activities of any nature.

Now, there are many competent judges who, I think, have good, valid reasons to lecture at law schools. There is a hazard, perhaps, here in breaking the tie between the academic world and the bench, and there ought to be, perhaps, some reasonable fee under those circumstances. I don't attempt to pass judgment upon whatever is determined there.

It is simply that in my position, I have not accepted and will not accept any fees for outside services, period.

Senator BAYH. I have another question I would like you to direct yourself to. I am glad to have your personal standards on the record.

You know now that you are going to be on the Supreme Court if this nomination is confirmed, which I think it will be.

Judge CARSWELL. Nice of you to tell me.

Senator BAYH. Is your personal standard going to be the standard that you hold other judges accountable to? Is it going to be the fifth circuit's standard, which says it is all right to own some stock?

Judge CARSWELL. I am going to go by Harrold Carswell's standard, and I don't think you can beat it. If you don't have any, don't accept fees for outside services, there can be no controversy about it.

If there is any question of conflict of interest in the judge's mind or anything to make somebody think he is hiding or his mind is turned or pushed in a certain way, he shouldn't sit on the case. I never have, and I don't intend to in the future.

I intend to follow the same course of conduct I have followed for the last 12 years, regardless of what someone writes as a code of ethics for the fraternity as a group.

Senator BAYH. The reason I bring this matter to your attention, and would like to proceed just a bit further on it, is that while you were on the fifth circuit, this *Southern Louisiana Gas* rate case came before your circuit and two of the judges involved had what, to me, would appear to be significant holdings.

Now, perhaps you could explain—as I recall the case, the court stated that the judges were not disqualified—I don't know whether this was a message over the telephone that was later made public, but the court later stated that the judges were not disqualified because of the interests that they had, but that they automatically withdrew themselves voluntarily from the case.

Would you help to define that for us, please?

Judge CARSWELL. Senator, it wasn't a telephone message, it was a printed opinion about that, a per curiam opinion, consisting of two fellow judges and me. There were three of us called to sit on this case.

Incidentally, it was once printed that I refused to disclose my stockholdings, I didn't refuse; it never occurred to me to tell anybody that I didn't have any. That was the fact about that.

But after this matter arose, the two judges of that panel made disclosure of their holdings in these two companies. This was a per curiam opinion, where we disqualified the entire panel. I disqualified myself because immediately following the first couple of hours of hearings, we had had a previous discussion about the case. This is just exactly in the area that I was discussing with you earlier. I felt it would be improper for me to continue even if they were not because then it might be said, or someone might think, that I had in turn gotten myself involved into some of their potential or possible, or apparent, disqualification.

Out of an abundance of caution, this action was taken by each of those judges. The opinion speaks for itself; it is a per curiam opinion. It speaks for all three of us. I cannot comment any more on it other than that. It would be improper to do so.

Senator BAYH. I want to refresh my memory, because I am sure you, having dealt personally with that case, are better qualified to testify to it than I. As I recall, the opinion stated that although we do not feel disqualified, we voluntarily withdraw ourselves from the case.

Now, is my interpretation erroneous?

Judge CARSWELL. Senator, I cannot attempt to interpret an opinion of the court of which we were a part. It will have to speak for itself.

Senator BAYH. Fine.

Is it your judgment that if a person has any substantial interest, he should withdraw himself from the case?

Judge CARSWELL. That is a matter of statute, and certainly he should. I call that a minimal statute.

Senator BAYH. Is any interest a substantial interest?

Judge CARSWELL. That is a matter of judgment, and upon the facts and circumstances of each case under the law.

Senator BAYH. That is right. That is exactly where we get into the fact that the greatest preponderance of jurisdiction in this country, according to what Judge Frank said, is if you have any interest at all, you disqualify yourself; the fifth circuit says if you have a relatively small interest in a large firm, you need not disqualify; and the fourth circuit says it is all right if you make this public.

What I want to know is what is the standard going to be on the Court?

Judge CARSWELL. I respectfully have to not answer that. Obviously your suggestion is that there is a conflict in the circuits.

Senator BAYH. I think there is.

Judge CARSWELL. Then, inevitably, that can only be resolved by the Supreme Court of the United States, and quite clearly, it is improper for me to express an opinion about that specific issue.

Senator BAYH. And, quite obviously, it would be my responsibility to find out what your opinion is on this.

Judge CARSWELL. I have given you my personal opinion. I cannot give you my standing on cases in court that should be resolved.

Senator BAYH. I realize that there are bound to be lines that you cannot cross over, but I think this a legitimate area of interest for those of us who want to try to increase that standard.

Are you conversant with the various canons of ethics that deal with impropriety and appearance of impropriety—canons 4, 13, 24, 29, 33, and 34? If you want me to read excerpts from them, I will, but I think you are certainly conversant with them.

Judge CARSWELL. Yes, sir.

Senator BAYH. In trying to reach a determination of what is ethical conduct and what is not, do you believe that these legal canons of ethics have received consideration by the judiciary?

Let me just read a couple of things that concern me, because in the matter which we struggled through earlier, the Haynsworth matter, frankly, I was never convinced in my own mind that Judge Haynsworth got involved in any impropriety, but there was a great appearance of impropriety.

We are trying to give the appearance of justice in our courts. That is why this canon says that a judge's official conduct should be free from impropriety and from appearance of impropriety. So it talks in 13 about kinship of influence and—we are talking about impro-

priety and the appearance of impropriety, and I wonder if you thought the strong burden placed on members of the bar as well as members of the bench should be used in reaching a national standard for judges?

Judge CARSWELL. If you're speaking in the abstract as to what I personally believe, if I drew up and wrote legislation, Senator, on the subject——

Senator BAYH. Well, I am talking——

Judge CARSWELL. Certainly a judge should not sit in a case where there is any appearance of impropriety. It is just that flat and simple. If there is anything more about the question that I have missed, I would like to know it.

Senator BAYH. Well, are you saying that you feel the canons of ethics should be used in trying to determine the standards of conduct——

Judge CARSWELL. Concerning that specific canon of ethics: I would think the whole question of attempting to boil down moral and ethical standards into a code, ever since the Sermon on the Mount, has been rather difficult. The mechanical and intellectual process of putting into words these notions and ideas is itself difficult.

I have no objections to these canons; certainly they should be considered. They are fine principles, and they should be considered along with other appropriate standards of ethical conduct across the spectrum of the matter.

Senator BAYH. I won't ask you to comment on this, because I am sure it will fly right in the face of your understandable reluctance to deal with past cases. But to show you why I am asking you this, the latest decision relative to standards of conduct came down in 1968 in the *Commonwealth Coatings* case, *Commonwealth Coatings* v. *Continental Coating*, in which the court simply referred to the canon of ethics 33 in sustaining the position of the court to overthrow a lower court.

That is why I think it is an important thing for our consideration.

Do you believe a judge should sit on cases involving close relatives, or in which such a relative is such a counsel.

Judge CARSWELL. I didn't hear the last part of your question.

Senator BAYH. Do you believe a judge should sit on a case involving close relatives or in which a close relative is a counsel?

Judge CARSWELL. No, he should not.

Senator BAYH. I think this is a normal question relative to Governor Kirk's efforts in the Florida case, in which I understand your son-in-law is one of the counsel for the Governor, is he not?

Judge CARSWELL. He has a legal job in Governor Kirk's office. What his duties are, I haven't the slighest idea.

Senator BAYH. Nevertheless, you said you felt that you should not sit on a case in which counsel is a close relative?

Judge CARSWELL. A judge should not.

Senator BAYH. Let me ask you a question on a matter on which some criticism has been forthcoming. I would like to give you the opportunity to answer this before some criticism is made in the record.

This business of this party or social event that was held in your home relative to what some people have alleged were lobbying activities—

would you give us your understanding of this so we can put the record straignt on it?

Senator TYDINGS. Mr. Chairman, why don't you put in the record the article that appeared in the Philadelphia Inquirer. I think that is the story to which Senator Bayh is referring. The headline is, "Party at Carswell Home Linked to Track Lobbyist."

Judge CARSWELL. I don't know what the article is.

Senator BAYH. I have another article, several pages about it.

Judge CARSWELL. I'll give my statement without regard to what any article says, because I know only what I know and that is all I know, and I am happy to tell you.

Senator BAYH. That is all we want to know.

Judge CARSWELL. All right, sir.

I had nothing whatsoever personally to do with that party being held under my roof. My brother-in-law, Jack Simmons, Jr., and his wife live—not immediately adjacent to us, but one house between.

Two of their children, ages 15 and 13, were killed in a tragic automobile accident on Saturday, the 1st of March, 1969. Which is not infrequently the case in our family, my wife, who is the sister of the father of these children, was asked if they could bring a party of people to our home because they simply felt that they could not have that party at their home.

These arrangements were made primarily between the wives, between my brother-in-law and sister and my wife. As I recall, I came into the party somewhat late. I knew some of the people there, some of the people I did not know. And, Senator, that is just all in the world there is to that, as far as I know. I had absolutely nothing to do with any of the suggestions of lobbying. I don't even know what was being lobbied.

Senator BAYH. One of the names in at least one of the articles I have here—I suppose it is in the one Senator Tydings referred to——

The CHAIRMAN. Joe, do you want this in the record?

Senator TYDINGS. Yes, I think we should have it, because it sets forth the accusation about which we are concerned.

The CHAIRMAN. It will be admitted.

(The newspaper article referred to follows:)

[From the Philadelphia (Pa.) Inquirer, Jan. 21, 1970]

PARTY AT CARSWELL HOME LINKED TO TRACK LOBBYIST

(By Clarence Jones, Inquirer Washington Bureau)

WASHINGTON, Jan. 21.—A reception and dinner party at Judge G. Harrold Carswell's home in Tallahassee, Fla., last spring was used in a sophisticated lobbying effort for a controversial racetrack bill.

The Supreme Court nominee's bother-in-law, Jack Simmons Jr., was one of the men who helped lobby a bill through the Florida Legislature permitting construction of a new horse-racing track halfway between Miami and Fort Lauderdale, Fla.

Judge and Mrs. Carswell were hosts for the party, but there is no evidence they were involved in any lobbying.

Simmons, a Tallahassee real estate broker, was at the party on the judge's lakefront lawn.

TRACK BUILDER THERE

So was Steve Calder, a Fort Lauderdale multimillionaire who is building the $12 million track.

Joe Benner, Calder's aide, and Colin English, a former Florida state school superintendent, also attended. Both Benner and English helped push the enabling legislation through the legislature.

Two state senators from Miami who were invited to the judge's house later said they regretted accepting the invitation.

Both said they resented Calder's presence in the receiving line.

"OBVIOUS LOBBYING"

"It looked like an apparent lobbying effort, State Sen. Edmund J. Gong said. "It was low-key, but obvious. If the judge didn't know about it, someone missed the boat as far as good taste is concerned."

The party may become an issue in Carswell's confirmation hearings before the Senate. Carswell opponents were talking about it in Washington Wednesday.

An investigation of the reports found no evidence that Carswell had any part in inviting the racetrack proponents to his home.

Calder, the track owner, said he was invited by Simmons.

FOUGHT FOR 6 YEARS

Gong and State Sen. Kenneth Myers, also of Miami, were invited to the party by State Sen. Mallory Horne of Tallahassee. Horne was a cosponsor and acted as one of the floor managers for the Calder bill in the legislature.

Calder had tried to get his enabling legislation for six years. It was bitterly opposed by the owners of the three other horse-racing tracks in South Florida, who combined to fight Calder.

One lobbyist for "the big-three" tracks, Miami attorney George O'Nett, said he heard rumors during the legislative session that a party at Judge Carswell's home had been used to aid Calder's bill.

"I bounced off the walls and went to work to find out if there was any truth to it," O'Nett said. He said he talked to a number of legislators who attended. "They all told me they were there, but didn't feel they were lobbied, except for Eddie Gong," O'Nett said.

DISCUSSED AT PARTY

"The only thing I know is that Judge Carswell had a big party," Calder said. "There was no lobbying that I know of. I was a guest like everybody else."

But Calder admitted discussing the track with several legislators at the party.

"Yes, I talked to all of them that were present," Calder replied. "We talked just about general things. A couple of them asked me about the track and I said I was trying to get it."

Was Judge Carswell even aware that Calder was pushing at the time for his racing legislation?

SURE JUDGE KNEW

"I feel sure he must have known it," Calder said. "He knew I was up there (in Tallahassee) and he knew me. But I don't think this had anything to do with it. He had a hell of a lot of people there who had nothing to do with the legislature, most of them town people."

Calder remembers that there were about 60 guests who were invited for cocktails followed by dinner, at tables set up on the judge's lakefront lawn.

Gong and Myers put the size of the party closer to 45 people, with a third to a half of them legislators.

The Calder bill was one of the best-prepared pieces of legislation to hit the Florida Legislature in years.

LOST ONE FORTUNE

Calder, 69, lost his first fortune at the age of 26 when the Florida land boom burst. He now owns 39,000 acres of timber in Costa Rica, condominium apartment houses in South Florida, a plastics manufacturing firm, investments in Jamaica, a jai alai fronton in the Canary Islands, an interest in a Hollywood, Fla., drag-racing strip, and a sugar mill in Haiti.

Calder told a reporter last spring that he had no idea how much money he was worth. He placed the figure at somewhere over $10 million, but said it was difficult to keep track because of the fluctuating stock market.

The party at the judge's house occurred sometime in early April, after Calder's legislation was introduced but before it passed.

Senator BAYH. Mr. Steve Calder was supposed to have been pushing the racetrack and he lobbied some of the guests in your home, and you have no personal knowledge of that? Is that accurate?

Judge CARSWELL. I had nothing whatsoever to do with any lobbying at my house, Senator, at all. What conversations occurred between guests, they occurred between them and not to my knowledge or with my participation in any such activity of any kind whatsoever.

The sole reason it occurred in my home was because of the request of our in-laws as a result of the children's deaths.

Senator BAYH. One other case I would like to bring up, and then yield to Senator Tydings. It involves the *Adams* v. *United States* case, in which a fellow in your office prosecuted in a liquor violation--as I understand, while you were U.S. attorney.

Later on, when you were judge, this person appeared before you as a result of a charge of perjury in the original trial. Is this the kind of thing that concerns a judge, where he ought to disqualify himself?

Do you feel that, really, the fact that you sat as one of the attorneys on one of the sides, prosecutor, in the previous case, that that does not officially constitute a conflict so that you should disqualify yourself? Or have I misunderstood or misinterpreted the facts?

Judge CARSWELL. I don't know about that, but I do know this: no man who has ever served as U.S. attorney would thereby forever be disqualified to be appointed U.S. district judge. If you give everyone who had appeared before him in a file judicial immunity, so to speak, from the judge's responsibility to try cases that come before him——

Senator BAYH. I'm not suggesting that at all. I am suggesting that perhaps it is something to be concerned about if a man is accused of a perjury charge in one case in which a man is district attorney, when that perjury charge is then tried, the previous prosecuting attorney finds himself judge.

Judge CARSWELL. All I can say to that is that the majority of the court held that it was perfectly proper for me to sit on the case. As a matter of fact, it never was suggested to me at the time the case was tried that there was anything improper about it.

It was only after the case was on appeal and he had been convicted in this regard, that he filed a section 2255 collateral attack. This was raised on a collateral attack. I am sure I know what you're talking about here, because there was a dissenting opinion in that case.

Two of the judges, Judges Tuttle and Bell, held that it was perfectly proper for me to sit. Judge Brown said it probably would have been better if I hadn't, but he went on to say he knew it was a completely fair trial in every respect, as the record will show.

Senator BAYH. I think you will find that basically, because the issue was not raised earlier, as you pointed out, it was later raised on appeal.

Judge CARSWELL. I would have to let the record speak for itself in that regard. It was sustained.

Senator BAYH. I am through. I appreciate your patience.

The CHAIRMAN. Senator Tydings wants to ask some questions, and we shall resume after the rollcall.

(Whereupon, there was a short recess.)

The CHAIRMAN. Let's have order, please.

Judge, is there anything else you would like to say about the country club case?

Judge CARSWELL. Yes, sir; I would like to make this one statement: 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.

The CHAIRMAN. You will be afforded that opportunity.

Senator Tydings.

Senator TYDINGS. Judge Carswell, you have been interrogated already about the 1948 racial supremacy speech. In your answer you repudiated it, said it was anathema to you, and repugnant to your position and your feelings of today.

You quite properly stated to the committee that we must determine whether or not you speak with conviction. You must realize that even though you have repudiated the speech today, that statement is insulting to many, many Americans. I think it would be helpful to us in determining just what your convictions are today, if we knew whether or not, even back in 1948, you were associated with those groups in your local community who are referred to, for lack of a better word, as the Ku Kluxers or the wool hat faction of politics. Were you a part of that political faction in Georgia when you were running for the legislature?

Judge CARSWELL. No, sir; no, indeed.

Senator TYDINGS. With which political faction were you associated? How would you describe your classification as a candidate?

Judge CARSWELL. Classified with the other candidates in that particular campaign? I was the liberal candidate, without a doubt.

Senator TYDINGS. How old were you at the time?

Judge CARSWELL. I was then 28 years old.

Senator TYDINGS. Had you been involved in Georgia politics prior to that time in any way, for example, had you been involved in any governorship race?

Judge CARSWELL. No, I was 10 years old when my father made a campaign for the governorship of Georgia, but I really didn't have much to do with that, either.

Senator TYDINGS. Were you a lieutenant of the late Gov. Gene Talmadge? Did you support him?

Judge CARSWELL. No, I did not support him. As a matter of fact, I supported, in 1956, in the same Irwinton Bulletin, his opponent, James V. Carmichael, and had something to say about that.

He was certainly the liberal candidate in 1946.

Senator TYDINGS. Would you care to comment on why you lost the race when you ran for the legislature?

Judge CARSWELL. I was considered too young, just out of the service, not to be trusted, on the liberal side, a little dangerous in racial matters, and as much too much of a liberal.

There was no question about it. I think that my opponents won the election on that basis.

Senator TYDINGS. A few questions on another area, Judge Carswell.

You were the elected representative of the district judges from the Fifth Judicial Circuit at the meeting of the Judicial Conference on June 10, were you not?

Judge CARSWELL. Yes, sir. I was elected at Dallas the preceding April—April of 1968.

Senator TYDINGS. And you supported the resolution of June 10 pertaining to financial disclosure and nonjudicial activities?

Judge CARSWELL. I did do so.

Senator TYDINGS (presiding). Do you believe that the resolutions that were promulgated while you were down there had merit then and still have merit?

Judge CARSWELL. It certainly has merit, Senator. In saying this, in complete candor, I would have to amplify that a little bit.

This matter needs some most careful study, as it is getting now. There are many ideas, and it would be my personal one, as I indicated earlier, that no judge should receive compensation for outside services that he renders. There are many thoroughly honest, thoroughly able judges throughout this country, and have been for many, many years, who have participated in lecture series at our great universities. There is a great body of opinion in the academic world and elsewhere that stands for the proposition that we should not cut these lines and that there should be some reasonable fee for those kinds of services.

Senator TYDINGS. Judge, let me ask, just to save your time and the committee's time, do you believe in the public disclosure aspect of that resolution of the Judicial Conference?

Judge CARSWELL. I do personally. I would not necessarily want all others to do so.

Senator TYDINGS. Why not?

Judge CARSWELL. Because this is a matter that I think needs to be worked upon and we need to get all the returns, so to speak, from Chief Justice Traynor's work and from the ——

Senator TYDINGS. Why did you support the resolution on June 10 if you don't believe all judges should make disclosure?

Judge CARSWELL. If it came before me to vote, Senator, I would so vote now. I didn't mean to indicate otherwise. I would be perfectly willing, however, to have this matter examined in depth, which we didn't do, frankly, in 2 or 3 days.

Senator TYDINGS. Do you think the same restrictions should be imposed upon Justices of the Supreme Court as on all other Federal judges?

Judge CARSWELL. Definitely.

Senator TYDINGS. You are aware, I suppose, of some of the reasons why the Judicial Conference took a step backward on November 1 and declined to support the June 10 resolutions?

You are aware, of course, that at least two Justices of the Supreme

Court have publicly stated that they would refuse to support any type of judicial disclosure?

Judge CARSWELL. I can't speak for them.

Senator TYDINGS. If you are elevated to the Supreme Court, are you going to be one of those Justices who take the position that because they are Justices of the Supreme Court, they should not be subject to any financial disclosure requirements?

Judge CARSWELL. I personally—I cannot speak for what the Court may do as an institution, but I personally, as a Justice of the Supreme Court, would willingly make the same disclosure as a Justice of the Supreme Court as I have made and would make to this committee.

Senator TYDINGS. I commend you for that, No. 1. No. 2, are you going to be passive on the Supreme Court on this issue or are you going to be willing to state to the other Justices that you feel a Justice of the Supreme Court has the same responsibility as other judges of the Federal court? Because that is important to some of us.

Judge CARSWELL. That is difficult to answer. I certainly will give my views, Senator. I expect that they will know them by tomorrow morning. But what will be heard by them if I am a member of the Court and their response to it, I certainly couldn't speak of the Court, for the Court as an institution. I am not yet a member of it.

Senator TYDINGS. Let me rephrase the question.

Do you see any constitutional or philosophical reason why Justices of the Supreme Court should not be subject to the same reporting requirements as lower court judges?

Judge CARSWELL. Philosophically, I can see none whatsoever. Constitutionally, I would respectfully have to decline to answer the question on the matter, because that is directly in the area of these other things we have discussed before.

Senator TYDINGS. If the Supreme Court did not choose in the years to come to follow guidelines set down by the Judicial Conference with respect to disclosure, such as the June 10 resolution, would you voluntarily make such a disclosure, even though some Justices of the Supreme Court might not?

Judge CARSWELL. I would so do.

Senator TYDINGS. In 1963, the Judicial Conference of the United States adopted the resolution "That no Justice or Judge of the United States shall serve in the capacity of an officer, director, or employee of a corporation organized for profit."

I understand from your testimony that you strongly support this position?

Judge CARSWELL. I certainly do, Senator. I always have.

Senator TYDINGS. Do you feel that it should be applicable to Supreme Court Justices just as to any other judge of the Federal courts?

Judge CARSWELL. Without a doubt.

Senator TYDINGS. I think, Judge Carswell, you are aware that for the past 4 years, the subcommittee which I chair, the Subcommittee on Improvements in Judicial Machinery, has been involved in a detailed study of matters relating to judicial fitness on the Federal Bench.

In 1968, I introduced a Judicial Reform Act, and it has been reintroduced in the 91st Congress. The key feature of the Judicial Reform Act is the establishment within the judiciary of a commission capable of dealing with problems of disability and unfitness.

Now, do you feel that there is any need within the Federal judiciary for such a commission?

Judge CARSWELL. I have to be very careful in answering this and not be evasive at all. I certainly do not speak to any pending legislation that might come before the Court. I cannot do so.

I can say this, and do say this, that we all must recognize, as I am sure you, Senator Tydings, do——

Senator TYDINGS. The machinery need not come by legislative action. It could come by resolution of the Supreme Court of the United States or resolution of the Judicial Conference. Legislation is the last straw, the last recourse, so to speak.

Judge CARSWELL. There is a problem within the judiciary in this field. Certainly it has to do with the senile, the sick, the improper judge. It is a serious problem, and we definitely need some established procedures to deal with them. There is no question about that.

Senator TYDINGS. Would you agree with the statement that, as presently constituted, there is no adequate machinery within the Federal Judiciary System for the removal or the retirement of the unfit or disabled judge?

Judge CARSWELL. The word "adequate," of course, is the key to the question. We have some procedures through the Judicial Councils. This is in an administrative area, not a judicial area. I think I can speak on this.

Some of the councils, in my judgment, have not taken an aggressive enough role and used the tools that they have available to them in this area. I think that may be the proper approach.

I share with you the overall aim of finding some instrument that will bring all of this into focus where it can be acted upon promptly and properly, with due respect to the person involved.

Senator TYDINGS. What is your feeling about mandatory senior judge status at the age of 70?

Judge CARSWELL. I have a very firm opinion about this and I don't hesitate to give it to you. I hope this is not beyond the realm of passing on the constitutionality of matters. I hestitate only to answer——

Senator TYDINGS. Senior judge status.

Judge CARSWELL. This, of course, would not be applicable to the Supreme Court.

Senator TYDINGS. No.

Judge CARSWELL. With that understanding, I will answer it without any hesitation. I think it is what ought to be, it should be. I am in favor of it and always have been.

Senator TYDINGS. Judge Carswell, let me return to the *Southern Louisiana Rate* case, in which you were a member of a panel with Judge Brown and Judge Jones. The issue arose as to whether Judges Brown and Jones should disqualify themselves from the case.

It is my understanding and recollection that initialy in that case, the judges who were to disqualify themselves wrote letters to counsel in which they advised counsel that they had interests in the various oil companies which might be affected by the case. They asked the counsel to come forward, if they wished, and suggest that they disqualify themselves. Is that a fair description of the history of that case?

Judge CARSWELL. I cannot speak to this on this point, Senator, be-

cause I simply don't know what the actions of the judges to whom you refer were. I had no stockholdings in the case, don't now. I do know, of course, and the opinion so states, that the whole panel was dissolved and there was never any exercise of any judicial function whatsoever by any one of the three of us at all.

I took the route of being very, very cautious, overly cautions, it may be. There was some question in my mind whether I should have asked a brother judge to take on such a task and decide that case. I might well have been criticized for evading a piece of hard work. But I felt in my own mind that, this case having been put together in one panel——

Senator TYDINGS. I think the final step that was taken was the best step and the only step.

Judge CARSWELL. That is all I——

Senator TYDINGS. The first step of sending the letter seems to me to have been an insufficient step. I think that evidently your panel agreed with that when they disqualified themselves.

Judge CARSWELL. I can only speak to what the opinion of the court was.

Senator TYDINGS. Judge Carswell, do you know whether or not, in your race for the legislature in 1948, you were opposed by the Ku Klux Klan?

Judge CARSWELL. I don't know who the members of the Ku Klux Klan were, but I certainly did not have their support. If the Klan was active in that campaign at all, it went to my opponent, not to me.

Senator TYDINGS. I have no further questions, Judge Carswell, except to say that the speech was unfortunate and that, as you pointed out, the members of the committee will have to pass upon your sincerity in renouncing the ideas expressed in that speech.

Before we recess, I would like to make two statements for the record, since I shall not be here in the morning. Tomorrow, there are going to be two witnesses who, if I were here, I would comment upon to the committee.

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.

I would also like for the record to state that the President of the Florida bar, Mark Hulsey, Jr., is a partner of one of my oldest and closest friends from Jacksonville, Fla., Lloyd Smith.

I have known Mark Hulsey, myself, personally, for some period of time. He has a very fine record in the bar. He has been president of the Florida bar, which I understand is the oldest integrated bar in the South.

He has also been very active in civic affairs in his State. He is a fine gentleman.

Senator Thurmond, do you have anything to add?

Otherwise, we will recess until tomorrow morning at 10.

Senator THURMOND. I think the chairman said to recess after you have finished until tomorrow morning, so I shall wait until then.

Senator TYDINGS. We shall now recess until 10 a.m.

(Whereupon, at 5:10 p.m., the committee adjourned, to reconvene at 10 a.m., on Wednesday, Jan. 28, 1970.)

NOMINATION OF GEORGE HARROLD CARSWELL

WEDNESDAY, JANUARY 28, 1970

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:25 a.m. in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Kennedy, Bayh, Burdick, Hruska, Fong, Scott, Thurmond, Cook, and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. The committee will come to order. Senator Fong.

Senator FONG. Judge Carswell, since 1959, when Hawaii was admitted into the Union, Hawaii has supplanted Florida as the most southerly State in the Union. So as one southerner to another, I would like to commend you on your nomination. [Laughter.]

TESTIMONY OF HON. GEORGE HARROLD CARSWELL, NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge CARSWELL. Thank you, sir.

Senator FONG. I have listened to the questions put to you and your answers to them and I congratulate you on the candor and frankness of your answers. Up to now, I am satisfied that the answers you have given satisfy me that you are worthy of confirmation.

Judge CARSWELL. I appreciate that very much, Senator.

Senator FONG. I have very few questions to ask you, except again to ask you whether deep down in your heart you feel any prejudice, any bias against any individual because of race, color or creed?

Judge CARSWELL. Absolutely not.

Senator FONG. And you feel that you can be a fair and impartial judge and that racial feelings will not enter into the decisions in your duties as an Associate Justice?

Judge CARSWELL. I am positive of that, Senator.

Senator FONG. Thank you very much, sir.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Carswell, I would like to congratulate you upon your appointment to the Supreme Court, and I would also like to congratulate President Nixon upon selecting you to fill this high position. I feel that at your age, you will be on the Court for a long time and will render great service to our Nation. You have a reputation for being

a man of unquestioned integrity, impeccable character, a person of outstanding ability, of being a legal scholar, a studious worker. It is my judgment that you will perform a magnificent service to the Supreme Court.

I believe you graduated from Duke University?

Judge CARSWELL. Yes, sir.

Senator THURMOND. And after that, you attended the University of Georgia Law School?

Judge CARSWELL. Briefly until Pearl Harbor caused the closing down of law schools generally.

Senator THURMOND. Then you completed your law degree at Mercer University?

Judge CARSWELL. That is correct.

Senator THURMOND. There was an interim period when you were out of school, according to the biography, I believe—you were in service from 1942 until 1945?

Judge CARSWELL. That is correct, Senator.

Senator THURMOND. In the Navy in World War II?

Judge CARSWELL. Yes, sir.

Senator THURMOND. And that accounts for the period after you attended the University of Georgia?

Judge CARSWELL. Yes, sir.

Senator THURMOND. I believe the record shows that you were appointed U.S. attorney by President Eisenhower, then appointed as district judge at the age of 34, probably the youngest in the Nation.

Judge CARSWELL. 38, Senator.

Senator THURMOND. Was it 38?

Judge CARSWELL. Yes, sir.

Senator THURMOND. You were appointed U.S. attorney at 34, I believe.

Judge CARSWELL. 33.

Senator THURMOND. And U.S. district judge at 38? Then circuit judge. So you have served in all echelons of the Federal judiciary up to this point and your appointment to the Supreme Court would naturally be the next step if you are elevated, is that correct?

Judge CARSWELL. Yes, sir, that would be an accurate statement.

Senator THURMOND. There has been a good deal said about balancing the Court. I think the public generally feels that there should be more balance on the Court, and President Nixon says there should be more balance on the Court. I was not surprised that he selected a person who has a reputation of having a conservative philosophy, because you cannot bring a balance to the Court unless that were done. I realize that some who do not favor such a policy would be opposed to you for that reason.

President Nixon has also stated publicly that he favored a judge who would interpret the law of the Constitution and not attempt to rewrite it. He has also said he favors a strict constructionist. And he evidently feels that you possess the qualities to carry into effect those thoughts. There is nothing wrong with this; it is perfectly proper. If a President wishes to change the complexion of the Court, that is the only way to do it. I was pleased that the American Bar Association, in their letter to Senator Eastland, our chairman, stated

that you are a man of integrity and judicial temperament and possessed of professional competence and unanimously recommended you as being qualified for the Supreme Court.

Now, as to your decisions, I shall not dwell at length on them. I want to say that, in looking at these decisions, it appears that you demonstrate an ability on your part to single out the issues in the case, to bring together the facts and applicable law, and succinctly state the conclusion with brevity and exactness. This style of writing judicial opinions is somewhat unique today, for the opinions of many of our judges are too long and superfluous. This style of legal writing indicates that you are capable of exactness in considering and interpreting a question of law. This ability certainly commends you to the position for which you have been selected.

There is nothing in your record that I have found that shows you do not believe in equality and fair treatment to all. There are some groups in this country who will take the position that possibly you do not believe in equality because you have not decided every case in their favor. There are some groups in this country who want a judge to go with them on every case, right or wrong. All a judge can do and should do is to hand down the decision in accordance with the law and the facts in the case. There is nothing in the record that I have found that indicates that you have done otherwise.

I was interested in reading an article which appeared in the paper, by Mr. Fred P. Graham, of the New York Times, entitled "Carswell's Credo Is Restraint."

On the question there of desegregation, the article stated this: "And when precedents"—speaking of civil rights precedents—"have existed, he has struck down segregation in crisp, forthright opinions. In 1965, he declared that the barbershop in Tallahassee's Duval Hotel had to serve Negroes under the public accommodations provision of the Civil Rights Act of 1964. He brushed aside a barber's assertion"—someone said that was your barber; I don't know whether it was or not, but it doesn't make any difference—"a barber's assertion that he was not covered because 95 percent of the customers were local people and not guests in the hotel."

From a reading of that, it is clear Judge Carswell observed that relative percentage of local as well as transient customers may not be used as criteria to determine coverage.

In 1960, when Tallahassee Negroes sued to desegregate the counters, waiting rooms and restrooms in the city-owned airport, he did not hesitate to order desegregation.

Are those statements correct, Judge Carswell?

Judge CARSWELL. Yes, sir that is a correct statement of the holdings in those cases; yes, sir.

Senator THURMOND. This was written by Mr. Graham for the New York Times, I believe.

Judge CARSWELL. That is a correct analysis of the cases.

Senator THURMOND. Now, quoting further from this article, it says:

Tom Harris, an official of the American Federation of Labor and Congress of Industrial Organizations, who led the successful attack against Judge Haynsworth, said today that Judge Carswell doesn't appear to have a significant record on labor cases. He says the AFL–CIO had no plans at present to oppose

him. The few labor opinions that Judge Carswell has written reflect his reluctance to use judicial power and his tendency not to extend the judiciary's power.

I was pleased to see that statement that Mr. Graham wrote about you, about extending judicial power and your reluctance to use judicial power and tendency not to extend the judiciary power. I think that is one common complaint the public in this country have today, about judges extending the judiciary power.

On the matter of injunctions, I was impressed with this statement:

It is my view that the injunctive power of the court should never be invoked lightly, nor should it be converted into a mere ministerial function triggered automatically upon the finding of an infraction of the law.

Mr. Graham quotes further on the question of established law. He quotes this:

Judge Carswell's opinions tend to be bloodless documents, setting out the facts and the precedents, then briskly coming to a conclusion that is said to be within the precedents. He is not given to broad statements of his philosophy, for his creed at this point in his career seems to have been summed up in one statement from an opinion he wrote shortly after he became a judge in 1958: "Established law with its imperfections must nonetheless be applied as it is and not on the predilections of the court."

All of these seem to be sound principles, and I was impressed with them. From your record as I have been able to ascertain it, you believe in deciding a case on the law and the facts and that you would follow the Constitution and uphold the Constitution, that you would be fair and just to all, discriminate against none, and show favoritism to none. Is that your philosophy?

Judge CARSWELL. I certainly would so seek to do, Senator Thurmond.

Senator THURMOND. I shall be pleased to support your confirmation.

Thank you very much, Mr. Chairman.

Senator KENNEDY (presiding). Senator Cook.

Senator COOK. Judge Carswell, I think it is interesting to note some of the reports of the newspapers of the last few days, because one of the problems that we face—by the way, I might say that most of these fellows sitting at the table that are with newspapers should have become your friend yesterday when you discussed the fact that you worked for the Macon newspaper and were paid very, very little. I think most of them in this room probably feel the same way about it.

But one of the things I think we fail to do when we analyze a nominee and when we seek to promote a particular thing, I think we fail to look at history. In regard to history and in regard to your 1948 speech, I would like to read into the record some history, and I hope that I can read before we are through with these hearings some more statements by other individuals who are now members of the Supreme Court, things that have been said about them. Then I thing we can evaluate whether history can in fact change a person and whether history can in fact improve one's attitude toward the social problems of this Nation.

In 1937, Senator Hugo L. Black from Alabama was nominated to be Associate Justice of the Supreme Court of the United States by President Franklin Delano Roosevelt. Both at the time of his nomination in August of 1937 and following his confirmation in the fall of

that year, it was urged that Justice Black should be refused confirmation because while in Alabama politics, he had been a member of the Ku Klux Klan. These charges were summarized by Senator Copeland of New York in a speech that he delivered on the floor of the Senate. For those who would like to read that entire speech, it is in 81st Congressional Record at pages 9068 to 9069. But let me quote some of the things that were said on that occasion. This is what Senator Copeland said:

> Does the leopard change his spots? Will Mr. Justice Black be any different than candidate Black, who, according to the Mobile Register of August 15, 1926, backed by the Klan, had a walk away in his race to the Senatorial nomination?

Likewise, the New York World said:

> With Alabama's most powerful political organization, the Klan, backing him, Hugo L. Black seems to have won the Senate nomination beyond a reasonable doubt. In Black, the Alabama Klan has a loyal and devoted friend.

The New York Times for August 9, 1926, said "Black has devoted part of his late campaigning to voicing opposition to Governor Al Smith in an effort to hold his part of the Klan's support."

The Senator went on to say:

> From the time he came into the Senate, Mr. Black has been a leader against all efforts to pass an anti-lynching bill. Within two weeks, he moved to table my own motion to add this rider to a pending bill.

Following Justice Black's confirmation, amid public criticism triggered by a series of articles in the Pittsburgh Post-Gazette, Justice Black made a national radio speech on October 1, 1937, in which he admitted that he had at one time been a member of the Klan, but vigorously denied that he had ever subscribed to any of the principles of the Klan.

Now, the point I am trying to make, Judge, is that I am afraid when many of the people write articles and when many of the people make statements, they do in fact forget history. And I would hope that before these hearings are over, I can give you statements made by other members who are now on the Supreme Court of the United States that will be far, far more shocking than the remarks that have been made about Justice Hugo L. Black. And I would suggest that for many of those who will testify, who will testify against your nomination, they had better prepare themselves to admit that man in fact, in a changing social atmosphere, not only does logically and honestly change his mind, but he has to change his mind and he has to change it based on our society. I must admit that, and I have used it quite frequently, it is a very good thing they do, because we have had to pull an awful lot of people kicking and screaming into the twentieth century.

Justice Carswell, there was some conversation yesterday about the case of *Ida Phillips* v. *The Martin Marietta Corporation*. You did not hear that case, did you?

Judge CARSWELL. I don't recall the particular case at the moment, Senator. Could you give me a little bit better reading on it?

Senator COOK. It was a case that was heard before Judge—is it Gewin?

Judge CARSWELL. Judge Gewin.

Senator COOK. It says "The petition for rehearing is denied and the Court having been polled at the request of one of the members

of the Court and a majority of the circuit judges who are in regular active service not having voted in favor of it." This was pursuant to rule 35 of the Federal Rules of Appellate procedure, Local Fifth Circuit, rule 12.

The rehearing en banc was also denied.

Now, in this, when the judges were polled, did all of the judges receive an entire copy of the record? If you recall?

Judge CARSWELL. Senator Cook, I just don't know in that particular instance. I would assume that the normal procedure was followed and the workings, inner workings of the court in this regard were just a pure administrative matter of mailing papers back and forth between the officers. The judges lived in different cities. The routine procedure in this is to send around what we call a pink slip procedure, calling attention to the fact that there may be a desire to reexamine an opinion. That would be a request for an en banc hearing. It does not necessarily mean that the opinion is under attack or that the judge requesting an en banc is absolutely committed and has made up his mind that it is to be changed or wants it changed, or that he even wants to dissent about it.

It is a mechanical procedure, sending out a notice to fellow judges on the bench, something as a warning to the effect that something about this disturbs me, I want to hear a little more about it, want to know something more about it. It may mean that this is a terrible opinion and I certainly don't want to be associated with it and I wash my hands of it, that sort of thing. That doesn't necessarily follow in every instance.

Senator BAYH. Would the Senator yield just for procedure here, please?

Senator COOK. Yes.

Senator BAYH. In other words, it is possible for a judge who votes in favor of a case or to sustain a position to ask for an en banc ruling, which could only have the effect of overruling?

Judge CARSWELL. No, Senator: that isn't what I said and that is not what I meant to say and that isn't the import of my words at all. What I meant and repeat is this—any judge sitting on a large court, and by the way, I am a member of the largest Constitutional court in the world, they tell me. We have something like 15 judges now. The judges sit in panels of three, the case we are talking about here is a case on which I did not sit on the panel.

Senator COOK. You did not?

Senator BAYH. The case I called to your attention was brought to my attention personally, which I brought to your attention 2 days ago, so you were warned it was going to come up.

Judge CARSWELL. Certainly.

I would like to complete my remark to this extent and only to this extent: A judge who votes for an en banc hearing is not voting to overturn a panel decision if it has been published. It merely means, only means, I want to take a better look at this thing, let's have another hearing on it. There is something about it obviously disturbing. Maybe some of the language, maybe some of the dicta that had nothing to do with the crucial issue, but it may come out later in a confusing manner in other instances; it may be cited as a precedent in a peculiar context. So this is a standard judicial procedure that I am sure is followed by

every court in the country. I don't think there is a judge in the country who has ever approached a hearing or a vote for an en banc hearing on any other basis. To do so is to commit yourself before you ever have the hearing.

Certainly I never voted for an en banc hearing with a firm conviction that I was going to go the other way. Although sometimes, you may be sure you are in sharp disagreement with the opinion. It might be that, but isn't necessarily that. That is all I am saying.

Senator BAYH. I appreciate that.

Senator COOK. The problem in this case involves a woman with two children and the Martin Marietta Corp., who had a rule that she could not be employed if she had some children. And you have been accused of being against women, which is an odd sort of thing to be said about men.

But the point I am trying to make is you did not sit on this case at all? You did not hear it?

Judge CARSWELL. I recall the case now that you have given me the facts and the context of it. Yes, this is the one Senator Bayh mentioned yesterday.

I was not on the three judge panel that heard the arguments in that case. Also, there were two of those judges who saw it one way under the particular facts of that particular case and wrote an opinion, one judge dissenting and asking for an en banc, again, calling upon his brother judges, of whom there are a dozen others, to take a look at it and see whether you think it should be overturned or not; Is there something here so bad about this opinion that you think it should definitely be overturned? Based upon those facts and upon those conditions, then the judge voted and I voted to sustain the two judges who had voted as they did; that is to say, I voted that it wasn't necessary, as far as I was concerned, to have an en banc hearing.

Senator COOK. But this does not preclude this case from being appealed?

Judge CARSWELL. Certainly it doesn't.

Senator COOK. This is the point I wanted to make in regard to the comment.

Judge CARSWELL. You mean appealed to the Supreme Court?

Senator COOK. That is correct.

Judge CARSWELL. Why, certainly not.

Senator COOK. Mr. Chairman, I believe that is all.

Senator ERVIN (presiding). Senator Griffin?

Senator GRIFFIN. Has Senator Scott had an opportunity?

Senator SCOTT. If Senator Griffin doesn't mind, I have only about two questions. Is that all right?

Senator GRIFFIN. Certainly.

Senator COOK. If the Senator would yield just a minute I would like to put this case in the record to show Judge Carswell's participation in it. It is listed as 416 Feb. 2nd, page 1257. It is the case of *Ida Phillips* v. *Martin Marietta.*

(The case referred to appears in the appendix.)

Senator SCOTT. Judge Carswell, yesterday a question was asked as to whether your decisions would be in support of the Constitution. I take it that includes the Bill of Rights. While I was here, I don't recall whether that question was ever broadened to go into that matter of

your philosophy a little more. In addition to your answer, that was entirely satisfactory to me, that you would indeed support the Constitution and your concept of the construction of it, may I ask if that also extends to support of the precedents of the Supreme Court so far as they are applicable and to other precedents of other courts where they have become precedents by virtue of not having been carried through to the Court of last resort?

Judge CARSWELL. My answer to that would be yes, Senator. This is what I was trying to say yesterday. Perhaps I didn't get it over as clearly as I would like to in one regard. I paraphrased what now Mr. Justice Stewart said when he was before this committee in a similar role. He was asked a similar question, and he responded, and I am paraphrasing as I read it at the time in the press. I wasn't here. I haven't looked at the transcript of the record, for that matter. But in any event, he made a statement in his context to the effect that no, he didn't want any Senator there to vote for his confirmation with the idea that he was going on to the Supreme Court to overturn all the precedents of the Court and to rewrite the Constitution. I would answer you in that same manner.

Senator SCOTT. Yet, of course, there are times and conditions, such as in the famous ancient case of *McNaughton*, where subsequent court interpretation may quite properly, in my view, bring about a different approach to this question of insanity, for example, that was involved in that case.

Judge CARSWELL. No question, that and many other areas.

Senator SCOTT. So the Court is indeed a growing and expanding body.

Judge CARSWELL. It is indeed. The law is a movement, not a monument.

Senator SCOTT. Something has been said about whether or not judges are bound by stare decisis. That is a very broad question, but would you care to comment on it, what you think of stare decisis?

Judge CARSWELL. I think what I said yesterday within the context of strict construction-loose construction, and reading the scale from one to the other. There is a little bit of the same play here, Senator Scott.

We start, of course, with the plain words of the Constitution, with the precedents that are imprinted upon them by the decisions, by the reading we get from the Federalist Papers and all the history that surrounded the adoption of that great instrument. We take the cases that have been decided throughout the courts, we put them all in. In the human mind—and judges are human, they are not computers, they fall in upon the mind for a decision based upon the particular facts in that case or controversy in that regard. This is where I referred to tract entitled "The Nature of the Judicial Process."

Senator SCOTT. Cardozo?

Judge CARSWELL. Justice Cardozo. It is a small tract, not any great tome, but it is a fine, explicit attempt to define what really goes on in a man's mind when he is called upon to make these decisions.

Am I responsive? I hope to be.

Senator SCOTT. Not only responsive, but I thought your answer may have shocked some in the audience by establishing that a southerner can also be a scholar. I was appreciative of that.

Judge CARSWELL. I apologize if I caused any problem.

Senator SCOTT. One other question. I had expressed some concern in another matter with reference to another judge on the question of following such important landmark precedents as *Brown* v. *the Board of Education*. I did not feel that dissents were really justified in the lower courts which appeared to be definitely against that decision when the lower court case again appeared to be on all fours with it. The support of *Brown* v. *the Board of Education* as a standing precedent of the Court does not give you any concern, does it?

Judge CARSWELL. No, sir.

Senator SCOTT. That is all I had.

Senator GRIFFIN. Judge Carswell, as the most junior member on the minority side, I find that almost all of the questions I had intended to ask, have already been asked.

Judge CARSWELL. Senator, that has been my role on my large court. I sympathize with you.

Senator GRIFFIN. I do want to say that I have been very pleased and impressed by your responses. I have had an opportunity to review the financial information you furnished to the committee. And I have had an opportunity to read a few, but not all, of your opinions as a judge. Frankly, I must register my disagreement with those who criticize your opinions by comparing them to a plumber's manual or by indicating concern because your opinions are concise and to the point.

While some Senators may be unable to comprehend that wisdom and sound judgment can be expressed succinctly and briefly, I want to assure you that there are other Senators who think it can be done, and who admire greatly those who have the ability to do it.

You have made an impressive appearance before the committee to those who, without looking at your record very carefully or listening to your answers, seek to dismiss your nomination by using such words as "mediocre," all I can say is that so far as I have been able to determine, I believe the Nation could use a lot more of your kind of "mediocrity"; obviously that is intended as a high compliment.

I believe you have demonstrated before this committee that you are a scholar of law; and that is demonstrated by your opinions. I say that even though I would not agree with each and every one of them.

There is one area of concern which has not been touched on as yet that I would like your views on. There was some reference made yesterday in a discussion with Senator Hart about the doctrine of separation of powers. At that time you made it clear that you thought there were limits concerning the extent to which the Supreme Court should infringe on the powers of the legislative branch.

There has been some concern on my part and on the part of some other Senators—and may I say on the part of justices of the Supreme Court and others over the years—that from time to time, sitting justices have not only perhaps infringed on the legislative branch but have involved themselves in the activities, functions, and decisions of the executive branch. Justice Stone, for example, was called upon several times to perform what were essentially functions of the executive branch. As is well known, Chief Justice Warren served as head of the Warren Commission to investigate the slaying of President Kennedy. And there has been a number of other instances from time

to time when Presidents have called on the members of the judiciary to perform what are essentially executive functions and make executive decision.

As you know, it was alleged that Mr. Justice Fortas participated so actively in executive branch decisions that it got to the point where it was almost a day to day advisory function, very similar to the function the Attorney General might perform. Would you give us your views concerning the appropriate roles members of the Supreme Court might play in extra-judicial activity?

Judge CARSWELL. I certainly am in accord with the view that the members of the Supreme Court have quite enough to do, I think, and have the constitutional responsibility to attend to their affairs under the Constitution in the judicial branch of the Government without chores or responsibilites in the sensitive area of executive decision. I don't make this, however, with any criticism of anyone who has been called upon by any President to perform any service that might not be strictly within the bounds, the limits of the work of the Court if it became of any national significance. I certainly have no thought or idea that this President who has nominated me would ever call upon me to do any such thing. I only met the man one time and shook his hand in 1954.

Senator GRIFFIN. Would it put you in a difficult position however, if he should call upon you at some time?

Judge CARSWELL. No, sir, I don't think this would put me in a difficult position with this President or any other President. If the nature of the request were such that—can't conceive what it would be. But certainly the President of the United States, I think, must, have the overall responsibility; if some statement needed to be made, something of this nature, something of a purely noncontroversial matter. Certainly it should be in the field of the law. I can't conceive of any specific—but say an eleemosynary type of thing. Something of this nature just happen to come to my mind. Certainly a judge should be a good citizen. He certainly shouldn't be a campaigner or politician. He certainly shouldn't be an adviser to Presidents on matters of crucial decision.

Senator GRIFFIN. Should or shouldn't?

Judge CARSWELL. Should not. I get into a little trouble. This is a southerner's problem. We say shouldn't when we mean should not. Should not be an adviser in the sense that you are referring. I subscribe fully to that thought and that is my view. It would certainly be a remote possibility that it would occur.

Senator GRIFFIN. I appreciate that. The doctrine of separation of powers is a very important part of our Government, and I think those appointed to the Supreme Court should exercise great restraint in the temptation that might be offered from time to time to breach that line.

I have no further questions, Mr. Chairman.

The CHAIRMAN (presiding). Senator Burdick.

Senator BURDICK. Mr. Chairman.

I also welcome you to the committee.

We don't enjoy the privilege of the separation of duties here in the Senate. We have more than our share of duties and as a result I missed the first part of this session.

I was interested in what Senator Scott had to say in asking you about the stare decisis. I know that yesterday you said the Supreme Court was not a continuing constitutional convention. To what extent has the decision been made to form a firm body of law, in your opinion? A firm body of the law?

Judge CARSWELL. Will you repeat your question? I am not sure I understand.

Senator BURDICK. To what extent, based upon the Constitution and based upon the decisions rendered upon the Constitution, has the law been firmly established in your opinion, so that in certain areas, such as in the *Brown* case and other cases, this is the rule of law today?

Judge CARSWELL. I am hesitating only because that obviously is a very difficult question to answer. I really could answer it best, I believe, by repeating what I said yesterday, and I think it pretty well covers it.

There is certainly an area, inevitably, where a judge, no matter how much he knows that he is not sitting for the purpose of rewriting the Constitution, must decide the case. In individual cases and controversies that arise under the individual facts and circumstances of a particular case, there just may well be, and frequently is, Senator Burdick, a gap in the statutes, a hiatus of sorts, where the judicial function and the judicial process inevitably requires the gap to be filled, because action has to be taken and rights determined. It is a new situation. It is a different situation. It is a many splendored thing in this regard. Therefore, I cannot unequivocably, flatly respond by saying that this is forever more established and nailed to the wall as the law of the land and we will never look at it again. And this is not. It is open to inspection.

The Nation itself is in such a process of change, constant change. We all, not only people change, but conditions change. Our society itself has absolutely changed in some aspects since the adoption of the Constitution. Yet it has been a marvelous instrument that has allowed us to live and to breathe under it and to make progress under it. Hopefully, we will continue this progress for another 200 years.

I am not trying to give you a broad speech on this subject because I don't know any other way to answer it than that. I hope I am being responsive.

Senator BURDICK. Do you give any particular weight to the type of decisions, let us say unanimous decision as against the 6–3 decision, or a 5–4 decision? Do you give it any quantitative weight?

Judge CARSWELL. I think any judge recognizes that a 5–4 decision isn't quite as solid as a 9–0 in any context. It is the law, it states the law, but we obviously recognize that there is an area of great dissention and controversy on that particular point, whatever it may be. That would be a factor, yes, sir. I think I would have to answer that yes.

Senator BURDICK. In such areas as covered by the Brown decision and some other areas, at the present time, at least, in your opinion, the law is pretty well set in that area.

Judge CARSWELL. I don't think there is any question about it.

Senator BURDICK. That is all.

The CHAIRMAN. Any further questions?

Senator ERVIN. Maybe I could make an observation that might shed some light on when a judge has to fill in what Justice Cardozo

called the indecisiveness of the law in his little book on the judicial process. When I had the privilege of serving on the North Carolina Supreme Court, we had on one conference two cases for consideration. One involved the will of a virtually illiterate woman who was like Maud's Mother in that her nouns and verbs didn't agree. When she had a verb, she didn't have a subject, and when she had a subject, she didn't have a verb. Justice Denny, one of my colleagues, wrote an opinion clarifying the will, and I wrote a dissent and I maintained that it was a very good will he had made for the lady but that he made it after her death.

At the same time, I had written an opinion for consideration at the same conference interpreting a provision of our workmen's compensation law. There the legislature had done about like the woman did in writing the will. Where they had a subject, they didn't have a predicate, and where they had a predicate, they didn't have the subject. And I had to ascertain the legislative intent. So I wrote an opinion making clear that which the legislature had made very ambiguous. And since both Judge Denny and myself had tendered opinions in the will case, the court had to vote which one it was going to adopt. So four of them voted to adopt Judge Denny's and three of them voted to adopt mine which made mine the dissenting opinion. I thereupon told Judge Denny that when this conference adjourns, I am going to tack up a sign on your office door.

He said, What are you going to say?

I am going to say, "post mortem wills a specialty."

Then Judge Denny said, If you do that, I am going to tack up a sign on your office door, and my sign is going to say "legislative repair shop now open for business."

The CHAIRMAN. Any further questions?

Senator ERVIN. I have one question somewhat brought to mind by Senator Burdick's question.

I have thought several times of that question myself, as to what decisions you are going to accept as bad ones, the interpretations of the Constitution or the statute? The best rule I have ever found to guide me was one that was stated by Judge Learned Hand. He was speaking at a memorial service for one of his colleagues to the Circuit Court bench of Judge Thomas Swann. He said that Judge Thomas Swann had devised this rule for his own guidance, that he should always accept the previous decision and never overrule it unless he reached the conclusion that the decision was untenable when it was made. And he said Judge Thomas Swann also said that even in cases like that, he was very reluctant to overrule the decision if a very solid foundation of case law had been based on that decision. In that case, he thought it was well to leave it to the legislative power to correct the law.

I think Justice Brandeis entertained that view, because he says it was sometimes better for the law to be settled than for it to be settled right, because a law must have stability. It must have stability if it is going to furnish worthwhile rules for the guidance of the conduct of the people and the conduct of the court.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Judge, you have been very patient. I wanted to talk about this en banc opinion again. I don't want to belabor that

case. I am unfamiliar with the en banc procedure, never having had the privilege of sitting on the bench. And I don't want to put words in your mouth. But is the effect of an en banc decision in which all of——

Judge CARSWELL. En banc decision or en banc request for an en banc hearing?

Senator BAYH. Let's say the effect of the refusal to hear en banc, which I understand was what this was. Is the effect of that to sustain the decision of the panel?

Judge CARSWELL. On that particular case and those particular facts, that is true.

Senator BAYH. And the interpretation of the particular law in question?

Judge CARSWELL. Yes, sir; to sustain the majority of the court that rendered that opinion. Although in that particular case, I was not on the panel that wrote the opinion or heard the arguments. I don't disassociate myself from it because I voted with the majority of the court to deny the petition for rehearing. Obviously, if you were disturbed about it, you would have voted to hear some more about it. The majority of the court wasn't that disturbed about it and did not so vote. I didn't mean to leave any other impression with you about that. There is no question about that.

Senator BAYH. Obviously, a person doesn't make that decision lightly. You have a chance to——

Judge CARSWELL. Senator, I hope I don't make these decisions lightly in any regard. It is a busy court, extremely busy.

Senator BAYH. I don't want to put too much significance on that particular policy or that particular procedure. That is why I want to make absolutely certain what we are involved in. I brought it to your attention that some concern had been expressed to me earlier when we first visited the day before yesterday. The Senator from Kentucky brings it up again today. I want to make absolutely sure what the effect of that vote up or down was or would be.

Judge CARSWELL. Yes, sir.

Senator BAYH. Now, I think I speak for everybody on this committee when we hope to be able to have a chance to vote for you. Yesterday I was assuming you would be confirmed. The big problem is this 1948 statement, which I think you recognized as a problem, because you repudiated it rather unequivocally.

Judge CARSWELL. I hope so.

Senator BAYH. Now, I asked you yesterday at what time your thoughts began to change and I think you suggested that this was a sort of process. I thought the answer yesterday was a very good one. I think part of this process causes us to look with a great deal of particularity at each step along the way at which a change might be in evidence. That is why, yesterday, two or three of the members of the committee asked questions rather repeatedly, I think, as I look back over the record, relative to this country club situation. I would like to just make sure where we stand on that.

Judge CARSWELL. All right.

Senator BAYH. Can you repeat very briefly, not to belabor this, but repeat very briefly your involvement in and participation in that club? As I recall, you said a fellow named Smith brought this to your attention. He is the only one you talked to?

The CHAIRMAN. Senator Bayh, we have here Mr. Proctor, who has all the records. I am going to put him on following the judge's testimony.

Senator BAYH. I think that is fine. Now, could we just have this answer.

The CHAIRMAN. Yes.

Judge CARSWELL. Let me get one thing straight about that. I said then and I say now that the only conversation I recall having had with any human being about this incident in 1956 is they wanted money to get a club; $100 was paid. I signed a paper of some sort that designated me as—I don't recall. The papers speak for themselves, whatever it was designated was there. I never attended a meeting with a human being about that matter. That is all there was to it. I recall that I thought, trying to be completely candid, that I had talked to a friend of mine in Tallahassee, whose name is Julian Vareen Smith. There has been some confusion. Somebody else thought it was Julian C. Smith. There are two of them in Tallahassee.

The CHAIRMAN. Do you know both of them?

Judge CARSWELL. Yes, but I know Julian C. Smith casually and I know Julian Vareen Smith quite well. He is the one I think with whom I had a conversation. I don't even remember talking to him since this has come up. I don't intend to. That is all there was to it.

This was a defunct outfit that went out of business. I now understand, I have been given to understand, by the papers brought up here from Tallahassee for the full inspection of this committee. We never functioned at all. This group went defunct and that is why I got my $76—not $75, but $76—back in February 1 of the next year. The corporation that actually took title to that property was an entirely different corporation that I never was on in any way at all. I think the records will show that I was a member of that club only actually for 3 years, 1963 to 1966, when my boys wanted to play golf and we even dropped out of that because it was too high a stipend; they would rather pay the greens fee than the full club dues and we used the club very sparingly.

Senator BAYH. Yesterday, as I recall, you said the purpose of this, to your knowledge, was to build a clubhouse?

Judge CARSWELL. Clubhouse or club facilities. I suppose they had in mind a swimming pool, tennis courts, the usual things.

Senator BAYH. Since you have looked at the documents, I suppose——

Judge CARSWELL. Senator, I have not looked at the documents. I didn't mean to leave that impression with you. The documents speak for themselves. I couldn't begin to tell you what the documents say.

Senator KENNEDY. Mr. Nominee, I think the document speaks for itself in terms of the incorporation of a club, a private club. Given the set of circumstances, the fact that there were fears of closing down of 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 yesterday is whether the formation of this club had as 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

$100 to repair of a wooden clubhouse, 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 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, unequivocably 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?

Judge CARSWELL. I certainly could not speak for what anybody might have thought, Senator. I know that I positively didn't have any discussion about it at all. It was never mentioned to me. I didn't have it in mind, that is for sure. I can speak for that.

Senator BAYH. Were there problems in Florida relative to the use of public facilities and having them moved into private areas——

Judge CARSWELL. As far as I know, there were none there and then in this particular property that you are talking about.

Senator BAYH. You weren't 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 discussion 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.

Senator BAYH. You were aware that the Supreme Court had previously, sometime before that, come down with an order prohibiting this type of thing?

Judge CARSWELL. Yes, sir; I am aware of the decision of the Supreme Court.

Senator BAYH. Well, I don't want to dwell on this at length, but I think we need to nail down that Judge Carswell has, after that one intemperate statement, been involved in a steady sequence of events which tend to repudiate it; and it concerns me, very frankly, for you incidentally to be involved at the time you were district attorney in the incorporation of a club at least some of the members of which have made public allegations that the purpose of this was to avoid the integration order which had been previously set down by the Supreme Court of the United States and which, 1 month after incorporation, was ordered relative to another court in Pensacola, in your own State. This concerns me. You had no knowledge of this *Pensacola* case, because it came down a month afterward. But one has to wonder if the district attorney wasn't aware that this activity was going on in the State of Florida.

Judge CARSWELL. Certainly, I was aware, Senator, that these things were going on. But you will find, and I think the records will show—I have not examined them, but I am positive that I have never been any incorporator, director, whatever the language may be on there, I have never participated in any corporation that ever took any action

with regard to anything. When that final incorporation was made, I was not any part of it at all. This was a purely defunct thing that went completely out of existence.

Senator KENNEDY. It went out of existence, but the question, I think, comes down to whether you were a part of it when it went into existence.

Judge CARSWELL. Not when it took any action, Senator. I think the record will have to speak for itself in this regard.

Senator KENNEDY. When you become a subscriber, as the article says, a director and subscriber—I am reading right out of article 8 of the incorporation—it says "the name and post office address of each director and subscriber" the number of shares of stock, and then it lists a number of names, of which yours is one—did you have any idea that that private club was going to be open 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 $100 to build a clubhouse and related facilities if we could do it. It didn't work, so I got out of it and—I did join the club in 1963 as a member.

Senator KENNEDY. When you signed 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. What was the practice at that time? You must have had some thought whether individuals whose skin was black could join that club or not?

Judge CARSWELL. Sir, the only time in my life I have been a member of a country club was a period of 1963 to 1966 anywhere. I have not been preoccupied with examining the country clubs' policies. I had nothing to do with it. I don't mean I wasn't aware of—there certainly were many places in this country, not only in the South but many other areas, where there have been discriminatory practices. But this did not enter into anything whatever with this.

Senator BAYH. Did you say 1963 to 1966 or 1953 to 1958?

Judge CARSWELL. I said the only time I was a member of a country club anywhere, as far as I can recall, was 1963 to 1966.

Senator BAYH. Then in the period during which you were a subscriber here, the matter of controversy, you were not a member of this?

Judge CARSWELL. We never had anything. It just died. It never was a country club.

Senator BAYH. Let me respectfully suggest that the purpose for the establishment of this organization, whatever it may be called, was not to go defunct. It was to accomplish a purpose.

Judge CARSWELL. I suppose that is a fair statement, Senator.

Senator BAYH. That purpose was to build a clubhouse or run a golf course and in the processes not to have to integrate according to a decision handed down a short time before by the Supreme Court of the United States?

Judge CARSWELL. That was not my purpose, it was never my purpose, I repeat.

Senator BAYH. I am sure of that. That is the way you look at it. The thing that concerns us is the reasonable question that others might doubt that that was the purpose for establishing the whole organization, particularly when you have the—I don't want to pursue this further right now.

Judge CARSWELL. All right.

Senator SCOTT. Would the Senator yield, because I think the amount in controversy here, $76 from $100, that is $24. I may say that is the biggest furor I have ever heard over $24 since the Indians sold Manhattan.

Senator BAYH. May I say to the Senator from Pennsylvania, I have the greatest respect for him, and I don't know if he has followed this line of controversy——

Senator SCOTT. I have followed it and I am well aware the press deadline is noon.

Senator BAYH. I am afraid that statement doesn't become the distinguished Senator from Pennsylvania.

Senator SCOTT. I am well aware it doesn't. I will be glad to withdraw the statement.

Senator BAYH. That is all right.

I might want to say I could care less about the $76. I think we are talking about a broader principle. That is—I think the Senator knows what it is.

Senator SCOTT. I should not have made the statement and I do withdraw it.

Senator ERVIN. I will make a statement now perhaps which I should not make. I am intrigued by the questions by my distinguished friends from Indiana and Massachusetts. While Judge Carswell was a member of the country club during this period of 3 years, approximately, the Congress of the United States passed the Civil Rights Act of 1964—not with my vote, because I was against it. That Civil Rights Act of 1964 provides in express terms that white people can have private clubs from which they exclude black people and black people can have private clubs from which they exclude white people. Every Member of the Senate who resides north of the Potomac River voted for that proposition. I didn't vote for it, but I think that was one of the sensible things in the Civil Rights Act of 1964, and my good friends from Indiana voted for it.

Senator BAYH. That is correct.

Senator ERVIN. Now it came out in the press of Washington several years ago, when we had some questions like this asked concerning a nominee for the Supreme Court, that several sitting members of the Supreme Court of the United States were then members of private clubs in the city of Washington which restricted their membership to white people.

Senator BAYH. Let me suggest, to put the record straight, if I may, that I think we are talking about apples and oranges. On one side we are talking about private clubs that are formed either to have white people in them or to have black people in them. On the other side, we have a public club which is assumed temporarily, at least,

by a private organization with the basic purpose of subverting the law of the land, the 1964 act.

Senator ERVIN. Those have been investigated. Newspapermen who have investigated this have stated in the press that the records show that the city of Tallahassee was running this club at a loss of $14,000 or $15,000 a year, that the city decided to close it down, that the property was sold by the city, just like they had the right and title to sell it and that, therefore, it was no longer a public club but a private one. So I think we are not talking about either apples or oranges, I think we are talking about green persimmons.

Senator KENNEDY. The point of both questions is whether, as was stated by the Senator from North Carolina, the club was closed only because of financial reasons or was in fact closed and this corporation developed with the intention to avoid the law. Now, I think that no one is questioning whether the nominee has a right to membership in an exclusive club. That is not the question. It is this other question which I think is a legitimate line of inquiry.

I have respected and added my applause for what the nominee said in reference to his 1948 statement. I think he was frank and forthright in his comment about his present view on this question. I suppose the only thing we have now to really look at is, as he said himself in his statement, that "there is nothing in my private life nor the public record of 17 years which could possibly indicate" he is a racist, and then it continues on. I suppose the question that comes up now is whether this recent statement is contradicted in terms of his relationship with this club. I think the only thing everyone of us in the Senate or this committee wants to do is get the full facts out on this question, and also the chance to review in some detail his decisions to see whether they are consistent with the 1948 statement or the 1970 statement. I think this is a perfectly legitimate line of inquiry, and hopefully, we will have an opportunity to spend the time, which I don't think many of us have had—I know I certainly haven't—in reviewing the decisions on this question. I think this is certainly the reason why I asked the question.

The CHAIRMAN. Any further questions?

(No response.)

The CHAIRMAN. You may be excused, Judge.

Governor Collins.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

STATEMENT OF LEROY COLLINS, TALLAHASSEE, FLA.

Mr. COLLINS. I do.

The CHAIRMAN. Governor, identify yourself for the record, please, sir.

Mr. COLLINS. My name is Leroy Collins. I live in Tallahassee, Fla., where I was born and raised. I am a former State legislator and former Governor. I am a former director of the community relations service, and former Under Secretary of Commerce of the United States. I helped found the law firm of Ausley, Collins, & Truett, which has had some recognition here in this proceeding yesterday.

Judge Carswell is one of this firm's most distinguished alumni. He is not the only one, however, because we had another one in the room yesterday, and his name is Rev. William Harris. He is the rector of Emanuel Episcopal Church in Alexandria, and I hope some of you have a chance to go out there and hear him. He was in our firm at about the same time Judge Carswell was there. He left the firm to take up the long road for qualification for the Episcopal priesthood. I don't know just what motivated him, whether being associated with that firm gave him a clearer glimpse of the kingdom or whether he came to greater understanding of the need for the redemption of souls. I hope it was the former. [Laughter.]

Senator ERVIN. Anyway, Governor, he preaches the doctrine of redemption, doesn't he?

Mr. COLLINS. He does and does it well, sir. I commend him to you.

I came here to testify in support of Judge Carswell's confirmation. I believe I know this man and I believe him to be qualified to make a fine Justice of the U.S. Supreme Court.

I first met Harrold Carswell at his wedding back in 1944. He was on leave from active duty in the Navy. He had been courting one of Tallahassee's finest, and the wedding occurred there in Tallahassee in that year. He went back to his duty in the Navy and, as this record shows, finished that duty and then went back to law school in Georgia.

After he had finished his law school training and a short time had passed, he came back to Tallahassee wanting to start in the practice of law there. We took him in as an associate at a salary that I think I would be embarrassed to have disclosed in this day of high prices.

I never shall forget the first case he argued. Most lawyers start down our way with cases in the justice of the peace court and then they grow and take on cases in the county court and then they go on and take them in the circuit court and ultimately, they arrive at the supreme court. This is the usual evolution of the beginning of a lawyer, training of a lawyer, experience of a lawyer.

But a day or two after Judge Carswell was aboard, I had a matter referred to me from a lawyer in Miami for argument in the State supreme court. It was a criminal case and the lawyer down there thought there was very little chance of securing a reversal. But he wanted us to try. I concurred in his pessimism, but I was willing to try. So I called Carswell in and told him I had his first case to argue, and that it was in the Supreme Court of the State of Florida. Well, instead of causing any fear or heavy concern, I remember how well he accepted the news. His face lighted up and he was ready to take that on right at the beginning of his legal career.

We did go down to the court and both of us argued the case. I thought he did a splendid job. We didn't get the reversal we sought, but we did get one judge to dissent. And he and I since have claimed that that one dissent; in that beginning case, as perhaps our greatest legal accomplishment in the practice of law, or among the greatest at least.

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 ever known. He is a delightful man to be around in every sense.

While he was in this firm that he organized on his own, he and I took different political roads. He took off with General Eisenhower for President of the United States and I was for Governor Stevenson. I mentioned this fact yesterday to one of my good Republican friends, and he said, well, you see where he has landed now and where you have. [Laughter.]

Well, I was sincere in my conviction and I have continued to be proud of everything I have done under the banners I have followed and I am sure he has the same feeling about his own record. We have continued, with it all, to be very fine friends and companions from time to time as well.

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. There was the discussion of possible influence in cases before Judge Carswell by former clients. And this seems to me to be very remote. In the first place, he was not on the court until 5 years after he had terminated all lawyer-client relationships.

Second, there is nothing to show that any litigant has ever complained of anything like this.

Also, there is nothing to show that any lawyer has ever complained of any possible danger in this, or that any grievance committee action has ever been suggested involving any impropriety in any action that this judge has ever taken. And certainly should not a man of Judge Carswell's public record be presumed to have followed the narrow path of judicial purity absent a specific showing of contrary conduct? I think so.

Now, Senator Bayh, you brought out the story about the alleged secret oath, and I don't blame you. If I had been where you are, I would have brought this out, too. The idea, even, of a prospective judge swearing that he would not hold an act of the Congress unconstitutional, thus abdicating his responsibility to support our constitutional concept of separation of powers, is highly repugnant to us all, including Judge Carswell. I think he made this very clear in his denial which was supported by the statements of the chairman of this committee.

But most of the complaints aired yesterday and some here this morning have centered around the racial question. There was the

question of the Tallahassee country club. Now, I don't know all of the facts and I understand there is a special witness who will be able to present those to this committee. I do know from faint recollection that I was involved, maybe in a way similar to Judge Carswell's involvement; I don't know about that. I don't play golf, either. I never have.

But since the judge denied that he played golf and now I have denied it, I don't want you to get the impression that we don't raise good golfers down our way. In fact, Bert Yancey, who won the Bing Crosby Open last Sunday, was raised on that same golf course that we are talking about. We are very proud of him. His father was city manager of Tallahassee there some 20-odd years. We have a lot of other people who like to play golf.

My recollection is very hazy. Some of the newsmen came up to me yesterday afternoon and were asking me some questions about this, and I said to them that I did recall that in the beginning of that issue of changing the ownership of the Tallahassee country club there were a lot of people who felt that racial discrimination was part of the motivation. And, as I recall, that is true.

Now, I think all this started back around 1952 or 1953. This is a period that I was thinking in terms of. Whatever this was, it became rather settled down and I know some time later—I don't know what the dates were, but there was a movement developed in the community to help the country club expand its facilities and be able to better entertain visitors. You know the usual arguments that are made to the people they usually go to for support for this kind of project.

They came to me and I know that I agreed to give $100. I think several hundred people in town did that, including our most distinguished citizens, I suppose. But you will get the facts on that a little later.

I never did go out and play golf. I was trying to meet what I thought was some civic responsibility when I subscribed. I think my wife did say at the time, too, that she thought it would be well for us to be able to go out there and enjoy meals and to take friends out there from time to time.

Anyhow, when I left Tallahassee to come up to Washington, which I did at the beginning of 1961, I offered my membership to be returned. I had used it very little and somebody, I don't even remember who, bought my membership and repaid to me substantially, if not all, that I had originally advanced.

Then there was the 22-year-old statement from the Georgia campaign that was talked about a great deal. I don't know any stronger terms the judge could have used in stating his own disavowal and abhorrence for the sentiments expressed.

Senator Tydings, I think, was very right in pointing up the offensiveness of such sentiments to most Americans of all sections of the Nation, black and white alike. And we can never—and he can never—expunge this from the record. Judge Carswell or Justice Carswell will be living it down all the days of his life, I suppose. But Judge Carswell, gentlemen, is no racist. He is no white supremacist. He is no segregationist. I am convinced of this and I feel sure that most, if not all, of you are.

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.

Let me read you just briefly from what Judge Tuttle said, not all of his letter:

I would like to express my great confidence in him—

Speaking of Judge Carswell—

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 justice of the Court of Appeals of the Fifth Circuit.

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.

Back in January of 1942, the late Senator Scott Lucas put in the Congressional Record a story from the New York Times which was published on January 11, the day before. This record is entitled, "Immortal Words of Famous Americans." I don't know how or when I put it in a file, but I did and I ran across it the other day. It was very interesting to me to go back over it. Here the New York Times, about a month after Pearl Harbor, I suppose being aroused in a patriotic sense itself as a great publishing company and aware of the fact that it was a time when the country needed to be aroused patriotically, scanned the literature of our Nation and came up with a group of statements that had been made about our country that it regarded as especially immortal. There are words here from Patrick Henry, as you would surmise, and Thomas Jefferson, and Abraham Lincoln, and Franklin D. Roosevelt, and Woodrow Wilson, and Longfellow, and many, many others commonly known to all of us.

But there was one statement included that I was not familiar with before. It was a statement by a former Frenchman named Crevecoeur, if I pronounce his name correctly. He was a farmer who came over to this country in the last half of the 18th century and settled in New England. He published a little pamphlet entitled, "Letters from an American Farmer." And included in what this farmer said were these words:

The American is a new man who acts on new principles; he must, therefore, entertain new ideas and form new opinions. From involuntary idleness, service dependence, penury and useless labor, he has passed to toils of a very different nature, rewarded by ample subsistence.

Is not this really the glory of this country, that the American is a new man, that he is capable of acting on new principles? And he must, therefore, develop new ideas and form new opinions. This is part of the soul, I think, of our country; and I think the simple fact that Judge

Carswell has openly professed here as abhorrant what he said in some long ago day, and the fact that his record since so clearly supersedes the old with new ideas and new principles, should provide adequate answer and satisfaction. I think all of us, whether we are serving in the Senate or whether we are serving on the court or any other place, will agree that Lincoln set this issue in good focus with a few words when he said: "I will adopt new views when I am convinced they are true views." I think this is just exactly what has happened in the case of Harrold Carswell.

Thank you very much.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. I have no questions. I just want to commend the excellence of Governor Collins' statement.

The CHAIRMAN. Senator Bayh.

Senator BAYH. 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.

Mr. COLLINS. Thank you, Senator.

Senator BAYH. He has served his State and has had the opportunity to serve his Nation. I have had a chance to work with him in what I felt at the time was a great national cause as far as constitutional amendment was concerned, and I have always found him to be honest and sincere. I would hope that some day, when I have had the opportunity to serve as he has had over a period of time, I could just come close to the record he has made.

Mr. COLLINS. Thank you, Senator.

Senator BAYH. It is a privilege and certainly a tribute to Judge Carswell that you are here. I think you hit on the points that are a matter of concern. I think most of them did given concern and hopefully, they will be all laid to rest.

You pointed out the 1948 statement which was a matter of concern to the judge and I think to all of us. I think you would recognize that at least I would not, and I am sure you will concur that we would not, want to condemn a man for a statement that he made 22 years ago in the heat of a campaign. The issue before us, if we are to fulfill our responsibility, is to recognize that if there is nothing between 1948, the occurrence of the very unfortunate statement, and a repudiation of that statement in 1970, there is a long void there that causes a considerable amount of concern. That is why we are looking for other acts or deeds to show repudiation at an earlier date. Your judgment is one of these acts and deeds, in my analysis. You have known this man, worked with him, and had the chance to become familiar with his thought processes.

Let me deal with one more thing. We cannot go over all the bits and pieces. But let me deal with the founding of this golf course.

Do you recall back when it was being put together, Governor Collins, that there was a general feeling around the State of Florida that at least some people felt they ought to look for ways to circumvent the Supreme Court ruling which prohibited the segregation of public facilities?

Mr. COLLINS. Senator, let me say this before responding to the record. I have nothing but admiration and respect for any member of this committee who wants to delve into and get the details of the background of any man who is before you where you have such a solemn and important responsibility of making a judgment. I don't resent your inquiry or that of anybody else here. And I am sure Judge Carswell doesn't. I think the country generally has awakened to the idea that it is appropriate for more detailed examination to be made than perhaps has been made in the past. This is wholesome, I think. I think these things are in the direction of good government. So I have no resentment at all, and I am sure Judge Carswell and those who want to see him on the Supreme Court, who feel that he is qualified to be on the Supreme Court, are anxious to respond to whatever questions you raise.

I hate to get into this thing because I am not sure of my facts and I think you are going to be made sure of the facts from this other witness, Mr. Proctor, who is here—I saw him. But I do think you ought to think in terms of the context of a long period of time here.

When the talk was first running around our town about changing the country club from municipal ownership to private ownership, I think practically all of this was in that period around 1952 and 1953. I think there were some court decisions back in those days. And I think that this is when the first move was made.

Later on—this move, so far as I know, didn't succeed. And later on, another move was made. In that period of time, it was after the *Brown* decision and all these other decisions had come along, after the people had been better conditioned to legal responsibility and all this sort of thing, and I don't recall any feeling in the community at that later time involving any racial issues. I know if it had been raised there, I doubt very much that I would have given them $100 if I felt that this was motivated by the desire to set up a plan for practicing racial discrimination.

I think most of us at that time thought the law was settled. And I don't know the extent to which black people were permitted to use the club facilities. I frankly don't know that. I used it very little myself.

While I do think it is important to recognize that at one point, you doubtless had a motivation that did involve that, this was before the decisions of the court which clarified the responsibilities with respect to something like that. Later on they made this move, they didn't have any money to improve the facilities, and they made this community-wide civic move to try to get support for it. I got into it somewhere along then, and I got out of it, too. And, apparently, Judge Carswell got into it along that time and he got out of it. Now, I don't know what I was involved in it, the signing of papers or anything of this sort, like apparently he has, from what was said here.

Senator BAYH. I don't want anyone to think it was my thought that anything had been going on previously to this time. I have decided in my own mind the particular significance of this and only after—the chronology of the thing was in November 7, 1955, the U.S. Supreme Court decided a case, *Owen* v. *The City of Atlanta*. In November 1955, the law of the land prohibited this type of assumption of public facility into a private corporation for the purpose of avoiding integration. Then this incorporation that we are discussing at some length here took place on April 24, 1956, the first part of the following year.

At that particular time, there was a case entitled *Augustus* v. *The City of Pensacola*, which was previously before the courts to try to resolve the same problem in Pensacola.

Now, that is the time reference. We do have a statement that was at least in one of the papers, that one of the members who signed this—of course, that motive isn't necessarily attributed to everyone or that they were even familiar with it. Julian C. Smith "It was in the back of our minds that this was the purpose."

Now, do you feel that at that time, to your knowledge, it was not the purpose to subvert the previous Supreme Court decision?

Mr. COLLINS. Well, here again, my recollection is so hazy about this thing that I really hate to talk about it. Judge Carswell had stated his own position and I can't state his for him.

Senator BAYH. If you don't remember——

Mr. COLLINS. I remember I got into it because I was involved in a somewhat similar way, and yet I don't think anybody in my area has a clearer record of nondiscrimination than I have.

Senator BAYH. No question about it.

Mr. COLLINS. My efforts have probably been puny in reality, but at the same time, I have tried to keep an open mind to recognize legal responsibilities and moral responsibilities that are inherent in all of this. And I know the circumstances were such at the same time that I didn't feel that I was doing anything wrong by giving $100 to this club campaign. And I assume that he didn't think he was doing anything wrong.

Senator BAYH. No one has carried a heavier burden under probably more difficult circumstances than you have, Governor.

Mr. COLLINS. I don't think I am on trial here.

Senator BAYH. If I am ever on trial, I would like to have you as a witness in my support.

Thank you, sir.

The CHAIRMAN. Senator Burdick.

Senator BURDICK. I simply want to thank the Governor for his contribution this morning. I think his contribution is excellent.

Mr. COLLINS. Thank you, Senator Burdick, thank you very much.

The CHAIRMAN. We are going to recess when Senator Hruska has finished, until 2 o'clock.

Senator HRUSKA. I have just one brief observation and a few questions. First, it is a compliment to the committee that a man with the national standing of Governor Collins would appear before us and testify as he has.

We are grateful for your appearance.

Governor, a few moments ago, there was reference to the 1948 speech, and then a repudiation of this speech in 1970. Some would wish us to think that these two events are back to back, with no intervening acts or declarations to support Judge Carswell's repudiation. Is it not true, however, that if that speech was made and even if he felt that way at the time, there had been a subsequent, continuous repudiation of it in the life and in the career and particularly in the public acts of Judge Carswell?

Mr. COLLINS. That is certainly true, Senator, in my judgment. I think that he started repudiating that speech within months after that speech was made, and I think in his lifetime activities since that time, that has been well indicated and shown.

Senator HRUSKA. I would think that would show itself in his activities as U.S. attorney. It certainly showed itself in the decisions that he made as district judge and as circuit judge.

Now, in the totality of that career there has been no evidence of anything but a well-balanced and a fair treatment of all litigants coming before him consistent with his duty as a servant of the law. Furthermore, let me call your attention to one other thing, which it seems to me is clear evidence that there had been a repudiation of the opinion expressed in the 1948 speech. That was when Judge Carswell, before the passage of Federal legislation, ordered a revised jury selection system. This was a practice which he initiated in his district court. He, himself, decided that all segments of the population must be represented in the venire. Isn't it significant that Judge Carswell did initiate this practice? If he was a "racist," as has been suggested, he certainly would not have adopted this practice.

In your judgment of the circumstances and of the mores, if you please, of your geographic area of the country, would you say that this act depicts one who was a white supremist or a racist, particularly in light of the fact that there are a lot of minority people in the Northern District of Florida?

Mr. COLLINS. I would certainly say that that does repudiate very expressly and very directly the statement of 1948.

Senator HRUSKA. And doesn't that type of repudiation mean even more than any words that are spoken now or 10 years from now?

Mr. COLLINS. I think so. I agree with your statement about that. And in fact, Judge Carswell was elected by the 28th Federal District judges serving in the fifth circuit to represent them at this conference. And I think the simple fact that he was singled out and selected to represent all these judges repudiates that overwhelmingly.

Senator HRUSKA. Thank you very much for your appearance here and your testimony.

Senator BAYH (presiding). Senator Thurmond.

Senator THURMOND. Mr. Chairman, I just want to say I have no questions of Governor Collins. I would like to commend the splendid statement he has made here on behalf of Judge Carswell.

Mr. COLLINS. Thank you, Senator Thurmond.

Senator COOK. Governor, I would like to say it is not only a compliment to this committee that you are here, but more than that, I think it is an extreme compliment to Judge Carswell. I think there is nothing finer in this country than for people to speak up for other people and for people to espouse the fine characteristics of other people. I may say that in regard to what Senator Hruska said, a 1948 remark, backed up by a 1970 exposure, doesn't mean that there is a void between 1948 and 1970. And I think the real gap that has closed that void has been the decisions that Judge Carswell has made, has been the attitudes that he has had, has been the life which he has lived.

I can only say as a Republican member of this committee who has always had a lot of admiration for you, when I was practicing law, we had a fine association with your law firm in Tallahassee, and we enjoyed it very much. Your bills were a little high. [Laughter.]

Mr. COLLINS. Thank you very much.

Senator BAYH. We will recess until 10 tomorrow.

(Whereupon at 12:10 p.m., the hearing was recessed to reconvene at 10 a.m., Thursday, January 29, 1970.)

NOMINATION OF GEORGE HARROLD CARSWELL

THURSDAY, JANUARY 29, 1970

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:40 a.m., in room 2228, New Senate Office Building, the Honorable James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Kennedy, Bayh, Burdick, Tydings, Fong, Thurmond, Cook, and Griffin.

Also present: John H. Holloman, chief counsel; Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. The committee will come to order.

Mrs. Patsy Mink, will you hold your hand up, please.

Do you solemnly swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. MINK. I do.

STATEMENT OF MRS. PATSY T. MINK, REPRESENTATIVE AT LARGE, STATE OF HAWAII

Mrs. MINK. Mr. Chairman, members of the committee, I thank you for according me this courtesy of presenting my views on the nomination of Judge G. Harrold Carswell to the Supreme Court of the United States. I am here to testify against his confirmation, on the grounds that his appointment constitutes an affront to the women of America. Although women constitute the majority of this Nation, we are still the most neglected and discriminated against group insofar as employment opportunities are concerned. It is for these women that I must speak up today and voice my strong opposition and urge your careful and deliberate consideration of the matters I shall present and which I believe go to the heart of Judge Carswell's qualification to assume this high office.

Too long America has permitted the male dominance of our society to determine the manner in which women are given the right of equal protection of the laws. It should be as self-evident today as it was 50 years ago when women finally won their right to participate in their government, that the Constitution does in fact accord us full and equal employment opportunities. If this was not self-evident, then at the very least the provisions of the Civil Rights Act must be viewed as underscoring the equality of women and their rights to equal job opportunity. No matter with what generosity I review the recent deci-

sion in which Judge Carswell participated, I am unable to find any redeeming evidence in his favor on this most crucial issue.

The Supreme Court is the final guardian of our human rights. We must rely totally upon its membership to sustain the basic values of our society. I do not believe that the addition of Judge Carswell to this Court will enhance this guardianship.

I call to the attention of this committee the appellate decision of *Ida Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257, in which Judge Carswell participated on October 13, 1969, as a member of the fifth circuit court of appeals.

This case of enormous importance to the equal rights for women involved the issue of whether it was proper for a private employer to refuse to hire a woman solely on the grounds that she had preschool age children, where no such disqualification was placed on the hiring of men with children of similar age.

Ida Phillips had submitted an application for employment with Martin Marietta Corp. for the position of assembly trainee pursuant to an advertisement in a local newspaper. When Mrs. Phillips submitted her application she was told that female applicants with preschool children were not being considered for employment, but that male applicants with preschool children were. A complaint was filed with the Equal Employment Opportunity Commission which found that title VII of the Civil Rights Acts had been violated. The plaintiff then filed a class suit in the U.S. District Court for the Middle District of Florida, at Orlando, Fla. The district court granted a motion to strike that portion of the complaint which alleged that discrimination against women with pre-school-age children violated the statute, and refused to permit the case to proceed as a class action. The complaint itself, however, was not dismissed and the plaintiff was allowed to prove her general allegation. The court held that Ida Phillips was not refused employment because she was a woman nor because she had preschool children. The court stated, "It is the coalescence of these two elements that denied her the position."

An appeal was taken to the court of appeals for the fifth circuit. A three judge panel of the court of appeals sustained the lower court. Following this decision, Judge Brown, the chief judge of the fifth circuit, made a request for a rehearing. This petition was denied. Judge Carswell voted to deny a rehearing. In so doing, I believe that Judge Carswell demonstrated a total lack of understanding of the concept of equality and that his vote represented a vote against the right of women to be treated equally and fairly under the law.

Four million working mothers in this country have children under the age of 6 years. The decision of this court which Judge Carswell sustained in effect placed all of these women outside the protection of the laws of this land. The decision stated that if another criterion of employment is added to that of the sex of the person, then it was no longer a discrimination based on sex. It ruled that Ida Phillips was not refused employment because she was a woman, but because she was a woman with preschool age children. Judge Brown in his dissent said, "If 'sex plus' stands, the Civil Rights Act is dead * * * free to add nonsex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example,

all sorts of physical characteristics such as minimum weight, shoulder width, biceps measurement, etc." * * * "without putting on the employer the burden of proving 'business justification' for such distinctions." The court's decision in effect gave sanction to this employer's prejudices that mothers with young children are unreliable and unfit for employment. I believe that this is the very kind of discrimination which the act of Congress sought to prohibit.

The failure of Judge Carswell to even support the request made by the chief judge of the fifth circuit court for a rehearing is an indication of the man's basic philosophy which I find totally unbecoming of a man being considered for appointment to the highest court of the land.

It was Judge Brown's view that irrespective of the correctness of the lower court's decision, the issue was of such fundamental importance that the full court had an obligation to review it. Judge Brown said:

> Court decisions on critical standards are of unusual importance . . . This is so because . . . effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general to vindicate, not individual, but public rights. This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down the standards not only for trial courts, but hopefully also for the guidance of administrative agents in the field, as well as employers, employees and their representatives.

Judge Brown went on to say:

> Equally important the full court should look to correct what in my view, is a palpably wrong standard.

Judge Carswell voted against this role of the court, and I believe demonstrated his lack of appreciation for this most important responsibility of our judicial system, the highest of which authority resides in the Supreme Court of the United States.

The Congress has acted in numerous ways to demonstrate its belief that working mothers with preschool age children should not be deprived of job opportunities by providing for day-care facilities for their children. This provision is the law in the social security amendments. President Nixon committed his administration to the vigorous support of providing more day-care facilities and underlined his support by saying that these centers for young children would offer more employment opportunities for mothers. Yet his appointment of Judge Carswell flies directly against the implementation of this belief. I find Judge Carswell's attitude deeply prejudicial to this whole concept, particularly in that he would not even accord the plea of the chief judge of his court of the fifth circuit for a full court review of this landmark case.

It is not possible for me to dismiss remarks made by Judge Carswell when he was 28 years old stating his irrevocable belief in white supremacy, like white supremacy, is equally repugnant to those who really believe in equality.

Half this Nation are women. I cannot believe that this half of America would vote to seat Judge Carswell on the Supreme Court when he would not vote to allow Mrs. Phillips a rehearing of her case even when that request came from a judicial colleague of the bench. To decide on such writs of review is the predominant work of the Supreme Court. Men who serve on this Court must have a high degree of sensi-

tivity. I would probably not be here today if a rehearing had been supported by Judge Carswell in the *Phillips* case, regardless of the verdict or how he voted. The essential question is his failure to demonstrate even the slightest concern for Mrs. Phillips as a human being, a pauper, standing at the mercy of that court fighting for the rights of all women.

May I conclude, Mr. Chairman, by urging this committee to defer final action on this matter to allow for a full and extensive investigation. I believe that the women of this country deserve this concern. I plead for your favorable consideration of my request.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, ma'am.

Senator Hart?

Senator HART. Mrs. Mink, I apologize for my late arrival. It was at another committee meeting which I was compelled to chair. I arrived too late to hear your statement in full. This is a rather lame response, therefore. Knowing you, I shall read your statement with great care.

I think I would say that with respect to any colleague in Congress, but having served with you on the platform committee, I know that you do not waste time over incidentals. If this is important enough to you, it becomes important enough to be a chore which we should undertake.

Mrs. MINK. Thank you very much, Senator.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Mr. Chairman, it is a great privilege to have Mrs. Mink before our committee.

I addressed a question to the judge yesterday relative to this matter of Mrs. Phillips' problem with Martin Marietta. Have you had a chance yet to explore what the judicial precedents are on the status of this rehearing? The judge yesterday tended to make light of this as a pro forma matter, that it really was not a true test of what he really believed as far as women's rights are concerned. Have you had a chance to explore this matter?

Mrs. MINK. It is a pending matter before the Supreme Court of the United States. It has been taken on appeal. Petition for a writ of certiorari has been filed. It is a matter of paramount importance insofar as equal opportunity rights are concerned in America for women.

Senator BAYH. What I was specifically concerned with was whether this is in fact a true test of Judge Carswell's feeling vis-a-vis women. He led us to believe yesterday that the petition for rehearing was a sort of pro forma matter, that it was really not a significant test. Since that time, the question has been raised as to whether this was a matter similar to a petition for certiorari at the Supreme Court level, or whether it really does get down to the nitty gritty of how the judge really feels. That is what I am trying to determine in my own mind. I share your concern with equal rights and equal opportunities. Have you looked into this?

Mrs. MINK. Yes, I have, and it is the procedural question which brings me here to the committee. As I said in my statement, if he had been a participating judge and had made a decision based upon his having heard the facts and reviewed the law, I probably could not hold against one man, one decision in an area such as this. But it was his failure to evidence any sensitivity toward this issue to accord the

chief judge of the Fifth Circuit Court of Appeals a petition for rehearing on a matter which the chief judge felt was of such fundamental importance. I think that one of the chief responsibilities of the Supreme Court is to have this kind of sensitivity, to be able to interpret what the issues are, to be able to make an intelligent decision as to whether a writ of certiorari should be granted or not. This to me is an important function of the Supreme Court. Yet in a case of such basic importance as the *Phillips* case, he refused to accord even a rehearing.

I think that this is my basic indictment of Judge Carswell, his lack of sensitivity. I find that such a judge, in my opinion, is not fit to serve on the Supreme Court because of his lack of understanding of what women's rights mean in this country and what the Equal Opportunity Act means for the fulfillment of opportunities for women in this country.

Senator BAYH. Then, I take it, your complaint, your criticism of this particular decision goes not to the establishment of a hiring policy that preschool age children might not be a good criterion as to whether a person should be hired or not, but that if it applies to women, it should also be applied to men?

Mrs. MINK. Exactly.

Senator BAYH. Would one also be fair in attaching the criterion that if there were a spouse remaining at home, maybe you could have a different criterion, or is that fair?

Mrs. MINK. I do not believe that the condition of the family should ever be a disqualification for employment. I think that this is what this case was all about. Certainly this woman may have had a mother to take care of her children. There may have been day-care centers to provide for adequate care. I have a bill, which I am hopeful will be enacted into law, which will provide day-care facilities for working mothers to implement what I believe to be the national policy with regard to opening up employment opportunities for women. If this case stands and is the law of the land, then women automatically with preschool age children can be deprived, without any further consideration, except the fact that there are young children at home, be deprived of a job, an opportunity to uplift themselves, to support their families, and to have a decent life.

Senator BAYH. I appreciate your bringing this matter to our attention. I want to look at it more thoroughly. I remember hearing rather persuasive statements from your colleague, Mrs. Chisholm, and from former Ambassador to Luxembourg, former dean of the Howard University Law School, Patricia Harris, both of whom I recall made critical statements that they have been discriminated against more as women than as citizens of the black race. I think this is the kind of condition we cannot tolerate in this country and I want to look at this case with a great degree of particularity and I appreciate your bringing it to our attention.

Mrs. MINK. Thank you very much.

The CHAIRMAN. Senator Fong?

Senator FONG. Mr. Chairman, I wish to welcome my distinguished colleague before us from the State of Hawaii.

Mrs. MINK. Thank you.

Senator FONG. I know Mrs. Mink has been in the forefront of the fight for equal rights for women and I commend her for it. Someone has said that a nation can't permanently remain on a level above the level of its women, and I personally subscribe to that.

Mrs. Mink has brought to this committee a very serious problem confronted by women who have children and who need to seek employment. As she has stated, 6 million women are in that category with preschool children who are seeking employment. We can understand employers not wanting to hire women, feeling that many of these children probably will be neglected, but there is no fear now, because there are facilities to take care of these children. There may be grandmothers and there may be friends to take care of these children. As one who has diligently fought for equal rights for women, I feel that employers should not discriminate against women in such a matter. I think that the body that really can help materially in this matter is the Equal Employment Opportunity Commission. That body should give this matter serious attention and should recommend that something be done. Otherwise, this committee will be forced to look into the matter.

I want to thank you for appearing before this committee and giving us your views and for your fight for women's rights.

Mrs. MINK. I thank you, Senator, for your comments. I appreciate them very much.

The CHAIRMAN. Senator Cook?

Senator COOK. Mrs. Mink, as the father of four daughters and knowing how my household is completely controlled by women, I am very much in sympathy with the remarks that you have made. But with all honesty and fairness, I think there are some things that should go into the record.

First of all, you put a great deal of emphasis on the fact that Judge Carswell did not follow his chief judge. Are you aware of the fact that 10 other judges on the fifth circuit did not follow their chief judge and allow an en banc hearing?

Mrs. MINK. Yes, I am well aware of that, Mr. Senator. But the other nine are not up for appointment to the Supreme Court.

Senator COOK. Would you criticize the other nine on the same basis?

Mrs. MINK. Yes, I would, if they were here.

Senator COOK. Would you criticize, for instance, Judge Wisdom, whom many people have felt—as a matter of fact a number of people in this room—that if a Southerner had to be nominated to the Supreme Court Judge Wisdom was a person of such temperament and such wisdom and such legal ability that he would withstand all of the tests to be nominated for Justice of the Supreme Court?

Mrs. MINK. I would have the same criticism of all the other nine judges.

Senator COOK. Would you have the same criticism of Judge McGowan, of the District of Columbia as a matter of fact, who was sitting on this case, who went down there and sat on this case as a guest judge?

Mrs. MINK. Yes, I would.

Senator COOK. Let me ask you this: I think your criticism might be well founded if the same things might have occurred. Have you read all of the testimony and all of the record in this case to see whether

the entire opinion was based on nothing but the dissenting opinion of Judge Brown?

Mrs. MINK. I have read all of the printed opinions that are available in the library here in Washington, beginning with the trial, through the appellate level.

Senator COOK. The only printed opinion is the dissenting opinion of Judge Brown.

Senator BAYH. Will the Senator yield?

Senator COOK. Yes.

Senator BAYH. The dissenting opinion of Judge Brown is listed in the appellate record. Congresswoman Mink mentioned that she had read the trial opinion.

Senator COOK. She just said she had not read the trial.

Mrs. MINK. Not the testimony. You asked whether I had read all of the testimony, and of course I have not. But I have read all of the printed opinions beginning at the trial level.

Senator COOK. Are you also aware of the fact, Mrs. Mink, that practically every case that is tried in the federal system, and I stand judged by most of the lawyers in this room, that as soon as a decision is rendered, the first thing the lawyers do is file a petition for rehearing?

Mrs. MINK. In this case, it was not one of the lawyers for either party that filed the petition for rehearing; this was one of the judges of the fifth circuit.

Senator COOK. But a petition for rehearing has been filed?

Mrs. MINK. In this case, it was the chief judge.

Senator COOK. And based on that, the judge wrote his dissenting opinion and circulated it to the judges.

Mrs. MINK. As I read the opinion which contained the dissent of the chief judge, it specifically noted in a footnote that no such petition for rehearing had been filed by either party, but that this was initiated by the chief judge.

Senator COOK. A petition had been filed, as a matter of fact, I think by one of the departments of the Federal Government in this case.

The only point I am trying to make is that I think you are summarily condemning, for instance, such distinguished judges as Judge McGowan, who was a former law partner of Adlai Stevenson, and I doubt very seriously you could accuse him of being against the rights of women. I think you are condemning Judge Wisdom, I think you are condemning Judge Goldberg, of Dallas. Until we read the entire record, other than the dissenting opinion, I think we are going a long way in condemning 10 judges who failed to agree with their chief judge on a matter which was heard at the fifth circuit level, on a matter that, even if it had been heard en banc, would have gone to the Supreme Court of the United States, and the Supreme Court will make that decision. I am just concerned about, as a matter of fact, an en banc indictment of 10 judges because of the dissenting opinion of Judge Brown on a case that will ultimately go to the Supreme Court of the United States anyway. I would have to say this in all fairness.

Mrs. MINK. If the Senator will permit me, I would like to read from the footnote of this opinion which contains the dissent of the chief judge. The footnote says, and I read verbatim——

Senator COOK. I might suggest I have asked for a copy of the entire record and will get a copy of that entire record to you.

Mrs. MINK. If the Senator will permit me to read the footnote. It says—

Presumably because it was amicus only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons, the private plaintiff, Ida Phillips, who has the awesome role of private attorney general without benefit of portfolio or more important, an adequate purse, presumably felt that she had fulfilled her duty when the court ruled. Subsequently, a poll being requested, the Government filed a strong brief attacking the court's decision.

Senator COOK. That footnote still does not obviate the fact that Reese Marshall, who represented Mrs. Phillips, filed a petition for rehearing.

Mrs. MINK. Subsequently, yes.

Senator COOK. Thank you, Mr. Chairman.

Senator GRIFFIN. Mr. Chairman, I am very glad to welcome a former colleague from the House, and one whom I served with on the Education and Labor Committee. Although I have not always agreed with the witness on legislative issues, I have always been impressed with her ability to argue her case, and I think, once again, you have demonstrated that you can argue a case very effectively. I think it is an excellent statement and one that the committee ought to consider very seriously.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, ma'am.

Mrs. MINK. Thank you very much.

The CHAIRMAN. Betty Friedan.

Do you solemly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. FRIEDAN. I do.

TESTIMONY OF BETTY FRIEDAN, NATIONAL PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

Mrs. FRIEDAN. I am Betty Friedan and I am a writer. I wrote a book called "The Feminine Mystique," and I am here to testify before this committee to oppose Judge Carswell's appointment as Supreme Court Justice on the basis of his proven insensitivity to the problems of 51 percent of U.S. citizens who are women, and especially his explicit discrimination in a circuit court decision in 1969 against working mothers.

I speak in my capacity as national president of the National Organization for Women (NOW) which has led the exploding new movement in this country for "full equality for women in truly equal partnership with men," and which was organized in 1966 to take action to break through discrimination against women in employment, in education, in government, and in all fields of American life.

On October 13, 1969, in the Fifth Circuit Court of Appeals. Judge Carswell was party to a most unusual judiciary action which would permit employers in defiance of the law of the land as embodied in title VII of the 1964 Civil Rights Act to refuse to hire women who have children.

The case involved Mrs. Ida Phillips, who was refused employment by Martin Marietta Corp. as an aircraft assembler trainee, because

she has preschool age children, although the company said it would hire a man with preschool age children.

This case was considered a clear-cut violation of the law which forbids job discrimination on grounds of sex as well as race. The Equal Employment Opportunity Commission, empowered to administer title VII, filed and amicus brief on behalf of Mrs. Phillips. An earlier opinion of the fifth circut filed in May upholding the company was considered by Chief Judge John Brown such a clear violation of the Civil Rights Act that he vacated the opinion and asked to convene the full court to consider the case.

Judge Carswell voted to deny a rehearing of the case, an action which, in effect, would permit employers in the United States today to fire 4 million working mothers who have children under 6. These mothers comprise 38 percent of the nearly 11 million mothers in the labor force today.

Judge Carswell said yesterday in answer to Senator Bayh's question—I was here in the room—that he understood full well—it was not a pro forma matter—that he understood full well the effect of his ruling here.

Now, in his dissent to this ruling in which Judge Carswell with others claimed no sex discrimination was involved, Chief Judge Brown said:

> The case is simple. A woman with preschool children may not be employed; a man with preschool children may. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query, the answer is just as simple: Nobody—and this includes judges, Solomonic or life-tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.
>
> It is the fact of a person being a mother—i.e. a woman—not the age of the children, which denies employment opportunity to a woman which is open to men.

It is important for this committee to understand the dangerous insensitivity of Judge Carswell to sex discrimination. When the desire and indeed the necessity of women to take a fully equal place in American society has already emerged as one of the most explosive issues of the 1970's, entailing many new problems which will ultimately have to be decided by the Supreme Court.

I suppose I am as much an expert as anybody on this explosion, since I seem to bear a major responsibility in helping to unleash it in this country and bringing it to consciousness. I say that it is a matter of historic necessity, almost, that women are today exploding in their belated insistance that they be able to use their rights under the Constitution and move equally in American society, especially in employment.

This necessity is historical in two ways: Biology and the advances in science in this world, in society which man has made, give a woman today 75 years, on the average, of human life. A relatively small proportion of these years now can be spent or must be spent in child rearing and child bearing. So a woman has the majority of the years of her adult human life and most of her human energy to be spent in society. She has no other place to use it. Secondly, the economics of our time have made it a historic necessity for women to move to full equality in society. I speak here now not only of the standards of living of a society of affluence where our demands for bringing up our children

and giving them education require in most instances a two-income family or in the great many instances where women are the sole support, require women to work to pay for what they and their children need; but also, the technology has removed from the home many of the tasks that used to be performed there and those tasks are now done outside in society, from the educating of children themselves to the baking of the bread and the weaving of the clothes. Women, along with others, must pay for these things and must have, in effect, a share of the work in society in order so to pay.

In any event, this explains why, according to Government figures, over 25 percent of mothers with children under six are in the labor force today.

Over 85 percent of them work for economic reasons. Over half a million are widowed, divorced, or separated. Their incomes are vitally important to their children perhaps even more important as a portent of the future is the fact that there has been an astronomical increase in the last three decades in the numbers of working mothers. Between 1950 and the most recent compilation of Government statistics, the number of working mothers in the United States nearly doubled. For every mother of children who worked in 1940, 10 mothers are working today, an increase from slightly over 1½ million to nearly 11 million.

In his pernicious action, Judge Carswell was not only flaunting the Civil Rights Act, designed to end the job discrimination which denied women along with other minority groups equal opportunity in employment, but was specifically defying the policy of this administration to encourage women in poverty, who have children, to work by expanding day-care centers rather than the current medieval welfare system which perpetuates the cycle of poverty from generation to generation. Mothers and children today comprise 80 percent of the welfare load in major cities.

Judge Carswell justified discrimination against such women by a peculiar doctrine of "sex plus" which claimed that discrimination which did not apply to all women but only to women who did not meet special standards—standards not applied to men—was not sex discrimination.

In his dissent, Chief Judge Brown said, "The sex plus rule in this case sows the seed for future discrimination against black workers through making them meet extra standards not imposed on whites." The "sex plus" doctrine would also penalize I submit the very women who most need jobs.

Chief Judge Brown said:

> Even if the "sex plus" rule is not expanded, in its application to mothers of pre-school children it will deal a serious blow to the objectives of Title VII. If the law against sex discrimination means anything it must protect employment opportunities for those groups of women who most need jobs because of economic necessity. Working mothers of pre-schoolers are such a group. Studies show that, as compared to women with older children or not children, these mothers of pre-school children were much more likely to have gone to work because of pressing need . . . because of fiuancial necessity and because their husbands are unable to work. Frequently, these women are a key or only source of income for their families. Sixty-eight percent of working women do not have husbands present in the household and two-thirds of these women are raising children in poverty. Moreover, a barrier to jobs for mothers of pre-schoolers tends to harm non-white mothers more than white mothers.

I am not a lawyer but the wording of title VII of the Civil Rights Act so clearly conveys its intention to provide equal job opportunity to all oppressed groups, including women—who earn today in America on the average less than half the earnings of men—and this discrepancy is worse this year than it was in previous years—that only outright sex discrimination or sexism, as we new feminists call it, can explain Judge Carswell's ruling.

I would recall to this committee the exact wording of title VII of the Civil Rights Act of 1964, which provides that:

(a) It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

These two provisions, of course, clearly cover the *Martin Marietta* case.

At the very least, Judge Carswell's vote in the *Martin Marietta* case reflects a total blindness to the very real problems women face today, in attempting at long last to use the rights guaranteed in the Constitution to assume full participation in American society, which is their necessity as human beings in the 1970's. The blacks until recently could say, with bitterness, that they were the "invisible men" in America, women have lately realized and with increasing vocal bitterness that they are invisible people in this country. And paradoxically, they are invisible as people precisely to the degree that they are too visible as sex objects—defined and used as sex objects to sell every conceivable product by American business, and yet denied the opportunity to earn a decent salary or hold a decisionmaking position in virtually every business or profession in America today.

This is what sexism is all about; this is the heart of it.

Human rights are indivisible and I and those for whom I speak would oppose equally the appointment to the Supreme Court in 1970 of a racist judge who has been totally blind to the humanity of black men and women since 1948 as to a sexist judge totally blind to the humanity of women in 1969.

That racism and sexism often go hand in hand is a fact often pointed out by social scientists, most notably Gunnar Myrdal, in his famous appendix to the "American Dilemma."

But to countenance outright sexism not only in words by judicial flaunting of the law in an appointee to the Supreme Court in 1970, when American women—not in hundreds or thousands but in the millions—are beginning finally to assert their human rights not only as a moral necessity but because history gives them no alternative, is unconscionable.

I trust that you gentlemen of the committee do not share Judge Carswell's inability to see women as human beings too. I will put, however, this question to you: How would you feel if in the event you were not reelected——

Senator BAYH. Would the witness yield for a moment? That is a very dangerous question to put to a panel of U.S. Senators. [Laughter.]

Mrs. FRIEDAN. I am putting it in a sort of rhetorical way, Senator. But I am putting it this way: How would you feel if you were not reelected, and I am putting it that 51 percent of your voters in your States are women and would not feel kindly if you name an outright enemy of women to the Supreme Court, but suppose for whatever reason that you were not reelected and you were then forced to return to the private sector. How would you feel, if when you went back to your State and applied for an executive job of the sort for which you would otherwise be eligible at some company or law firm or university if you were told you were not eligible because you have a child or children, as I assume most of you do?

How would you feel if your sons were told tomorrow, explicitly or implicitly, that they could not get or keep certain jobs if they had children?

Then how do you feel about appointing to the Supreme Court a man who has said your daughters may not hold a job if they have children?

The economic misery and psychological conflicts entailed for untold numbers of American women and their children and husbands by Judge Carswell's denial to women of the protection of a law that was enacted for their benefit are only a faint hint of the harm that would be done in appointing such a sexually backward—and I use that, of course, in the larger sense—judge to the Supreme Court. For during the next decade, I can assure you that the emerging revolution of the no longer quite so silent majority—and that 51 percent who are women are the majority, even if in society, employment, and Government, they are oppressed as a minority—will pose many pressing new problems to our society, which will inevitably come before the courts and indeed will probably preoccupy the Supreme Court of the 1970's as did questions arising from the civil rights movement of the blacks in the 1960's.

I can testify almost with certainty that this is so, by the fact that I have been asked, though I am not a lawyer, merely an expert in this field, I suppose, because I am a leader of this emerging revolution, I have been asked recently by very distinguished law schools, Yale Law School, Harvard Law School, New York University Law School, to lecture to classes of law students on the new areas in the law that are going to emerge as a result of this new second phase of the human rights revolution.

In any event, it is already apparent from decisions made by judges in other circuit courts that Judge Carswell is unusually blind in the matter of sex prejudice and that his blindness will make it impossible for him to fairly judge cases of sex prejudice that will surely come up.

Recently courts have begun to outlaw forms of discrimination against women long accepted in society. The Fifth Circuit Court of Appeals—convened as a three-judge court without Judge Carswell—on March 4, 1969, in *Weeks* v. *Southern Bell Telephone* ruled that weightlifting limitations barring women, but not men, from jobs, were illegal under title VII. The Seventh Circuit Court of Appeals, on September 26, 1969, in *Bowe* v. *Colgate Palmolive Co.* ruled that, if retained a weightlifting test must apply to all employees, male and female, and that each individual must be permitted to "bid on and fill

any job to which his or her seniority entitled him or her." Separate seniority lists for men and women were forbidden.

The Ninth Circuit Court of Appeals in *Rosenfeld* v. *Southern Pacific* 293 F. Supp. 1219 (C.D. Cal, 1968) decided in favor of a woman employee by ruling that California's statutes relating to hours and weight-lifting were unconstitutional under title VII of the 1964 Civil Rights Act.

In the area of criminal law, the case of *Daniel* v. *Pennsylvania* 210 P Super 156, 232 A. 2d 247, 255 (1968), it was decided that women could not receive a punishment of up to 10 years if the punishment a men could receive for the same crime is limited to 4 years in prison.

A list of a few existing instances of discrimination against women, all involving Government action, and all already involving law suits or about to involve law suits, where my organization has been asked to intervene as amicus, law suits maybe going up, I would imagine, to the Supreme Court in the next few years, follows. It goes without saying that most of these examples would arouse the fury of any sensitive human being, much less a human being that you are considering for nomination to the Supreme Court.

1. In New York City, male, but not female, teachers are paid for their time spent on jury duty.

2. In Syracuse, N.Y., male, but not female teachers are paid for athletic coaching.

3. In Syracuse, an employer wants to challenge the rule that forbids her to hire female employees at night in violation of New York State restrictive laws.

4. In Pennsylvania, a woman has requested help in obtaining a tax deduction for household help necessary for her to work.

5. In Arizona, a female law professor is fighting a rule that forbids her to be hired by the same university that employs her husband in another department.

6. In California, a wife is challenging a community property law which makes it obligatory for a husband to control their joint property.

7. And, all over the country, the EEOC regulation, which made it illegal to have sex segregated want ads for males and females, have not been followed by most newspapers, and actions are being brought about this.

In other sections, very significant cases that are likely to come up involve women's claims that the right to control of their own reproductive process would involve repeal of existing abortion laws, removing them from the criminal statute.

There is also growing protest that public accommodations which refuse to admit women, are denying women their rights under the Constitution. And the educational institutions which discriminate against women are denying women their equality of opportunity under the Constitution.

The Honorable Shirley Chishold, a national board member and founding member of my organization of NOW, has summed it all up in her statement that she has been more discriminated against as a woman than as a black.

It would show enormous contempt for every woman of this country and contempt for every black American as well as contempt for the

Supreme Court itself if you confirm Judge Carswell's appointment.

I say this in behalf of the right of every woman in America to the full opportunity to life, liberty, and the pursuit of happiness that is guaranteed here under the Constitution, even though that Constitution until now has been interpreted on the Supreme Court as if it were written only for men and not for women. But this country is of, by, and for, its government is of by, and for the people, who are women as well as men. Women are finally beginning to say, in much the same spirit that our revolutionary ancestor said, no taxation without representation; that as citizens of this country, and indeed as a majority of this country, this Constitution must be interpreted to give them equal protection, equal opportunity under the law, equal protection of the rights guaranteed them in the amendments.

We cannot say, I cannot say, that all women in America want equality, as vociferously as some of us are saying now that we want equality. because I know that women, like all oppressed people, have swallowed and plowed into themselves the denigration of women by society that has gone on for generations. Some women have been to much hurt by denigration, by self-denigration, by the lack of the very experiences and education and training need to move in society as equal human beings, to have the confidence that they can so move in a competitive society.

We can say with absolute assurance that while we do not speak for every woman in America, we speak for the right of every woman in America to become all she is capable of becoming—in her own right and/or in partnership with man. And we already know now that we speak not for a few, not for hundreds, not for thousands, but for millions. We know this simply from the resonance, if you will, that our own pitifully small actions have created in society.

I do not believe that you, gentlemen, even if your own duties prevent you from watching television or reading books, can be unaware of this revolution in recent years.

I think also that with the sensing of enormous change in America, you who are in a position to affect the Supreme Court, what it is going to become in the future, you ought to try to grasp the psychology of young women today, even though this psychology may be somewhat different from the psychology of the women who brought you up, or, indeed, the women who are your wives.

I quote from one such young woman, whose name is Vivian Morgan. She said:

> The rallying cry of the black civil rights movement has always been: "Give us back our manhood." What exactly does that mean? Where is black manhood? How has it been taken from blacks? And how can it be retrieved? The answer lies in one word: responsibility; they have been deprived of serious work; therefore, they have been deprived of self-respect; therefore, they have been deprived of manhood. Women have been deprived of exactly the same thing and in every real sense have thus been deprived of womanhood. We have never been taught to expect any development of what is best for ourselves because no one has ever expected anything of us—or for us. Because no one has ever had any intention of turning over any serious work to us. Both we and the blacks lost the ballgame before we ever got up to play. In order to live you've got to have nerve; and we were stripped of our nerve before we began; black is ugly and female is inferior. These are the primary lessons of our experience, and in these ways both blacks and women have been kept, not as functioning rational human beings, but rather as operating objects, but as a human being

who remains as a child throughout his adult life is an object, not a mature specimen, and the definition of a child is: one without responsibility.

At the very center of all human life is energy, psychic energy. It is the force of that energy that drives us, that surges continually up in us, that must perpetually be reaching for something beyond itself. It is the imperative of that energy that has determined man's characteristic interest, problem-solving. The modern ecologist attests to the driving need by demonstrating that in time when all the real problems are solved man makes up new ones in order to go on solving. He must have work, work that he considers real and serious, or he will die. Even if he does not die of starvation. That is the one characteristic of human beings. And it is the only characteristic, above all others, that the accidentally dominant white male asserts is not necessary to more than half the members of the race, i.e., the female of the species. This assertion is quite simply a lie. Nothing more, nothing less. A lie. That energy is alive in every woman in the world. It lies trapped and dormant, like a growing tumor, and at its center here is despair, hot, deep, wordless.

No man worth his salt does not wish to be a husband and father; yet no man is raised to be a husband and father only and no man would ever conceive of those relationships as instruments of his prime functions in life. Yet every woman is raised, still, to believe that the fulfillment of these relationships is her prime function in life.

Listening to these young women who put in even more bitter words than I would, because they have been educated in an era when the expectation of human rights for every American has been more than in the era when I grew up and was educated—listening to those words, I ask the question of myself: Am I saying that women have to be liberated from men? That men are the enemy? No, I am not. I am saying that men will only be truly liberated, to love women and to be fully themselves, when women are liberated to be full people. To have a full say in the decision of their life and their society and a full part in that society.

Until that happens, men are going to bear the burden and the guilt of the destiny they have forced upon women, the suppressed resentment of passivity, the sterility of love, when love is not between two fully active, fully participant, fully joyous people, but has in it the element of exploitation.

It is the insensitivity to this fact which I submit is the crux of sexism, and which made me say that Judge Carswell could be called sexually backward.

I say that men will not be fully free to be all that they can be as long as they must live up to an image of masculinity that denies all the tenderness, the sensitivity, in a man that might be considered feminine. Because all men have that in them, as all women have the potential in them of truly active, participant human dignity, women not just as objects, but as subjects of the story. Men, also, have in them enormous capacities that they have to repress and fear in themselves, living up to this obsolete and brutal maneating, bear-killing, Ernest Hemingway, crewcut Prussian sadistic, napalm all the children in Vietnam, bang-bang you're dead, image of masculinity, the image of all powerful masculine superiority that is absolute. All the burdens and responsibilities that men are supposed to shoulder alone, makes them, I think, resent women's pedestal—which I believe Judge Carswell still believes. Up from the pedestal is what young women say. That pedestal, that enforced passivity, may be a burden for women, but it is also a burden for men.

Men are not allowed by their masculinity, or what they believe is their masculinity, to express their resentment against that.

That hostility is so severe today that the rage, the violence implicit there, may explode in the 1970's in a way that will make the violence of the 1960's look almost pale. The violence that is now breeding because of the inequality, the sex discrimination, to which Judge Carswell is so blind, this violence is becoming explosive.

Men are not allowed by the obsolete image of masculinity to express their resentment. Men are not allowed to admit that they have sometimes been afraid. They are not allowed to express their own sensitivities, their own needs, sometimes, to be passive and not always active. Their own ability to cry. So, they are only half human as women are only half human until they have a full voice and a fully active part in our emerging human society.

That is why in your confirmation of a nominee to the Supreme Court, it is so very important to appoint a man who is at least free of the worse sex prejudices of this country, of this society, not a man who embodies them.

The specific forms and instances of discrimination against women are easy to document. Voluminous evidence demonstrating widespread social and professional discrimination on the basis of sex has been, and continues to be, gathered. This obviously will be coming before the Supreme Court in the 1970's. In most States the domicile of a married woman is that of the husband, which means that she cannot vote or run for office if she lives elsewhere. She cannot legally do business in her own name, and, in many instances, she cannot borrow money or contract for anything without the approval of her husband. This will undoubtedly come before the Supreme Court. Rape by a husband is legal. This will undoubtedly come before the Supreme Court. In many States the husband has complete legal control of all property owned by both jointly. This will obviously come before the Supreme Court in the 1970's. Often laws relating to property passing at death discriminate against women. There is a Supreme Court decision barring women from jury duty, although a recent lower Federal court decision has gone the other way. In some States a woman can be sentenced to jail for a longer period of time than a man who commits the same offense. Women are barred from many publicly funded educational institutions on the one hand, and from publicly licensed places of public accommodations on the other. We are already aware of cases here that will undoubtedly be coming before the Supreme Court in the 1970's.

Perhaps the most effective area of discrimination is in employment. This is the nitty-gritty of the issue and this is where Judge Carswell is on record by refusing even to give a hearing to a decision which the chief judge said would make the law prohibiting sex discrimination in employment dead.

Last year 89 percent of the women in the labor force earned less than $5,000, as compared to 40 percent of the men. Further, women are paid 40 percent less than men holding the same jobs. This is shown by U.S. Department of Labor Statistics. Today there are fewer women principals of schools, fewer women professors, and fewer women lawyers than there were in 1950 on a percentage basis.

The percentage of women in executive, decisionmaking jobs, even in traditionally female professions such as schoolteaching, social work,

and library work, is going down. Automation and the advent of new technology reduces blue collar jobs requiring heavy muscles and brings men into some of the jobs previously considered feminine, such as elementary schoolteaching and social work. Yet women, because of sex discrimination in employment and the kind of discrimination that was upheld by Judge Carswell in the *Marietta Martin* decision, are still being denied access to training opportunities in the jobs in society that are at the frontier and that are not about to be replaced by automation.

I submit to you, gentlemen, that you cannot in good conscience, and out of your obligation to the 51 percent of this country who are women, you cannot confirm the appointment of Judge Carswell to the Supreme Court.

Thank you.

The CHAIRMAN. Thank you, ma'am.

Senator Hart?

Senator HART. I apologize for having to miss some of the testimony. But I enjoyed what I heard, and I think the lecture is deserved.

You know, I have been brainwashed on this subject at home. [Laughter.]

Mrs. FRIEDAN. I hope so.

Senator HART. In a way, men, North and South alike, have had the hang-up that some of us suggest our distinguished chairman had when he grew up with reference to another matter, a racial matter. I am sure that in the South, the white man genuinely believed that the black man was happy. It was only when an outside agitator came in that there was trouble; he believed that. In most cases, it did not reflect cruelty, he just instinctively felt that way. Now, of course, most realize that that was not the attitude of the black man; quite the contrary.

Well, most men, until the very recent past, honestly thought that the only unhappy woman was one who did not understand how happy she should be. We just assumed that these roles you have just described were appropriate, inherent in the law of nature, the result of nature's law. Now, you say you hope I am brainwashed. I hope I am. But I think many men are. We do realize that we were making the same wrong assumption about women, their role and their feeling, that perhaps the chairman was making about how happy the fellows were in the field.

You caution us that the revolution by women may be comparable to the revolution of the men in the fields in the South. I do not know. But it would behoove us, not in order to avoid revolution, but to do what makes good sense, to understand the new advice, the feelings that are much more widespread than most men now understand.

It is a fact that we deny ourselves the talents that are lost so long as these idiotic distinctions are drawn. I must say, we even react as men when a woman voices this message sharply. I am sure you are immune by now. But men do hate to be lectured on this subject, especially by a woman as strong as you. But all men should read your book, then maybe we would all have a little better understanding of why your concern is so sharp for us.

Thank you. I hope I escape having a glove laid on me when I get home.

Mrs. FRIEDAN. Thank you, Senator Hart. I think, of course, that men are not the enemy, that they have this, as I say, blindness because

they have been brainwashed by society, as even women themselves have been brainwashed. And they are not the enemy. There is no conspiracy of men against women or to keep them down, to keep them barefoot and/or pregnant or even a conspiracy to keep them out of jobs. I do not believe that. I think that men must have the blindness removed and confront women simply as human beings. This is the essence. We cannot any longer take sex discrimination as a joke in employment or in any other field. Up to now, you know, that has been the simplest way to dismiss it, to take it as a joke. I have even seen certain signs of that here. But I think it is a tribute to the fact that you gentlemen have begun to be aware of the importance of this problem and the new voice that you have permitted me to testify. I have been told, although I do not know whether this is true or not, that I am the first woman representing an organization devoted to women's rights who has ever testified about the nomination of a Supreme Court justice. If so, I think that your having permitted me to do so—while I believe it is certainly our right to have a say—is your recognition that you must consider very seriously the interests of the 51 percent of women in confirming this nominee, Judge Carswell, on whose record such a serious question is raised.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Thank you, Mr. Chairman.

I sat here with a great deal of interest not only listening to the words but sensing some of the reaction in the hearing. At the risk of being critical or stepping on toes, I think the fact of some of the reaction here is evidence of a certain amount of male smugness that some of us have.

On the other side, I am hopeful that your voice and others will be successful in really painting the picture, the size of the problem. When we talk about 68 percent of the employed women having no husband, no man in the household, being the sole source of support of those children, I think this dramatizes the problem that we have in the question of employment discrimination. The fact that 75 percent of those women and their families and children are already living in poverty accents the critical nature of this problem.

The injustices that you point out in the last part of your testimony graphically express that many of these are perhaps quite normal concerns involving a woman as a mother, as an integral part of the household, that many of the items of discrimination have no relevancy to a woman being a mother to keep a household together and to minister to the children. I am hoping that the day will come when we can right some of these injustices. I appreciate your addition to the record.

Mrs. FRIEDAN. Thank you.

The CHAIRMAN. Senator Cook?

Senator BAYH. Will the Senator yield, please?

Senator COOK. I always do.

Senator BAYH. You are very kind.

Since Senator Tydings is not here, he wanted me to make an unequivocal statement that he is for women. [Laughter.]

Thank you, Senator Cook. I appreciate it.

Senator COOK. First, let me say that I am delighted that this is a revolution, and I think it should be. I have a daughter who is a sophomore at Northwestern and I have a daughter who I hope will be a freshman at Yale. That in itself is some revolution.

I also hope that for some fairness for you and all the women of the United States that Mrs. Romney does run for the U.S. Senate. [Laughter.] I think we need more women in the Senate.

Senator HART. See how we fall into the trap of making judgments on the basis of sex. This is supposed to be irrelevant. [Laughter.]

Senator BAYH. That is not a true test of equality, pitting those two together. [Laughter.]

Senator HART. Would you not agree that that ought to be irrelevant?

Senator COOK. I might also say that I ran against a woman and she was the former president of the National Business and Professional Womens' Clubs. She is a friend of mine, I am fond of her, and it was a fantastic campaign. We truly covered the issues.

Senator HART. If the Senator will yield, I did the same thing in 1964. The lady is now Republican national vice chairman.

Senator COOK. You see, I keep yielding all the time.

There are some things I would like to get straight in all fairness to the nominee. In this ruling, in which Judge Carswell said that no sex discrimination was involved—you will admit that Judge Carswell did not write the opinion of the lower court, did not sit on the case?

Mrs. FRIEDAN. But he joined in the denial of the hearing.

Senator COOK. But this was not a court of last resort. The rights of the respective parties were well preserved. You will admit this?

Mrs. FRIEDAN. Yes, but this is such a clearcut case in an area that is of enormous importance in terms of the future, and he is on the record here in a way that women can't take lightly. It is too serious a matter.

Senator COOK. You say Judge Carswell justified discrimination against women by the peculiar doctrine of sex-plus? Now, he neither adopted the opinion of the lower court nor adopted the dissenting opinion. Would you agree with this?

Mrs. FRIEDAN. No; because I was here yesterday, and I heard Judge Carswell say in answer, I believe, to a question of Senator Bayh that he did indeed understand that by denying the hearing, denying the request of the Chief Judge Brown for the case to be reheard—as you know, Chief Judge Brown felt it was such a flagrant violation of sex—in denying this, Judge Carswell did indeed understand that he was in effect establishing as a precedent the lower court decision which, as I have said in my testimony, would automatically now mean that any employer in this land could refuse to hire or could summarily fire a woman with children under six. He said he understood that.

Senator COOK. You understand also that Mrs. Phillips was not really applying for a job, she was applying as a trainee for a job, under a program of trainees.

Mrs. FRIEDAN. And women very badly need more job training than they are getting. The problem of high school dropouts today, the high-school dropout rate of girls and especially of black girls and the denial to women of adequate job training in both the private and public sector, is a very, very serious problem.

Senator COOK. Well, let me ask you this: Do you feel that, by reason of the great significance that you put on it, this is his attitude and this will continue to be his attitude?

Mrs. FRIEDAN. Senator, I no more than you, can be a mindreader. I can only judge by the record.

Senator COOK. The reason I say this is because by the record, as you stated, on March 4, 1969, in the fifth circuit, in *Weeks* v. *Southern Bell Telephone*, they ruled that weightlifting limitations barring women from jobs but not men, were out.

Mrs. FRIEDAN. Judge Carswell, sir, was not sitting in it.

Senator COOK. But he didn't sit in the *Phillips* case either.

Mrs. FRIEDAN. But he did sit on the denial of the rehearing.

Senator COOK. He didn't sit at all. If we know how the procedure works, there are 15 judges in the Fifth Circuit. They all sit in different cities. They are mailed these things, they look them over and they are asked what should be done. The opinion of *Weeks* v. *Southern Bell Telephone* was mailed to Judge Carswell. Now, if this is his opinion and if he is against women, then why do you think that he did not write a dissenting opinion in the *Weeks* v. *Southern Bell Telephone* case? Because if he is really against women, why was he not against the ruling of the Fifth Circuit that ruled that such weightlifting limitations barring women were illegal, and why didn't he say they were legal? I think if you lay so much precedence on a case that he didn't hear, that he did not read the testimony of, how do you justify in your mind that if this is his attitude, why did he not, when the *Weeks* case came to him, because all of the opinions are circulated and he read the *Weeks* case, why didn't he come to the conclusion that this is a case he should write a dissenting opinion on because it was giving women a right under Title VII that he thought maybe they shouldn't have? Why didn't he?

Mrs. FRIEDAN. It is clear, sir, that he was not on the three-judge court that heard that case and the chief judge did not in that case ask for a rehearing. But it is also clear in the record that Chief Judge Brown did ask for a rehearing on the *Ida Phillips* v. *Martin Marietta* case. One does not there, therefore, have to resort to mindreading. In that instance, he ruled, he did vote. And one can fairly judge a man by his record. I am not a lawyer, but I do understand that mindreading isn't somehow permissible in courts of law.

Senator COOK. The point I am trying to make to you is, in all fairness, that I think you are condemning Judge Carswell on a case that he did not sit on, on a case that he did not have the record on, on a case that was merely submitted to him saying, should there be an en banc hearing or should there not, knowing full well that the rights of all the litigants were still being preserved. I am merely asking the point because I think, in all fairness to you and all fairness to your movement, which I will wholeheartedly subscribe to, I think you are on awfully thin ice. I will have to be honest with you and I can merely say that many of the other judges you are condemning on the same basis. Many of us, not having read the record, are assuming an awful lot.

Mrs. FRIEDAN. Well, sir, in my responsibility as a spokesman for women in the country——

Senator COOK. I think you handle it very well.

Mrs. FRIEDAN (continuing). And as a woman myself, it is my responsibility to take this question very seriously indeed. I am glad to see that you are enough aware of the implications of Judge Carswell's ruling to feel the necessity of apologizing. I, myself, so one does not

have to resort to mindreading, would wonder if you gentlemen should not put some questions to Judge Carswell about ascertaining more fully his views on the question of the rights of women under the Constitution, since the question has been raised. But as of the moment, with this on the record, I would concur with Congresswoman Mink that I would certainly protest the appointment of a judge to the Supreme Court, to the highest tribunal of this land, who would deny a hearing to women, deny a hearing on a case involving a law of such extreme importance to women as the law prohibiting sex discrimination in employment.

Senator COOK. But may I say for the record that I think there is a great deal of mindreading in your statement. I think there is a great deal of across-the-board condemnation of Judge Carswell, purely and simply because of the remarks that were made, the fact that it says that Judge Carswell discriminated when he did not sit in this case, when he did not hear this case, and I think there is an assumption of a great deal of mindreading in your statement.

I might say to you that, having been a judge before I came here, and having read with great interest and listened with great interest to what you have said, I think the position of women in this country in regard to the courts is abominable. I had under my jurisdiction all of the juvenile courts in my community of 750,000 people. And the position that men in this country subvert women to who must seek help from local governments, from State governments, and from national governments, is such that they ought to be horsewhipped. And I say this in all sincerity. So I think that your movement is tremendous and I think that it should grow.

For instance, one of the great things that I am very much involved in in the United States Senate is a constitutional amendment for 18, 19, and 20-year-olds to vote in this country. I was a strong supporter of it in my State, and everybody considers Kentucky a Southern State, a backward State, and we have allowed 18 and 19-year-old young people to vote in our State for about 10 or 12 years now. We would like some of these progressive, modern, up-to-date States to get on the ball.

Mrs. FRIEDAN. Well, sir, since you bring up the question of constitutional amendments, I hope you are also going to see to it that finally, in 1970, the equal rights amendment to the Constitution is added that will prohibit sex discrimination in any law in this country.

Senator COOK. I am certainly for it. I think it is a just cause that you have, but I think your condemnation goes way beyond the realm of the attitude and the philosophy of Judge Carswell.

I appreciate your testimony.

The CHAIRMAN. Thank you ma'am.

Mr. Mark Hulsey, Jr. Hold your hand up.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. HULSEY. I do.

The CHAIRMAN. Identify yourself for the record. You are president of the Florida Bar Association, is that correct?

TESTIMONY OF MARK HULSEY, JR., PRESIDENT, FLORIDA BAR ASSOCIATION

Mr. HULSEY. Yes, sir, my name is Mark Hulsey, Jr. I am a lawyer from Jacksonville, Fla. I am also president of the Florida Bar.

I might say, although I was not called as a rebuttal witness following Mrs. Friedan, I want to reassure the committee that neither Judge Carswell not myself is sexually backward. I wanted to clear that point up in your mind.

Gentlemen, it gives me, of course, great pleasure to appear before this committee in support of the nomination of Judge Harrold Carswell to be an Associate Justice of the Supreme Court of the United States. I might say to the committee at the outset that the Florida Bar is the sixth largest bar in America, having some 11,373 lawyers and judges. It is also, interestingly enough, the oldest integrated bar in the South, having become fully integrated in 1949 by Supreme Court rule. Every person, then, in Florida, is required to belong to the Florida Bar under our Supreme Court rule.

I might say also that our bar is managed by circuit representatives. These are lawyers who are elected by other lawyers from the 20 judicial circuits in the State, and I add, Mr. Chairman, that under a reapportionment formula that would please former Chief Justice Earl Warren. It is a very democratic process. These circuit representatives are known as the Board of Governors of the Florida Bar, and there are 41 of us.

In anticipation of my appearance before this committee, we conducted a written poll of the 41 members of the Board of Governors. I am happy to say to this committee that the Board of Governors of the Florida Bar, speaking as the elected representatives of the 11,373 lawyers and judges in Florida, unanimously endorse Judge Carswell, and urge this committee to recommend to the Senate his early confirmation.

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 observations of him, first as U.S. attorney when I was an assistant U.S. attorney in another district—he and I handled a few criminal cases together—and as a trial lawyer, practicing before him in his court in Tallahassee on several occasions, and in one civil rights case, I recall, and on social occasions—based on all of these observations, 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.

I will be glad to answer any questions of the committee.

The CHAIRMAN. It is 12 o'clock. Let us recess until 2.

Senator TYDINGS. Mr. Chairman, do you have for the record the introductory remarks I put in on the evening 2 nights ago in connection with Mr. Hulsey?

I would ask unanimous consent that those introductory remarks be removed to the hearing immediately prior to Mr. Hulsey's testimony.

(The remarks from the hearing of January 27, 1970 follow:)

Before we recess, I would like to make two statements for the record, since I shall not be here in the morning. Tomorrow, there are going to be two witnesses who, if I were here, I would comment upon to the committee.

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.

I would also like for the record to state that the President of the Florida bar, Mark Hulsey, Jr., is a partner of one of my oldest and closest friends from Jacksonville, Fla., Lloyd Smith.

I have known Mark Hulsey, myself, personally, for some period of time. He has a very fine record in the bar. He has been president of the Florida bar, which I understand is the oldest integrated bar in the South.

He has also been very active in civic affairs in his State. He is a fine gentleman.

Senator BAYH. Could I ask the witness a question, please. I am not going to be able to be here immediately after the recess.

In response to your opening remark, Mr. Hulsey, I don't think I said the judge was sexually backward.

I would like to get your expertise relative to this hearing process that we have been debating back and forth. I am not a lawyer in that circuit. You are. Could you give us the benefit of your feelings here? I want to read you one of the statements that the judge made, because I am not sure you were here.

Mr. HULSEY. I was here. I heard it.

Senator BAYH. Then you know what the judge said relative to this and I don't want to make a greater issue out of this than it should be. But what does it mean when the judge votes to deny a rehearing?

Mr. HULSEY. Well, I think we are talking about two different things. Do I understand that I get an expert witness fee now in testifying before the committee?

Senator BAYH. I thought perhaps you had already been paid that before you came.

Mr. HULSEY. Thank you, sir. No, sir; I haven't.

Senator BAYH. I think the record should show that that last remark was in jest.

Mr. HULSEY. Thank you, Senator. I recall when you appeared at our convention in Miami and we were delighted to have you down there.

Senator BAYH. I enjoyed it. It is nice of you to be here.

Mr. HULSEY. I think we are talking about two different things. Senator Cook mentioned that automatically, almost, in every lawsuit, when you lose the case, the first thing you do is file a petition for rehearing. That means, of course, that—the court sits in banks of three. You only have three judges sitting.

Senator COOK. I might say that in a number of cases, I filed a petition for rehearing that I knew darned well I wasn't going to get, but I really filed it and I filed it with all the intent that lawyers file a petition for rehearing, in an effort to get another crack at it.

Mr. HULSEY. Yes, sir.

I might say particularly the fifth circuit asks us, in order to prod some of the dilatory lawyers—I am not one of those—not to file these petitions unless you really mean it. Ofttimes, you file a petition automatically.

I don't know the facts of that particular case. I know nothing about

it other than what I have heard here. I don't know whether a petition for rehearing was filed or not before the three-judge panel. I understand something was filed from Judge Brown's footnote. It may be that the Government, as amicus curiae, filed some kind of paper. But be that as it may, Judge Brown, who is not particularly shy and retiring, as you heard from his rhetoric, apparently asked the court to consider a hearing en banc. I am sure the committee realizes that when you have 15 men sitting on the court, all of whom are pretty strong minded and all of whom think they are absolutely right, that when you have the panels of three sitting around, oftentimes, you have conflicts that arise. By that, I mean you could have panel A hearing a case involving a certain matter of law; you can have panel B in another part of the circuit hearing the same point of law, but a different panel of judges. So they want to be certain that when the fifth circuit court of appeals speaks, it speaks as one court, even though they have the several panels sitting around the circuit. So, therefore, I am not familiar with the internal procedure, but I know they have an internal procedure whereby the judges can request, when they think there is something wrong with a given opinion, or may conflict with something that another panel has ruled OK, they circulate that opinion among the judges by mail. In Jacksonville, for example, we have a circuit judge sitting there, Judge Simpson. He receives these opinions through the mail. He reviews it and decides whether or not to grant the en banc hearing. That merely means that if he reads the decision, he thinks there is something wrong with it, too, and that Judge Brown's letter is persuasive, then he will vote by mail to having rehearing, or to have a hearing en banc. That means all 15 judges will sit.

Well, as I understand this case, they did just that. I don't know who the three judges were originally, but they ruled 2 to 1 upholding Judge George Young, I presume, from the middle district of Florida. Then Judge Brown said, well, let's have the full panel consider this case. So they circulated the case around the whole panel to determine whether or not they wanted to have a full hearing. And 10 judges apparently voted no and five voted yes——

Senator COOK. Three voted no.

The CHAIRMAN. There were 13 judges on the court at that time. There are 15 now.

Mr. HULSEY. I see.

Frankly, although I, too, have a number of ladies in my house, and although I, too, am very much in favor of womanhood, I think it is a little unfair to say that because Judge Carswell, in an administrative matter within the circuit court of appeals, voted not to hear a case en banc, automatically labels him as antiwomen. I just don't think that follows. If that is what you are asking me to comment on.

Senator BAYH. I wanted to get your opinion on that procedure, because I am not familiar with it.

Mr. HULSEY. I don't think there is anything unusual about it. I thing it is routine, it happens frequently. And as I say, the primary purpose, and we have this in Florida, where we have district courts, is to enable the court to speak as one voice. Because you know, when you have a negative court of law and then you have different panels sitting, you are always going to run the risk of some difference of views among the judges themselves.

Senator COOK. If the Senator would yield, in essence what you are saying, Mr. Hulsey, is that this was an administrative matter and not a decision on the merits?

Mr. HULSEY. I think that is true, yes, sir.

Senator COOK. Of course Judge Carswell——

Senator BAYH. That is not what Judge Carswell said.

Mr. HULSEY. I don't think you would ever have a judge here sit here before this illustrious body and the American people and say, of course, I didn't consider it. Of course, he did. But let's say at best it was a perfunctory consideration. By that I mean he looked at the record, he saw a very distinguished district judge who ruled as he did, he saw a panel of other judges who ruled upholding that judge: he read the opinion, looked at what was before him without conducting an exhaustive study of the case, and ruled that in this particular case, he just didn't feel that it warranted an en banc hearing, because it was probably going on up to the Supreme Court anyway.

That would just be my impression of it.

The CHAIRMAN. Let us recess now until 2 o'clock.

Mr. HULSEY. Mr. Chairman, excuse me, having a tendency as I always do to talk too much, there is one thing I would like to tell the committee in view of what I have heard here for 2 days.

The CHAIRMAN. We are going to take you back at 2 o'clock.

Mr. HULSEY. Oh, you are. Excuse me, Mr. Chairman. In view of that, I will withhold this.

(Whereupon at 12:05 p.m., the hearing was recessed to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Mr. Hulsey, before we recessed you said you wanted to make a statement.

TESTIMONY OF MARK HULSEY, JR., PRESIDENT, THE FLORIDA BAR (Resumed); ACCOMPANIED BY HON. SPESSARD L. HOLLAND, U.S. SENATOR FROM THE STATE OF FLORIDA

Mr. HULSEY. Yes, sir. I might say, Mr. Chairman, during the noon recess I got to thinking about Senator Bayh's question about the court rule with respect to requesting an en banc hearing and I have before me here rule 35 that relates to that subject, under the Federal rules of appellate procedure for all U.S. courts of appeal in the country. It is rule 35 and it gives the circumstances under which the court will grant a hearing en banc.

I will be glad to leave this with the committee or read it into the record. I think it is pertinent to what the committee is referring to.

The CHAIRMAN. You can read it.

Mr. HULSEY. All right, sir, I will just read section 35(a) entitled "Determination of causes by the court en banc."

(a) When hearing or rehearing en banc will be in order:

A majority of the circuit judges who are in regular active service may order an appeal or other proceedings be heard or reheard by the Court of Appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except, (1), when consideration by the full court is necessary to secure

or maintain uniformity of its decisions or, (2), when the proceeding involves a question of exceptional importance.

That is (a); (b) relates to how you make a suggestion for the hearing, and (c) is the time when you make the suggestion.

I thought that the committee might want to have that rule, Mr. Chairman.

The CHAIRMAN. Yes, sir. Now, at this point I would like the record to show that from February 1, 1967 through December 29, 1969, 206 petitions for rehearing en banc were filed by the parties in the Fifth Circuit Court of Appeals. Of this number, 184 were denied, 20 were granted, and 12 are currently pending. You may proceed.

Mr. HULSEY. Thank you, Mr. Chairman.

I was just going to conclude my remarks before the noon recess by saying that as I recall, there was some suggestion made to Judge Carswell that there was a timelag in his decisions particularly in civil rights matters. I might say that I was counsel of record in the case entitled "*Brooks* v. *the City of Tallahassee.*" It is recorded at 202 Federal Supplement page 56 and is the so-called *Tallahassee Airport Segregation* case.

I was almost amused when I heard that he dragged his feet, because I noted from my records that the suit was filed on June 26, 1961, the trial was held on September 15, 1961, and his order was entered on October 17, 1961: and I say to the committee that I have never been involved in any litigation during my 22 years' practice where a Federal court moved any faster than in this case of *Brooks* v. *the City of Tallahassee.*

Customarily you have a year perhaps in ordinary civil litigation in the district court, and this took something under 4 months, so I would say that on my experience with the judge, he expedited the litigation rather continuously. As a matter of fact, I recall, and I looked at my record, he telephoned me several times from Tallahassee, I lived in Jacksonville 159 miles away, and he telephoned me several times to tell me to hurry up and let's move this case on.

I might add here that frankly my experience with Judge Carswell as a lawyer has been one that he has a tendency to push you pretty hard in the handling of a lawsuit. Some people think lawyers are slow, and I guess some of them are, and he is the type of judge who is very anxious to move the case. He may offend some lawyers at times. In fact I could almost say he offended me a little bit in this *Brooks* case by pushing me so hard, but I have never found him to be anything other than fair, considerate, and quite a good trial judge.

The CHAIRMAN. Senator Burdick?

Senator BURDICK. No questions.

Senator HOLLAND. Mr. Chairman, might I make a brief statement?

The CHAIRMAN. Yes.

Senator HOLLAND. I am sorry I was not here when Mark Hulsey, Jr., was presented to the committee. I knew his father before him. I know him and I know him well. He was a classmate of my oldest sons at the law school of the University of Florida. He served with distinction in the Navy in World War II and in the Korean war. He was a flier in the Navy, not a pilot but a navigator in the Navy, just as I was an observer in the Army Air Force in World War I, and perhaps that drew us a little closer together.

I was glad when he came out of the Korean war to suggest his appointment as an assistant district attorney in the middle district of Florida. I believe it may have been the southern district at that time.

Mr. HULSEY. It was.

Senator HOLLAND. And he did serve in that capacity with highly satisfactory results until he went back into the private practice on his own. I am glad to present him and recommend him as being an outstanding member of our younger lawyer group in Florida, and that standing is reflected by the fact that he has served, and this service has been I can say with distinction as president of our Florida State Bar Association.

Mr. HULSEY. Thank you, Senator.

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. Thank you, sir. I assume I may be excused?

The CHAIRMAN. Thank you, sir.

Mr. Proctor hold your hand up, please, sir.

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. PROCTOR. I do.

Senator HOLLAND. Mr. Chairman, I have been going to Tallahassee pretty regularly for a long time both in the practice of law and in 1933, 1935, 1937, and 1939 as a member of the Florida State Senate, and then for 4 years as Governor, with two of my children marrying into Tallahassee families. I have known this young man, if you will permit me to call you young, since he was a boy, and I want to say for him that he comes from one of the fine Tallahassee families, that I believe completely in his integrity, and I recommend him in the highest terms to this committee. I am sorry I cannot stay, Mr. Chairman, because I have to go elsewhere.

The CHAIRMAN. Mr. Proctor, identify yourself for the record.

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.

SenatorBURDICK. 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.

Sentor 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.

TESTIMONY OF JAMES WILLIAM MOORE, PROFESSOR OF LAW, YALE LAW SCHOOL

Mr. MOORE. Thank you, sir. I am Prof. James William Moore, Yale Law School, New Haven, Conn.

This morning we heard a great deal about the rights of women and with much eloquence. May I say that Yale too appreciates women, and we now let women through the old sacred halls of Maury's where Louie dwells and they come singing the Whiffenpoof song. Candor compels me to say that the quality of the singing has not improved any.

I appear at my request to testify in support of the prompt confirmation of G. Harrold Carswell as a Justice of the Supreme Court of the United States.

While my qualifications are set forth in more detail in an attached appendix, briefly they are these. For 35 years I have been a student of the Federal judicial system, its jurisdiction, practice, and procedure. I hold a named chair, Sterling professor of law, at Yale University; am a member of the Supreme Court's standing Committee on Practice and Procedure; have authored many legal articles and books, chief of the latter being "Moore's Federal Practice," and "Collier on Bankruptcy" (14th edition)——

The CHAIRMAN. "Moore's Federal Practice" is in most law offices, isn't it?

Mr. MOORE. Well, I like to think so, sir.

The CHAIRMAN. I think it is a standard textbook, is it not?

Mr. MOORE. Well, it is a self-serving statement, but I will make it. I think it is.

And at the present time am, in addition, counsel to the trustees, now a single trustee, of the New York, New Haven & Hartford Railroad since the beginniing of its reorganization in mid-1961.

Now, as an author, may I say that I would attach no significance to a vote by a judge denying a plea for rehearing en banc. It is just not possible to determine what promoted that vote on the substantive issues. It in a sense is something like the denial of cert. And as Justice Frankfurter once said the bar has been told over and over again that no significance should be attached to a denial of cert.

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 creed 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 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 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, creed, 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 became 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.

I thank you, sir.

(Biographical material submitted by the witness follows:)

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 Appeals for the Second Circuit; United States District Courts for the states of Montana, Connecticut, and Southern District of New York, Interstate Commerce Commission.

The CHAIRMAN. You have made a very able statement.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. I don't have any questions. I would like just to commend Professor Moore for the very excellent statement he has made here. We thank him for coming and presenting this excellent statement.

Mr. MOORE. Thank you, sir.

The CHAIRMAN. We certainly thank you.

Mr. MOORE. May I be excused, sir?

The CHAIRMAN. Yes, sir.

Mr. MOORE. Thank you.

The CHAIRMAN. Prof. Gary Orfield.

Stand up please.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ORFIELD. I do.

The CHAIRMAN. You may proceed, sir. Identify yourself for the record.

TESTIMONY OF GARY ORFIELD, ASSISTANT PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY

Mr. ORFIELD. My name is Gary Orfield. I am assistant professor of politics and public affairs at Princeton University. I am the author of a recently published book on school desegregation in the South after the passage of the 1964 Civil Rights Act.

Before I begin my prepared testimony, I would like to take this opportunity to speak briefly about the procedure of this committee in handling the nomination.

The CHAIRMAN. Wait a minute, we are not interested in your views on the procedure of the committees. If you have something to say about this nominee, which is the question, we will hear it.

Mr. ORFIELD. I think that this is relevant to my statement, Senator, because it concerns the quality of research that it has been possible to

do in the 1 week between the time the announcement was made of Judge Carswell's nomination and the beginning of these hearings.

The CHAIRMAN. There is no difference. This hearing is being held just exactly as all of them have been held.

Mr. ORFIELD. As you know, there was a much greater time span between the announcement of Judge Haynsworth's——

The CHAIRMAN. No, sir.

Mr. ORFIELD. And the beginning of the hearings.

He was announced in August.

The CHAIRMAN. No, sir, you are talking about something you know nothing about.

Mr. ORFIELD. I was here for those hearings, Senator.

The CHAIRMAN. What?

Mr. ORFIELD. It was announced in August, I believe, around the middle of August, and the hearings didn't convene until well into September.

The CHAIRMAN. Yes, sir, Judge Haynsworth's hearings were set 1 week after the nomination came to the Senate. That was true of Mr. Justice White. It was true as I recall of Mr. Justice Goldberg. It has been true of all of them. I remember that in the case of Mr. White, we held hearings after 1 week, gave a week's notice and held hearings one morning, and had an executive session of the committee, and reported him out to the floor and he was confirmed by 2 o'clock that afternoon.

Mr. ORFIELD. In the case of a man who is very controversial and has an extensive district court record it puts an extraordinary burden on scholars and journalists to adequately review that record.

The CHAIRMAN. You are not even a lawyer?

Mr. ORFIELD. Senator, I have worked extensively in constitutional law and also in southern constitutional matters.

The CHAIRMAN. I don't believe it took. [Laughter.]

Mr. ORFIELD. Pardon?

The CHAIRMAN. I don't believe it took.

Mr. ORFIELD. I would say, Senator, my view of constitutional law conforms much more highly with consistent Supreme Court precedents and courts of appeals precedents than yours does.

The CHAIRMAN. Go ahead with your testimony.

Mr. ORFIELD. All right. But I believe that in the 1 week's time so much came out that it is very important that adequate time be permitted to investigate all the ramifications of his appointment.

This committee meets for the second time in 4 months to consider the nomination to the Supreme Court of a man whose chief qualification appears to be an abiding unwillingness to protect the constitutional rights of black Americans. My study of Judge Carswell's decisions during more than 11 years on the Federal bench clearly reveals that the President has succeeded in the difficult task of finding a Southern Federal judge whose civil rights decisions are even worse than those of the nominee so decisively rejected in November. The President has selected an obscure judge who has made no visible contribution to the development of the law and whose record is distinguished only by his persistent refusal to make the law an effective shield for black people claiming elemental rights.

The Senate should reject the nomination of Judge Carswell because of his continuing unwillingness to perform his judicial duty. Carswell's early and passionate support for white supremacy puts a heavy burden on this committee to assess his ability to rise above his early prejudices and impartially enforce the law. I agree with former Vice President Humphrey that if his subsequent record indicated "a sense of balance and a sense of openness" he should be confirmed. Unfortunately, however, analysis of Carswell's decisions on school desegregation and other civil rights issues reveals no sueh openness. His record is one of a judge who would rather risk bad law and repeated reversals than offend the feelings of local segregationists.

At a time when the Justice Department repeatedly goes into Federal court to ask for delays in school desegregation and the Supreme Court repeatedly rejects these arguments, the effort to put a man with a record of resisting civil rights claims on the Court is extraordinarily important. Since the Nixon administration has largely abandoned the use of executive authority to enforce civil rights laws protecting the majority of black Americans who live in the South, the overwhelming burden is on the courts. This burden will be multiplied if the administration's effort to kill the enforcement provisions of the 1965 Voting Rights Act succeeds in the Senate. Nothing less than the political and social future of the South will rest on the shoulders of the Federal judiciary.

Without powerful leadership by the Supreme Court it is likely that school desegregation retreats last year by the Justice Department and HEW would have destroyed the entire momentum of the school desegregation process. School officials across the South who want to finish the 16-year struggle could have been subjected to years more of bitter racial controversy. Already, however, there are signs that the Court is losing its previous unanimity on school cases. The 6 to 2 split on the most recent case suggests that additional Nixon appointments might tip the balance away from strict enforcement. There is nothing in Judge Carswell's record to indicate that he would have voted with the majority on any of the recent cases. Surely his appointment would encourage yet another round of resistance by southern segregationists.

At a time when the Court urgently needs strengthening it is tragic that the President should make a transparently political appointment to a seat once filled by such great judges as Cardozo and Frankfurter. Not only has the President again damaged the Court, but he has also again underlined his disinterest in the views of the great body of American citizens committed to equal opportunity. It is a bitter commentary on the present state of our political leadership that this committee should be sitting here today expecting to endorse the nomination of a man who once proudly published a statement expressing his contempt for the rights of black citizens and has repeatedly refused to fulfill his constitutional duty to protect those rights as a Federal judge.

My statement today will be divided into three parts. First, I will consider briefly Judge Carswell's political background. Second, I will examine in detail Carswell's disposition of school desegregation cases as a district judge and comment briefly on a variety of other civil rights matters which came before his court. Finally, I will discuss the Senate's historical responsibility in reviewing Supreme Court nominations.

In his famous campaign speech in August 1948, Judge Carswell pledged that he would oppose to the "limits of my ability" any Federal civil rights legislation. His supporters have attempted to excuse his white supremacy speech by comparing it with the revelation, after his confirmation, that Justice Hugo Black had once belonged to the Alabama Ku Klux Klan. This argument implies that since Black later authored opinions upholding civil rights, perhaps the same transformation will overtake Judge Carswell after he is seated on the high bench.

This argument was raised rather extensively yesterday by Senator Cook.

The analogy, however, fails on two counts. First, Black, unlike Carswell, has no record of campaigning for public office on a racist platform. Black's mistake was made at a time when the KKK exercised immense political power, not a generation later after the United States had just completed a war against a racist tyranny in Germany, a time when we were finally beginning to act against pervasive segregation in American life.

Secondly, the analogy falsely implies that both men responded similarly after having made a mistaken but politically understandable identification with segregationists. Actually, Black's career repeatedly demonstrated his desire to obtain equal justice for all, even as Carswell's record reveals resistance to racial change.

John P. Frank, a leading witness for Judge Haynsworth, has skillfully described Black's record in his biography of the Justice. One of Black's first important cases was a successful lawsuit against a steel company for abusing a Negro convict. Black gained a reputation for protecting black litigant's rights as a police court judge in Birmingham, Ala., and led an effort to eliminate the use of torture of black suspects in a nearby community. In examining reports of hundreds of Black's campaign speeches, Frank found no evidence that he ever spoke of white supremacy or agitated the race question. The KKK, in fact, turned against Black after he bucked the widespread anti-Catholicism of the rural South to work for the election of Al Smith in 1928.

So in Black's record there was clearly a certain courage to defy local racist attitudes, even at a time when those attitudes were much more entrenched, even at a time when progress seemed much more hopeless than in the 1960's in which Judge Carswell's decisions were made and the circumstances in which his 1948 speech was made.

Carswell, however, openly avowed white supremacy, even as the national leadership of his party was struggling to enact President's Truman's civil rights program. Carswell characterized the President's proposal as a "civil wrongs" bill and called it unconstitutional. Truman's attack on job discrimination was "part and parcel of this same rotten vote-getting scheme." A World War II veteran, Carswell had failed to understand the fallacy of the "master race" argument of the Nazis. His segregationist speech, given even as the Armed Forces were desegregating themselves, was to an American Legion chapter. The greatest danger he could see to American leadership was the possibility that Congress might enact a civil rights law. Carswell's speech reflected exactly the kind of irresponsible political leadership which has made

the postwar racial transition in the South so agonizing and so protracted.

After he moved to Florida, Carswell's next reported political venture was in Senator Russell's battle against Estes Kefauver in the 1952 Democratic primary. Senator Russell, after the nomination was announced, told the Atlanta Constitution that Carswell was "very active for me." The primary was an extremely important one and Russell's central issue in his successful bid to damage Kefauver's nomination hopes was opposition to Federal action against job discrimination, the so-called FEPC. According to an authoritative report on the primary prepared by political scientists from several leading Florida Universities for the series, "Presidential Nominating Politics in 1952," "probably the paramount issue in the campaign was FEPC legislation which the two Senators debated over television on election eve." In the north Florida area, they report, the campaign tended to emphasize white supremacy.

This is one of the things that it occurs to me it might be useful to have a little more time to investigate, if this committee's proceedings were not so precipitous. Certainly it is very unclear at this stage just what Mr. Carswell's involvement in the Russell campaign was.

It certainly was to some extent a racist campaign. Should it be possible to identify Judge Carswell with this campaign, I think one has to admit that that is a possibility. Certainly that would deepen the question that is raised by his 1948 speech.

Of course, it is very, very difficult for either journalists or scholars to make this type of investigation in the limited time that has been allowed.

I would like to just make a brief comment on the golf course issue. After Judge Carswell was appointed as a U.S. attorney, he became involved in this golf course issue. It has been extensively discussed. It seems to me it is rather transparently clear that a man who was the U.S. attorney would have knowledge of a very important Supreme Court decision, a man who was dealing with the most important social facility in his home community would probably be aware that it was being transferred from public to private ownership, and that the consequence of the transfer would be to institute a policy of segregation, and to avoid implementation of the Supreme Court's decision.

It seems to me that a financial defense for this is a rather flimsy one, as most parks are not money making operations. It is perfectly normal for municipalities to sustain a loss to keep a recreational facility open. This is another issue that more time would be useful for an investigation.

Far more important than his political background, however, is Judge Carswell's record after he was named by President Eisenhower to the Federal bench. Carswell was appointed not long after the Little Rock crisis and served during a period which severely tested the values and courage of Federal judges responsible for enforcing unpopular demands of the law. Carswell decisively failed this test.

He also handled very brief litigation in at least one other school district but I want to investigate in detail the ones that were in his court several times to show the way in which he failed to comply with existing law. Senator Hruska said the first day of the hearings that law is a fast moving and dynamic area, and that the judgment of the

adequacy of Mr. Carswell's record should be made in terms of whether or not he was willing to employ the contemporary standards of the law.

I think the evidence in these school cases shows that he was not willing to employ the contemporary standards of the law, and that far worse than Judge Haynsworth, who was insensitive to the social needs and to the factual circumstances of cases, Judge Carswell in fact has been in a number of cases unwilling to employ settled law.

Judge Carswell handled extensive litigation involved in desegregating three northern Florida school districts. He supervised the desegregation process in Escambia County, containing Pensacola and the surrounding area, in Leon County, containing his home city of Tallahassee, and in nearby Bay County. These were not Black Belt counties with large black majorities like those now in turmoil in Mississippi. Their problems were manageable and the job of the Federal district judge was eased by relatively responsible State political leadership. In Carswell's court, however, the effort to desegregate these school systems tended to drag on forever.

The *Pensacola* case first came before Carswell in 1960 and was still in court last year. Both of Carswell's first two actions on this case were reversed by the Fifth Circuit Court of Appeals.

In their initial complaint, civil rights lawyers asked Carswell to hear evidence on the importance of ending rigid faculty segregation as an essential step in making school integration work. The black children claimed that total segregation of teachers could only be supported by the racist assumption that all blacks were inferior to all whites, the very assumption that the Supreme Court was trying to eliminate from the law in its school decisions. "Assignment of school personnel on the basis of race and color", the lawyers argued, "is * * * predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior * * * and, therefore, may not teach white children". The intent of the 1954 decision, they argued, was the creation of a nonracial "school system", something obviously impossible so long as completely segregated faculties announced to the community and the children that one set of schools was "Negro" and another "white."

The issue of faculty desegregation was not a settled question of the law, and Judge Carswell was confronted with an important new issue. Rather than hear arguments on the issue, however, Carswell threw it out of court. He arbitrarily struck the whole issue from the student's complaint, asserting that black students had no standing to sue for for desegregated faculties. He mocked a very serious question, saying: "Students can no more compain of injury to themselves of 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." *Augustus* v. *Board of Public Instruction of Escambia County*, 185 F. Supp. 450, 5 *Race Rel. L. Rep.* 645 (1960).

When the case came before the fifth circuit on appeal, the superior court read Carswell a lecture on his mishandling of this important issue. Carswell, the judges said, was wrong to assume without serious investigation of either the law or the facts that Negro students could not possibly be injured by faculty segregation. He had erred in using a "drastic remedy" appropriate only where the question "has no possible relation to the controversy." *Augustus* v. *Board*, 306 F. 2d 862 (1962).

I think this is a suggestion of his insensitivity, not to be able to imagine there could be any possible damage to a child in having to attend schools with a totally segregated faculty. This is the first example of his willingness to use his discretion as a district judge to even strike out of argument on a very important issue raised by the litigants.

The Pensacola suit was filed in February 1960, but Carswell did not obtain a desegregation plan from local authorities for a year and a half. Even then, Carswell allowed another year before the first short step was taken toward token desegregation. He approved a defective plan which provided only vague notification of rights to black parents, allowed only 5 days a year for blacks to request transfer to white schools, and authorized the school board to reject transfer applications on a variety of general grounds. *Augustus* v. *Board*, 6 Race Rel. L. Rep. 689 (1961).

On appeal, the fifth circuit rejected the plan approved by Judge Carswell. "We are forced to conclude," the court said, "that it has not gone far enough." The court did not simply remand the case for further consideration, but directed a specific first step. "We are reluctant," the circuit judges said, "to substitute our judgment for that of the district court." Clearly, they believed that Carswell needed direction.

Carswell's next major case involved the local Tallahassee school system. He approved a desegregation plan which opened only one grade each year to token desegregation through the system known as "freedom of choice." He issued this order in spite of the directive to his court in the fifth circuit's Pensacola decision that at least two grades be desegregated the first year if desegregation did not begin until 1963. *Steele* v. *Board of Public Instruction of Leon County*, 8 Race Rel. L. Rep. 932 (1963).

Another indication of his grudging, delaying grant of rights, even delay in grant of minimal relief.

The third case which was to come repeatedly before his court was that of Bay County, which operated a sizable school system south of Tallahassee along the gulf coast. When this case came before Carswell a decade after the 1954 decision, the country's schools were still totally segregated. Although the law of school desegregation had developed greatly between 1962 and his July 20, 1964, order on the *Bay County* case, Carswell ignored the intervening court of appeals and Supreme Court decisions and issued an order based on his 1962 Pensacola order.

The Fifth Circuit Court of Appeals had handed down three important school decisions more than a month before Carswell's Bay County order, decisions which demanded more rapid school desegregation. The Supreme Court itself had set a standard of increasing speed in school desegregation. The Supreme Court had held in a 1963 case, *Goss* v. *Board of Education*, 373 U.S. 683, that passage of more than 9 years since *Brown* had changed the whole context within which desegregation plans must be considered. Two months before Carswell's Bay County decision, the Supreme Court held that "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights * * *." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

Against this background, Carswell's Bay County ruling was all the more amazing. Except for students graduating from grade school to junior high or from junior high to high school all children would be forced to remain in segregated schools for another year. Then token integration would begin on a grade-a-year basis. Even those students eligible to transfer the first year could enter white schools only if their parents came to the superintendent's office, during working hours, on one of only 4 days allowed for the purpose. Even then the school board could use vague general criteria in the Florida pupil assignment law, to reject applications.

A black family desiring to have its constitutional rights in the form of desegregated education for its children had to be very brave and very stubborn to go into the superintendent's office, take off work and make out an application that might not be granted to obtain a desegregated education under this plan.

In another passage of the Bay County decision, Carswell suggested that students could be constitutionally assigned to different schools on the basis of achievement or IQ tests, thus indicating sympathy for what is becoming a favorite device to prevent integration in Mississippi. Such tests naturally reflect the cumulative impact of school segregation and such a plan tends to reflect and to preserve a system of separate and unequal schools. *Youngblood* v. *Board of Instruction of Bay County*, 9 Race Rel. L. Rep. 1206 (1964).

This issue in all likelihood will be coming before the Supreme Court as it is becoming one of the principal reactions in Mississippi and there is a good deal of talk of it in other Deep South States, to try to avoid the latest Supreme Court decision saying that time has finally elapsed for school desegregation in the South.

Shortly after the Bay County ruling, Carswell served as a member of a three-judge panel of the Fifth Circuit Court of Appeals. The court issued a ruling, in a case involving a Georgia school district, which clearly suggested that Carswell had been lax in his disposition of the Bay County case. In a dissent, Carswell expressed his anger at the court's effort to speed up desegregation.

Citing recent Supreme Court and fifth circuit actions, the two circuit judges on the panel concluded that the local school board should open at least the first two grades to possible desegregation during the first year and should also allow black high school seniors to transfer so that each child would "have at least an opportunity to enjoy a desegregated education during his school career."

Already there were students in the school who had been there for 10 years since the 1954 decision. The only way in which they could enjoy even 1 year of their constitutional rights was to open up senior year desegregation. No delay would be permitted before beginning desegregation and three more grades would have to be opened each succeeding year. In striking contrast to Carswell's Bay County order, which would have extended the process of free choice desegregation until fall, 1976, the fifth circuit directed completion by 1967.

Carswell's dissent reveals a flash of anger normally absent in his dry and terse opinions. He was outraged at this circuit court intervention. "No court," he wrote, "should rain down injunctions unless there be some demonstrated factual necessity to insure compliance with the law." He found no such necessity in the record of a local school board

which had maintained absolute segregation for 10 years after the 1954 decision. On the contrary, he thought local officials had "an intention to effectuate the law." He argued that the district judge should have more discretion to change the requirements and thus assure "orderly compliance," presumably by authorizing a weaker desegregation plan less offensive to local white sensibilities.

Carswell wanted to send the case back to the district judge without any specific instructions. He concluded his dissent by expressing his hope that the decision was not "promulgated" as a "standard nostrum" or a "mold of inflexible cast" for the future lower court decisions. *Gaines* v. *Dougherty County Board*, 334 F. 2d 983 (1964).

After returning to Florida, Carswell took his first opportunity to show that he felt none of the new urgency stressed by the fifth circuit. The *Tallahassee* case was back with the black children asking for more rapid progress and some faculty desegregation to bring the local plan into compliance with recent decisions by higher courts. Ignoring current appeals court standards, Carswell ruled that there was no need to make "any basic structural change * * * in order to guarantee the full constitutional rights of plaintiffs."

Carswell insisted that the only relevant precedent was the 1962 *Pensacola* decision, thus asserting in effect that intervening supreme court decisions and fifth circuit decisions had no bearing or no influence, no legal force in his district. *Steele* v. *Board*, 10 Race Rel. L. Rep. 606.

When civil rights lawyers reopened the *Pensacola* case, Carswell ruled the same way. He insisted that he had no discretion to make a "basic structural change," and he refused to provide any significant relief. *Augustus* v. *Board*, 11 Race Rel. L. Rep. 149 (1966). Falsely claiming that the fifth circuit supported his order, he adopted a line of reasoning which assumed that district judges should ignore new developments in the law until they are specifically reversed on each individual case.

Carswell's decisions were shockingly inadequate when compared to many other contemporary Federal district court decisions or to voluntary school desegregation plans being submitted to HEW by school districts all over Florida. Another Florida district judge, for example, tried to comply with higher court decisions in 1965 by ordering Indian River County in central Florida to complete free choice desegregation by 1967. *Sharpton* v. *Board of Public Instruction of Indian River County*, 11 Race Rel. L. Rep. 702. Florida was the first State in the South to have all school districts not under court order in compliance with HEW's school desegregation guidelines and most school districts opened all grades to freedom of choice desegregation in September 1965. In effect, Carswell's orders, incorporating neither the substantly demands or the procedural standards of either the fifth circuit or of HEW plans protected recalcitrant school districts from the impact of the 1964 Civil Rights Act. These school districts could continue drawing Federal aid, heavy Federal aid in areas like Pensacola which has a major naval air station, and yet remain almost totally segregated.

As late as the fall of 1966, when HEW was demanding substantial annual progress toward abolition of the entire dual school system and when the case law was developing very rapidly, Carswell clung

to his hopelessly outdated 1962 grade-a-year token integration plans. When black litigants from Tallahassee again appealed for a more adequate order, he refused to consider revising the terms of his original orders. *Steele, Knowles* v. *Board*, 12 Race Rel. Rep. 197 (1966). The fifth circuit again had to reverse Carswell, finding that his plan failed "in a number of important respects." 371 F. 2d 395.

The Justice Department found Carswell's Bay County desegregation plan so inadequate that it intervened on behalf of black litigants in the county in 1966. Ironically, the Justice Department is now lobbying for Senate approval of a Supreme Court nominee whose decision was so inadequate that Justice had to use its authority, and its scarce staff, under the 1964 Civil Rights Act to ask for a chance in one of his orders less than 4 years ago. *Youngblood, United States* v. *Board of Public Instruction of Bay County*, 12 Race Rel. L. Rep. 199 (1966).

Not until the fifth circuit made its historic Jefferson County decision in 1967 and made it unambiguously clear to district judges that they were expected to incorporate the explicit terms of that order in their desegregation plans, did Judge Carswell finally come into compliance with contemporary law on school desegregation. He then issued identical orders to each of the three school districts.

The record of Carswell's stewardship during the ordeal of school desegregation was one of magnificant 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 Tallahassee schools were still in separate and completely segregated schools that same year. (Southern Education Reporting Service, Statistical Summary, 1966–67, p. 11.) Judge Carswell had put local values above his responsibility to uphold the Constitution.

You have heard in the testimony of previous witnesses reference to a couple of civil rights cases which supposedly showed Judge Carswell's record as a defender of civil rights. One of them involves desegregating a barber shop. I won't comment on that one. The other one that has been spoken of, and spoken of today by the representative of the Florida Bar, was the desegregation of the Tallahassee Municipal Airport. This case I think doesn't provide much grounds for defending a record of active protection of civil rights. In 1961 in this case, *Brooks* v. *City of Tallahassee*, Carswell in fact refused to issue an injunction against the restaurant operator guilty of segregation in the operation of a restaurant on Tallahassee municipal property.

A judge known to be tough on criminals, he said he would rather take a promise not to do it again rather than force compliance by issuing an injunction. *Brooks* v. *City of Tallahassee*, 6 Race Rel. L. Rep. 1099 (1961). A violation of the Constitution apparently demanded more gentle treatment than a violation of a criminal statute.

I want to comment just briefly on a couple of other civil rights cases. I haven't had time and nobody has had the time to read all of these cases in the very short amount of time that has been allowed for the preparation of these hearings. But this sampling of cases is enough to indicate very serious concern about the adequacy of his record.

When two black students were expelled from a Tallahassee college because of a disputed State conviction for a civil rights demonstra-

tion, Carswell refused to examine the issues involved either in their conviction or in their expulsion. *Due* v. *Florida Agricultural and Mechanical University*, 8 Race Rel. L. Rep. 1396 (1963). When civil rights workers tried to help black voters register in 1964 in a county just north of Tallahassee, they were convicted of criminal trespass and delinquency by a local judge, and appealed to Carswell's court for a writ of habeas corpus. Rather than examine the merits of their conviction, Caswell deferred to local segregationists and remanded the case back to the county court. *Wechsler* v. *County of Gasden* (1965). He was reversed by the fifth circuit.

You will hear more about this case from another witness.

The following year Carswell dismissed a suit calling for desegregation of the Florida School for Boys and Girls. On appeal, the fifth circuit rejected his argument that students who had subsequently been paroled from the school had no right to file suit. The appeals court pointed out that under Carswell's ruling it would be virtually impossible to end clearly unconstitutional segregation since the average stay of a child in the reform school was shorter than the time elapsing between filing suit and obtaining a desegregation order in a Federal court. Carswell, the court held, had misused the doctrine of mootness and misinterpreted the relevant Florida law in dismissing the case. *Singleton* v. *Board of Commissioners of State Institutions*, 11 Race Rel. L. Rep. 903 (1966).

In a case decided last year, Carswell told a black prisoner that even if his constitutional rights were violated by exclusion of Negroes from the grand jury which indicted him, there was nothing the Federal court could do. He summarized his philosophy of the limited and passive role of the Federal courts. "The vindication of Federal rights is left to State courts except in those rare cases where it is clearly predicted by reason of the operation of a pervasive and explicit State law that those rights will be denied." *Baxter* v. *State of Florida*, 295 F. Supp. 1164 (1969).

In summary, Carswell's judicial record is one of unflagging hostility to litigants asking Federal courts to energetically protect the rights of black Americans. He has been quite willing to risk what he must have known would be inevitable reversals in order to delay even token desegregation. His record is devoid of any indication that he understands the urgency of the race problem in American society. He has failed to do his duty and he does not merit promotion to the highest appointive office in American Government.

I share the feeling of a previous witness, Professor Moore, that it would be a good thing to have a Justice from the South, and it seems to me that there are plenty of highly qualified judges in the South who merit promotions, highly qualified politicians in the South who have taken some leadership, have moved with the forces of history in the South rather than lagged behind them reluctantly dragging their feet. I could cite perhaps in response to a question the differing attitude of a judge who succeeded Judge Carswell in handling the *Pensacola* case, in the decision issued last year, and the attitude is like night and day from Judge Carswell, but I want to turn now to another issue that is going to be important if this question is seriously debated before the Senate.

In a sense this issue raises a question that was not really faced clearly by many Senators in the Haynsworth debate. It asks the question in

effect whether the Senate has the right to reject the President's nomination on philosophical grounds, grounds of failure to perform a duty involving movement of the law rather than on simply the grounds of conflict of interest.

No one doubts the propriety of Senators refusing to confirm a Supreme Court nominee who is unfit for office. There is wide controversy, however, about the suitabilitv of Senators voting the nominee down on philosophical grounds.

The historic precedents for a major Senate role in selecting Justices are very strong. The Constitutional Convention itself laid a strong foundation for the Senate's powers. The power has been actively used, particularly when different parties representing different philosophies controlled the White House and the Senate.

The Senate has rejected a higher proportion of Supreme Court nominees than for any other office.

On some important occasions racial issues have played a leading role in successful attacks on nominees.

The Founding Fathers repeatedly debated the question of proper method of nominating judges and they repeatedly decided in favor of legislative involvement. The original Virginia plan submitted to the Convention provided for the selection of judges exclusively by Congress. The Convention initially decided that the Senate should appoint judges without any Presidential involvement whatever.

This provision remained in drafts of the Constitution until late in the Convention. The idea of Presidential appointment with consent of the Senate was twice voted down before it was accepted as a compromise near the end of the Convention.

Motions proposing nomination by the President without Senate approval were defeated by the Convention whenever they were offered. The final compromise for nomination of Supreme Court justices clearly was intended to divide the power between the President and the Senate.

Writing in the Federalist Papers, Hamilton, who had little sympathy for legislative power, defended the Senate's confirmation power. Review by the Senate, he said, would have a powerful though in general a silent operation. "It would be," Hamilton said, "a silent check on the spirit of favoritism of the President and it would tend greatly to prevent the nomination of unfit characters."

A primary reason why most Presidents nominate eminent, respected attorneys or judges is that the Senate's power usually militates against overtly political appointements of mediocre men.

President Nixon has chosen to test that power by making just such an appointment.

The Senate successfully asserted its right to reject the nominee even before George Washington's first term was ended. His choice for Chief Justice in 1795 was turned down largely because of doubts about the judgment he had shown in giving a highly partisan speech on a foreign policy issue which had polarized the Nation.

The Senate's action made possible the later appointment of Chief Justice John Marshall, the greatest judge in the Court's history. Andrew Jackson faced bitter Senate resistance. President John Tyler was defeated on four nominations after he broke with his party.

As the country became polarized five more nominees were denied posts during the 15 years before the Civil War. After the war, the controversy over reconstruction policies led the Senate to reply to one of Andrew Johnson's nominations by reducing the size of the Court and thus eliminating the vacancy.

Racial issues have figures in several nomination battles since the Civil War. Since the Court was thought to share the blame for causing the war because of its brutally anti-Negro position in the *Dred-Scott* case, it was not surprising that the Republican leaders in Congress after the war fought to keep those unsympathetic to the rights of freed men off the Court.

President Andrew Johnson's troubles related to congressional fears of judicial rejection of civil rights laws, extending Federal power to protect the freed slaves of the South. Later one of President Grant's nominees was rejected. It was rejected after he was attacked as a pro-slavery Democrat and condemned for a letter he had written to Jefferson Davis. His nomination was then withdrawn within a week.

The only nominee rejected between 1900 and the Fortas controversy was John J. Parker, who was accused of bias against blacks and unions. Racial issues, of course, were again extremely prominent in many of the Senate floor speeches against Judge Haynsworth.

Many battles over Supreme Court nominations in the 20th century, most battles, I should say, have been policy disputes. Questions of economic regulation, governmental power, individual rights and civil rights have been in the forefront. Seldom have Presidents faced a Senate strongly in the hands of the other party, and seldom have they presented nominees openly unsympathetic to the basic values of their time.

The Senate has both the right and the responsibility to try to determine the meaning of the Carswell nomination for the development of the law. Supreme Court appointments are irrevocable, and their consequences often extend far beyond the incumbency of a given President. This is particularly true, of course, when a young man such as Judge Carswell is nominated.

There is nothing in either the Constitution or in American political tradition to suggest that the Senate must passively accept appointments which could seriously erode public confidence in the judiciary, or which would signal an important shift in national policy.

In his definitive study of the confirmation process, "advise and consent of the Senate," Joseph Harris observes:

> The Senate as well as the President has given primary attention to the philosophy, outlook, attitude and record of nominees to the Supreme Court with regard to social and economic problems of society. The contests that have taken place in the last 50 years over nominations to the Supreme Court have been confined almost wholly to such issues, though not always openly so. Generally speaking, these considerations have been most important when the nominee was not an outstanding lawyer and his qualifications for the Court were marginal.

I think that is clearly the case in this nomination.

While the Senate has blocked nominations to the Supreme Court only three times in this century, according to Professor Harris this record perhaps indicates that Presidents have been choosing judicial personnel with a careful regard to senatorial moods as much as it shows any lapse of the senatorial power.

Felix Frankfurter believed that it was completely appropriate for Senators to consider the philosophy of nominees; the meaning of due process and the content of terms like liberty are not revealed by the Constitution. It is 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, Frankfurter said: "are molders of policy rather than impersonal vehicles of revealed truths."

One of the Senate's great men, George Norris, of Nebraska, made similar comments during a confirmation debate: "Why," he said, "do we have 5-to-4 decisions and why is it that the five are usually the same and the four are usually the same? If you will examine you will find that it is the viewpoint of the individual that they have carried with them."

Without charging any dishonesty, without charging any intention to do wrong to either side, after all the close cases, the difficult cases in an appellate court are often determined by human nature, by the viewpoint of the individual. That is part of the man and remains part of the judge.

Senators participating in the Haynsworth debate on the floor of the Senate similarly expressed a very strong conception of the Senator's rights and responsibility to consider a nominee's judicial record. Senator Muskie told the Senate that a Supreme Court Justice must be fully sensitive to the efforts of all Americans to participate fully in our society.

Senator Javits found Judge Haynsworth guilty of persistence in error in his handling of civil rights cases. I think that this is a very interesting and important concept for evaluating Carswell's record, persistence in error. I think that the Senate has a clear right and a responsibility to reject a judge who is guilty of persistence in error in handling his duties on the lower court, especially where basic constitutional rights are involved.

I think that Judge Carswell's record is one of persistence in error, persistence in clear error.

Other Senators expressed themselves on this issue. Senator Mondale spoke of the impact of such an appointment on the country. If the Supreme Court, the one institution to which black Americans can look with confidence, he said, is turned around there will be no reason for those in the South committee to resist change to act in any other way than according to their convictions.

Senator Case said that the Senate's role in Supreme Court appointments, unlike Cabinet appointments, was of equal responsibility, although somewhat different in character, to that of the President himself.

In the Haynsworth record he found the degree of insensitivity to human rights unfitting for the tribunal to which the American people look as the ultimate protector of constitutional guarantees.

These comments and those of many other Senators certainly apply with even greater force in the case of Judge Carswell. Not only was he insensitive but he failed to enforce existing law.

Senators I believe must attempt to assess the adequacy of a President's nominee to the Court which often plays a decisive role in na-

tional matters. This responsibility is particularly heavy in times of national crisis, when the resolution of fundamental issues deeply dividing the Nation may well depend on the wisdom and sense of justice of the men on the Supreme Court. We are half way through a great and painful social revolution. This generation has begun a deadly serious effort to eliminate the hypocrisy which has always marred the American ideal of equal opportunity. Our courts have finally recognized and begun to act against the pervasive and corrosive impact of segregation on American society.

Since 1954 some kinds of official segregation have been largely eliminated from American life. There is still far to go, however, particularly in northern civil rights issues.

The problems are becoming increasingly complex and difficult. If the revolution that is so well begun now is to succeed the Supreme Court must surely continue its determined efforts to make real the promise of equal protection of the laws embodied in the Constitution.

During the last days as I read Judge Carswell's decisions I became more and more appalled that our national leaders could consider placing on the Supreme Court a man so unwilling to recognize——

Senator THURMOND. Would you let me interrupt you a minute?

Mr. ORFIELD. Surely.

Senator THURMOND. We have two other witnesses here. I do not want to rush you but we are trying to determine whether we can take more witnesses this afternoon. You have gone beyond your prepared text. Are you about through?

Mr. ORFIELD. I am about through. I will be through in about 1 minute, Senator.

When Carswell's 1948 speech was revealed, I expected that there would be loud demands for a thorough investigation of his entire career. Instead this speech has been dismissed as an excusable youthful lapse. Examination of Carswell's judicial record strongly suggests that the speech was more than a mere aberration. It expressed in an extreme and overstated manner a general opposition to the use of governmental power to correct deep racial inequities in American society. The judicial record clearly reveals far more genuine concern of the need to protect local practices of segregation from the courts than for his responsibility to see that all American citizens promptly receive the rights guaranteed to them by the Constitution.

His record and the political calculations of those who selected him epitomize the white racism discussed so eloquently in the Kerner Commission report. This nomination expresses a moral bankruptcy of the administration. Confirmation would be a betrayal of the Senate's responsibility.

Senator THURMOND. Are you through?

Mr. ORFIELD. I am through.

Senator THURMOND. We are glad to have you here. I am just wondering, are you a volunteer witness or were you asked to come here by someone?

Mr. ORFIELD. I am a voluntary witness, Senator.

Senator THURMOND. A voluntary witness.

Mr. ORFIELD. After I read Judge Carswell's speech I thought I had better go read the decisions and after I read the decisions I knew I had to come.

Senator THURMOND. I believe you testified against Judge Haynsworth too?

Mr. ORFIELD. I certainly did.

Senator THURMOND. Were you a volunteer witness there?

Mr. ORFIELD. I was.

Senator THURMOND. Or were you asked to come?

Mr. ORFIELD. I was a voluntary witness.

Senator THURMOND. You were?

Mr. ORFIELD. I was teaching at the University of Virginia last year and knew many of the school districts.

Senator THURMOND. While you were teaching at the University of Virginia, I believe you testified on several occasions before congressional committees, did you not?

Mr. ORFIELD. No, I never testified before a committee until the Haynsworth nomination, Senator.

Senator THURMOND. Is that the first time you have testified?

Mr. ORFIELD. Yes.

Senator THURMOND. And this is just your second time before a congressional committee?

Mr. ORFIELD. That is right.

Senator THURMOND. You liked the first time pretty good.

Now, in your testimony on Judge Haynsworth, I believe you conceded that the fifth circuit, of which Judge Carswell is a member, had been more liberal than the fourth circuit in interpreting the Supreme Court's cases requiring desegregation, did you not?

Mr. ORFIELD. I did, and that has been true throughout most of the period since 1954, up until the very recent past. Now I think the fourth circuit is somewhat ahead of the fifth circuit which has recently been reversed on a couple of occasions by the Supreme Court on decisions in which Judge Carswell——

Senator THURMOND. You thought the fourth circuit was bad then because Judge Haynesworth was a member, and now Judge Carswell has been nominated so you think the fifth circuit is getting bad?

Mr. ORFIELD. I should point out, Senator, I have not discussed Judge Carswell's Fifth Circuit decisions since he has been a member of the Fifth Circuit. There have been very few civil rights decisions he has participated in. My discussion today is based on his participation on the district court, which has been most of his judicial career, and where he was repeatedly reversed by the Fifth Circuit, which was doing a very creditable and important job in upholding the Constitution.

Senator THURMOND. I believe you referred to his white supremacy statements when he ran for office in 1948 in your statement, did you not?

Mr. ORFIELD. Yes, I did.

Senator THURMOND. Did you not recognize in your Haynesworth testimony that political exigencies could excuse anticivil rights statements if a candidate were running for elective office in contrasting that with the position of a person that you could not excuse if he was a Federal judge and had a life tenure?

Mr. ORFIELD. I said that I thought it was much more serious for a Federal judge to make a statement denigrating the rights of blacks than it was for a Southern politician to make such a statement. Certainly I said that.

Senator THURMOND. Did you not take the position he could be excused if he was running for office?

Mr. ORFIELD. I said it was more excusable. I certainly will not excuse it myself, and the thing that troubles me about Judge Carswell's statement is that he told the committee itself the other day that he not only said that for political purposes but that he really believed it at the time he said it.

Senator THURMOND. I notice you have gone into some of the cases here by Judge Carswell. Did you mention the barbershop case?

Mr. ORFIELD. No, I did not, Senator.

Senator THURMOND. That was against your position. Why won't you be fair enough to mention that?

Mr. ORFIELD. Senator, if the committee had allowed me adequate time to prepare I would have gone into all of these cases. It was impossible for me to read all of these cases.

Senator THURMOND. Did you know or have you looked into this barbershop case where in 1965 Judge Carswell declared that the barbershop in Tallahassee's Duvall Hotel serve Negroes under the public accommodations provisions of the Civil Rights Act of 1964?

Mr. ORFIELD. I think it was a clear case and I think he decided it rightly in that case. I do not think that really gets to the issue.

Senator THURMOND. He decided the way you believe, therefore it was right?

Mr. ORFIELD. I think he decided as the law clearly was written.

Senator THURMOND. And did you mention when the city airport was desegregated?

Mr. ORFIELD. Yes. I did discuss that case and he refused to issue an injunction against people who admitted they were guilty of segregation.

Senator THURMOND. In 1960 when Tallahassee Negroes sued to desegregate the counters of restaurants in the airport he did not hesitate——

Mr. ORFIELD. He got a voluntary agreement.

Senator THURMOND. And yet you criticized him because he did not go further, is that right?

Mr. ORFIELD. Senator, the question was whether he would be satisfied with a voluntary statement from the operators of the airport facilities or whether to issue an injunction. He took the less rigorous course in accepting a voluntary statement from somebody who had been previously violating the Constitution.

Senator THURMOND. Have you examined Judge Carswell's opinions in any other area of the law with which Federal courts deal besides civil rights?

Mr. ORFIELD. I have read a couple of criminal cases, but I have not had any time to really make a detailed investigation.

Senator THURMOND. Does not a judge have to act on a diversity of cases in all fields? Are you going to judge him on just one field or a few decisions in one field, because you have not covered all of those? Are you fair, do you think, to do that?

Mr. ORFIELD. Senator, do you think you are fair in asking people to assume an impossible burden in a few days' time?

Senator THURMOND. I am asking you questions now. You are before us as a witness. Do you think you are fair to try to judge Judge

Carswell as a judge, a prospective Supreme Court Justice, when you pick out only certain decisions that seem to indicate your position, fail to give other decisions, and do not go into other areas at all?

Mr. ORFIELD. I believe I have read all of his major school desegregation decisions which is the field of law which I am most familiar with and most competent to testify on. I think that they indicate such a basic betrayal of his responsibility that they are plenty adequate in themselves to justify rejection of the nomination. I think that you will be hearing testimony from some other opposition witnesses on other issues involving criminal proceedings for example.

Senator THURMOND. In the case of *Steel* v. *Taft* in which Judge Carswell refused to order the city of Tallahassee to help open its public swimming pools after it had closed them, did you know that the Fifth Circuit had taken the same position in *Palmer* v. *Thompson?*

Mr. ORFIELD. I am not raising any complaint about that.

Senator THURMOND. And so you are putting up your opinion against the Fifth Circuit's opinion?

Mr. ORFIELD. I did not criticize him on that case, Senator.

Senator THURMOND. Well, he took the position that was opposite from yours.

Mr. ORFIELD. I did not say that in every civil rights decision he made he was reversed. I am saying that there is such a large number of reversals that I believe that that indicates a general attitude toward the law which is an extremely unfortunate attitude for a district judge and would be a disaster for a member of the Supreme Court.

Senator THURMOND. Do you know anything against Judge Carswell's character, his integrity, his honesty, his reputation?

Mr. ORFIELD. Senator, I have made no investigation of his personality or background, but I think that there should be more time for journalists to investigate his background before the Senate has to act on this issue, because it seems to me that in the short time we have had——

Senator THURMOND. Would you answer what I have asked you?

Mr. ORFIELD. I do not know Judge Carswell.

Senator THURMOND. You do not know anything against him?

Mr. ORFIELD. I have no personal personality complaints against him.

Senator THURMOND. And you are not a lawyer?

Mr. ORFIELD. No, I am not a lawyer.

Senator THURMOND. And yet you are attempting to pass on his qualifications here as a lawyer, and as a judge, when you admit you are not a lawyer yourself, and you know nothing against him so far as his reputation and honesty and character is concerned?

Mr. ORFIELD. I am making no comment whatever about his character.

Senator THURMOND. All right. Thank you.

Senator Bayh, do you have any questions?

Senator BAYH. Yes.

Mr. Orfield, I for one appreciate the time and effort that yon have gone to here. I appreciate the fact that there are some citizens in this country who will voluntarily approach the committee to address themselves to this kind of problem; and although I do not know whether you enjoyed the last experience or not, I imagine you have done a lot more profitable things in your life, from a pecuniary standpoint, than studying the Haynesworth and the Carswell matters.

The distinguished Senator from South Carolina suggested that perhaps you erred in limiting your study to the civil rights field. Do you know of any statement that Judge Carswell made in any other area such as the 1948 statement which was made professing white racism and which would have the impact that this would have if a judge believed this today?

Mr. ORFIELD. No, I do not, Senator.

Senator BAYH. Is it fair to assume that this would alert anyone who was really concerned about the quality of the nominee going to the court that this is an area that one ought particularly to investigate?

Mr. ORFIELD. Absolutely. I think it demands the most careful investigation from the Senate. I think for the Senate not to would be an indication that the Senate was really losing faith in this whole movement for equal rights in this society.

Senator BAYH. I have not decided in my own mind the impact of the cases. Your statement raises additional concerns in my mind, your analysis of these cases. I hope you will continue your study until the Senate works its will one way or the other on this, and if you have other matters, I wish you would bring them to our attention.

Are you familiar with the barber shop and the swimming pool cases and would you care to comment on how they fit in this whole pattern? We want to get everything out in the open here.

Mr. ORFIELD. I have no particular objections to the barber shop case. It seems to me that was sound law. I have not read the swimming pool case and I will not make any comment on it, Senator.

Senator BAYH. You mentioned the Fifth Circuit. There was some discussion between you and our distinguished colleague from South Carolina relative to who was first or who was last vis-a-vis the Fifth and the Fourth Circuits. How would you categorize Judge Carswell's position in the area of civil rights and equal opportunity compared with other judges on the Fifth Circuit, and indeed with other judges in the State of Florida? You mentioned, I think, the Pensacola judge.

Mr. ORFIELD. Well, I think that there were many Federal district judges during this period who exhibited a great deal more sensitivity to the decisions of higher courts, and who were willing to really explore the human and legal problems that were involved in this tremendous transition of dismantling the dual school system. You find Judge Carswell seemingly insensitive to these issues, unwilling to apply fairly clearly established law, and so unwilling to explore new legal issues that are raised, new unsettled legal issues that actually in one case, on a very important issue of faculty desegregation, he just threw it out of his court without even hearing evidence on it, without even examining the law.

I think it is an extremely disturbing record.

Senator BAYH. One of the matters that concerns several of us—we must try to determine what kind of Justice Judge Carswell would make if he is confirmed to the Supreme Court. I think it is very true that the 1948 statement would serve as a warning flag to look closely in this area. Most of us, not being without fault in our past experience, would not like to say that a man making one mistake back in 1948 should be forever held accountable for that mistake if indeed he has changed and feels differently.

The one example that is continuously relied upon to show how indeed the Court has benefited from one such individual is Justice Black.

Are there similarities between the previous records of Judge Carswell and Justice Black, and does Justice Black's record on the Supreme Court now indicate what Judge Carlswell might do?

Mr. ORFIELD. I have seen that comparison made very frequently, and as I said early in my statement, I think it fails on two counts.

One is that in a very thorough investigation of Black's political career, John Frank, who was a leading witness before the committee on the Haynsworth hearings, in behalf of Judge Haynsworth, said there was no reference in any campaign speech by then candidate for the Senate Black which indicated either support for white racism or any kind of anti-Negro attitude; and consistently in Black's political career before he came into the Senate, as a police court judge in Birmingham, and earlier than that as a lawyer, he had been willing to defend and to protect the rights of black ligitants.

This is a record wholly different from Judge Carswell's.

Judge Carswell has told us he actually believed that statement when he made it. I think Justice Black made a mistake in joining the clan, later admitted it, later was actively disliked and opposed by the clan. I think the disturbing thing to me about Judge Carswell's statement is that it seems to tie in with the whole history of unwillingness to move, and insensitivity to problems in this whole area of civil rights.

I certainly hold to the view that if this statement had been made and it had heen followed by a good sound record as Federal district judge, that the Senate probably should dismiss that as a youthful indiscretion. It wasn't, however. He was later involved in this campaign, with heavy civil rights emphasis in the Russell primary. He was later involved in this golf course business, which seems to me to be far from settled in my mind after hearing the testimony.

And then as a Federal district judge he was repeatedly involved in cases where he was reversed or where he ignored existing law, all in the civil rights field. I do not think Judge Carswell is stupid. I think he is a very effective man in his testimony. I am sure he must have known what the law was. That means that he must have intentionally courted reversal by the superior court, in order to buy some more time for preserving segregation at the local level.

Senator BAYH. It is pretty difficult for us to look into a man's mind and judge his motivation.

Mr. ORFIELD. That is right.

Senator BAYH. We can read the cases and analyze them.

Mr. ORFIELD. Of course, but the only explanation I can think of is stupidity or unwillingness to recognize an existing precedent. I have sort of eliminated the first from my mind.

Senator BAYH. I appreciate your taking the time to come here and give us the benefit of your opinion.

Mr. ORFIELD. Thank you very much.

Senator BAYH. Mr. Chairman, I would like to say, and I think I speak for Senator Kennedy as well as myself, that because of other obligations this afternoon, we were not here when Mr. Proctor testified. We tried to find him. I understand he is at a Washington hotel. I do not know that anybody has been able to talk to him yet but we would like very much to have a chance to ask some questions of Mr. Proctor, and have access to some documents that he had that were not placed in the record. I hope we can do this, if not today, I under-

stand that we are going to hear some witnesses Monday. If that is the case I hope that we can have a chance to ask some questions of Mr. Proctor. Thank you.

Senator THURMOND. On that point, I might say I was not acting chairman, and I think that matter would have to be taken up with the permanent chairman, Senator Eastland.

The next witness is Prof. William Van Alstyne.

Raise your hand and be sworn.

The evidence you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. VAN ALSTYNE. I do.

Senator THURMOND. Have a seat.

You may proceed with your statement.

TESTIMONY OF WILLIAM VAN ALYSTYNE, PROFESSOR OF LAW, DUKE UNIVERSITY LAW SCHOOL

Mr. VAN ALSTYNE. Thank you, Mr. Chairman, Senator Bayh.

My name is William Van Alstyne, and I am a professor of law at Duke University where I have taught constitutional law and related seminars on the Supreme Court since 1965. Prior to that time, I was professor of law at Ohio State University where I taught courses in constitutional law from 1959 to 1964. I have also been a visiting professor at Stanford University Law School, UCLA Law School, the University of Denver Law Center, the University of Mississippi, and a senior fellow at the Yale Law School.

I have written approximately 30 articles in the field of constitutional law published in various professional journals including the Harvard, Yale, Stanford, and Michigan Law Reviews. A member of the Supreme Court Bar and admitted to practice in California, I have participated in constitutional litigation in the U.S. Supreme Court and the Federal district courts and Court of Appeals for the Fourth Judicial Circuit, either as an amicus curiae or as assigned counsel on contested issues of constitutional law.

Prior to entering academic life in 1959, I served as an attorney in the Civil Rights Division of the U.S. Department of Justice, following a brief period of service as a deputy attorney general for the State of California. My academic degrees are from Stanford University (LL.B. 1958, Order of the Coif, articles editor of Law Review) and the University of Southern California (B.A. 1955, philosophy, magna cum laude).

I mention these matters because I too am a volunteer in these hearings, and have no pretension about my own prestige, and have tried to establish in an appropriate fashion at least some professional basis for appearing before you this afternoon.

I have in addition previously served as consultant to the Senate Subcommittee on Separation of Powers, under Senator Ervin, and I am currently general counsel to the American Association of University Professors and a member of the board of directors of the North Carolina Civil Liberties Union, an affiliate of the ACLU.

This afternoon, however, I appear purely in a personal capacity. 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 professional familiarity with Judge Haynsworth's judicial record which I believe might be of asassistance 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 pubished 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 grating 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.

Senator BAYH. To put this in proper perspective, since we were talking about the fourth and fifth circuits, in this case you say Judge Carswell held exactly contrary to what another Federal district judge in Florida held and contrary to the fourth circuit?

Mr. VAN ALYSTYNE. That is correct.

Senator BAYH. And the interesting thing, if I am correct, is that of the cases you have cited, four are cases that he held while he was district court judge and they were subsequently reversed not by the Supreme Court but by the court of appeals?

Mr. VAN ALYSTYNE. That is correct. It is correct also, of course, that there are several cases in which relief was not denied to plaintiffs suf-

fering 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 a 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)

Senator THURMOND. Any questions, Senator Bayh.

Senator BAYH. This is from one Senator's standpoint a damning piece of testimony, offering the judge's——

Mr. VAN ALYSTYNE. Senator, I have not come here to damn Judge Carswell. I do not know him personally.

Senator BAYH. Perhaps I should use a word other than damning.

Mr. VAN ALYSTYNE. No, but 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.

Senator BAYH. I want to tell you, Professor, I have been searching for those. I have been hoping that we can find them.

You were Assistant Attorney General in the Civil Rights Division of the Justice Department. At what time?

Mr. VAN ALYSTYNE. In the year 1958–59.

Senator BAYH. That was during the Eisenhower administration?

Mr. VAN ALYSTYNE. It was.

Senator BAYH. You were deputy attorney general of the State of California?

Mr. VAN ALYSTYNE. Yes, sir.

Senator BAYH. A member of the bar?

Mr. VAN ALYSTYNE. Yes.

Senator BAYH. Magna cum laude from the University of Southern California. Those are pretty impressive credentials, and I would assume that those credentials plus your sincerity indicates very well that you do not take the analysis that you have given us lightly.

Mr. VAN ALYSTYNE. Not at all.

Senator BAYH. May I ask just one question, the same question that I asked of a previous witness. Do you make a specific comparison between the Hugo Black example and the Judge Carswell example?

Mr. VAN ALYSTYNE. I can and I think it is in three dimensions rather than two. I agree with Professor Orfield and his distinctions and would want to add additional observations about reassuring events, aside from his nominal affiliation with the clan.

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 occasion 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 report, 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 report if this nomination is confirmed.

I find no similar situation in the circumstances of the confirmation of Senator Black.

Senator BAYH. Thank you. I have no further questions.

I would like to point out that I am sure that this has been no little inconvenience to you, Professor, and I am grateful.

Mr. VAN ALYSTYNE. I appreciate the opportunity very much.

Senator BAYH. Let me just make one observation. This is particularly revealing to me because we did not see eye to eye on the previous nominee. I was struggling with a different subject on that, but you have obviously given this a great deal of attention.

Senator THURMOND. The Senator from Indiana did not listen to your testimony in the Haynsworth case but it seems he is very interested this time.

Senator BAYH. Neither did the Senator from South Carolina prove his consistency, and I imagine the record will show that.

Senator THURMOND. It looks like the professor is going to lose both times.

Mr. VAN ALYSTYNE. Well, with regard to Senator Bayh's predicament at least, I am reminded of a recollection of Justice Frankfurter who said that it is so seldom that wisdom ever comes, we ought not to be reluctant though it comes late.

Senator THURMOND. Thank you again.

The next witness is Mr. Lowenthal of Rutgers University.

Hold up your hand, please.

The evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LOWENTHAL. It will.

Senator THURMOND. Have a seat.

TESTIMONY OF JOHN LOWENTHAL, PROFESSOR OF LAW, RUTGERS UNIVERSITY

Mr. LOWENTHAL. My name is John Lowenthal. I am an attorney, a graduate of Columbia Law School, and professor of law at Rutgers Law School in Newark, N.J. I am a member of the New York Bar, and the bars of the Supreme Court of the United States, the second, fifth, and eighth circuits and various Federal district courts in those circuits.

I come here in my capacity as a private citizen and as a lawyer who litigated a civil rights case before Judge Carswell in the Federal district court in Tallahassee in 1964. In that case Judge Carswell by his actions to my satisfaction completely vindicated his statement of 1948 that he would always act in accordance with the sentiments he expressed in 1948.

Senator BAYH. Pardon me. You do not have a prepared text, professor?

Mr. LOWENTHAL. No, sir; I do not.

Senator BAYH. That is all right.

You say that his actions in the case before you, he vindicated——

Mr. LOWENTHAL. His statement that in 1948 he would always act in accordance with his belief in segregation and white supremacy.

Senator BAYH. In other words, you feel that——

Mr. LOWENTHAL. His conduct in the case I will describe to you was consistent with his 1948 beliefs. But I will state the facts and leave the conclusions to you.

Senator BAYH. I will not interrupt. I had misunderstood.

Mr. LOWENTHAL. Please do interrupt so that I can clarify whatever you wish clarified. I briefly described the case in a letter to the New York Times that was published on January 25, at page E–15, and I would like to put that into the record in lieu of a written statement if I may.

Senator BAYH. Does the Senator have any objection to this being put in the record?

Mr. LOWENTHAL. May I do that?

Senator THURMOND. Excuse me, I was reading something here.

Senator BAYH. The Communist oath, we are going to put it in the record. [Laughter.]

Senator THURMOND. Do you want it in the record? Are you going to testify about this today?

Mr. LOWENTHAL. Yes.

Senator THURMOND. I see no objection to it. Without objection it will go in the record.

(The letter referred to follows:)

[From the New York Times, Jan. 25, 1970]

CARSWELL'S RECORD

NEWARK, N.J., *January 20, 1970.*

TO THE EDITOR: When G. Harrold Carswell was a Federal district judge in Tallabassee, he was well known to both local and out-of-town lawyers as a vigorous opponent of civil rights. As I encountered bim, he was no "strict constructionist" when it came to aiding the Old South's cause. Rather, he was such a "judicial activist" that he seemed more the partisan lawyer than the disinterested judge one hopes to find on the Federal bench.

Judge Carswell's concept of the judge's role is revealed by the following: Civil rights workers helping blacks register for the 1964 Presidential election were charged in local county courts with criminal trespass and juvenile delinquency.

Lawyers furnished by the Lawyers Constitutional Defense Committee removed the cases to the Federal District Court in Tallahassee; but the county officials ignored the removals, banned the out-of-state lawyers from the county courts, and proceeded to convict and jail the civil rights workers.

Petitions for writs of habeas corpus were filed in the Federal court. Judge Carswell called for argument, but the county officials did not even bother to file an appearance in his court, let alone argue their case. They evidently knew their man: Judge Carswell granted habeas corpus but, at the same time, on his own motion and without a hearing, remanded the cases to the county courts from which they had just been removed. (The remand was reversed on appeal to the Fifth Circuit. Wechsler, et al. v. County of Gadsden, Fla., Oct. 18, 1965. Last year, President Nixon elevated Judge Carswell to the Fifth Circuit.)

When I had to leave Tallahassee, I could not find a local lawyer willing to take civil rights cases. Leading members of the Tallassee bar, from whose ranks Judge Carswell came and who now practice before him, told me that they sympathized with the problem of obtaining counsel in civil rights matters, particularly for defendants in criminal cases, but that they could not afford to jeopardize their practices by taking such cases.

Judge Carswell's partisan judicial temperament, and his proclivities on civil rights, do not seem to me apprproiate for a Justice of the Supreme Court of the United States.

JOHN LOWENTHAL,
Professor, Rutgers Law School.

Mr. LOWENTHAL. Thank you. This was in August 1964 when Senator Goldwater was opposing President Johnson for the Presidency. In northern Florida, which a previous witness today described as further to the right than Louis the 14th I think he said, most of the Democratic figures in northern Florida were switching to support Goldwater. That was true, for example, of the registrar of voting in Gadsden County, which is near Tallahassee. The register of Gadsden County was also the editor of the local newspaper, and he was a Goldwater supporter whose office both for the newspaper and for registration was plastered with Goldwater literature.

There were at the time a number of voter registration workers advising local blacks about their Federal rights to register and vote in the forthcoming Federal elections.

Seven of these voter registration workers were arrested by Gadsden County officials in August 1964 on a charge of criminal trespass.

Senator BAYH. Excuse me, Senator Thurmond. I do not want to take precedent here, but since we do not have a written statement, I would like to make certain that there is a clear understanding. Do you mind if I interrupt occasionally to ask a question? I do not want to throw the witness off, but as far as these registrars are concerned, could you just give us a word of explanation? Were these federally appointed registrars? Were they local registrars? Were they volunteers? So we will know in what capacity they were on the scene?

Senator THURMOND. It is getting kind of late. As briefly as you can make it we will appreciate it.

Mr. LOWENTHAL. I will make it brief. My understanding is that the registrars are not federally appointed. They are appointed locally. They handle registration for State as well as Federal elections and they get paid some modest sum.

Senator BAYH. They were official registrars?

Mr. LOWENTHAL. Official registrars, absolutely. Anyone who wished to register had to be registered by the registrar. Seven workers were

arrested for criminal trespass, although several of them were local residents, and had relatives in the vicinity. The case was immediately removed from the local county court, Gadsden County, to the Federal district court, Judge Carswell's court in Tallahassee, the reason being that the attorneys thought that the local officials who were hostile to the voter registration drive would be unlikely to accord an adequate or fair trial. So the case was removed properly to the Federal district court.

At that point Judge Carswell indicated his attitude for the first time in this case by requiring two filing fees, which was no small matter for the impoverished voter registration workers, although there is law in his circuit and was at that time expressly for forgoing a requirement of filing fees in removal cases. The law in his circuit was *Lefton* v. *Hattiesburg*, 33 Fed. 2d 380.

This has always seemed to me a departure from strict constructionism. Nonetheless the filing fees were paid. The removal papers were filed with Judge Carswell, but notwithstanding the Gadsden County officials ignored the removal to the Federal court, ejected the lawyers from the county court, gave no time to the defendants to hire or obtain any lawyers, and proceeded to try, convict, and jail the voter registration workers.

Senator BAYH. Excuse me just a moment. How does one eject a lawyer? How do authorities or officials eject lawyers?

Mr. LOWENTHAL. Marshals or other officers in the court were directed physically to remove the attorneys from the courtroom.

Senator BAYH. So these people were tried and convicted without any lawyer to represent them?

Mr. LOWENTHAL. That is correct. At that point or early the next morning at 2 a.m., I arrived in Tallahassee and it was obvious that since my clients were now in jail, the first move was habeas corpus, so I prepared habeas corpus petitions at once.

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. Moreever the voter registration drive was stalled while the workers were in jail, and the local blacks were intimidated from registering. Judge Carswell did not make it easy to file the habeas corpus petitions.

In the first place, he required after we had prepared them that they be redone on his own special forms. These required the signature of the petitioners so we had to drive way out to Quincy where the jail was, some 25 miles from Tallahassee, only to learn that the defendants were 25 miles further out on a road work gang.

Senator BAYH. Is this common practice to require the signature of the petitioner?

Mr. LOWENTHAL. I do not know. At that point I telephoned Judge Carswell and told him of the situation, and he agreed to accept the habeas corpus petitions without signatures under the circumstances, and asked me to convey to the Gadsden County officials his invitation to appear for a hearing before him. The Gadsden County officials, the prosecutor, declined to appear in Judge Carswell's court. I attended therefore in Judge Carswell's chambers a session in which I can only describe his attitude as being extremely hostile.

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.

Senator BAYH. Who were those lawyers who were earlier ejected from the case?

Mr. LOWENTHAL. I do not recall their names, but they were lawyers who were also, I believe, from the north and had preceded me representing these voter registration workers. They then had to return to their jobs or whatever else in the north and I was sent down to replace them.

Senator BAYH. If it is possible I would appreciate it if you could get their names. I would like very much to have those names.

Mr. LOWENTHAL. Judge Carswell indicated that he would try his best to deny the habeas corpus petitions, but I pointed out that he had no discretion in the matter, that the Gadsden County officials had clearly acted in derogation of Judge Carswell's own jurisdiction, since the removal to Judge Carswell's court was wholly proper. Judge Carswell agreed with that, and granted the habeas corpus petitions, but at the same time on 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.

For the record, I would like to produce Justice Carswell's order granting the habeas corpus petition, remanding to the Gadsden County court and denying my request for a stay. I have sufficient copies if I may be permitted to offer it for the record.

Senator BAYH. May we have that for the record, Mr. Chairman?

Senator THURMOND. Without objection.

(The documents referred to follow:)

The United States District Court for the Northern District of Florida, Tallahassee Division

COUNTY OF GADSDEN, FLORIDA, PLAINTIFF

v.

STUART WECHSLER, ET AL., DEFENDANTS

(Tallahassee Civil Action No. 1022)

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS, FILED AUGUST 17, 1964

This cause came on to be heard ex parte with counsel for petitioners being present and after attempted notification of appropriate State of Florida authorities, and it appearing to the Court that petitioners complied with the removal statutes of the United States by filing their petition for removal with the Clerk of this Court on August 14, 1964, and that thereafter but prior to purported trial of the said petitioners in the Justice of the Peace Court, Quincy, Gadsden County, Florida, the Justice of the Peace was personally served and acknowledged service of copy of the petition for removal in accordance with the statute, it is, therefore, clear under the provisions of Title 28 United States Code 1446 that the Justice of the Peace Court, Quincy, Gadsden County, Florida, was divested of jurisdiction to try these petitioners and that the subsequent trial was a nullity at law. The above statute is very specific in stating that a State Court

from whence the action is attempted to be removed loses jurisdiction immediately upon it being served with appropriate removal papers from United States District Court, and it is not necessary that a specific order to this effect be entered by the United States District Judge as apparently was the impression of the Justice of the Peace.

The petitioners are, therefore, entitled to the relief prayed for as a matter of law in that their petition for writ of habeas corpus should be granted.

It is, therefore, upon consideration hereby,

Ordered that petitions of each of the above entitled petitioners for writ of habeas corpus are hereby granted and the Sheriff of Gadsden County, Florida, is hereby directed to release said defendants from his custody forthwith upon service upon him, or his authorized deputy of a true copy of this order certified by the Clerk of this Court. Personal service by attorney of record for these petitioners upon the Sheriff of Gadsden County, Florida, is specifically authorized.

Done and Ordered in Chambers at Tallahassee, Florida, this 17th day of August, 1964.

G. HARROLD CARSWELL,
United States District Judge.

ORDER OF REMAND, FILED AUGUST 17, 1964

(Title Omitted)

It appearing to this Court that the removal of the above entitled cause from the Justice of the Peace Court, Quincy, Gadsden County, Florida, should be remanded to that Court for further proceedings in accordance with law and the Constitution of the United States, in the interest of justice and in the interest of sound judicial administration, and in accordance with the holding and basic philosophy of Dresner, et al v. Municipal Judge, City of Tallahassee, ------ F.2d ------, decided by the United States Court of Appeals, Fifth Circuit, on August 5, 1964, affirming the order of this Court dated August 3, 1964, it is, therefore, upon consideration hereby

Ordered:

1. This cause be and it is hereby remanded to the Justice of the Peace Court, Quincy, Gadsden County, Florida, for further proceedings in accordance with law.

2. The petitioners here, defendants in the subject action pending in the Justice of the Peace Court, Quincy, Gadsden County, Florida, shall be allowed to make new bond, or reinstate old bond on the original proceeding in an amount not more than that originally set pending trial or other proceeding in accordance with law.

Done and Ordered in Chambers at Tallahassee, Florida, this 17th day of August, 1964.

G. HARROLD CARSWELL,
United States District Judge.

ORDER DENYING PETITION FOR STAY, FILED AUGUST 17, 1964

(Title Omitted)

Attorneys for petitioners, defendants in the criminal proceeding in the Justice of the Peace Court, Quincy, Gadsden County, Florida, having moved ore tenus for a stay order from this Court staying the proceedings in the said Justice of the Peace Court pending the possible filing of notice of appeal filed by them in petitioners' behalf from order of this Court remanding this cause to the said Justice of the Peace Court be and it is hereby denied.

G. HARROLD CARSWELL,
United States District Judge.

Mr. LOWENTHAL. If the committee wishes additional copies. I have them. The documents that I have just put in the record come from the printed record on appeal to the fifth circuit in *Wechsler* vs. *County of Gadsden, Fla.*, No. 21825 filed in the Court of Appeals for the Fifth Circuit on February 4, 1965, pages 32 through 35.

Senator BAYH. This all took place just about 5 years ago?

Mr. LOWENTHAL. Yes.

Judge Carswell refused to permit his marshal to serve the habeas corpus petitions on the Gadsden County sheriff, although I understood, but I do not recall from what source, that it is routine practice or had theretofore been routine practice for the Federal marshal to serve habeas corpus petitions.

Senator BAYH. Excuse me, I hate to keep interrupting here.

Mr. LOWENTHAL. Please do.

Senator BAYH. You had a petition for habeas corpus granted?

Mr. LOWENTHAL. I was the lawyer before him, and I asked that order granting the habeas corpus on the Gadsden County sheriff, so that I myself had to drive out to Quincy and serve it on the sheriff. I did that. 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.

Senator BAYH. You say the judge refused to let his marshal serve this. What conversation transpired there? Were you present when this order was made?

Mr. LOWENTHAL. At all times.

Senator BAYH. You heard the judge say "Mr. Marshal"——

Mr. LOWENTHAL. I was the lawyer before him, and I asked that the marshal serve the habeas corpus order on the Gadsden County sheriff. Judge Carswell declined to have his marshal do that, and said that I myself could do it, which I had to do.

Senator BAYH. What about these phone calls? You say he had the marshal call the Gadsden County sheriff. How are you familiar with that call?

Mr. LOWENTHAL. 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.

Senator BAYH. Since I have already interrupted, could you please tell us what grounds the judge gave for having given habeas corpus, and assuming jurisdiction of the case in the first place, and then waiving it right back to the party from when he had assumed jurisdiction?

Mr. LOWENTHAL. The ground he gave is stated in his order of remand that I have put into the record. He said:

> It is in the interests of justice and in the interests of sound judicial administration and in accordance with the holding and basic philosophy of Dresner vs. Municipal Judge City of Tallahassee, a fifth circuit decision of August 5, 1964.

When I finally could find that unreported decision, I concluded that it had nothing whatever to do with the case. It was a decision in which the fifth circuit had directed a district judge to amend a habeas corpus order in some respect, so irrelevant that I do not recall what it was.

Senator BAYH. Can you give us the citation again, please?

Mr. LOWENTHAL. *Dresner* v. *Municipal Judge, City of Tallahassee*, U.S. Court of Appeals, Fifth Circuit, August 5, 1964. I have a penciled

note in the margin that it is No. 21802, but I no longer have a copy of that decision, which I believe to be unreported.

Senator BAYH. What grounds did he give for accepting the original transfer?

Mr. LOWENTHAL. He had no choice. The papers were properly filed in his court and properly served on the sheriff of Gadsden County, so that the removal under Federal law was unquestionably proper as he set forth in his habeas corpus order.

Senator BAYH. He got it out of the county court by Federal law. Is it Federal law that put it back in the county courthouse?

Mr. LOWENTHAL. He said so.

Senator BAYH. And relied on this *Dresner* case?

Mr. LOWENTHAL. Yes.

Senator BAYH. Which is a Federal——

Mr. LOWENTHAL. Yes.

Senator BAYH. Thank you.

Mr. LOWENTHAL. The men having been rearrested and put right back in jail presented me with the same problem as before, that is to say the men were unsafe in a county jail, and they were unable to do their voter registration work. It was therefore necessary, because Judge Carswell had denied a stay of his remand, to go to the Fifth circuit.

Overnight this was done and the fifth circuit—one judge immediately granted a stay pending my filing notice of appeal to the fifth circuit of the remand order.

Senator BAYH. At that point did your clients get out of jail?

Mr. LOWENTHAL. They got out of jail the morning after the habeas corpus and remand. They got out of jail on bail that Judge Carswell said they could get out on if they could get the bail. It took overnight to get the bail. The stay from the fifth circuit prevented further proceedings by the Gadsden County prosecutor pending the appeal.

Senator BAYH. This is getting to be rather confusing and I am making it more so I am afraid. The judge remanded to the county court?

Mr. LOWENTHAL. So the county prosecutor rearrested the men immediately and put them back in jail.

Senator BAYH. What right did the Federal judge have to set bail? How did he set bail for a county court that he had removed the case to from his own jurisdiction? How did he get back into the act?

Mr. LOWENTHAL. In paragraph two of his order of remand he simply states that the petitioners, the habeas corpus petitioners, the defendants in Gadsden County "shall be allowed to make new bond or reinstate old bond," that is to say should be allowed to get out on bail. He simply put that in his order of remand. They were able to get bail by the next morning. Meanwhile the stay was granted by the fifth circuit, so that the Gadsden County prosecutor could not proceed to further prosecute all over again pending the appeal to the fifth circuit. We managed then to get the notice of appeal filed in the fifth circuit, but that itself was no easy job in Judge Carswell's court.

All the little ways in which a Federal district judge can make life difficult seemed to me to be in force in that court. It took us as I recall about 2 days to work out all the redtape to file our notice of appeal, and obtain the necessary appeal bond. Nonetheless we did it, and the fifth circuit ultimately, but it was a year later, reversed, that is to say

reversed Judge Carswell's order of remand, and I would like for the record to furnish the unreported decision of the court of appeals reversing Judge Carswell's remand. *Wechsler* v. *County of Gadsden*, October 18, 1965, No. 21838 in the U.S. Court of Appeals for the Fifth Circuit. Here is a copy.

(The document referred to follows:)

In the United States Court of Appeals for the Fifth Circuit

No. 21835

STUART WECHSLER, ET AL., APPELLANTS

v.

COUNTY OF GADSDEN, FLORIDA, APPELLEE

Appeal from the United States District Court for the Northern District of Florida

(October 18, 1965)

Before JONES and BELL, Circuit Judges, and JOHNSON, District Judge

Per Curiam: The order of the district court remanding this cause to the state court was entered prior to the decisions of this Court in *Rachel v. State of Georgia*, 342 F.2d 336, reh. den. 343 F.2d 909, and *Peacock v. City of Greenwood*, 347 F.2d 679. These decisions require that the order of the district court in this cause be vacated and the cause remanded so that such action may be taken as is appropriate in the light of the two cited cases.

Reversed and remanded.

Senator THURMOND. Are you through now?

Mr. LOWENTHAL. I am through.

Senator THURMOND. Do you have any more questions?

Senator BAYH. You realize you are under oath while you are making these statements?

Mr. LOWENTHAL. Of course.

Senator BAYH. Was there anyone else with you at the time all of this was going on?

Mr. LOWENTHAL. There were various people with me besides Judge Carswell when I was in his presence. I remind you that the initial part of this case was conducted by someone other than myself, that is to say when I arrived in Tallahassee, my clients were already in the county jail. I filed the habeas corpus petitions, but I did not file the original removal petition to Judge Carswell's court. That was filed I think 2 days before or 1 day before by somebody else.

Senator BAYH. Was there another attorney or anyone else with you representing the accused?

Mr. LOWENTHAL. Yes. There were several. There were both attorneys and there were students from law schools who were volunteering their services as well.

Senator BAYH. Do you remember the names of any of these individuals?

Mr. LOWENTHAL. I remember the name of I believe one attorney who was with me, whose time overlapped mine, but I do not recall whether he was present at the hearing before Judge Carswell to which I have just testified. I do know, however, that there was either a Florida attorney or a law student present with me.

Senator BAYH. Do you remember the names of any of these?

Mr. LOWENTHAL. I do not.

Senator BAYH. Having read the letter to the editor I had several questions but I think I have asked them.

I have no more questions.

Senator THURMOND. Just let me ask you this. Did you go down there before Judge Carswell in a professional capacity? Were you employed to do that?

Mr. LOWENTHAL. No.

Senator THURMOND. Or were you a volunteer?

Mr. LOWENTHAL. I was requested to go down, but I was not paid to go down. I volunteered my services.

Senator THURMOND. You were volunteering your services?

Mr. LOWENTHAL. Yes, sir.

Senator THURMOND. This is a rather interesting hearing. We just had a volunteer witness. Now we have a volunteer lawyer.

Mr. LOWENTHAL. Lawyers often volunteer their services where counsel are otherwise unobtainable.

Senator THURMOND. We are going to stop now. This is the last witness. Thank you very much for appearing.

Mr. LOWENTHAL. Thank you.

Senator THURMOND. Next week we have certain witnesses. Next week we are going to hear Congressman John Conyers, Jr., of Michigan, Clarence Mitchell, director of NAACP, and Joseph L. Rauh, Jr., Americans for Democratic Action.

Senator BAYH. Mr. Chairman, I hope that we can have——

Senator THURMOND. There will be no hearing, I believe, tomorrow, and so we will recess to the call of the Chair.

Senator BAYH. I would like to repeat the request that we made earlier, inasmuch as I do not see Mr. Proctor here. Has he returned? I hope that we can have an opportunity to question him.

Senator THURMOND. I would suggest that you take that up with the chairman.

(Whereupon, at 5:05 p.m., the committee adjourned, to reconvene subject to the call of the Chair.)

NOMINATION OF GEORGE HARROLD CARSWELL

MONDAY, FEBRUARY 2, 1970

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:20 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Hart, Kennedy, Burdick, Tydings, Scott, Fong, Thurmond, Cook, Mathias and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

TESTIMONY OF ERNST H. ROSENBERGER, MEMBER OF THE BAR OF THE STATE OF NEW YORK

The CHAIRMAN. Mr. Rosenberger, hold up your hand, sir.

Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROSENBERGER. I do, sir.

Senator TYDINGS. Give your legal background, Mr. Rosenberger.

Mr. ROSENBERGER. Yes, sir. I am a member of the bar of the State of New York.

The CHAIRMAN. Speak a little louder, please, sir.

Mr. ROSENBERGER. Yes, sir. I was admitted to the bar in 1958.

The CHAIRMAN. Pull those mikes closer.

Mr. ROSENBERGER. Is that better, sir?

The CHAIRMAN. Go ahead.

Mr. ROSENBERGER. Is that better?

The CHAIRMAN. Yes.

Mr. ROSENBERGER. I was admitted to the bar of the State of New York in 1958. I was admitted to the U.S. District Courts for the Southern District and the Eastern District of New York in 1959, and to the court of appeals second circuit in 1961. I attended New York Law School under the New York State War Service Scholarship. While there I was editor-in-chief of the "Law Review" and entered the National Moot Court Competition for my school. I am a member of the Association of the Bar of the City of New York and the New York State Bar Association and the National Association of Defense Lawyers in criminal cases. I am presently practicing law in a partnership in the State of New York.

May I make a statement, sir?

In the summer of 1964 I was a volunteer lawyer for the Lawyers' Constitutional Defense Committee of the American Civil Liberties Union serving in northern Florida. At that time attorneys were assigned to serve for approximately 2 weeks at a time. We were assisted by volunteer law clerks. The overlap between attorneys was about 1 day, that is I would serve for 2 weeks and the day before I left another attorney arrived.

During my stay in Florida, I used as an office the boilerroom of a building on Calhoun Street in Tallahassee, and I slept in Quincy, Fla. Tallahassee is in Leon County, Quincy is the seat of an adjoining county which is Gadsden County which is next west to it.

My responsibility extended from Gadsden County eastward over five counties.

Hostility to us was patent throughout the area. The postman in Quincy would not deliver mail because the mailbox was mounted about 6 inches back from the line of mailboxes.

Senator TYDINGS. Who is "us"?

Mr. ROSENBERGER. Well, sir; volunteers working in voter registration, that is student volunteers, the lawyers and law clerks. All of us stayed in this house in Quincy. Now there were places where voter registration volunteers had put up posters and those posters were regularly torn down by a deputy sheriff.

There were restaurants, several, where I was refused when I tried to enter.

The CHAIRMAN. Have you got a copy of your statement?

Mr. ROSENBERGER. Sir?

The CHAIRMAN. Do you have a copy of your statement?

Mr. ROSENBERGER. I have just the one, sir.

The CHAIRMAN. Go ahead.

Senator HART. Mr. Chairman. Mr. Rosenberger, it may be the fault of the mike, but perhaps you can overcome it in part by speaking louder.

Mr. ROSENBERGER. I am sorry, sir. I will.

Voter registration workers were assaulted. Firebombs were placed under an automobile. Shots were fired through the window of a house where volunteers were staying. That was just to indicate what the general aura of hostility was in the area at that time.

Now I met Judge Carswell on August 15th of 1964. On that day there was argument before the fifth circuit court of appeals which had come to Tallahassee to hear this particular argument. This was on an appeal from an order by Judge Carswell denying a writ of habeas corpus to nine clergymen who had been arrested some time earlier in Tallahassee as freedom riders, in that they were arrested at the Tallahassee airport restaurant.

During that day—we had argument in the morning—during that day Judge Carswell in my presence in chambers in the courthouse in Tallahassee suggested to the city attorney, Mr. Rhodes, city attorney of Tallahassee, that this whole case could be ended by reducing the sentences of the clergymen to the time already served. By doing that, you see, they would not have standing to bring a writ of habeas corpus, because they would not be in jail, and they would thus be assured of a permanent criminal record from which there could be no further appeal.

Senator TYDINGS. How long had they been there?

Mr. ROSENBERGER. Sir?

Senator TYDINGS. How long had they been in jail?

Mr. ROSENBERGER. They had not been in jail very long. At that point they had been in jail about 2 days I would imagine or 3 days. Now, the circuit court order, which was made that day, did not affirm Judge Carswell's order as he had written it, but rather modified it to provide that if the State court did not grant a speedy hearing on an application, the district court, the U.S. district court, that is Judge Carswell, would then hold an immediate hearing.

This was really a very substantial change in the order. I understand that in the *Wechsler* case Judge Carswell cited that case which was the *Dresner* case, as having been affirmed. Actually it was modified by the circuit, and then affirmed. It was not affirmed as written.

The CHAIRMAN. You say the *Wechsler* case was affirmed by the circuit?

Mr. ROSENBERGER. No, sir. I said the *Dresner* case was affirmed as modified. It was not affirmed as written.

The CHAIRMAN. Excuse me.

Mr. ROSENBERGER. He, that is Judge Carswell, had suggested to city attorney Rhodes that this was the way that the whole thing could be disposed of. The following day I was called to Mr. Rhodes' office. He proposed that I request a reduction of sentences. I had in the interim spoken to these clergymen at the Tallahassee jail, and they instructed me that they did not want to ask for a reduction of sentence. Rather they wanted a habeas corpus hearing where they would be vindicated.

He then asked me, he, that is Mr. Rhodes, asked me to accompany him to the office of the city judge. I did. I found that the clergymen had been brought over from the jail. Judge Rudd then read a prepared order reducing the sentences, and in this order he cited my having made an application for reduction of sentence.

I told him that I had made no such application. I would make no such application. And my clients did not want that application. Rather they wanted a hearing wherein they would be vindicated. Nonetheless, he reduced the sentences and stated to them, "Now you have got what you came for. You have got a permanent criminal record."

Senator TYDINGS. They had a what?

Mr. ROSENBERGER. A permanent criminal record.

Senator TYDINGS. You mean because it was mooted or shortened they had no chance to appear in Carswell's court or any other court, and they would have a permanent criminal record for their entire life?

Mr. ROSENBERGER. That is right, sir. When he reduced the sentence he took away any chance they had to have a hearing before Judge Carswell or anybody else. That was the end of the road because it was mooted, and that record is ineradicable. Those nine clergymen still have that record of conviction today, and I suppose they always will.

Senator HRUSKA. Mr. Rosenberger, what you now describe was the decision of the circuit court, was it not?

Mr. ROSENBERGER. What I have described has been three decisions, three actions really. One was the decision of the circuit court in the *Dresner* case, which modified Judge Carswell's order. During that day was when Judge Carswell told Mr. Rhodes how he could moot the

question, and then following that suggestion, Judge Rudd, who was the city judge in Tallahassee, actually reduced the sentences.

Senator HRUSKA. But the order issued by Judge Carswell was consistent with the judgment of the Fifth Circuit Court of Appeals sitting in Tallahassee, is that not correct?

Mr. ROSENBERGER. The circuit court of appeals sitting in Tallahassee changed Judge Carswell's order.

Senator HRUSKA. And pursuant to that modification, Judge Carswell issued an order that was in compliance with that change, is that not true?

Mr. ROSENBERGER. No, sir.

Senator TYDINGS. Tell him why not.

Mr. ROSENBERGER. What happened, sir, is that the circuit court itself changed the order of Judge Carswell, and before any further order could be entered——

Senator TYDINGS. Changed it to do what?

Mr. ROSENBERGER. Changed it to provide that if an immediate habeas corpus were not granted in the State court, Judge Carswell would proceed to hold hearings on a habeas.

Senator TYDINGS. In other words, the fifth circuit told Carswell that either the county court would have to hold a hearing, giving them their day in court, or that Carswell would?

Mr. ROSENBERGER. That is exactly right, sir.

Senator TYDINGS. And what did Carswell tell the city attorney?

Mr. ROSENBERGER. He told him in effect how to circumvent that because he told them: If you go ahead and reduce these sentences, then there will not be any hearing, there will not be anything. It will be moot.

Senator TYDINGS. When and where did he tell the city attorney that?

Mr. ROSENBERGER. He told him that on the day of August 5. He told him that while the circuit court was sitting in Tallahassee and told him that in the courthouse in Tallahassee.

Senator HRUSKA. But it is your understanding that it was the circuit court that issued the modification order, and that it was not Judge Carswell who did it. Am I correct?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. I just wanted to get that straight.

Mr. ROSENBERGER. Yes, sir; that is correct. In the case of Wechsler, there were seven young people, seven volnnteers, who had been arrested in Gadsden County. Three of them were adults and four were under the age of 17. I believe five of the seven were residents of Gadsden County and two were volunteers from elsewhere who had come as voter registration workers. They were arrested for trespassing on lands which were not posted, which were reached by a road leading from the public highway, which had no indication that it was a private road, not posted, not fenced, and they were arrested while they were talking to people about registering. They were arrested by sheriff's officers of Gadsden County, Fla.

The CHAIRMAN. Now someone swore out an affidavit against them in a justice of the peace court; is that correct?

Mr. ROSENBERGER. An affidavit was sworn after the time of the arrest; yes, sir.

The CHAIRMAN. After the time of the arrest?

Mr. ROSENBERGER. They were taken into custody on the road.

Senator TYDINGS. Go into a little more detail. Tell the chairman the whole story.

Mr. ROSENBERGER. All right, sir. These seven people were on this road. This was a place where tenant farmers lived on a larger farm. Actually on this farm there lived, I believe, the cousin of one of the people who had been arrested and she had frequently visited on this farm to visit her family.

Now the overseer of the farm came down the road and saw these people talking to tenant farmers. He came up to them. He told them that they were trespassing, that this was private property. They explained that they were there to talk to people about voting. He said they were trespassing. They said, All right, we'll leave. He said, No, I am having you arrested. And he told them to wait, which they did, and they were arrested there, for trespassing on unposted lands while talking to people about registering to vote.

The CHAIRMAN. What is the Florida statute on posting?

Mr. ROSENBERGER. The Florida statute, as I understand it, did not require posting.

The CHAIRMAN. All right.

Mr. ROSENBERGER. Yes, sir.

The CHAIRMAN. So they were trespassing. You keep saying that the land was not posted.

Mr. ROSENBERGER. Yes, sir, but there was no way for them to know it was a trespass.

The CHAIRMAN. A man is presumed to know the law, is he not?

Mr. ROSENBERGER. He is presumed to know the law, sir, but he is not presumed to know the fact.

The CHAIRMAN. I know, but a lot of States in this country have got a statute that provides when you are on private property if you are told to get off and you do not do it you commit trespass.

Mr. ROSENBERGER. Yes, sir, if you are told to get off.

The CHAIRMAN. And that is what you tell me the Florida statute is.

Mr. ROSENBERGER. When told it was private property they said they would leave, and the man said, No, you are going to be arrested.

Senator TYDINGS. In other words he would not let them leave?

Mr. ROSENBERGER. He would not let them leave. Had he said get off, that would have been a different circumstance. He said, this is private property. They said, we will leave. He said, No you won't, you will be arrested.

The CHAIRMAN. They stayed there until when? They went to the justice of the peace court?

Mr. ROSENBERGER. No, sir, he did not go to court prior to their arrest. He had them arrested while there, while they were on the premises. After they were arrested, he then filed an affidavit in the justice of the peace court in Gadsden County. Now, I filed a removal of those cases. I filed two removals, one for the four juveniles, one for the three adults. I paid a filing fee in the northern district of Florida in Judge Carswell's court.

Now about 2 months before that the fifth circuit court had rendered a decision pointing out that filing fees were not to be collected in such cases, and further pointing out that that law had been changed in 1948

which had provided for filing fees in cases such as these, but I paid a filing fee, and the cases were removed. I then went to court with these defendants in Quincy, explained to the justice of the peace that the cases had been removed.

Senator TYDINGS. What do you mean by the phrase "had been removed"?

Mr. ROSENBERGER. I had drawn removal papers, a petition for removal under section 1443 of title 28 of the United States Code, and I had filed those papers with the clerk of the court in Tallahassee, with the district court having jurisdiction in that case. Under the law, that operates to change the jurisdiction from the State court to the Federal court.

Senator TYDINGS. In other words, once you file a paper, regardless of whether a judge signs it, the removal is automatic under the Federal law?

Mr. ROSENBERGER. Yes, sir. There is no provision for a judge to sign an order of removal. It is done by the filing.

Senator TYDINGS. Right. Go ahead.

Mr. ROSENBERGER. Now the judge in Gadsden County was Judge Blackburn. I told him the cases had been removed. He said that he had the papers, but that he did not recognize this removal. He was going to proceed. I explained to him the provisions of the statute dealing with removal, that is that he no longer had any jurisdiction. He said he would proceed with the case.

I asked for a continuance. He said he would proceed with the case. I then left the front of the courtroom and seated myself in the spectators' section of the courtroom behind the rail. I sat down there. At that point Judge Blackburn told the sheriff, who was present in the court, to remove me from the court, and I was physically ejected from that courtroom by deputy sheriff Martin.

Senator TYDINGS. Was there any other attorney in there to defend those boys?

Mr. ROSENBERGER. No, sir. They went to trial without counsel, were convicted without counsel, and were sentenced without counsel. I drew an affidavit that covered what had happened, and the next day I left Florida to come back to New York, and I understand that later Mr. Lowenthal served a writ of habeas corpus in the northeastern district based on the facts as I have briefly outlined them here.

Senator TYDINGS. What happened to those four boys and three adults after the trial? Did they go to jail?

Mr. ROSENBERGER. Yes, sir. They were sentenced to jail immediately that morning. A writ of habeas corpus was filed. The writ of habeas corpus before Judge Carswell. In that case he sustained the writ but——

The CHAIRMAN. You are not talking now from personal knowledge of what happened?

Mr. ROSENBERGER. After the time of their sentence? My personal knowledge, sir, goes up until the time that the habeas was filed for. Yes, sir, that is as far as I can say of my own personal knowledge.

The CHAIRMAN. I see.

Mr. ROSENBERGER. But they were sentenced without counsel.

Senator GRIFFIN. Up until the time you filed it or up until the time you were ejected from the court?

Mr. ROSENBERGER. Up until the time I was ejected from the court, I then made an affidavit to be used in the application for the writ, the preparation of papers, as to what happened to them in that court, of course, up until the time I was ejected, until the time I knew that they had been taken to jail.

Senator HRUSKA. Mr. Rosenberger, did you have with you a copy of the judge's odrer of habeas corpus?

Mr. ROSENBERGER. Yes.

Senator HRUSKA. The judge had issued an order, had he not, granting the petition for a writ of habeas corpus?

Mr. ROSENBERGER. That was later, sir. That was later. What happened the day that I was there was that the case had been removed. There had not yet been a habeas corpus, but there was a removal.

Senator TYDINGS. Was the case removed because you filed the paper?

Mr. ROSENBERGER. Yes, sir, and I had a copy of that removal petition, and the notice of filing, and I did give that to Judge Blackburn. He already had one. He took it and threw it aside.

Senator HRUSKA. So that it was only a copy of the pleadings, the petition for the writ that you had with you?

Mr. ROSENBERGER. Not the petition for the writ, sir, but the petition for the removal under 1443. Now the petition for the removal is self-executing, that is when it is filed under the terms of that section, when it is filed with the district court, the U.S. District Court, then the State court is divested of jurisdiction.

Senator TYDINGS. You did not handle the petition for the writ of habeas corpus. You left at the end of your 2-weeks term and Mr. Lowenthal picked up there, is that right?

Mr. ROSENBERGER. That is right, sir. He actually filed the petition for the writ of habeas corpus.

Senator GRIFFIN. So far as this case is concerned, to the extent to which you were involved and to the extent you have personal knowledge, Judge Carswell is not involved, is that correct?

Mr. ROSENBERGER. In the case of Wechsler?

Senator GRIFFIN. In this case right here.

Mr. ROSENBERGER. Because I have spoken about two cases.

Senator GRIFFIN. Right, I understand.

Mr. ROSENBERGER. In the case of Wechsler, my personal knowledge is the background for the writ of habeas corpus in which Judge Carswell was involved.

Senator TYDINGS. Would you tell us about Judge Carswell's filing fee.

Mr. ROSENBERGER. Yes, sir. There was a filing fee required of me when I filed the removals.

Senator TYDINGS. A filing fee of how much?

Mr. ROSENBERGER. Sir, I believe it was $5 per removal.

Senator TYDINGS. And what was the law in the circuit about the filing fees?

Mr. ROSENBERGER. The law of the circuit was specific that there need be no payment of filing fees, and that was decided in *Lefton* v. *the City of Hattiesburg* at 333 Fed. 2d 280, and that was decided in June of 1964. The removals that I am talking about were filed by me in August, 2 months after this decision.

Senator TYDINGS. The $5 filing fee should not bother anybody.

Mr. ROSENBERGER. Well, sir, it is a matter of following the law. The law said that there be no filing fee, and filing fees whether $5 or $2 represent a substantial hardship to people who——

Senator TYDINGS. Did these youngsters have money?

Mr. ROSENBERGER. They had no money. I paid the fee, sir.

Senator TYDINGS. You paid it out of your own pocket?

Mr. ROSENBERGER. Yes, sir; I did.

Senator TYDINGS. During your period of practice, did you have occasion to meet and work with other lawyers involved in defending so-called civil rights workers or freedom riders?

Mr. ROSENBERGER. Yes, sir; I did.

Senator TYDINGS. During that occasion did you have an opportunity to discuss with these lawyers Judge Carswell's reputation for fairness where black minority groups, voter registrants, or civil rights workers were before his court?

Mr. ROSENBERGER. Yes, sir; I did.

Senator TYDINGS. What was his reputation for being able to afford a fair trial for minority groups or civil rights workers in voter registration or similar litigation in his district of Florida?

Mr. ROSENBERGER. His reputation in that area was bad, sir. 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 habeas 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.

Senator TYDINGS. Would you for the benefit of the committee repeat the incident involving the city attorney, Mr. Rhodes, and Judge Carswell and relate it to your testimony about his reputation for fairness and affording equal rights to all people regardless of whether they happen to be minority or civil rights workers?

Mr. ROSENBERGER. Yes, sir. Now on the day that the circuit was in Tallahassee to hear argument, I met with Judge Carswell and Mr. Rhodes in the courthouse. Judge Carswell outlined to Mr. Rhodes that he could terminate this whole thing just by reducing the sentences to time served. Now that could have no other effect except to moot the entire question, to leave them with no way for vindication, to assure 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.

Senator HRUSKA. With whom did you talk in that regard, to Judge Rhodes?

Mr. ROSENBERGER. No, sir, it was Judge Carswell and Mr. Rhodes. Mr. Rhodes was the city attorney.

Senator HRUSKA. Did they have conversation between the two of them, Judge Rhodes and Judge Carswell?

Mr. ROSENBERGER. Yes, sir.

Senator TYDINGS. He is not a judge. He is a lawyer.

Mr. ROSENBERGER. Mr. Rhodes?

Senator HRUSKA. Mr. Rhodes, and were you present when that conversation occurred?

Mr. ROSENBERGER. Yes, sir, I was.

Senator HRUSKA. And that is what you were told? That is what you overheard?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. And where was that conversation held?

Mr. ROSENBERGER. In an office in the courthouse in Tallahassee.

Senator HRUSKA. In which courthouse?

Mr. ROSENBERGER. The Federal Building.

Senator HRUSKA. The Federal Building. And is it your contention that the State did not comply with the order that Judge Carswell had issued in that *Dresner* case? We are now talking about the *Dresner* case, are we not?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Is it your contention that the action which was taken by Mr. Rhodes was not in compliance with the judge's order?

Mr. ROSENBERGER. That is correct, sir.

Senator HRUSKA. And you still say that it was not Judge Carswell's order but the order of the circuit court?

Mr. ROSENBERGER. The order of the circuit court modifying Judge Carswell's order, yes, sir.

The CHAIRMAN. How did they modify it? In what respect did they modify Judge Carswell's order?

Mr. ROSENBERGER. Well, the original order had been a denial of the habeas corpus. That was Judge Carswell's original order. The modification was that in the event that the State did not grant a habeas corpus hearing, then Judge Carswell would hear the matter, so that what it was, was a retaining of jurisdiction.

The CHAIRMAN. Did it not provide, that modification provided for bond, that it would go back to the circuit court, but Judge Carswell would retain jurisdiction to see that they got a speedy trial? Now, isn't that the truth about it?

Mr. ROSENBERGER. There was no question of speedy trial in that case. In Dresner they had already had a trial. It was a matter of hearing. It was a matter of a hearing on the habeas corpus. They had had a trial and had been convicted.

The CHAIRMAN. I know, but the modification that the circuit court made was that they get a speedy hearing then instead of a trial?

Mr. ROSENBERGER. Yes, sir.

The CHAIRMAN. And that Judge Carswell retained jurisdiction?

Mr. ROSENBERGER. Yes, sir.

The CHAIRMAN. Would send it back to the State court?

Mr. ROSENBERGER. Yes, sir.

The CHAIRMAN. And they would be entitled to bail. That was all it was, was it not?

Mr. ROSENBERGER. They were to get a hearing on their habeas in the State court. By reducing the sentences they no longer had standing to bring a habeas corpus or to have any hearing on the matter.

Senator HRUSKA. Who did not have standing, the State court?

Mr. ROSENBERGER. No, sir; the defendants.

Senator TYDINGS. The ministers?

Mr. ROSENBERGER. The ministers had no more standing.

Senator HRUSKA. No more standing where?

Mr. ROSENBERGER. Anywhere to bring a habeas corpus because once their sentences were reduced and they were discharged they were no longer in custody or under bail, and there was no longer any standing by them to get a habeas.

Senator HRUSKA. Is it your contention, Mr. Rosenberger, that the action on the part of that State court was not in compliance with the circuit court order?

Mr. ROSENBERGER. That is my contention, sir. It was a circumvention of the circuit court.

Senator HRUSKA. And it is your recollection that it was the circuit court that signed that order and sent it to the city court?

Mr. ROSENBERGER. No, sir. It was the circuit court that modified the order.

Senator HRUSKA. Yes.

Mr. ROSENBERGER. Of the district court.

Senator HRUSKA. Yes.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Mr. Chairman, I should like to have included in the record at this time a copy of the order issued by Judge Carswell on August 6. It was he who sent the order to the State court. It was not the circuit court, notwithstanding the testimony here of Mr. Rosenberger that the circuit court did it. The circuit court did not do it. The circuit court rendered a decision which affirmed Judge Carswell subject to certain modifications. Upon the basis of the circuit court decision, then Judge Carswell issued a conforming order, and I shall read it:

"This court having been fully advised that the United States Court of Appeals for the Fifth Circuit on August 5, 1964, affirmed the judgments of this court entered in the above captioned case respectively by its order dated August 3, 1964, in Tallahassee Civil Action 1016 and by its order dated August 4, 1964 in Tallahassee Civil Action No. 1017, and further directing that this court modify said orders in certain particulars, in conformity therewith it is hereby

"Ordered that previous orders of this court dated August 3, 1964, in the Tallahassee Civil Action No. 1016 and August 4, 1964, in Tallahassee Civil Action No. 1017 be and they are hereby modified so as to provide as to each petitioner that if such petitioner makes an application for habeas corpus to a State court of competent jurisdiction, and if such State court fails either to order the discharge of such petitioner from custody or his release from custody upon nominal bail within three (3) days from the date of the filing of such application, that any further delay will render State corrective process ineffective to protect the rights of the petitioner: and this court will upon the request of any such petitioner forthwith proceed to a hearing of the application on its merits, and further that this Court retains jurisdiction until the termination of any such State court habeas corpus proceeding, and if such petitioner is denied relief or the proceeding unreasonably delayed, this Court will upon request of such petitioner proceed to a hearing on the merits.

"Done and ordered in Chambers at Tallahassee this 7th day of August, 1964."

Now the way this Senator interprets this order is that it was in compliance with the judgment of the circuit court of appeals.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Have you any quarrel with his having signed this order?

Mr. ROSENBERGER. I have no quarrel whatever with his having signed that order, sir.

Senator HRUSKA. Now then do you want to modify your testimony just a little bit? It was not the circuit court of appeals that sent an order to the Tallahassee court. It was Judge Carswell, was it not?

Mr. ROSENBERGER. That order is Judge Carswell's order, yes, sir.

Senator HRUSKA. That is right.

Mr. ROSENBERGER. But you will note, sir, that in that order it refers to a modification by the circuit and that this order is in compliance with that modification.

Senator HRUSKA. That is right.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. But that is not what the witness said. The witness said it was the circuit court of appeals that sent an order to the Tallahassee court. They did no such thing. They ordered the trial judge, Judge Carswell, to modify his order and issue it, and that is what he did, so in that respect your recollection was in error?

Mr. ROSENBERGER. I am corrected.

Senator HRUSKA. And that is not the only one but so far you will say that your recollection is faulty?

Mr. ROSENBERGER. I am corrected, Senator.

Senator HART. Your quarrel with Judge Carswell is that having gotten that he then told the local judge how to beat it?

Mr. ROSENBERGER. That is exactly right. He signed that order and then he told them how to go about nullifying that order.

Senator HRUSKA. Was that suggestion in violation of the order?

Senator TYDINGS. Let him answer the question.

Senator HRUSKA. I think that would require a little bit of explanation. Was what was done in violation of this court order and if so in what respects did the action of the State judge violate Judge Carswell's order?

Mr. ROSENBERGER. Sir, the action of the State judge denied these people the right to bring the habeas corpus which that order refers to.

Senator TYDINGS. And they never had a chance to clear the criminal record and consequently do those nine clergymen have that record?

Mr. ROSENBERGER. They have it today.

Senator TYDINGS. Today?

Mr. ROSENBERGER. And they will continue to have it.

Senator HRUSKA. But the permission was given here for them to file habeas corpus in the State court?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Did they do it?

Mr. ROSENBERGER. Yes, sir, they did, and before any action could be taken on that habeas corpus their sentences were discharged, and once their sentences are discharged by operation of law they no longer have a right to bring any habeas corpus.

Senator HRUSKA. That is what the order said, that if a writ of habeas corpus is filed in the State court and there is prompt action on that, that ends the case. That is what this order says. Now, what you would want them to do——

Senator TYDINGS. There is no hearing.

Senator HRUSKA (continuing). Is to violate this order?

Mr. ROSENBERGER. No, sir.

Senator TYDINGS. If the Senator will read the order it calls for a hearing. The order is its own best witness. It says a hearing and the hearing was never granted.

Mr. ROSENBERGER. They never got a hearing on that habeas. That whole question was mooted when their sentences were cut.

Senator HRUSKA. That is in compliance with the order. Let me read the language and I will read it slowly and clearly and loudly:

"That if such petitioner makes an application for habeas corpus to a State court of competent jurisdiction, and if such State court fails either to order the discharge of the petitioner in custody or his release from custody upon nominal bail within three days, then they can go back to the Federal court."

They have such a petition filed. They granted it, and they discharged the prisoners. That is what the court order says.

Mr. ROSENBERGER. Well, sir, the court order does say exactly that, but that is not what happened. They filed the petition. They never got the hearing on the petition. They were never granted the relief on the petition. Rather the original judge, the city judge just cut the sentence, and by cutting the sentence, he took away from them the right to proceed on a habeas corpus, because once a sentence has been cut, the issue is moot, and they may not proceed on a habeas.

Senator FONG. You were interested in getting your clients out of jail, is that correct?

Mr. ROSENBERGER. I was interested—at that time, sir, I had discussed it with the clients after we spoke with Judge Carswell. I outlined it to the clergymen. They said they would rather spend the other 2 days in jail and clear their records and their names than have themselves released that day and carry a criminal record.

Senator FONG. The final result you were trying to obtain was to get them out of jail?

Mr. ROSENBERGER. To vindicate them, sir, to vindicate them, not just to get them out of jail.

Senator FONG. Now when Judge Carswell told the city attorney that by reducing the sentence the whole question would be moot——

Mr. ROSENBERGER. Yes, sir.

Senator FONG (continuing). He was not prejudicing your case, was he?

Mr. ROSENBERGER. Yes, sir, he was, sir, since——

Senator FONG. You still could bring the matter up on a petition on an appeal if the sentence was reduced, and you were not satisfied with the sentence. You still could have brought it up to the circuit court, couldn't you?

Mr. ROSENBERGER. No, sir, I could not. There was no further jurisdiction to proceed.

Senator FONG. You could have appealed the sentence on the ground that it did not conform with the law. The only thing that you had knocked out of your hands was the right of a writ of habeas corpus, and it did not prove anything. You still would have the right of recourse of going to the circuit court to prove that these men were incarcerated wrongly.

Mr. ROSENBERGER. No, sir, because the only recourse we had to the circuit court at that point was recourse through a writ. There was no longer a recourse through appeal.

Senator FONG. Why couldn't you appeal?

Mr. ROSENBERGER. This was a case, sir, coming back from 1961. It was an airport integration case originally decided in 1961, on which there had been appeals, and a filing date had been missed, so the appeals were terminated. Therefore the only recourse open to these men at this time was recourse in the matter of a writ.

Senator HRUSKA. And a writ of certiorari was petitioned for in that case in the Supreme Court and it was denied, was it not?

Mr. ROSENBERGER. A writ of certiorari was asked for, was granted, and then withdrawn. It was withdrawn so there was no certiorari.

Senator HRUSKA. I read the one sentence per curiam decision rendered on June 22, 1964 in the Supreme Court of the United States.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA (reading):

"The questions which this court certified to the Supreme Court of Florida 375 U.S. 136 having been answered in the affirmative, the petition for certiorari is dismissed" not withdrawn, is dismissed, "as improvidently granted, 28 United States Code 1257."

Mr. ROSENBERGER. Is dismissed as improvidently granted, which would indicate, sir, that it will be granted.

Senator HRUSKA. It was dismissed. It was not withdrawn.

Mr. ROSENBERGER. But it had earlier been——

Senator HRUSKA. Mr. Rosenberger, getting back to this order, the order says as I read it to you that if the State court either fails to discharge such petitioner from custody or his release from custody upon nominal bail within 3 days from the date of filing of such application for habeas corpus that any further delay will render the State corrective process ineffective to protect the rights of such petitioner, and this court will, upon the request of any such petitioner, proceed forthwith to a hearing of the application on its merit.

Was such a request made of the Federal court?

Mr. ROSENBERGER. Was a request—I am sorry, sir, I did not follow your question entirely.

Senator HRUSKA. Let me start all over again.

Mr. ROSENBERGER. The subsequent request?

Senator HRUSKA. I am reading from the order now.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA (reading):

If such petitioner makes application for habeas corpus to a State court of competent jurisdiction, and if such State court fails either to order the discharge of such petitioner from custody or his release from custody upon nominal bail within 3 days from the date of filing of such application, that any further delay will render State corrective process ineffective to protect the rights of such petitioner, and this court will, upon the request of any such petitioner, forthwith proceed to a hearing of the application on its merits.

Now this is the order that Judge Carswell signed pursuant to the mandate of the circuit court of appeals.

Mr. ROSENBERGER. That is correct, sir.

Senator HRUSKA. My question is if there was a violation of this order, you had a written invitation here to come back into Judge Carswell's court and get a consideration of the proceedings on their merit. Did you make such an application?

Mr. ROSENBERGER. I did not, sir.

Senator HRUSKA. And why did you not? You have a written invitation.

Mr. ROSENBERGER. If the order had been violated, but not if the order had been circumvented, as it was here. Once they are discharged, once their sentences are cut, they no longer have standing to make any habeas corpus application. That is what happened here.

Senator HRUSKA. Now Mr. Rosenberger, you cannot have it both ways. You say it was not violated, and then you say it was violated. Which do you take your choice, because if it was violated, you could go back into court. If it was not violated, it was not violated.

Mr. ROSENBERGER. It was not violated.

Senator HRUSKA. All right.

Mr. ROSENBERGER. It was circumvented. There is a difference, sir.

Senator HRUSKA. Then you could not get into court because the order was not violated. is that your present position?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Well I think, Mr. Chairman, that pretty well spells it out. How is a man going to appeal from an order that is not violated. and if it is not violated. what is your complaint now?

Mr. ROSENBERGER. That it was circumvented, sir.

Senator HRUSKA. I see.

Mr. ROSENBERGER. There is a big difference.

Senator HRUSKA. We are getting into semantics now. What does circumvent mean that is different than a violation? Can't you go back on the ground of circumvention?

Mr. ROSENBERGER. No. sir.

Senator HRUSKA. You cannot?

Mr. ROSENBERGER. I have no standing once those people are——

Senator HRUSKA. Notwithstanding the language of this order?

Mr. ROSENBERGER. Yes, sir, notwithstanding the language of the order.

Senator HRUSKA. Very well.

Senator SCOTT. Could I ask a clarification of something?

Mr. ROSENBERGER. Yes, sir.

Senator SCOTT. At one point you said something about a filing date having been missed.

Mr. ROSENBERGER. Yes, sir.

Senator SCOTT. What was that? What happened in that?

Mr. ROSENBERGER. That was an earlier proceeding on the way up to the Supreme Court.

Senator SCOTT. I understood that.

Mr. ROSENBERGER. That was a matter in which I was not personally involved, but that is what formed the predicate for this case having come back to Tallahassee.

Senator SCOTT. Who missed the filing date just for clarification?

Mr. ROSENBERGER. The earlier attorneys for the ministers.

Senator SCOTT. Somebody in the case missed the opportunity to file and preserve certain rights at a certain point?

Mr. ROSENBERGER. Yes, sir.

Senator SCOTT. Is that what you are saying?

Mr. ROSENBERGER. Yes, sir. I was not involved at that time.

Senator HRUSKA. Mr. Chairman, the witness did mention the *Wechsler* case and if we could get into that that would be helpful because that was a follow-on from the *Dresner* case, is that not right, the *Wechsler* case?

Mr. ROSENBERGER. The *Wechsler* case, yes, sir.

Senator HRUSKA. Would you care to explain the *Wechsler* case as far as you know it?

Mr. ROSENBERGER. Well, sir, I can tell you about the factual pattern of the *Wechsler* case. Professor Lowenthal was the man who argued the *Wechsler* case, but the *Wechsler* case was ——

Senator TYDINGS. Mr. Chairman, we are going to have a witness, the next witness, who actually was one of the law clerks involved and who can testify without hearsay directly to the facts. This witness can only give hearsay.

Senator HRUSKA. Very well, that will be fine.

Senator FONG. Is it your contention that Judge Carswell is unsympathetic to civil rights when he told the city attorney to get rid of this case, lower the bail?

Mr. ROSENBERGER. Yes, sir, it is.

Senator FONG. That is your contention?

Mr. ROSENBERGER. That is my contention.

Senator FONG. He was prejudiced?

Mr. ROSENBERGER. Yes, sir.

Senator FONG. And he was biased?

Mr. ROSENBERGER. Yes, sir.

Senator FONG. Wasn't he trying to help the defendants?

Mr. ROSENBERGER. No, sir, since by doing that he assured that their conviction record would stand.

Senator FONG. Thank you.

Senator GRIFFIN. If I may, what is the purpose of a writ of habeas corpus? Isn't it to get the people out of jail when they are being held and they are not supposed to be there?

Mr. ROSENBERGER. It is to test the legality of their being held, yes, sir, and by lowering the sentence, you never got to the question of the legality of why they were being held.

Senator GRIFFIN. As I heard that order read two or three times ——

Mr. ROSENBERGER. Yes, sir.

Senator GRIFFIN (continuing). By the Senator from Nebraska, it said unless they were discharged from custody.

Mr. ROSENBERGER. Yes, sir.

Senator GRIFFIN. Or a hearing was held on the writ in the State court, that the Federal court would hear it.

Mr. ROSENBERGER. Yes, sir.

Senator GRIFFIN. And they were discharged.

Mr. ROSENBERGER. They were discharged, yes, sir, and thus they lost their standing.

Senator GRIFFIN. You lost—no, their lawyers lost their standing to have a consideration on the merits when they lost their right to appeal on the merits, isn't that true?

Mr. ROSENBERGER. Yes, sir, but they had another opportunity.

Senator GRIFFIN. And it was to get them out of jail and they did get out of jail. is not that correct?

Mr. ROSENBERGER. The hearing on habeas was to test the legality of their detention.

Senator GRIFFIN. Then are you saying that the court of appeals' decision, which was carried out by Judge Carswell, was in error?

Mr. ROSENBERGER. No, sir. It was not in error.

Senator GRIFFIN. Because that order said they either had to discharge them from jail or give them a hearing and they did not. They were discharged from jail, is that right?

Mr. ROSENBERGER. They were discharged but not on the writ that was referred to in the order. The order referred to their being discharged on the writ.

Senator GRIFFIN. Then you are saying that there was a violation of the order?

Mr. ROSENBERGER. No, sir. Again it was not a violation of the order.

Senator GRIFFIN. O.K., I give up.

Senator COOK. Mr. Rosenberger——

Mr. ROSENBERGER. Yes, sir.

Senator COOK. As I take it from what you have said, you are of the opinion that Judge Carswell was the only lawyer involved in all this who knew how to circumvent this action as you have put it. For instance, when you overheard this with Mr. Rhodes, you knew that this question could be mooted by this very action did you not?

Mr. ROSENBERGER. I realized it when it was pointed out. I had not thought of it initially, but I realized that it could be mooted by that device.

Senator COOK. The point I am trying to make is I think in essence what you are saying is that Judge Carswell was the only one who knew that this was the way that it could be mooted, and therefore he gave the suggestion. With all the other lawyers that were involved in the case, you feel that this could only come as a result of Mr. Rhodes' conversation with Judge Carswell, not from anybody else's legal knowledge, that this was the way that this question could be mooted, is this correct?

Mr. ROSENBERGER. I would not say that it could come only from that. I say that it did come from that, because I was present when that conversation took place. I cannot say that no one else had the idea, but I know that Judge Carswell had the idea because I heard him say it. I cannot say that he was the only one who had it.

Senator COOK. Did you make the city judge change his order where it said that you had requested that this be done?

Mr. ROSENBERGER. I asked him to change it.

Senator COOK. And did he change it?

Mr. ROSENBERGER. I do not know, sir. He read that order into the record.

Senator HRUSKA. Was that the judgment of conviction?

Senator COOK. No, this is the order of reducing the term.

Mr. ROSENBERGER. Yes, sir, the order of reduction.

Senator COOK. And you took no action on the fact that the language was not changed and it said that such reduction of term had been reduced at your request?

Mr. ROSENBERGER. Sir, this was on a record, and on that record I stated that it was not at my request. It was on a stenographic record.

Senator COOK. Is it in that record?

Mr. ROSENBERGER. I have not seen that record, sir, but I know that there was a stenographer and that I stated that it was not at my request, that my clients had not authorized me to make such a request.

Senator TYDINGS. You protected it in open court?

Mr. ROSENBERGER. That was in open court, yes, sir.

Senator COOK. And you took no further action on the fact that an order had been issued that said you had requested a reduction of your clients' sentences when in fact you had not?

Mr. ROSENBERGER. I took no further action except to correct it in open court, sir.

Senator COOK. All right.

Senator FONG. In relation to the removal order, tell us why do you consider Judge Carswell unsympathetic to civil rights in relation to the removal?

Mr. ROSENBERGER. To the removal order?

Senator FONG. Yes.

Mr. ROSENBERGER. Well, sir, specifically there is the question of filing fees.

Senator FONG. Just the filing fee?

Mr. ROSENBERGER. Which are not authorized.

Senator FONG. In other words, he——

Mr. ROSENBERGER. And further——

Senator FONG. Wait, he required you to——

Mr. ROSENBERGER. Pay a filing fee.

Senator FONG. $5?

Mr. ROSENBERGER. I believe it was $5.

Senator FONG. $5 for all the defendants?

Mr. ROSENBERGER. Per petition?

Senator FONG. Per petition?

Mr. ROSENBERGER. There were two petitions. One had three defendants, another had four defendants on the petition.

Senator FONG. So you had two petitions?

Mr. ROSENBERGER. I had two petitions.

Senator FONG. And you paid $10?

Mr. ROSENBERGER. Sir, I believe it was $10.

Senator FONG. And who asked you to pay it?

Mr. ROSENBERGER. The clerk with whom it was filed.

Senator FONG. And did Judge Carswell ask you to pay $10?

Mr. ROSENBERGER. Personally?

Senator FONG. Yes.

Mr. ROSENBERGER. No, sir; but he is the judge of that district who sets the rules for that district.

The CHAIRMAN. Wait a minute. Isn't it true now that the administrative office in the Supreme Court Building here in Washington requires the clerk in every removal case to collect a $15 filing fee, and they have got a printed manual out to that effect, and the judges have got nothing to do with it? Now isn't that the truth?

Mr. ROSENBERGER. Sir, the circuit court said it is not to be collected in a criminal removal. The fifth circuit said——

The CHAIRMAN. The question I asked you was as to that manual that is binding on every court clerk as of that time in the United States?

Mr. ROSENBERGER. Sir, I would say that if the circuit had said it is not to be done, then it is not binding.

The CHAIRMAN. Then why are blaming Judge Carswell? It was something the clerk did.

Mr. ROSENBERGER. The judge is responsible for his district, sir.

Senator FONG. And the fees are set by whom?

Mr. ROSENBERGER. The fee here was negated by the fifth circuit. The fifth circuit had ordered that no such fee be collected.

Senator FONG. Do you know who sets the fees to be collected by circuit courts?

Mr. ROSENBERGER. Who sets the fees?

Senator FONG. Yes.

Mr. ROSENBERGER. Which are collected in the circuit?

Senator FONG. Yes.

Mr. ROSENBERGER. No, sir; I do not.

The CHAIRMAN. How much did you pay the fifth circuit?

Mr. ROSENBERGER. The fifth circuit?

The CHAIRMAN. Yes.

Mr. ROSENBERGER. I do not believe I paid anything in the circuit court, sir.

Senator HRUSKA. When you filed the appeal on Dresner, didn't you pay a filing fee?

Mr. ROSENBERGER. I did not file that appeal. I argued but I was not the attorney who filed it.

The CHAIRMAN. $25.

Senator FONG. Isn't it correct that filing fees are set by the Supreme Court pursuant to statute?

Mr. ROSENBERGER. Pursuant to statute, yes, sir.

Senator FONG. Yes.

Mr. ROSENBERGER. But the statute as to this particular case had been changed in 1948. In 1948 they eliminated filing fees in criminal removals. They left filing fees applicable in other removals, but not in——

Senator FONG. When you paid the filing fee of $10 for removal, was Judge Carswell present?

Mr. ROSENBERGER. No, sir.

Senator FONG. He was not present?

Mr. ROSENBERGER. No, sir.

Senator FONG. He was not aware then that you had paid a $10 filing fee?

Mr. ROSENBERGER. I do not know whether he was aware of it or not, sir. He was not present.

Senator FONG. Outside of that particular instance, in which you claim that he was unfriendly to civil rights because you had to pay a filing fee in a removal case, what other instances do you refer to?

Mr. ROSENBERGER. Well, coming back to the *Wechsler* case as an example, there he remanded a removal after a habeas without a hearing on the removal.

Senator HRUSKA. And you think that was against the law? You think his ruling to remand was against the law, is that your understanding?

Mr. ROSENBERGER. I think his ruling to remand without holding a hearing on the question of remand was improper, yes, sir.

Senator HRUSKA. On the score of your check, Mr. Rosenberger, let me read to you this sentence from a letter dater August 6, 1964, and it is signed by Richard T. Rives, Acting Chief Judge of the United States Court of Appeals for the Fifth Judicial Circuit. It is a letter addressed to Mrs. Earl James, chief deputy clerk of the Fifth circuit in New Orleans, and one sentence says this:

"I enclose to you the following: Check for $25 of Ernest H. Rosenberger, one of the attorneys for the appellants for the docketing fee."

Does that refresh your recollection, so that you will change your previous testimony that you did not pay a docketing fee elsewhere?

Mr. ROSENBERGER. Yes, I paid it. I thought one of the other attorneys paid it in that case.

Senator HRUSKA. You paid it?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. You testified a little bit ago that you did not pay any fee. Does this refresh your recollection at all?

Mr. ROSENBERGER. I did not testify that no fee was paid in the circuit, sir. I testified that I believed one of the other——

Senator HRUSKA. The record will show exactly what you said.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. But at any rate now you are willing to say——

Mr. ROSENBERGER. That I did.

Senator HRUSKA (continuing). On this basis that you paid the fee?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. And do you think that Judge Rives when that fee was asked for, do you think he is anti-Negro also?

Mr. ROSENBERGER. No, sir.

Senator HRUSKA. Or was he doing what the statute required?

Mr. ROSENBERGER. There he was doing what was required. When there is a case that says that there shall be no fees, then whoever collects a fee is doing——

Senator HRUSKA. There will be testimony on that later, Mr. Rosenberger, but the fact is the manual at that time to the clerk of the court required a filing fee. Now the point is notwithstanding what the law was in the circuit, if the clerk did not collect that fee, he would have been personally liable for that amount. It is the administrative office of the courts that sets the fee. That will come out in evidence later today.

The CHAIRMAN. I want to read that part of the manual that governed from 1952 to 1966.

The statute which now governs as to fees for the commencement of civil cases is title 28 United States Code, Section 1914 which reads in part as follows:

"(*a*) The clerk of each district court shall require the parties instituting any civil action to pursue the proceeding whether by original process, removal, or otherwise to pay a filing fee of $15 except that in application for a writ of habeas corpus the filing fee shall be $5".

Mr. ROSENBERGER. Yes, sir. Now in the prior statute——

Senator TYDINGS. Will the witness hold?

Mr. ROSENBERGER. Yes, sir.

Senator TYDINGS. At this point I would like the clerk to insert the entire opinion in the case of *Lefton* v. *City of Hattiesburg*, 333 Fed. 2d 280. In interpreting section 1914(a) the Court held that where a removal in a criminal case was concerned, no fee was required to be paid. That was a law which governed the U.S. district court in which Judge Carswell presided, when he required a filing fee to be paid on a criminal removal, notwithstanding this decision of the Fifth Circuit.

(The case referred to appears in the appendix.)

Senator HRUSKA. Did Judge Carswell require you to pay a fee? You testified a little bit ago that Judge Carswell did not, that it was the clerk that required you to pay, which is right?

Mr. ROSENBERGER. It was the clerk.

Senator HRUSKA. Well now to that extent the Senator from Maryland probably had better correct his statement.

Senator TYDINGS. I retract the statement. It was the clerk of Judge Carswell's court that collected it.

Senator HRUSKA. And that is something we can get into when the clerk appears here which he will later in the day, and he will explain just who sets the Court fees.

There is one aspect of your testimony, Mr. Rosenberger I cannot understand. You said there was a circumvention of the court order and that there was a denial of the right to correct the criminal record against these people.

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Now, the fact is, is it not, that the criminal record started when there was the conviction in the city court?

Mr. ROSENBERGER. Yes, sir; that is when it started.

Senator HRUSKA. So that had to be dealt with on the basis of the conviction in the city court. Now how would the granting of a writ of habeas corpus—what effect would that have on that conviction in the city court?

Mr. ROSENBERGER. Well, in the writ of habeas corpus, on a hearing it would have been held that that conviction was an improper conviction, and they would have been discharged.

Senator HRUSKA. No, the writ of habeas corpus if it were granted would have given the defendants freedom from jail. That is the purpose of a writ. Now what would the execution of that writ of habeas corpus freeing the men from jail, what effect would that have on their criminal record? It would still be there, would it not, subject to a disposal on appeal from that conviction?

Mr. ROSENBERGER. That writ would have held, in attaining that end, that that conviction was an improper conviction.

Senator HRUSKA. The writ would have said, You men are free. Leave jail if you want to or stay there if you want to, but you are free to go. That is all the writ would have done by way of execution. There would be no trial.

Mr. ROSENBERGER. By way of execution that is all it would have done.

Senator HRUSKA. Sir?

Mr. ROSENBERGER. You are right, sir, by way of execution that is what it would have done. It would have freed them. However, it would have ruled that their detention was illegal. That would have been the basis for the order, sir.

Senator HRUSKA. The granting of a writ of habeas corpus does not affect the record of conviction, does it? Is that what you are trying to say? That is not involved. A writ of habeas corpus says free that man, and they free him, but the——

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. But the conviction stands unless it is reversed upon its merits.

Mr. ROSENBERGER. But in this case there was directed to be a hearing on the merits.

Senator HRUSKA. It was doing no such thing. It was a granting of the writ. It was the granting of the writ, and the purpose of the writ is to get them out of jail and they got out of jail.

Mr. ROSENBERGER. They got out of jail.

Senator HRUSKA. It had no bearing upon any conviction by the city court, and could not have had.

Mr. ROSENBERGER. But in the order that you read, sir, it directed a hearing on the merits.

Senator HRUSKA. That was to be a hearing on the merits of the writ. Well, you had your opportunity. If that procedure was wrong you had a written invitation to go to Judge Carswell's court, and he was acting under the mandate of the circuit court. For some reason you did not appeal it and now you resort apparently to the word "circumvention." Is it for the purpose of covering something that you did not do that you should have done? Could that be a possible explanation of the use of the word "circumvention" instead of violating?

Mr. ROSENBERGER. No, sir.

Senator HRUSKA. It would not?

Mr. ROSENBERGER. No, sir.

Senator HRUSKA. Then why did you not go and allege to the judge that the order was circumvented and you wanted it put on record so you could appeal therefrom?

Mr. ROSENBERGER. Sir, once they were discharged, we had no longer any standing to bring any writ.

Senator HRUSKA. Notwithstanding that written invitation to come back to the Federal court?

Mr. ROSENBERGER. Yes, sir.

Senator HRUSKA. Thank you.

The CHAIRMAN. Any questions?

Senator MATHIAS. Mr. Chairman, the witness indicated that he heard a conversation between Judge Carswell and the city attorney.

Mr. ROSENBERGER. Yes, sir.

Senator MATHIAS. Who was present during that conversation?

Mr. ROSENBERGER. I was, sir.

Senator MATHIAS. Just the three of you?

Mr. ROSENBERGER. The three of us; yes, sir.

Senator MATHIAS. And were the other two parties to that conversation aware that you were hearing what they were saying?

Mr. ROSENBERGER. Oh, yes, sir; I am quite certain they were. I was in the room.

Senator MATHIAS. And what was said was in your presence and intended for your ears as well as for anybody else's ears?

Mr. ROSENBERGER. Yes, sir; since Mr. Rhodes then asked me to make that application.

Senator MATHIAS. And no others were present at all?

Mr. ROSENBERGER. Not that I recollect, sir.

Senator BURDICK. Mr. Chairman, I did not appear in the hearing room until you were well into your testimony, but I would like to get a few things straight here. Are you contending that the Carswell order of August 6 is not consistent with the circuit court?

Mr. ROSENBERGER. No, sir. The order of August 6 is consistent.

Senator BURDICK. Is consistent?

Mr. ROSENBERGER. Yes, sir.

Senator BURDICK. All right. Getting to the meat of the order it says that "If such State court fails either to order the discharge of such petitioners from custody or release from custody upon the nominal bail within 3 days of date of filing," and so forth. Let us take the first part "If the State court fails to order discharge of such petitioner."

Mr. ROSENBERGER. Yes, sir.

Senator BURDICK. This order is consistent with the circuit court order?

Mr. ROSENBERGER. The order from which you are reading; yes, sir.

Senator BURDICK. It is consistent?

Mr. ROSENBERGER. Yes, sir.

Senator BURDICK. And this is part of the order. Was the petitioner discharged?

Mr. ROSENBERGER. Not by the State court to which the habeas corpus was filed but by the city court.

Senator BURDICK. They were discharged?

Mr. ROSENBERGER. They were discharged.

Senator BURDICK. Upon the presentation of this order?

Mr. ROSENBERGER. They were discharged.

Senator BURDICK. Immediately?

Mr. ROSENBERGER. The next day, yes.

Senator BURDICK. And they were discharged in conformance with this order?

Mr. ROSENBERGER. No, sir; not in conformance with that order. In conformance with that order they would have been discharged under a writ of habeas corpus. They were not discharged under a writ of habeas corpus.

Senator BURDICK. Let me read it again.

The order says that "If the State court fails either to order the discharge of such petitioner" and so forth. Did the State court discharge the peitioners?

Mr. ROSENBERGER. The city court did, yes, sir, which is the State——

Senator BURDICK. The city court had possession of the petitioners?

Mr. ROSENBERGER. Of the petitioners; yes, sir.

Senator BURDICK. And after this order was issued, they were discharged?

Mr. ROSENBERGER. Yes, sir.

Senator BURDICK. That is all.

Senator MATHIAS. Mr. Chairman, one further question.

In some instances a writ of habeas corpus is granted purely on a mechanical basis. Some act was or was not done, and therefore a man is entitled to be released. There is no factual or legal background beyond the narrow grounds set out in the petition for the writ?

Mr. ROSENBERGER. Yes, sir.

Senator MATHIAS. Is it your contention that in this case, however, that it was not only the operational aspect of the physical release, but that the mere granting of the writ would also establish a legal principle which was really at the basis of this whole proceeding?

Mr. ROSENBERGER. Yes, sir.

Senator MATHIAS. And is it further your contention as a lawyer that if this second aspect of substantive principle, which was at the root of the whole case, had been established by granting the writ, that this would have had a substantial effect on the criminal record that had been established by the city court in the first place?

Mr. ROSENBERGER. Yes, sir. It would have operated to vindicate the position of the defendants.

Senator MATHIAS. You feel that this would have been the inevitable consequence of the granting of the writ on the original basis?

Mr. ROSENBERGER. No question about it, sir.

Senator THURMOND. Mr. Chairman, I just have one question.

Mr. ROSENBERGER. Yes, sir.

Senator THURMOND. Would you mind telling us who employed you and who paid you and paid your expenses in connection with this case?

Mr. ROSENBERGER. Sir, I was not paid. My expenses, that is my air fare to Tallahassee from New York and back again, was paid by the Lawyers' Constitutional Defense Committee of the American Civil Liberties Union.

Senator THURMOND. Thank you.

The CHAIRMAN. Any further questions?

Senator FONG. The city courts stated that the defendants be released without giving any opinion as to why they should be released?

Mr. ROSENBERGER. Yes, sir.

Senator FONG. So if the city court took that action defendants are released without stating why they were released you would not have gotten what you wanted?

Mr. ROSENBERGER. In this case it went further. The city judge at the end of his statement said "Now you have what you came for. You have a permanent criminal record." That is what he stated to those clergymen in his court that day.

Senator HRUSKA. Mr. Chairman, I think it would serve for purposes of clarity and reference if there were included in the record the order of Judge Carswell on August 3, 1964, in which he denied the writ of habeas corpus, and that part of his order, Mr. Chairman, was affirmed and confirmed by the Circuit Court on August 5, and then on August 5 the Circuit Court directed the District Court to modify its order. A copy of that order should really appear in the record so that all of those three documents would tell the whole story.

The CHAIRMAN. They will be admitted.

(The documents referred to follow:)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

(Tallahassee Civil Action No. 1616)

ISRAEL DRESNER, AUSTIN M. WARMER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDOE, ROBERT J. STONE, J. W. COLLIER, JR., PETITIONERS

VS.

FRANK STOUTAMIRE, AS CHIEF OF POLICE, CITY OF TALLAHASSEE, FLORIDA, RESPONDENT.

ORDER

This cause came on to be heard on petition for writ of habeas corpus and counsel for the respective parties being present and heard and the grounds for the petition having been set forth in accordance with Rule 15 of this District and heard on oral argument, and counsel for respondent having been heard in opposition, and it appearing that these petitioners have not sought to avail themselves of relief in the courts of Florida as provided in law and made explicit in

this same litigation by the Supreme Court of the United States, it is, upon consideration, hereby

Ordered:

1. Relief sought by petitioners is denied at this time without prejudice to petitioners, or any of them, to proceed for relief in the appropriate court or courts of the State of Florida either by petition for a writ of habeas corpus or under the ambit of Criminal Procedure Rule No. 1 of the Supreme Court of Florida.

2. The Court finds that it has jurisdiction of this cause and retains jurisdiction for a period of thirty (30) days during which time petitioners are afforded opportunity to proceed as hereinabove provided.

Done and ordered in Chambers at Tallahassee this 3rd day of August 1964.

G. HARROLD CARSWELL,
U.S. District Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before Rives and Jones, Circuit Judges, and Simpson, District Judge

ISRAEL DRESNER, ET AL.

v.

FRANK STOUTAMIRE, AS CHIEF OF POLICE, CITY OF TALLAHASSEE, FLORIDA

WAYNE C. HARTMIRE

v.

FRANK STOUTAMIRE, AS CHIEF OF POLICE, CITY OF TALLAHASSEE, FLORIDA

Per Curiam:

The District Court is directed to modify its order so as to provide as to each petitioner that if such petitioner makes application for habeas corpus to a state court of competent jurisdiction, and if such state court fails either to order the discharge of such petitioner from custody or his release from custody upon nominal bail within three (3) days from the date of filing of such application any further delay will rendre state corrective process ineffective to protect the rights of such petitioner, and the District Court will upon the request of such petitioner forthwith proceed to a hearing of the application on its merits, and further that District Court will retain jurisdiction until the termination of any such state court habeas corpus proceeding, and if such petitioner is denied relief or the proceeding unreasonably delayed, the District Court will upon request of such petitioner proceed to a hearing on the merits.

With the modification so directed, the judgment of the District Court is Affirmed.

This order shall serve as the mandate of this Court and is issued forthwith.

RICHARD T. RIVES,
U.S. Circuit Judge.

WARREN L. JONES,
U.S. Circuit Judge.

BRYAN SIMPSON,
U.S. District Judge.

Attest a true copy issued by the mandate of the Court this August 5th, 1964.

RICHARD T. RIVES,
U.S. Circuit Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

(Tallahassee Civil Action No. 1016)

ISRAEL DRESNER, AUSTIN M. WARMER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, J. W. COLLIER, JR., PETITIONERS,

VS.

FRANK STOUTAMIRE, AS CHIEF OF POLICE, CITY OF TALLLAHASSEE, FLORIDA, RESPONDENT.

(Tallahassee Civil Action No. 1017)

WAYNE C. HARTMIRE, PETITIONER,

VS.

FRANK STOUAMIRE, RESPONDENT

ORDER

This Court having been duly advised that the United States Court of Appeals for the Fifth Circuit on August 5, 1964 affirmed the judgments of this Court entered in the above captioned cases respectively by its order dated August 3, 1964 in Tallahassee Civil Action 1016 and by its order dated August 4, 1964 in Tallahassee Civil Action No. 1017, and further directing that this Court modify said orders in certain particulars, in conformity therewith, it is hereby

Ordered that previous orders of this Court dated August 3, 1964 in Tallahassee Civil Action No. 1016 and August 4, 1964 in Tallahassee Civil Action No. 1017 be and they are hereby modified so as to provide as to each petitioner that if such petitioner makes application for babeas corpus to a state court of competent jurisdiction, and if such state court fails either to order the discharge of such petitioner from custody or his release from custody upon nominal bail within three (3) days from the date of filing of such application, that any further delay will render state corrective process ineffective to protect the rights of such petitioner; and this Court will upon the request of any such petitioner forthwith proceed to a hearing of the application on its merits, and further that this Court retains jurisdiction until the termination of any such state court habeas corpus proceeding, and if such petitioner is denied relief or the proceeding unreasonably delayed, this Court will upon request of such petitioner proceed to a hearing on the merits.

Done and ordered in Chambers at Tallahassee this 6th day of August 1964.

G. HARROLD CARSWELL,
U.S. District Judge.

Senator TYDINGS. I would like to read into the record at this time in the case of *Lefton* v. *The City of Hattiesburg*, cited as 333 Fed. 2d 280, from page 285, paragraph 2. The decision which was handed down by the U.S. Court of Appeals, Fifth Circuit on June 5, 1964. The court states, and I shall read that paragraph in its entirety:

"Filing fees are not to be collected in connection with criminal removal petitions. Such fees are regulated by statute. The comparison of the present statute with its predecessor shows that there is now no authority for the clerk to charge fees in such proceedings."

The CHAIRMAN. Any further questions?

(No response.)

The CHAIRMAN. Mr. Knopf.

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF NORMAN KNOPF, ATTORNEY, DEPARTMENT OF JUSTICE

Mr. KNOPF. I do.

Mr. Chairman, before I am asked questions I would ask the committee's permission to make a statement of two or three sentences.

The CHAIRMAN. I can not hear you.

Mr. KNOPF. Mr. Chairman, before I answer questions, I would like permission to make a statement of just two or three sentences if I may.

My name is Norman Knopf. I wish to put on the record that I am here pursuant to a subpena issued by this committee. I also would like it put on the record that I am presently employed by the Department of Justice, but any knowledge that I have regarding Judge Carswell was learned by me 2 years prior to my joining this Department and I have gained no knowledge nor have I had any contact with Judge Carswell while working for the Department.

Thank you.

Senator TYDINGS. Would you give your educational background, Mr. Knopf?

Mr. KNOPF. Yes, sir. I attended Cornell University where I received an A.B. in 1961. I then went on to Columbia Law School, where I was on the Law Review and received an LL.B in 1964. Thereafter in the fall of 1964 through the fall of 1966 I clerked for a Federal judge in the sourthern district of New York, and thereafter I joined the Department of Justice in the civil division, appellate section, where I am currently employed. I write briefs in civil matters, contracts, torts, that type of thing and argue cases in the U.S. court of appeals. I am a member of the bar of the State of New York, the bar of the Supreme Court of the United States, and the bar of most of the U.S. court of appeals, the one exception being the first circuit. I presently live in Bethesda, Md., with my wife and two children.

I have a son 2 years old and a daughter 3 weeks old.

Senator TYDINGS. Mr. Knopf, I want to direct your attention to the summer of 1964. Could you tell the committee whether you were engaged in bringing legal assistance to civil rights workers?

Mr. KNOPF. In the summer of 1964 I 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 students recently graduated such as I was, not admitted to the bar, we knew we could not practice law, but we volunteered to assist full fledged lawyers who were practicing law. As such I was assigned to northern Florida to work with attorneys for the Lawyers Constitutional Defense Committee. Mr. Rosenberger, who was just here, was one of those attorneys whom I assisted. Mr. Lowenthal, who, I read in the paper, was before this committee, was also an attorney I worked with.

I was down in Florida during August, and a little bit into September. I stayed there constantly, while the Constitutional Defense Committee lawyers came and went in 2 week periods.

Specifically we were assigned, the lawyers and my assisting them, to work with a CORE voter registration project to register black people in the northern area of Florida. Florida had no literacy requirement for registration. A person merely had to show up at the

registration desk and give his name. The CORE volunteer workers, many of whom were from Florida itself, and some of whom came from the North, would assist black people in getting to the registration place to register so that they could vote in the Federal elections scheduled in November.

As I heard Mr. Rosenberger testify and as this committee has heard, the project met with a great deal of hostility by the white people of the area. There were assaults. There was a bombing. There was a shooting, and so on. There were frequent arrests.

Specifically with the arrests, this is where the Lawyers' Constitutional Defense Committee attorneys came in, and tried to defend project workers that were arrested or remove the cases. As an assistant to the attorneys, I was sort of a jack of all trades. I typed papers, filed papers served papers, ran errands, kept our office—a one-desk, one-typewriter office in a boiler room in a cellar. I also was able to accompany the attorneys in many instances in their given rounds and duties to observe what happened.

Senator TYDINGS. During the time that you were in Tallahassee working with civil rights workers, did you have occasion to work on a case involving a man named Wechsler and some other students who were arrested?

Mr. KNOPF. Yes, sir. That was my first big case that I had some contact with down there. Wechsler and some other voter registration workers were arrested for trespassing while going to black tenant farmers and asking them to come and register to vote.

Senator TYDINGS. Was that the incident just described by Mr. Rosenberger?

Mr. KNOPF. That is correct, and so I will not repeat what has already been said, except to say that I prepared under Mr. Rosenberger's direction the papers for removal by typing them out, and I also filed the papers in Judge Carswell's court. We filed the removal papers, and I was also with Mr. Rosenberger when he went to the State court after the removal papers had been filed to inform the State court officials that under Federal law they had no jurisdiction to continue to trial as the case had been removed.

Senator TYDINGS. Why did you try to remove the case?

Mr. KNOPF. 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, the local Federal court.

Senator TYDINGS. Now go back to the Wechsler case. What happened in the Wechsler case in the local court when the removal papers were filed?

Mr. KNOPF. Did you say local Federal court?

Senator TYDINGS. In the State court.

Mr. KNOPF. In the State court? I was present when Mr. Rosenberger served the papers on the judge, and the defendants were already in the courtroom, and the trial was just about to start when Mr. Rosenberger gave the papers and explained to the judge who appeared to be unfamiliar with removal proceedings exactly what had occurred and that the State court no longer had jurisdiction to try the case.

The judge indicated, as Mr. Rosenberger said, that he was going ahead. He didn't know anything about removal. He wasn't going to pay any attention to it and told him to sit down and get away from these people because he asked Mr. Rosenberger whether he was a member of the Florida Bar, and when he said "No," the judge said, "Well, then, get away from these defendants. You cannot represent them."

I believe sometime before Mr. Rosenberger was thrown out of the courtroom it was stated that there was no attorney present to represent these people, that they could not get an attorney and they would like a continuance at least to get an attorney to represent these persons, and at one point one of the—when the trial had started the judge had asked the workers some questions. One of the workers turned around to look at Mr. Rosenberger who was sitting in the back, for some kind of advice, and at that point the judge threw Mr. Rosenberger out of the courtroom. He ordered him out and when he was slow in going somebody came along and helped him out.

Senator HRUSKA. Would the Senator yield? That is a reference, when you say the courtroom, that is the city court.

Mr. KNOPF. This is the local Gadsden County.

Senator HRUSKA. The local court?

Mr. KNOPF. That is correct.

Senator HRUSKA. You wouldn't want the impression to be gotten that Judge Carswell suffered any lawyer to be kicked out of his courtroom at any time?

Mr. KNOPF. Oh, no, I am referring to the Gadsden County Court; yes, sir. It was then after that incident, and the trial was immediately held, these people were sentenced to 60 days in jail or a $50 fine, and they were immediately put into the local jailhouse. Then I was told to prepare habeas corpus papers to file in Federal court because the attorney told me that it was clear, and I had read the statute, this was my understanding, that it was clear that the State court had no jurisdiction to try these people, since the matter had been removed, and therefore it was mandatory that a habeas corpus writ be issued.

At this point, as I recall it, Mr. Rosenberger was about to leave, and we got a new attorney, Mr. Lowenthal to come down.

Senator TYDINGS. Now did you personally assist Mr. Lowenthal and did you appear with Mr. Lowenthal before Judge Carswell in the *Wechsler* case?

Mr. KNOPF. Yes. I was present with Mr. Lowenthal when he went before Judge Carswell to seek the habeas corpus relief.

Senator TYDINGS. Would you tell the committee what you observed, including Judge Carswell's attitude toward you and the students and nonstudents involved with the civil rights voting project whom you were seeking to defend?

Mr. KNOPF. Yes, sir. I would be less than honest if I said that I actually remembered verbatim some words that were said. I do not. I do have——

Senator TYDINGS. Tell the committee to the best of you memory what you observed.

Mr. KNOPF. Yes.

Senator TYDINGS. And we are particularly interested in Judge Carswell's attitude.

Mr. KNOPF. 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.

Senator TYDINGS. Did the State send a representative?

Mr. KNOPF. No, sir. I personally had called the county prosecutor to inform him of the hearing to tell him when it would be held so that he could show up, and I remember his response roughly, his attitude, because it was an attitude that I met of numerous other prosecutors while working down there. Their attitude was they were not going to chase all the way over to Federal court to defend this case, that everything would blow over after the summer anyway, and they had much more important things to do in terms of criminal matters or private practice back in their home seat, and they were not going to show up and they didn't want anything to do with it in effect. So there was no one there from the county. There were just the civil rights attorneys plus the judge. So no one had argued against the granting of habeas corpus relief.

But I remember Mr. Lowenthal going on and on with the judge that he had to grant relief because the statute spoke in terms of "shall grant habeas corpus," not "may," and Judge Carswell said that there were very few areas of the law, I am not quoting, I mean this is my impression, it was something along like this, that there were few areas of the law that there wasn't some discretion left to the judge, and he was going to exercise that discretion against us and he would keep these people in jail.

Mr. Lowenthal argued strenuously that we feared for the safety of these people in jail, and that it was quite clear that these persons were convicted in violation of Federal law. They didn't even have an attorney. They were working on voter registration projects and things like that.

Senator TYDINGS. Did Judge Carswell have all of the facts before him?

Did Mr. Lowenthal give him all of the facts as related here by Mr. Rosenberger to this committee this morning?

Mr. KNOPF. Yes, he did, and they were also, most of them, I wouldn't swear to all of them exactly, were in the petition, because I drew up the petition, these facts were set forth either in the removal petition or in the habeas corpus petition, generally setting forth all these facts. There then went on a lengthy discussion between Mr. Lowenthal and the judge exactly as to what the law was, and the judge required some books to be brought out, the statute to be put before him and so on, and he eventually concluded that we were right, I mean Mr. Lowenthal was right, in that he had no choice. He had to grant habeas corpus, because these state court was without jurisdiction. So he then very reluctantly granted it. He said all right, we win, something like that, you know, all right, here it is.

He then said, however, I don't know exactly in what order, but I remember that he then said but he did have discretion with regard to removal, and he would remand the removal petition back to the state court, and Mr. Lowenthal argued that there had been no request from the county prosecutor, no one had showed up to ask for this remanding, and the judge said that he had the power to do it himself, and that he would do it without a request. So on his own motion he remanded.

They then got into a discussion about serving the habeas corpus. At first I was under the impression, and it appeared, the Marshal was there, that the Marshal was taking the habeas papers to serve them, but Judge Carswell announced that the Marshal would not serve the papers, that Mr. Lowenthal would have to drive out to the county jail himself, and serve these papers.

The CHAIRMAN. The judge announced that the Marshal would not serve the papers, that he would have to serve them himself?

Mr. KNOPF. That is correct.

The CHAIRMAN. Isn't that ordinary procedure?

Mr. KNOPF. No. We thought it was extraordinary, and Mr. Lowenthal said as much. He said, isn't it normal practice for the Marshal to serve the papers and in fact isn't it required even by law? Judge Carswell—all I remember is that the Marshal was not going to serve the papers.

Senator HRUSKA. That was Mr. Lowenthal's interpretation of the law, that it is normal process?

Mr. KNOPF. That is correct.

Senator HRUSKA. Did he cite any authority or did he get any?

Mr. KNOPF. To be honest I don't really remember. I don't remember it, sir.

Senator HRUSKA. The fact is to the contrary but we will pass that over for the time being. He did say, however, that it is normal process for the Marshal to serve the writ.

Senator TYDINGS. Marshals serve writs in the Districts that I have always practiced in. You don't give them to attorneys as the witness has testified.

Mr. KNOPF. Yes. As I say, as someone who had not practiced I wouldn't be in a position to say.

Senator HRUSKA. Just to sort of get this in perspective, the present clerk of the court served for 20 years as a deputy marshal and he will be a witness here. His testimony will be that never in those 20 years did he ever serve a writ of habeas corpus with one exception, and that was where the writ was directed to him as Marshal to go out to the jail and procure the person there and bring him into court. With that exception, it was the invariable practice to have the person applying for the writ or his attorney of record see to it that it was properly served. I think it would be well for the record to show that at this point, so as to dispel the idea of usual procedure being circumvented.

Mr. KNOPF. Yes, sir. I am merely saying what I remember. I am not saying that I know what the law is here.

Senator HRUSKA. You testify properly. If Mr. Lowenthal made that statement, then you are being a very faithful witness by recounting what that conversation was.

Mr. KNOPF. Yes, sir. I then recall there was more discussion exactly on the service of the writ, and Mr. Lowenthal, it was part of his argument to ask that the Marshal serve the writ, mentioned the fact that we feared for the safety of the people in jail if they were not released, and he feared for his own safety in serving the writ, and more important, he feared that if he served the writ, it would be ignored, because this is what in fact as I just testified happened in the local Gadsden County Court, he just ignored the removal papers. And I presume it was felt that if a U.S. Marshal showed up it may have more meaning to the local sheriff. There was a great deal of discussion about this, and then I recall Judge Carswell announced that we needn't worry about the sheriff paying attention to the papers and giving them the proper regard, because he would have the Marshal call the sheriff and explain what was going on, so that he would be prepared to recognize the habeas corpus writ when it was served.

Then I went with Mr. Lowenthal out to the jail and we served the papers on the sheriff.

Senator TYDINGS. Would you tell the committee what happened when you served the papers on the sheriff?

Mr. KNOPF. The sheriff was very polite to us. He immediately sent for the prisoners, and released them, and as I recall, the prisoners got as far as the front steps of the jail when they were immediately rearrested again, and when we asked what were the charges we were told that the matter had been remanded to the State court and therefore the sheriff had the jurisdiction to rearrest them again, and they were put back in jail again.

Senator TYDINGS. Did the sheriff say whether or not he was contacted by the judge or by the judges office? Did he tell you how he knew it had been remanded and how he knew that he could rearrest them right away?

Mr. KNOPF. No, sir. I can only speculate as to how he knew. I do know that we tried to obtain a stay in the court of appeals immediately of the remand order of Judge Carswell, so that we could preclude

such a situation as this, but it took longer to get a stay, which was granted, and by the way, Judge Carswell refused to grant the stay. That was asked of him, and I neglected to mention that before. I forgot. That was asked of him by Mr. Lowenthal that if Judge Carswell was going to remand on his own motion back to the State court could he at least stay his order to give us a chance to have that reviewed in the court of appeals and he denied that stay. But eventually a stay was obtained, and the people were released again, because of that stay, and as I understand from what I read in the paper, there was a trial in the court of appeals, not a trial, there was a review in the court of appeals, and Judge Carswell's decision was reversed. The remand decision was reversed.

Senator TYDINGS. Would you tell the committee what you can recall as to whether or not Judge Carswell made it easy for you to file a habeas corpus petition to bring the matter of these civil rights voter workers before his court?

Mr. KNOPF. I recall having an awfully hard time, difficult time filing anything in Judge Carswell's court. And I had had occasion to file things in another Federal court, the adjacent middle district of Florida court. That was Judge Bryan Simpson's court and things were much easier there so I had a basis of comparison.

As I recall, as my memory serves me and I have had notes, there was a $15 filing fee, not a $5 filing fee, and that we had to pay $30 and I had no money. I was only being paid for room and board at the sum of $30 a week, and the lawyers had to put up the fee. They voluntarily put it out of their pocket as I understand. I think Mr. Rosenberger forked it over on one of these occasions. There was a $30 filing fee that we had to pay.

In addition I remember typing out, I mean this stuff was done on an emergency basis, the habeas corpus, I remember staying up very late at night typing out a habeas corpus petition only to have it rejected the next day by the judge because we hadn't done it on the special forms his office provided for, and so we had to then go and make out special forms which really involved quite a lot more work. They had to be typed, information had to be gotten, and then when those special forms were filed the matter was before Judge Carswell. In addition I specifically——

Senator TYDINGS. Tell us about those forms. Were they pursuant to, did Judge Carswell say that they were required pursuant to rules of his court?

Mr. KNOPF. I don't really recall. I presume—I don't really recall. I just know he said he couldn't entertain it unless they were on the forms provided by his court. I do know that with regard to the rules of the court, since I was more or less responsible for getting the papers in proper order, and typing them up and so on, I was very sensitive to this. I had been rebuked by Judge Carswell for failing to follow rule 15, a local rule of his court, and I seem to recall on several occasions we had been criticized because our papers were not proper in that they failed to follow local rule 15.

I had gone to the clerk's office and tried to get a copy of the local rules, but during the summer the clerk kept on informing me that they were out, they had all been given out and there were none available, he would try to get me a copy. I did not obtain a copy until very

nearly the end of the summer when we were going back home, and at that time the copy that the clerk gave me showed that the local rules went from rule 1 through rule 14, there was no rule 15.

Senator TYDINGS. All right, let's take that habeas corpus petition. Did you and Professor Lowenthal attempt to file a writ of habeas corpus petition with the signatures of the attorney as the signator on the petition?

Mr. KNOPF. I don't, to be frank, recall which signatures you had to have. I do know there had to be some signatures because every time we had a signature we had to go get a notary public and we couldn't get one in town, they wouldn't cooperate with us. We finally got one we had to pay $1 a shot. I do remember running around trying to get somebody to notarize it but I really don't recall which signatures we had to have.

Senator TYDINGS. Do you recall whether or not you had to attempt to find the prisoners on the road gang in order to get their signatures?

Mr. KNOPF. I do recall once trying to find out where the prisoners were, but to be quite frank, I don't remember why we were trying to do that.

Senator COOK. If the Senator would yield, I think Mr. Lowenthal's testimony was that he went to the jail and they were out on a gang and they called Judge Carswell and Judge Carswell said to bring——

Senator TYDINGS. The Senator is correct.

Senator SCOTT. Could I ask one question at this point? I want to clarify something. During the colloquy between Mr. Lowenthal and the judge, it was in open court, wasn't it?

Mr. KNOPF. I remember it being in his chambers. I mean anyone I presume could go into chambers, but it was in his chambers.

Senator SCOTT. No reporters present?

Mr. KNOPF. I recall the only persons being present were the civil rights lawyers, the judge, and I think maybe his clerk and the marshal, but I am not sure at what stage they were there, and that was it.

Senator SCOTT. Were there any articles about this colloquy in the local press, for example, furnished by you or Mr. Lowenthal or anyone else?

Mr. KNOPF. I really don't——

Senator SCOTT. Did the press make any report of this incident at all?

Mr. KNOPF. I know that the press gave extensive coverage to the difficulties, the bombing, the shooting and so on in the project, but I really don't know whether they reported this. I don't know whether anyone told them. I don't recall. I know I didn't. I don't recall doing it, I wouldn't swear to that. I don't recall it. Maybe they did learn about it and report it. We were so busy typing papers running around to the jail and so on I don't remember if I read it or told anybody or anything like that.

Senator SCOTT. You don't remember whether it appeared in the papers or not?

Mr. KNOPF. No, I don't.

The CHAIRMAN. Any further questions?

Senator TYDINGS. Yes. Mr. Knopf, was it your impression that Judge Carswell was endeavoring to assist the local officials in keeping these voter registration workers in jail?

Mr. KNOPF. Well, I can't state why he was doing what he did. I don't know. I just know that he stated that he was not going to let

them out of jail. He said that he would not let them out of jail and as long as he had the power to do that he would keep them in. It wasn't until he was shown that he had to let them out that he did.

Senator TYDINGS. You stated that you assisted lawyers who represented civil rights workers in the middle district of Florida before Judge Bryan Simpson?

Mr. KNOPF. That is correct.

Senator TYDINGS. Was it your impression from your experience in the middle district of Florida, that the judge accorded a fair trial and equal treatment to the persons you represented, civil right workers or others?

Mr. KNOPF. My experience was limited in the middle district. I filed papers there, removal papers and we were paying no fee when we filed papers there, and while I was there filing the papers, I went and sat in in Judge Simpson's courtroom to listen to other cases that I was not directly involved with. They were civil rights matters. And I couldn't help but note the difference there. There seemed to be there was no arguing, shouting. There was a calm situation and the judge spoke it seemed to me without any hostility. Both sides talked things over. We did not, when I was there, have any matter before the judge, Judge Simpson, because what happened in the remand matters, removal matters, in Judge Simpson's court was they just sat there. No prosecutor showed up to ask that they be remanded. The judge did not do it on his own motion. They just sat there and I understand that eventually they were dismissed for failure to prosecute.

Senator TYDINGS. In your judgement, based on your work before Judge Carswell, do you think that Judge Carswell gave a fair and unbiased hearing to persons in his courtroom who were either civil rights workers or members of minority groups involved in voting rights projects?

Mr. KNOPF. Senator, as I understand it, I was called here to convey the facts that I know. I think the facts speak for themselves. I don't really know that the committee needs my opinion here, if I may duck that question.

Senator TYDINGS. All right.

The CHAIRMAN. You have stated that Judge Carswell objected to northern lawyers, is that correct?

Mr. KNOPF. Yes, sir.

The CHAIRMAN. Don't you know as a matter of fact that he has had dozens of northern lawyers in his court and never at any time raised any objection?

Mr. KNOPF. No. All I know is my experience with Mr. Lowenthal as a civil rights northern lawyer.

Senator TYDINGS. You didn't wish to give the impression that Judge Carswell treated northern lawyers who might be representing big corporations in the same manner that he treated you and Mr. Lowenthal did you?

Mr. KNOPF. I only conveyed my experience with Mr. Lowenthal. That has been my sole experience.

The CHAIRMAN. Any further questions?

Senator HRUSKA. I have some questions, Mr. Chairman.

Mr. Witness, you have stated several times on the matter of removal and remanding that the judge insisted that he had power to do that

on his own authority without reference to any request by the county or city or whoever?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. Do you think that is true?

Mr. KNOPF. To be frank, sir, after volunteering down there I have done no other work in the civil rights area, legal work, and I really can't give an opinion.

Senator HRUSKA. Was he criticized by Mr. Lowenthal for taking that position and granting the order and ordering the remand on his own motion as opposed to——

Mr. KNOPF. I believe, I know Mr. Lowenthal argued that that should not be done, that it was extraordinary since there had been no request from anyone and I also know in light of your question that the fifth circuit reversed him in this case. It was reversed so I presume that——

Senator HRUSKA. Let me read section 28 U.S.C., section 1447, subparagraph (c).

If at any time before a final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs.

Would that not pretty well establish the authority as well as the direction to the court to proceed on his own authority?

Mr. KNOPF. Your reading that has refreshed my memory a little bit. I remember Mr. Lowenthal making the argument, on which I make no comment as to whether it is valid or not, that under that statute the least the judge should do is provide him with a hearing on the issue of remand, having both sides present, in which he can show that it had not been improvidently granted. That was the argument made.

Senator HRUSKA. Of course he was reversed, wasn't he, in the circuit court?

Mr. KNOPF. Yes; I understand he was. I have no personal knowledge.

Senator HRUSKA. I should like to read, Mr. Chairman, the opinion which is brief. It has only two sentences. It is found in 351 Federal Second, page 311.

"Pro curium decision" in the case of *Weschler* v. *County of Gadsden:*

The order of the District Court remanding this cause to the State Court was entered by or to the decision of this court in *Rachael* against the *State of Georgia* (5th Circuit) 342 Federal Second 336. *Rehearing denied* 343 Federal 2nd 909 and *Peacock* against the *City of Greenwood* (Fifth Circuit) 347 Federal 2nd 679. These decisions require that the order of the District Court in this case be vacated and the cause remanded so that such action may be taken as is appropriate in the light of the two cited cases. Reversed and remanded.

That is your recollection of the ruling, is it?

Mr. KNOPF. Well, I was not there. I have read that report.

Senator HRUSKA. You have?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. There were two orders entered by the judge, weren't there? One was the order of remand?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And there was another order granting the petition for writ of habeas corpus. They were separate orders, weren't they?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And is it your idea that this was illegal and improper in view of the circuit court's opinion?

Mr. KNOPF. I don't think I could——

Senator HRUSKA. Were his rulings proper or improper?

Mr. KNOPF. The only thing I could say honestly is I did not like the rulings. I did not really feel that I had a thorough enough knowledge of the law to know whether they were proper. I felt in the legal matter that there certainly was an arguable question at the very least, at which a full hearing should be had on the issue. I knew that removal proceedings, because I had done a little research on it when I was down there, was a very complicated matter and the law was not very clear, and I felt that at least there should be a full hearing to determine what the law is rather than sui spontae remanding by the district judge.

Senator HRUSKA. The circuit court relied upon the case of *Peacock* v. *City of Greenwood*. Did you know that that case was appealed to the Supreme Court?

Mr. KNOPF. I have subsequently learned that, yes, sir.

Senator HRUSKA. And what did it hold?

Mr. KNOPF. I believe they held that the removal. I think that was a case where there was a removal and it had been remanded after a hearing. They held that it was proper to remand. I am not sure.

Senator HRUSKA. Well, as a matter of fact they reversed the fifth circuit, and the effect was to support Judge Carswell in his orders. They held among other things that voluntary workers of this type were not proper subjects in 28 United States Code 1443(2). They said it does not apply to voluntary workers. It applies only to Federal officials or anyone assisting them, and that very likely was the basis for the judge saying, that was his version of it, that it appeared that the case was removed improvidently and without jurisdiction. The *Peacock* case was also a matter of criminal trespasses with volunteers. The court went on to say that insofar as improper treatment in the State courts is concerned, that they could not present that case to the Federal court prior to the time that trial was held in the State court. So the fifth circuit court ruling, in which Judge Carswell was reversed, was completely obliterated from the books as the law of the Nation, and the case of *City of Greenwood* v. *Peacock*, 384 United States 808, decided June 30, 1966, became the law, and it vindicated completely the legal rulings of Judge Carswell.

THE CHAIRMAN. Now, he knew that. He was trying to kid the committee. What happend was that the fifth circuit under the authority of the *Peacock* case overruled Judge Carswell.

Now this witness stopped right there and said he was overruled. Now he says that he knows that the Supreme Court overruled the fifth circuit and reinstated the *Peacock* case, and vindicated everything Judge Carswell did.

Senator TYDINGS. All right. Now for the record I would like to enter at this time the order of remand of Judge G. Harold Carswell dated August 17, 1964, *In the Matter of Wechsler et al.*, in which Judge Carswell cites, as the basis for the remand, the case of *Dresner et al.* v. *Municipal Judge, City of Tallahassee*, a case which was never mentioned in any of the subsequent appeals.

(The order of remand referred to appears previously in this hearing in the testimony of Mr. Lowenthal.)

Senator TYDINGS. I would like to enter in the record at this time the case of *Georgia* v. *Rachel* which is on a similar point, and in which the Supreme Court ruled in a manner which would have supported the U.S. court of appeals in its overruling of Judge Carswell in this matter.

(The case referred to appears in the appendix.)

The CHAIRMAN. They may be received.

Senator HRUSKA. I should like to add, Mr. Chairman, a copy of the order granting a petition for writ of habeas corpus entered by Judge Carswell, and I should like to make the observation that the Supreme Court in the case of *City of Greenwood* v. *Peacock* expressly discussed the *Rachel* case, and it was distinguished on the facts and the position of Judge Carswell was completely and absolutely vindicated as a matter of Supreme Court ruling.

(The order granting petition for writ of habeas corpus referred to appears previously in this hearing in the testimony of Mr. Lowenthal.)

Senator HRUSKA. The witness who appeared here, Mr. Lowenthal, is not here. Mr. Chairman, I imagine we could believe one of two things about his failure to mention the fact that the fifth circuit court was overruled by the Supreme Court. The alternatives are these. Either he didn't know about it and didn't concern himself about it, which would reflect a little bit upon his ability to say that he is an authority in this field. The other alternative is that he did know about it and did not disclose it to the committee. I hope that latter point is not true, because I would not want to think that he knew something that the committee was entitled to have and should have had at that time.

I think even a casual reference to that Supreme Court case will show that Judge Carswell's acts were consistent with the law, one of the few times I imagine that any judge would be able to make a decision and have that sort of a guess of what the Supreme Court 2 years later would actually come out with, but that is the way it came out. I think it is very determinative of the attitude of Judge Carswell.

Now Mr. Witness, you said a little bit ago that the attitude in Judge Carswell's court was different in the middle district of Florida as opposed to the northern district, and you were there in the middle district with similar petitions of removal, were you not?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And so on?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And did the judge enter, did he approve the removal of the cases to the Federal court in that case, in those cases?

Mr. KNOPF. Sir, it is my understanding that the mere filing of a petition automatically removes the case. There is no need for a judge's——

Senator HRUSKA. Therefore your education should be furthered by a reading of the Supreme Court case in the *Peacock* case, because that is not true in a case of this kind, and they say so. It is not automatic. It is not to be entertained. If it involves volunteers of this kind, there isn't jurisdiction. There is no jurisdiction under that section 1443, so your understanding was erroneous, if what I tell you is the proper interpretation of the city of Greenwood against Peacock.

Mr. KNOPF. If what you tell me is correct, this happened after my work there. These are cases that happened subsequently. I have not in all honesty followed the civil rights law.

Senator HRUSKA. At any rate did the middle district of Florida judge accept that as automatic and did he accept the petition of removal?

Mr. KNOPF. In terms of—I never saw the judge personally. The petitions were filed. Notices were given. They were filed with the clerk. I don't file them personally with the judge. I file them personally with the clerk's office. The judge on any of the petitions that I filed never set them down for hearing, and never had a hearing to see whether to remand, because of the opposition, the prosecutors of the local counties never responded to any papers served. They did not make any such motion.

Senator HRUSKA. Did he make any order at all?

Mr. KNOPF. He may have subsequently after I left. These things usually take time, and I was only there for a month. I really do not know whatever happened.

Senator HRUSKA. That is not a very hospitable way to treat a petition for people who are in jail, is it?

Mr. KNOPF. Oh, no, these——

Senator HRUSKA. Couldn't that be construed as being very anti-civil-rights, very hostile to the Negro groups, and to you voluntary workers?

You didn't choose to interpret it that way, did you?

Mr. KNOPF. I must have misspoken, sir. I did not say that I filed any removal petitions for persons in jail. These were persons who had been released already from jail.

Senator HRUSKA. They were already released?

Mr. KNOPF. They had been released. They were usually out on bond.

Senator HRUSKA. But at any rate you asked for a decision with reference to their legal rights, and no action was taken on it. Is that a hospitable way for a southern judge particularly to treat guests?

Mr. KNOPF. Sir, it was the most hospitable way we could think of to let the matter just lie there.

Senator HRUSKA. If it had been Carswell the story would have gone out he didn't take any action on it and therefore he was hostile.

Mr. KNOPF. No. Mr. Lowenthal pleaded with Judge Carswell not to take any action. That is what we wanted, no action at all because then the people would be out of jail, the matter would be removed to Federal court, there would be no State trial and with a little bit of luck there would be no Federal trial.

Senator HRUSKA. If he took no action at all the case would not have been removed because the Supreme Court said that is not an automatic thing. It doesn't even apply to these people.

Senator TYDINGS. That Supreme Court case was not the law of the land at that time.

Mr. KNOPF. No, sir.

Senator HRUSKA. No it wasn't but on the other hand we have asked in the confirmation of another judge here that he should have known what the Supreme Court was going to say. That was the argument on the part of some of his opponents and now we say it is not the law of the Supreme Court of the land. He was a leader in his field.

He held that that statute did not apply, and the Supreme Court confirmed his leadership and said, you are right, Judge Carswell. So therefore I can't quite understand the basis for your testimony that the attitude in the middle district was different from Carswell. It was a little more genteel.

Mr. KNOPF. Two things if I may answer that. First of all in proceedings where I was present in front of Judge Carswell, I did not hear any discussion from him with regard to the law as to what it was or was going to be. All I heard was that he was going to rule against us if he possibly could.

In terms of what I heard in the middle district, and this was not on my own removal petitions, this was on other civil rights matters, I merely stated that I was sitting in and I was listening and I did not hear any judge berate a lawyer, talk to him, lecture him, for coming down and being a northern lawyer or something like that, and it was on that basis that I said the attitude was different. My experience I will admit was very limited in the middle district.

Senator HRUSKA. Getting back to the payment of filing fees, who asked you for the filing fees?

Mr. KNOPF. I can't recall in each case. In some case certainly it was the clerk, but in many instances we ran into the trouble that the clerk's office was always closed so we couldn't file anything. Frequently we had to lodge them with the secretary.

Senator HRUSKA. Well may——

Senator TYDINGS. Let him finish.

Senator HRUSKA. It was not responsive. Go ahead.

Mr. KNOPF. Where we filed with the clerk, the clerk asked for the fee. I recall in several instances having to file with the secretary, the marshal's secretary, and picking up the phone and calling another clerk's office of Judge Carswell's in another city because the local clerk's office was closed. We had that problem. I believe the clerk was sick. I really don't know.

Senator HRUSKA. Let me rephrase my question then so that we get an answer to what all of us are interested in. In the case of your filing the papers dealing with this case of Mr. Wechsler——

Mr. KNOPF. Yes, sir.

Senator HRUSKA. Where did you file those papers and who asked you for the filing fee?

Mr. KNOPF. Well, as I said. to repeat, whomever I filed it with, it was the clerk or the secretary.

Senator HRUSKA. Don't you remember where you filed them? In the *Wechsler* case you filed two petitions and you paid $30. Where did you file them?

Mr. KNOPF. I even filed a third petition in the *Wechsler* case. He was rearrested again at the end of August, in another totally different incident he was rearrested again by the local police for trespassing. That is why I am confused. I don't really recall which specific removal petition I filed with whom. It was either with the clerk or with the marshal's secretary.

Senator HRUSKA. Did you pay $30 more than once?

Mr. KNOPF. I paid $15 for each petition, and I think we had to pay something for the habeas corpus filing, so that would be $45 there then.

Senator HRUSKA. Let me try once more. With whom did you file the petitions in the *Wechsler* case?

Mr. KNOPF. Either the clerk of the court or I think it was the marshal's secretary, because the clerk's office was closed.

Senator HRUSKA. And where were you when you handed him the papers? Were you in the clerk' soffice?

Mr. KNOPF. Yes, sir.

Senator HRUSKA. I see. And you paid the money there in response either to the clerk, if you filed it with him, or to the deputy marshal if you filed it with him.

Mr. KNOPF. With his secretary, yes.

Senator HRUSKA. Did you consult with Judge Carswell or did he order the filing fee to be paid?

Mr. KNOPF. I cannot recall whether the clerk or the secretary went to get instructions, no.

Senator HRUSKA. I am asking, did you?

Mr. KNOPF. No, I did not file with the judge. I do not recall doing so.

Senator HRUSKA. Now with reference to the specific form for a petition of this kind, did you consider that a burden or was it an assist to the lawyers who come there from other jurisdictions and who are not familiar with court rules? Was it a burden that you should have put it on a form that was approved in advance by the court? How much more cruel it might have been had he allowed you to file that petition and then disallow it because it was technically insufficient. Did that occur to you?

Mr. KNOPF. No, sir, that did not occur to me.

Senator HRUSKA. Well, I would suggest that as you proceed in the practice of law, and I speak from a quarter of a century's experience, this lawyer always greeted with joy the handling of a special form, because then he knew the court couldn't quibble about the details and technicalities. It was their form. Now maybe there is a lesson to be learned in that. But at any rate Judge Carswell's opponents cite this as something which is derogatory to civil rights litigants, and I think very, very unfairly myself.

Now the signature of the plaintiffs was required. Is that unusual?

Senator TYDINGS. Is the Senator asking a question because I think the witness should respond to that first question of the Senator's if he wishes, if it is a question.

Senator HRUSKA. Sure.

Mr. KNOPF. I only testified, I believe, unless I am mistaken, that I personally found it a burden because I had stayed up the whole night before, or most of the night, trying to type out a habeas corpus petition because we feared, every hour these people stayed in the local jail, for their safety, and then to discover all that work was for nothing because we had to start all over again on special forms, I found that a burden, yes, sir.

Senator HRUSKA. Perhaps so, but had he considered those forms that you struggled with in your maiden attempt, as I understand it——

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And everyone has to have a first day in the practice, but had that petition been denied you, and you would have had to start over again, the delay would have been even longer, would it not?

Mr. KNOPF. That is a possibility, yes, sir.

Senator HRUSKA. Well, if he had set the case for a hearing in the afternoon instead of telling you about it in the morning—who asked you put it on a special form?

Mr. KNOPF. I think we got word—I really don't recall. I think the judge himself sent word through a secretary or something that he couldn't consider them, they weren't on the form but I really don't have a strong recollection.

Senator HRUSKA. Is that as strong as you can get, you think so or you suppose so?

Mr. KNOPF. No I withdraw that statement. I really do not recall.

Senator HRUSKA. Who told you that you should put it on a special form?

Mr. KNOPF. I do not recall. I just know that the papers were returned, that they were not proper papers.

Senator HRUSKA. And you don't know who returned them or where you got them?

Mr. KNOPF. It was either the marshal or the secretary or the court clerk. It was not Judge Carswell personally. He did not hand them back to me personally. They were filed and then returned I believe.

Senator TYDINGS. Aren't most or a great many habeas corpus petitions really just one page petitions written in long hand by prisoners?

Mr. KNOPF. Well, I don't want to state that I have had a great deal of experience with habeas corpus. I do recall that Judge Carswell's forms required about the same or less information than we had already put in our typewritten form, than what we had typed up ourselves.

Senator TYDINGS. His forms didn't have as much information as you had already provided?

Mr. KNOPF. I seem to recall that. There was nothing we had left out that he had asked for. We even had more.

Senator HRUSKA. With regard to the signatures, when the judge was informed that these men were another 25 miles distant from Quincy, he said, well, bring it in. We will waive signatures. He did that, didn't he?

Mr. KNOPF. I don't have any——

Senator HRUSKA. That is what Mr. Lowenthal testified.

Mr. KNOPF. Well, this must have been something that he had spoken to the judge about. I don't recall being present at any such conversation.

Senator HRUSKA. Did you know that signatures were waived upon a showing that these people were not in the jail in Quincy, but they were removed some additional 20 or 25 miles? Did you know that?

Mr. KNOPF. I did not know that of personal knowledge, no, sir. I only can remember distinctly what I handled directly. I don't recall doing this directly. I frequently did not accompany Mr. Lowenthal. I stayed behind in the office and did other work and this perhaps is one of those instances.

Senator HRUSKA. But if it is true as I tell you that Mr. Lowenthal so testified, would you construe the waiver of signatures upon that showing, would you construe the waiver of the signature by the judge as being an act of hostility towards civil rights groups and voter registrars and volunteer workers?

Mr. KNOPF. I didn't give my personal opinion. It seems the facts would speak for themselves.

Senator HRUSKA. You thought what?

Mr. KNOPF. I say the facts would speak for themselves there.

Senator HRUSKA. Well, if they speak as loudly to them as they do to me, I know what the answer is.

When did you learn that the *Peacock* case was appealed to the Supreme Court and reversed?

Mr. KNOPF. I read Mr. Lowenthal's testimony in the paper, and he cited the court of appeals case in the fifth circuit on appeal from Judge Carswell's remand order, and that was the first that I had learned that it actually had gone through trial. And I went and found the citation in the Federal Reporter and saw the thing and it cited Peacock.

Senator HRUSKA. That was back in 1966 wasn't it?

Mr. KNOPF. The *Peacock* case was back in 1966, but I read the case for the first time yesterday, sir.

Senator HRUSKA. After you had left this volunteer work you didn't follow this line of cases any longer, did you?

Mr. KNOPF. That is correct.

Senator HRUSKA. I imagine you have other things to occupy your days with now haven't you?

Mr. KNOPF. Yes, sir, I do.

Senator HRUSKA. Earning a pay check. Well, that is good. But I think, Mr. Chairman, I should like to ask unanimous consent that either the entire opinion in the *Greenwood* case be included in the record or properly selected excerpts to show the tenor of it, and the complete vindication, a complete vindication of Judge Carswell's orders both in the *Dresner* case and in the *Wechsler* case and the companion cases, and I do hope that as much is made out of that clearance as there was in the incomplete showing on the state of the law when we had other testimony before this committee.

The CHAIRMAN. Any other questions?

Senator TYDINGS. Right after the *Greenwood* case I would like to include the *Georgia* v. *Rachel* case.

Senator HRUSKA. By all means because that is also discussed in the *Peacock* case.

The CHAIRMAN. I am not going to print them in the record. They will go in as exhibits.

(The cases referred to appear in the appendix.)

Senator HRUSKA. That would be fair, Mr. Chairman, because they are bulky. This one has a great many pages. I think it has as many as 45 printed pages.

Senator FONG. Mr. Knopf, how many times did you appear in Judge Carswell's court?

Mr. KNOPF. You mean before the judge personally?

Senator FONG. Yes.

Mr. KNOPF. The one instance that I testified about.

Senator FONG. And in that one instance you asked for an order of removal?

Mr. KNOPF. No, we asked for habeas corpus relief.

Senator FONG. You weren't there when he had the order of removal?

Mr. KNOPF. The order of removal we merely filed with the clerk of the court, and we were operating under the assumption, I may be

wrong as the Senator pointed out, that that was automatic. If it was automatic we didn't have to appear personally.

Senator FONG. So you did not appear before Judge Carswell when you asked for the order of removal?

Mr. KNOPF. No, sir, but at the habeas corpus hearing he brought up the matter of the order of ——

Senator FONG. So when you paid the fee of $15 for one petition and another $15 for another petition actually Judge Carswell was not present?

Mr. KNOPF. No, sir. I was not before him.

Senator FONG. So therefore you couldn't hold him to be prejudiced for the clerk asking you to give him $30, could you?

Mr. KNOPF. No. I merely commented that in that court it was required that a $15 fee be paid.

Senator FONG. Yes, so I say you can't hold him as being prejudiced because you paid $30?

Mr. KNOPF. I just testified to the fact that his court required the $30 fee.

Senator FONG. So when you appeared before him you were asking for a writ of habeas corpus, Mr. Lowenthal was?

Mr. KNOPF. That is correct.

Senator FONG. You secured your writ of habeas corpus?

Mr. KNOPF. That is correct.

Senator FONG. He did not deny it?

Mr. KNOPF. At first he did, but then his mind was changed during the course of the argument between counsel.

Senator FONG. And he listened to the arguments and changed his mind?

Mr. KNOPF. Yes, sir.

Senator FONG. And he granted the writ of habeas corpus?

Mr. KNOPF. Yes, sir.

Senator FONG. So you got your writ of habeas corpus that you went for?

Mr. KNOPF. Yes, sir, technically we did.

Senator FONG. Did he give you something else?

Mr. KNOPF. He gave us something else, yes, sir, which in effect nullified the writ of habeas corpus.

Senator FONG. What he gave you was interpreted as correct by the Supreme Court of the United States?

Mr. KNOPF. I will not make any legal judgments. I am not familiar with those cases.

Senator FONG. The distinguished Senator from Nebraska told you that the *Peacock* case affirmed him.

Mr. KNOPF. Based on his representations.

Senator HRUSKA. If the Senator will yield, I don't ask him to take my judgment of it. The decision will speak for itself.

Mr. KNOPF. Yes, sir.

Senator HRUSKA. And I have spoken true about it.

Senator TYDINGS. At the time, however, it was contrary to the law of the fifth circuit and it was reversed by the fifth circuit.

Mr. KNOPF. That is my understanding, yes, sir.

Senator FONG. So you have really no complaint against what Judge Carswell did. He granted you a writ of habeas corpus which you had

asked for, and he followed the law even though the law substantiated him afterwards that it had to be remanded.

Mr. KNOPF. No, I do not testify that I had no complaint. This was why it was in my memory. I did not favor his actions that he did with regard to the relief requested. I did have a complaint in that I felt that the relief that was finally requested was a relief which we were really entitled to, if in terms of nothing else, in fairness and discretion.

Senator FONG. He gave it to you and took it back?

Mr. KNOPF. That is right.

Senator FONG. This is what you are kicking about?

Mr. KNOPF. Yes, sir.

Senator FONG. But according to the law he had to take it back.

Mr. KNOPF. He had to take it back?

Senator TYDINGS. Not under the law of the fifth circuit at that time. He was reversed.

Senator FONG. Remanding it to the State courts.

Mr. KNOPF. I don't know what the subsequent development of the law is. I can just tell you what my belief was at the time and at that time my belief was that at the very least we were entitled to a hearing and at the proceedings there should not have been a sui spontae remanding but somebody from the other side should have come forward and asked for it.

Senator TYDINGS. Did you ask for a stay?

Mr. KNOPF. Yes, sir, the attorney asked for a stay to the court of appeals stressing again that if these people were sent back, there would be an immediate retrial, they would be immediately put back in jail, and we would again have to worry about their safety, and in addition the voter registration drive would severely suffer, because there were few workers as there was and having most of them in jail was certainly not helping, and that stay was denied by the judge but it was eventually obtained from the fifth circuit.

Senator FONG. If the decision of the Supreme Court is correct then he had to remand it?

Mr. KNOPF. I don't really want to comment. I don't understand those Supreme Court cases.

Senator FONG. If that was the law——

Senator TYDINGS. It depends which decision you read and how you read it. The fifth circuit reversed that remand under the law of the fifth circuit at that time.

Senator HRUSKA. Would the Senator yield?

Senator FONG. I yield.

Senator HRUSKA. Let's get this chronology straight. The first case that the fifth circuit spoke on in this series of litigations was the *Dresner* case. The *Dresner* case was used as the basis for Judge Carswell's rulings in the *Wechsler* case. Between the time that he wrote the rulings in the *Wechsler* case and the time the appeal on the *Wechsler* case appeared in the fifth circuit, the fifth circuit decided two cases, *Peacock* and *Rachel*, and the court says so in its per curium opinion. The court states that on the basis therefore of its decision in *Peacock* and *Rachel*, both of which were decided after the *Wechsler* rulings and the *Dresner* rulings were made, "We reverse and remand this case to Judge Carswell."

But *Peacock* was then appealed to the Supreme Court, and *Rachel*, decided the same day, was discussed in *Peacock* opinion and dis-

tinguished on the facts, at the time the Judge Carswell rendered his decision in *Wechsler*, it was in keeping with the fifth circuit law as he knew it then, and consistent with subsequent Supreme Court pronouncements on the subject.

Mr. Chairman, that brings me to the suggestions that I made when these hearings were opened. A judge or a nominee will be criticized for having rendered anticivil rights cases, and an effort will be made to make it so appear, but it is not that simple. The decision made and which is criticized must be judged and must be evaluated in the light of the law which prevailed at the time the decision was made. This is a rapidly changing field of the law and it will continue to be, and when each of the decisions of Judge Carswell are considered in the context and in the light of the law as it existed when he made those decisions, he will have been found to be accurately applying the law that was then the law.

Mind you, the *City of Greenwood* v. *Peacock* is a construction of a statute passed in 1866, and this is the first time they tied into it to get a job done, and then some people say well, 1954 is 16 years ago, why do we have all these quarrels about the application of *Brown* v. *School Board*.

There are thousands of applications and thousands of decisions and rulings and each one has to be reviewed, but if we take it chronologically and take the state of the law as it existed when the Carswell rulings were made, he was consistently accurate.

Senator FONG. Just one question. Actually Judge Carswell was correct when he gave you the writ of habeas corpus and when he remanded the case to the State court.

Mr. KNOPF. That was my understanding at that time.

Senator FONG. But you just don't like his attitude, is that correct? The decisions were correct but his attitude was wrong is what you are saying?

Mr. KNOPF. I don't really think, because I am not a civil rights expert, I really don't want to hazard a guess as to whether his decisions were proper in the light of the law. I really haven't followed it.

Senator FONG. Thank you.

The CHAIRMAN. Senator Cook.

Senator COOK. Mr. Knopf, you stated that it was the basic plan of your organization to file writs of habeas corpus so that these matters could be removed from State courts and then hopefully they would lie there in Federal courts and you would not have to try them, is that correct?

Mr. KNOPF. Yes, sir, this was one of the things we had hoped.

Senator COOK. The theory was that you would then have them out of the jurdiction of the State and hopefully you would not have to try all these cases in the Federal court and they would lie there for failure of prosecution and then they would be removed from the docket?

Mr. KNOPF. That is correct, sir.

Senator COOK. Now Mr. Rosenberger this morning, he was aware of this procedure, was he not, that the removals logically, if they followed procedure, they would logically see to it that cases would lie there dormant and that they would not be tried?

Mr. KNOPF. Yes, I believe he was. I can't testify. I mean I knew it. I presume he knows it.

Senator COOK. If this were the procedure of your organization, clearly you knew it, and I suppose that the lawyers that came there knew it also.

Mr. KNOPF. Yes.

Senator COOK. That the procedure was really——

Mr. KNOPF. This was with regard to the voting registration.

Senator COOK. Correct.

Mr. KNOPF. Because we wanted to keep the project going.

Senator COOK. That is correct.

Mr. KNOPF. And have volunteers available.

Senator COOK. Mr. Rosenberger this morning made a great deal to do about the fact that these people's rights had not been adjudicated in Federal court by reason of the fact that their sentences were commuted at the local level and therefore the question became moot. Now it was the procedure of your organization hopefully that none of these cases would be tried in the Federal courts anyway, is that not true?

Mr. KNOPF. This is the voter project. Mr. Rosenberger was talking about something entirely separate from the voting project.

Senator COOK. In other words, in the airport case?

Mr. KNOPF. That is right. This had nothing to do whatsoever with the voting project.

Senator COOK. In other words, in those cases you intended to pursue them. In those cases you intended to pursue them to a conclusion in the Federal court. I am not really trying to argue with you. I am just trying to get it straight.

Mr. KNOPF. To be frank, sir, all I know is what I heard Mr. Rosenberger testify to. I had nothing to do with the Tallahassee ministers case. I was not in the courtroom. I did not participate in filing the papers or working with Mr. Rosenberger.

Senator COOK. In other words, in the voting right cases, it was your desire that these questions really die in the Federal courts for failure of prosecution, and that in other cases not involved with voting rights, such as the Tallahassee airport case, that you all would pursue these things and that they would be tried at the Federal court level, is that correct?

Mr. KNOPF. All I know is what I heard Mr. Rosenberger testify to and I understood that that was his testimony.

Senator COOK. Well, he did not testify to the fact that on a mere filing of a writ of habeas corpus, on a simple writ of removal, that these cases would be allowed to die in the Federal courts.

Mr. KNOPF. No.

Senator COOK. He took the position that these cases would be vigorously prosecuted in the Federal courts, and I merely want to get it correct. Again I say I really don't want to argue. I noticed that you said when you got a petition of removal, that once they got into Federal court you hoped that they would sit there and they would be taken off the docket. As a matter of fact, I think as the *Wechsler* case was after 2 years for failure to prosecute.

Mr. KNOPF. Assuming of course the worker was out of jail and not in jail, then we had hoped that it would not go fully to prosecution.

Senator COOK. But for the record you do want to make a distinction, because I do not want to put words in your mouth, you do want to make a distinction between the voter right cases and those cases which called for a writ of habeas corpus.

Mr. KNOPF. Yes, sir. I was testifying solely with regard to what I knew of the voter rights cases.

Senator COOK. All right.

Mr. KNOPF. And those that I handled.

Senator COOK. I wanted to get that straight in fairness to you and to Mr. Rosenberger. Thank you.

Senator TYDINGS. I have a couple of questions. As I understand it, Mr. Knopf, the reason that you felt that the treatment accorded to you in Carswell's district was not fair in the matter of the remand did not relate so much to the substantive law as it did to the fact that he acted, first of all, sui sponte, on his own motion, without any request from the State. He acted without notice or hearing to the defendants in an area in which the law at very best was murky, and he refused to grant any sort of stay pending the appeal, and that the effect of his order, of course, was to keep the individuals in jail.

Mr. KNOPF. Yes, sir, I testified that that was the course of events that occurred.

Senator TYDINGS. Now, you indicated that in the colloquy between Judge Carswell and Mr. Lowenthal, Judge Carswell expressed his displeasure on out of staters coming into Florida, particular northern lawyers. Did he talk about or express his displeasure with the civil rights workers coming in on the voter registration projects? Did he discuss that?

Mr. KNOPF. I can't recall, as I said before, any specific quotes. I just remember that it was quite clear to me that he was against the whole project and all of the efforts.

Senator TYDINGS. He was against the whole voter registration project for the Tallahassee area?

Mr. KNOPF. That he was against the civil rights work that was going on in the Tallahassee area, that is correct.

Senator HRUSKA. On the effect of Judge Carswell's rulings on your motion to remand and also your petition, the effect could not have been for these people to continue in jail, because the order of remand granted the right of bail. The second paragraph of the order to remand says "the petitioners here, defendants in the action pending and in the justice of the peace court shall be allowed to make new bond or reinstate old bond on the original proceeding in an amount not more than that originally set pending trial or other proceeding in accordance with the law.

So even that order of remand didn't keep them in jail, and the writ of habeas corpus having been granted, the writ didn't keep them in jail, isn't that true?

Mr. KNOPF. As I understand it, the writ released them from jail on their first conviction before the county court, which was a nullity, because county courts had no jurisdiction. But since the matter was remanded, the county court could go ahead and try them again and put them in jail again, and in that jail charge there would be—this habeas wouldn't be applicable.

Senator HRUSKA. But they would be able to make new bond or have the old bond continued in force according to the order of remand.

Mr. KNOPF. As I understood it, that order of remand—well, if what you tell me is true it sounds that they probably could make bail if they could get the money which was a large problem among the workers.

Senator TYDINGS. Were they able to get the money?

Mr. KNOPF. Yes, eventually the money was put up, I believe by the town, the black townspeople. A drive was made to collect the bail money.

Senator TYDINGS. How long did they have to stay in jail?

Mr. KNOPF. I really don't recall. I think it was less than a week. It may have been just a few days. I really don't remember.

Senator COOK. I think Mr. Lowenthal said 2 days, once he got his order from the Fifth Circuit, in that particular case.

Mr. KNOPF. But as I understand it, the trial was never held again in the county court, because a stay was obtained from the Fifth Circuit. The stay was obtained by attorneys who went directly to the Fifth Circuit, the stay of removal—a stay of remand order, I misspoke—so there could be no trial again in the county court.

Senator HRUSKA. Well, Mr. Lowenthal says in the transcript:

> They got out of jail the morning after the habeas corpus and remand. They got out of jail on bail that Judge Carswell said they could get out on if they could get the bail. It took overnight to get the bail. The stay from the Fifth Circuit prevented further proceeding by the Gadsden county prosecutor pending the appeal.

Senator BURDICK. Anything further, gentlemen?

The committee is in recess until 2 o'clock.

(Whereupon, at 12:45 p.m., the committee was recessed, to reconvene at 2 p.m., of the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order. Mr. Waits.

Hold your hand up, please, sir.

Do you solemnly swear the testimony you are about to give will be the truth the whole truth and nothing but the truth so help you God?

Mr. WAITS. I do, sir.

The CHAIRMAN. Please identify yourself for the record.

TESTIMONY OF MARVIN S. WAITS, CLERK OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

Mr. WAITS. Yes, sir; my name is Marvin Waits. I am clerk of the U.S. District Court for the Northern District of Florida.

The CHAIRMAN. Before you were clerk, what was your position?

Mr. WAITS. I was supervisor deputy U.S. marshal for the Northern District of Florida stationed in Tallahassee, sir.

The CHAIRMAN. What years were you?

Mr. WAITS. I was appointed deputy U.S. marshal in March 1946, sir.

The CHAIRMAN. And when were you appointed clerk?

Mr. WAITS. I was appointed clerk of the court January 1, 1966.

The CHAIRMAN. Were you around Judge Carswell much when you were there?

Mr. WAITS. I moved. I was transferred from Gainesville, Fla. to Tallahassee, Fla. in July 1953, and at that time Judge Carswell was appointed U.S. attorney, and that was my first acquaintance with Judge Carswell.

The CHAIRMAN. Answer my question. Were you around him much when you were marshal?

Mr. WAITS. Yes, sir, yes, sir.

The CHAIRMAN. Were you in his court much?

Mr. WAITS. I was in his court nearly every time there was court, sir.

The CHAIRMAN. As clerk of course you swear all the witnesses? You are in court now, are you not?

Mr. WAITS. Yes, sir.

The CHAIRMAN. You heard the testimony before Judge Carswell's hostility toward northern lawyers?

Mr. WAITS. Yes, sir.

The CHAIRMAN. State whether that is true or not.

Mr. WAITS. I have never heard Judge Carswell make any derogatory remarks about any counsel, whether he comes from the East, West, North, or South, sir.

The CHAIRMAN. And that as long as he has been judge?

Mr. WAITS. That is as long as he has been judge, sir.

Senator HRUSKA. Mr. Waits, this morning we had some filing fees for cases discussed, and particularly in removal cases. But whether they are removal cases or not how does the clerk determine those fees? How does he determine how much to charge?

Mr. WAITS. The clerk determines his fees from the clerks manual. The manual is published by the Administrative Court of the United States, from the Supreme Court.

Senator HRUSKA. And you are supposed to go by that manual that is furnished you by the Administrative Office?

Mr. WAITS. Yes, sir.

Senator HRUSKA. Suppose you don't make a charge in compliance with that manual, what happens when an audit is made of those books?

Mr. WAITS. When the audit is made and the money does not coincide with the cases, then it is the clerk's responsibility to make up any deficit.

Senator HRUSKA. So that if a fee should have been charged according to that manual and you didn't charge it and collect it, you are personally responsible as clerk?

Mr. WAITS. That is true.

Senator HRUSKA. Is that right?

Mr. WAITS. That is true.

Senator HRUSKA. Does the judge have anything to do with fixing the fees and determining their amounts?

Mr. WAITS. No, sir.

Senator HRUSKA. What did the manual that was in effect in August 1964 provide by way of fees for removal cases?

Mr. WAITS. Sir, the only thing I can say is the manual that was given to me when I became clerk in 1966.

If you will bear with me a minute. I have a Xeroxed copy of the manual that was in the clerk's office in 1966, sir. This was from a manual dating back, I think, to 1952 through 1966.

Senator HRUSKA. What number is it, and read the applicable part, please.

Mr. WAITS. It is 1210 of the clerk's manual, which states as follows:

The statute which now governs as to fees for the commencement of civil cases is title 28 United States Code section 1914 which reads in part as follows:

A. The clerk of each district court shall require the parties instituting any civil action suit or proceedings in such court whether by original process, removal

or otherwise, to pay a filing fee of $15 except that on application for a writ of habeas corpus the filing fee is $5.

Senator HRUSKA. Now some mention was made here of a court decision in the fifth circuit court, in which there was a ruling that fees be dispensed with in certain of these removal cases. What do you know about that?

Mr. WAITS. Sir, the Administrative Office of the U.S. Courts published a new manual that I received in 1966, and this is a Xeroxed copy of section C, 1001.5. It says:

"Note. New language effective April 1, 1966: underscored.

"A." And this is underscored:

"Criminal cases removed from state courts; filing fees are not chargeable for filing of petitions to remove criminal prosecutions from state courts (*Lefton* v. *The City of Hattisburg*)."

Senator HRUSKA. That was the case that was cited. Give us the date of that revised manual again. When did it take effect as designated by the Administrative Office of the U.S. Supreme Court?

Mr. WAITS. Sir, it says "Note. New language effective April 1, 1966 underscored" and this paragraph is underscored.

Senator HRUSKA. And the *Wechsler* case, of course, the happenings on that were back in 1964 under the other matter?

Mr. WAITS. That is true, sir.

Senator HRUSKA. You have provision, don't you, for applications in forma pauperis, where there is an allegation by a litigant that he is not able to pay a fee?

Mr. WAITS. Yes, sir.

Senator HRUSKA. Have you ever know of any case in Judge Carswell's court where that allegation was made where it had been refused by Judge Carswell?

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

Senator HRUSKA. Have you known of any cases where he has allowed the parties to proceed without the fees?

Mr. WAITS. Yes, sir.

Senator HRUSKA. In cases where there was an allegation that they could not pay it?

Mr. WAITS. Yes, sir; when the affidavit accompanies the petition they are filed without prepayment of fees by order of the court.

Senator HRUSKA. Now another matter that was discussed this morning was the matter of the service of writ of habeas corpus.

Senator KENNEDY. Would the Senator yield on this point?

Senator HRUSKA. On this point I will be happy to.

Senator KENNEDY. Do you know from your own personal experience whether any of those cases where Judge Carswell waived the payment of the fee, involved civil rights matters or voting rights matters?

Mr. WAITS. No, sir; to my knowledge I couldn't say, sir.

Senator KENNEDY. Was there ever a time to your knowledge that a petition was entered by any civil rights workers or voter registrars which said that they didn't have the resources to pay such filing fees and in which the judge himself waived the paying of such fees? Do you remember such cases?

Mr. WAITS. No, sir; not since I have been clerk, in 1966.

Senator KENNEDY. But there were other cases in which he did waive the payment?

Mr. WAITS. Yes, sir. To my knowledge, sir, there have been no voting rights cases filed in our court since 1966, to my knowledge.

Senator KENNEDY. Thank you.

Senator HRUSKA. Mr. Waits, another subject that was discussed this morning was the matter of the marshal serving a writ of habeas corpus. How long have you served as marshal?

Mr. WAITS. Twenty years.

Senator HRUSKA. Deputy marshal?

Mr. WAITS. Yes, sir; as a deputy marshal.

Senator HRUSKA. Did you ever during that course of time serve any writ of habeas corpus that had been granted by a judge?

Mr. WAITS. No, sir.

Senator HRUSKA. The order of habeas corpus here recites in its last paragraph "ordered that petitions in behalf of each of the above entitled petitioners for writ of habeas corpus are hereby granted and the sheriff of Gadsden County is hereby directed to release said defendants from his custody forth with upon service upon him or his authorized deputy of a true copy of this order certified by the clerk of this courtroom. Personal service by attorney of record for these petitioners upon the sheriff of Gadsden County, Fla. is specifically authorized."

Now under those circumstances it is the attorney for the plaintiffs, is it not, who must make it his business to see that this writ is delivered to the sheriff?

Mr. WAITS. Well, sir, I would assume so, sir, that the order speaks for itself, sir.

Senator HRUSKA. At any rate it is not a duty that is imposed upon you and you have never served a writ of this kind?

Mr. WAITS. No, sir; I have never served a writ of this kind.

Senator HRUSKA. Let me ask you this. Have there been instances where a writ has been issued which is directed to the marshal?

Mr. WAITS. Yes, sir.

Senator HRUSKA. For the purpose of securing the presence of a person before the Federal court itself? In that instance is it not true that the language in the order will say that the U.S. marshal is hereby authorized and directed to execute and to serve this writ? Am I correct in that statement?

Mr. WAITS. Yes, sir.

Senator HRUSKA. Have you had sueh writs before you and have you served them?

Mr. WAITS. Many, sir.

Senator HRUSKA. But they are always directed to you, not to the attorney for the plaintiffs or to some other person?

Mr. WAITS. That is true, sir.

Senator HRUSKA. Under whose auspices does a marshal function? Is it under the judge or is it under the district attorney or under the attorney general?

Mr. WAITS. A deputy marshal serves under a marshal of the district who is responsible to the Attorney General of the United States, sir.

Senator HRUSKA. Has the judge anything to do with appointing a marshal?

Mr. WAITS. No, sir.

Senator HRUSKA. Aside from the duties assigned to a marshal as outlined in the statute, and also in the rules of the court, has a judge anything to do with how the marshal performs his work?

Mr. WAITS. No, sir.

Senator HRUSKA. How is the clerk of the court appointed, Mr. Waits?

Mr. WAITS. The clerk of the court is appointed by the chief judge of the district, sir.

Senator HRUSKA. There was some evidence also this morning that had to do with the phone call to the sheriff of Gadsden County when the writ of habeas corpus was granted. Do you specifically recall communicating with the sheriff of Gadsden County about the judge's order in the Wechsler case?

Mr. WAITS. I do, sir.

Senator HRUSKA. Let me ask you is the Wechsler case anything new? Were you acquainted with it?

Mr. WAITS. I was acquainted with it, sir.

Senator HRUSKA. Was your familiarity by reason of the filing?

Mr. WAITS. Well, sir, as the deputy marshal I wouldn't be involved in it with the filing or anything. I am just aware that——

Senator HRUSKA. You have testified that you called the sheriff of Gadsden County about this writ. Tell us——

The CHAIRMAN. First did Judge Carswell instruct you to call that sheriff.

Mr. WAITS. No, sir.

Senator HRUSKA. How did the call come about?

Mr. WAITS. The call came about, the sheriff of that county requested me or asked me as marshal, a Federal law enforcement officer, to please advise him if and when the court made a ruling in the case.

Senator HRUSKA. Was that the request in this particular case?

Mr. WAITS. Yes, sir.

Senator HRUSKA. What is the custom in cases of this kind where writs are asked for and where the sheriff knows about it?

Mr. WAITS. Well, sir, it is not really unusual for a deputy marshal who is fairly close with the court to get such requests from the FBI, from a chief of police, or from a sheriff to let them know maybe about something they have some interest in.

Senator HRUSKA. And is that a part of your cooperative arrangements with the sheriffs as it is their arrangement with you?

Mr. WAITS. Yes, sir.

Senator HRUSKA. If you had a hold on a man in a county jail, and there were some proceedings pending there, and you wanted to know when he was going to be released if he was, would you make a request of the sheriff to inform you?

Mr. WAITS. Yes, sir.

Senator HRUSKA. So that you could then do your necessary pickup?

Mr. WAITS. That is right, sir.

Senator HRUSKA. And the reverse also held true?

Mr. WAITS. That is true, sir.

Senator HRUSKA. Have you ever as clerk or a marshal had access to orders or rulings of Judge Carswell until they are filed with the clerk's office?

Mr. WAITS. No, sir.

Senator HRUSKA. And did you get any instructions or were you ordered or requested by Judge Carswell to call the sheriff of Gadsden County in connection with this *Wechsler* case, and the writ of habeas corpus and the order to remand?

Mr. WAITS. No sir. I got a copy from the clerk's office after it had been filed as a matter of public record.

Senator HRUSKA. And it was after that that you made your call to the sheriff?

Mr. WAITS. It was after that, sir, that I made my call to the sheriff.

Senator HRUSKA. There may have been other things covered in this morning's testimony that would affect your duties and the compliance with those duties, but for the time being that exhausts my list here, my check list, Mr. Chairman.

Senator TYDINGS. Marshal, when you called the sheriff in the *Wechsler* case, did you advise him to rearrest the civil rights workers?

Mr. WAITS. I did not, sir. I advised him what the contents of the order was, sir.

Senator TYDINGS. Did you advise him what the legal consequences of the order were?

Mr. WAITS. No, sir; I did not, because I am not a lawyer and I could not interpret the legal interpretations of the order.

Senator TYDINGS. You had no idea of what the legal consequences were?

Mr. WAITS. I had a vague idea, yes, sir.

Senator TYDINGS. Had that ever been done before in your courts, a remand followed by an immediate rearrest by the sheriff?

Mr. WAITS. Not to my knowledge, sir.

Senator TYDINGS. You said that you telephoned back and forth in other cases?

Mr. WAITS. Yes, sir. We have close communication with sheriffs in other fields, sir, helping us locate people.

Senator TYDINGS. Had you ever had a case before——

The CHAIRMAN. Let him finish his answer. Had you finished your answer?

Senator TYDINGS. All right, finish your answer.

Mr. WAITS. Helping us locate people. They are very cooperative in helping us serve writs, not serving the writ but helping us locate people and what not, sir.

Senator TYDINGS. You understand what a writ of habeas corpus is?

Mr. WAITS. Yes, sir.

Senator TYDINGS Have you ever called up the sheriff before to advise him that a writ of habeas corpus had been signed?

Mr. WAITS. That a writ of habeas corpus had been signed, sir?

Senator TYDINGS. Yes; by Judge Carswell.

Mr. WAITS. You mean an order, sir?

Senator TYDINGS. Well, an order for a writ, an order in connection with a writ.

Mr. WAITS. No, sir. I think this is the first one, sir.

Senator TYDINGS. This was the first time that Judge Carswell ever signed, to your knowledge, a writ, an order connected with a writ of habeas corpus for civil rights?

Mr. WAITS. To my knowledge then as a deputy marshal, yes, sir.

Senator TYDINGS. Had the sheriff ever handled any order for a writ of habeas corpus from the district court before to your knowledge?

Mr. WAITS. Not to my knowledge, sir.

Senator TYDINGS. How do you think the sheriff knew when he received that order for the writ of habeas corpus that he could rearrest the prisoners right after it was issued, if he had never had any experience before with a writ of habeas corpus and usually the writ of habeas corpus frees people from jail?

Mr. WAITS. I couldn't answer that, sir.

Senator TYDINGS. Do you think anybody had any conversations with him?

Mr. WAITS. That I don't know, sir.

Senator TYDINGS. Did you suggest to him that he could rearrest the people?

Mr. WAITS. I did not, sir.

Senator TYDINGS. Do you know whether the judge had anyone else call him?

Mr. WAITS. I do not, sir.

Senator TYDINGS. Do you have any idea where he got his information or how he knew that he could rearrest them?

Mr. WAITS. I do not, sir.

Senator TYDINGS. No further questions.

Senator HRUSKA. Mr. Waits, what does Rule 15 of the local practice in the Federal court provide?

Mr. WAITS. Rule 15 of the local rules of the Northern District of Florida provide—it deals with writs of habeas corpus, sir.

Senator HRUSKA. The fees on habeas corpus?

Mr. WAITS. No, sir. Rule 15 has to do with, well, the filing of petition for writ of habeas corpus, yes.

Senator HRUSKA. Will you read it for us.

Mr. WAITS. Yes, sir.

United States District Court Northern District of Florida. Order amending general rules of practice. Upon consideration it is hereby ordered that the general rules of practice of the Northern District, of the United States District Court Northern District of Florida are amended by adoption of the following to be effective April 30, 1963:

Rule 15. Petitions for writs of habeas corpus and motions pursuant to 28 USC 2255 attacking a sentence imposed by this court by persons in custody: petitions for writs of habeas corpus and motions filed pursuant to 28 USC 2255 (attacking a sentence imposed by this court) by persons in custody shall be in writing signed and verified. Such petitions and motions shall be on forms supplied by this court.

That is A.

B. The following information shall be supplied by every petitioner:

1. Petitioners full name, prison number if any.
2. The name of respondent.
3. The place of petitioners detention.
4. The name and location of the court which imposed sentence.
5. The indictment number of numbers if known upon which and the offenses for which sentence was imposed.
6. The date which sentence was imposed and the terms of the sentence
7. Whether a finding of guilty was made after a plea of guilty, not guilty or nollo contendre.

Senator HRUSKA. Is it much more extended than that?

Mr. WAITS. It is two pages, sir, two more pages.

The CHAIRMAN. After all, there was a Rule 15. The testimony this morning was that there was no Rule 15.

Mr. WATTS. Yes, sir. There was a Rule 15 signed by Judge Carswell and dated, done and ordered in chambers at Tallahassee, Fla., this 30th day of September 1963, signed Judge Carswell, United States District Judge.

Senator HRUSKA. I ask unanimous consent that a copy of that rule in its entirety be placed in the record at this point.

Senator BURDICK. Without objection it is so ordered.

(The document referred to follows:)

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA

Order amending general rules of practice

Upon consideration, it is, hereby

Ordered that the General Rules of Practice of the United States District Court for the Northern District of Florida are amended by adoption of the following, to be effective September 30, 1963.

RULE 15

Petitions for Writs of Habeas Corpus and Motions Pursuant to 28 U.S.C. 2255 (Attacking a Sentence Imposed by this Court) by Persons in Custody.

(a) Petitions for a writ of habeas corpus and motions filed pursuant to 28 U.S.C. 2255 (attacking a sentence imposed by this Court) by persons in custody, shall be in writing, signed and verified. *Such petitions and motions shall be on forms supplied by the Court.*

(b) The following information shall be supplied by every petitioner:

(1) petitioner's full name and prison number (if any);

(2) the name of the respondent;

(3) the place of petitioner's detention;

(4) the name and location of the court which imposed sentence;

(5) the indictment number(s) (if known) upon which, and the offense(s) for which, sentence was imposed;

(6) the date upon which sentence was imposed and the terms of the sentence;

(7) whether a finding of guilty was made after a plea of guilty, not guilty, or nolo contendere;

(8) in the case of a petitioner who was found to be guilty following a plea of not guilty, whether that finding was made by a jury, or by a judge without a jury.

(9) whether or not petitioner appealed from the judgment of conviction or from the imposition of sentence, and, if so, the name of each court to which he appealed, the results of such appeals, the date of such results, and (if known), citations of any written opinions or orders entered therein;

(10) whether petitioner was represented by an attorney at any time during the course of his arraignment and plea, his trial (if any), his sentencing, his appeal (if any), or preparation, presentation or consideration of any petitions, motions or applications which he filed with respect to this conviction; if so, the name and address of such attorney(s) and the proceedings at which petitioner was so represented; and

(11) if petitioner seeks leave to proceed *in forma pauperis*, whether he has completed the affidavit attached to the form.

(c) The following additional information shall be supplied by a petitioner in State custody:

(1) if petitioner did not appeal from the judgment of conviction or the imposition of sentence, the reasons why he did not do so;

(2) in concise form, the grounds upon which petitioner bases his allegation that he is being held in custody unlawfully, the facts which support each of these grounds, and whether any such grounds have been previously presented to any court, state or federal, by way of any petition, motion or application; if so, which grounds have been previously presented and in what proceedings; and

(3) whether petitioner has filed in any court, state or federal, previous petitions, applications, or motions with respect to this conviction; if so, the name and location of each such court, the specific nature of the proceedings therein, the disposition thereof, the date of each such disposition and (if known), citations of any written opinions or orders entered therein.

(d) The following additional information shall be supplied by a petitioner in federal custody who is seeking a writ of habeas corpus:

(1) whether petitioner has filed in any court, state or federal, previous petitions for habeas corpus, motions (pursuant to 28 U.S.C. 2255) to vacate sentence, or any other petitions, motions or applications with respect to this conviction; if so, the name and location of any and all such courts, the specific nature of the proceedings therein, the disposition thereof, the date of each such disposition, and (if known) citations of any written opinions or orders entered therein;

(2) in concise form, the grounds upon which petitioner bases his allegation that he is being held in custody unlawfully, the facts which support each of these grounds, and whether any such grounds have been previously presented to any federal court by way of petition for a writ of habeas corpus, motion pursuant to 28 U.S.C. 2255, or any other petition, motion or application; if so, which grounds have been previously presented and in what proceedings; and

(3) if a previous motion pursuant to 28 U.S.C. 2255 was not filed, or if such a motion was filed and denied, the reasons why petitioner's remedy by way of such motion is inadequate or ineffective to test the legality of his detention.

(e) The following additional information shall be supplied by a petitioner in federal custody who is seeking relief by motion pursuant to 28 U.S.C. 2255:

(1) the name of the judge who imposed sentence;

(2) in concise form, the grounds upon which petitioner bases his allegation that the sentence which was imposed upon him is invalid, the facts which support each of these grounds, whether any such grounds have been presented to any federal court on a previous petition for a writ of habeas corpus, motion pursuant to 28 U.S.C. 2255, or any other petition, motion or application, and, if so, which grounds have been previously presented and in which proceedings; and

(3) whether petitioner has filed in any court petitions for habeas corpus, motions pursuant to 28 U.S.C. 2255, or any other petitions, motions or applications with respect to this conviction; if so, the name and location of each such court, the specific nature of the proceedings therein, the disposition thereof, the date of each such disposition and (if known), citations of any written opinion or orders entered therein.

(f) Where a petition or motion is taken *in forma pauperis*, petitioner shall complete the *forma pauperis* affidavit attached to the back of the form and shall set forth information which establishes that he will be unable to pay the fees and costs of the habeas corpus or 28 U.S.C. 2255 proceedings.

(g) Petitions and motions shall be addressed to: United States District Judge, Northern District of Florida, Tallahassee, Florida. Petitioner shall send to the Court an original and one copy of the completed petition or motion form.

Done and ordered in Chambers at Tallahassee this 30th day of September 1963.

G. HAROLD CARSWELL,
U.S. District Judge.

Senator COOK. Only one question, Mr. Waits, relative to a question from the Senator from Maryland. You have no knowledge really of your own whether this is the first time the sheriff of Gadsden County has had a writ of habeas corpus?

Mr. WAITS. No, sir; I wouldn't know how many he may have had.

Senator COOK. I noticed that the Senator pursued it and you said that to your knowledge it may have been the first time but you have no knowledge.

Mr. WAITS. This is the first time that I had ever had any contact with him about one, sir.

Senator COOK. All right, sir.

Senator TYDINGS. I wonder where you got a copy of that rule?

Mr. WAITS. Sir?

Senator TYDINGS. Where did you get your copy of rule 15?

Mr. WAITS. Sir, rule 15, this copy here, has been attached to the U.S. District Court, Northern District of Florida General Rules of Practice, Bankruptcy Rules of Practice, effective July 1, 1959. This amendment has been attached to this copy of those rules, sir.

Senator TYDINGS. Where did you get your copy of the rule?

Mr. WAITS. Where did I get them, sir?

Senator TYDINGS. Yes.

Mr. WAITS. I got them in the clerk's office, Tallahassee, Fla., U.S. district court.

Senator TYDINGS. I have nothing further.

(The Chairman subsequently made the following affidavit a part of the record:)

STATE OF FLORIDA, COUNTY OF GADSDEN, ss:

Before me, the undersigned authority, this day personally appeared Otho W. Edwards of Quincy, Gadsden County, Florida, who being by me first duly sworn, deposes and says:

That he was Sheriff of Gadsden County, Florida from February 5, 1944 until January 7, 1969; that during the year 1964, he recalls that warrants were sworn out by the Justice of the Peace in Gadsden County, Florida, for the arrest of Stuart Wechsler and several other defendants on charges of criminal trespass, and in the performance of his duty he served said warrants upon the said Wechsler and the others and arrested them according to the commands of said warrants: that at some point these cases were removed to the Federal District Court of the Northern District of Florida, Tallahassee Division, presided over by Federal District Judge Harrold Carswell; that after these cases were removed to Federal Court, Judge Carswell issued an order directing him as Sheriff of Gadsden County to release said defendants, and on the same day Judge Carswell issued an order remanding the Wechsler proceedings to the Justice of Peace Court in Quincy, Gadsden County, Florida, and ordering the defendants to be released on bond. The order granting petition for writ of habeas corpus and the order of remand were delivered to him by the attorney for the defendants.

Affiant further says that to his best recollection he has never talked with Judge Carswell, either by telephone or in person, about these cases, or, as a matter of fact, about any other court proceedings until he was called on the telephone by Judge Carswell on January 30, 1970, and was asked what his recollection was about receiving notice of the Judge's action in the Wechsler case, and affiant told him he had never had a telephone conversation with him about that or anything else. Affiant further says that his only other contacts with Judge Carswell have been that he testified once in Judge Carswell's court as a witness in a criminal case and he saw him once at a doctor's office in Tallahassee and they exchanged greetings for no more than a minute or two.

Affiant further says that at the time these cases were pending in Federal Court, Marvin Waits of Tallahassee, Florida, was Deputy Marshal in charge of the Tallahassee office and he recalls asking Mr. Waits if he would let him know when the court ruled in the matter so that he might judge his actions accordingly, and pursuant to this request, Mr. Waits did call him and advised him of the orders entered by Judge Carswell on August 17, 1964; that this call by Mr. Waits was in accordance with the routine procedure which existed between enforcement agencies in our area at that time and so far as he can recall this was a courtesy extended to any enforcement agency or officer who made a similar request.

OTHO W. EDWARDS.

Sworn to and subscribed before me this 31st day of January, 1970.

BARBARA R. BROWN,
Notary Public, State of Florida at Large.

My Commission expires: January 15, 1972.

Senator BURDICK. The next witness is Mr. Conyers.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CONYERS. Mr. Chairman, I am Congressman Conyers from Michigan. I have been over here all this morning. I have been waiting patiently to testify and will continue to do so. But would you be kind enough to indicate to me approximately when I will be permitted to offer testimony in this matter?

Senator COOK. Mr. Chairman, I would like to move that the Congressman be given the privilege of testifying at this time.

Senator TYDINGS. I think he should be given that privilege right now.

Senator BURDICK. You will be given the privilege without a motion. I did not know the Congressman was here.

Senator HRUSKA. I might say that there had been a request of the chairman by another Senator that Mr. Schlossberg be heard briefly before Congressman Conyers. I do not know if the chairman was aware that the Congressman was here or not. That request did not come from this side of the chairman. It came from the other side of the chairman. I make that by way of explanation, Congressman, because that request was made by another member of the committee.

Senator BURDICK. Proceed, Congressman.

Mr. CONYERS. Thank you very much. In coming before this committee to speak against the appointment of Judge Carswell to the Supreme Court I reflect the considered judgment of my eight other black colleagues who serve in the House of Representatives. This presentation, however, is specifically endorsed by the following:

Congresswoman Shirley Chisholm of New York.

Congressman William Dawson of Illinois.

Congressman Adam Clayton Powell of New York.

Congressman William Clay of Missouri.

Congressman Louis Stokes of Ohio.

The other black members are in business and other activity and had not been able to read this final document, but they are united in the opposition again of this nominee to the Supreme Court.

If our argumentation against this nominee and the one before him could be heard and understood by the President of the United States, then perhaps you could be spared these continued appearances on my part. I am here again to prevail upon you to establish the basic principle that any person of a racist or segregationist persuasion is per se unqualified to serve on the U.S. Supreme Court. I grant you that this is to some in the Congress a new and strange point of view. There are those who may even consider it un-American, especially when a racist persuasion does not exclude one from either of the other two branches of the Federal Government but we must begin somewhere, must we not?

As is the case so frequently in American politics, this daring suggestion is really not as revolutionary as it first sounds; it is more a matter of practicing what we preach. It is a matter of putting into effect the lofty platitudes that everyone agrees upon. On August 8, 1968, when he was accepting the Republican nomination to be President, Richard Nixon said:

> Let those who have the responsibility to enforce our laws and our judges have the responsibility to interpret them be dedicated to the great principles of civil rights.

I urge that the Senate insist that the President keep his pledge. This is why I urge you to reject the nomination of Judge Carswell to serve on the U.S. Supreme Court.

To black Americans and their leaders and to millions of whites who are dedicated participants in the struggle for freedom, this nomination is the second in a series of attempts to subvert the cause of equal justice. What is more, this strategy is becoming clearer to more citizens each day. No amount of obfuscation that may take place during these hearings is going to change that.

How can we come here today and seriously argue that Judge Carswell's unquestionably racist philosophy has changed, now that he has been nominated to the Supreme Court? It is hardly sufficient to suggest that this appointment will do him a world of good. In the meantime it will do the Nation a world of harm.

We should not have to take that risk. There are 320,000 attorneys, 439 Federal judges, and thousands of State court judges in the United States. Why does the President have to nominate one with a racist background?

You have before this body for consideration a nominee whose record as a judge leaves in my mind no doubt of his inability to sit on the highest court of the land and fairly decide issues that bear upon the question of equality between the races.

Second, we have a man who as a mature leader of his community committed himself to that perverse, sick theory, white supremacy. This theory of racism has created more dissension, ill will, and hatred than any other notion in the 194 years of our Nation's history, and some would still attempt to rationalize Mr. Carswell's attachment to this contemptible doctrine. How can we put a man on the highest bench who has said, and I quote only in brief part:

"I am a southerner by ancestry, birth, training, and 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 him 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."

Third, while a member of the Justice Department he participated as a director in changing a public golf course to a private facility for the express purpose of excluding blacks, in opposition to the court decision, and then denied his activity until it was exposed.

Through 1967, of the four civil rights cases that were decided by Judge Carswell and subsequently appealed to the circuit court, four were reversed, and I hope somebody asks me to cite them. And in addition, as Senator William Proxmire has pointed out: "Perhaps an even more disturbing phenomenon, however, because it goes beyond interpreting the law, has been Judge Carswell's habit of delaying civil rights litigation as long as possible. For example, in the Steele against Leon County Board of Education, a school desegregation case, plaintiff made a motion for further relief on May 7, 1964. On May 26, Judge

Carswell sustained defendant's objections to the raising of questions looking into teacher segregation. No further hearings were ordered before school opened. On January 20, 1965, the school was found to be in compliance with certain 1963 orders. In February of 1965, plaintiffs filed a further motion for hearings. After a series of legal maneuverings the court reaffirmed a denial of plaintiff's motion for further relief. Finally, on January 18, 1967, the circuit court remanded the case for further consideration in light of its decision in United States against Jefferson County Board of Education—tantamount to a reversal. Finally, after almost 3 years, the Carswell court granted the relief sought. This dilatory behavior in civil rights cases, where justice delayed is certainly justice denied—in this instance for 3 school years—casts serious doubt upon Judge Carswell's judicial temperament."

In a study done as a Yale Ph. D. dissertation in 1966 by Mary Hannah Curzan, Judge Carswell was found to be one of a group of 10 Southern judges whose civil rights decisions merited them the segregationist label. This label was applied, by the way, to only one-third of the Southern judges whose civil rights decisions were analyzed.

In a recent interview Professor Leroy D. Clark of New York University, who formerly headed the operation of the NAACP Legal Defense Fund in Northern Florida, claimed Carswell had repeatedly delayed school cases by failing to rule until pressed to do so, and then often by issuing decisions that were palpably wrong and quickly reversed. "We would have a hearing and it would take several months for him to rule," Mr. Clark said. "I would have to file a motion to ask him 'would you please rule?' which is outrageous."

Mr. Clark, is also quoted by Time Magazine as saying that "he was probably the most hostile judge I have ever appeared before: he would rarely let me finish a sentence."

Professor John Lowenthal of Rutgers University, a law professor, has, I presume, already testified before your committee as to the procedural tactics of Judge Carswell in 1964 in a case against civil rights workers trying to help enroll black voters in Florida. Professor Lowenthal said he found Judge Carswell's behavior consistent with his commitment to white supremacy.

Mr. William Kunstler, a prominent civil rights and civil liberties lawyer has also expressed to me his intentions to testify before this committee concerning his own shocking experiences as a trial lawyer in Judge Carswell's court.

To any serious member of the bar, an appointment to the Supreme Court is the highest recognition that can be achieved. In the instant case of the present nominee, there can be found little or no trace of judicial or scholarship.

Mr. Chairman, from his own admission he has never written any legal articles or other papers. Such considerations were apparently irrelevant in President Nixon's search for the right political man. James A. Wechsler has raised the question quite appropriately in my mind when he said:

"Was this the worthiest prospect available—even granting the premise that the seat was being reserved for a Southern conservative? The conclusion is an insult to the very breed of man Carswell is supposed to represent, and which has on occasion produced judges widely esteemed for their learning in the law. Such an appointment invites

contempt for the Nation's highest court, disrespect for the law, and those who practice it is further heightened when the American Bar Association places its seal of approval on so shabby a political product."

As we said on September 24, 1969, in this same room before this same committee, the confirmation of such a nominee would serve notice that our Government intends to block off the few avenues that are now available for legal attack on the bastions of racism in our country. For it is the Supreme Court, my colleagues, which has given black people a certain measure of faith in the slow-moving and creaky legal machinery with which we are afflicted. To impair the courts' ability to deal with racism is to impose strains on the fabric of a society beyond its limits.

We urge you to reject the nomination of Judge Carswell. His appointment would hardly be consistent with the constitution's uncompromising hostility to segregation and inequality. It would unequivocally tell black people that the one significant route for peaceful resolution of our society's racial injustices now open to them is gradually being phased out.

In this Nation today we face more than a credibility gap. Amidst all the rhetoric the people of our country feel a profound lack of faith in the institutions of American Government and their ability to fulfill their charged responsibilities. Therefore, it is incumbent that the United States Senate insist on the appointment to the Supreme Court only of individuals of the highest standard, men who clearly will measure up to the awesome responsibilities and duties of membership on that court. This should be decided only on the basis of distinctive achievement and a demonstrated record of fidelity to the principles of equality inherent in the Constitution. We submit that in the nomination of Judge G. Harrold Carswell, this has not been so demonstrated. In our judgment, Judge Carswell is unqualified to sit on the Supreme Court, and we consequently urge that you reject his nomination.

That, Mr. Chairman, concludes my formal testimony and I will make myself available for any questions or discussions that might be desired.

Senator KENNEDY. I just want to extend a word of greeting to the Congressman and express my appreciation for your taking the time to be witness. As I understand the thrust of your statement, Congressman, am I right in observing that you don't feel that the blacks of this country who might have their cases adjudicated by the nominee sometime in the future, if Judge Carswell is approved by the Senate, would feel a sense of security or a sense of justice or fairness in having their cases decided by him?

Mr. CONYERS. Absolutely not, and it isn't based on suspicion. It is based on impartial evaluations that have been brought to my attention about the record that the judge already has. We are not predicting what he might do in the future, but all we as human beings can do is guide ourselves by his activities, his conduct, his statements, and his philosophical beliefs in the past, and I think that that is eminently correct. Not only do black Americans have little faith in this appointment, but millions of white Americans who have as much discretion know that if we don't have a fair court and a fair government we

are not going to be able to succeed in this democratic experiment and I think they too take the same kind of objection to this nomination.

Senator KENNEDY. You have always been one that has been pledged to nonviolence as well as to progress, equal rights and equal opportunities for all citizens.

In your efforts to deal with the tempers and frustrations of many of our black citizens, do you think your job will be easier or more difficult when you seek to get young blacks who are disillusioned and have a sense of hopelessness to try and work through the system, if this nominee is approved?

Mr. CONYERS. Senator Kennedy, not only is it getting more difficult, but with these and other kinds of activities and lack of activities coming from the Congress as a whole and the executive, in my judgment, it is becoming impossible to convince a lot of our young black citizens that they do really fit into this society.

They believe that they are not included. They believe from all the statistical evidence that is now clearly made available to them, and more importantly, from what they can see going around them, that there are two distinct separate societies in America, a black society catching hell, if you will pardon the expression, and a white society living in comparative affluence.

Now it does no good for nine black Congressmen to be trying to run around this country telling everybody that we are really trying to get together, that the Kerner commission report is being given any kind of fair understanding much less application, that the Walker riot commission report or the other commission reports on violence in this country, and all the other measures and records that indicate that black people are more unemployed, are more neglected by our Government, in greater numbers than whites. It is impossible for us to begin to tell them through this nomination that we are doing anything but losing the battle of persuading our colleagues in the Senate and in the House of Representatives that we can come together in this country, that we can resolve our differences, because you cannot put a man who had made these kinds of statements and others on the highest bench of the land with a prayer that maybe he will shape up.

I think that is an unfair imposition to ask of any American, be he black or white.

Senator KENNEDY. Last Friday the President said he hoped black Americans would judge him by his deeds, not by his words. What is your reaction to that statement in the context of the Carswell nomination?

Mr. CONYERS. Well, of course we have been doing both, and I can't tell you which is more disappointing. I suppose the deeds are really more disappointing, because we all speak a certain amount of political rhetoric not to be fulfilled. I don't think black people are any more naive on that subject than any other part of our American citizenry.

But what is going on is that we are definitely moving away from the coming together that the President had originally made such a great emphasis about, and I deplore it, and I think that this nomination, like the Haynsworth nomination before it, leaves us shuddering every time a vacancy opens up on the Supreme Court. If this is the direction we are going, heaven help us when he gets a chance to name a third vacancy on the Supreme Court.

Senator BURDICK. Senator Hruska.

Senator HRUSKA. No questions.

Senator BURDICK. Senator Tydings.

Senator TYDINGS. I only wish to apologize to the Congressman for keeping him waiting.

Mr. CONYERS. That is quite all right. I enjoyed what I heard.

Senator BURDICK. Senator Griffin.

Senator GRIFFIN. I would like to welcome to the committe my colleague from the Michigan delegation. I do not have any questions, Mr. Chairman.

Senator BURDICK. Senator Cook.

Senator COOK. No questions.

Senator BURDICK. Thank you, Congressman.

Mr. CONYERS. You are welcome. Thank you very much.

Senator BURDICK. The next witness will be Stephen Schlossberg.

Mr. CONYERS. Mr. chairman, excuse me, but may I include in my testimony the excerpts from the Carswell speech from which I quoted as part of my testimony at this hearing?

Senator BURDICK. I think it is in the record but it will be included without objection.

(The material referred to is printed previously in this hearing.)

Mr. CONYERS. Thank you very much.

(The Chairman subsequently made the following letter a part of the record:)

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES.
Washington, D.C., February 2, 1970.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: As the legal and political background of Judge G. Harrold Carswell has been publicly scrutinized, it has become increasingly obvious that he has neither the legal credentials nor the jurisprudential qualifications to meet the exacting standards of excellence rightly demanded of Supreme Court nominees. At a time of great stress on all our democratic institutions of government, we cannot afford to choose a man of less than the highest legal qualifications with a demonstrable sensitivity to critical problems facing our society today. The man considered by the Senate this month will, if confirmed, have a profound effect on the direction of Supreme Court decision-making for years to come. We feel that Judge Carswell's mediocre legal background and public statements make it impossible for us to remain silent about his nomination.

Despite his propitious disclaimer of his 1948 statement in support of segregation, his actions since then, both on and off the bench, do not lend credibility to the repudiation.

In 1956 we find that while a U.S. attorney, he joined others in Tallahassee, Florida in incorporating a public golf course as a private club to escape the mandate of the Court he now seeks to join.

While a District Judge for the Northern District of Florida, three out of four civil rights cases decided by him were reversed.

In Steele vs. Leon County Board of Education, a school desegregation case, it took from 1965 to 1967, three years of delays and denials, to grant the relief sought.

In testimony before your Committee, Professor John Lowenthal of Rutgers University testified that Judge Carswell took unusual steps to block efforts of those seeking to help enroll black voters in Florida.

Only six months ago was he nominated to the Fifth Circuit Court of Appeals. At that time the Leadership Conference on Civil Rights opposed his appointment on the ground that he had as a District Judge been preculiarly hostile to the civil rights of Negroes. An examination of the civil rights cases tried by Judge Carswell, in the U.S. District Court for the Northern District of Florida, from 1958–67 bears that testimony out.

The challenge of racism in a democratic society is the most fundamental challenge we face domestically. Both study and sad experience have affirmed that the division between black and white threatens the very fabric of our nation. If legal processes are not able to bring redress of grievances and equal opportunity to all citizens, then increasing conflict and violence will be an inevitable result. The Supreme Court has been a fundamental force in maintaining a belief in legal process as an agent of change. It is the Supreme Court which affords citizens ultimate redress of grievance and it is to the Court that many responsible citiens look for guidance.

To consent to the nomination of a man to that Court who has a record of regressive decisions in the most critical area of contemporary law and who in addition has a very mediocre background as a jurist, is an affront not only to blacks, but to all Americans.

Judge Carswell has never published in legal journals, has been a member of the Circuit Court only six months and even a previous supporter of Judge Haynsworth, Professor William Van Alstyne of Duke University Law School, does not believe that Judge Carswell is qualified to be appointed to the Court.

We urge the Senate Judiciary Committee to minutely scrutinize his qualifications, his judicial decisions, and his judicial temperament. On the basis of what has been made public of Judge Carswell's background and racial attitudes, we believe he does not meet the high standards for a Supreme Court Justice and we oppose his confirmation.

We request that this letter be included in the record of the hearings.

Sincerely,

JOHN CONYERS, Jr.
ABNER J. MIKVA.
DONALD M. FRASER.
PHILLIP BURTON.
BENJAMIN S. ROSENTHAL.
ROBERT W. KASTENMEIER.
WILLIAM F. RYAN.
DON EDWARDS.
GEORGE E. BROWN, Jr.

TESTIMONY OF STEPHEN I. SCHLOSSBERG, GENERAL COUNSEL, INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS

Mr. SCHLOSSBERG. Mr. Chairman, members of the committee, my name is Stephen I. Schlossberg and I have the honor to be the general counsel of the UAW with headquarters in the great State of Michigan. I am here to testify against confirmation of the nomination of Judge Carswell.

It might be useful to you, Mr. Chairman, and to the members of the committee, if I were to tell you something of my background.

Senator BURDICK. I believe all the witnesses have been sworn. Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?

Mr. SCHLOSSBERG. I do.

Thank you, Mr. Chairman. I was born and raised in Roanoke, Va., a city not too far from the great city of Washington. I had the honor to go to the University of Virginia. I have an undergraduate degree from that school, and an LL.B from that law school. I am a member of the Order of Coif and I was a member of the Virginia Law Review and I belong to the Raven Society and Omega Delta Kappa in the University of Virginia.

I guess if some one had told me back when I lived in the city of Roanoke, Va. that in the short space of a few months I would twice be coming to the Senate Judiciary Committee to complain of the President's choice of a nominee to the Supreme Court, I would have told them they were mad. It seems incredible to me that in this day and time,

in this age in which we live, that we are seeing the same sad and dreary thing all over again, only this time much worse. I say much worse because it seems to me that the President of the United States and the Attorney General have in effect said to the Senate, and through the Senate to the people of the United States, especially to the minority groups in the United States, you did it to me once and I am going to do it to you now.

This is an insult. This appointment is an insult in terms of professionalism and in terms of commitment to the Senate of the United States, to the people of the United States, to the Negroes of the United States and to the whites of the United States.

It is an insult to the white southeners that I grew up with in Roanoke, Va., and people like them throughout the whole South, because it is not necessary to be indecent and to be a bigot to have a political career in the South, and certainly it wasn't necessary in the 1940's.

I graduated from high school in Roanoke, Va. in 1938, and the leaders of the established community in Roanoke did not feel it necessary to use the kinds of words that Judge Carswell felt it necessary to use some years later, to swear allegiance to white supremacy. The very idea that a man who did that and who has lived a judicial and official career tied in with the U.S. Government that has not given the lie to those words, that that man now stands as the nominee before the U.S. Senate for the Supreme Court of the United States.

Predictably Judge Walsh and his blue ribbon panel have stamped their approval on this undistinguished nominee. This nominee. The only things I know he has written: I know he has written a segregationist speech 22 years ago, one of the worst I have ever heard. 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. He may have written some checks. I know he wrote a loan application once in which he borrowed, he and his wife, some $48,000 on her $75,000 worth of stock in a plant called the Elberta Crate and Box Co., and I will get to that Elberta Crate and Box Co. in a moment.

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, and a pedestrian man not only in his opinions but in his action on the bench that has shown itself undivorced from those racist sentiments expressed some 22 years ago.

The UAW does not oppose him because he is an antilabor judge. We are not that parochial in our opposition to judges. We believe that this union as other institutions in this great country of ours have an obligation to do something about the quality of life, and that means more than just rhetoric. When we stand as this country does at a crossroads between brotherhood and fratricide, it seems to me that when a man stands for confirmation by this great body, by the Senate of the United States, and his civil rights, his human rights record is not only questionable but tarnished, that man cannot be

allowed to assume his seat, at least without objection by those who value the quality of this democracy in this country in which we live.

That is why we are here.

I do not mean to imply that we do not have labor arguments against this man. I read to you now the text of a wire sent by Mrs. Caroline Davis, who is the director of the UAW Women's Department, to the President, to President Nixon. She said:

"Along with numerous other women's groups and organizations I want to add most vehement protest to your appointment of Judge Carswell to the Supreme Court. Judge Carswell showed no concern for women or the welfare of children of working mothers when he ruled last fall in the *Ida Phillips* v. *Martin Marietta* case. His ruling was that women with preschool children could be denied employment. The case is being appealed to the Supreme Court.

"One can guess how Judge Carswell will decide. I doubt he can view this case objectively in view of his earlier decision in the *Phillips* case.

"His decision flies in the face of your proposed program for the employment of women on public assistance. There are 5 million women working who are widowed or divorsed and are the sole support of families. The majority of these women have small children. This decision of Judge Carswell's is rank discrimination against women, since men with preschool children are not denied employment.

"On behalf of the 200,000 UAW women members, I strongly urge you to reconsider your appointment of Judge Carswell for the Supreme Court. Based on his past performance on segregation and this *Phillips* case, he is not the caliber to sit on the Supreme Court."

Turning now to the Elberta Crate and Box Co., I call to your attention an article with the byline of one Carol Thomas, from a paper called the Southern Patriot and I gather that that is the publication of the Southern Conferences Educational Fund.

Date line Tallahassee, Fla., and it says, the lead is:

Student support for 300 striking workers at the Elberta Crate and Box Co. helped the workers stay out for 42 days.

That is the lead. Now I want to read down a little bit.

The strikers, almost all black, walked out September 23. Support from about 200 white students at Florida State University was immediate. They joined in several marches from the university to the box company, and then set up picket lines of their own, supporting the workers' picket lines. Several students were arrested.

Skipping now——

Black workers never made more than the minimum wage, no matter how long they were employed by the company—but whites made up to 50 cents more an hour than their black coworkers.

A black women reported that her boss said he "wouldn't pay niggers" because "niggers stink".

There was no sick leave, sick pay, or retirement pay. "I quit April 15, 1968 after working since 1949," one man said, "I feel that they owe me some retirement retirement pay. I've made a lot of money for this company * * * I had to get another job when I quit because there was no retirement program." Another man, who retired after 45 years with the company, was refused enough work to keep his company insurance alive.

Mr. Chairman, with your permission, I would like to submit the full text of this clipping from the newspaper with respect to the Elberta Freight and Box Co.

Senator BURDICK. Without objection it is so ordered.
(The article referred to follows:)

STUDENTS SUPPORT FLORIDA STRIKERS

(By Carol Thomas)

TALLAHASSEE, FLA.—Student support for 300 striking workers at the Elberta Crate and Box Co. helped workers stay out for 42 days. It was the first strike in the company's 70-year history.

The strikers, almost all black, walked out September 23. Support from about 200 white students at Florida State University was immediate. They joined in several marches from the university to the box company, and then set up picket lines of their own, supporting the workers' picket lines. Several students were arrested.

The workers, who are represented by the International Woodworkers of America (IWA—AFL-CIO), said the students brought food and money to the union hall almost daily while the strike went on.

The company hired poor white people to replace the black strikers. When the students appealed to them to stay out of the factory, the company filed suit seeking a restraining order to prevent strikers and their supporters from "cursing, abusing, threatening, coercing, or otherwise intimidating" non-striking employees. Union and student leaders were named in the suit.

Local president Nero Pender charged that the company was trying to break the strike and "burst the relationship between strikers and students."

WORKING CONDITIONS

Black workers never made more than the minimum wage, no matter how long they were employed by the company—but whites made up to 50 cents more an hour than their black co-workers.

Discrimination takes other forms, as well. "The black workers have to keep on doing something every minute," Flay Rolling said. "The white mechanics stand around and drink cokes when the machines stop. The white mechanics can take a break anytime. Those white mechanics are workers, just like us, but they don't work. They are paid higher than us."

A black woman reported that her boss said he "wouldn't pay niggers," because "niggers stink."

There was no sick leave, sick pay, or retirement pay. "I quit April 15, 1968, after working since 1949," one man said. "I feel that they owe me retirement pay. I've made a lot of money for this company . . . I had to get another job when I quit because there was no retirement program. Another man, who retired after 45 years with the company, was refused enough work to keep his company insurance alive.

Workers got only three holidays a year (Thanksgiving, Christmas and July 4)—and then had to work on Saturdays to make up. They got one-week paid vacations until they had worked for the company for seven years.

The kiln crew got 12 minutes for lunch. Other workers got half an hour, without pay. There is no place to eat at the factory and during lunch, workers were not allowed to talk to each other.

Each worker was entitled to two six-minute toilet breaks.

Physical conditions were uncomfortable—and dangerous. There was no heat in the plant. The workers installed some heaters themselves, but it didn't make much difference because of drafts from broken windows and holes in the floor.

"They want some of us to work in the rain—of course, the machines are protected from the weather," one man said. Saws have no shields. Many workers have lost feet and fingers. One worker had his head cut off.

THE SETTLEMENT

The strikers went back to work after winning a partial victory—an 11-cent pay increase in two years, instead of the three cents that the company had offered them, and the promise of improved working conditions.

Mr. SCHLOSSBERG. I call attention now, Mr. Chairman, to a clipping that appeared in today's paper, the Washington Daily News, an article by Whitney Young, the distinguished president of the Urban League,

in which he expresses the same kind of concern I do, in which he finds this appointment to be an insult not only to the black citizens of America but to the white citizens and especially the white southerners of America. He says:

The second large group of Americans who have been insulted are white southerners. For too long, white people in the South have been burdened by leaders who make no bones about their racism, men whose avowed purpose is to keep the South in the chains of the past.

But growing numbers of white southerners, especially younger people and better educated citizens, are coming to resent such false leadership. They know that the siren calls of last-ditch segregationists lead only to dead-ends. So it is insulting to such people when national leaders reach into their ranks for someone to "represent" the South, and come up with shopworn segregationists.

With your permission again, Mr. Chairman, I would like to submit the full text of the Whitney Young article from today's Washington Daily News.

Senator BURDICK. Without objection.

(The article referred to follows:)

CARSWELL

(By Whitney M. Young)

Let's suppose—just suppose—that a president of the United States appoints a black militant to the Supreme Court.

Let's suppose that this new appointee had a record of belief in black supremacy. Let's further suppose that back in 1948, he made an election speech in which he stated:

"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 yield to no man . . . in the firm, vigorous belief in the principles of black supremacy, and I shall always be so governed."

Pretty strong stuff, isn't it? Well, let's continue on our imaginary tale. Let's assume that all this became public. What would the reaction be?

You guessed it. Howls of indigation would sweep the country. Headlines would blare: "Racist Appointed to Court." Protests would be mounted. Undoubtedly, the President would have to withdraw the nomination.

Now let's leave the land of make believe. Let's consider reality—what really happened last week. The President nominated for the Supreme Court vacancy—the very one to have been filled by Clement Haynsworth—a southern judge.

It was revealed shortly that this judge had, during a Georgia election campaign in 1948, made exactly the racist statements above, except of course, he declared his belief is white supremacy, not black supremacy. He was not an immature child. He was almost 30 years of age.

What was the reaction?

The judge said he no longer thinks that way.

The Attorney-General says it all happened so long ago, anyway. The President is silent. Some Senators say they'll vote to confirm anyway because, after all, it was only a political speech.

Such a nomination is an insult to at least two large groups of Americans.

First, it is an insult to black citizens, who increasingly took to the courts for equal protection of the laws. They expect to find capable men on the bench, men consistently and publicly devoted to justice and equality. Black people were especially looking for the nomination of a jurist whose appointment would symbolize continued federal concern with equal rights.

The second large group of Americans who have been insulted are white southerners. For too long, white people in the South have been burdened by leaders who make no bones about their racism, men whose avowed purpose is to keep the South in the chains of the past.

But growing numbers of white Southerners, especially younger people and better educated citizens, are coming to resent such false leadership. They know that the siren calls of last-ditch segregationists lead only to dead-ends. So it is insulting to such people when national leaders reach into their ranks for someone to "represent" the South, and come up with shopworn segregationists.

There are plenty of judges in the South who have served with distinction. There are plenty of federal judges there who have upheld the rights of black citizens under the law; judges whose devotion to duty outweighs sectional considerations or narrow personal bias.

At a time when black people are continually being told they must achieve more, that standards can't be lowered, it is especially important that standards for federal judges be maintained, and not lowered to satisfy political considerations.

Mr. SCHLOSSBERG. I read you now a telegram which each of you received, I take it, since it was sent to each of you by the president of our union, by Walter Reuther. I would like to have it put into the record and so I will read it into the record since it is relatively brief.

On behalf of the UAW I urge you to oppose the nomination of Judge Carswell to be Associate Justice of the Supreme Court. The President's choice is all the more unfortunate, for in this time of testing in the hisory of American democracy, when every American is obligated to make his maximum contribution toward achieving brotherhood and understanding, it is imperative that those who sit on the highest tribunal of the land symbolize the concept of one nation and one people. It is essential that one who ascends to the highest court must have an unquestioned record of commitment to the cause of human rights.

It would be a tragic signal to the American people if the first Southern appointment to the Supreme Court since the Brown decision in 1954 should go to Carswell, whose personal credentials in the crucial and sensitive area of human rights are questionable.

I would say, Mr. Chairman, in my own humble opinion, that there are at least a thousand men in the United States qualified to be Justices of the Supreme Court, qualified in terms of professionalism and in terms of commitment to the values that this country has always sworn allegiance to. There are men in this room who are qualified to be members of the Supreme Court. I have been struck sitting here this morning by the quality of questioning of witnesses by the Senate Judiciary Committee, extreme advocacy and extreme capability. When I think that the President has to go so far, to reach so far down, to find such a nonentity, the only things that recommend him are, No. 1., that he has been on the court of appeals so short a time that we can't muster the number of decisions to reinforce what is perfectly obvious, his racism and his narrow view toward human rights and toward people, because these people who hate blacks also hate people. You can't just hate black people and go through life that way thinking you are better than them. You find that you are also better than working people and that you become not only a white supremacist but a male supremacist and it fits together. It is all the piece.

His only achievements are that he has written so few opinions on the court of appeals, and because most of the speeches he made in Georgia and Florida have not been reported by the newspapers and picked up, but I know we might find one anyway. It may turn out tomorrow that we might find another speech by Judge Carswell of more recent vintage. And in that respect, Mr. Chairman, let me urge the Senate Judiciary Committee to get Judge Carswell back here so you can clear the air.

I think when that young man from the Justice Department stood here, with no axe in the world to grind, as Senator Hruska said trying to earn a living, working for the very Justice Department that found this man, when he stood here and said that he felt the hostility in the air, in chambers, when he as a young law student stood beside a civil rights lawyer who had volunteered his time in the South and the

judge let the vehemence of his personality creep out, that is recent. That is recent, Mr. Chairman and members of the Judiciary Committee, not 22 years ago.

I would like to hear him answer that. I was not satisfied with the press reports I read of his participation in that country club, where he said originally it was to set up some kind of clubhouse, and when he was asked about the golf course he said, well, I guess they were going to do something around the golf course, and where he evasively said, well he was an incorporator or a something or a potentate or something.

I think we owe him the opportunity to come up here to clear the air. I would like to hear some of those answers. I would like to hear the answers to the charges made against this man by civil rights leaders, who have had experience with him.

Fortunately I would say I have not run into this judge. I have run into some other judges probably almost as bad, because we can't have all judges in the United States capable to sit on the Supreme Court bench.

But I think it is imperative, in the light of the testimony that has come out, especially today, Mr. Rosenberger's testimony, and this young man, Mr. Knopf's testimony, that you bring this judge back here. Don't let some clerk come here and say to the best of his knowledge the justice never said anything. Ask him what he said in chambers to that Northern civil rights lawyer who had the temerity to go down South, for no money, and fight for voting rights for people that Judge Carswell thought he was better than.

I hope that the Senate of the United States will not accept the insult handed to it by the executive branch that if you turn me down on a Haynsworth I will find somebody worse, because it can't go too far. We are at the bottom of the barrel now, and if you do it again, if the Senate has the courage to meet its great responsibility and say to the President, this man is not fit to sit on the Supreme Court, then I say to you eventually he will have to come up with an appointment that is suitable to the Senate and to this Nation in this time.

He cannot keep coming up with somebody worse, because Carswell just about rings the gong. Now Haynsworth, however bad he was, you proved a principle there. You cannot make a million dollars wheeling and dealing while you sit on the Federal bench, no matter how conservative you are or how good a Republican you are, you proved that, and then be appointed to the Supreme Court as a reward for it.

Now you can prove another principle. You can't be an undistinguished, dull graduate of the third best law school in the State of Georgia, with an undistinguished judicial record, and a record of hostility to black people, and be appointed to the Supreme Court.

I am available for questions, Mr. Chairman.

Senator BURDICK. Thank you.

Senator Tydings.

Senator TYDINGS. No questions.

Senator HRUSKA. I join the Senator from Maryland in passing.

Senator BURDICK. Senator Griffin.

Senator Cook.

Senator COOK. I am not going to join any of you, because, Mr. Witness, I hate to say this but I don't think you have a humble opinion

about anything the way you have been tearing people apart. I am delighted that you had an opportunity to graduate from the University of Virginia. I didn't And I am sure that there are a great many people that graduated from the same law school that Judge Carswell did that would like to have an opportunity to tell you that they are probably very successful lawyers today, and whether they graduated from a third-rate college or a second-rate college, as you were so prone to make a point of, that they did their best and they did the best they could do with the legal profession that they had assumed that they had been loyal to it.

I graduated from the second best law school in the State of Kentucky. I think it is the best. It is the University of Louisville. However, there are only two in that State, and I would hope that graduates from the law school that Judge Carswell graduated from would take direct offense at what you have said and I would be very frank with you.

Secondly, you stated that you knew of your own knowledge that Judge Carswell helped write the articles of incorporation for a country club in Tallahassee, Fla. Now do you know of your own knowledge that Judge Carswell helped write these articles of incorporation, because this is what you stated?

Mr. SCHLOSSBERG. If I did I misspoke. Based on my readings of this committee's hearings.

Senator COOK. Then you do not know of your own knowledge that he helped write the articles of incorporation?

Mr. SCHLOSSBERG. Only from what I read in the papers, that he was listed as one of the incorporators.

Senator COOK. If someone listed you as a lawyer, and you have written many articles of incorporation, you know that the incorporators that you listed in those articles didn't help you write the articles of incorporation, didn't you?

Mr. SCHLOSSBERG. I probably misspoke, Senator.

Senator COOK. All right, let's take the *Ida Phillips* v. *Martin Marietta* case. Do you know that Judge Carswell did not sit on that case?

Mr. SCHLOSSBERG. Yes, Senator.

Senator COOK. You knew that he voted on an en banc hearing?

Mr. SCHLOSSBERG. Yes.

Senator COOK. And that of the 13 judges that voted on that en banc, 10 voted against an en banc hearing and three voted for.

Mr. SCHLOSSBERG. That is right.

Senator COOK. Do you have the same condemnation for the other nine who voted along with Judge Carswell, which vote did not deny the rights of Ida Phillips, but which merely said that the rights of the parties are preserved and that there is no point in taking an en banc hearing and if it wants to be appealed the right of appeal is reserved.

Mr. SCHLOSSBERG. Let me say, Senator, that I do have the same feeling that everybody who voted against an en banc hearing in the *Martin Marietta* case was wrong and demonstrated it to me in that case, because it was so clear, as it seemed to be to the three judges who dissented in that denial of an en banc hearing, it was so clear that that was a violation of the Equal Opportunity Act title VII, it was so clear

that it violated the sex discrimination provisions, that I would say that that would be a serious mark against anybody who voted that way.

Now I oppose Judge Carswell not alone because he voted in that case. I oppose him for many other reasons. You know, it is only a part of a picture.

Senator, I didn't get a chance to answer your first comment on the law school. I tried to make it clear, and I do apologize to anybody else who graduated from that law school, I said I did not hold it against him that he went to the third best law school. It is his record since that I hold against him. A lot of people who read law, Senator, have become some of our most brilliant advocates, judges and lawyers. You know, I didn't mean to——

Senator Cook. One other question. Of what great significance to Judge Carswell himself do you attribute your testimony about the Elberta Crate & Box Co.?

Mr. Schlossberg. Well, it indicates to me that he is a part of a milieu, of a society that is hostile to people, to Negroes and to workers. After all, this was a strike which had racial overtones, this is a company in which he and his wife are heavily invested. This is a family business. I don't say that this proves, alone, that this alone could stand as a mark against him, but it is part of a whole pattern. It is part of a whole pattern. He is tied in with the Elberta Crate & Box. I think if you will read that clipping you will get the flavor.

You would be embarrassed to hold stock in that company. I would.

Senator Cook. Would you suggest that Judge Carswell say to his wife who inherited 78 shares of stock from her father that she absolutely had to dispose of that stock?

If your wife inherited stock and you didn't like the company from which she inherited it, and it had tremendous value and it had tremendous growth, would you feel inclined to say to your wife, I don't care what you inherited from your father, you have got to get rid of it, because if you do feel that way and suggest that, I am going to put Betty Friedan on you and you two can discuss how you feel about women's rights.

Mr. Schlossberg. These are always difficult things.

Senator Cook. She inherited this. This is in the record.

Mr. Schlossberg. Oh, yes.

Senator Cook. He had nothing to do with it.

Mr. Schlossberg. Let me say, Senator, on this business of inheritance I do know of a couple in Detroit where the wife did inherit some slum property, and he talked to his wife reasonably: Do you want to be a slum landlord? and he convinced her as I would hope to convince my wife. My wife is a reasonable, educated person; I wouldn't demand that she sell it, but I would talk to her about it; and I doubt if I would put it up for my note if I knew that it was a racist company, even if it were my wife's, if I couldn't convince her to get rid of it.

Senator Burdick. Senator Cook, do you have more questions?

Senator Cook. I think that is all, Mr. Chairman.

Senator Burdick. We will recess until after the vote on the Senate floor.

Senator Cook. Fine. Will the witness be back?

Senator Burdick. Yes. We will recess for about 20 minutes.

(Short recess.)

Senator BURDICK. Mr. Schlossberg, I believe that is all. We thank you very much for your appearance before the committee.

Mr. SCHLOSSBERG. Thank you, Mr. Chairman.

Senator BURDICK. Mr. Leroy Clark.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. CLARK. I do.

Senator BURDICK. Proceed.

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, again, 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 County*, which Congressman Conyers has given you the details on. It took me, and I was counsel in that case also, 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 pro-

cedural 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 desegregate 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 desegre-

gate. 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 judge, 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 are privy to Mary Kurzan's doctoral thesis. I, by the way, was probably the first person to receive that 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 Birming-

ham, 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.

Seator 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 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.

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.

(The entire prepared statement by Professor Clark follows:)

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 along 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 country 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 F 2d 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, Val*, 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 Institution 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 principals 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 racial 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 in tact 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, world-wide, 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.

Thank you.

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 whas 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 constanly 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 impedient 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 beeen 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?

TESTIMONY OF THOMAS E. HARRIS, ASSOCIATE GENERAL COUNSEL, AFL–CIO; ACCOMPANIED BY LAURENCE GOLD, ATTORNEY, AFL–CIO

Mr. HARRIS. I do. My name is Thomas E. Harris, associate general counsel of the AFL–CIO, and I appear here for the purpose of presenting the statement of our president, Mr. George Meany.

Mr. Meany is out of the city at this time. Accompanying me is Mr. Laurence Gold, who is one of the attorneys for the AFL–CIO, and who did some of the legal research which is reflected in this presentation.

The AFL–CIO opposes the confirmation of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court of the United States. We do not do so because we view Judge Carswell as antagonistic to the interests of organized labor, narrowly conceived. For our review of his opinions indicate that he does not have a record in labor cases sufficiently extensive to permit a considered judgment. Rather the premise of our opposition is that this nomination is based exclusively on calculations of partisan political advantage, and was made without regard to professional or judicial merit. We find such a process of selection a direct and immediate threat to the status of the judiciary as a branch of Government equal in origin and title to the executive and the legislative branches.

This nation has chosen to entrust greater responsibility to our Supreme Court than any other. The Court has the final power to set the meaning of the Constitution, and of major pieces of legislation which touch vital conflicting interests. Consequently the effects of its judgments are often of the greatest practical impact. Moreover, as Prof. Archibald Cox has recently reminded us, the Court's "opinions are sometimes the voice of the spirit telling us what we are by reminding us of what we may be. But while the opinion of the Court can help shape our national understanding of ourselves the roots of its decision must be already in the Nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by."

Thus the Court's task is one of extreme difficulty and sensitivity. A Justice must, therefore, possess great depth and breadth of knowledge, profound understanding and complete self-discipline and detachment. If he does not have these qualities, experience demonstrates that the results he reaches will tend to be an unmastered reflection of personal inclination rather than an attempt to capture the essence of right season. In the light of the nature and importance of the Supreme Court's role, and the threat to the public interest posed by a Justice whose qualifications are incommensurate with his responsibilities, the only guarantee sufficient to safeguard the confidence of the people is a nominee of extraordinary stature—a man who has demonstrated the ability to live greatly in the law. It is plain that Judge Carswell does not meet this standard.

Can it be said that Judge Carswell is a great scholar of the law; a present day Holmes? The answer is "No." Judge Carswell has never published a scholarly article or book.

Can it be said that Judge Carswell was a prominent figure at the bar prior to his elevation to the bench; a present-day Brandeis? The answer, again, is "No." Judge Carswell has characterized his private practice of law as "a just struggling along proposition."

Can it be said that Judge Carswell has proved himself, through the discharge of political responsibilities of the highest order; a present-day Hughes? The answer, again, is "No." His one political campaign, a losing one, was characterized by a racist stand that the judge has felt compelled to state he repudiates. His service as the U.S. attorney for the northern district of Florida appears, so far as we can ascertain, to have been competent. But that position is not a major one; basic policy is generally made in Washington and critical cases are usually tried by the larger U.S. attorney's offices. And there

is nothing to show that the judge, as opposed to the recently deposed U.S. attorney for the southern district of New York, was a pioneer in introducing novel and imaginative techniques of law enforcement.

Can it be said that Judge Carswell was a great U.S. district judge; a present-day Learned Hand? Once more the answer is "No." As Senator Hruska pointed out, "The role of the district judge is somewhat limited inasmuch as he is not a policymaker and he is bound to the decisions and rulings of the superior courts * * *"

Judge Carswell's record is replete with instances in which he breached this limitation by refusing to follow the decisions of the Supreme Court and fifth circuit in race relations cases. On the other hand, we have searched Judge Carswell's decisions with some diligence to find an instance in which he surmounted this limitation by writing an opinion that improved or clarified the law in a significant way. We have not found such an opinion nor has one been pointed out by the judge's supporters.

Finally, can it be said that Judge Carswell is one of the most distinguished of the approximately 90 sitting U.S. court of appeals judges? Again, the answer must be "No." Prof. William Van Alstyne of the Duke University Law School, a recognized scholar of constitutional law, who found Judge Haynsworth "an able and conscientious judge * * * (whose decisions) even in instances where I could not personally find agreement private or professional with a particular result * * * had been arrived at with reassuring care and reason" stated that Judge Carswell's record reflected "a lack of reasoning, care, or judicial sensitivity overall * * * There is, in candor, 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."

Taking the comparison one step further, during the Haynsworth debate that jurist was characterized as a man "at the top of those eligible for consideration" from the fourth circuit. No one can so characterize Judge Carswell. He is one of our most junior appellate judges, having served for only 7 months, and he has written just over 50 appellate opinions in total. If we were to limit consideration simply to fifth circuit judges appointed by Republican Presidents, it is inconceivable that any observer of competence, other than one who believes obedience to the letter and spirit of *Brown* v. *Board of Education* is a disqualifying factor, would conclude that Judge Carswell is the equal, much less the superior, of Judges Wisdom and Brown, both of whom are truly distinguished moderates. And, of course, if the net were cast further and a cross section of lawyers who study the Federal Reporter were asked to select the 10 best Federal appellate judges, we are confident that Judge Carswell's name would not appear.

Since it is beyond dispute that the standard of excellence was not the administration's guide, the question becomes, What standard did it utilize? In order to preclude consideration of this question, the executive branch has maintained a discreet silence, and has pushed for a quick vote by the Senate. There have been no joint appearances for the television cameras, or press releases detailing the nominee's record. Given the paucity of the affirmative case for confirmation this is hardly surprising, but it cannot obscure the obvious—that the administration's sole guide in making its selection was its southern political strategy.

That strategy requires a relatively youthful nominee from the South, preferably a State in which the Republicans have made headway and have a good chance to make more, with a poor civil rights record and a good chance of confirmation. Judge Carswell meets the requirements of this standard perfectly. Indeed, there is no other standard which explains the choice. He is in his early fifties; Florida is one of the four States of the old Confederacy to have elected a Republican Senator; the Leadership Conference on Civil Rights had opposed his confirmation as a circuit judge on the ground that as a district judge he had been particularly hostile to the civil rights of Negroes; since he had served as a U.S. attorney prior to his confirmation as a district judge and owns no stocks or bonds there was little, if any, reason to fear conflict-of-interest charges; finally, the Senate had confirmed him as a court of appeals judge just 7 months ago.

The President has the powerful force of initiative in making a nomination to the Supreme Court. It is always to be hoped that he will utilize his favored position to further the national good by choosing a man who represents our best instincts as a people. When he does so he practices a politics of union that serves to strengthen our governmental system.

The standards of the southern strategy, on the other hand, are responsive to a politics of disunion. This nomination is a slap in the face of the Nation's Negro citizens.

It can only be considered to be the result of a studied attempt to find a Federal judge whose civil rights record is recognized by the Negro community to be even worse than Judge Haynsworth's was shown to be. The testimony of Professors Orfield, Van Alystyne, and Lowenthal and that of the Leadership Conference on Civil Rights analyzing Judge Carswell's decisions demonstrate this point. These decisions show that the judge's reprehensible 1948 speech was not an isolated anomaly disproved by subsequent acts, but a key to his basic point of view. That speech, it should be emphasized, was not simply an endorsement of the separate but equal doctrine of *Plessy* v. *Ferguson*, an endorsement which could perhaps be forgiven on the ground that it was based on the accepted legal doctrine of the day, but an endorsement of "white supremacy," a legal doctrine that had been repudiated in 1868 with the adoption of the 14th amendment.

It does not seem to us enough to lightly dismiss the judge's "white supremacy" statement as a youthful indiscretion committed two decades ago and now recanted, as the President did in his press conference. The judge, at 28, was no child when he voiced these repugnant views. He never repudiated them by word until the speech was exposed by an enterprising reporter and threatened his promotion to the Supreme Court.

We would, of course, be impressed if Judge Carswell, by his actions on the bench, had demonstrated his latter-day conversion. But his decisions, by which you should judge him, adhere more to his 1948 white-supremacy prejudices than to his suddenly announced 1970 views.

It is a slap in the face of those who recognize the concept, artieulated by Senator Griffin, that "Under our Constitution the power of any President to nominate constitutes only half of the appointing process. The other half lies with the Senate."

The rejection of Judge Haynsworth was not, we believe, simply a direction to the administration to choose any other undistinguished jurist it might unearth as long as he was not a wheeler-dealer. It expressed the Senate's view that, while the President was free to choose men of a conservative cast of mind, he should limit himself to lawyers and jurists of real achievement. It was a recognition that nominations based on the purely negative concept of disadvantaging certain groups in our society poison the well springs of the selective process. It was, in fact, a reaffirmation of the lessons of the abortive 1937 campaign to pack the Court—while the President is free to have the executive branch of his choice he is not free to have the Supreme Court of his choice. The administration's response can only be called a contemptuous show of force. It is an attempt to prove that the President's resolve to vindicate the prerogatives he claimed during the Haynsworth debate is such that further resistance is futile.

Finally, the nomination is a slap in the face of the Federal judiciary. It demonstrates a desire to reward those who failed in the task of making civil rights for all a reality, and to rebuke those who exhibited the courage to do what was both right and necessary during a time of crisis. It demonstrates a desire to downgrade the Court by making appointments a political plaything rather than the highest honor open to the legal profession. It is entirely fair to say, as the New York Times has done, that this nomination is "contempt of [the Supreme] Court."

Prior to 1932 the labor movement felt the brunt of a judiciary organized against it. The corrosive effects of years of "government by injunction" on the worker's confidence in the Federal courts have yet to spend themselves. That experience convinces us that judges inadequate to their task pose a powerful threat to our governmental system. We know of no safeguard other than requiring nominees of demonstrated excellence, men whose careers provide a basis for confidence in their judgment. We do know, however, that nominations that have no justification other than a narrowly partisan, divisive political strategy are certain to exacerbate this threat.

The administration has shown itself to be unmoved by these simple basic truths. But that is not the end of the matter. The President has only half the appointment power, the other half lies with the Senate.

It would be a wise use of that power to refuse to confirm. To fail to do so, and to allow a nomination that is a calculated political attack on the responsible Negro leadership of this country, would be a national tragedy.

The AFL–CIO urges that this committee and the Senate refuse to confirm the nomination.

We thank you for this opportunity to state our views.

Senator BURDICK. Thank you for your testimony.

Senator Hruska?

Senator HRUSKA. No question, Mr. Chairman.

Senator THURMOND. No questions, Mr. Chairman.

Senator BURDICK. I guess that is all.

Mr. HARRIS Thank you.

Senator BURDICK. Dean Pollak.

Do you swear that the matters you testify to in this hearing will be the truth, the whole truth and nothing but the truth so help you God?

TESTIMONY OF LOUIS H. POLLAK, DEAN, YALE LAW SCHOOL

Mr. POLLAK. I do. Mr. Chairman, my name is Louis Pollak. I very much appreciate the opportunity extended to me to speak with respect to the nomination of Judge Carswell. I am a lawyer, a member of the bars of Connecticut and New York, and of the Supreme Court. I have been for the past almost 15 years a teacher of law at Yale and for the last 4 years I have been dean of that law school.

I am a member of the board of directors of the NAACP Legal Defense Fund, which reflects my longstanding interest in constitutional law and particularly the constitutional law which relates to the protection of equal rights, and in addition to being a member of other bar associations, I am chairman elect of the section of individual rights and responsibilities of the American Bar Association. But my appearance here, I must of course emphasize, is entirely individual. I speak for no organization at all, nor do I speak for the school with which I have the privilege of being associated. This is an entirely personal presentation, and it is a personal presentation which arose out of my own professional concern and citizen concern for the development of our constitutional law under the aegis of that extraordinary innovation in government which is the U.S. Supreme Court.

When the President nominates and the Senate confirms an Associate Justice of the U.S. Supreme Court, it does an awesome thing. The President and the Senate in combination are entrusting a fair measure of the Nation's future to the man or woman, one can hope that in due course it may be a woman, who sits on that Court and participates in the shaping of our fundamental institutions. And so the question I urge upon this committee, the question before this committee and ultimately before the U.S. Senate, with respect to every nominee for the highest court in our land is inescapably in the last analysis is the nominee a lawyer qualified or giving promise of being qualified to sit on the Bench on which Mr. Justice Black now sits, on which Frankfurter and Warren sat, on which Hughes and Holmes and Brandeis sat, Field and Miller and Taney and Marshall. That is the question which must be asked with respect to a nominee for the highest court in the land.

When I first learned of the nomination of Judge Carswell, I must confess some astonishment that a lower court judge, who after a period on the district court of some years and so very brief a passage through the court of appeals, was now to be placed on the U.S. Supreme Court, a course of elevation that I had to think back some time to find an analogy for, and the only analogy in our recent judicial history was the not very encouraging one, and I say this with regret, of Mr. Justice Whittaker, whose passage through the court of appeals was equally brief and whose stay on the U.S. Supreme Court was disappointing. But with deference to Mr. Justice Whittaker, it must be said that he was a nominee who before he went on the Federal bench at all had distinguished himself greatly at the bar, as he is now again a leader of the active bar.

With respect to Judge Carswell, from what little I knew of him at hearsay and from the press, there was no such background of demonstrated achievement whatsoever. One gathered from the newspapers, of course, that he had given a speech, a deeply deplorable speech which

he now regretted, but there was nothing in the record that suggested that here was a lawyer and judge whose light had been hidden under a bushel not of his own devising.

My concern at the nomination, for I felt maybe it was simply that I knew too little about him, was greatly heightened last week, Mr. Chairman, in reading press accounts of the testimony of scholars who happened to be men whom I know, and know well, and for whom I have the highest regard, who seemed to know at first hand, and from their acquaintance with the judge's work, that indeed the record was a very limited one; that indeed, as has been suggested by the testimony of Mr. Harris just before me, of Congressman Conyers before, that here was a nomination which was far more easily explained not on the basis of professional excellence but on the ground that here was a nominee who was a Republican and a southerner, and a Republican and a southerner marked in his judicial career by lukewarmness at best on the fundamental issues of civil rights.

I believe Mr. Fred Graham of the New York Times has put it that the judge's opinions are marked by a lack of zeal with respect to civil rights.

Now I urge upon the committee that I in no way object to a President giving weight in the selection of a judicial nominee to geographic and indeed political considerations, but one should add a Republican and a southerner to the Court by itself seems to me a continuity with what is certainly in our regular tradition of judicial appointment, and it is the kind of criterion of diversity geographical and philosophic which strengthens the Court when rightly applied, that is to say when rightly applied in the direction of appointing a man who at a minimum presents the highest professional qualifications and the kind of promise of performance on the highest court suggested by the ringing roster of those who have been the leaders of that Court.

But when one adds to the criterion of Republicanism and southernism the criterion of lukewarmness on the greatest issue confronting our Nation and perhaps our world today, failure to meet which forthrightly has caused what are perhaps our most perplexing and profounding disturbing problems, then it seems to me we have to take a second look.

It was at this point that the profound professional concerns of Professor Van Alystyne, Professor Lowenthal, what I had heard of Professor Clark's views, led me to feel that, arrogant as perhaps this seems, I wanted to come before this committee and express my deep concern. But also I felt that I owed it to this committee to make what assessment I could, in a very limited time, namely over this weekend, of as much of the judge's work as I could, and I have read for many hours some 4 or 5 years of the judge's cases on the district court running from 1969 back to 1965, to get a sense of the general flow of the cases he decides, not alone those in the highly controversial areas of civil rights, and the related areas of habeas corpus to which some attention has been paid at great length, and properly so, before this committee.

I would report to you that on a canvass of the opinions which I have had the opportunity to read, and 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, no more than that, and I am

talking now about the general run of contract, of tort, of Federal jurisdiction, of tax cases, the run of cases which a district judge has before him. I will have a special word in a moment for the particular areas of judicial concern to which so much testimony has been given.

One element which concerned me as I read his opinions was a repeated use of dispositive techniques which avoided hearings. The motion for summary judgment granted, the striking of the pleading—these are techniques which properly used can be extremely helpful in terms of economy of judicial time. But where overused quite obviously they have the effect of frustrating the litigation, the actual litigation with live witnesses of real issue.

And then I saw the same theme emerging in the civil rights cases and in the habeas corpus cases to which considerable attention has been paid. The *Tallahassee Theater* case, for example, which Judge Carswell found presented a wholly inadequate complaint, one not worth pursuing to litigation, only to be reversed by the Court of Appeals for the Fifth Circuit—found it almost a classic statement of a conspiracy to deprive plaintiffs of their constitutional rights.

In the field of habeas corpus, not much has been said about this but it happens to be an area of special professional interest to me, I was particularly struck by failures there by District Judge Carswell to hold hearings in the face of allegations which plainly, so it seemed to me, would if substantiated constitute denials of fundamental principles of due process of law.

I make this point particularly in the light of an admonition, a very important admonition I think which Senator Hruska put to us earlier today, that in judging a judge, one must in fairness judge him in the light of the law as it stood at the time he decided, not in the light of our later, more comprehensive notion of what the law should have been and later became.

In the light of that standard, what the law was at the time the cases were before it, I submit there is very little way of explaining Judge Carswell's successive decisions in two habeas corpus cases, the *Dickie* case in which there was a reversal in 345 F. 2d 508, and *Baker* v. *Wainright*, again a reversal at 391 F. 2d 248. Both of these cases, though I have characterized them as habeas corpus cases, to be more precise were applications by Federal prisoners under section 2255 of the United States Code for release from custody on the ground that they had not had counsel. I misspoke myself, if I may, Mr. Chairman, with the first citation. It should have been the *Meadows* case, 282 F. 2d 942 and the *Dickie* case, 345 F. 2d 508.

These two cases were virtually identical. In both cases a Federal prisoner alleged that he had pleaded guilty to a Federal information, and waived counsel at a time when he was mentally incapacitated. In the *Meadows* case Judge Carswell dismissed the application without a hearing. He was reversed by the Court of Appeals of the Fifth Circuit in 1960, 282 F. 2d 942.

In the *Dickie* case, virtually the same application was made to him by another Federal prisoner. Again, and years had passed, Judge Carswell denied the application without a hearing and the fifth circuit reversed, 5 years later, 345 F. 2d 508.

I put those cases to the committee in the very terms in which Senator Hruska asked us to consider the judge's handwork. How did he

deal with the problem in which he knew the existing law because the existing law had been made for his circuit by reversal of his own prior decision? Comparable cases which I find of particular difficulty are *Baker* v. *Wainright* to which I referred, 391 F. 2d. *Brown* v. *Wainright* in 394 F. 2d. There were cases involving, the first of them involving lack of counsel on appeal of a State court conviction. No hearing was held by Judge Carswell, notwithstanding the fact that the U.S. Supreme Court had years before, as the fifth circuit pointed out, said repeatedly this was a constitutional requirement.

Brown v. *Wainright* was a confession case testing the voluntariness of a confession. *Harris* v. *Wainright* at 399 F. 2d raised questions of the competence of the applicant to stand trial and whether indeed he had been sane at the time of the alleged offense. In none of these cases did Judge Carswell hold a hearing. Each time he was reversed by the court of appeals and a hearing directed.

If the committee please, these are cases perhaps more modest in dimension than the civil rights cases to which much attention has properly been given. The constituents of habeas corpus cases are not people of influence. They are many of them ignoble, unworthy by the ordinary standards of our market. But they are people to whom our Constitution owes vindications of its principles. It is only if the rights of the worst of us are protected, the New York Court of Appeals pointed out in the *Gitlow* case almost half a century ago, that the rights of the best of us will survive.

And in these instances, a district judge, so it seemed to me, was failing to follow clear mandates of the court above him in failing to explore applications plainly alleging serious constitutional deprivations.

Before I leave these cases I would like, if I may, to say a word hopefully to clear up a problem which seemed to me to obscure much of this morning's discussion with respect to removal procedure. I gathered it was the thrust of Senator Hruska's questions that in his understanding a district judge had to approve a removal application. With all deference I think that is not the case. Removal under the federal system is an automatic process. Removal is effectuated when the lawyer files the paper of removal. There is nothing the district judge has to do at that stage of the litigation. The district judge's office with respect to removal comes only if there is an application to remand the case to the State court, and the issue so much discussed this morning of the procedure followed in one of the cases about which Mr. Lowenthal testified, the issue is not, I submit, settled by Senator Hruska's observation that the fifth circuit's *Peacock* and *Rachel* decisions were later overturned by the U.S. Supreme Court.

If one were following out that problem as to whether removal were proper in the case described by Mr. Lowenthal, that is to say whether a district judge should have remanded those cases, if one were pursuing that legal issue, one would be exploring a very subtle problem, and I don't offer you any firm judgment on the result one way or another, a very subtle problem as to whether the case which Mr. Lowenthal was seeking to keep in the Federal court was closer akin to the *Rachel* case than the *Peacock* case, two cases decided by the Supreme Court of the United States at the same time.

A plausible argument certainly could have been made that this was of the *Rachel* variety. But I think the critical point, if I understand

the concerns which Mr. Lowenthal and those associated with him have, was that Judge Carswell, with respect to that very difficult problem, even more difficult perhaps at the time because the Supreme Court had not yet thrown light on the area, that Judge Carswell, when there was no application for remand before him, remanded the cases on his own motion and without a hearing, and at a minimum the issues tendered by a properly filed remand motion were serious legal issues which should have required a conscientious hearing; just as indeed the habeas corpus cases and some of the civil rights cases to which I have referred, which the judge disposed of on the pleadings or by summary judgment only to be reversed later, were cases which required a hearing.

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.

If I am right in what I have said, or if I am even close to right, and whether I am close to right I think itself probably requires, in deference to the judge himself, far more study than I myself have had a chance to do in a very limited time of his judicial work, I am only testifying from what I have read, but if I am close to right, I suggest that in this setting this committee must consider carefully the implications of appointing to the Supreme Court a judge known not to be zealous, again to use Mr. Graham's understatement, not to be zealous about civil rights; for it begins to appear, I submit, that what distinguishes this nominee from other southern Republicans the President might have put forward, and I cite the examples which Mr. Harris gave, Judge Brown, Judge Wisdom, with them I might rank Judge Frank Johnson of Alabama, what distinguishes this nominee from judges of that caliber is on the one hand a particular form of judicial conservatism, of which the trademark is the nominee's lukewarmness with respect to the enforcement of the guarantees of the Bill of Rights, not alone but particularly in the *Rachel* field, and on the other hand the nominee's far less substantial professional qualification for a place on our highest court.

In this context 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 is 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 Florida 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 of 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.

Thank you.

Senator KENNEDY. Thank you very much, Dean. We appreciate very much your comments on this. I know you have been here for a long day, and I want to tell you how much we welcome your remarks. You said that you are an officer of the Section of Individual Rights and Responsibilities of the American Bar Association, but you do not speak for the association or the section. Can you tell us why that section doesn't express itself on Supreme Court nominations if it has a strong opinion?

Mr. POLLAK. Well, I am a relative novice with respect to the constitutional dynamics of the ABA, Senator, but I believe that the section would not be regarded as having any standing to speak to an issue of judicial qualification, since there is a committee, Judge Walsh's committee, which reports, as I understand it, to this committee its views on that issue, so it would be essentially a jurisdictional problem.

Senator KENNEDY. Don't you think your section would be able to bring a rather different and unique point of view in terms of the qualifications of the nominee? Don't you think that would be valuable and helpful for members of this committee and the members of the Senate to have?

Mr. POLLAK. Well, if we were entitled to express a view, I would hope it would be a view worth your having. I do not for a moment though, Senator, I do want the record to be very clear on that, I do not for a moment want any confusion to arise with respect to my own agency in that matter. I am in no way speaking for the section or for any other member of the section. I have not consulted any other member or officer of the section with respect to my remarks, just as I have consulted nobody in the various other organizations or the university with which I am affiliated, in that sense.

I would think, and perhaps this is really more directly responsive to your question, I would think that there were many members, many individual members of the American Bar Association, and many individual attorneys not members of the American Bar Association, but certainly I can think of many in the association, whose views as to a particular nomination might well not correspond with the views which are formally rendered to you. I think that is perhaps all I should say with respect to that.

Senator KENNEDY. In your opinion, based upon your research and review of these cases, and given your own rather extraordinary background, and the fact that you are dean of one of the great law schools in our country today, are you prepared to tell us how you would characterize the judge's decisions in terms of civil rights issues?

Mr. POLLAK. You understand, Senator, that I am responding only in terms of the cases which I have read. I do not know the judge, and

so this is a purely consumer response. Those cases I have read, in which he has written in the area of civil rights, seem to me cases marked by, on the whole, a very restrictive view of the rights protected by the Constitution. Examples which seem to me relevant here are the *Escambia County School* case, I believe it goes by the name of *Augustus* v. *Board of Public Instruction*, about which Professor Clark gave some testimony, the unreceptivity of Judge Carswell to the proposition that school segregation was more than a question of the allocation of students by race but also ran to the question of faculty segregation, Judge Carswell's unreceptivity to what seemed such an obvious and fundamental proposition seems to me astonishing.

It is of interest, incidentally, that that litigation was commenced on behalf of the plaintiffs with two lawyers as counsel for plaintiff who now grace the Federal bench, Judge Motley and Mr. Justice Marshall, but they had gone on to their judicial careers before that long litigation was completed, before the rights they sought to protect at the bar were vindicated.

Again it seemed to me that Judge Carswell's difficulty with the proposition that a reform school also had to be desegregated, that seemed to me a curiously narrow view of what constitutional rights were to be protected for black people. I am aware of course that there are at least two cases, there may be more, but this is the barber case in which Judge Carswell did direct compliance with the 1964 act, and there is the *Tallahassee Airport* case. These stand out, from my point of view, in rather signal and lone exception to the other cases in which the judge was so frequently reversed by the court above him.

Senator KENNEDY. I have no further questions.

Senator TYDINGS. Mr. Chairman, I have no questions other than to ask the distinguished witness if it is correct that you testified that in your judgment the nominee before us is the most poorly qualified nominee to the Supreme Court in our generation?

Mr. POLLAK. Well, I went beyond your generation or even my generation, Senator. I put it back to the beginning of the century, to the nomination of Mr. Justice Holmes in 1902. It might be taken back farther than that perhaps, but that covers some 40 nominations, and I would assert that on that ranking this nominee falls short of any.

Senator TYDINGS. Is that the area of your scholarship, between 1902 and to date, that you comment upon?

Mr. POLLAK. I cannot confine my scholarship that way or indeed claim that as a preserve. I guess it is how far back I thought I could safely take the estimate in a few minutes' reckoning. I will have to say and state quite candidly that when one gets back to the 19th century, at least I find, that there are names of people who were sometimes very briefly, sometimes for several years, on the Supreme Court of the United States, names which have at least been lost on me, so I cannot really go back and make relevant comparisons with great confidence, except for the main figures of course, back before 1900, but 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.

Senator TYDINGS. I thank you.

Senator KENNEDY. Senator Hruska?

Senator HRUSKA. Dean, when you were asked to characterize the opinions of Judge Carswell, you prefaced your remarks by saying well, "From those cases of his that I have read," and then you went on. How many cases did you read?

Mr. POLLAK. Before you had returned, Senator, I explained that in the very little time at my disposal, that is to say starting Saturday evening and running through yesterday noon, I think I ran through his district court opinions from 1969 back through 1965, a period of about 5 years, and it is not a very neat process just going through the volumes of "Fed. Sup.," but there were 30-some odd opinions, about 30. Now I do want to be sure the record is clear on that, and I am particularly glad you asked me that precise question, Senator, because it is true that I have not read his opinions since he has been on the court of appeals or when he was sitting by designation on the court of appeals, and that is really because I have no convenient way of indexing them. It would be something I would be happy to do, and in fairness to the nominee and to this committee I would be ready to do, if there were more time to go into it at greater length.

Senator HRUSKA. But your lack of time did not permit you to get into his circuit court cases?

Mr. POLLAK. That is correct.

Senator HRUSKA. I understand there are some 50 opinions that he has rendered?

Mr. POLLAK. I heard that today.

Senator HRUSKA. That is the only figure I go by, the figure that we heard today. Now, Dean, in all honesty, would it have made any difference in this case if he were a good judge and had written good opinions? Do you think it would have made any difference? You know we had a rather unfortunate experience for the bar and for the country not too long ago in another man that was nominated from that area of the country, and he had good opinions and he was a good jurist and is, as time will prove, but he earned $1 million somehow or another, and there was the appearance of an evil and he was said to be a man in reproach because accusations were brought against him. Besides there were people who said well, he wasn't a contemporary man.

Do you think it would really have made any difference if this man had written brilliant opinions and good opinions? Would he have been accepted now at this juncture?

Mr. POLLAK. Senator Hruska, it would have made a difference, indeed a positive difference to me. As I tried to make clear, though I was deeply concerned about a position announced by this young lawyer 22 years ago, I would not regard that as disqualifying if I saw in his professional record the kind of excellence and the kind of current constitutional commitment required of an appointee.

With respect to, and I am particularly glad to compare this with the experience which the Senate and the Nation just went through with respect to Judge Haynsworth, I was one of those who felt that Judge Haynsworth should not be confirmed. Indeed, though there is no reason for you to recall it, I think I probably burdened you with a carbon copy of a letter I wrote to my Senators, Senators Dodd and Ribicoff.

Senator HRUSKA. You did.

Mr. POLLAK. But I would make the point that my opposition to the confirmation of Judge Haynsworth was limited to the problem

of the appearance of sloppiness, if you will, with respect to what cases he sat on. I did not, on the basis of what I knew, think that Judge Haynsworth should fail of confirmation on the ground that he was not professionally qualified, though it was reasonably clear to me that there would be many issues, and many important constitutional issues, on which I and Judge Haynsworth would differ.

I was fully prepared to accept the professional appraisal of him, which was made, for example, by Professor Van Alystyne, who in these hearings has indicated by contrast his limited view of Carswell, or that was made by Prof. Charles Wright of Texas, another scholar, who thought Judge Haynsworth would be an able addition to the Supreme Court of the United States.

I would have gladly gone along with the nomination in terms of professional competence. It was a quite different issue, one that I do not believe is even present in this case, which led me to take a view in opposition to Judge Haynsworth. So in direct response to your question, for me it would have made a controlling difference, if the professional record of this nominee were other than what it is.

Senator HRUSKA. Were you here most of the day to hear the testimony?

Mr. POLLAK. I was.

Senator HRUSKA. This afternoon?

Mr. POLLAK. Yes; I was, Senator.

Senator HRUSKA. You say your opinion would be different had he been a man better accomplished in the writing of opinions or legal treatises or maybe a book or two, even if it is about climbing mountains or whatever. It would have made a difference to you. But would it have made a difference to the voices of opposition that have been raised against him in your judgment? I know you live in an academic atmosphere. Sometimes we kind of envy people who live in that type of atmosphere.

Mr. POLLAK. Not recently, however.

Senator HRUSKA. But you are a good reader and you are a good student of life and of contemporary affairs. Do you honestly believe it would make any difference in the type of opposition that is developing here to this man, if he had been a man of excellence in an academic way?

Mr. POLLACK. Senator, obviously you are much more acclimated than I as to what kinds of pressures develop with respect to public problems of this kind. My own judgement, however, is that if Judge Carswell were a man of different caliber, we would have had no such problem as that posed before this committee today. You would not have had the testimony of Professor Van Alystyne. You would not have had the testimony of Professor Orfield, whom I do not know. You would not have had the testimony of Professor Lowenthal. I don't believe, as I think about the witnesses today, that they would take the same view, most of them, that they have announced, had they not shared my view that here was a man not qualified professionally, and evidently selected, as Mr. Harris has suggested and as Congressman Conyers has suggested, and others have suggested, on bases other than professional qualification. That is the great difficulty. And when one identifies what those other issues are, then one's concern for the future of the Court becomes enlarged.

Senator HRUSKA. But you do feel that if there were juristic attainment and academic attainment, by your standards, maybe some authorship and a little bit of proven quality, he would not have the trouble he is having now?

Mr. POLLAK. Senator, would you permit me? I have talked much about professional attainment, but I do not want that necessarily to be equated, even though others have stressed this, with the writing of books or treatises or articles. Those may very well be evidence of important achievement, but that is not what is required. What is required, I think, is to find in the core of judicial work the distinction, the preeminent distinction, that goes with the place on the Supreme Court of the United States.

I do not know, for example, maybe I am just uninformed, I do not know in Judge Brown's case or Judge Wisdom's case, of these extraneous evidences of judicial distinction.

Senator HRUSKA. That is well put, and I accept that explanation. You know lurking in the back of my head, and it does not only lurk there, it looms large there, Dean Pollak, is the experience we had with John Parker, brilliant jurist, a great scholar, preeminent in his field, but he came from the wrong part of the country for the people who said, No, we cannot have that man, and they voted him down. One of the great tragedies of judicial history in America, excellence above most nominees to the Supreme Court, just in the vein about which you speak, and they said no, which leads me to think there are other considerations here, a lot of rationalization, a lot of them, but there are other considerations here. The President has been trying to fulfill his promise to the American people when he said last fall during the campaign that he was going to try to put balance in that Court. But there are people who are bound and determined it seems to me that balance is not achieved. They do not want it, and if they will not find one reason, if they will not find the stock situation or if they do not find anything of that nature, the appearance of evil and being put in reproach when the reproach consists of an accusation made, all of them unfounded and unjustified, then they will find something else, and here we find a new handle. We find a new handle. The man has no excellence. He does not write books, and he has not been on the bench very long, and he has written only 50 opinions, and therefore he does not do, but back of it all witness the case of John Parker, is the idea, We don't want a man from that section of the land on the Supreme Court.

Do you think there is anything to that?

Mr. POLLAK. Senator, Judge Parker has been very much in my mind because though I know there is a variety of view about him and in his later years he wrote a number of opinions with which I disagree, I have always thought of him as a judge of very considerable distinction, and 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. But the adjectives you use in referring to Judge Parker, the brilliance, the excellence, the ability that you properly ascribe to him, are not, I respectfully suggest, adjectives that can appropriately be attributed at this stage to this judge, the nominee who is now before you.

Senator HRUSKA. And how are we going to determine that in advance? How are we going to determine that a man who has attained

brilliance before his appointment will continue it or he will fall down on the job, or the contrary, that being very mediocre, which I do not consider Judge Carswell to be and neither does the bar association, but if it were a nominee who was mediocre, what is there to stop him from becoming a brilliant and a good and an excellent Justice of the Supreme Court? Particularly if he had all the good qualities that Judge Carswell has, diligence and honesty and sincerity and a good practical grasp of the judicial system, all of those things? What is there to prevent him from becoming a good member of the Supreme Court?

Mr. POLLAK. Senator, obviously I hope that my fears are not vindicated. I think it is entirely likely that Judge Carswell, notwithstanding the reservations I and others have expressed, will be confirmed. He will sit on the Court, and I hope in that event that my doubts are proved groundless. But I think all of us as people of affairs make predictions about the most important decisions before us on the basis of the record that we know, and therefore when a nominee is put forward, as President Eisenhower put forward, for example, Judge Potter Stewart of the sixth circuit, one could look at Judge Stewart's record on that court and see that he had already distinguished himself greatly, and that there was every reason to expect that he would distinguish himself further on the highest court of the land. That is the kind of demonstration of excellence which I think this committee must insist upon as a minimum in passing upon nominees for the U.S. Supreme Court.

Senator HRUSKA. Well, there have been some harsh things said about Judge Carswell today. There have been some harsh, unkind and totally unwarranted things attributed to the President of the United States in this matter. We are going to hear some more of them tomorrow, and I presume we are going to hear that this man is not for the Constitution. And there are others who are for the Constitution, and we should be for nominees who are for the Constitution. We had a young witness here who was well motivated and very noble. He performed volunteer work down there in Florida. The first time he ever appeared in court and he knew just exactly what kind of a judge Mr. Carswell was. I was in practice a quarter of a century before I came to the Senate and I know of some mature lawyers who when they get through with a trial in a court have their opinion and they voice it in no uncertain terms. If the judge found against him he is a bad judge and if they found for him he is a good judge and I guess that is the way we are sometimes motivated. But I do not believe that some of the testimony, such as we have heard here today, bitter, vituperative, vindictive, very harsh and unwarranted, I do not know that that has any place in a matter of this kind because it impugns the desires and the motivations of a President who has proven himself to be a patriot. I would not ascribe to him, and I do not think the Nation will ascribe to him base political motivations in this appointment.

He is just as interested in the future of the Supreme Court as anybody else, and maybe more than a lot of people, having in mind that this is a Nation of over 200 million citizens and with 50 States. Remember Judge Parker, who in the general legal world ranked high in terms of excellence and brillance. He was pretty shabbily treated,

notwithstanding his efforts and qualifications. I just wonder how much we are seeing history reenacted in this nomination.

Mr. POLLAK. I hope the record is clear, Senator, that with respect to Judge Parker I thought him indeed a very able judge. If there was something in what you just said which suggested that perhaps——

Senator HRUSKA. He rendered a number of opinions with which perhaps you did not agree and you would not go to the extent that I went in describing him as an excellent and a brilliant judge. It was that that I referred to.

Mr. POLLAK. I thought he was a very able judge, of very considerable distinction. I have long entertained doubts whether it was not a great mistake to fail to confirm Judge Parker's nomination, and indeed in one respect I think one aspect of that debate illustrated something, a point which you made earlier today, that one ought to look at a judge's work in terms of what the law was at the time, because I believe it to be true that Judge Parker was unfairly charged with innovation in a labor injunction case in which he was merely following the applicable Supreme Court precedent, so that Judge Parker's case has always illustrated that very pointed proposition which you put to us earlier today.

Senator HRUSKA. Innovation in what respect, in respect to——

Mr. POLLAK. As I recall the debate over Judge Parker, many of those who charged that he was antilabor used as evidence an opinion of his in the circuit court which was an opinion upholding a labor injunction, or directing the granting of such an injunction, and that decision of his was one which in terms of the applicable Supreme Court law at the time was simply a proper application of what the Supreme Court had said, so that to fault Judge Parker in that respect was to fault him for doing exactly what a lower court judge is supposed to do. I had commented in your absence, Senator Hruska, on the fact that you made the point to us, the admonition, that in evaluating Judge Carswell we should look at the law as it stood at the time he made his decisions. It seemed to me that in the habeas corpus field I found him departing from clearly enunciated standards at the time he was making his decisions, and I also addressed myself to the problem of removal and remand which had concerned you so much before, but I do not mean to rehearse that further now. But I did want you to know that when you were away, Senator, I was addressing myself to some of your concerns on that score.

Senator HRUSKA. Thank you very much. You have been helpful to the committee.

Senator THURMOND. Judge Pollak, you are of course welcome here. I was surprised at one of the statements you made if I understood it correctly. Did you say you considered Judge Carswell the least qualified man to be appointed to the Supreme Court in the history of the country or just how far back did you go?

Mr. POLLAK. My cutoff point, Senator, was back to the beginning of this century, 1900. That takes us back to the appointment of Justice Holmes.

Senator THURMOND. Do you know Judge Carswell personally?

Mr. POLLAK. No, I do not. I am speaking wholly on the basis, as I indicated to Senator Hruska, of what I have read of his work product

and of what I have heard of the testimony of those who seem to have more direct knowledge.

Senator THURMOND. You are judging from what the witnesses have said today, that is from what you heard in testimony today?

Mr. POLLAK. Well, I have the advantage happily of reading some of the testimony by Professor Van Alystyne, who has I think read a good deal more.

Senator THURMOND. On what basis? You have considered what the witnesses who have testified here against him have had to say and judged him, at least partly, on that basis?

Mr. POLLAK. In part. For example, obviously I do not take uncritically every kind of unrepudiated criticism that is made of any man, but two of those who have had—there are two kinds of testimony I think that have come to you, Senator. There has been the scholarly testimony of those like Professor Van Alystyne and Professor Orfield, who have looked at a great deal of his work. Now I am not acquainted with Professor Orfield. I am acquainted with Professor Alystyne and his work, and I know the kind of respect it deserves. And I have had some opportunity, some limited opportunity, to confirm his impressions by reading a number of Judge Carswell's opinions on my own, though as I acknowledged to Senator Hruska it is of course only a fraction of the whole matter.

Beyond that there has been testimony from lawyers who have had by experience before Judge Carswell some personal basis for seeing him in action as a judge.

Now I would be very chary in general about estimates by counsel of judges they appear before, especially since I am conscious, as one who has occasionally been in court, that when a judge decides against you, you do not always have the most charitable view of him. But it happens that both Professor Lowenthal and Professor Clark are lawyers whom I know, and know well, and admire and know the integrity of, and know the standards of, so their views with respect to how they have been treated, or how they see causes treated, issues treated, in court seem to me views that bear very great weight. But of course I would be first to say that if there is another perspective to be looked at, if there is conflicting testimony with respect to that aspect of the judge's work, that should be brought to this committee's attention.

Senator THURMOND. When did you first decide to come here and testify?

Mr. POLLAK. Somewhere between Thursday and Friday last, Senator. I had been reading the papers and was being more and more distressed, and then when I saw my friend and former colleague Professor Van Alystyne had testified, I tried to get in touch with him to see if I could get a copy of his statement.

Senator THURMOND. Did someone suggest you come?

Mr. POLLAK. In the first instance the person who suggested it was my wife. In effect she said, if you feel what happens to the Supreme Court is important, and you have got doubts, don't you think you should tell somebody?

Senator THURMOND. So you did not plan to come until after some of the witnesses had testified?

Mr. POLLAK. That is correct.

Senator THURMOND. So you evidently are basing, as you say, your opinions about Judge Carswell now on the basis of what the witnesses

have had to say about him, and those who testified against him primarily?

Mr. POLLAK. Senator, that is important, true, but what is also true is that I have been able—his biography I take it is a matter of public record, but I have thought that in fairness to the committee, if I was going to say anything worth your listening to, and in fairness to myself, and in fairness to the judge, I also should attempt myself to read enough of his work so that I could get at least some sense as to whether indeed his work product was of the essentially pedestrian character which was attributed to him, and whether it was true that in the particular areas with which he has been attacked as being inadequate in the civil rights area, and the related area of habeas corpus, whether I concur in that judgment, because these are fields, these happen to be fields in which I have done some work, and my own direct reading of the judge's work product in those areas confirms for me that this is—I do not enjoy saying this, but that it is second rate.

Senator THURMOND. You of course know that he has a very fine record in college, that he was a successful practicing attorney, that he was a distinguished U.S. attorney, he was a distinguished circuit judge and now has made a good record on the circuit court of appeals. You are familiar with his record, aren't you?

Mr. POLLAK. Senator, you have read some of the characterizations of his career. I think he himself did not characterize his practice as a very extensive one. He was in private practice as I recall only a few years. He graduated from law school in 1948 and became U.S. attorney I think 5 years later. He was in Governor Collins' law firm for a while and then formed his own small firm.

Senator THURMOND. That would not make too much difference, would it, if we had a law professor who had been appointed to the Bench who had not had any practice?

Mr. POLLAK. Indeed that is true with respect to——

Senator THURMOND. And so that would not be too much against him?

Mr. POLLAK. I am trying to assess the way you have put the matter to me. I thought you had said that it was a distinguished private practice. I think it was a very brief period of private practice and as a junior lawyer. I do not say it in criticism but I do not think anything important can be made out of it in one way or another.

Senator THURMOND. I said it was a successful practice and distinguished service as a U.S. attorney.

Mr. POLLAK. I have no way of characterizing that.

Senator THURMOND. It would not make any difference, the matter of adjectives if they were all good.

Mr. POLLAK. I know nothing about his service to the——

Senator THURMOND. You are mostly expressing an opinion on this man because some of your friends have testified, have given testimony that indicates to you that he is not qualified for the position, but to go so far as to say that he is probably the least qualified man since the 1900's is going a very long way, don't you think? That is 70 years, suppose someone would say about you that you are the least qualified man since 1900 to be dean of the law school at Yale University, how would you feel?

Mr. POLLAK. Well, I think that would probably be a reasonably good estimate. Actually there have been fewer of us and I can make that comparison fairly readily, and I certainly cannot put myself——

Senator THURMOND. Did you say you want to admit to that statement?

Mr. POLLAK. But I said what I said with deliberation and deference, and I would be glad to go back with you through the men who have been named to the Supreme Court. We could work our way backward, and see the level of——

Senator THURMOND. You have been testifying a long time and we are about ready to get through, but it seems to me you made a very exaggerated statement, and it seems that your intense zeal—have you ever been called a zealot of civil rights?

Mr. POLLAK. I cannot recall anyone offering me that before.

Senator THURMOND. It seems you are showing intense zeal in that field, together with some of the other lawyers who were volunteer lawyers down there in the same field may have warped your mind a little bit on this subject.

Mr. POLLAK. Senator, I think it is right for you to apply a substantial discount to what I say in terms——

Senator THURMOND. I am not trying to discount you. You have got a right to say what you want to.

Mr. POLLAK. No, no, I understand.

Senator THURMOND. But here you are trying to block a man from the Supreme Court who has a fine record, who has decided labor cases both ways, civil rights cases both ways, other cases both ways. He has had a diversity of practice. He has handed down a diversity of opinions, and I am just wondering if you really feel when you reflect on it that down in your heart you really do him justice?

Mr. POLLAK. Senator, I acknowledge, and that is why I wanted it to appear on the record, that I happen to have in some areas of the public law very strongly held views, most particularly I believe very strongly in the enforcement, however much this is a latter-day enforcement, of the provisions of the 14th amendment which have fallen for so long into disuse. I want this committee to know that I have those constitutional biases in assessing any of my views, and yet I have come before you because my field is constitutional law. I have worked with the Court, this may sound megalomaniac on my part, but I have worked with its work ever since I graduated from law school.

My first job was law clerk to the late Justice Rutledge, so that it was my privilege to spend a year there seeing Justices at close range, hearing great lawyers argue great cases, and I thought I knew what made a Judge of the U.S. Supreme Court from what I saw of that group of distinguished men, and it is that kind of sense of critical importance of the job those men do, I am talking now about judges with some of whom I found myself frequently in very profound intellectual and philosophical disagreement, but it is in terms of the importance of their mission and the absolute indispensibility of the highest order of professional competence and constitutional insight, it is against that kind of background, Senator, that I offer you what I agree may sound like exaggerated views, but I think back to the kind of record of demonstrated achievement which judge after judge had, whether it

was Senator Black or Senator Byrnes or Judge Cardozo or Mr. Brandeis, Governor Hughes, Judge Stone who had been Attorney General, Senator Sutherland, judge after judge were men who came to the U.S. Supreme Court capping a public career of extraordinary distinction, and that seems to me the standard which this committee is required to urge upon the Senate to uphold in this case.

Senator THURMOND. I have no more questions. I must say that even with your intense zeal in the civil rights field and your sympathy for the witnesses who testified, and basing your opinion chiefly upon what those witnesses had to say, I am a little disappointed that you would go so far as to express the strong opinions that you have about Judge Carswell.

Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir. You are excused.

Mr. PROCTOR. I believe you have been previously sworn. Proceed.

Senator Kennedy has some questions.

Senator KENNEDY. Mr. Proctor, would you care to be seated. You appeared before the committee a few days ago, did you not, to testify?

TESTIMONY OF JULIAN PROCTOR, TALLAHASSEE, FLA.—Recalled

Mr. PROCTOR. That is correct.

The CHAIRMAN. Pull those mikes before you.

Mr. PROCTOR. Pardon me, I would like to get a few notes here, Senator. It has been a long day and I might be able to speed up things a little bit if I have these before me.

All right, Senator.

Senator KENNEDY. I was wondering if you could review with us very briefly what happened when the municipal golf course in Tallahassee became a private golf club. Could you give us the events leading up to that transition?

Mr. PROCTOR. Senator, yes, sir, I will do it very briefly. I would like to bring out at the very beginning that the Tallahasse Country Club was organized as a private country club back in February of 1924. It was turned over to the city of Tallahassee in August of 1955, because of financial conditions, and it was turned over to the city at a very nominal charge, because——

The CHAIRMAN. You mean 1935.

Mr. PROCTOR. 1935, I beg your pardon, sir. Because of the very little interest, the few members were unable to carry the financial burden. There was a clause in the deed, when it was transferred to the city of Tallahassee, that the original country club had the right to lease the property back, should the city ever decide to lease or dispose of the property.

In September of 1952, the stockholders of the original old Tallahassee Country Club reorganized and requested the return of the club because of dissatisfaction with the operation of the club. The clubhouse itself was pretty well rundown. It was an old, wooden structure. The golf course needed improvement, and because of that dissatisfaction and the desire of those members and golfers in and around Tallahassee who wanted a new clubhouse and a new golf course.

Senator KENNEDY. When was that? That was in what year?

Mr. PROCTOR. September of 1952 when it originally began.

Senator KENNEDY. What happened in September?

The CHAIRMAN. Let him answer the question. Did you finish your answer?

Mr. PROCTOR. That continued until February 14 of 1956. At that time the city leased the golf course back to the original Tallahasse Country Club.

Senator KENNEDY. What happened in September of 1952? Was there some kind of incorporation? Did the old stockholders get together? Was there some kind of meeting?

Mr. PROCTOR. There was a meeting of the old stockholders.

Senator KENNEDY. How many were there of them at that time?

Mr. PROCTOR. I do not know the exact number.

Senator KENNEDY. They got together and did they petition the city at that time?

Mr. PROCTOR. They got together and they discussed it with the city commission at that time, and petitioned the city to turn the club back over to them for their private operation.

Senator KENNEDY. Then you said in 1956, February 14 of 1956, it was actually transferred back to this group, is that correct?

Mr. PROCTOR. That is correct.

Senator KENNEDY. And was the group that it was transferred to in 1956 the same group of stockholders that met in 1952? Were there others who were added to that group?

Mr. PROCTOR. There were others who were added to that group, and they formed a new club. This same group combined with a group of other interested citizens, and formed the Capital City Country Club, Inc. They filed for a certificate of incorporation on April 24 of 1956.

Senator KENNEDY. As I understand it, one of those incorporators was the nominee, Judge Carswell; is that correct?

Mr. PROCTOR. One of the original subscribers was Judge Carswell. We had some 300-odd subscribers at that time.

Senator KENNEDY. Now this was an added membership over the 1952 meeting, was it not?

Mr. PROCTOR. That is correct.

Senator KENNEDY. Could you give us any idea of how many were added to it and how many were original stockholders?

Mr. PROCTOR. Original stockholders back in 1924, Senator? I do not know. It was 35 maybe.

Senator KENNEDY. The group that met in 1952 was approximately how large? Are you talking about two or three or 15 or how many?

Mr. PROCTOR. I do not know. I am talking about probably 15 to 20. They were heirs, and those members who had received this original stock.

Senator KENNEDY. And the club itself, of which the 1952 group had been stockholders, was a private country club, was it not? They had been former members or stockholders in a private country club?

Mr. PROCTOR. Some of them were original stockholders. Others were families of original stockholders.

Senator KENNEDY. And it had been a private country club?

Mr. PROCTOR. It had been a private country club from 24 to 35, at which time the city took it over and operated it at their request, and with their cooperation.

Senator KENNEDY. Now do you have a list of the directors of the old country club and the incorporators of the new Capital City Country Club? Do you have that information available?

Mr. PROCTOR. I have. It is available and I will make it available to the committee.

Senator KENNEDY. Could it be made a part of the record?

The CHAIRMAN. Oh, sure.

(The documents referred to appear in the appendix.)

Senator TYDINGS. Before you leave that point, as I understand it, you had several hundred subscribers when you decided to——

Mr. PROCTOR. Correct.

Senator TYDINGS. And you picked from those subscribers 21 persons to use as incorporators?

Mr. PROCTOR. As subscribing incorporators, correct.

Senator TYDINGS. One of those 21 names was the name of U.S. attorney for the district of northern Florida, was it not?

Mr. PROCTOR. Judge Harrold Carswell, or Harrold Carswell, right.

Senator TYDINGS. How did you happen to pick him as one of the 21 incorporators?

Mr. PROCTOR. Senator, I cannot answer that question. It is just we took 21 out of the group. I happened to be one of the 21. Why did they pick me?

Senator TYDINGS. Were you trying to pick prominent people in the community to show community support?

Mr. PROCTOR. Not necessarily. Many of them were prominent. I would not consider myself particularly prominent, and I happened to be one.

Senator TYDINGS. Did you just pick them out of a hat? How did you do it?

Mr. PROCTOR. No, we just picked out a group of 21.

Senator TYDINGS. You just did it at random? You did not particularly want to have a U.S. attorney's name in that group of subscribers and incorporators?

Mr. PROCTOR. No.

Senator TYDINGS. It was just happenstance?

Mr. PROCTOR. It just happened.

Senator TYDINGS. You just happened to pick him?

Mr. PROCTOR. Absolutely, right.

Senator KENNEDY. Were there any blacks who were incorporators or invited to participate?

Mr. PROCTOR. It was open to the public.

Senator KENNEDY. Were there any blacks who were asked to participate?

Mr. PROCTOR. I did not ask any.

Senator KENNEDY. Do you know from your own knowledge whether any were?

Mr. PROCTOR. I do not know.

Senator KENNEDY. Were there any in fact included in that list?

The CHAIRMAN. His answer was he did not know.

Mr. PROCTOR. I do not know.

Senator KENNEDY. You have the list of the 21?

Mr. PROCTOR. I have a list of the 21. I also have a list of about 400 people.

The CHAIRMAN. Ask him the questions but give him time to answer the questions,

Mr. PROCTOR. In addition to the 21 subscribers, there were about 400 other subscribers who had decided to join the country club, of which I can provide the list to the committee.

Senator KENNEDY. You are familiar with the 21 incorporators?

Mr. PROCTOR. I am.

Senator KENNEDY. Were any of those black?

Mr. PROCTOR. No.

Senator KENNEDY. To your knowledge do you know whether any of the 400 members of the club were black?

Mr. PROCTOR. I do not know.

Senator KENNEDY. Would you know if there were some black members?

Senator TYDINGS. Do you really want us to believe that you do not know whether any of the subscribers were black?

Mr. PROCTOR. There are one or two names that I would not know, and I would not answer that they were black or white.

Senator KENNEDY. Were there any blacks that played on the golf course prior to the time that it became the Capital City Country Club, that is while it was the municipal club?

Mr. PROCTOR. Wait a minute, repeat the question, please.

Senator KENNEDY. Were any black citizens permitted to play on the municipal golf course?

Mr. PROCTOR. When the city was operating it?

Senator KENNEDY. When the city was operating it.

Mr. PROCTOR. I do not know. It was a city golf course. It was open to the public. It was not a private country club. It was operated by the city, and for city revenue. The pros were hired by the city. I cannot answer that question because I am maybe a 1-day-a-week golfer.

Senator KENNEDY. What was the pattern or the practice at this time in municipal country clubs either in Tallahassee or in that area? Were blacks permitted to play?

Mr. PROCTOR. Senator, I was not familiar with the other country clubs in that area.

Senator KENNEDY. Actually the Florida A&M golf team, which as I understand it was all black, was allowed to play there?

Mr. PROCTOR. Was allowed to play? They could have been.

Senator KENNEDY. Were you familiar with that?

Mr. PROCTOR. I am not familiar with it.

Senator KENNEDY. As I understand it they were allowed to use the course before 8 a.m. every morning.

Mr. PROCTOR. Also the Florida State University Golf Club were able to use it. They could have played. I would not necessarily know.

Senator KENNEDY. At some time then in 1956 this course was turned over to a group of incorporators?

Mr. PROCTOR. That is right, May 4, 1956. Now may I bring out a point here?

Senator KENNEDY. Yes, I wish you would.

Mr. PROCTOR. You mentioned the fact about Judge Carswell's name being one of the original subscribers, and on the 21 subscribing original directors. It just happens that I was among the original 21. To my knowledge Harrold Carswell never participated during that time, never attended a meeting to my knowledge, and I attended about 93

percent or more of them. He took no active interest at that time in the development of the Tallahassee Country Club.

On May 4, 1956, the Tallahassee Country Club assigned its lease to the new Capital City Country Club, Inc.

Senator KENNEDY. And Judge Carswell was an incorporator, was he not?

Mr. PROCTOR. He was one of the original incorporators.

Senator KENNEDY. And he actually signed——

Mr. PROCTOR. He signed as one of 21 subscribing members.

Senator KENNEDY. And he received a stock certificate, did he not?

Mr. PROCTOR. He did not.

Senator KENNEDY. He did not?

Mr. PROCTOR. No, because we were in the formative stage of the club. The dues were set, $300. We paid, some of us paid $100 at the time, in order to have sufficient money on hand for the incorporation. Judge Carswell was one of those who paid the $100.

On September 1, 1956, the Capital City Country Club, Inc., took the lease over from the Tallahassee Country Club. They still had not issued the stock.

On September 4, 1956, the Capital City Country Club, Inc., had its first annual stockholders' meeting. Forty-two names were proposed as the original stockholders of the new club. Harrold Carswell's name was among those 42. He was not elected to the board of directors. They elected 21 directors out of 42. He was not among those elected.

Senator KENNEDY. Now at some time did he receive a share of stock?

Mr. PROCTOR. No. It was on February 3 of 1957, before the stock had been issued, that Carswell withdrew, requested that he be withdrawn as a member and wrote a letter to that effect.

Senator KENNEDY. Do you have that letter, a copy of the letter?

Mr. PROCTOR. No. I say a letter. I do not know exactly if it was by letter for actually at that time we do not have the records so I stand corrected. He requested that his name be withdrawn. On February 12 of 1957; Carswell was refunded $76 of the $100. I do have a copy here of the date in which he along with that many who were refunded their money, which I will be happy to pass over to the committee.

Senator KENNEDY. So he never in effect received any paper that would indicate that he had actually got this share of stock or that he had given $100 for it in your bookkeeping?

Mr. PROCTOR. Right, not up until that time because the stock was not issued. The only record of that was on the subscribing forms that were filled out by the secretary of state of the State of Florida. His name happened to be among those present.

Senator KENNEDY. Did he sign any note to indicate that he had actually received his $76 back?

Mr. PROCTOR. Not that I know of. I imagine it was in the form of a check. I assume that he endorsed the check because I believe he used that money.

Senator KENNEDY. But there was no passage of any paper?

Mr. PROCTOR. No passage of any paper. We had all paid our $100, but as far as stock certificates, we did not. We had not received any. As I stated a few minutes ago, we had to buy three shares at $100 a share to become members. Before they were issued there was a large list

including Harrold Carswell who withdrew their names and requested a refund of their money. He was charged, I think, $12 a month for 2 months' dues during that interim.

Senator KENNEDY. Isn't it fair, Mr. Proctor, to say that when this club was a municipal club, that actually it was a segregated club?

Mr. PROCTOR. It might be fair for you to say that, but it was open to the public.

Senator KENNEDY. Was it open to the blacks?

Mr. PROCTOR. It was open to the citizens of Tallahassee.

Senator KENNEDY. And did any blacks to your knowledge use that club?

Mr. PROCTOR. I do not know. You stated that some played so it must have been open to them.

Senator KENNEDY. How many times do you play there?

Mr. PROCTOR. I said once a week.

Senator KENNEDY. Once a week, and did you ever see any?

Mr. PROCTOR. But once a week during the warm weather.

Senator KENNEDY. From your own experience and knowledge of municipal facilities in Tallahassee, were they segregated prior to 1956 or not?

Mr. PROCTOR. Senator, I do not think that I could answer that question. It was open to the public. We had not had any—it would have been open for membership should they have the desire to join.

Senator KENNEDY. And did in fact—well, the question is not the municipal. The question is, Did any of them, even when it became a private club, did any of them join?

Mr. PROCTOR. I do not know, but I will say this. That when the Tallahassee Country Club took over the club, there was an article in the paper describing, giving information as to the forming of the club. It gave the names of the officers, it listed the directors, and it stated in the newspaper that the club would remain open to the public by payment of daily green fees, monthly dues or annual dues.

The CHAIRMAN. I have got a newspaper clipping here that says this:

> 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. The club plans to construct new facilities including a new club house and swimming pool.

Mr. PROCTOR. That is what I am referring to.

The CHAIRMAN. And so it was an announcement?

Mr. PROCTOR. It was an announcement to the public in the local newspaper.

The CHAIRMAN. By the club?

Mr. PROCTOR. By the club.

The CHAIRMAN. That it was open to all people, is that correct?

Mr. PROCTOR. That is correct, open to the public.

Senator KENNEDY. So it was generally known that a new club was being formed?

Mr. PROCTOR. Yes.

The CHAIRMAN. I want that admitted into the record.

(The article referred to follows:)

COUNTRY CLUB CORPORATION ELECTS 21 NEW DIRECTORS—DIRECTORS TO NAME OFFICERS BEFORE OCTOBER 1

The Tallahassee Country Club Corporation last night elected 21 directors to serve terms of three, two and one years beginning Oct. 1.

The 21 stockholders, including Temporary President Blair C. Stone, will meet sometime before Oct. 1 to elect permanent officers and adopt rules and regulations of the private club.

The Country Club organization took over operation of the club from the City on Sept. 1.

Those elected to three-year terms in addition to Stone were Paul Brock, Wilson Carraway, Julian Proctor, Robert Parker, Syd Andrews and Charles Ausley.

TWO-YEAR TERMS

Two-year directors are J. V. Smith, Ernest Daffin, Godfrey Smith, Payne Midyette, Ryals Lee, Cheever Lewis and Mark Ahrano. Three-year directors elected were Jimmy Lee, Sid Steyerman, M. R. Clements, Lee Foster, Edwin White, Charles Belvin and Frank Pepper.

In other action the club adopted its by-laws, one feature of which limits the club to its present membership of 400. It prohibits transfer of stock from one member to another without club approval.

Dues and fees, already tentatively agreed upon, will be confirmed later. In future years only one slate of seven directors for three-year terms will be elected.

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. The club plans to construct new facilities, including a new club house and swimming pool.

A new pro shop already has been constructed near the site of the first tee. New pro Chuck Rea began work on Sept. 1.

Mr. PROCTOR. There was generally a good bit of publicity about the new club, correct.

Senator KENNEDY. A good deal of publicity about the new club?

Mr. PROCTOR. Correct.

Senator KENNEDY. As the chairman mentioned, it was a front page story. People read the newspapers and it was generally understood that a new club was being formed, is that not correct?

Mr. PROCTOR. I assume so. We find a lot of things out in the newspaper.

Senator KENNEDY. And it was a golf club that was being formed, as the chairman mentioned, not just the repairing of a club house?

Mr. PROCTOR. Senator, that is one of the things that I thought I made clear very definitely the other day when you were absent. And I thought I brought it out a few minutes ago: The club plans to construct new facilities including a new clubhouse, swimming pool, tennis courts, et cetera. There is also a picture here that you might be interested in seeing, of the pro shop that we had.

The CHAIRMAN. Give it to the press. Let them see what kind of a club.

Mr. PROCTOR. This is not the club itself but it is a picture of the pro shop that we built actually while the city of Tallahassee owned it. While the city also operated this municipal golf course, we wanted air conditioning in the locker rooms, we members of the golf course paid for the air conditioning, in both the ladies' and the men's rooms. We also bought the furniture and decided if we had to do this, we would request that we lease the club. The club was in a rundown condition. A new club was greatly needed in Tallahassee.

Senator KENNEDY. What was the date of that newspaper story?

Mr. PROCTOR. September 5, 1956.

Senator KENNEDY. In February, February 15, 1956 in the Tallahassee Democrat there was another frontpage story about a municipal golf course leased to a private firm. I was wondering if that could be made a part of the record as well?

The CHAIRMAN. Read it. Let me see. Is it the same club?

Senator KENNEDY. It is the same club.

The CHAIRMAN. It will be admitted of course.

(The article referred to follows:)

[From the Tallabassee Democrat, Feb. 15, 1956]

MUNICIPAL GOLF COURSE LEASED TO PRIVATE FIRM—VOTE IS 4 TO 1 AS CITY MAKES DEAL FOR $1

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."

TO BE PRACTICAL

As for greens fees, Parker said, "We'll have to be practical in fixing dues."

Mayor Williams voted against the measure after asking Parker if he felt "$1 a year was an equitable amount."

Parker said in view of the financial losses of the course under city operation, and other factors, he felt it was.

City records show a loss of about $14,000 a year on the course.

AFTER COOLING OFF

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 a year payment.

The golf course was originally conveyed to the city along with outstanding indebtedness Aug. 27, 1935 with an agreement that if the city "desired to be relieved of the operation," the Tallahassee Country Club would have first option.

NINE HOLES ADDED

At that time the course was a nine hole layout, with nine holes being added during WPA times.

All in all, the land involved in the lease covers 206 acres.

Under the lease, the country club would pay for the upkeep of the course and clubhouse, pay all utility bills, and taxes levied by the city and county.

There is no assessment on the property at the present time since it is city owned.

Under the arrangement, the country club group would not pay any special improvement Liens such as roads.

The lease provides the country club group would have the right to operate a swimming pool, tennis courts, bowling alleys, shuffleboard courts and other recreational facilities.

Mr. PROCTOR. That was when?

Senator KENNEDY. February 15, 1956. This is just a copy. Maybe you can take a look. It is an exact copy of the text. As I understand it in reading that article, it said:

Asked if the course would be open to the public, Mr. Robert Parker, who represented the Country Club group said, Any acceptable person will be allowed to play.

Now in Tallahassee, Fla. in 1956 in the context of a golf course, can you tell us what "any acceptable person" meant?

Mr. PROCTOR. Senator, I would say that it would be the same as any private club, any acceptable person.

Senator KENNEDY. Isn't that really just another code name for whites only?

Mr. PROCTOR. I would not say so.

The CHAIRMAN. You don't believe it, do you?

Mr. PROCTOR. I beg your pardon, sir?

The CHAIRMAN. You don't believe it?

Senator KENNEDY. Wasn't there at the same time, was there a black golf course in Tallahassee?

Mr. PROCTOR. About the same time there was built a black golf course. I do not have the records of that. The city built a black golf course over near the Jake Gaither Park. Probably you have heard of Mr. Gaither. I do not have any dates. I could not tell you.

Senator KENNEDY. I would like to, Mr. Chairman, state on February 15 in this same article entitled "The Municipal Golf Course Leased to Private Firms" appears the following, and I am quoting, and it is on that page:

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.

Mr. PROCTOR. Now under construction.

Senator KENNEDY. That is right. "* * * to any responsible group that wants to take it over."

Don't you really think it is a fair inference that one club was going to be for the whites and one club was going to be for the blacks?

Mr. PROCTOR. Well, I think it is a fair inference it was going to be a private club.

Senator KENNEDY. And one was going to be for the blacks and one was going to be for the whites?

Mr. PROCTOR. That is what this states.

Senator KENNEDY. That is the newspaper article?

Mr. PROCTOR. I have not seen this article before.

Senator KENNEDY. As you say, it was generally understood——

The CHAIRMAN. Wait a minute, let him read it.

Read the article.

Mr. PROCTOR. "Municipal Golf Course Leased To Private Firm—Vote Is 4 to 1 as City Makes Deal for $1.

"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——"

Senator KENNEDY. Could I ask on this part here, did you know that there was an objection that was raised by the mayor?

Mr. PROCTOR. At that time?

Senator KENNEDY. Yes.

Mr. PROCTOR. I do not remember. However, I did attend that meeting. I do not remember. That has been a few years ago.

The CHAIRMAN. Was there any question of race mentioned in that meeting?

Mr. PROCTOR. No question of race mentioned in that meeting, and no question of race or discussion of race, of blacks during any of the formative stage of that private club.

The CHAIRMAN. What you are saying is that at no meeting was any question raised that entered——

Mr. PROCTOR. Ever entered into our discussion at the board and the meetings at which we were forming this club.

Senator KENNEDY. And that club meeting that took place about 2 months prior to this meeting which was part of the development of this corporation.

Mr. PROCTOR. That is correct.

Senator KENNEDY. Then will you continue reading, please.

Mr. PROCTOR. Which one?

Senator KENNEDY. Just what you were reading. Try "After Cooling Off."

Mr. PROCTOR. All right.

"The action came after a 2-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 hinted as the reason for the move."

Is that what you would like for me to read? Is that far enough?

Senator KENNEDY. Yes. Does that refresh your recollection?

Mr. PROCTOR. Not altogether.

Senator KENNEDY. Is it a fact——

Mr. PROCTOR. Just a minute. I think I have an article in here that I would like to read.

The CHAIRMAN. I do not see what one politician said——

Mr. PROCTOR. "First reaction to the move by several commissioners"—this is another article.

Senator KENNEDY. What date is that?

Mr. PROCTOR. This is dated on September 2, 1952.

"Country Club Organizers"—

Senator KENNEDY. We are talking about 1956, are we not?

Mr. PROCTOR. We are, but I would just like to read you an article about the same person.

Senator KENNEDY. I would be glad to have the article read to me. I would like to just stay on this point.

Mr. PROCTOR. Let me read you just one little sentence here.

The CHAIRMAN. Proceed.

Mr. PROCTOR (reading).

Commissioner H. G. Easterwood said he would consider leasing the club if the corporation would take over all expenses. Mayor Commissioner B. A. Ragsdale and Commissioner H. C. Summit could not be contacted for comment.

Senator KENNEDY. According to this article, Mr. Proctor, there had been, at least in the opinion of former City Commissioner Easterwood, racial considerations and this had been raised at one of the formative meetings, according to this article, had it not?

Mr. PROCTOR. Well, I do not know whether this was a meeting or if this was at a city commission meeting which I did not attend. It said this. After cooling off, the "action came after a 2-month cooling

off period following the proposal's first introduction." That could have been a city commission meeting. I was not a city commissioner.

Senator Kennedy. But that would still be at the time of the formation of this club, would it not?

Mr. Proctor. It would be at the time of the formation of the club.

Senator Kennedy. And racial factors had at least been raised, according to this article, by City Commissioner H. G. Easterwood. I am not asking whether you were at the meeting.

Mr. Proctor. That is right.

Senator Kennedy. According to this article they had been raised, had they not?

Mr. Proctor. Evidently they may have been raised. Commissioner Easterwood is no longer in this world, so I could not speak for him.

Senator Kennedy. But at least as reported on the front page of the newspaper?

Mr. Proctor. According to this article, yes, sir.

Senator Kennedy. They had been a matter of consideration?

The Chairman. But you never heard it?

Mr. Proctor. I have never heard Easterwood, I have never heard Julian Smith, mentioned in an article, raise any discussion of the blacks and whites during the formation of this club.

The Chairman. After all, the best evidence is not what one politician says in a newspaper, but it is what happened at those meetings. Now was any question raised at any of those meetings?

Mr. Proctor. It was not raised. It was not discussed at any of the formative meetings of the Tallahassee Country Club, Inc., by the directors or subscribing members before taking over the club. The article that I have here announced the fact that when the club was taken over, "and although it was a new private organization" that it was open to the public for daily, monthly, and yearly green fees.

The Chairman. And it was your understanding that that club was open to all members?

Mr. Proctor. That is correct.

Senator Kennedy. But it was also your understanding, further, that there were not any blacks that were either incorporators or members of that club?

The Chairman. He did not say that.

Senator Kennedy. I am asking him.

Mr. Proctor. In the group that I worked with, no. If there were any blacks on the 450 to 500 members who subscribed to the original stock, I do not know.

Senator Kennedy. Is it further your understanding that if the golf course had remained under city control, that it would have had to have been integrated?

Mr. Proctor. If it had remained under city control it may not have existed.

Senator Kennedy. If it had existed, under the Supreme Court decisions of 1955 would it not have had to be integrated?

Mr. Proctor. Under your Supreme Court ruling I assume that it would. That was the law.

Senator Kennedy. And so that the group that took over the golf course was an all-white group, was it not?

Mr. PROCTOR. The majority, yes. I do not know of any blacks. I do not know.

Senator KENNEDY. Is it further your understanding that if the course was a private club, which it was, under the Supreme Court decisions then, and even under then existing civil rights acts, that as a private club it did not necessarily have to be integrated?

Mr. PROCTOR. Would you repeat that question. I am not sure about that.

Senator KENNEDY. As a private club, the club did not have to integrate, did it, Mr. Proctor, under the Supreme Court rulings at that time, and as a municipal golf course it did have to integrate?

Mr. PROCTOR. Under the club as it was formed, it was open to the public. On July of 1957 the Capital City Country Club bought sufficient land from the city of Tallahassee, 10 acres to be exact, in order to build a new clubhouse and build the facilities that they desired. And also at that time it became—the club started out as a profit organization, and after that submitted a petition for a nonprofit corporation under a new club. That took place January 1st of 1957. The club petitioned the court to change the name to the Capital City Country Club, and to become a nonprofit corporation. At that time it became a private club.

The CHAIRMAN. The judge's only interest in it, you fellows called on him for $100?

Mr. PROCTOR. That is correct.

The CHAIRMAN. He never attended any meetings. Did he know anything about the club?

Mr. PROCTOR. I would not know how he would other than what he read in the paper, because he absolutely never attended a meeting. He never attended one of the early meetings.

The CHAIRMAN. And then?

Mr. PROCTOR. And then he withdrew his membership less than 6 months after. Well, I guess it was about 6 months after he joined, before the stock was ever issued and before it became a club.

Senator KENNEDY. Mr. Proctor, if he read the newspapers, if he read the front page of that newspaper, he would understand from that article that has been included as part of the record, and which you referred to, that there was the formation of a new and private club, that there was also a club that that would be available for blacks, that the new club was going to be available to only "acceptable persons," and certainly I do not think it would be unreasonable to assume given the situation at that time, that acceptable persons would have a segregated connotation to it. And furthermore, if he read that article——

Mr. PROCTOR. Senator, I would like to say that in trying to get a new club started like that, there are a lot of people who are approached as a civic duty and asked to contribute.

Senator KENNEDY. Further——

The CHAIRMAN. Are you through?

Mr. PROCTOR (continuing). To get a club started. I feel sure that that was probably and I know that is the reason Judge Carswell joined, because he is not a golfer. At that time his family, his children were not large enough to play golf, and we did not have facilities there that was an inducement for anyone to join the club. We were

trying to get something started, get a club started that we could enjoy and that would be an asset to the city of Tallahassee, and it was greatly needed. We also went to many others. Governor Collins was one. I think he mentioned here during his testimony that he was approached and probably had $100 invested and did not know what was going on. But Judge Carswell was never active other than the fact that he made a subscription by payment of $100 toward membership. Before the club was formed completely he withdrew his membership and got his money back.

Senator KENNEDY. As I understand it, the club itself, those initial incorporators did do at least one thing. That was to take over the lease of this land, did they not?

Mr. PROCTOR. That is right, the lease was assigned to this group, that is correct.

Senator KENNEDY. So they did function?

Mr. PROCTOR. Functioned to that extent, correct, but Judge Carswell was not functioning. His name was there.

Senator KENNEDY. No further questions, Mr. Chairman.

The CHAIRMAN. You are excused, sir.

We are going to recess until 9 o'clock in the morning. We are going to hear two witnesses from 9 until 11:30 and the hearings will be closed.

We have had requests over the weekend from a number of people who wanted to testify. They can file a statement up until Thursday of this week.

There will be an executive session of the Judiciary Committee at 11:30 tomorrow morning.

The committee is now adjourned for today.

(Whereupon, at 6:50 p.m., the committee was recessed, to reconvene at 9:00 a.m. Tuesday, February 3, 1970.)

NOMINATION OF GEORGE HARROLD CARSWELL

TUESDAY, FEBRUARY 3, 1970

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 9:10 a.m., in room 2228, New Senate Office Building, Senator Joseph D. Tydings presiding.

Present: Senators Tydings (presiding), Ervin, Hart, Kennedy, Burdick, Bayh, Fong, Thurmond, Cook, Mathias and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

Senator TYDINGS. We will continue the hearings on Judge Carswell's nomination to be a Justice of the Supreme Court.

I would like to welcome before this committee Joseph L. Rauh, Jr., and Clarence Mitchell, whose illustrious background and biographical sketch needs no further mention.

TESTIMONY OF CLARENCE MITCHELL, LEGISLATIVE CHAIRMAN, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. MITCHELL. Thank you, Mr. Chairman and members of the committee.

I must say that as a native of the State of Maryland, I feel especially happy to be before you Senator Tydings as acting chairman of the committee, and also before you Senator Mathias. I admire both of you greatly and I feel this is a wonderful opportunity to present our case.

I would like to say before I begin, Mr. Chairman, that I have heard a number of reports which indicate that there are those who have thrown in the towel and it is assumed that this presentation is an exercise in futility.

I do not come here in that spirit. I come here in the spirit that this committee is still open to hearing what we have to say and that it will weigh what we present in reaching its decision.

I also believe that the Senate of the United States will take the evidence into consideration when it considers this nomination.

I would not take up the time of this committee if I thought that the result had already been determined and it was useless to present our case.

Senator MATHIAS. Mr. Chairman, if I could interrupt the witness just very briefly, I would like to respond to his opening remarks and say that we welcome him here not only as a distinguished citizen of Maryland, but he and I have had an opportunity to do business together in the other body as well as here on a number of matters, and I have always found that the information that he brings to the

Congress is useful, dependable, and I know that on this occasion as on all occasions in the past it will receive the kind of consideration that its author merits.

Mr. MITCHELL. Thank you very much, Senator Mathias.

Mr. Chairman, on a procedural matter, I would just like to mention that ordinarily I try to save the time of the committee by summarizing my statement, but in this instance I have given considerable thought to this. I have tried to weigh its contents, and with your indulgence I would like to read it in full. I also would like to call attention to the fact that joining with me is Mr. Rauh, one of the most distinguished lawyers in our country, who is the general counsel of the Leadership Conference on Civil Rights, and at the close of my testimony I would appreciate an opportunity for him to follow immediately, because it is our arrangement that questions arising on legal matters that are included in this testimony would be answered by him.

I would like to just say that I have this brief statement about his background that I would like to read. He has been so deeply engaged in so many crusades for the public interest that people tend to lose sight of his remarkable scholarly attainments.

Mr. Rauh graduated from Harvard College in 1932 magna cum laude and first in his class. He served as a law clerk to both Justices Cardozo and Frankfurter, to whose seat Judge Carswell now aspires.

Mr. Rauh has argued many significant constitutional cases before the Supreme Court, and has written widely on the subject of human rights. I am sure all will agree that he is uniquely qualified to analyze the nominee's record before this committee.

Now my prepared statement begins.

Mr. Chairman and members of the Judiciary Committee:

I am Clarence Mitchell, director of the Washington Bureau of the National Association for the Advancement of Colored People, and legislative chairman of the Leadership Conference on Civil Rights. The NAACP and the Leadership Conference are opposed to the nomination of Judge G. Harrold Carswell to the U.S. Supreme Court.

It is not easy for one to appear before this or any other committee for the purpose of opposing a Presidential appointment to high office. Because he has been elected by the people of the United States, there is a proper and wholly understandable inclination of citizens to accept the President's recommendations on those who will carry out his policies and programs in the executive branch of Government. To some extent, the same attitude applies when a President makes appointments to the judicial branch of Government. However, there is a major difference. The executive branch appointees are usually for the duration of the President's term or terms in office. The judicial appointments are for the lifetime of the nominees and through such nominees, presidential policies may stretch far beyond the term or even natural life of a Chief Executive.

In these times the people have a right to demand that appointees to all of the courts, and most especially the United States Supreme Court, be scrutinized with great care. The people have a right and a duty to insist that the nominees be free from racial bias and also free from a record of advocacy or the practice of racial bias. The record of Judge Carswell is not free from the taint of racial bias. It is tragic that he is already a member of the Judiciary in the Fifth Circuit.

This tragedy will be compounded if he is approved for a place on the Supreme Court.

At three points in Judge Carswell's adult life he has elected to cast his lot with those who seek to deprive Negroes of first class citizenship. On each of these occasions he has chosen to take on the protective coloraton of the wrongdoers because that was the accepted practice in the area where he lived at the time. We do not challenge his right as an individual, whether as a technique of survival or because of personal beliefs, to consort with racists and advocates of segregation. We do challenge his right to sit in judgment in our Federal courts at any level when he joins those who seek to maintain a society in which some citizens are consigned to second class status simply because they are not white.

Judge Carswell's first opportunity to take a stand came in 1948 when he was a candidate for State office in Georgia. In order to understand the seriousness of what candidates were saying in that time it is necessary to look at the events which were then occurring. On December 5, 1946, President Harry S. Truman issued Executive Order No. 9808 establishing the President's Committee on Civil Rights. In issuing that Executive order the President said:

> Freedom from fear is more fully realized in our country than in any other on the face of the earth. Yet, all parts of our population are not equally free from fear. And from time to time, and in some places, this freedom has been gravely threatened. It was so after the last war, when organized groups fanned hatred and intolerance, until, at times, mob action struck fear into the hearts of men and women because of their racial origin or religious beliefs.
>
> Today, freedom from fear, and the democratic institutions which sustain it, are again under attack. In some places from time to time, the local enforcement of law and order has broken down, and individuals—sometimes ex-servicemen, even women—have been killed, maimed, or intimidated.

The State of Georgia was among those driven by strife created by those who were determined to keep the Negro "in his place", as they say, with force, violence and murder. There was but a short step from the inflammatory phrase spoken in the political hustings to the physical attack on individuals solely because of their race. The committee appointed by President Truman carried out its assignment. In 1948, it published a report setting forth four basic rights which "influenced its labors." These rights were safety and security of the person, citizenship and its privileges, freedom of conscience and expression and equality of opportunity.

One gruesome example of the committee's findings occurred on July 20, 1946, when four Negroes were lynched in Monroe, Ga. This is the direct quotation from the committee's report:

> On July 20, 1946, a white farmer, Loy Harrison, posted bond for the release of Roger Malcolm from the jail at Monroe, Georgia. Malcolm, a young Negro, had been involved in a fight with his white employer during the course of which the latter had been stabbed. It is reported that there was talk of lynching Malcolm at the time of the incident and while he was in jail. Upon Malcolm's release, Harrison started to drive Malcolm, Malcolm's wife, and a Negro overseas veteran, George Dorsey, and his wife out of Monroe. At a bridge along the way a large group of unmasked white men, armed with pistols and shotguns, was waiting. They stopped Harrison's car and removed Malcolm and Dorsey. As they were leading the two men away, Harrison later stated, one of the women called out the name of a member of the mob. Thereupon the lynchers returned and removed the two women from the car. Three volleys of shots were fired as if by a squad of professional executioners. The coroner's report said that at least 60 bullets were found in the scarcely recognizable bodies. Harrison consistently

denied that he could identify any of the unmasked murderers. State and Federal grand juries reviewed the evidence in the case, but no person has yet been indicted for the crime.

The reaction of the country to the report was varied. Some viewed it with great acclaim and others denounced it. Most of those who denounced it were in the areas of the most acute racial discrimination, particularly in the State of Georgia. This report and other efforts to liberalize the racial policies of the Democratic Party became a major campaign issue. Some individuals who sought office or were public officials in the South attempted to defend the principle of equal treatment under law. Some left the party to form or participate in other political organizations. Some remained in the Democratic Party but adopted an outright racist stance during their campaigns. Judge Carswell was in this last group that adopted the outright racist stance in the campaign. His statement while campaigning said:

I am a Southerner by ancestry, birth, training, inclination, belief and practice. I believe that segregation of tbe races is proper and the only and correct way of life in our State. I have always so believed and I shall always so act. I shall be the last to snbmit 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 limit 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.

It is interesting to note, this statement did not come to general public attention until 22 years after he made it. The question arises, how can a man be investigated for the office of U.S. attorney, U.S. district judge, U.S. judge on the circut court of appeals, and as a nominee for the U.S. Supreme Court without this significant part of his life being weighed in the consideration of his fitness for office? It emphasizes the callous approach to racial matters in our country. There are a great many people who just do not take such statements seriously. We do take them seriously. We do not think they are excused by the youth of those who make them. But, even if youth is a defense, Judge Carswell was a mature adult at the time he made this statement and cannot claim that his tender years provide immunity from the censures that attach to such statements. In addition, there is nothing to show that in the long period of his public life between 1948 and the present that the judge has rejected, retracted or reformed with respect to his 1948 views. Only now, when the prize is a place on the U.S. Supreme Court, does he come forth to acknowledge that such a statement was error. Because this statement was brought to light by a private citizen, it is reasonable to assume that a more careful investigation by the duly authorized government representatives may well reveal other expressions of this kind made at a later date.

Indeed Newsweek magazine only this week in the current issue contains a story about the judge's telling of one of the things that in the old days we used to call darkie stories at a meeting of distinguished lawyers in which he said he talked to a black man in Indo-China and asked him whether he was from Indo-China, and the man replied, "No, I'se from Outdo' Georgia."

In order to get the point of that joke one must realize that this is a play upon dialect that Negroes are supposed to use as clowns and persons unworthy of recognition as first class citizens.

Senator KENNEDY. When was that?

Mr. MITCHELL. This according to Newsweek was just 2 months ago. He was the principal speaker at the Georgia State Bar Association meeting in Atlanta, and the story says one of the lawyers indicated "that some of us were really shocked" because this is recognized to be in poor taste now by public officials, and it is really one of the indiciae of an attitude of consigning Negroes to an unimportant status, so that when they get killed it is not very important or when they are subjected to discrimination in jobs, housing, and things of that sort, really you do not take them quite as seriously as you would a normal human who would happen to be white.

It is reasonable to assume, as I said, that a more careful investigation would reveal similar statements, but we contend that standing alone the statement that the judge made in 1948 as an appeal to persons for the vote is sufficient to bar him from the Supreme Court.

We do not say you should never forgive anybody for making a mistake, but we do say with the Supreme Court it is a different kind of a situation, and that his 1948 racist statement is enough to bar him from the Court.

No amount of political expediency, no amount of personal criticism expressed against those who oppose this appointment and no attempts to dismiss the statement as one made in the "heat of the campaign" will ever be accepted by most Negroes in the United States and most civilized people in the world as legitimate excuses for approving this nomination. The stark fact now is this: An advocate of racial segregation has been named by the Nixon administration to serve on the U.S. Supreme Court. Now that this fact is known, those who vote for the approval of this nomination will be voting to place a segregationist on the U.S. Supreme Court.

There is a second chapter in Judge Carswell's life which must also be reviewed in the context of the times. It is interesting I had that in the text in my statement and Senator Hruska mentioned yesterday that we have to look at things in the context of the times, and I think it is fair to do that. In the 1940's the Negroes of the United States expanded their legal attacks on segregation to include swimming pools, golf courses, play grounds, parks, and other recreational facilities owned and operated by State, municipal, or other government units. In St. Louis, Mo., a court granted an injunction against the city for its refusal to allow Negroes to use a municipal swimming pool. (*Draper* v. *City of St. Louis*, 1950.)

I might say, Mr. Chairman, that I have the citations on the cases that I have included here on a separate sheet. I offer that for the record in case anybody wants to check on it.

(The document follows:)

CASES CITED IN TESTIMONY

Lopez v. *Seccombe*, 71 F. Supp. 769 (S.D. Cal 1944).
Law v. *Mayor and City Council*, 78 F. Supp. 346 (1948).
Rice v. *Arnold*, 340 U.S. 848, 54 SO. 2d 114 (1950).
Beale v. *Holcombe*, 193 F. 2d 384, 347 U.S. 974 (1951).
Holmes v. *City of Atlanta*, 350 U.S. 879 (1955).
Moorehead v. *City of Fort Lauderdale*, 248 F. 2d 544 (1957).
Steele v. *Board of Public Instruction of Leon County, Fla.*, 371 F. 2d 395 (1967).
Draper v. *City of St. Louis*, 92 F. Supp. 546 (E.D.Mo., 1950).

Mr. MITCHELL. Similar decisions had been given in California (*Lopez* v. *Seccombe*, 1944) and in municipally owned golf courses (*Law* v. *Mayor and City Council of Baltimore*, 1948).

In 1950 a Florida court upheld regulations providing for the use of a municipal golf course by Negroes on Monday only, the claim being that the allocation of time to 1 day was in proportion to the Negro use (*Rice* v. *Arnold*, 1950). The Florida Supreme Court upheld this decision on the basis of the "separate but equal" doctrine. Subsequently, the U.S. Supreme Court held that racial segregation on publicly owned gold courses was unconstitutional (*Holmes* v. *City of Atlanta*, 1955).

To avoid complying with the clear intention of the Supreme Court decision, many public officials either closed the facilities that were available for recreation or transferred them to private ownership.

I would just like to backtrack, Mr. Chairman and members of the committee, to point out that I said in my statement the Supreme Court had held that racial segregation on golf courses was unconstitutional. Because this is the Judiciary Committee, I think I might indicate what was technically correct: The Law case which I have mentioned in the city of Baltimore went up to the Supreme Court, and the *Holmes* case of Atlanta also went up to the Supreme Court. The Supreme Court in two memoranda decisions held that these cases had to be reviewed in the light of the *Sweatt* and *McLaurin* cases, which had been decided by the Supreme Court. The Florida State supreme court, when the case got back there, interpreted that to mean that separate but equal was permissible. The Florida supreme court held that it was possible to meet the Supreme Court's requirements simply by having 1 day set aside for Negroes on the golf course, because this was all that the traffic seemed to require. To avoid complying with even this limited interpretation of the Supreme Court, many public officials either closed the facilities that were available for recreation or transferred them to private ownership.

For example, in 1956, the Georgia State parks director leased nine of the parks to private citizens at an average price of $2,000 per month to preserve segregation. In 1957 the residents of Marshall, Tex., voted to sell their municipal swimming pool after a suit was filed against segregation. The New York Times for July 10, 1957, reported the Fort Lauderdale, Fla., sold its $1 million golf course for $526,400 to private people to evade a Federal court ruling permitting Negroes to use the course.

All of these events certainly should have come to the attention of persons in the city of Tallahassee.

On April 24, 1956, citizens of Tallahasse, Fla., where Judge Carswell was then residing, changed their golf course from a municipally owned facility where Negroes played on a very restricted basis to a privately owned facility where Negroes could not play at all. They were banned because of race.

I understand that some of the citizens down in Tallahassee have submitted affidavits to the committee, and I have copies of those affidavits here with respect to this matter. The first one is from Mrs. Christina Ford Knowles, and it is dated the first day of February 1970. She says:

I am an adult black citizen residing in Tallahassee, Florida, who has worked as an Administrative Assistant to the Reserve Officers Training Corps for five-

and a half 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 he 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 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.

There is another affidavit here from a gentleman who has played on the golf course, and the burden of that is that he played on it while it was under public auspices, but was barred from playing when it went under private auspices.

We have also here an affidavit from a white citizen. This is from Mrs. Clifton Van Brunt Lewis, and it says:

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 splendid 205 acres through an agreement whereby the city paid off a $6,500 note and agreed to obtain funds to improve the property. The agreement stipulated that the funds should be $35,000 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 iuvited to join the Capital Country Club at its inception. We refused the invitation because we wanted no part in converting public property to private use without just compensatiou 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 inceptiou several years before the Country Club fiasco. In this Council I knew first-hand from Dr. 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 tbat I had with a variety of parties during that period on the subject of a golf course, the issue being of wide civic concern. I would have heen suprised 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 aud a city commissioner was known to have raised questions about the racial implications involved.

At this point, Mr. Chairman, with your permission I would like to offer for the record these affidavits plus a reprint of a story that appeared in the Tallahassee Democrat for February 15, 1956, on page 1. That story is the one to which you referred, Senator Kennedy,

yesterday, and I therefore will not read it again, but I would like to offer these for the record.

Senator KENNEDY. They will be received.

(The affidavits referred to follow:)

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 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, 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.

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 splendid 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 Dr. Charles U. Smith, Profes-

sor 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

DULUTH H. BAKER, JR.

Mr. MITCHELL. It is well known that Judge Carswell is listed as one of the incorporators of this private club. If Judge Carswell had been an ordinary citizen unaware of the full implication of signing articles of incorporation or if he had been a lawyer in private practice who wished to be of assistance to his fellow citizen this action would not be important.

I would just like to digress a minute, Senator Kennedy, to point out that I was present when you examined Judge Carswell on that point, and I was struck by his reticence in saying what common sense indicated a lawyer and a judge should say. You asked him whether he was aware of signing this document, and he said it was just for the purpose of repairing some little broken-down clubhouse. Then when you got into the reading of the articles of incorporation, I think the lawyer and the judge in him triumphed, because he had to admit that he was aware of the purposes of this corporation.

This was no ordinary signing of a document that some friends handed to him and he just signed it.

I can well remember once somebody handed me some articles of incorporation to sell something which they said they would not describe to me, but I took the trouble to look at it, and discovered that it was something promoting what they called Civil Rights Whiskey. I think Senator Tydings knows that I would get into much trouble with my mother-in-law, who favors total abstinence, if I had signed that document. I had commonsense enough not to sign it. I certainly think that, given the civil rights issues of the times, one had to read that kind of property transfer document with care. I cannot believe that Judge Carswell did not know what he was doing. He was the U.S. district attorney sworn to uphold the Constitution and laws of the United States. As such, he had an obligation, not only to avoid participation in efforts to defy the law, but also to avoid the appearance of participation in such efforts.

He did not fulfill this obligation. He signed a document which, whatever may have been its original objective, accomplished the result of banning Negroes from a recreational facility solely because of their race. It is interesting to note that those who defend Judge Carswell first excuse him for his 1948 racist utterances on the grounds of youth, but his 1956 action is somewhat more difficult. Nevertheless, they are inclined to excuse this also because it was a so-called routine signature and he paid a small sum of money to accomplish the noble purpose of repairing a damaged clubhouse located on the golf course property, according to his version.

It may be that the members of this committee can accept this explanation given by Judge Carswell and still be at peace with their

own consciences, but it is unlikely that reasonable men and women outside of the Senate will accept it. Those who favor racial segregation undoubtedly will rejoice if the expanation is accepted because it will be proved that sophisticated methods of evading the law have triumphed, but they most likely, even though segregationists, will know that the explanation is ridiculous on its face. Those who do not favor racial segregation will feel the cold iron pressure of the chains of frustration once again restraining their efforts to achieve a society in which those who deny equal treatment to their fellow citizens are not rewarded with high office and new opportunities to poison the wells of justice as judges on the bench.

The third opportunity for Judge Carswell to demonstrate by his action that he had repudiated the 1948 speech came after the great decision of the U.S. Supreme Court in 1954 outlawing racial segregation in the public schools. By that time he was a judge on the bench of the northern district of the State of Florida. Others have dealt more in detail with his record as a judge, and Mr. Rauh will also comment on that point.

I offer one example which indicates how he again became a part of the pattern which is exemplified by the words of his 1948 speech. It is well known that the unthinking and unskilled advocates of segregation resisted the 1954 decision with force, intimidation, violence, economic pressure and even murder. It is also well known that the wiser and more sophisticated forces of resistance resorted to changes in the laws of States, delays through extended litigation and other obstructionist tactics under the color of law. Judge Carswell was a part of this latter strategy. Even if we assume that he was unknowingly a part of it, the end result is the same. He was a force which contributed to the pattern associated with the delay in implementation of the school desegregation decision. The example I offer is *Steele* v. *Board of Public Instruction of Leon County, Fla.* This was a suit instituted in 1963 to require desegregation of public schools. Because of delays largely chargeable to Judge Carswell, the case was not settled until 1967. Counsel in the case discussed it yesterday in the hearings before this committee.

In closing this presentation, it should be remembered that in a convention of wolves it is always easy to pass a resolution justifying raids on the sheepfold because the occupants thereof willfully and knowingly stimulate the flow of gastric juices in the digestive system of the predators. This lupine type of reasoning is widely used in our society today—especially in the area of civil rights.

We urge our citizens to rely upon the law, but we appoint prejudiced law officers as enforcers. We breathe a sigh of relief when Negroes go into the courts instead of into the streets, but we then confront them with judges who have decided to deny them relief even before they enter the courthouse door.

The one great exception to all of this has been the U.S. Supreme Court. This Court is under attack and condemnation because it has handed down decisions that destroy longstanding unjust practices. The State legislatures pass unconstitutional restrictions on freedom and the Supreme Court is condemned because it strikes down such monstrous attacks on liberty. Those who vilify the Supreme Court have learned to make use of vague words and phrases that arouse base pas-

sions and protests against the most noble tribunal in the civilized world.

One of the phrases current today is "strict constructionist." One may very well ask what does that mean? The simple answer is it means everything and it means nothing. Therefore, it is better to speak in plain words when one describes the qualifications that are being sought in a judge who is to be elevated to this high Court. When one makes a plain word substitute for this term it is necessary to look at the policies and practices of this administration, the Nixon administration.

These policies and practices are clearly designed to create further and inexcusable delays in the desegregation of public schools. This is the policy now employed by the U.S. Department of Justice. It was the policy of Judge Haynsworth and it is a clearly discernible thread in the decisions given by Judge Carswell. We believe that if the administration's desire to have a so-called strict constructionist on the Supreme Court has any meaning in the case of the nominee now before this committee, it means that the President wants a judge who will use his office to delay school desegregation in particular and all other civil rights progress in general.

But, let us see what Judge Carswell thought about that term "strict constructionist." He did not give a clear definition in a reply to a question on that point. Instead, he offered the committee a new phrase by saying that, "I do not think the Supreme Court should be a continuing constitutional convention." The hearer is entitled to ask what does that mean? Does it mean that the Court was sitting as a convention when it upheld the right of Negroes to play on a publicly owned golf course? Does it mean that the Nation's highest tribunal is no longer acting as a court when it orders implementation of a 15-year-old decree against segregation in the public schools? In the light of his past record, it is fair to conclude in these instances that Judge Carswell would believe that such decisions are the products of a "continuing constitutional convention" rather than the constitutionally sanctioned decisions of a court of law.

We have seen and heard many of the supporters of his nomination. Some of them are reasonable men who have appeared from time to time as champions of civil rights. Their advocacy of approval for this nomination is another indication of the wide gulf that separates the reality faced by the oppressed and the insulated world in which their sympathizers live. As one travels about the country, it is clear that the victims of racial discrimination are not convinced that Judge Carswell has really abandoned his belief in the wisdom of racial segregation and the verity of white supremacy. Perhaps it would be possible for the men of good will, who support Judge Carswell, to understand the feelings of the victims of racial discrimination if those gentlemen would suppose for a moment that they were considering a nominee who in his early adult career had blatantly expounded the doctrines of Adolf Hitler or Josef Stalin. We might accept his profession of a change of ways 20 years after the speech was made, but we would not put him on the U.S. Supreme Court or any other Federal court. Most of the black citizens of the United States do not believe there is any difference between European demagoguery and the homegrown variety which, for want of a more odious term, we call racism.

The Negroes of America are waiting to see whether the Senate of the United States will ratify racism by confirming this nominee in spite of

his speech and in disregard of his record. We hope that the grave error which was committed when Judge Carswell was nominated will not be riveted into the history of our country by the Senate of the United States. Therefore, we ask that the nomination be rejected.

This concludes my testimony and I yield to Mr. Rauh, Mr. Chairman.

Senator TYDINGS. Mr. Rauh.

A VOICE FROM THE AUDIENCE. Excuse me, I would like to make a statement.

Senator TYDINGS. We have two witnesses, Mr. Mitchell and Mr. Rauh now, and we are going to hear from Mr. Rauh at this time.

The Chair recognizes Mr. Rauh.

TESTIMONY OF JOSEPH L. RAUH, JR., GENERAL COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. RAUH. Members of the Senate Judiciary Committee:

My name is Joseph L. Rauh, Jr. I appear here today with Mr. Mitchell. I am general counsel of the Leadership Conference on Civil Rights. I am also appearing as vice chairman for Civil Rights of Americans for Democratic Action.

On August 2, 1948, the then Mr. Carswell said:

> I yield to no man * * * in the firm vigorous belief in the principles of white supremacy, and I shall always be so governed.

That is possibly the worst statement ever made by a candidate for the U.S. Supreme Court. It is certainly the worst statment made by a candidate for the U.S. Supreme Court in this century.

Worse yet, Judge Carswell still does not understand the enormity of what he said. Let me explain that. Judge Carswell and others referred to the fact that this statement was pre-Brown. What difference does it make that it was pre-Brown? *Plessy* v. *Ferguson*, a much hated case, was the law of the land pre-Brown, but *Plessy* v. *Ferguson* stated the proposition that all men are created equal, that they must have equal facilities if separate.

The doctrine of white supremacy espoused by then Mr. Carswell was as much a violation of *Plessy* v. *Ferguson* as any he could possibly have proclaimed. The law of America at the very moment he spoke was equality, and I think he does not even today see that what he said was not just prosegregation which was valid pre-Brown. He does not see that white supremacy ended with the end of slavery and the 13th, 14th and 15th amendments. He still has some idea that it was not so bad because Brown came out later. I hope I have made clear the situation as it was pre-Brown.

Now Judge Carswell having made this statement, there is in law a presumption of a continuation of a shown condition or state of affairs if the contrary is not shown:

"From proof that a certain relationship, status, condition, or state of affairs has existed, it may be presumed that such status, condition, or state thereafter continued to exist, in absence of proof to the contrary * * * Where the habits and character of persons have been in issue, the rule has been applied. I Jones, Evidence, fifth edition, 1958, section 66, page 117."

In other words, the law presumes that Judge Carswell's statement continues to be his position, unless he has rebutted that presumption.

Now the testimony I intend to give this morning is to show that there has been no rebuttal of the presumption of continuancy of his white supremacy position, and indeed that everything that has happened since has reaffirmed his white supremacy position.

First, there has been no direct repudiation by Judge Carswell until several days after he was nominated for the Supreme Court of the United States. For 22 years that statement stood as an unrepudiated position reaffirming the presumption that it continued as his position.

Furthermore, and more damaging, there has been no indirect repudiation of that statement. No witness here, including Judge Carswell, has pointed to a single writing exhibiting compassion for the Negroes of America. Judge Carswell's 1948 white supremacy statement stands unrepudiated and unrebutted on the record of his actions to which we can now turn.

The golf course incident has been much discussed. Judge Carswell was an incorporator and director of a private golf course whose purpose was to deprive Negroes of the opportunity to play on the municipal course. He did this as U.S. Attorney. I say after thought and after consideration that there is a serious question whether incorporation and operation of a segregated golf course under these circumstances was a criminal act; 18 U.S.C. 241 makes it a felony to conspire to "injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."

In *United States* v. *Price*, 383 U.S. 787, that section, that is 18 U.S.C. 241, was interpreted to apply to 14th amendment rights. Although this ruling came after the golf course incident, it was no change in the law, but a declaration of the intent of the statute as passed in 1870.

If in fact the city, city officials and private persons did scheme to segregate the municipal golf course by passing it into private hands, they were depriving Negro citizens of clearly defined 14th amendment rights.

Some months previously the Supreme Court had held in *Holmes* v. *City of Atlanta*, 350 U.S. 879, I believe it was in November 1955, that municipally owned golf courses must be desegregated. It would seem that the present operators of the course, who hold it under a 99-year $1 a year lease, continue such a denial of 14th amendment rights under *Burton* v. *Wilmington Parking Authority*. Therefore the question should arise whether in fact a criminal conspiracy existed.

I do not want to repeat earlier testimony. I only want to refer to the fact that Leroy Clark, a professor at New York University, John Lowenthal, a professor at Rutgers, Ernst Rosenberger, a lawyer in New York City, and Norman Knopf, a lawyer in the Justice Department, if he is still there, all came here to testify to the hostility of Judge Carswell in the mid-1960's—not in 1948, not in 1956, but in the mid-1960's. All four of them, unrebutted, testified that he was hostile to civil rights and civil rights workers in the mid-1960's.

Now before analyzing the 15 cases in which Judge Carswell was reversed for denying human and individual rights, I feel it necessary as a lawyer to call this committee's attention to the nominee's wholesale lack of candor on both the white supremacy statement and the golf course incident.

First with respect to the white supremacy statement. When he was told about this, he went on television and referred to the fact that it had been "attributed" to him. He tried to explain that evasion before this committee, but I believe wholly unsucessfully.

When a man has made that speech, has had those views—he even told Senator Hart, I believe it was, that he believed those views—he should have known that they were not attributed to him. They were the statements he had made.

Furthermore I think his effort to indicate that this statement was pre-Brown and therefore explained by that fact was equally a lack of candor, but I think I said enough about that before.

But the worst lack of candor came on the golf course incident. There were seven statements, seven statements, made during the golf course incident, that if you had had a witness up here for anything else, you would have jumped all over him and made perfectly clear what you thought of his willingness to tell the truth. I will give you these seven.

On page 20 of the transcript Judge Carswell said, and I quote:

I read the story very hurriedly.

Who in this room would believe that a man nominated for the Supreme Court of the United States, having had the statement on white supremacy come out, having seen a story which corroborated the white supremacy statement, knowing that his job on the Supreme Court was at stake, would have, and I quote:

read the story very hurriedly.

Secondly, on page 22 of the transcript Senator Hruska said:

Were you an incorporator of that club as was alleged in one of the accounts I read?
Judge CARSWELL. No, sir.

On page 66 he admitted he had been an incorporator.

Three. At page 21 of the transcript he said:

I was never an officer or director of any country club anywhere.

The face of the incorporation papers put in the record here demonstrate he was a director.

Four. On page 24 Judge Carswell was asked by Senator Hruska:

Were you familiar with the by-laws or the articles of incorporation?
Judge CARSWELL. No, sir.

But look on page 66:

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.

Five. On page 21 he said:

Judge CARSWELL. Somewhere about 1956, someone, a friend of mine—I think he was Julian Smith—said, we need to get up some money to do something about repairing the little wooden country club.

But on page 67 he says, in answer to a question by Senator Kennedy:

Would this lead you to believe that their only interest was just in the building of a clubhouse?
Judge CARSWELL. Oh, no: I certainly was aware that there would be things going on around the clubhouse that normally do.

Six. At page 23 this appears:

Judge CARSWELL. There has certainly been no racial discrimination among the guests.

The affidavits Mr. Mitchell has put in the record rebuts that completely.

Seven. On page 148, the next day:

Judge CARSWELL. This was a defunct outfit that went out of business.

What was the true fact about that? The resolution which I believe is part of the record of this corporation, made perfectly clear that it was not going out of business. The resolution made perfectly clear that the corporation was making one small change, namely a shift from profit to not for profit. Now what actually happened is perfectly clear. Somebody goofed. When they did the original incorporation, they put it under a profit statute of Florida. Well, that was a mistake. Nobody expects a country club to make money. Everybody assumes a country club has got hard times. Anybody who belongs to a country club knows it is a nonprofit operation.

You are damn lucky if you get somebody to pay the deficit. So all they did was shift under the corporate laws of Florida from a profit-making corporation to nonprofit, and this is the resolution making the shift.

There are certain whereas clauses. Then it says:

"Whereas it is deemed wise and expedient to change the corporate nature of the Capital City Country Club, Inc., from a corporation for profit to a corporation not for profit: Now, therefore, be it *Resolved*," that we are going to make the change and then follows: "Be it further *Resolved*, That all acts of the stockholders and directors of Capital City Country Club, Inc., to this date, be and they are hereby approved and ratified; and further, that it is the sense of this meeting that all of the directors and officers of this corporation be continued in their present status, respectively, in the new corporation, Capital City Country Club, when duly organized."

How can anyone say that the original club went defunct when it simply changed from profit to nonprofit? The word "defunct" was absolutely wrong on the basis of that resolution.

I do not know how you describe seven misstatements by a nominee for the Supreme Court on one incident and I guess what I think I ought to simply do is leave the adjective out. That is up to the committee. I have stated the facts, and I will leave it at that.

Now I want to come to the 15 cases in which Judge Carswell was unanimously reversed by the Court of Appeals in the area of human and individual rights. I did not look at all of the other cases in the limited time. I did not read the way Van Alystyne and Pollak read. I want this perfectly clear. Van Alystyne and Pollak, who are scholars, read through whole volumes. Their opinion of Judge Carswell comes from the reading of say a whole Federal Supplement volume, one case after the other, and they got their low opinion of him that way.

They read a random cross-section of opinions. I think Van Alystyne said that he read them all except in the court of appeals, and I think that Pollak said he had read 5 years. That is not what I did. I am not really any longer qualified to read in all the other areas. I do not teach law and there would be some areas that would be Greek to me. I

am testifying on particular cases that I have not only read but studied, and which in my judgment render Judge Carswell unfit for the Supreme Court, which deals so much in the area of civil rights and individual rights.

Let us go into these 15 one by one, and where there has been discussion previously, I would simply like to add to it, not repeat it.

The first case is *Augustus* v. *Board of Public Instruction of Escambia County, Fla.* In the court of appeals the citation is 306 F. 2d 862 (1962). This is the so-called *Pensacola School System* case.

The Pensacola School System was wholly segregated as of 1960. Suit was commenced on February 1, 1960, by Negro parents. The first thing that Judge Carswell did was strike the effort by the Negro parents to desegregate the school faculties.

Now it would not have been so bad after a hearing to have ruled against faculty desegregation, because the law was unsettled on faculties at that moment. I would be the first to admit that; the law was unsettled. But Judge Carswell ridiculed these Negroes who sought to get desegregated faculties. He made a joke of them.

Let me read you what he said about them. Judge Carswell granted a motion to strike the part of the case that dealt with teachers, and this is what he said:

> Students herein can no more complain of injury to themselves of 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.

I say a man who makes that comparison to a racial issue is a man who has hostility on the racial issue. This is no question of leniency or nonleniency of teachers. This is a question of the inferiority of Negro teachers being alleged, and his laughing at it.

That was the 1960 ruling. You see, while I have said there were only 15 cases, I am going to show you that in more than one of these cases Judge Carswell was overruled twice in the same case, but I am only counting them as one.

In 1960, Judge Carswell laughed at the idea of faculty desegregation. But then in 1961, he got to the actual school plan of Pensacola. Although the suit was filed in February 1960, Judge Carswell did not obtain a desegregation plan from local authorities for a year and a half. Even then, he allowed another year before the first short step was taken toward token desegregation. He approached a defective plan which provided only vague notification of rights to black parents, allowed only 5 days a year for Negroes to request transfer to white schools and authorized the school board to reject transfer applications on a variety of general grounds.

Now the court of appeals in 1962 in the case I have cited got appeals from both rulings. They handled the appeal from the motion to strike on the faculty problem, and they also handled the appeal of the Negro children in relation to the speed of desegregation. In both instances the court of appeals reversed unanimously.

As to the motion to strike, they were quite caustic in reversing: "Whether as a question of law or one of fact, we do not think that a matter of such importance should be decided on motion to strike . . . A disputed question of fact cannot be decided on motion to strike." Rather, there should be a hearing as to whether the children could prove that it affected them to have faculty segregation.

Then in regard to the other problem of the speed of the Pensacola plan, they said flatly: "It has not gone far enough . . ." And then this is kind of cute: The court of appeals says: "We are reluctant to substitute our judgment for that of the district court." And then they go on and specifically tell him what to do. I take it they did this because they were rather scared he would not do it if they did not tell him exactly what they wanted, and the court then spells out how much further he has to go in order to meet their requirements.

The second case occurs in 1964. *Due* v. *Tallahassee Theaters, Inc.*, 333 F. 2d 630. This was a complaint under sections 1981, 82, 83 and 85, of title 42 of the United States Code against the two theater corporations, their managers, the city officials and the city of Tallahassee, alleging a conspiracy to deny Negroes the right to go to movie theaters.

Judge Carswell threw it out on a motion to dismiss, and this is what the court of appeals said to him, again chastising him and again unanimous:

> 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.

And then they go on to say this. They set forth the essence of the complaint in the opinion not as the plaintiffs had stated it but as the defendants had stated it, and then court of appeals said:

This appears "to be a classical allegation of a civil rights cause of action."

In other words, Judge Carswell without a hearing had thrown out what the court of appeals said was "a classical allegation of a civil rights cause of action." Then they went on to reverse him a second time in the same case.

He had not only thrown out the case of everyone except the sheriff, but he granted the sheriff summary judgment, because the sheriff in an affidavit said he had not conspired with anybody.

The court said in effect:

> You cannot give summary judgment on a sheriff's affidavit that he did not conspire with anybody. You have got to have a trial on whether he conspired with anybody."

And they reversed him on that point too.

The third case is Wechsler, which has been much discussed and bruited about here. I regret that Senator Hruska is not here for this discussion, but possibly he will be here later. So we can discuss it after I have concluded my direct testimony.

The style of that case is *Wechsler* v. *County of Gadsden, Fla.*, 351 F. 2d 311, in 1965. I am not going to repeat the facts in that case. You have heard them from Lowenthal, Knopf and Rosenberger. But there are two points that are worth making.

First, Senator Hruska said that the court of appeals "relied on Peacock." I wrote that down. The court of appeals in reversing Judge Carswell unanimously relied on *Peacock* and on *Rachel.* Now I have re-read *Peacock* and *Rachel.*

Senator Cook. You mean the Supreme Court?

Mr. Rauh. The Supreme Court; yes, sir.

Senator Cook. The fifth circuit?

Mr. RAUH. When the fifth circuit sent it back, they sent it back on their own decisions in that area.

Senator COOK. That is right.

Mr. RAUH. And then later both of those cases went to the Supreme Court. Now I have re-read *Rachel* and *Peacock* and the only candid thing a lawyer could say to you is that it is debatable whether the *Wechsler* case fell under *Rachel* or *Peacock*. I can state what the problem is easier than I can give you the answer.

Rachel held that if a person is relying on a Federal statute when he does the act involved, he can remove to Federal court from a State criminal prosecution for that act. *Peacock* holds that when he is not relying on a Federal statute as a basis of the act for which he is arrested by the State, he cannot remove simply because he says " I cannot get a fair State trial" or "My first amendment rights are being infringed."

It is not clear which this was in *Wechsler*. I want to make this perfectly clear, because I think we could spend all day arguing whether *Wechsler* was *Peacock or Rachel*, and I think this is unnecessary. And that brings me to the second point and the most important point about this case where Senator Hruska was wrong.

He also said that *Peacock* in the Supreme Court denied the principle of automatic removal, and permitted sua sponte remands without hearings. He did not say without hearings and I want to make this perfectly clear. He did say sua sponte.

Now *Peacock* does not say that, and that is the important point for the present situation. *Peacock* is an appeal from two cases. It is an appeal from a case called *Peacock* in the fifth circuit, and it is an appeal from a case called *Weathers* in the fifth circuit. In both of those cases, there was a motion for remand. There was a hearing. In neither of those cases was it either on the judge's own motion to remand or without a hearing.

Then later in the *Peacock* case in the Supreme Court, the judges are saying why they did what they did. The five judges in the majority are apologizing to a degree to the civil rights movement for what they have done by saying there is not a right of removal.

What the Supreme Court majority said was if there were a right of removal in *Peacock*, every criminal case in the South would be tried in a Federal court and we cannot go that far. In explaining how far that would go, they say this:

> If the individual petitioner—and I am now quoting from page 832 of the Supreme Court's decision in Peacock 384 U.S. 808—If the individual petitioners should prevail in their interpretation of section 1443(1), then every criminal case in every court of every State—on any charge from a $5 misdemeanor to first-degree murder—would be removable to a Federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the State court. On motion to remand, the Federal court would be required in every case to hold a hearing.

What the Supreme Court is saying there is the real reason why they refused removal in *Peacock*—because everybody would remove every criminal prosecution from the State court to the Federal. Then there would be a motion to remand by the State. Then there would be a hearing on that and an appeal and this is too much for the Federal courts. It is the exact opposite, I respectfully submit, from what Senator Hruska had indicated.

The Supreme Court made perfectly clear in Peacock that removal was automatic. There had to be a motion to remand, and there had to be a hearing on that motion to remand.

Now, what did Judge Carswell do? Judge Carswell without a motion for remand, without a hearing, did in fact remand. I respectfully suggest, and I carefully note my words, I respectfully suggest that he thereby violated the testimony of Lowenthal, Rosenberger, and Knopf when they said that he wanted to remand so the protesters would not get out. I think that when you see that double violation—not on the ultimate substance of Peacock as to which I have tried to be candid and fair, not on the ultimate substance or substantial point of Peacock on which there is a debate, but on the fact that he remanded without a motion, and on the fact that he remanded without a hearing—there is no debate that was error. That was part of his pique against civil rights workers that you heard here.

Senator BAYH. Could I interrupt just a moment to ask one question to put this in proper perspective? On the motion to remand, was that made by one of the parties in Peacock?

Mr. RAUH. In both of the lower court cases that were reviewed by the Supreme Court in Peacock, there were motions to remand, yes, sir, and hearings on the motions to remand.

Senator BAYH. By one of the parties——

Mr. RAUH. Yes, sir.

Senator COOK. Mr. Chairman, I merely want to say that we had made an agreement before the Senator from Indiana came in that we were not going to interrupt the witnesses. I agreed to that at that time. We took the position, and I think as a matter of fact both of the witnesses agreed, that we should get their statements in before any questions were asked. I merely want to know whether the procedure is going to be followed or whether when anybody wants——

Senator BAYH. Strike that question from the record.

Senator COOK. No; that is perfectly all right, but I want to make it clear that this is what we agreed to.

Senator HART. The Senator from Kentucky is quite in order. I came in by plane and you started early. I did not know the understanding. We will respect it.

Senator COOK. I think that is the understanding.

Mr. RAUH. Senator Cook is correct. We both asked, because of the fact that time was limited, that we be allowed to complete our testimony. We would be happy to go on with questions, and I think Senator Cook and I could have some fun before the afternoon was up. But we did want to complete our testimony and get it in, if there is to be an insistence on the time limitation. As far as Mr. Mitchell and I are concerned we are at your service for as long as necessary, but I see that I have only approximately an hour more. I am on the third case and I have got lots of work to do here.

Senator HART. All of us wanted an analysis of those cases.

Senator BAYH. I regret that I asked the question. I wasn't aware of the original agreement. I think the point is well taken. I would rather hear your testimony than ask the question. I just wanted to refine this. I would like to hear the discussion between you and the Senator from Kentucky, because I think this would be enlightening to all of us to get a fuller explanation of the problems involved, but I apparently do not have the time to do that.

Mr. RAUH. Maybe we could be invited back at a later time. We are available.

Senator COOK. I apologize for bringing up the matter, Mr. Chairman.

Mr. RAUH. Going on now to the fourth case, *Singleton* v. *Board of Commissioners of State Institutions*, 356 F. 2d 771. You have heard of this case; it is the reform school case.

Judge Carswell said that children who were in the reform schools and brought a suit to stop the segregation of the reform schools had no standing to continue their suit when they got out.

I can only say that anybody who would have taken that position believed in segregated reform schools because it was obvious those children had standing to bring this case, and the court of appeals ruled three to nothing that they had such standing.

Senator FONG. What year was that?

Mr. RAUH. That is 1966, sir. In 1967 you get another double reversal. That is *Steele* v. *Board of Public Instruction of Leon County, Fla.*, 371 F. 2d 395.

This is the *Tallahassee School Desegregation* case. Here Judge Carswell approved a desegregation plan which opened only one grade each year to token desegregation through "freedom of choice." This is 1963 and he is approving a desegregation plan which opened only one grade, and only one grade on a freedom of choice basis.

He issued this order in spite of the directive to his court in the fifth circuit's *Pensacola* decision that at least two grades be desegregated the first year, if desegregation did not begin until 1963.

That is how bad Judge Carswell was in 1963, but he got worse in 1965. At a hearing on April 19, 1965, at which Mr. Leroy Clark appeared before Judge Carswell on a motion to speed up the school plan, Clark said it was bad enough in 1963, but since then you had had the Supreme Court's decisions in *Goss* and in *Griffin* cases, where the Supreme Court had ordered faster action. Clark said in effect: We want a new hearing. Now I quote out of the transcript of the hearing in *Steele* in the district court on April 19, 1965:

Mr. CLARK. Your Honor, basically, our motion for further relief would be proposed or require a reorganization of the present system of assignment.

Judge CARSWELL. Let me ask you this—you mean this would be an effort to reorganize the plan, or that is to change the structural nature of the plan that has been approved by this Court and the Fifth Circuit?

Of course the Tallahassee plan had not been to the Fifth Circuit yet, so I do not know what Judge Carswell meant by that. Maybe you would like to ask him. But going on:

Mr. CLARK. Oh, yes, I think so.

The COURT. Well, I don't think we need to go any further. I think I made that very clear in the other motion. There is no necessity for this whatsoever and it would just be an idle gesture regardless of the nature of the testimony.

I say that a judge in 1965, who on a motion to reform the Tallahassee school decree said "it would just be an idle gesture regardless of the nature of the testimony" is a close-minded segregationist judge. When this case got to the court of appeals he was reversed on both his 1963 and 1965 rulings.

Sixth is the case of the third of the three big school districts in his jurisdiction. You see, Judge Carswell's district essentially has three big places—Pensacola, Tallahassee, and Bay County. I have told you

about those first two school districts, and now comes Bay County, which was the third of the big school cases before Judge Carswell.

This reversal was also unanimous on December 1, 1969, but not yet reported. The situation is as follows. The style of the case in the court of appeals is *Youngblood and United States* v. *Board of Public Instruction of Bay County, Fla.* No. 572, in the court of appeals. Judge Carswell was reversed unanimously December 1, 1969.

Of course he was already on the court of appeals by that time, but the court reversed his district court action unanimously.

This suit was filed by Negro students and parents in November 1963. On July 20, 1964 Judge Carswell made his first ruling in the case. Now remember that this ruling comes in 1964, after *Goss* and *Griffin*, and this is in effect what he held:

Except for students graduating from grade school to junior high, or from junior high to high school, all children would be forced to remain in segregated schools for another year. Then token integration would begin on a grade a year basis. Even though students eligible to transfer the first year could enter white schools only if their parents came to the superintendent's office during working hours on one of the only four days allowed for the purpose. Even then the school board could use vague general criteria in the Florida pupil assignment law to reject applications.

This was so bad that the United States intervened in September 1966. A Jefferson County freedom of choice decree was entered in April 1967. In June 1968 the private plaintiffs filed a motion for supplemental relief in light of the Supreme Court decision in *Green* and the companion cases. The United States filed a similar motion on July 16, 1968.

These motions asserted that the freedom of choice plan failed to realistically promise to bring about a unitary school system to Bay County and asked the district court to direct the school board to devise an effective alternative to free choice. At that time it was anticipated that for the 1968–69 school year approximately 75 percent of the Negro elementary and junior high school students would attend schools traditionally maintained for Negroes. No white students had even chosen to attend these schools. Four of the 20 elementary schools and one of the four junior highs were all black. The high schools had been desegregated in 1967.

A hearing was held on July 18, 1968, and on August 12, 1968. The court issued an opinion which approved continued use of free choice for the 1968–69 school year. Remember this is after *Green* made clear what the Supreme Court thought of free choice. Yet Judge Carswell stated he was—

> . . . not convinced that a freedom of choice plan . . . has no place in the Bay County school system at the present time or that it has operated ineffectively as a tool of desergregation in Bay County, Florida at the present time.

However, the court also stated that "the defendants, in formulating a plan for the operation of the Bay County School System for the 1969–1970 school year, have the burden of coming forward with a plan for desegregating the county schools that . . . promises realistically to work now."

The court ordered the board to file on or before January 1968 "tentative plans for the operation of the Bay County School System

in accordance with the law during the 1969–1970 school year," and to file extensive factual material on the operation of the system. The school board then filed with the district court, in response to the August order, a request that it be permitted to continue its free choice plan.

The United States filed a response to this request again urging that an alternative to freedom of choice, which would abolish the racial identity of the system's schools, should be devised and implemented for the 1969–1970 school year.

The court then held a "pretrial conference" in all the Northern District of Florida school cases on January 22, 1969. At this conference, the school board represented to the court that a bond issue election was scheduled for April 10 and that resulting new construction would fully desegregate the system. The plaintiffs and the United States asserted that the construction plans were vague and were speculative only, and urged that the board file a new plan which would be effective by September 1969. The district court then directed that the "defendants shall formulate and adopt a desegregation plan in accordance with the law as set out by the United States Supreme Court" in Green and subsequent decisions of the circuit court of appeals.

Such plan was to be filed by March 21, 1969 with a hearing scheduled for April 10, 1969. However, on February 14, the court notified the parties that, as time is of the essence, and in order to avoid unnecessary expenditures of public funds, a nonevidentiary hearing was to be held in chambers on February 18.

At this conference the board again asserted its intention to continue freedom of choice, and the plaintiff and United States voiced objections to the continued use of freedom of choice.

Following this hearing, the board pursuant to the court's ordered oral directive, filed a plan which would continue free choice and would establish special programs at the four Negro schools "to make said schools more attractive for white students . . ."

The plaintiffs moved for an evidentiary hearing on this plan, which was denied. The United States filed further objections, which included some possible alternatives to free choice which were available to the board.

A further nonevidentiary hearing was held, and on April 3—5 days before the bond issue election—the court entered its order approving continuation of freedom of choice. This was reversed by the court of appeals en banc on December 1, 1969.

This brings the situation right up to the present time. Judge Carswell refused to allow the law of the land to apply to the schools of the district in which he sat. As you know from Professor Orfield's testimony, the districts in his area moved the slowest in Florida and in some cases were worse than other States, States that were bordering, and I wish there were time to go into all that, but there is not.

The seventh case was reversed under the same circumstance as Youngblood. I would like to make a correction. I gave the number of the *Bay County* case in the district court. The number of the *Bay County* case in the court of appeals is No. 27863 and the number of the *Alachua County* case in the court of appeals is No. 27983.

The Alachua County situation is roughly similar to the *Bay County* case, and the reversal was unanimous as in the *Bay County* case.

The eighth case is *Dawkins* v. *Green*. There plaintiffs brought an action relying on Dombrowski to enjoin certain prosecutions in the State court, alleging that the defendants, the public officials of Gainesville, Fla., and Alachua County, Fla., acted in bad faith in prosecuting the plaintiffs under the color of law enforcement to suppress and give a chilling effect to the exercise of the plaintiffs' rights as secured by the Constitution of the United States.

Despite that allegation, which was a proper allegation under Dombrowski, Judge Carswell on June 4, 1968 granted a motion for summary judgement and dismissed the complaint. Now what had happened was that the defendants had filed affidavits saying that they were not acting in bad faith, and without a hearing Judge Carswell dismissed the complaint. This is what the court of appeals said in reversing him unanimously: Those affidavits have "no probative value."

Of course they had no probative value. If you bring a suit against sombody, and you say he is acting in bad faith, and you offer to prove he was acting in bad faith, and he files an affidavit that he is not in bad faith, you have still got a right to prove it. That is exactly what the court of appeals said. Anybody who would have dismissed that complaint in *Dawkins v. Green*, the eighth case I have cited here of unanimous reversals, really didn't want to look into the facts of the case.

I am afraid I did not give the style of that case and I should have. It is *Dawkins* v. *Green*, 412 F. 2d 644.

Senator FONG. When was it?

Mr. RAUH. That was 1969, sir. The reversal was 1969. I think his action was in 1968, sir.

Eight unanimous reversals by the court of appeals, some with two reversals in them, in the civil rights area. Now you say eight is not so bad, eight civil rights cases. That is not so bad. He was there 11 years, why shouldn't he get reversed eight times on civil rights. Well, why doesn't he once get affirmed or get reversed the other way? Why doesn't he once really take care of a human situation and get affirmed or get reversed the other way? The story is that everything he did on civil rights, and I am coming to the barber shop case, everything he did on civil rights was wrong. This man was unanimously wrong on civil rights. He was strengthening instead of rebutting the presumption that goes with his 1948 speech and his 1956 golf course participation and his hostility that you heard about. Instead of rebutting, these cases confirm the presumption that goes with his statement.

I have got eight cases and I do not have to stop there. I have seven more, but I just wanted to put one other case in the interstices of this argument. Judge Carswell once sat on the court of appeals in a civil rights case by designation and he got overruled 2 to 1 because he had his own vote. It is the only civil rights case in which he was not overruled three to nothing because he was sitting on the court.

The name of the case is *Gaines* v. *Dougherty County Board of Education*, 334 F. 2d 983. This is 1964, 10 years after the *Brown* case. An appeal comes to the court of appeals from a school district in Georgia. The majority of the court of appeals says that they think a minimum requirement would be desegregation of the first two grades of the school together with desegregation of the 12th grade. What they

say about the 12th grade is that every kid, before he gets out of school, ought to have 1 year under the *Brown* case, which had been decided 10 years earlier. Otherwise a whole decade of kids would get swept out of school never having gone into a desegregated class. So the court of appeals, Judges Tuttle and Wisdom, announce this really radical doctrine that you should desegregate—10 years after Brown—the first grade, the second grade and the 12th grade.

Judge Carswell is sitting with these two very distinguished judges, and he dissents. He cannot even go along with Judges Tuttle and Wisdom on so little a position as two grades at the beginning and one at the end. But then it gets worse. He writes an angry dissent about what they do on page 986 of the Federal Reporter. It reads as follows:

> 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.

Here is a school district that for 10 years is totally segregated, and he refers "to raining down injunctions" to get three classes integrated, and I do not even count that case in my 15.

Now there is a thread of "no hearing" running through Judge Carswell's performance. He does not want to hear the civil rights side. Let us go back and look at these cases just on the point of no hearing. In *Augustus* he struck the teacher issue rather than give the Negroes a hearing. In *Due* he granted a motion to dismiss without giving a hearing. In *Wechsler* he ordered the remand without giving a hearing. In *Singleton* he dismissed without a hearing in the reform school case because he said the Negro probationers had no standing.

In *Steele*, in the second half of the case where Clark asked him for a hearing in 1965 to change the desegregation plan, he refused a hearing. And in *Dawkins* v. *Green* he refused a hearing and said that the affidavit of the sheriff that he was not acting in bad faith was enough.

The real reprise in this musical comedy of Judge Carswell is that he never wants to give anybody a hearing and I am just coming to what the lady next to me wants to tell you about. She wants to repeat the testimony on Martin Marietta, and I hope you will allow her to do that. I did not particularly want to interrupt. I have been waiting a long time for this chance, and I simply say that I hope you will hear her too. I meant no discourtesy, but I wanted my day in the sun too.

Senator HART. It is 5 minutes of 11, and under the order entered, we conclude at 11:30. If you really want the lady to be heard, we are under a limitation.

Mr. RAUH. I am going to get done just as fast as I can.

Senator HART. I am just saying——

Mr. RAUH. I am doing the best I can, sir. I have 15 cases and I have got to show you that the figure 15 is a minimum, a modest estimate. I want you to leave this room this morning realizing that the record of this man on civil and individual rights in the court of appeals of his own area, the court of appeals of his own southern colleagues, is 45 to nothing, that there was 15 reversals, each unanimous, and I have just got to go on to prove this matter.

I was talking about no hearings and I was pointing out that this is why the ladies of this country are so up in arms at confirming for the Supreme Court a man who would not even give a hearing to them in Martin Marietta.

Now there are seven additional cases which complete the 15. There are seven cases where, on review of criminal trials either under 28 U.S.C. 2255 or by habeas corpus from State courts, Judge Carswell refused a hearing despite an allegation in the 2255 petition or the habeas corpus petition which was adequate to require a hearing and in which the court of appeals in blunt words, three to nothing, did reverse him.

The first case—which now becomes the ninth case—is *Meadows* v. *United States of America*, 282 F. 2d 942, in 1960. There the petitioner moved under 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 very preemptorily, saying this was an adequate petition and obviously should have a hearing.

The tenth case is *Dickey* v. *United States*, 345 F. 2d 508, 1965, where the petitioner moved to vacate judgment and sentence under 28 U.S.C. 2255 on the ground that he was mentally incompetent at the time he waived counsel. Judge Carswell denied the motion without an evidentiary hearing. He was reversed unanimously and instructed to give the man a hearing.

The 11th case is *Baker* v. *Wainwright*, 391 F. 2d 248, 1968. I want to point out here Judge Carswell got it once in 1960, from the court of appeals, he got it a second time in 1965 from the court of appeals, on the simple proposition of law that, if you state a case in 2255 or habeas corpus, you are entitled to a hearing. Having been reversed unanimously on this proposition in 1960 and in 1965, he got five reversals in 1968 on this very proposition. *Baker* v. *Wainwright*, 391 F. 2d 248 is the 11th case of my series, and the first of the five cases in 1968 where this occurred.

In that case petitioner alleged that he was denied the right to counsel on appeal from his conviction. After conviction, petitioner filed affidavit of insolvency and pro se notice of appeal. The State court did not apprise him of his right to have counsel appointed.

Judge Carswell, on habeas corpus, denied without evidentiary hearing. Judges Wisdom, Bell and Dyer reversed and remanded for evidentiary hearing.

The 12th case and the second in 1968 is *Dawkins* v. *Crevasse*, 391 F. 2d 921. This is the *Dawkins* case that we had before, but this time on the bail issue, and on the bail issue the exact same thing happened. Petitioner was denied bail without hearing and the court of appeals reversed with direction to enter order granting bail (Thornberry, Ainsworth and Dyer).

The 13th case and the third in 1968 where this occurred is *Brown* v. *Wainwright*, 394 F. 2d 153, May 1, 1968. There petitioner alleged that his incriminating statements used against him were involuntary. It was a habeas corpus proceeding, but the petition was denied without evidentiary hearing. Again Judge Carswell was reversed unanimously and the case remanded for evidentiary hearing.

The 14th case and the fourth in the same year, 1968, is *Harris* v. *Wainwright*, 399 F. 2d 142. Petitioner alleged that he was not sane at the time of offense or at time of trial. No pretrial hearing or motion for an examination had been made, though petitioner had a hearing of mental commitment. At hearing of petitioner's postconviction attack

in State court petitioner was not produced and was not represented by counsel. The State court held that petitioner was represented by "able counsel" at trial and the conviction was not illegal.

Judge Carswell denied summarily, without even requiring the respondent to reply to the habeas corpus petition. He was reversed unanimously with directions to determine if issues raised by allegations require evidentiary hearing and for consideration of whether the court should appoint counsel to represent petitioner.

The 15th and last of the court of appeals reversals—but not last of the cases against Judge Carswell—is *Barnes* v. *Florida* 402 F. 2d '53. Petitioner alleged coercion of guilty plea and ineffective assistance of counsel. He alleged he saw court-appointed counsel only a few minutes 4 days before trial and a few minutes prior to trial. He claimed the attorney coerced him into pleading guilty and submitted portions of a certified letter from the lawyer as proof.

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

I guess that would be enough, but it is not all that occurred. The trouble is that there is such an overwhelming amount here that you simply cannot get it all in. I think if there were time, there are dozens of additional things that I would like to produce. I think it has been a monumental task with great help from other people, especially the Washington Research Project Action Council, and Mr. Frank Pohlhaus, assistant to Mr. Mitchell, that we have been able to put this much together in this short time.

Now if that were all, it would be terrible, but those 15 cases do not include the *Gaines* case that I gave you, where Judge Carswell dissented from Judges Tuttle and Wisdom. They do not include the refusal to hear Martin-Marietta. And they do not include the case of *Edwards* v. *State of Florida*, CA No. 1271.

The facts I am about to relate are all contained in the official record of that case and can be inspected in the office of the clerk of court, U.S. District Court for the Northern District of Florida at Tallahassee.

In October 1966 Ray Eugene Edwards, a prisoner in a Florida jail, filed a handwritten petition for a writ of habeas corpus which he had drawn up while in prison, using whatever legal materials were available there.

The clerk of the district court then sent him a mimeographed form to fill out. The form was labeled "Petition for Writ of Habeas Corpus" and a filled-out copy was returned to the clerk of court on October 25. From the documents in the court records, it appeared that Edwards had never directly appealed his conviction. Instead, he had tried three times to have his conviction set aside under a procedure set out in rule 1 of the Florida Rules of Criminal Procedure. The papers do show that he may have been confused, and thought that his rule 1 motions were appeals.

In his rule 1 motions, he had told the State court that he was indigent and asked that a lawyer be appointed to represent him, that he be furnished with a transcript of the proceedings leading up to his conviction. The State court denied these requests on the ground that an indigent had the right to an appointed lawyer and to a free transcript only on direct appeal from his conviction and not on collateral attack.

In figuring out the form sent him by the clerk of the district court, Edwards made the mistake of putting "coerced guilty plea" in the wrong blank. It should have been placed in the blank under the question asking the grounds for his claim that he was being unlawfully detained. Instead, he put this allegation under the question asking the grounds for his attacks on his conviction in the State court rule 1 proceedings. Edwards had put only "Denial of appointment of counsel for appeal" and "Denial of court records, etc., with which to appeal" under the first question.

Although Federal statutes set forth a tightly limited time schedule for the speedy handling of habeas corpus petitions, Judge Carswell did not act until February 14, 1967—3 months after the time set by statute had expired. At that time he granted Edwards' motion to proceed *in forma pauperis*, but denied his petition. Although an allegation that a prisoner was forced to plead guilty clearly presents a factual issue which, if found to be true, would require that the writ of habeas corpus be granted, Judge Carswell denied the petition without holding a hearing on the allegation, thereby violating the clear requirements of 28 U.S.C. 2243.

His order denying the petition ignored the allegation entirely, choosing to focus only on the item specified under the correct blank. Then, almost unbelievably, he denied a certificate of probable cause for appeal.

So what you have is not just the 15 reversals. I do not know how many more of these *Edwards* cases exist. We do not have time. We want to go through the records of this judge. This type of case does not come out of any printed volume. This is not in any book we have easy access to. This comes out of a file. Give us time. This judge, a judge who would do what I have just read you from the *Edwards* case, did not do it just once. I have shown you 15 reversals. But these are the ones we want to look at now. These are the ones that you ought to ask for.

Now just a word on another point. I do not have time, because I do want to draw some conclusions from some of this testimony, I do not have time to tell you in full just how bad the jury system is that Judge Carswell set up. In this room you have heard at least twice, once from Judge Carswell and once from somebody else, about the great jury system he set up. That jury system is discriminatory and is illegal. I have here a memorandum which I simply do not have time to read, but which I ask to be inserted dealing with the problem "Racial Discrimination in Judge Carswell's System of Selecting Persons for Jury Service." I am available to answer questions on it, but I am trying to save a couple of minutes for the lady. In the short time I have left, there are other things I would rather deal with. But this document can be examined by you. I have extra copies here. This document, examined by you, will show that the Carswell jury system, far from being in his favor, is the other way and I ask that it be inserted in the record at this point.

Senator HART. Without objection it will be printed.

(The document follows:)

WASHINGTON RESEARCH PROJECT ACTION COUNCIL

MEMORANDUM

February 1, 1970

To: Marian W. Edelman.
From: Richard T. Seymour.
Re: Racial Discrimination in Judge Carswell's System of Selecting Persons for Jury Service.

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. 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]

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[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 1792, 1794 (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.

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 statisics for whites, relatively few black citizens of voting age are registered to vote. Considering the proximity of the counties 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.

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[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.

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 of voting age from consideration for jury service, but disqualifies 32.1% of the nonwhites.

The results of the official questionnnaires 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 30,079 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 increases 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.

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+	57.6
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	4,294	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 of 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 conservation January 30, 1970.
[2] Includes 1 Indian.

APPENDIX A

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 be 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 by 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 aud Service Act of 1968 will be fully accomplished and implemented by the use of voter registration lists, as supplemented by 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 its part and after full consultation with the Fifth Circuit Jury Working Committee and the Judicial Council of the Fifth Circut. 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, at 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 and 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 he 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 conrt 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. DETERMINATION 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.A. § 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.

APPENDIX B.—VOTER REGISTRATION IN THE SOUTH, SUMMER, 1968, VOTER EDUCATION PROJECT, SOUTHERN REGIONAL COUNCIL, INC., ATLANTA, GEORGIA

The figures presented herein were accumulated during the summer and late summer of 1968. While they do not represent the final registration figures for the November elections, the difference is not expected to be large. The figures were compiled from a variety of sources—public and private, official and unofficial.

For four states—Arkansas, Tennessee, Texas and Virginia—complete or near-complete county-by-county figures showing white and Negro registration were not available. In these four states statewide estimates have been made, based on the best information obtainable.

In three states—Mississippi, Alabama and Georgia—there are large numbers of voters not registered by race. These have been divided between the white and Negro columns on the basis of VEP estimates.

In these three states, VEP figures are cumulative and do not reflect names removed from voters lists because of purging. This is likely to result in inflated totals, particularly in white registration, in some counties. Also, population figures are based on the 1960 census, and thus registration figures might exceed population figures in counties that have experienced considerable growth.

Statistics for this booklet were prepared by Mrs. Michael H. Chanin of the VEP staff.

MARVIN WALL,
Director of Research.

VERNON E. JORDAN, JR.,
Director.

FLORIDA

County	White voting-age population	Negro voting-age population	White registered	Negro registered	Percent White registered	Percent Negro registered
Alachua	30,555	9,898	25,534	5,081	83.6	51.3
Baker	3,203	807	3,458	595	100+	73.7
Bay	31,940	4,964	22,747	3,033	71.2	61.1
Bradford	5,580	1,345	4,608	896	82.6	66.6
Brevard	58,433	6,494	81,098	4,647	100+	71.6
Broward	189,517	27,009	199,923	20,524	100+	76.0
Calhoun	3,434	582	3,674	366	100+	62.9
Charlotte	8,659	427	12,483	349	100+	81.7
Citrus	5,174	829	7,663	618	100+	74.5
Clay	9,508	1,276	9,200	1,002	96.8	78.5
Collier	8,163	1,364	9,719	713	100+	52.3
Columbia	8,092	3,122	9,240	2,516	100+	80.6
Dade	537,448	75,573	367,730	55,393	68.4	73.3
De Soto	6,339	1,343	4,020	847	63.4	63.1
Dixie	2,138	363	2,981	396	100+	100+
Duval	203,804	58,430	143,664	39,581	70.5	67.7
Escambia	76,688	18,041	59,511	12,593	77.6	68.8
Flagler	1,789	846	1,853	372	100+	44.0
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
Glades	1,061	741	1,193	234	100+	31.6
Gulf	4,196	1,138	3,861	693	92.0	60.9
Hamilton	2,486	1,621	2,899	1,033	100+	63.7
Hardee	6,734	552	5,125	308	76.1	55.8
Hendry	3,430	1,180	3,533	820	100+	69.5
Hernando	5,689	1,151	5,832	769	100+	66.8
Highlands	10,997	2,251	10,998	1,497	100+	66.5
Hillsborough	213,950	31,114	171,916	21,734	80.4	69.8
Holmes	6,131	249	6,465	179	100+	71.9
Indian River	13,182	2,637	11,852	1,466	98.9	55.6
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
Lake	30,535	6,438	24,439	2,258	80.0	35.1
Lee	30,636	4,677	35,427	2,685	100+	57.4
Leon	28,241	12,322	26,599	6,902	94.2	56.0
Levy	4,483	1,568	4,294	595	95.8	37.9
Liberty	1,525	240	1,940	211	100+	87.9
Madison	4,380	3,067	4,516	2,072	100+	67.6
Manatee	42,291	5,278	35,132	2,604	83.1	49.3
Marion	21,001	9,283	20,194	5,237	96.2	56.4
Martin	9,291	1,753	9,775	1,340	100+	77.2
Monroe	25,512	2,919	15,906	1,723	62.3	59.0
Nassau	7,054	2,076	6,056	1,498	85.8	72.2
Okaloosa	30,816	2,097	23,569	1,073	76.5	51.2
Okeechobee	2,870	533	3,203	429	100+	80.5
Orange	137,780	21,771	97,588	8,893	70.8	40.8
Osceola	11,697	1,122	10,780	665	92.2	59.3
Palm Beach	119,342	29,541	113,683	18,605	95.3	63.8
Pasco	22,329	2,391	27,462	855	100+	35.0
Pinellas	255,369	18,121	222,350	10,694	87.1	59.0
Polk	97,314	19,224	74,234	8,896	76.3	46.3
Putnam	13,095	5,089	9,852	1,949	75.2	38.3
St. Johns	13,771	4,331	10,400	1,957	75.5	45.2
St. Lucie	17,238	6,527	15,962	4,020	92.6	61.6
Santa Rosa	14,710	1,082	13,186	726	89.6	67.1
Sarasota	49,533	4,125	46,266	1,782	93.4	43.2
Seminole	24,372	7,050	20,188	3,160	82.8	44.8
Sumter	5,396	1,523	5,177	1,039	95.9	68.2
Suwannee	6,409	2,149	5,972	1,009	93.2	47.0
Taylor	5,454	1,724	5,961	1,090	100+	63.2
Union	2,880	1,082	1,930	263	67.0	24.3
Volusia	74,209	11,615	66,526	7,167	89.6	61.7
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	2,617,438	470,261	2,195,172	292,046	83.8	62.1

Mr. RAUH. Members of the committee, on behalf of the Leadership Conference on Civil Rights, speaking for Mr. Mitchell and myself, I beg of you not to let the record stand this way. I beg this committee not to close the hearing, not to give the impression to the public of railroading. And let me give you six reasons why you should not close this hearing today.

First, how many other times did Judge Carswell say "white supremacy"? That statement was not found by this committee. That statement was found by a telecaster down in Florida. The Newsweek quote was found not by this committee but by a private investigator. I think we ought to find out how many other times he said it. I do not believe there is a man in this country who has ever proclaimed white supremacy just once.

Second, how can you let the golf course incident rest as it stands, with the seven misstatements of fact by Judge Carswell? Don't you have to investigate? Don't you have to go further? Don't you have to find out if I am right when I say that there is a serious question whether there was a crime here?

Third, it is an open secret in this town that there are Carswell unreported opinions and actions in the Department of Justice files, in the Civil Rights Division files. Those files have never been made available to this committee. I suggest that every case which the civil rights division had in front of Judge Carswell be read by some representative of this committee and be made available to the civil rights groups.

Fourth, I think you should go into the jury situation covered in the memorandum I have just filed in the record.

Fifth, there are other witnesses who have requested to testify besides the lady at my right, and they are quite remarkable people asking to testify. A. Philip Randolph, the dean of the human rights movement, a man whose whole life has been given to this, has asked to come before the committee. Do you really want to say that A. Philip Randolph cannot come before this committee? Dorothy Height representing literally, I do not know exactly, hundreds of thousands, millions of women in her organization, seeks to come before this committee. Bayard Rustin, a great and trusted leader, seeks to come before this committee. The American Jewish Congress, representing a large segment of the Jewish community, has asked to come before this committee. Mike Masaoka, representing the Japanese community, has asked to come before the committee. I do not know how many other requests they have got in the other room of people who want to come before this committee.

Can you really close this hearing out today?

Sixth and last and most important, we ask that Judge Carswell be recalled. We ask that he explain the discrepancies in his golf course testimony. We ask that he explain the discrepancies in his jury testimony, in the testimony on his jury record. We ask that he explain the 1964 incidents. We ask that he answer whether he did in fact turn his back on Leroy Clark.

Let me just say this one thing on this point. If Judge Carswell were worthy of the Supreme Court, he would demand the right to come back. As he sits up there, if he should be confirmed, asking lawyers to explain things through every lawyer's mind in this country standing before Judge Carswell will be the thought: You didn't explain the dis-

crepancies in your own testimony, the discrepancies in your actions. You hid, you fled.

He has a right to demand to come back here. I use the analogy of Justice Black. He explained. Judge Carswell has not explained. We ask that he be recalled and, if he were qualified to sit on this great bench, he would come back, and insist he could come back.

In conclusion therefore, gentlemen, I respectfully suggest to you that Judge Carswell is Judge Haynsworth with a cutting edge. He is Judge Haynsworth with a bitterness and a meanness that Judge Haynsworth never had. A Senate that would not confirm Judge Haynsworth cannot confirm Judge Carswell. It cannot accept the principle that because the Senate refused to confirm someone, it thereby has to confirm somebody worse. Otherwise you will get to the point where you may never refuse to confirm anybody because there will be a threat that it will be worse the second time.

You have heard Mr. Pollack and others say this man has never written one legal statement for the public. To put in the seat of Oliver Wendell Holmes, who wrote "The Common Law," the seat of Benjamin Cardozo, who wrote "The Nature of the Judicial Process," the seat of Felix Frankfurter, whose writings and scholarship were legion, to put in the seat of those three men a man who has never published one page on the law is to be disrespectful to the great justices of the past. Nor is there one opinion cited by anybody in his favor with one exception that I am coming to.

Here you had Professor Moore, a great scholar, who has written and has read everything. Professor Moore, in order to write "Moore's Federal Practice" and keep it up to date, has to read everything. Yet he comes before you and cannot cite one case worthy of note of Judge Carswell.

So you say "the barber shop" case. That is the one case anybody has ever talked about. If Judge Carswell is confirmed, God help us, it will be the first time in history that a man ever was confirmed for writing an opinion that his racist barber ought to cut a Negro's hair.

But what about that case? Let us look at it. It is called *Pinkney* v. *Meloy*, 241 F. Supp. 943 in 1965. I am going to read you the statute. The fact anybody should cite this case in his favor is real proof that nobody expects Judge Carswell to do anything. I want to read you the statute. You all passed the statute.

Section 201(b)(4) of the 1964 law 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.

Two criteria are required for coverage. First, that it is part of an establishment that is covered, and second, that it holds itself out to serve the patrons of the covered establishment. Gentlemen, both of those points were stipulated by the parties. The stipulation of the parties reads as follows:

> The Duval Hotel is located in the City of Tallahassee . . . is a place of public accommodation as defined by the Civil Rights Act of 1964 . . . and is covered by the Civil Rights Act.

In other words, they stipulated the first half of the criteria. And then they say, and this still in the stipulation:

> There are signs in the hotel elevators listing the various services located in the hotel, including defendant's.

Both halves of the statutory requirement for coverage were thus stipulated. I say that when anybody has got to rely on a case that was stipulated as covered by the law, they are in one heck of a shape.

Members of the committee, this is the worst possible time in our history to put a man like Judge Carswell on the Supreme Court. There is a new revolution going on, and it is going on in two ways in the South. There are those who want to comply. There are people, decent people, who want civil rights for everybody, and this is a slap in the face to them. But then there are others, best exemplified by Governor Kirk, who are starting a new revolution against civil rights. What you are doing is fanning the flames of that negative revolution and killing the good revolution by putting Judge Carswell there.

Finally, I came here as a lawyer and I said I was going to prove my case. My case is this: There is a presumption that a man who says he is a white supremacist, is a white supremacist until he proves the contrary. I say that the record before you, instead of proving the contrary, buttresses the 1948 white supremacy speech.

There is the golf course incident, in which Judge Carswell has not only been implicated deeply, but lacking in candor before this committee. There is the civil rights hostility running down to the present. I think Leroy Clark said he was there until as late as 1966, being insulted, "never letting me finish a sentence, turning his back on me." Do you really believe that Rosenberger, Knopf, Lowenthal and Clark were not telling the truth? You could not believe that if you saw them. They have nothing to gain out of this.

So you have a record buttressing the white supremacy statement. And then you have the cases. You have 15 cases of unanimous reversal, nothing in his favor. What you really have here is 45 to nothing against Carswell, plus the other cited cases.

Well, if we have not proved our case, I do not know how anything can prove a case in this country. Don't let the fact that you did not want to do it again stop you. It is not the fault of the Senate that we are here today. You did what you had to do on the nomination of Judge Haynsworth. Don't let the fact that it came back worse discourage you. Remember you will have to live with your conscience, and I am going to predict now that those who vote for Carswell for the Supreme Court are going to find as time goes on that more is going to come out against him. If in 2 weeks this black record can be built by volunteers, by people with no staff, if so black a record can be built in 2 weeks, what could be built with an adequate investigation?

I just suggest that caution does not lie with confirming a man who proclaimed and has proved his belief in white supremacy. Caution stands with those of us who ask you to say no.

Senator HART. Thank you very much, Mr. Rauh. The witnesses are available for questioning.

Senator KENNEDY. Mr. Mitchell and Mr. Rauh, would your opinion be as strongly expressed in terms of your reservation about the nominee's attitude in the field of human rights and civil rights if he had not made that speech in 1948? Do you think the events since that time would still justify an expression of reservation on your part?

Mr. RAUH. Yes, Senator Kennedy. I would have been here with those cases proving the case against Judge Carswell. I would say that these are independent points. Mr. Mitchell so eloquently made clear that you

cannot put a man on the Supreme Court who had said that. There are a lot of things you can forgive him for, and you can forgive his statement, if he had really recanted, but you could not put him on the Supreme Court. That is point one.

My point is wholly different and in addition to that point. I would be here opposing Judge Carswell as a segregationist if he had never made the statement. I simply say that the statement illuminates the later history.

Mr. MITCHELL. I think too, Senator Kennedy, that the fact that we in the Leadership Conference opposed his nomination to the court in the Fifth Circuit when we did not know about his white supremacy statement indicates that we considered him unfit.

Senator BAYH. I have no question, but I would say that some of the questions I had were answered by the extreme detail in which you examined those cases, and there is a very great concern in my mind on this critical issue.

Senator ERVIN. Senator Cook?

Senator COOK. I was wondering, we have 5 minutes, I think, under our order and I wonder whether it is the desire of the chairman to hear the lady who wished to testify?

Senator ERVIN. Under the agreement, as I understand it, the order of the chairman, and under the tacit agreement of the committee, if Mr. Rauh and Mr. Mitchell have finished testifying, then we will stand in recess. We will adjourn the public hearing and go into executive session.

Mr. RAUH. Sir, it is not 11:30, couldn't the lady be heard? Let her talk.

Senator ERVIN. Have you finished testifying, Mr. Rauh?

Mr. RAUH. I would just like to say one thing in my testimony. I think you would be making a terrible mistake not to hear the lady.

(A prepared statement by the lady referred to, Jo-Ann E. Gardner, was subsequently on February 4, 1970 filed with the committee and follows:)

Pittsburgh, Pa., February 4, 1970.

THE JUDICIARY COMMITTEE OF THE U.S. SENATE.
Senate Building.
Washington, D.C.

DEAR SIR: I was invited by the Judiciary Committee staff to submit the attached statement for the written record of the hearings on the nomination of Judge Carswell to the Supreme Court.

Yours sincerely,

JO-ANN E. GARDNER.

STATEMENT OF DR. JO-ANN E. GARDNER REPRESENTING FOCUS ON EQUAL EMPLOYMENT FOR WOMEN COALITION OF GROUPS, BIPARTISAN NATIONAL; CHAPTERS IN BOSTON, WASHINGTON AREA, PITTSBURGH, UTICA, KALAMAZOO, MINNEAPOLIS, LOS ANGELES

I am Jo-Ann Gardner, experimental psychologist, employed at Learning Research and Development Center, University of Pittsburgh as center associate. My work is the development and evaluation of Computer Assisted Instruction in elementary mathematics.

"In every society there are at least two groups of people, besides the Negroes, who are characterized by high social visibility, expressed in physical appearance, dress, and patterns of behavior, and who have been 'suppressed'. We refer to women and children. Their present status, as well as their problems in society, reveal striking similarities to those of the Negroes." (Opening paragraph, *An American Dilemma*, Gunnar Myrdal, Appendix 5.)

Much has been said about Judge Carswell's statements and opinions about the proper place of blacks in our society. I would like to request that he be examined also very closely with respect to his beliefs and attitudes about the proper place of women in today's society.

I am desperately concerned because of his recent decision in October of 1969 in the case of *Phillips* v. *Martin-Marietta*. In 1948 it was politically sound to make a speech asserting white supremacy. In 1970, although the Supreme Court has never ruled on a sex discrimination case, there are laws which make it appear likely that numerous cases will be brought to the Supreme Court.

In 1948, the people of this country were not sensitive to the dreadful inequities produced by white supremacist statements. Today, in 1970, the people are generally unaware of the dreadful inequities that result from parallel but more subtle male supremacist beliefs.

For example 54% of all families headed by a black woman are below the level of poverty; 25% headed by a white woman are below the level of poverty; comparable figures for families headed by a white male or black male are 6.7% and 22.2% respectively. (U.S. Department of Commerce, Bureau of the Census: CPR–60, No. 55.)

Part of my purpose in coming here today from Pittsburgh, is to get into the record some of the information about equal employment problems women face. Today, 30,000,000 women are employed. This is 38% of the labor force. In spite of the 1963 Equal Pay Act and Title VII of 1964 Civil Rights Act, a comparison of wage and salary income of full-time year round women workers with that of males shows that women's relative position has deteriorated during the period of 1957–1967. In 1957, women's median wage was 64% of men's wages: in 1967, women's median wage earnings were 58% of men's earnings. I cite these figures from the Labor Department to bring forcefully to your attention the position of women, who are 51% of the population.

I would like to enter the following publications from the Labor Department which give a more complete picture. (1) "*Who are the Working Mothers?*" (2) "*Why Women Work.*" These two pamphlets show conclusively that mothers of small children who work, do so because of *need*.

With respect to Judge Carswell's decision in the *Phillips* v. *Martin-Marietta* case, it is particularly important to consider the implications of that decision, particularly as it affects poor women, and especially poor black women. However lawyers might argue, *women* know that it was sex discrimination and they suspect the motivation was that of the white *middle class* male belief that women with small children should be at home. But this belief about what women should do is contrary to the facts of what women *must* do. This table, also prepared by the Labor Department, shows how income of the *husband* is related to the proportion of wives with small children in the labor force; in general, the less the husband earns, the greater percentage of wives who are working:

NUMBER OF WIVES IN THE LABOR FORCE

[In percent]

Annual income of the husband	With children under 6	With children 6 to 17
Less than $1,000 per year	33.0	60.7
Income $1,000 to $2,000 per year	29.2	47.9
Income $2,000 to $3,000 per year	32.6	53.8
Income $3,000 to $5,000 per year	35.0	55.3
Income $5,000 to $7,000 per year	34.0	52.8
Income $7,000 to $10,000 per year	25.2	48.9
Income over $10,000 per year	16.2	35.7

It has been argued that opinions as to the proper place of women are determined and justified by their being biologically different, just as it was once argued that blacks' place was due to their inherent differences. The argument about the place of blacks being due to basic biological inferiority is now recognized to be false and irrational. I am here to put forth the claim that attitudes and beliefs about women's proper place and jobs which they should hold are similarly false and irrational. Let me cite one example which illustrates the irrationality and the pervasiveness of such beliefs. Title VII of the 1964 Civil Rights Act allows exemption from the prohibition of discrimination based on sex when there are *bona fide occupational qualifications* based on sex. The

EEOC has ruled that lingerie salespersons must be female (i.e., job classification is by sex) yet no such exemption has been considered in the case of obstretician-gynecologists, surely a much more intimate service for a professional to perform for a woman.

The hope for equal employment opportunity today rests, in my opinion, not on appeals for fair treatment, but on the inescapable fact of modern life that it would be better for society if women were "procreationally unemployed" Judith Blake, Chairman of the Department of Demography at the University of California at Berkeley, has argued that for this to happen, women must have other socially approved options for a life career.

This Committee has an unprecedented opportunity to accomplish several very desirable ends at a single stroke. By questioning Judge Carswell very closely about his attitudes and beliefs about women (1) he may be educated so that he will be less likely to commit errors regarding women such as he has already committed and *retracted* regarding blacks; (2) general public attention will be drawn to an area which is directly related to one of our nation's most pressing problems. Information which is available but generally unknown will become a matter of public record and may enlighten judges, lawyers, legislators and others entrusted with concern for the public good.

U.S. DEPARTMENT OF LABOR—WAGE AND LABOR STANDARDS ADMINISTRATION

WHY WOMEN WORK

More than 30 million women are in the labor force today because their talents and skills are needed by the dynamic American economy. The development of new industries and expanded activities in other industries have opened new doors for women in business, the professions, and the production of goods and services.

Decisions of individual women to seek employment outside the home are usually based on economic reasons. Most women in the labor force work because they or their families need the money they can earn—some work to raise family living standards above the level of poverty or deprivation; others, to help meet rising costs of food, educattion for their children, medical care, and the like. Relatively few women have the option of working solely for personal fulfillment.

Millions of the women who were in the labor force in March 1968 worked to support themselves or others. This was true of the majority of the 6.4 million single women workers. Nearly all the 5.6 million women workers who were widowed, divorced, or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. In addition, the 2.3 million married women workers whose husbands had incomes of less than $3,000 in 1967 certainly worked because of economic need. If we take into account those women whose husbands had incomes between $3,000 and $5,000 (which is still below the $5,915 considered necessary even for a low standard of living for an urban family of four), about 2.2 million women are added. The marital status of women in the labor force in March 1968 follows:

Marital status	Women in the labor force in March 1968	
	Number	Percent distribution
Total	28,778,000	100.0
Single	6,357,000	22.1
Married (husband present)	16,821,000	58.5
With husband whose 1967 income was—		
Below $3,000	2,338,000	8.1
$3,000 to $4,999	2,153,000	7.5
$5,000 or over	12,313,000	42.8
Married (husband absent)	1,413,000	4.9
Widowed	2,483,000	8.6
Divorced	1,704,000	5.9

Mothers with husband present.—Of the 16.8 million married women (husband present) who were in the labor force in March 1968, 9.3 million had children under 18 years of age. About 2 million of these mothers—900,000 whose husbands had incomes in 1967 of less than $3,000 and 1.1 million whose husbands had incomes between $3,000 and $5,000—were helping to support their children. In fact, 24 percent of the 3.6 million working wives with children under 6 years of age and 20 percent of the 5.7 million working wives with children 6 to 17 years of age (none under 6) had husbands whose incomes were less than $5,000.

Nonwhite wives.—About 15.9 million married women (husband present) who were in the labor force in March 1968 were living in nonfarm areas. Of these nonfarm wives, 22 percent of the nonwhite (12 percent of the white) had husbands whose incomes were less than $3,000 in 1967. An additional 25 percent of the nonwhite wives (11 percent of the white) had husbands whose incomes were between $3,000 and $5,000.

Women heads of families.—Of the 49.8 million families in March 1968, 5.3 million were headed by a woman. Fifty-one percent of the women family heads were in the labor force, and more than three-fifths of these women were the sole support of their familles. About a third of all families headed by a woman had incomes of less than $3,000 in 1967. Nearly a fourth of all families headed by a woman were Negro; their median family income in 1967 was $3,015, as compared with $4,879 for families headed by a white woman.

Wives whose husbands are unemployed or unable to work.—In the 43.3 million husband-wife families in March 1968, 732,000 husbands were unemployed and 5.6 million husbands were not in the labor force. About 320,000 wives of unemployed husbands and more than a million wives whose husbands were not in the labor force were working or seeking work. Many of these women were the sole support of their families.

Women whose husbands are employed in low-wage occupations.—There were 679,000 married women at work in March 1968 whose husbands were farmworkers; another 724,000 had husbands working as nonfarm laborers; and 915,000 had husbands employed in service occupations. The median wage or salary income of men in these three major occupation groups was low in 1967—it was below the poverty level among farmworkers and barely above the poverty level for nonfarm laborers.

Women's reasons for entering the labor force.—According to a special study, nearly half the women 18 to 64 years old who took jobs in 1963 went to work because of economic need. Particularly likely to have taken jobs for economic reasons were women who were widowed, divorced, or separated from their husbands (54 percent) and married women living with their husbands (48 percent). The proportion who indicated financial necessity, including husband's loss of job, as the reason for going to work was even higher among married women whose husbands earned less than $60 a week (73 percent) and those who had children under 6 years of age (56 percent).

Of married women who stopped working in 1963, only a small percentage did so because they no longer needed to work.

NOTE.—Figures used are from the U.S. Department of Commerce, Bureau of the Census, and U.S. Department of Labor, Bureau of Labor Statistics.

(The chairman subsequently made a part of the record the following letter from Senator Hruska and enclosed analysis.)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., February 6, 1970.

HON. JAMES O. EASTLAND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: During the recent hearings on the nomination of Judge Carswell to the Snpreme Court, Joseph Rauh testified regarding the judge's judicial performance, particularly in civil rights and habeas corpus cases.

As I indicated at the time, I feel this testimony was misleading and prejudicial in nature.

Enclosed for your consideration is a legal analysis of Jndge Carswell's performance which I feel effectively rebuts Mr. Rauh's testimony and deserves your careful study and analysis.

With kind personal regards,

Sincerely,

ROMAN L. HRUSKA,
U.S. Senator, Nebraska.

Analysis and Comment Concerning Judge Carswell's Record in Civil Rights and Criminal Law

I. CIVIL RIGHTS DECISIONS

Mr. Joseph L. Rauh, counsel for the Leadership Conference on Civil Rights, testified that the Court of Appeals for the Fifth Circuit had reversed eight of Judge Carswell's decisions in civil rights cases. This statement, while technically true, gives an entirely misleading impression of Judge Carswell's overall rights record. It ignores all of the other civil rights cases in which Judge Carswell participated—six cases which were not appealed; four cases which were affirmed; and five Court of Appeals decisions. Any acceptable standard of evaluating judicial decisions for this purpose should fulfill at least two requirements: (1) It should treat all a judge's decisions in the field of law which were remanded for reconsideration in light of intervening appellate standards.

Since opposition to Judge Carswell's confirmation comes from those who urge that he is unsympathetic to civil rights claims, the following breakdown of his decisions in this field suggests itself:

(a) "Pro-Civil Rights" decisions and votes.

(b) "Neutral" civil rights decisions and votes—cases in which Judge Carswell as a district judge decided against the claims of civil rights litigants, but was affirmed unanimously by the Court of Appeals; cases in which the Court of Appeals panel on which Judge Carswell was sitting unanimously decided against the claims of civil rights litigants; and cases which were remanded for reconsideration in light of intervening appellate or Supreme Court decisions.

(c) "Anti-Civil Rights" decisions and votes.

If Judge Carswell's civil rights cases are classified in this manner, eight of his decisions may be described as "pro-civil rights", ten may be described as "neutral", and five may be described as "anti-civil rights". These figures refute the contention that Judge Carswell is prejudiced against civil rights litigants.

A. *Eight Pro-Civil Rights Decisions*

Judge Carswell has decided the following eight decisions in favor of the civil rights litigants.

In *Brooks* v. *City of Tallahassee*, 202 F. Supp. 56 (1961), civil rights plaintiffs sought to enjoin the owner of a restaurant at the Tallahassee Airport from discriminating against Negroes, and to enjoin the city from maintaining signs desiguating separate waiting rooms, lunch rooms, and rest room facilities for Negroes at the airport. Judge Carswell held that the city and the restaurant had violated the constitutional rights of the Negroes. Because the city had continued to maintain the objectionable signs, Judge Carswell issued an injunction against any future violations by the city.

In *Youngblood* v. *Board of Public Instruction of Bay County, Florida*, 230 F. Supp. 74 (1964), the plaintiff Negroes sought to compel desegregation of the schools in Bay County, Florida. The plaintiffs' motion for summary judgment was opposed by the School Board on the ground that a recently decided case for the District Court of the Southern District of Georgia, *Stell* v. *Savannah-Chatham County Board of Education*, 220 F. Supp. 667, held that a pupil placement system like that then existing in Bay County was not violative of the Constitution. Judge Carswell refnsed to follow *Stell*.

The School Board also sought to justify its procedures by arguing that race was not the sole factor it considered in making school assignments. It argued that the use of a racial index as one criterion in making pupil assignments was justified by inherent racial differences in intelligence and aptitude.

Judge Carswell fiatly rejected this argument and stated:

> "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 hasis 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 the 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." 230 F. Supp. at 76.

In *Pinkney* v. *Meloy*, 241 F. Supp. 943 (1965), Judge Carswell held that a hotel barbershop was covered by the Civil Rights Act of 1964, even though 95 percent of its clientele were local residents. This was the first time a court had been asked to consider whether the Civil Rights Act extended to a barbersbop located in a hotel. There were no other judicial interpretations of the Act which required Judge Carswell to decide in favor of the Negro plaintiff.

In *Lance* v. *Plummer*, 5th Cir., 353 F. 2d 585 (1965), Judge Carswell sat by designation on the Court of Appeals for the Fifth Circuit along with Chief Judge Tuttle and Judge Thornberry. The district court had granted an injunction to the civil rights plaintiffs against the defendant motel operators and others located in St. Augustine, Florida. The district court had ordered the motels in question to serve plaintiffs in compliance with the newly enacted federal Civil Rights Act, and had ordered the other defendants not to interfere with the plaintiffs in their efforts to obtain services at motels and other places in St. Augustine. Defendant Lance was a deputy sheriff whom the trial court found had followed some of the plaintiffs while they were trying to obtain accommodations, and defendant Lance was therefore found in contempt. The trial court ordered him to resign his position as deputy sheriff and refrain in the future from acting as a law enforcement or peace officer. The district court further ordered Lance to pay plaintiffs' attorneys' fees.

The defendants appealed, claiming principally that the sanctions imposed by the court were punitive, and that attorneys' fees should not have been awarded. The Court of Appeals, in an opinion written by Chief Judge Tuttle and concurred in by Judges Thornherry and Carswell, affirmed (with a minor modification) the judgment of the district court.

In two unreported decisions, Judge Carswell enjoined restaurants from discriminating against Negroes. *Lamb* v. *Betts Big T* (1966); *Russell* v. *Ski Line Truck Center* (1969).

In *Baxter* v. *Parker*, 281 F. Supp. 115 (1968), a Negro plaintiff brought a civil rights action against a sheriff and a county, alleging that the sheriff assaulted him. Judge Carswell held that the complaint stated a cause of action against the sheriff. He denied the sheriff's motiou to dismiss and directed the sheriff to file an answer. Judge Carswell granted the county's motion to dismiss on the ground that it was a governmental subdivision of a state and thus not a "person" within the meaning of the federal statute.

Soon after Judge Carswell took his seat on tbe Fifth Circuit Court of Appeals, he joined with Chief Judge Brown and Judge Jones in affirming a district court decision holding a city ordinance unconstitutional. *Robinson* v. *Coopwood*, 415 F. 2d 1377 (1969).

A municipal ordinance of Holly Springs, Mississippi, required that the city police be given notice of auy march at least one hour before its commencement. Marchers were required to identify the points of origin and destination as well as the route to be takeu and the approximate number of participants. The notice was also required to inform the police of any mass meetings, assemblages, or demonstrations which were plauned.

In support of the constitutionality of the notice requirement, the city argued that it exercised no discretion as to whether such marches could take place. No permit was required. The advance notice was solely for the purpose of permitting tbe police to perform their legitimate and necessary functions.

The plaintiffs argued that the notice requirement had been used to break up an existing peaceful march. The district judge agreed, holding that the notice requirement was an unconstitutional prior restraint upou the exercise of First Amendment rights.

The Court held that if the activities likely to occur during an assembly are not such as to incite people to violence or to threaren the security of the community or to interfere with the orderly function of governmental authority, it is a constitutionally protected activity and may not be made unlawful by the mere failure of its participauts to have giveu law enforcement officers advance notice of their plans. There is no reason to require previous notice of an intention to conduct a peaceful assembly when there is no public danger reasonably auticipated.

B. *Ten neutral civil rights decisions*

Three categories of cases are included under this heading—those in which Judge Carswell's ruling as a District Judge was affirmed by the Court of Appeals; those in which Judge Carswell, while sitting on the Court of Appeals, joined in a unanimous decision with two concededly "liberal" circuit judges; and those

in which Judge Carswell's ruling as a District Judge was vacated by the Court of Appeals for reconsideration in light of Supreme Court or Fifth Circuit decisions announced subsequent to Judge Carswell's ruling in the case. The reasons for characterizing as "neutral" cases of these three descriptions are apparent. A ruling affirmed by the Court of Appeals indicates that Judge Carswell correctly applied existing law. A decision in which Judge Carswell joined "liberal" judges can hardly be described as "anti-civil rights". Finally, it would be unjust to subject a judge to criticism for failing to anticipate landmark rulings of higher courts.

Four of Judge Carswell's civil rights opinions were affirmed on appeal. No reference was made to these cases by witnesses who testified against Judge Carswell. The four affirmances are as follows:

Knowles v. *Board of Public Instruction of Leon County*, affirmed, 405 F. 2d 1206 (1969).

Presley v. *City of Monticello*, affirmed, 395 F. 2d 675 (1968).

Ball v. *Yarborough*, affirmed, 281 F. 2d 789 (1960).

Steele v. *Taft*, affirmed in effect by *Palmer* v. *Thompson*, No. 23841 (October 1969).

While the Fifth Circuit dismissed *Steele* itself as moot on October 9, 1969, in a companion case decided the same day, *Palmer*, a majority of the Fifth Circuit sitting en banc clearly affirmed Judge Carswell's holding. Judge Carswell held that if a city chose to operate swimming pools it must operate them on an integrated basis. However, he held that the federal court did not have the power to force a city to provide swimming pools in the first place. Such a ruling was clearly required by four Court of Appeals decisions, including two decisions in the Fifth Circuit. *Hampton* v. *City of Jacksonville*, 304 F. 2d 319 (1962); *City of Montgomery* v. *Gilmore*, 277 F. 2d 364 (1960); *Clark* v. *Flory*, 237 F. 2d 597 (1956); *Tonkins* v. *City of Greensboro*, 276 F. 2d 890 (1960). While these decisions did not allow Judge Carswell to order the City of Tallahassee to provide swimming pools, Judge Carswell nevertheless expressed his disapproval of the policy being followed by the city. In his opinion, he stated:

> "The failure to render such discretionary service by the city may well be subject to valid criticism as a matter of public policy. On the fact of it, such policy may seem tragically absurd, but such decision is clearly under the law a function and a responsibility of the elected public officials and the officers and employees working under them."

In the following two cases, Judge Carswell agreed with the decisions of Circuit Judges Tuttle, Wisdom and Rives and District Judge Johnson. Mr. Rauh, in his testimony in opposition to Judge Haynsworth, stated that "there are wonderful Southern judges—Tuttle, Brown, Wisdom, Johnson—who would have been heroic additions to the Court." (Hearings, p. 469).

In *Abernathy* v. *Patterson*, 295 F. 2d 452 (1961), cert. denied, 368 U.S. 986, Judge Carswell, sitting on the Court of Appeals by designation, joined Judges Rives and Wisdom in affirming a decision of District Judge Frank Johnson. Judge Johnson had dismissed a complaint filed by four Negroes against the Governor of Alabama in an attempt to prevent the Governor from bringing a libel action against them. Judge Johnson held they had an adequate remedy at law.

In *Gaines* v. *Dougherty County Board of Education*, 329 F. 2d 823 (1964), Judge Carswell sat by designation on the Court of Appeals, and joined in an opinion written by Judge Tuttle and concurred in by Judge Wisdom. The court affirmed with modification the district court decision approving a school desegregation plan. Since modifications ordered by the court substantially liberalized the school plan, this case could fairly be characterized as "pro-civil rights". However, since the court withheld judgement on the grade-a-year plan pending Supreme Court resolution of that question in another case, it has been classified as a "neutral" decision.

In the following four cases, Judge Carswell's decision was remanded for reconsideration in light of a Supreme Court or Fifth Circuit decision handed down after Judge Carswell's opinion.

In *Steele* v. *Board of Public Instruction of Leon County*, 371 F. 2d 395 (1967), the Fifth Circuit held that the desegregation plan adopted by Judge Carswell in 1963 failed in a number of respects to meet the standards laid down by the Fifth Circuit in December 1966 in the *Jefferson* case. The *Jefferson* opinion of the Fifth Circuit was a landmark civil rights case. The majority opinion was sixty pages long and contained 114 footnotes. Following the opinion was a proposed decree which covered seven pages and went into great detail including the

form of an explanatory letter to be sent to the parents explaining the desegregation plan. This type of intervening decision by an appellate court is obviously not the type of decision that a fair-minded district judge could have anticipated three years earlier.

In *Wechsler* v. *County of Gadsden*, 351 F. 2d 311 (1965), Judge Carswell had 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 and remanded for reconsideration in light of two cases handed down by the Fifth Circuit after Judge Carswell's order. These two other cases were later appealed to the Supreme Court. *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Greenwood* v. *Peacock*, 384 U.S. 808 (1966). The Supreme Court affirmed the ruling of the Fifth Circuit in *Rachel*, but reversed the ruling in *Peacock*.

The issue before the court was the scope of the provision of the judicial code allowing removal from state to federal courts in certain cases involving civil rights. The Supreme Court held that removal could he had in a limited class of state court cases in which the very bringing of the prosecution would constitute a denial of the state defendants' civil rights. On the other hand, the Supreme Court held that removal was not authorized where the state criminal defendants claimed that prosecution under a general criminal statute was motivated either by desire to frustrate their civil rights activities or to deny their First Amendment freedoms.

It is impossible to tell from the opinion of the Court of Appeals in the *Wechsler* case what the nature of the removal petition presented to Judge Carswell had been. However, on page 322 of the transcript of the hearings of the nomination of Judge Carswell, Professor Lowenthal described the removal plaintiffs as having been "arrested for criminal trespass". He further stated that the reason for removal was "that the attorney thought that the local officials who were hostile to the voter registration drive would be unlikely to accord an adequate or fair trial."

Based on these statements of the counsel for the removal plaintiffs, it is clear that the doctrine enunciated in the *Peacock* case is applicable to the facts presented by *Wechsler*. 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 a federal court.

Mr. Rauh testified that two of Judge Carswell's school desegregation cases were recently reversed nnanimously by the Fifth Circuit. *Youngblood* v. *Board of Public Instruction of Bay County*, No. 27863; *Wright* v. *Board of Public Instruction of Alachua County*, No. 27983 (Dec. 1, 1969). What Mr. Rauh failed to tell the Committee was that the entire Fifth Circuit, including Judge Carswell, sat en banc to consider thirteen different school desegregation cases. All of these cases were reversed and remanded for reconsideration in light of the intervening decision of the Supreme Court in *Alexander* v. *Holmes County Board of Education*, 24 L. Ed. 2d 19 (1969). While Judge Carswell of course did not participate in the two cases which he had decided as a district judge, *Youngblood* and *Wright*, he joined with the rest of the Fifth Circuit in reversing the other eleven decisions. Thus, while it is technically correct to say that these two decisions of Judge Carswell were reversed on appeal, that fact standing alone is very misleading since it indicates that Judge Carswell was out of step with the Fifth Circuit. Actually, Judge Carswell was in complete agreement with all fourteen judges of the Fifth Circuit in holding that the intervening decision of the Supreme Court required reversal in these school desegregation cases.

C. *Five Anti-Civil Rights Decisions*

Judge Carswell's decisions in the following five cases may fairly be described as "anti-civil rights" under the standards earlier described, but under those same standards they must be balanced against the "pro" civil rights cases and the "neutral" civil rights cases in order to evalnate fairly his entire record. In fonr of the cases, his decision against civil rights plaintiffs was reversed on appeal to the Fifth Circuit; in the fifth, he dissented in part while sitting by designation on the Court of Appeals from a rnling of a majority of the panel in favor of civil rights claims.

Augustus v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (1962);

Due v. *Tallahassee Theaters*, 333 F. 2d 630 (1964);

Dawkins v. *Green*, 412 F. 2d 644 (1969);

Singleton v. *Board of Commissioners of State Institutions*, 356 F. 2d 771 (1966) *Gaines* v. *Dougherty County Board of Education*, 334 F. 2d 983 (1964), Judge Carswell dissenting.

There must he some qualification as to the inclusion of *Augustus*, however, as an "anti-civil rights" case. That case represented the first time in which a Court of Appeals had occasion to pass on the question of whether the *Brown* holding required desegregation of faculties as well as of stndents in public schools, a question which was not authoritatively resolved until the Supreme Court's decision in the *Bradley* case, 382 U.S. 103, decided in 1965. Two other district judges in otber circuits dealing with the same issue at the same or a later time—Judge Wilson in Tennessee and Judge Butzner in Virginia, neither known as hostile to civil rights claims—each decided the issue in much the same manner as Judge Carswell did and each was in turn reversed by his respective Court of Appeals. *Mapp* v. *Board of Education of City of Chattanooga*, 6th Cir., 319 F. 2d 571 (1963), and *Bradley* v. *School Board of Richmond*, 4th Cir. 345 F. 2d 310 (1965). It sbould also be borne in mind that in tbe *Augustus* litigation, Judge Carswell issued the first desegregation decree in Florida, which was compiled with by the affected school board within the ninety day time limit imposed by his decree. While the plaintiffs were denied the additional relief of teacher integration and successfully sought a reversal of that portion of Judge Carswell's decree on appeal, he himself had in the decree granted substantial parts of the relief they sought.

On the basis of the foregoing, it may fairly he said that Judge Carswell's record in the area of civil rights is not "liberal" in the sense that one might classify a very few other southern federal judges, but just as surely it cannot be fairly said that his record is "segregationist" or "anti-civil rights" in the sense that one might classify still other southern judges. It is, on the whole, a record which is that of a "middle of the roader".

II. HABEAS CORPUS DECISIONS

Mr. Rauh testified before the Committee that Judge Carswell had been reversed seven times in habeas corpus cases. This testimony conveyed an incomplete and distorted picture of Judge Carswell's record in this area. Nine such cases in which Judge Carswell was *affirmed* by the Fifth Circuit were omitted. These cases are *Smith* v. *United States*, 283 F. 2d 245 (1960); *Adams* v. *United States*, 302 F. 2d 307 (1962); *Batson* v. *United States*, 304 F. 2d 459 (1962); *Gant* v. *United States*, 308 F. 2d 728 (1962); *Young* v. *United States*, 337 F. 2d 753 (1964); *Glinn* v. *United States*, 338 F. 2d 62 (1964); *Hamilton* v. *United States*, 341 F. 2d 914 (1965); *Hamilton* v. *Florida*, 390 F. 2d 872 (1968); *Rogers* v. *Wainwright*, 394 F. 2d 492 (1968). In each of the cited cases, the Fifth Circuit agreed with Judge Carswell's handling of the request for relief.

Three other habeas corpus decisions were omitted from tbe testimony. Tbe first is *Beufve* v. *United States*, 334 F. 2d 958 (1965). The issue in that case was whether the petitioner's guilty plea had been voluntarily entered with full understanding of its consequences. The same issue had arisen in an earlier case before Judge Carswell. *McCullough* v. *United States*, 231 F. Supp. 740 (1964). There, the defendant contended that he had been unaware of the sentencing provisions of the Federal Youth Corrections Act under which he had been sentenced. Judge Carswell ordered that a hearing be held on the allegation. He stated that the defendant would be entitled to relief if in fact the hearing disclosed that he had been unaware of those provisions. In announcing his ruling, Judge Carswell explicitly followed the decision of the Fourth Circuit Court of Appeals in *Pilkington* v. *United States*, 315 F. 2d 204 (1963), an opinion by Judge Simon Sobeloff.

One week after Judge Carswell's *McCullough* decision, the Fifth Circuit refused to follow *Pilkington* in *Marvel* v. *United States*, 335 F. 2d 101 (1964). The petitioner in *Marvel* sought *certiorari* in the Supreme Court. While *Marvel* was pending before the Supreme Court, *Beufve* came before Judge Carswell. Following the controlling Fifth Circuit precedent announced in *Marvel*, he denied relief. Shortly thereafter, the Supreme Court vacated the ruling in *Marvel* and remanded for a determination on whether the petitioner had been misled by the trial judge as to maximum sentence. *Marvel* v. *United States*, 380 U.S. 262 (1955).

Judge Carswell's denial of relief in *Beufve* reached the Fifth Circuit shortly after the Supreme Court's decision in *Marvel*. The Fifth Circuit vacated Judge Carswell's order on the authority of the Supreme Court's ruling. Thus, Judge

Carswell was reversed only because he had followed the Fifth Circuit's decision in *Marvel* which was later disapproved by the Supreme Court.

In summary, Judge Carswell initially followed the more "liberal" ruling of the Fourth Circuit. When the Fifth Circuit refused to follow that decision, Judge Carswell changed his position to conform with the Fifth Circuit's. The Supreme Court, however, found the Fifth Circuit rule overly restrictive and adopted a position closely akin to that taken by Judge Carswell originally in *McCullough*.

Likewise omitted from the testimony was *Rowe* v. *United States*, 345 F. 2d 795 (1965). The appellant in that proceeding sought relief under 28 U.S.C.A. § 2255 from a mail fraud conviction. The basis of the appellant's challenge is not stated in the Fifth Circuit's per curiam opinion vacating Judge Carswell's order denying relief. The appellate court declared only that "*Merrill* v. *United States*, 5th Cir., 1964, 338 F. 2d 763, requires a reversal." The *Merrill* case involved issues regarding the defense of insanity and the statutory construction of 18 U.S.C.A. § 2314, one of the provisions of the National Stolen Property Act.

The last of the cases omitted by Mr. Rauh is *Cole* v. *Wainwright*, 397 F. 2d 810 (1968). It is discussed later in this memorandum.

Mr. Rauh is correct in stating that in the seven instances he cited the Fifth Circuit has disagreed with Judge Carswell's rulings in habeas corpus cases. It was urged upon the Committee that this indicates a lack of sympathy for the claims of convicted defendants. An examination of the issues in each of these cases, however, places the holdings announced in a broader perspective.

In six of the cases, the issue presented was whether the petitioner's allegations entitled him to an evidentiary hearing. This question had long vexed the federal courts as the following passage from Chief Justice Warren's opinion in *Townsend* v. *Sain*, 372 U.S. 293, 310 (1963) indicates.

> "It has become apparent that the opinions in *Brown* v. *Allen*, *supra*, do not provide answers for all aspects of the hearing problem for the lower federal courts, which have reached widely divergent, in fact often irreconcilable, results."

In *Townsend*, the Supreme Court in a 5 to 4 decision announced new standards to be applied by the lower federal courts in cases where evidentiary hearings were sought by habeas corpus petitioners. The majority, in an opinion 30 pages long, laid down this test:

> "Where the facts are in dispute, the federal court on habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. at 312.

Justice Stewart, in his dissent, took sharp issue with the majority holding:

> "To require a federal court now to hold a new trial of factual claims which were long ago fully and fairly determined in the courts of Illinois is, I think, to frustrate the fair and prompt administration of criminal justice, to disrespect the fundamental structure of our federal system and to debase the great writ of habeas corpus." 372 U.S. at 334.

Following this decision in March, 1963, it became the duty of the lower federal courts to apply the new standard. The principal issue in cases raising the "hearing" question is not whether the state prisoner shall have an initial "day in court." The issue is rather whether, after having already had a trial, and perhaps a hearing on appeal or post-conviction attack in the state judicial system, he is then entitled to a partial re-trial in the federal court on issues which were once litigated in the state court, or whether the federal court may accept the state court's determination of those issues as binding on it.

Before turning to a more complete analysis of Judge Carswell's cases in this area, it is worth pointing out that disagreements between federal district judges and the Court of Appeals as to the requirement for hearings were by no means limited to Judge Carswell. In the three years preceding the appointment of Judge Bryan Simpson to the Court of Appeals for the Fifth Circuit, during which time he was a district judge in the Middle District of Florida which adjoins the Northern District, he was reversed twice by the Court of Appeals for the Fifth Circuit for *refusing* to grant a hearing to a state convict, *Edge* v. *Wainwright*, 5th Cir., 347 F. 2d 190 (1965), and *Haacks* v. *Wainwright*, 387 F. 2d 176 (1967). During this same period of time, Judge Simpson was also reversed twice by the Court of Appeals for the Fifth Circuit for having *granted* a writ of habeas corpus at the request of state prisoners, *Wainwright* v. *Simpson*, 5th Cir., 360 F. 2d 307 (1966), and *Wainwright* v. *Padgett*, 363 F. 2d 822 (1966).

Further illustrative of the confused state of the Fifth Circuit law in this area is the marathon case of *Lee* v. *Alabama*, 5th Cir., 386 F. 2d 97 (1967). There one

Huey Lee was convicted of first degree murder for the slaying of his father in the Alabama state courts in 1943. After numerous unsuccessful collateral attacks on the state conrts of Alabama, and two unsuccessful federal petitions, Lee sought habeas corpus for a third time in the United States District Court for the Middle District of Alabama claiming that he had been mentally incompetent at the time of his trial in October, 1943. The federal district court denied a hearing, and the Court of Appeals for the Fifth Circuit affirmed. *Lee* v. *Wiman*, 5th Cir., 280 F. 2d 257 (1960).

Undaunted, Lee tried again for collateral relief in the state courts, was unsuccessful, and then filed another petition for habeas corpus in the federal district court, which was again dismissed without hearing. On appeal to the Fifth Circuit this time, the jndgment of the district court was originally affirmed, *Lee* v. *Alabama*, 364 F. 2d 945. Lee's petition for rehearing by that three-judge panel was subsequently denied, with one of the three judges dissenting. 373 F. 2d 82. Lee's petition for rehearing en banc by the entire court was granted, and in an opinion handed down on Jnne 27, 1967, the majority of the Fifth Circuit held that the federal district court should have had an evidentiary hearing on Lee's claims. In addition to the majority opinion, there was a separate concurring opinion and a dissenting opinion.

The federal district judge who twice denied this same state convict's petition for habeas corpus without a hearing was Judge Frank M. Johnson. Judge Johnson was described by Mr. Rauh in his testimony opposing the confirmation of Judge Haynsworth as a "wonderful southern judge . . . who would have been [a] heroic addition to the court." Haynsworth hearings, p. 469.

It is in this context that Judge Carswell's decisions must be viewed. In *Meadows* v. *United States*, 282 F. 2d 942 (1960), for example, an evidentiary hearing was ordered by the Court of Appeals. The petitioner in that case had waived indictment, waived counsel and venue, and entered a plea of guilty to a charge of a Dyer Act violation. He was given a four-year sentence. The petitioner moved under 28 U.S.C.A. § 2255 to vacate the judgment entered upon the basis of his guilty plea. He alleged that he "was discharged from the Armed Forces as a psychoneurosis patient" and that "the irresponsible acts held against him at his trial were acts beyond control of petitioner which happened when his war-scrambled brains failed to function like a normal person." Judge Carswell found the allegations frivolous in nature and denied the motion. The Court of Appeals found the allegations "inartful," but nevertheless held that an evidentiary hearing was required.

A similar factual sitnation was presented in *Dickey* v. *United States*, 345 F. 2d 508 (1965). In that case, as in *Meadows*, the defendant had waived counsel and entered a plea of guilty. In seeking relief under section 2255, the defendant alleged that about five years prior to his arraignment he had suffered a head injury which resulted in blackouts, loss of memory and mental derangement and that he was mentally incompetent at the time of the arraignment and sentencing. Judge Carswell reviewed the arraignment record and denied relief. The Court of Appeals found that the petitioner was entitled to an evidentiary hearing.

In *Baker* v. *Wainwright*, 391 F. 2d 248 (1968), a Florida convict serving a sentence for robbery sought federal habeas corpus relief on the ground that he had been denied the right to the assistance of counsel on the appeal from his conviction. The petitioner alleged that he had not waived his right to appellate counsel and that the state had not offered him one. The Court of Appeals held that an evidentiary hearing was necessary on the question of whether the petitioner's indigency and desire to appeal were made known to the trial court and whether he knowingly and intelligently waived his right to the appointment of appellate counsel.

In *Brown* v. *Wainwright*, 394 F. 2d 153 (1968), a state prisoner sought federal habeas corpus relief. The State of Florida contended that the petitioner had not exhausted his available state remedies and that the federal petition was therefore premature. Judge Carswell ruled against the state on this point, holding the federal proceeding timely. The Court of Appeals, however, was uot convinced that the petitioner had presented each of his claims to the state courts, and it remanded for a determination by the district court on this question. On the merits, Judge Carswell ruled against the petitioner. He stated that the face of the petition showed all of the allegations to be without merit. The Fifth Circuit's opinion does not specify the nature of each of the petitioner's allegations. However, as to a number of them, Judge Carswell's order of denial was affirmed. The Fifth Circuit rejected, for example, the petitioner's contention that he had been prejudiced by the fact that the jury at his trial was present when the trial judge heard evidence

on the issue of the voluntariness of an incriminating statement. The Fifth Circuit pointed out that the trial judge determined that the statement was voluntary and agreed with Judge Carswell that no prejudice resulted from the jury's also being present. The appellate court agreed as well with Judge Carswell's rulings on three of the other allegations raised. The Court stated:

> "We are of the opinion that the allegations that illegal and false testimony was used, that the verdict was contrary to the great weight of the evidence, and hearsay evidence was admitted, do not require an evidentiary hearing. . . ."

The Fifth Circuit's final holding was "that the other asserted grounds for relief are sufficiently stated to require an evidentiary hearing thereon." No further discussion of these "other asserted grounds" appears in the opinion.

In *Harris* v. *Wainwright*, 399 F. 2d 142 (1968), a Florida convict sought a writ of habeas corpus after being denied relief in a state post-conviction proceeding. The petitioner had been convicted in 1959 and was serving three sentences for breaking and entering a dwelling with intent to commit larceny and one for assault with intent to commit manslaughter. He challenged his convictions in the state post-conviction proceedings on the ground that he had not been sane at the time of the offenses and at the time of trial. After a hearing, the state court denied relief. The petitioner then pressed these claims before Judge Carswell. After consideration of the transcript of the state post-conviction hearing, Judge Carswell denied relief. The Court of Appeals ruled that the state hearing had not been adequate in all respects, and it directed Judge Carswell to hold another evidentiary hearing.

The last of the cases raising the "hearing" issue which was cited by Mr. Rauh is *Barnes* v. *Florida*, 402 F. 2d 63 (1968). In that case, the petitioner was a Florida convict serving two consecutive ten-year sentences for escape and possession of a weapon. The petitioner had been convicted after entering pleas of guilty to each of the charges. He sought collateral relief on the ground that his court-appointed counsel had coerced him into pleading guilty by assuring him that a deal had been made for shorter sentences. Judge Carswell examined the record and trial transcript and found the petitioner's allegations to be without merit. The Court of Appeals ruled that an evidentiary hearing should be held.

There is one other case in which Judge Carswell was directed to hold an evidentiary hearing. *Cole* v. *Wainwright*, 397 F. 2d 810 (1968). The Court of Appeals did not state the nature of the petitioner's allegations in its per curiam opinion.

The seventh and final case cited by Mr. Rauh posed the question of the authority of a federal court to order that bail pending a *state* appeal be allowed. In *Dawkins* v. *Crevasse*, 391 F. 2d 921 (1968), the petitioners were challenging their convictions of contempt of the Alachua County Court. The convictions rested on the defendants' participation in the distribution of inflammatory and threatening handbills in the hallway adjacent to the Grand Jury Room while the Grand Jury was in session or during a recess. The state courts denied bail pending appeal. The petitioners sought their release on the ground that the conviction and sentence were in violation of their constitutional rights. Alternatively, they sought release on bond pending appeal. Judge Carswell denied their request for bond and did not pass on the merits of their constitutional contentions because they had not exhausted available state remedies. The Court of Appeals ruled that the petitioners' appeals to the state courts were not "so lacking in merit or frivolous as to warrant denial of bail pending appeal." Accordingly, the Federal Circuit Court ordered that bail be allowed, despite the fact that the state courts had denied it.

Judge Carswell's record in habeas corpus cases does not bear out the charges which have been made. It is true that on seven occasions the Court of Appeals expressed the view that a new evidentiary hearing should be held, while Judge Carswell had found the record and transcript of past proceedings sufficient to permit a judgment. However, as indicated above, the question of when a hearing is required and when it is not has been a difficult one for lower federal judges generally. Condemnation based upon seven reversals on this issue over a period of 11 years is unwarranted.

III. CRIMINAL TRIALS

The claim that Judge Carswell is insensitive to individual rights in criminal proceedings is refuted not only by his habeas corpus cases but also by those cases in which his actions as trial judge were reviewed by the Fifth Circuit Court of Appeals. Witnesses failed to mention these cases.

The Fifth Circuit approved the manner in which Judge Carswell conducted criminal trials in the vast majority of cases. Of the 44 appeals from criminal trials, the Fifth Circuit affirmed in 36 cases, or in 82% of the appeals. It reversed in 8 cases, or in 18% of the appeals.

This record on its face speaks with sufficient clarity as to require no further discussion.

Affirmances (36)

Cooey v. *United States*, 266 F. 2d 792 (1959).
Tillman v. *United States*, 268 F. 2d 422 (1959).
Harrison v. *United States*, 279 F. 2d 19 (1960), *cert. denied*, 364 U.S. 864.
Sikes v. *United States*, 279 F. 2d 1961 (1960).
Ward v. *United States*, 288 F. 2d 620 (1961).
Adams v. *United States*, 287 F. 2d 701 (1961).
Padgett v. *United States*, 283 F. 2d 244 (1960).
Bruner v. *United States*, 293 F. 2d 621 (1961), *cert. denied*, 368 U.S. 947.
Fitzgerald v. *United States*, 296 F. 2d 37 (1961).
Ward v. *United States*, 296 F. 2d 898 (1961).
Burgess v. *United States*, 304 F. 2d 160 (1962).
Maloney v. *United States*, 304 F. 2d 878 (1962).
Jordan v. *United States*, 324 F. 2d 178 (1963).
Stone v. *United States*, 324 F. 2d 804 (1963), *cert. denied*, 376 U.S. 938.
Porter v. *United States*, 338 F. 2d 53 (1964).
McCranie v. *United States*, 333 F. 2d 307 (1964).
Kolomyski v. *United States*, 351 F. 2d 950 (1965).
Booker v. *United States*, 341 F. 2d 535 (1965), *cert. denied*, 383 U.S. 961.
McConnico v. *United States*, 354 F. 2d 1006 (1966).
Garrett v. *United States*, 356 F. 2d 921 (1966), *cert. denied*, 384 U.S. 975.
Thibodeau v. *United States*, 361 F. 2d 443 (1966), *cert. denied*, 385 U.S. 1028.
Hodges v. *United States*, 363 F. 2d 439 (1966).
Harris v. *United States*, 384 F. 2d 363 (1967).
Beufve v. *United States*, 374 F. 2d 123 (1967), *cert. denied*, 389 U.S. 881.
Freeman v. *United States*, 384 F. 2d 882 (1967).
Harvey v. *United States*, 390 F. 2d 662 (1968), *cert. denied*, 393 U.S. 881.
Morgan v. *United States*, 399 F. 2d 93 (1968), *cert. denied*, 393 U.S. 1025.
Robinson v. *United States*, 395 F. 2d 211 (1968).
Harris v. *United States*, 400 F. 2d 264 (1968).
Brown v. *United States*, 401 F. 2d 769 (1968), *cert. denied*, 394 U.S. 962.
Henderson v. *United States*, 402 F. 2d 755 (1968).
Hayes v. *United States*, 407 F. 2d 189 (1969), *cert. dismissed*, 395 U.S. 972.
Taylor v. *United States*, 410 F. 2d 392 (1969).
United States v. *DeCicco*, 415 F. 2d 799 (1969).
Holley v. *United States*, 412 F. 2d 851 (1969).
McCollum v. *United States*, not reported, Docket No. 26025 (January 23, 1969).

Reversals (8):

Slade v. *United States*, 267 F. 2d 834 (1959).
Carnley v. *United States*, 274 F. 2d 68 (1960).
Wood v. *United States*, 283 F. 2d 4 (1960).
Argent v. *United States*, 325 F. 2d 162 (1963).
Potter v. *United States*, 362 F. 2d 493 (1966).
Morgan v. *United States*, 380 F. 2d 915 (1967).
Atwell v. *United States*, 398 F. 2d 507 (1968).
McMillian v. *United States*, 399 F. 2d 478 (1968).

Senator ERVIN. The committee has already made its order and the public hearing is adjourned and the committee will go into executive session at this time.

(Whereupon, at 11:25 a.m. the committee proceeded to executive session.)

(The Chairman subsequently made the following letter from Judge Carswell a part of the record:)

U.S. COURT OF APPEALS,
FIFTH CIRCUIT,
Tallahassee, Fla., February 5, 1970.

GENTLEMEN OF THE COMMITTEE: I appreciate the Committee affording me this opportunity to make such statement as deemed appropriate at the closing of the record of its hearings.

A full and careful reading of the entire transcript of testimony and the supporting record and documents suggests three principal areas of adverse views. First, a large portion of the transcript is concerned with court rulings in individual cases spanning some eleven years of my experience as a trial judge in the federal system and some seven months as an appellate jndge. I feel deeply that no nominee for the Supreme Court should depart from the salutary and hist'orical practice of refusing to discuss and defend individnal actions he has taken in his judicial capacity. Within this limitation, however, it may well he noted that in most, if not all, individual cases there is more than one ultimate ruling which makes any numerical score sheet in *pro* or *con* categories scarcely meaningful or conducive to statistical analysis. For example, there are frequent situations where the ultimate relief requested was granted, but injunctions were denied as nnnecessary or unwarranted to assure fnll and prompt compliance. This accords with the full language of Rule 16 of the Canons of Judicial Ethics, which includes an admonition to the Judge that such injunctions should not he granted lightly or inadvisedly.

Precedent should not be lightly discarded. Even so, no Judge shonld be timid in deciding cases in full and fair compliance with constitutional mandate.

Secondly, testimony has been received hefore the Committee on Jannary 29 and on February 2 from several attorneys who had cases in my conrt. This testmony has indicated that the attorneys were dissatisfied with my rulings in these cases and with my attitnde toward them or their cients. Since I do not remember specific colloquies with counsel in the cases referred to, I can only state that I have consistently approached hearings with an open mind, to be convinced by counsel of the merits of the arguments.

Certainly a Judge should be courteous to counsel, especially to those who are young and inexperienced, and to all others appearing or concerned in the administration of justice in the court. See Canons of Jndicial Ethics, Rule 10. This precept I respect and I follow, and I did so in these cases as in others.

Lawyers from all parts of the nation have practiced before me over the years withont any suggestion of any act or word of discourtesy or hostility on my part. Notwithstanding assertions to the contrary, I emphatically deny such episodes on my part to those in civil rights litigation or any other, and this is fully snpported by statements in the record by connsel in such cases.

Next, with regard to each of the above areas, or to any other aspect of my performance of jndicial obligations, I state again to this Committee, as I did when personally before it: I am not a racist and harbor no notions of racial superiority, which are themselves insulting and obnoxious. My record so shows. Efforts of some to show otherwise through the news media have resulted in complete distortion of facts scarcely recognizahle in their true context. Noteworthy in this regard are statements in the record of not less than six Federal Judges who were present in Atlanta last December when I spoke to the Georgia Bar Association. Their nnequivocal repndiation of any suggestions whatever of racial overtones speaks for itself.

Throughout, I have sought to be fnlly responsive to the qnestions of the Committee, as the Senate seeks to discharge its important responsibility under the Constitution. By like token, I am appreciative aud keenly sensitive of my unfettered obligation to discharge my dnty under the same great instrument.

Respectfully,

G. HARROLD CARSWELL,
U.S. Circuit Judge.

APPENDIX

THE FLORIDA STATE UNIVERSITY,
Tallahassee, Fla., January 21, 1970.

Senator JAMES O. EASTLAND,
Chairman of the Senate Judiciary Committee,
Senate Office Building, Washington, D.C.

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 cnrrent 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 he invaluable background for the responsibilities upon the Supreme Court. His active interest in the work of the Jndicial Conference of the United States is also important. The Judge has been much interested in legal education and had an important part in the estahlishment of the new College of Law at Florida State University.

Judge Carswell's interests have been primarily in the law and in his family. It is fortnnate 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 wonderfnl 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, University of Iowa.

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. Harrold Carswell to the Supreme Court. Judge Carswell is not a graduate of this school, however, it has been my pleasure to be acqnainted with the Judge for about twenty years. During that time I have ob-

served 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.*

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.

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.

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 of 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 evidence 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.

[Telegram]

TALLAHASSEE, FLA.

JAMES O. EASTLAND,
Chairman, Judiciary Committee,
U.S. Senate Washington, D.C.:

I unqnalifiedly endorse Judge G. Harrold Carswell for the position of Justice of the Supreme Court. He possesses all of the qualifications necessary to be a fine member of that court. I urge his confirmation and hope that it may be accomplished expeditiously as his services are much needed now.

ELWYN THOMAS,
Justice of the Supreme Court of Florida, (Retired).

[Telegram]

NEWMAN, GA., *February 3, 1970.*

Re "Newsweek, February 9, concerning Judge Carswell's Atlanta speech for Georgia bar."

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington, D.C.:

I, along with a number of Federal judges, sat on the platform and heard the full talk. The facts are these: Judge Carswell was responding to an introduction by Judge Bell, who noted that Judge Carswell had lived in many parts of Georgia as a young man. To this, Judge Carswell, referring to himself, responded in substance: Yes, I, like Judge Bell, have lived in many Georgia towns, I am somewhat like the man Georgia's distinguished Senator Russell is said to have referred to in an anecdote concerning Gen. Vinegar Joe Stillwell of Southeast Asia. The general prided himself in his ability to identify by nationality any person at a glance. He said, see that man over there, he is from France, he is from Canada, and that deeply tanned soldier there is from Indo-China, to which the soldier replied. No, sir. General, I am from ontdoor Georgia, Carswell then confessed, I am that man, I am from many parts of Georgia.

There were no suggestions of racial overtones whatsoever in his speech.

LEWIS B. MORGAN,
Circuit Judge, U.S. Court of Appeals for the Fifth Circuit.

[Telegram]

FEBRUARY 3, 1970.

Senator JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.:

We are familiar with the contents of the wire sent you today by Circuit Judge Lewis R. Morgan relative to the appearance by Judge Harrold Carswell before

the luncheon meeting of the Georgia Bar Association in Atlanta on December 11, 1969. We were present on the platform and heard the anecdotes told by the presiding officer and in introduction of Judge Carswell as well as those related by Judge Carswell preparatory to his address on procedural appellate problems within the fifth circuit. We did not consider any part of the program to have racial overtones nor did we feel that the remarks of Judge Carswell reflected on any citizens of the United States.

SIDNEY O. SMITH, Jr.,
Chief Judge, U.S. District Court, Northern District of Georgia.
NEWELL EDENFIELD,
U.S. District Judge.
ALBERT J. HENDERSON, Jr.,
U.S. District Judge.
Judge FRANK A. HOOPER,
U.S. Senior District Judge.

[Telegram]

NEW ORLEANS, LA., *February 3, 1970.*

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Senate Office Building, Washington, D.C.:

Re Newsweek article February 9 issue concerning Judge Carswell's speech to Georgia State Bar Association, Atlanta. I was present as a guest at the speakers' table on that occasion. The anecdote which Judge Carswell told in his speech relative to General Stillwell carried no racial overtone, indignity or implication of any kind. To hold otherwise would be an unfair attribution.

ROBERT A. AINSWORTH, Jr.,
Judge, U.S. Court of Appeals, 5th Circuit.

[Telegram]

MELBOURNE, FLA.

Hon. Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington, D.C.

DEAR SENATOR EASTLAND: 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 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.

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.

Should a further statement regarding my association with him be desired, I would welcome the opportunity to further elaborate.

More sincerely yours,

MIKE KRASNY.

[Telegram]

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 senstive 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 fnrther consideration because after the district court had ruled, the 5th circuit iu two cases, *Rachel* v. *State of Georgia*, 347 F2 679, gave a broad interpretation of removal jurisdiction. Suhsequently 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 ahsurd 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 hy 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 emotiou of those ou 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 iu 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.

[Telegram]

PENSACOLA, FLA., *February 4, 1970.*

Senator JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.:

From early 1960 and for sometime thereafter I served as school board attorney in the suit brought against it by *Augustus, et al.* At no time in the various hearings in this case at which I was present did Judge G. Harrold Carswell, either in chambers or in open court, treat any counsel or any party or any witness with other than courtesy and respect. There was no indication or any intimation that

any counsel was treated discourteously or any counsel for either side received any treatment other than that received by all, and there was definitely no actual, implied or suggested discourtesy or unpleasant treatment extended any one involved in the case in my presence, or within my knowledge.

RICHARD H. MERRITT, *Attorney.*

[Telegram]

TALLAHASSEE, FLA., *February 4, 1970.*

Senator JAMES O. EASTLAND,
Senate Judiciary Committee, New Senate Office Building,
Washington, D.C.:

As baliff in Judge Carswell's court for eleven years, I was daily within hearing distance of his chambers at practically all times when hearings were held. In August, 1964, when counsel in the *Wechler* case appeared before Judge Carswell in chambers, I was present in the room throughout the whole proceeding. At no time then, or any other time, did Jndge Carswell speak in a sbrill or rude voice to these attorneys or any other attorneys or anyone, or treat anyone in a hostile manner. He did not express any statement at all abont lawyers from other parts of the country or express opposition to what they were doing. They were treated courteously in every way. I don't know about the legal orders entered, bnt at the conclusion of the hearing I thought the attorneys there were pleased with the results because they had gotten the writ they had come for. Neither Judge Carswell nor anyone else on his staff showed any hostility or discourtesy whatsoever to these attorneys.

WILLIAM T. CORROUTH.

[Telegram]

PENSACOLA, FLA., *February 3, 1970.*

Senator JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.:

I was attorney representiug Alachna County School Board in the case of *Wright* v. *Board of Public Instuction of Alachua County* from the time the suit was filed until I resigned as attorney for the Alachua County School Board just prior to my appointment as U.S. district judge of the northern district of Florida in January of 1968. Having attended all of the hearings before the court as counselor for the school board, I can state unequivocably that Judge Carswell never once displayed hostility or discourtesy to any attorney, party or witness in this case. His demeanor in chambers and on the bench was at all times fair and courteons to all. This was trne in all other litigation in which I appeared before him.

WINSTON E. ARNOW,
U.S. District Judge.

[Telegram]

ST. SIMONS ISLAND, GA., *January 29, 1970.*

Hon. JAMES O. EASTLAND,
U.S. Senator from Mississippi
Senate Building, Washington, D.C.:

It is with extreme pleasnre for my family the Isenbergs, originally of Gordon, Ga., Wilkinson County, to endorse Hon. G. Harrold Carswell for the high honor of Jnstice of the Snpreme Conrt. The family of Judge Carswell are of the finest stock and there never has been nor never will be any racist feelings in any of this fine Georgia family. Judge Carswell's father was a personal friend of my family who are a member of the minority group and we feel sure that he will serve with distinction and honor if confirmed to this high office. I am a former member of the General Assembly of Georgia representing Glynn County and nast president of the chamber of commerce and past chairman of the Brunswick, Ga., Port Authority. If I can be of any further assistance in your investigation of this upright Christian gentleman please do not hesitate to call me and I will gladly appear at my own expense before your honorable committee.

JOE ISENBERG.

[Telegram]

ALACHUA COUNTY, FLA., *February 3, 1970.*

Re Judge G. Harrold Carswell.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington, D.C.:

I have been actively representing school board of Alachua County, Fla., and integration litigation since October 1968 as well as Florida high school activities association in which black lawyers were involved on the other side. All of this litigation in the lower court was before Judge Carswell. I have never seen Judge Carswell discourteous to any lawyer. He disagreed on occasions with their contentions as he did mine but did so in both cases in the same manner.

HARRY C. DUNCAN,
Attorney for School Board.

[Telegram]

HUNTINGTON, IND., *February 4, 1970.*

Senator JAMES O. EASTLAND,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR: This will advise you that I have known Judge Harrold Carswell for approximately fifteen years. My acquaintance with him stems from my appointment by President Eisenhower as U.S. attorney for northern Indiana, and later as special assistant to Attorney General Herbert Brownell and then William P. Rogers as executive officer in charge of all U.S. attorneys. Shortly following the controversial *Brown* decision 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 U.S. attorney who was helpful to me and the department in this respect, I will be glad to substantiate this by personal testimony or affidavit. Please feel free to call upon me to assist your honorable committee in any way that I can.

Sincerely and respectfully yours,

JOSEPH H. LESH.

[Telegram]

PENSACOLA, FLA., *February 3, 1970.*

Senator JAMES O. EASTLAND,
Washington, D.C.:

I have at all times been an attorney for the defendant board of public instruction of Escambia County, Fla., in the school integration case instituted against it by Dr. Charles A. Augustus, et al., as plaintiffs, and attended every conference and hearing in the case before Judge Carswell. Judge Carswell was never rude or discourteous in any way to any of the attorneys in the case and he was always equally courteous and respectful to the attorneys for the plaintiffs.

J. EDWIN HOLSBERRY
of Holsberry, Emmanuel, Sheppard & Mitchell.

[Telegram]

TALLAHASSEE, FLA., *February 3, 1970.*

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington, D.C.:

My law firm has represented the Board of Public Instruction of Leon County, Fla., in the school desegregation case styled *Clifford N. Steele, et al* v. *Board of Public Instruction of Leon County, Fla.*, since the filing of that suit in the U.S. District Court for the northern district of Florida in March 1962. Judge Harrold Carswell presided over that case from its inception until he was elevated to the court of appeals for the fifth circuit.

I personally appeared as attorney for the Leon County School Board in the *Steele* case in March 1967, and have been actively engaged in the representation of the board since that time to the present date. I have appeared in that capacity innumerable times in open court. Judge Carswell has always conducted himself with dignity and courtesy to all attorneys of record in the *Steele* case.

There have been not less than 12 different lawyers sent to Tallahassee from New York and elsewhere to represent the plaintiffs in this case against the school board. On many occasions these attorneys were unfamiliar with prior proceedings and attempted to reargue points which had long since been ruled upon by Judge Carswell, and in many instances unreasonably demanded the right to do so. Judge Carswell on several such occasions did understandably show impatience with these attempts to relitigate points previously adjudicated, but in no sense was this a reflection of personal animosity toward the lawyers or the cause they represented, but an effort to handle the case expeditiously.

I do hereby unequivocably state that Judge Carswell has not exhibited disrespect or hostility toward the plaintiff's attorneys in the *Steele* case and his attitude and demeanor toward north attorneys has always been considerate and well-mannered. I have read about the testimony of some of these out-of-State attorneys before your committee, and I cannot stand idly by and not reply to what I consider ridiculous and unwarranted charges.

C. GRAHAM CAROTHERS.

[Telegram]

PANAMA CITY, FLA., *February 3, 1970.*

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
New Senate Office Building, Washington, D.C.

DEAR SIR: I have been lead counsel for the Bay County School Board in the case of *Youngblood and U.S.A.* v. *Board of Public Instruction of Bay County, Fla.* Marianna, Fla., civil action No. 572 since 1964 when this case was originally filed. Judge G. Harrold Carswell was the U.S. trial judge in this case from the beginning until his elevation to the fifth circuit court of appeals. In 5 years of litigation, there were by actual count, 14 attorneys in his court representing the plaintiff in this desegregation case. Often there were different attorneys at each of the several consecutive hearings. His patience and courtesy to all counsel was remarkable to behold, particularly in view of the fact that counsel for the plaintiffs changed on several occasions; all counsel in our case were treated with respect and fairness by the court regardless of his cause or residence. If Judge Carswell indicated any impatience at all it was at my clients for failing to get on at the job of desegregating the public schools of Bay County, Fla.

JULIAN BENNETT,
Attorney for Bay County School Board.

FEBRUARY 5, 1970.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

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. In the case of

Augustus v. *Escambia County Board of Public Instruction*, Judge Carswell entered an order granting the school board ninety days in which to submit a desegregation plan for the entire school system. On the next to the last day permitted by the court order, the board submitted a plan similar to ones which were adopted in the Florida metropolitan areas of Tampa and Miami. Jndge Carswell's rnling in this case was reversed by the Fifth Circuit only on the question of faculty desegregation.

I attach to this letter a clipping from the *Pensacola News* of Friday, March 17, 1961, which gives a contemporary account of Judge Carswell's school desegregation order in that case. I also attach a clipping from the *Baltimore Afro-American*, which fairly describes my activities in the field of civil rights litigation.

I am presently employed as Deputy Chief Conciliator for the United States Equal Employment Opportunity Commission, and reside here in Washington.

Yours very truly,

CHARLES F. WILSON.

IF IT'S INTEGRATED IN FLORIDA, ATTY. C. WILSON HELPED TO DO IT

PENSACOLA, FLA.—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.

Atty. Wilson, who maintains offices in Pensacola at 507 W. Gadsden St., is well known throughout the state as president of the General Alumni Association.

It is significant that the school desegregation and the transportation desegregation cases in which he figured prominently were handled by the youthful Pensacola attorney with the cooperation and assistance of the NAACP Legal Fund, Inc.

School desegregation cases handled by Atty. Wilson include the case of Augnstns versus the Board of Public Instrnction, Escambia County, Fla., in which the public schools were desegregated from tbe elementary grades through junior college. Also the case of Steele versus the Board of Public Instruction, regated.

He also had the case of Leon County, Fla., in which schools were ordered desegregated also the case of Board of Public Instruction of Bay County, Fla., which has been filed but has not been completed and the case of Koen versus H. Clay Knight, superintendent of Mobile Connty, Ala., in wbich the suit to desegregate the Mobile, Alabama Trade School is still pending.

Transportation cases handled by Atty. Wilson include: Evans and Boney versus the city of Mobile, a suite to desegregate the Mobile, Ala., bus lines, the outcome of which was the desegregation of the buses and the employment of drivers by voluntary action.

The case of Cook versus the city of Mobile, a suit to room and restaurant facilities at the Mobile, Ala., airport. In the latter case, the facilities were desegregated by agreement.

Atty. Wilson was also active in a recreational case, Augustus versus the city of Pensacola. the outcome of this case was the desegregation of the Pensacola, Fla. Municipal Golf Course and the subsequent desegregation of all club house facilities.

In addition to the cases cited above, the Pensacola lawyer has represented the Pensacola NAACP Youth Council and the Conncil of Ministers in snccessful efforts to desegregate local lunch counters. He has also represented the NAACP and Youth Council in a presently continuing effort to desegregate places of public accommodations in Panama City, Fla.

Moreover, as a service to his alma mater, Atty. Wilson has represented numerous Florida A and M University students in picketing and civil rights demonstration cases in Tallahassee.

The holder of the B.S. degree from Florida A and M earned the LL.B. degree from the Howard University School of Law, Washington. He is president of the Southwest Bar Association and has been admitted to practice before the supreme court of the State of Washington.

In addition to serving as president of the Florida Alnmni Association, Atty. Wilson is legal adviser to many civil organizations in the Pensacola area.

REACTION OF CAUTION VOICED HERE

Escambia County School Board was ordered to submit to the federal court within the next 90 days a plan of school admissions not based on race.

The order was signed by U.S. District Judge G. Harold Carswell in a suit brought here last year by the parents of 12 Negro children seeking to break down racial barriers in the school system.

It was the first public school integration order to be entered in Florida since the U.S. Supreme Court's 1954 desegregation decree.

Reaction to the decision in most places was one of caution.

In Pensacola, Negro attorney Charles F. Wilson, who along with attorneys for an affiliate of the National Association for the Advancement of Colored People represents the Negro children, had this comment:

"It is difficult for me to say whether I am pleased or displeased (with the order) because I don't know just what procedure will be instituted to carry this program forward.

"And I'm not more concerned with the plan than I am with the order."

J. Edwin Holsberry, chief counsel of the three legal firms retained by the Escambia school board specifically to fight the integration suit, said he did not know at this point exactly what the next move will be.

He said a conference with other attorneys, the school superintendent, and members of the school board would be necessary before any decision could be reached.

Neither Wilson nor Holsberry had seen an exact copy of Judge Carswell's order.

Dr. W. J. Woodham Jr., superintendent of the county schools, was attending a conference of school officials today in Jacksonville and could not be reached for comment.

The Associated Press quoted Assistaut Atty. Gen. Ralph Odum as saying it appears federal courts are going to force some iutegration in Florida's public schools.

"Obviously the federal courts from the U.S. Supreme Court on down to the district courts are moving in the direction of some integration in Florida," Odum said.

"The federal courts are going to compel Escambia, Hillsborough, Volusia, Duval and any other counties where such suits are pending to have some integration," he said.

"This doesu't reflect my personal view of what's right and wrong but I think it's going to happen," he said.

"Personally, I think it's all wrong," he added. "I'm against it."

State School Supt. Thomas Bailey said he would rather reserve comuent uutil he had read the decision.

The court order did not specify the school board had to admit the particular children named as plaintiffs in the suit to a whitie school.

But it said the plaintiffs "and the class they represeut" must be afforded a "reasonable and conscious opportunity to apply for admission to, or transfer to, any schools for which they are eligible without regard to their race or color and to have that choice fairly cousidered by enrolling authorities . . . "

Whether the school board now must actually begin preparation of such a plan, or whether preparatiou will be delayed by further court actiou, is still to be determined.

The text of Judge Carswell's ruling is as follows:

"Based upon the depositions filed in this cause and upou the testimony presented at hearings on January 16, 1961, the court finds that plaintiffs have established on this record that applications for admissiou to and transfer within the public schools of Escambia County, Florida, are acted upon by the Board of Public Iustruction, on consideration of the race or color of the iudividual applicauts in violation of the coustitutional rights of said applicauts as provided by the Supreme Court of the United States in Browu vs. Board of Education of Topeka, 347 U.S. 483, and subsequent cases.

"Therefore, in consideration of the foregoing, the Board of Public Iustruction of Escambia County, Florida, is hereby granted a period of uiuety days from the date of this order to submit to this court for its consideratiou a plan whereby the plaiutiffs and members of the class represented by them are hereafter afforded a reasonable and conscious opportunity to apply for admission to, or transfer to, any schools for which they are eligible without regard to their race or color, and

to have that choice fairly considered by enrolling authorities, in accordance with the United States Court of Appeals, Fifth Circuit, opinion of Gibson vs. Board of Public Instruction, Dade County, Florida, 272 F. 2D 763.

"Done and ordered in chambers at Tallahassee, Florida, this 16th day of March 1961.

"(Signed) G. HARROLD CARSWELL.
"United States District Judge.

TOWERS MOTOR PARTS, CORP.,
Lowell, Mass., January 24, 1970.

Hon. F. BRADFORD MORSE,
House of Representatives,
Washington, D.C.

DEAR BRAD: Although I realize that you will not be called upon to vote on the confirmation of Judge G. Harrold Carswell, I am writing to you to share information which may be of some interest to those who will be required to decide how to vote on the matter.

You have no doubt read that Judge Carswell served in the United States Navy during World War II. He and I reported for duty aboard the U.S.S. Baltimore early in 1943 at the Fore River Works in Quincy, Mass. We were both newly-commissioned ensigns, and we were put in the junior officers bunkroom together with about twenty other civilians in uniform.

The Baltimore shook down in the Caribbean, then went to the Pacific and operated as part of the fast carrier striking force screen, participating in all the invasions of the Central Pacific campaign—Gilberts, Marshalls, Saipan, Guam, Iwo, Philippines, Okinawa—interrupted only by a return to the West Coast in August, 1944 to pick up President Roosevelt and take him to Pearl Harbor to meet with General MacArthur and Admiral Nimitz.

George Carswell and I were aboard all during that period, until he was detached in February, 1945, to attend staff school, and I was aboard until May, 1945, when I was ordered to Japanese Language School. We were promoted to Junior grade lieutenants and moved out of the J.O. bunkroom and into a cabin for two officers, where we were roommates for about a year. We had a chance to learn each other's views during a period when we were both under a good deal of combat-generated emotional pressure. I think that under such circumstances a lot of basic human values become evident, and during that year we talked about everything under the sun—education, politics, philosophy, sex, history, movies and anything else that came to mind.

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 steward's mates. There were other officers of Southern origin who were outspokenly antagonistic to the steward's mates for racial reasons, but George Carswell was always pleasant and considerate to all. Our Gunnery Officer, Comdr. Truesdell, felt that the steward's mates ought to be given the opportunity to serve in a more meaningful capacity, and saw to it that their station at general quarters was to man a battery of 20 millimeter anti-aircraft guns. While other officers questioned the desirability of this, George Carswell was enthusiastically in favor of it.

I remember that once during a short excursion in the forward area George and I together encountered for the first time a black petty officer, evidence that at long last the Navy was beginning to move away from its segregationist policies, and George could see the wisdom of that too.

In view of the attacks on Judge Carswell's legal philosophy by civil libertarians, and especially in view of the pro-segregationist views expressed in his campaign for election to the state house of representatives from a rural constituency in Georgia in 1948, which he recently has firmly and, I am convinced, sincerely repudiated, I am sure that members of the Senate must be subject to pressure to vote against his confirmation to the Supreme Court. At the same time I am sure that the Administration would welcome an expression of regularity and support by an affirmative vote.

My own position is this: I have no axe to grind for or against whatever position Senators may take, but I hope that you may find useful the opinion of a

concerned constituent who happens to have had some extended personal contact with Judge Carswell. My opinion is that Judge Carswell was not and is not a racist or a bigot. He is a warm, friendly, outgoing person, extremely intelligent, and about as liberal as the Southern Milieu into which he was born could produce at that time. I have no fear of his subverting past actions and decisions of the Court should his appointment be confirmed. While I do not think that his elevation to the Court would warrant the probability of his development into a liberal of the Hugo Black variety, neither do I believe that we should fear the emergence of a modern Roger B. Taney. Out of personal knowledge and affection for George Carswell as I knew him during the war, I am happy to be able to give some justification for a favorable consideration of his appointment.

Sincerely yours,

ALLAN L. LEVINE,
Executive Vice President.

State of Florida

Secretary of State

I, Tom Adams, Secretary of State of the State of Florida, Do Hereby Certify That the following is a true and correct copy of

Letters Patent and Charter for TALLAHASSEE COUNTRY CLUB, a corporation organized and existing under the Laws of the State of Florida, Recorded on the 5th day of March, A. D., 1924, Book 120, Pages 361 - 366, Resident Agent Certificate filed on the 25th day of July, A. D., 1927, and Corporation Report and tax Return filed on the 18th day of November, A. D., 1931, as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the 30th day of January, A.D. 19 70.

Secretary of State

LETTERS PATENT

THE STATE OF FLORIDA

To All to Whom These Presents Shall Come, Greeting.

Whereas,

T. J. Hicks, D. M. Lowry, L. A. Yates, Geo. C. Lewis, J. A. Bondle, W. H. Pickard and W. E. Van Brunt,

on the twenty-eighth day of February, A.D. 1924, filed in the office of the Secretary of State a proposed charter of a corporation to be known as

with a capital of TALLAHASSEE COUNTRY CLUB

dollars for the purpose of THIRTY THOUSAND ($30,000.00)

the conduct and operation of a country club for the recreation, health, amusement and pleasure of its members and others and to make rules and regulations concerning the same; to invest in real estate and personal property of every class and description, and to manufacture, produce and otherwise acquire, own, mortgage, lease bonds, lease, pledge, sell, assign, transfer or otherwise dispose of, trade, deal in and with goods, wares, merchandise and real and personal property of every class and description, as aforesaid; to carry on any other business in connection with the foregoing, and to do every corporate act authorized by law in furtherance of same as shall seem necessary and desirable, and to do everything incident to or necessary or usual in the conduct and operation of any or all of such businesses;

and have published due notice thereof, and have otherwise complied with the Statute in such case made and provided;

Therefore, the State of Florida hereby incorporates the above named persons, their associates and successors, into a body politic and corporate in deed and in law by and under the said name of

and grants unto them full authority to exercise the powers and privileges of a corporation for the purpose above stated, in accordance with their said charter and the laws of this State.

TALLAHASSEE COUNTRY CLUB

In Witness Whereof, These presents have been attested with the Great Seal, and signed and countersigned by the Governor and Secretary of State of the State of Florida, at Tallahassee, the Capital,

(SEAL)

this the fifth day of March, A. D. 19

GARY A. HARDEE
Governor

H. CLAY CRAWFORD
Secretary of State

NOTICE OF INTENTION TO APPLY FOR LETTERS PATENT

Notice is hereby given that the undersigned will apply to the Honorable Cary A. Hardee, Governor of the State of Florida at Tallahassee, Florida, on the 6th day of March, A. D. 1924, for Letters Patent incorporating themselves and their associates and successors, under the following proposed charter or articles of incorporation, the original of which is now on file in the office of the Secretary of State of the State of Florida.

T. J. Hick[illegible],
D. M. Lowry,
L. A. Yates,
Geo. E. Lewis,
J. R. Randle,
W. H. Pickard,
W. E. Van Brunt.

PROPOSED CHARTER OF TALLAHASSEE COUNTRY CLUB.

We, the undersigned, hereby mutually agree to unite and associate ourselves as a corporation under the laws of the State of Florida, and for such purpose we hereby make, execute and adopt the following charter or articles of incorporation.

ARTICLE I.

NAME

The name of the corporation shall be TALLAHASSEE COUNTRY CLUB, and its principal place of business shall be at Tallahassee, Florida, with such branch offices or places of business established elsewhere in the United States of America as the Board of Directors may direct.

ARTICLE II.

NATURE OF BUSINESS

The general nature of the business to be transacted by the corporation is and shall be the conduct and operation of a

country club for the recreation, health, amusement and pleasure o its members and others and to make rules and regulations concerni the same; to invest in real estate and personal property of every class and description, and to manufacture, produce and otherwise acquire, own, mortgage, issue bonds, lease, pledge, sell, assign, transfer or otherwise dispose of, trade, deal in and with goods, wares, merchandise and real and personal property of every class and description, as aforesaid; to carry on any other business in connection with the foregoing, and to do every corporate act authorized by law in furtherance of same as shall seem necessary and desirable, and to do everything incident to [illegible] necessary or usual in the conduct and operation [illegible]

ARTICLE III

CAPITAL STOCK

The capital stock of said corporation shall be Thirty Thousand ($30,000.00) Dollars to be divided into three hundred (300) shares of the par value of one hundred dollars each. The capital stock shall be sold for cash only.

ARTICLE IV

EXISTENCE.

This corporation shall have perpetual existence and shall use a corporate seal, which shall be adopted by the Board of Directors.

ARTICLE V.

OFFICERS.

The business of this corporation shall be conducted by a President, Vice President, Secretary, Treasurer and Board of Directors to consist of not less than five nor more than eleven stockholders and such other officers and agents as the Board of Directors may from time to time provide. The offices of Secretary and Treasurer may be held by the same person. The stockholders shall meet upon the call of the President for the first meeting of the stockholders of said corporation in the City of Tallahassee for the purpose of adopting by-laws, holding first election of officers, completing the organization of the corporation, [illegible] for

such other business having for its purpose the furtherance and carrying out of the purposes of this organization as aforesaid. The stockholders shall meet annually thereafter on the first Tuesday in October of each and every year. The Board of Directors shall be elected at the first meeting of stockholders and thereafter at be elected by the Board of Directors. All officers shall the annual meeting of stockholders, all other officers shall/hold their respective offices until their successors are duly elected and qualified. The Board of Directors may change the annual stockholder's meeting time to some other annual meeting time if they so desire. The officers who shall manage the affairs of the corporation until the election of their successors at the first meeting of stockholders, after the granting of Letters Patent, shall be T. J. Hicks, President, D. M. Lowry, Vice President, L. A. Yates, Secretary and Treasurer; and T. J. Hicks, D. M. Lowry, L. A. Yates, Geo. E. Lewis, J. R. Randle, W. H. Pickard and W. E. Van Brunt constituting the Board of Directors. The Board of Directors shall meet immediately after the adjournment of the stockholders meeting.

ARTICLE VI

INDEBTEDNESS

The highest amount of indebtedness or liability to which said corporation can at any time shall be Thirty Thousand Dollars.

ARTICLE VII

NAMES AND RESIDENCES OF STOCKHOLDERS

The names and residences of the several subscribers for stock and incorporators of said corporation with the number of shares subscribed for by each of them are as follows, to wit:

T. J. Hicks,	Tallahassee, Florida,	5 shares
D. M. Lowry,	Tallahassee, Florida,	5 shares
L. A. Yates,	Tallahassee, Florida,	5 shares
Geo. E. Lewis,	Tallahassee, Florida,	5 shares
J. R. Randle,	Tallahassee, Florida,	5 shares
W. H. Packard,	Tallahassee, Florida,	5 shares
W. E. Van Brunt,	Tallahassee, Florida,	5 shares

IN WITNESS WHEREOF, the undersigned have joined as subscribing incorporators of TALLAHASSEE COUNTRY CLUB and do respectfully agree to take the number or shares of stock hereinbefore set forth.

T. J. Hicks,

D. M. Lowry,

L. A. Yates,

Geo. E. Lewis,

J. R. Randle,

W. H. Pickard,

W. E. Van Brunt.

State of Florida,)
County of Leon.)

Before me, the undersigned authority, this day personally appeared T. J. Hicks, D. M. Lowry, L. A. Yates, Geo. E. Lewis, J. R. Randle, W. H. Pickard, and W. E. Van Brunt and acknowledged the signing of the foregoing articles of incorporation for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official Notarial Seal at Tallahassee, Florida on this the 28th day of February, A. D. 1924.

Lillian Philips,
Notary Public State of Florida at Large
(SEAL) My commission expires October 18, 1926.

STATE OF FLORIDA)
: SS
Office Secretary of State)

I, H. CLAY CRAWFORD, Secretary of State of the State of Florida, do hereby certify that the foregoing is a true and correct copy of Charter of TALLAHASSEE COUNTRY CLUB, as filed in this office and recorded in Book 120, pages 361-366.

GIVEN under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the fifth day of March, A. D. 1924.

(SEAL)

H. CLAY CRAWFORD

SECRETARY OF STATE

NOTICE OF INTENTION TO APPLY FOR LETTERS PATENT.

Notice of hereby given that the undersigned will apply to the Honorable Cary A. Hardee, Governor of the State of Florida at Tallahassee, Florida, on the 5th day of March, A D 1924, for Letters Patent incorporating themselves and their associates and successors, under the following proposed charter or articles of incorporation, the original of which is now on file in the office of the Secretary of State of the State of Florida.

T. J. Kent
[illegible]
[illegible]
Geo. E. Leavy
J. R. Beasley
W. T. Riccard
W. F. Trawbridge

PROPOSED CHARTER OF TALLAHASSEE COUNTRY CLUB.

We, the undersigned, hereby mutually agree to unite and associate ourselves as a corporation under the laws of the State of Florida, and for such purpose we hereby make, execute and adopt the following charter or articles of incorporation.

ARTICLE I NAME.

The name of the corporation shall be TALLAHASSEE COUNTRY CLUB, and its principal place of business shall be at Tallahassee, Florida, with such branch offices or places of business established elsewhere in the United States of America as the Board of Directors may direct.

ARTICLE II. NATURE OF BUSINESS.

The general nature of the business to be transacted by the corporation is and shall be the conduct and operation of a country club for the recreation, health, amusement and pleasure of its members and others and to make rules and regulations concerning the same; to invest in real estate and personal property of every

class and description, and to manufacture, produce and otherwise acquire, own, mortgage, issue bonds lease, pledge, sell, assign, transfer or otherwise dispose of, trade, deal in and with goods, wares, merchandise and real and personal property of every class and description, as aforesaid; to carry on any other business in connection with the foregoing, and to do every corporate act authorized by law in furtherance of same as shall seem necessary and desirable, and to do everything incident to or necessary or usual in the conduct and operation of any or all of such businesses.

ARTICLE III. CAPITAL STOCK.

The capital stock of said corporation shall be Thirty Thousand ($30,000.00) Dollars to be divided into three hundred (300) shares of the par value of one hundred dollars each. The capital stock shall be sold for cash only.

ARTICLE IV. EXISTENCE.

This corporation shall have perpetual existence and shall use a corporate seal, which shall be adopted by the Board of Directors.

ARTICLE V. OFFICERS.

The business of this corporation shall be conducted by a President, Vice President, Secretary, Treasurer and Board of Directors to consist of not less than five nor more than eleven stockholders and such other officers and agents as the Board of Directors may from time to time provide. The offices of Secretary and Treasurer may be held by the same person. The stockholders shall meet upon the call of the President for the first meeting of the stockholders of said corporation in the City of Tallahassee for the purpose of adopting by-laws, holding first election of officers, completing the organization of the corporation, and for such other business having for its purpose the furtherance and carrying out of the purposes of this organization as aforesaid. The stockholders shall meet annually thereafter on the first Tuesday in October of each and every year. The Board of Directors shall be elected at the first meeting of stock-

holders and thereafter at the annual meeting of stockholders, all other officers shall be elected by the Board of Directors. All officers shall hold their respective offices until their successors are duly elected and qualified. The Board of Directors may change the annual stockholders' meeting time to some other annual meeting time if they so desire. The officers who shall manage the affairs of the corporation until the election of their successors at the first meeting of stockholders, afterthe granting of Letters Patent, shall be: T. J. Hicks, President, D. M. Lowry, Vice President, L. A. Yates, Secretary and Treasurer; and T. J. Hicks, D. M. Lowry, L. A. Yates, Geo. E. Lewis, J. R. Rendall, W. H. Pickard and W. E. Van Brunt constituting the Board of Directors. The Board of Directors shall meet immediately after the adjournment of the stockholders meeting.

ARTIBLE VI. INDEBTEDNESS.

The highest amount of indebtedness or liability to which said corporation can at any time shall be Thirty Thousand Dollars.

ARTICLE VII.
NAMES AND RESIDENCES OF STOCKHOLDERS.

The names and residences of the several subscribers for stock and incorporators of said corporation with the number of shares subscribed for by each of them are as follows, to wit:

T. J. Hicks,	Tallahassee, Florida.	5 shares.
D. M. Lowry,	Tallahassee, Florida.	5 shares.
L. A. Yates,	Tallahassee, Florida.	5 shares.
Geo. E. Lewis,	Tallahassee, Florida.	5 shares.
J. R. Randall,	Tallahassee, Florida.	5 shares.
W. H. Pickard,	Tallahassee, Florida.	5 shares.
W. E. Van Brunt,	Tallahassee, Florida.	5 shares.

IN WITNESS WHEREOF, the undersigned have joined as subscribing incorporators of Tallahassee Country Club and do respectfully agree to take the number of shares of stock

hereinbefore set forth.

T. J. Hicks
D. M. Lowry
L. A. Yates
Geo. E. Lewis
J. R. Randall
W. H. Pickard
T. E. Van Brunt

State of Florida,)
:
County of Leon.)

Before me, the undersigned authority, this day personally appeared T. J. Hicks, D. M. Lowry, L. A. Yates, Geo. E. Lewis, J. R. Randall, W. H. Pickard, and T. E. Van Brunt and acknowledged the signing of the foregoing articles of incorporation for the purposes therein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed my official Notarial Seal at Tallahassee, Florida on this the 28th day of February, A D 1924.

Lillian Philips
Notary Public State of Florida at Large.
My commission expires October 18-1926

STATE OF FLORIDA

OFFICE SECRETARY OF STATE

CERTIFICATE AS TO APPOINTMENT OF RESIDENT AGENT AND NAMING OF OFFICERS AND DIRECTORS OF A CORPORATION

The undersigned, in accordance with Chapter _____ Laws of Florida, Acts of 1927, entitled: "An Act Relating to Corporations," hereby certifies:

First,—That Tallahassee Country Club

a Corporation duly organized and existing under the laws of the State of Florida has filed in the office of Secretary of State, a copy of its charter.

Second,—That the name of its authorized agent in said State of Florida upon whom service of process may be had is and its place of business or domicile for the service of process within the State of Florida are as follows:

Comptroller's Office

KENNETH MORAN Street or Building STATE CAPITOL

City of Tallahassee County of Leon

State of Florida

As provided in Section 12 of said Chapter, the following are the Officers:

NAME:	SPECIFIC ADDRESS:
Kenneth Moran, Prest.,	State Capitol
Wm B Galt, Vice Prest.,	City Offices
Lewis G Thompson,	Supreme Court

DIRECTORS:

NAME:	SPECIFIC ADDRESS:
Harry Readel,	"Tall Timbers" R F D
T J Hicks,	College Avenue
Edward Conradi,	Fla. State College for Women
L A Yates,	College Ave
F C Elliot	Capitol Building
Lewis G Thompson	Supreme Court
Wm Galt	City Building
Kenneth Moran	Capitol Building
G P Mc Cord	Lewis Bank Bldg.
D M Lowry	Capital City Bank
F B Winthrop	Lewis Bank Bldg.

IN WITNESS WHEREOF, the Corporation has caused this instrument to be signed in its Corporate Name by its duly authorized officers and its Corporate Seal to be affixed this 16 day of June A. D. 19 27.

TALLAHASSEE COUNTRY CLUB

Kenneth Moran President

By _____

President or Vice-President.

ATTEST: Lewis G. Thompson

Secretary.

State of Florida }
County of Leon } ss.

The said Kenneth Moran and Lewis G Thompson being duly sworn, upon their oaths do severally say that they are respectively the President and Secretary of said Tallahassee Country Club, a corporation as aforesaid, and that the matters and facts stated in the foregoing statement are true.

Subscribed and sworn to before me this the 16th day of June A. D. 19 27.

Clerk Florida Supreme Court

State of Florida

Office Secretary of State

ACCEPTANCE OF APPOINTMENT AS RESIDENT AGENT

The undersigned, having been designated as Agent for the service of process within the State of Florida upon Tallahassee Country Club a corporation, organized under the laws of the State of Florida does hereby accept the appointment as such Agent for the above named corporation. The location of the office of said corporation is (Street or Building) Comptroller's Office State Capitol

City of Tallahassee County of Leon

State of Florida.

IN WITNESS WHEREOF, The name and seal of the said Resident Agent is hereunto affixed at

Tallahassee Florida this the 1st day of July A. D. 192 7

Kenneth Moran (Seal)

Resident Agent for

Tallahassee Country Club

Form D.C.T.R.—For Domestic Corporations.

Corporation Report and Tax Returns
to the
Secretary of State of Florida

As required by Senate Bill No. 734, Chap. 14677 (as amended) Laws of Florida, 1931.

No._____
Date Rec. NOV 18 1931
Checked by _____
Entered C. B. page_____
Tax pd. $_____

HON. R. A. GRAY, Secretary of State,
Tallahassee, Florida.

SIR:

In compliance with the law above referred to we submit below information called for, and enclose remittance for $_____ to pay the tax imposed by said law.

(1) That Tallahassee Country Club
(Give correct name of corporation)
a corporation duly organized and existing under the laws of the State of Florida, with its principal place of business within said State at _____, County of _____, has designated and established _____
(Street or Building)
City of _____, County of _____, State of Florida, as its place of business or domicile for the service of process within the State, and has named and does hereby name as its agent _____

(2) NAMES AND ADDRESSES OF OFFICERS:
Name. Address.

Non Profit
This is a Corporation

(3). NAMES AND ADDRESSES OF DIRECTORS:
Name. Address.

(4) General nature of main business engaged in _____

(5) Date incorporated _____

☞ (See copy of law, on back of this sheet.)

Date of last meeting of Board of Directors:_____

Is Corporation active?_____ If inactive, state how long_____

Is it the purpose of the Corporation to begin operation in the future?_____

CAPITAL STOCK STATEMENT

(6) The total authorized capital stock of the corporation is___ $_____

of which there is issned and outstanding

_____ shares _____ par value, amount ___ $_____

_____ shares no par value, fixed by law (see Section 12) for purpose of tax at $100.00 per share _____ $_____

Total capital stock outstanding _____ $_____

Tax as per schedule _____ $_____

Note:—In the case of no par value shares, a financial statement may be submitted to show the actual value, and this will be the basis of the taxation; or the corporation may elect to value such shares at $100.00 *per share.*

(7) We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

(SEAL)

J. Ken Bayless Jr

By President ~~or Vice-President~~.

ATTEST:

_____

Secretary.

State of Florida

Secretary of State

I, Tom Adams, Secretary of State of the State of Florida,

Do Hereby Certify That the following is a true and correct copy of

Certificate of Incorporation of CAPITAL CITY COUNTRY CLUB, INC., organized and existing under the Laws of the State of Florida, filed on the 24th day of April, A. D., 1956; Resident Agent Certificate filed on the 23rd day of May, A. D., 1956; Capital Stock Tax Report for part year 1956 and 1957 filed on the 9th day of August, A. D., 1957; Petition to Leon County Circuit Court changing corporation from a profit corporation to a non-profit corporation approved by the Honorable Hugh M. Taylor, Judge of the Circuit Court, in and for Leon county, pursuant to Chapter 57-90, Laws of 1957, filed on the 9th day of August, A. D., 1957; Exempt Tax Report filed on the 20th day of January, A. D., 1960; Exempt Tax Report filed on the 17th day of May, A. D., 1963; Exempt Tax Report filed on the 24th day of September, A. D., 1964; Exempt Tax Report filed on the 28th day of July, A. D., 1965; Exempt tax Report filed on the 12th day of July, A. D., 1966; Exempt Tax Report filed on the 21st day of June, A. D., 1967; Exempt Tax Report filed on the 18th day of September, A. D., 1968, as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida at Tallahassee, the Capital, this the 30th day of January, A.D. 1970.

Secretary of State

Certificate of Incorporation

OF

CAPITAL CITY COUNTRY CLUB, INC.

We, the undersigned, hereby associate ourselves together for the purpose of becoming a corporation under the laws of the State of Florida, by and under the provisions of the Statutes of the State of Florida, providing for the formation, liability, rights, privileges and immunities of a corporation for profit.

ARTICLE I

NAME OF COMPANY

The name of this corporation shall be:—

CAPITAL CITY COUNTRY CLUB, INC.

262.00
5.00
1.00
3.00
271.00
271.00

ARTICLE II

GENERAL NATURE OF BUSINESS

The general nature of the business and the objects and purposes proposed to be transacted and carried on, are to do any and all of the things herein mentioned, as fully and to the same extent as natural persons might or could do, viz:—

To purchase, lease, acquire, lay out, and operate a golf course, tennis courts, swimming pool, club house and club facilities, and the like, and to maintain and operate the same; to purchase, lease, or rent any and all real or personal property necessary for said purposes; to do all things incident to and in the furtherance of a private country club for the recreation, health, amusement and pleasure of the members thereof, and to operate any business or facility incident to and in the furtherance of said objectives.

To borrow money and to negotiate loans for the purpose of carrying into effect the objectives of this corporation; to execute promissory notes, bonds, debentures, and other negotiable instruments of whatsoever nature, and to secure the same by mortgage on its property or otherwise.

Generally to make and perform contracts of any kind and description for the purpose of attaining any of the objects of the corporation; to do and perform any other acts and things, and to exercise any and all powers which a co-partnership or natural person could do and exercise, and which now are or hereafter may be authorized by law, and generally to do and perform any and all things necessary or incident to the performing and carrying out of the powers hereinabove specifically delegated or implied.

ARTICLE III

CAPITAL STOCK

The authorized Capital Stock of the Corporation shall be:—

Fifteen Hundred (1500) shares of common stock which shall have a par value of $100.00 per share.

All of said stock shall be payable in cash, property, labor or services at a just valuation to be fixed by the Board of Directors at a meeting called for that purpose; property, labor or services may be purchased, or paid for with the Capital Stock at a just valuation to be fixed by the Board of Directors at a meeting called for that purpose.

ARTICLE IV

AMOUNT OF CAPITAL TO BEGIN BUSINESS WITH

The amount of Capital with which this corporation shall commence business shall be FIVE HUNDRED DOLLARS.

ARTICLE V

CORPORATE EXISTENCE

This corporation shall have a perpetual existence unless sooner dissolved according to law.

ARTICLE VI

PRINCIPAL PLACE OF BUSINESS

The principal place of business of said corporation shall be at Tallahassee, Leon County, Florida, with the privilege of having branch offices at other places within or without the State of Florida and within or without the United States of America.

ARTICLE VII

NUMBER OF DIRECTORS

The number of directors of this corporation shall be not less than ~~three (3) nor more than~~ five (5) nor more than twenty-five (25).

ARTICLE VIII

DIRECTORS

The name and post office address of the first officers of this corporation who shall hold office for the first year or until their successors are chosen, shall be:

Blair C. Stone, President	Tallahassee, Florida
Paul H. Brock, Jr., Secretary	Tallahassee, Florida
B. Cheever Lewis, Treasurer	Tallahassee, Florida

ARTICLE IX

SUBSCRIBERS

The name and post office address of each Director and subscriber and the number of shares of stock which each agrees to take are:

Sidney D. Andrews	Tallahassee, Florida	1 share
Charles S. Ausley	"	"
C.H. Belvin	"	"
Paul H. Brock, Jr.	"	"
Wilson Carraway	"	"
Harrold Carswell	"	"
M.R. Clements	"	"
Howell Collins	"	"
Hilton Cooper	"	"
Ernest Daffin	"	"
B. Cheever Lewis	"	"
William L. Moor	"	"
Robert C. Parker	"	"
C.R. Phillips	"	"
Julian Proctor	"	"
Godfrey Smith	"	"
Julian C. Smith	"	"
Julian V. Smith	"	"
Sidney V. Steyerman	"	"
Blair C. Stone	"	"
J. Edwin White	"	"

ARTICLE X

SPECIAL CHARTER PROVISIONS

The original incorporators of this corporation shall have the right to, and will after the organization of the same, assign and deliver their subscriptions of stock herein to any other persons who may hereafter become subscribers to the Capital Stock of this Corporation, who upon acceptance of such assignment, shall stand

in lieu of the original incorporators and assume and carry out, all of the rights, liabilities and duties entailed by said subscriptions, subject to the laws of the State of Florida, and the execution of this power.

IN WITNESS OF THE FOREGOING, we have hereunto set our hands and seals this 24th day of April, A.D. 1956.

SIDNEY D. ANDREWS (SEAL)

CHARLES S. AUSLEY (SEAL)

C.H. BELVIN (SEAL)

PAUL H. BROCK, JR. (SEAL)

WILSON-CARRAWAY (SEAL)

HARROLD CARSWELL (SEAL)

M.R. CLEMENTS (SEAL)

HOWELL COLLINS (SEAL)

HILTON COOPER (SEAL)

ERNEST DAFFIN (SEAL)

B. CHEEVER LEWIS (SEAL)

WILLIAM L. MOOR (SEAL)

ROBERT C. PARKER (SEAL)

C.R. PHILLIPS (SEAL)

JULIAN PROCTOR (SEAL)

_____ (SEAL)
GODFREY SMITH

_____ (SEAL)
JULIAN C. SMITH

_____ (SEAL)
JULIAN V. SMITH

_____ (SEAL)
SIDNEY V. STEYERMAN

_____ (SEAL)
BLAIR C. STONE

_____ (SEAL)
J. EDWIN WHITE

STATE OF FLORIDA
COUNTY OF LEON

I HEREBY CERTIFY THAT on this the 24th day of April, A.D. 1956, personally came and appeared before me, the undersigned authority, SIDNEY D. ANDREWS, CHARLES S. AUSLEY, C.H. BELVIN, PAUL H. BROCK, JR., WILSON CARRAWAY, HARROLD CARSWELL, M.R. CLEMENTS, HOWELL COLLINS, HILTON COOPER, ERNEST DAFFIN, B. CHEEVER LEWIS, WILLIAM L. MOOR, ROBERT C. PARKER, C.R. PHILLIPS, JULIAN PROCTOR, GODFREY SMITH, JULIAN C. SMITH, JULIAN V. SMITH, SIDNEY V. STEYERMAN, BLAIR C. STONE and J. EDWIN WHITE, all to me well known, and well known by me to be the persons of that name described in and who severally acknowledged to me that they executed the foregoing "ARTICLES OF INCORPORATION" as their free and voluntary act and deed and for the uses and purposes therein set forth and expressed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year above written.

Barbara B. White
Notary Public, State of Florida at Large.

(SEAL)

My Commission Expires: 6/23/59

Fee Paid

STATE OF FLORIDA

OFFICE

SECRETARY OF STATE

Certificate Designating Place of Business or Domicile for the Service of Process Within This State, Naming Agent Upon Whom Process May Be Served and Names and Addresses of the Officers and Directors.

In pursuance of Chapter 47.34, Florida Statutes 1953, the following is submitted, in compliance with said Act:

First—That CAPITAL CITY COUNTRY CLUB, INC.

a corporation duly organized and existing under the laws of the State of Florida

with its principal place of business at City of Tallahassee

County of Leon, State of Florida

has designated and established Brock Building
(Street or building)

City of Tallahassee, County of Leon

State of Florida, as its place of business or domicile for the service of process within this State, and named as its agents Paul H. Brock Jr.

to accept service of process.

OFFICERS: AFFIX TITLES: NAME	SPECIFIC ADDRESS
President Blair C. Stone	218 E. Park Ave. Tallahassee, Fla.
Vice-President Sydney D. Andrews	2221 Amelia Circle, Tallahassee, Fla
Vice-President Robert C. Parker	1432 Country Club Dr., Tallahassee,
Secretary Paul H. Brock Jr.	Brock Bldg., Tallahassee, Fla.
Treasurer B. Cheever Lewis	Lewis State Bank, Tallahassee, Fla.

DIRECTORS:

NAME	SPECIFIC ADDRESS
See list attached	

By Paul H. Brock Jr.
Paul H. Brock Jr., Secretary

Having been named to accept service of process for the above stated corporation, at place designated in this certificate, I hereby accept to act in this capacity, and agree to comply with the provision of said Act relative to keeping open said office.

Paul H. Brock Jr.
Paul H. Brock Jr., Secretary

It is necessary to file this certificate within thirty days after filing Certificate of Incorporation, as to domestic Corporations and within thirty days after issuance of permit to foreign corporations; and thereafter only when corporation has changed its place of business or agent.

Filing Fee, $1.00

(DO NOT DETACH)

Form D.C.T.R.—For Domestic Corporations

Corporation Report and Tax Returns

to the

Secretary of State of Florida

As required by Chapter 608, Florida Statutes

Date Rec. 8-5-57

Amt. Rec. _____

Amt. of Tax 118.34

HON. R. A. GRAY, Secretary of State,
Tallahassee, Florida.

SIR:

In compliance with the law above referred to we submit below information called for and enclose remittance for $ 118.34 to pay the tax imposed by said law.

(1) That CAPITAL CITY COUNTRY CLUB, INC.
(Give correct name of corporation)

Principal place of business Tallahassee, Florida

Insert to whom receipt is to be mailed Ausley & Ausley, Tallahassee, Florida

a corporation duly organized and existing under the laws of the State of Florida, with its principal place of business within the State at Florida, County of Leon, has designated and established

City of Tallahassee, County of Leon, State of Florida, as its place of business or domicile for the service of process within the State, and has named and does hereby name as its agent upon whom service of process may be made:

Paul H. Brock, Jr.

Whose address is: Brock Building, Tallahassee, Florida

Date of last meeting of Board of Directors July 17, 1957

Is Corporation active? See below* If inactive, state how long

Is the purpose of the Corporation to begin operations in the future?

CAPITAL STOCK STATEMENT

(6) The total authorized capital stock as follows:

1500 shares of the par value of $100.00 each

_____ shares without nominal or par value

TO CORPORATION ADDRESSED:

Corporation Capital Stock Tax is due July first each year. On the inside of the form herewith you will find the law in full. In filling out the form be sure and show all information provided for. Do not overlook showing the number of shares of stock issued and outstanding, and in case of shares of no par, show the amount actually invested in all outstanding shares, including any paid in surplus and any surplus set aside as part of the invested capital.

The corporation law requires that each and every corporation shall have not less than three directors, and be sure and show this number on the form.

R. A. GRAY, *Secretary of State.*

Date of last meeting of Board of Directors July 17, 1957

Is Corporation active? See below* If inactive, state how long

Is the purpose of the Corporation to begin operations in the future?

CAPITAL STOCK STATEMENT

(6) The total authorized capital stock as follows:

1500 shares of the par value of $100.00 each

shares without nominal or par value

☞ OUTSTANDING CAPITAL STOCK AS FOLLOWS:

1200 shares of the par value of $100.00 each $120,000.00

shares without nominal or par value, actual

☞ (Be sure and show number of shares issued and their actual value. Evidence of actual value may be shown by a condensed sheet) . . . . . $

Total outstanding capital stock $120,000.00

Tax as per schedule . . . . . $ 118.34

ONLY ONE REPORT NECESSARY WHERE MORE THAN ONE YEAR'S TAX IS PAID AT THE TIME OF FILING.

(7) We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

(SEAL)

By President or Vice-President

ATTEST:

Secretary

STATE OF FLORIDA,

COUNTY OF LEON

Personally appeared before me BLAIR C. STONE, President of Capital City Country Club, Inc.

who deposes and says that he executed this certificate for and in behalf of said corporation, and that the statement therein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 6th day of August, 1957

(SEAL)

(Signature of officer taking acknowledgement)

My commission expires: 6/23/59 Notary Public, State of Florida at Large.

* This corporation has been changed from a corporation for profit to a corporation not for profit by Order of the Circuit Court of Leon County, Florida, dated July 6, 1957, and this return is a final return made to effectuate the change in corporate nature of the corporation, the remitted tax being a tax due by the corporation to April 6, 1957.

(DO NOT DETACH)

ANNUAL CORPORATION CAPITAL STOCK TAX LAW

608 32 Annual report of corporation; contents.—

(1) All corporations heretofore or hereafter incorporated in this state and all foreign corporations heretofore or hereafter authorized to do business in this state are required to file with the secretary of state on or before July 1st of each year a sworn report, on such form as the secretary of state shall prescribe, giving (a) the name of each officer and director and his post office address, (b) the home office of the corporation, (c) the name and address of the resident agent upon whom service of process may be made, (d) the main line of business engaged in by the corporation, (e) the date of the last meeting of its board of directors, (f) whether the corporation has been actively engaged in business during the previous twelve (12) months or if its charter powers have been dormant and unused during that period, (g) the number of the shares of the capital stock of such corporation with the par value thereof, (h) the total amount of capital stock, and if a foreign corporation the amount of its capital stock allocated for use in the State of Florida, (i) such other information as may be needed to show whether the corporation is active or inactive, and (j) such other information as may be necessary for the secretary of state to have in carrying out the provisions of this section and §608 33

(2) Provided, that railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative associations, corporations not for profit and corporations paying the maximum capital stock tax, shall be required to furnish the information required under (a) through (f) of subsection (1) hereof only.

(3) All reports herein required shall be for the calendar year and shall be due to be filed on July 1st of each year and the tax payable under §608 33 shall be paid at that time

608 33 Capital stock tax.—

(1) Every corporation, except railroad, pullman, telephone, telegraph, insurance, banking and trust companies, building and loan associations, cooperative marketing associations and corporations not for profit, doing business in this state shall pay to the state for the use of the state a capital stock tax according to the following schedule:

SCHEDULE FOR CAPITAL STOCK TAX

For all corporations with capital stock not exceeding $10,000 00	$ 10.00
For capital stock of over $10,000 00 and not over $25,000 00	25 00
For capital stock of over $25,000 00 and not over $50,000 00	50 00
For capital stock of over $50,000 00 and not over $100,000 00	75 00
For capital stock of over $100,000 00 and not over $200,000 00	100.00
For capital stock of over $200,000 00 and not over $500,000.00	200 00
For capital stock of over $500,000 00 and not over $1,000,000 00	500.00
For capital stock of over $1,000,000 00 and not over $2,000,000.00	750.00
For capital stock of over $2,000,000.00	1,000.00

The capital stock above mentioned refers to the invested capital represented by shares of stock outstanding.

(2) In the case of any Florida corporation having been organized or any foreign corporation which has been authorized to do business in Florida, less than twelve (12) months at the time the report is due and the capital stock tax is to be paid, the tax due that year shall be pro rated according to the number of months the corporation has been in existence or authorized to do business in this state

(3) Nothing in this section or in §608 32 shall apply to any corporation that has been adjudged bankrupt or dissolved by order of court except that any such corporation shall file a statement setting forth its status in that respect, but shall not be required to pay the capital stock tax.

(4) In the event any of the shares of stock of any such corporation should be no par value, then for the purposes of this section, each share shall be presumed to have value of at least one hundred dollars ($100 00) per share, which presumption may be overcome by actual proof submitted to the secretary of state. The secretary of state shall make such investigation as he may consider necessary and increase or decrease the value of no par value stock as he may determine to be correct, and in so doing he may take into consideration all facts tending to show the fair market value of the stock, including its sale price, the amount of the surplus of the corporation and such other pertinent facts as he may deem advisable.

608 34. Duties of secretary of state.—The secretary of state shall prescribe the form and furnish the blanks upon request to make the annual reports called for in §608.32, examine the reports when received and if the information called for is given in such reports, he shall file the same as information and keep such reports as public records. He shall pay into the state treasury to be used for such purposes as the legislature may determine all moneys collected under the provisions of §608 33 He shall cause a notice of the requirements of §§608 32-608 33, to be mailed to the last known address of every corporation doing business in the state which shall fail to file within thirty (30) days after July 1st, the report required by §608 32 or pay the capital stock tax imposed by §608 33.

608 35 Penalty for failure to file report and pay tax.—Any corporation failing to comply with the provisions of §§608 32 and 608 33 for six (6) months shall not be permitted to maintain or defend any action in any court of this state until such reports are filed and all taxes due under this chapter be paid.

TO CORPORATION ADDRESSED:

Corporation Capital Stock Tax is due July first each year. On the inside of the form herewith you will find the law in full. In filling out the form be sure and show all information provided for. Do not overlook showing the number of shares of stock issued and outstanding, and in case of shares of no par, show the amount actually invested in all outstanding shares, including any paid in surplus and any surplus set aside as part of the invested capital.

The corporation law requires that each and every corporation shall have not less than three directors, and be sure and show this number on the form.

R. A GRAY, *Secretary of State*

DIRECTORS:

NAME	MAILING ADDRESS
Sydney D. Andrews	2221 Amelia Circle, Tallahassee, Fla.
Charles Ausley	1410 Betton Road, Tallahassee, Fla.
C. P. Belvin	2115 N. Randolph Circle, Tallahassee, Fla.
Paul L. Brock Jr.	Brock Bldg., Tallahassee, Fla.
Wilson Carraway	717 Millerest, Tallahassee, Fla.
Jerrold Carswell	243 E. 6th Ave., Tallahassee, Fla.
L. E. Clements	1543 Lee Ave., Tallahassee, Fla.
Howell Collins	1521 Old Fort Dr., Tallahassee, Fla.
Milton Cooper	1527 E. Country Club Dr., Tallahassee, Fl
Ernest Daffin	1103 E. Lafayette, Tallahassee, Fla.
~~Xxxxx Xxxxxx~~	~~1225 Knoxville Xxx, Xxxxxxxxxx~~
B. Cheever Lewis	Lewis State Bank, Tallahassee, Fla.
William L. Moor	1552 Isabel Court, Tallahassee, Fla.
Robert C. Parker	1432 Country Club Dr., Tallahassee, Fla.
C. M. Phillips	1203 Seminole Dr., Tallahassee, Fla.
L. Julian Proctor	1614 S. Meridian St., Tallahassee, Fla.
Godfrey Smith	216 S. Magnolia Dr., Tallahassee, Fla.
Julian C. Smith	1520 Marion Ave., Tallahassee, Fla.
Julian V. Smith	Industrial Savings Bank, Tallahassee,
Sidney W. Sheperman	1071 Myers Park Dr., Tallahassee, Fla.
Blair C. Stone	213 E. Park Ave., Tallahassee, Fla.
J. Edwin White	403 E. Georgia St., Tallahassee, Fla.

Paul L. Brock Jr., Secretary

Corporate 6 Page 159

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

IN RE: MATTER OF CAPITAL CITY COUNTRY CLUB, INC.

P E T I T I O N

Comes now CAPITAL CITY COUNTRY CLUB, INC., by Blair C. Stone, its President, subscriber to the following proposed charter and to this Petition and, presents this, its proposed charter, for the approval of the Hon. _____, Judge of the Circuit Court, in and for Leon County, Florida, respectfully saying:

1. That, heretofore, on the 24th day of April, 1956, CAPITAL CITY COUNTRY CLUB, INC., was incorporated, as a corporation for profit, under the Laws of the State of Florida.

2. That such corporation, from its inception, became engaged solely in carrying out the purposes and objects for which corporations not for profit are authorized under the Laws of Florida to carry out.

3. That, heretofore, on January 29, 1957, Blair Stone, Paul H. Brock, Robert C. Parker, Charles S. Ausley and Godfrey Smith who are all officers and/or directors of this Petitioner, acting on behalf of this Petitioner, CAPITAL CITY COUNTRY CLUB, INC., petitioned the Hon. W. May Walker, Judge of the Circuit Court, in and for Leon County, Florida, for approval of a proposed charter for CAPITAL CITY COUNTRY CLUB, a non-profit corporation, which said charter, having been approved by the Court, was recorded in Corporation Book 6, page 87-90 on January 29, 1957, in the Public Records of Leon County, Florida.

4. That the purpose and intent of your Petitioner in seeking and obtaining a non-profit corporate charter for CAPITAL

CITY COUNTRY CLUB, was that such non-profit corporation should succeed to all of the rights, assets, duties and liabilities of your Petitioner, CAPITAL CITY COUNTRY CLUB, INC., the profit corporation.

5. That by Chapter 57-90, General Laws of 1957, Regular Session, which act became effective on May 13, 1957, the Legislature provided that any profit corporation which has transferred, or is in the process of transferring, its functions and assets to a non-profit corporation, shall, upon the recital of the facts, circumstances and intentions surrounding such transfer proceedings, in a petition filed before the Circuit Court, and the subsequent approval thereof, be deemed to have acted in a manner so that the non-profit corporation should succeed to the rights, liabilities and assets of its corporate predecessor, the same as if the original petition had been filed in accordance with the provisions of Chapter 617, which provides, in substance, that a corporation for profit engaged solely in carrying out the purposes and objects for which corporations not for profit are authorized, may change its corporate nature by the filing of a Petition before this Court.

6. That it is, and has been, the purpose and intention of this Petitioner to bring about the transfer of its functions and assets to CAPITAL CITY COUNTRY CLUB, the non-profit corporation, within the terms, provisions and purview of Chapter 57-90, Laws of 1957 and Section 617.16, 617.17, 617.18 and 617.19, Florida Statutes, 1955.

7. The name of this corporation shall be CAPITAL CITY COUNTRY CLUB, and its principal office and location shall be in Tallahassee, Leon County, Florida.

8. The purposes for which this corporation is formed are as follows:

A. To maintain a club house, grounds and other physical plant for the benefit of its members, to promote social intercourse and to further athletic sports and recreational activities, particularly the game of golf.

B. To solicit, collect, receive, hold, invest, re-invest, distribute and disburse donations, subscriptions, gifts, bequests and other funds for the purposes of this corporation.

C. To engage in any charitable, eleemonsynary, educational or other activity which may be necessary to effect and carry out the purposes of this corporation, and the doing of any and all things necessary or incident thereto.

9. Any person shall be admitted to membership in this corporation subject to the requirements and limitations upon membership as may from time to time be fixed and established by the by-laws of the corporation or by its Board of Directors.

10. This corporation shall commence on the 29th day of January, 1957, and shall have perpetual existence.

11. Names and residence of the subscribers to this proposed charter are as follows:

Blair C. Stone, President, Tallahassee, Florida

Paul H. Brock, Jr., Secretary, Tallahassee, Florida.

12. The affairs of this corporation shall be managed by a President, Vice President, Secretary and Treasurer, together with a Board of Directors composed of not less than five (5) members, nor more than thirty-one (31) members, of this corporation who shall be elected by the membership thereof at each annual meeting of the corporation, for terms as provided by the

by-laws, provided that, the number of members of the Board of Directors may, from time to time, be diminished or enlarged, within the above set forth limits, by a vote of two-thirds (2/3) of a quorum of the members present at any meeting.

13. Until the first election of officers and directors shall be held, the present officers and directors of CAPITAL CITY COUNTRY CLUB, INC., a corporation for profit, shall serve as the officers and directors of this corporation in the same respective capacities in which they serve in CAPITAL CITY COUNTRY CLUB, INC. The present officers and directors of CAPITAL CITY COUNTRY CLUB, INC., and the officers and directors of this corporation hereby designated to serve until the first election shall be

Sydney D. Andrews
Charles S. Ausley
Paul H. Brock, Jr. - Secretary
Wilson Carraway
Robert C. Parker - Vice President
Julian M. Proctor
Blair C. Stone - President
Mark Ahrano
Ernest C. Daffin
Ryals Lee
B. Cheever Lewis - Treasurer
Payne Midyette, Sr.
Godfrey Smith
Julian V. Smith
C.H. Belvin
M.R. Clements
Leo Foster
James M. Lee, Jr.
Frank Pepper
S.V. Steyerman
J. Edwin White

14. The by-laws of this corporation shall be made, altered, amended or rescinded by the directors subject to the approval of a majority of a quorum of the stockholders.

15. The highest amount of indebtedness or liability to which this corporation may subject itself shall be $500,000.00, or two-thirds (2/3) of the value of the property of this corporation, whichever figure shall be the lesser.

16. This corporation may own real estate in the value of not more than $1,000,000.00.

17. CAPITAL CITY COUNTRY CLUB agrees to accept all of the property of the petitioning CAPITAL CITY COUNTRY CLUB, INC., and further agrees to assume and pay all its indebtedness and liabilities.

18. Attached hereto is a certified copy of the resolution duly adopted by the stockholders authorizing the change in corporate nature and directing an authorized officer to file this Petition before the Court.

WHEREFORE, your Petitioner prays that the Court will

1. Approve the proposed charter contained herein, and

2. Find that the Petitioner, CAPITAL CITY COUNTRY CLUB, INC., acted under the terms, provisions and within the meaning and purview of Chapter 57-90, Laws of 1957.

(Corporate Seal)

(Seal)

CAPITAL CITY COUNTRY CLUB, INC.

By /s/ [illegible]
Blair C. Stone, President

Attest /s/ [illegible]
Paul H. Brock, Jr., Secretary

Corporation 6 page 164

STATE OF FLORIDA,

COUNTY OF LEON.

BEFORE ME, the undersigned authority, this day personally appeared BLAIR C. STONE and PAUL H. BROCK, JR., President and Secretary, respectively, of CAPITAL CITY COUNTRY CLUB, INC., a corporation under the Laws of the State of Florida, to me known to be the subscribers to the foregoing Petition and proposed Charter of Incorporation, who, having first been duly sworn, acknowledge and say that they are the subscribers aforesaid and that it is the intention of CAPITAL CITY COUNTRY CLUB, INC., in good faith, to carry out the purposes and objects set forth in the foregoing proposed Charter.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Tallahassee, Florida, this 2nd day of [illegible] A.D. 1957.

(Seal)

/s/ [illegible]
Notary Public, State of Florida at Large.

My commission expires: [illegible]

ORDER

Having examined the foregoing proposed Charter, Petition and certified copy of Resolution, and having found the same to be in proper form and for the objects and purposes authorized by the Laws of the State of Florida, the same be, and it is hereby, ratified and approved this [illegible] day of [illegible], A.D. 1957. It is further found that CAPITAL CITY COUNTRY CLUB, INC., is and has been, from its inception, engaged solely in

carrying out purposes and objects for which corporations not for profit are authorized under the State of Florida, to carry out.

WHEREFORE, it is decreed that all of the rights, assets, duties and liabilities of CAPITAL CITY COUNTRY CLUB, INC., a corporation for profit organized and heretofore existing under the Laws of Florida be and they are hereby transferred to and assumed by CAPITAL CITY COUNTRY CLUB, a corporation organized under the Laws of the State of Florida not for profit; that the CAPITAL CITY COUNTRY CLUB, in obtaining its corporate charter which was approved by this Court on the 29th day of January, 1957, shall be deemed to have acted under Chapter 57-90, Laws of the State of Florida, 1957, and that the said CAPITAL CITY COUNTRY CLUB, a non-profit corporation, shall be deemed to have thereby succeeded to the rights, liabilities and assets and its corporate predecessor, CAPITAL CITY COUNTRY CLUB, INC., a corporation for profit, as fully and completely as if the original petition of CAPITAL CITY COUNTRY CLUB for a non-profit corporate charter had been filed under the provisions of said Chapter 57-90.

DONE AND ORDERED this 1. day of August, A.D. 1957.

/s/ Mack [illegible]

CIRCUIT JUDGE

Corporation 6 PAGE 186

RESOLUTION

WHEREAS, heretofore on or about the 24th day of April, 1956, CAPITAL CITY COUNTRY CLUB, INC. was incorporated under the laws of the State of Florida as a corporation for profit, and

WHEREAS, the said CAPITAL CITY COUNTRY CLUB, INC. is presently engaged solely in carrying out purposes and objects for which corporations not for profit are authorized under the laws of the State of Florida, and

WHEREAS, it is deemed wise and expedient to change the corporate nature of the CAPITAL CITY COUNTRY CLUB, INC., from a corporation for profit to a corporation not for profit,

NOW, THEREFORE, BE IT RESOLVED by the stockholders of CAPITAL CITY COUNTRY CLUB, INC., at a special meeting assembled, that the Board of Directors be, and they are hereby, authorized and directed to do all things necessary and proper to effectuate and carry out the formation and organization of a corporation, not for profit, to be known as CAPITAL CITY COUNTRY CLUB and to transfer all of the property, assets, indebtedness and liabilities of CAPITAL CITY COUNTRY CLUB, INC. to CAPITAL CITY COUNTRY CLUB upon the effective organization thereof.

BE IT FURTHER RESOLVED that all acts of the stockholders and directors of CAPITAL CITY COUNTRY CLUB, INC., to this date, be and they are hereby approved and ratified; and further, that it is the sense of this meeting that all of the directors and officers of this corporation be continued in their present status, respectively, in the new corporation, CAPITAL CITY COUNTRY CLUB, when duly organized.

Corporation 6 PAGE 157

Adopted this 22nd day of January, 1957, by a majority vote, a legal quorum being present.

Attest: /s/ Paul H. Brock, Jr.
Secretary

(SEAL AFFIXED)

CERTIFICATE

I, Paul H. Brock, Jr., Secretary of CAPITAL CITY COUNTRY CLUB, INC., a Florida corporation, hereby certify that I am the authorized custodian of the records of such corporation and that on the 22nd day of January, 1957, at Tallahassee, Florida, at a meeting of the stockholders of CAPITAL CITY COUNTRY CLUB, INC., the foregoing Resolution was offered, considered and adopted by majority vote, a legal quorum being present.

And, I further certify that the foregoing copy of such Resolution is a true and correct copy thereof.

/s/ Paul H. Brock, Jr.
Paul H. Brock, Jr., Secretary

SEAL

(Seal)

STATE OF FLORIDA, COUNTY OF LEON,
I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a Non Profit Corporation Charter filed in my office on the 6 day of July A D. 1957 and recorded in Corporation Book 6 at page 157 WITNESS my hand and official seal this 6 day of July A D 1957.

GEO. G. CRAWFORD, Clerk Circuit Court
By [illegible], D. C

CORPORATION REPORT TO THE SECRETARY OF STATE OF FLORIDA

Railroad Companies, Pullman Companies, Telephone and Telegraph Companies, Insurance Companies, Banking and Trust Companies, Building and Loan Associations, Cooperative Marketing Associations, Corporations not for profit and Corporations paying the maximum capital stock tax, as required by Section 608.32, Florida Statutes, 1953.

Hon R. A. Gray, Secretary of State
Tallahassee, Florida

In accordance with the law above referred to, we submit below information called for:

(1) That... Capital City Country Club, Inc. ...
Name of Corporation

duly organized and existing under the laws of the State of... Florida ...

with its principal place of business at ..Golf Terrace, Tallahassee, Fla. ...
City State

Leon , has designated Golf Terrace ,
County Street or Building

City of Tallahassee, County of Leon, State of Florida. as its place of business or domicile for the service of process within the State, and has named as its agent.

...

whose address is ...

(2) NAMES AND ADDRESSES OF OFFICERS (be sure to affix titles):

Name	P. O. Address
Weldon G. Starry, President	1300 E. Park Ave., Tallahassee, Fla.
Tom Green, Jr. V. President	2107 Lee Ave. Tallahassee, Fla.
Earl K. Yancey, Secretary	622 Hillcrest, Tallahassee, Fla.
Julian C. Smith, Treasurer	1520 Marion Ave., Tallahassee, Fla.

(3) NAMES AND ADDRESSES OF DIRECTORS:

Name	P. O. Address
See attached list	

(4) GENERAL NATURE OF MAIN BUSINESS ENGAGED IN...

Golf Course, Dining room and social events (private - limited to members and their guests)

(5) Date of last meeting of Board of Directors... December 17, 1959 ...

Has the Corporation been actively engaged in business during the previous twelve months? Yes

If inactive, state how long its charter powers have been dormant ...

(6) We, the undersigned, certify the above state of facts to be true and correct as shown by our records.

President or Vice-President

ATTEST: Earl K. Yancey
Secretary

STATE OF FLORIDA
COUNTY OF LEON

Personally appeared before me WELDON G. STARRY
who deposes and says that he executed this certificate for and in behalf of said corporation. and that the statement therein contained is true and correct to the best of his knowledge and belief

Sworn to and subscribed before me this 13 day of January , 19 60 .

SEAL

Virginia Kelly
Signature of Officer Taking Acknowledgment
Notary Public, State of Florida at Large

The 1953 Legislature made it necessary for the following corporations, Railroad Companies, Pullman Companies, Telegraph and Telephone Companies, Insurance Companies, Banking and Trust Companies, Banking and Loan Associations, Cooperative Associations, Corporations not for profit and Corporations paying the maximum capital stock tax to file with the Secretary of State on July first of each year, a form he shall prescribe, giving the above information, however, they are not required to pay a corporation capital stock tax.

CORPORATION REPORT TO THE SECRETARY OF STATE OF FLORIDA

Railroad Companies, Pullman Companies, Telephone and Telegraph Companies, Insurance Companies, Banking and Trust Companies, Building and Loan Associations, Cooperative Marketing Associations, Corporations not for profit and Corporations paying the maximum capital stock tax, as required by Section 608.32, Florida Statutes, 1953.

Hon. Tom Adams, Secretary of State
Tallahassee, Florida

In accordance with the law above referred to, we submit below information called for:

(1) That Capital City Country Club, Inc. (Name of Corporation)
duly organized and existing under the laws of the State of Florida
with its principal place of business at Tallahassee (City), Florida (State)
Leon (County), has designated Golf Terrace (Street or Building)
City of Tallahassee, County of Leon, State of Florida,
as its place of business or domicile for the service of process within the State, and has named as its agent,
Raymond E. Logan, Manager
whose address is 1933 Belvedere Tallahassee, Fla.

(2) NAMES AND ADDRESSES OF OFFICERS (be sure to affix titles):

Name	P. O. Address
Joe N. Hutto, President	P. O. Box 1112, Tallahassee, Fla.
Joe Hosford, Vice President	P. O. Box 3547 U S S, Tallahassee, Fla.
Ray Higgins, Secretary	1111 N. Gadsden St., Tallahassee, Fla.
Roy McGahagin, Treasurer	2204 Monticello Dr., Tallahassee, Fla.

(3) NAMES AND ADDRESSES OF DIRECTORS:

Name	P. O. Address
(See separate list attached)	

(4) GENERAL NATURE OF MAIN BUSINESS ENGAGED IN
Country club

(5) Date of last meeting of Board of Directors April 23, 1963

Has the Corporation been actively engaged in business during the previous twelve months? Yes

If inactive, state how long its charter powers have been dormant

(6) We, the undersigned, certify the above state of facts to be true and correct as shown by our records.

Joe N. Hutto
President or Vice-President

ATTEST: R. G. Higgins
Secretary

STATE OF FLORIDA
COUNTY OF }

Personally appeared before me
who deposes and says that he executed this certificate for and in behalf of said corporation, and that the statement therein conteined is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 11th day of May, 1963.

SEAL

Signature of Officer Taking Acknowledgment

The 1953 Legislature made it necessary for the following corporations, Railroad Companies, Pullman Companies, Telegraph and Telephone Companies, Insurance Companies, Banking and Trust Companies, Banking and Loan Associations, Cooperative Associations, Corporations not for profit and Corporations paying the maximum capital stock tax to file with the Secretary of State on July first of each year, a form he shall prescribe, giving the above information, however, they are not required to pay a corporation capital stock tax.

Capital City Country Club
Board of Directors

MAY 17 1953

David Avant
207 West Park Avenue
Tallahassee, Fla.

Ronald Brugh
P. O. Box 805
Tallahassee, Florida

X Wayne Cook
P. O. Box 1196
Tallahassee, Fla.

Dr. James Conn
1726 Sherwood
Tallahassee, Florida

Leo L. Foster
P. O. Box 669
Tallahassee, Fla.

Dr. George Gramany
P. O. Box 487
Tallahassee, Fla.

Tom Green
P. O. Box 1138
Tallahassee, Fla.

Ray Higgins
1331 N. Jackson St.
Tallahassee, Fla.

Louis Hill
513 Plantation Road
Tallahassee, Fla.

Joe Hosford
P. O. Box 3242 CSS
Tallahassee, Fla.

Joe Hutto
510 Winnedge Ride
Tallahassee, Fla.

Jimmy Lee
1100 Russell Road
Tallahassee, Fla.

M. J. Livingston
P. O. Box 686
Tallahassee, Fla.

J. Robert McClure, Sr.
1311 Lemond St.
Tallahassee, Fla.

Roy McGahagin
2204 Monticello Drive
Tallahassee, Fla.

Lester Moon
Box 1169
Tallahassee, Fla.

M. Julian Proctor
P. O. Box 230
Tallahassee, Fla.

J. W. Rogers
2114 Golf Terrace
Tallahassee, Fla.

Board of Directors, Continued

Charles Rovetta
1554 Mitchell Avenue
Tallahassee, Fla.

Don Veller
1553 Fernando
Tallahassee, Fla.

Judge John Wigginton
Rt. 3, Box 203
Tallahassee, Fla.

POSTMASTER
Check Reason for Non-Delivery
( ) Moved, left no address
( ) Out of business
( ) No such address
( ) Unknown
( ) Closed for season
( ) Refused
RETURN REQUESTED

Corporation Report for Foreign and Domestic Corporations

(Not For Profit and Exempt (Section 608.32(2), Florida Statutes))

State of Florida
TOM ADAMS
SECRETARY OF STATE
Tallahassee, Florida

BULK RATE
U. S. POSTAGE
PAID
Tallahassee, Fla
Permit No. 88

Refer to This Number in All Correspondence
47-04- A-92620

This return is due on July 1 1964
DUE 30 DAYS AFTER RECEIVED

A92,620

CAPITAL CITY COUNTRY CLUB INC
GOLF TERRACE DR
TALLAHASSEE FLA

1. Capital City Country Club, Inc. (Give exact name of corporation) — 2. (General nature of business or object) private club

3. P O Box 67 (Street or Post Office Box of principal place of business) — Tallahassee (City) — Leon (County) — Florida (State)

4.
a. J. Lee, Jr. (Officers-Name) — President (Title) — 1100 Russell Rd. Talla. (Address)
b. Roy McGahagin — Treasurer — 2204 Monticello Dr., Ta
c. Rau Higgins — Secretary — 1321 N. Gadsden St., T
d. Leo Foster — Vice-President — 1902 Golf Terrace, Ta
e.
f.
g.

5.
a. Julian M Proctor (Directors - Name) (Law requires at least (3) three) — P O Box 230 Talla (Address)
b. Fred Dillmon — P O Box 3026 Talla
c. R. C. Johnston — 1407 Nekoma Lane, Talla
d.
e.
f.
g.
h.

6. R. E. Logan, Manager (Resident Agent Name) — 1733 Belvedere, Talla (Address)
I hereby acknowledge acceptance of the appointment as resident agent upon whom service of process may be made. R E Logan (Signature of resident agent)

7. Last meeting of Directors Sept. 10, 1964 (Month - Day - Year) 8. Corporation Active? yes (Yes or No) 9. If inactive, inactivity began (Month - Day - Year)
10. If inactive, will corporation begin business in the future? (Yes or No) 11. Date Incorporated 8-6-57 (Month - Day - Year) 12. If foreign corporation, Date Qualified in Fla (Month - Day - Year)

13. If foreign corporation, give the number of States in which you do business.

14. We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

J. Lee Jr
By President or V-President

Attest R G Higgins
Secretary

STATE OF Florida
COUNTY OF Leon

Personally appeared before me J. M. LEE JR who deposes and says that he executed this certificate for and in behalf of said corporation and that the statement herein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 7th day of September, 1964

(Notary Seal)

Wallace D. Burnett
Signature of Notary taking acknowledgment

Send Original to: TOM ADAMS, SECRETARY OF STATE, TALLAHASSEE, FLORIDA
(SEE INSTRUCTIONS ON BACK OF LAST COPY)

ORIGINAL

CORP -40, 6 64

POSTMASTER
(Mark Stamp for Non-Delivery)
( ) Moved, left no address
( ) Out of business
( ) No such address
( ) Unknown
( ) Closed for vacation
( ) Refused
RETURN REQUESTED

Corporation Report for Foreign and Domestic Corporations

(Not For Profit and Exempt (Section 608.32(2), Florida Statutes)

State of Florida
TOM ADAMS
SECRETARY OF STATE
Tallahassee, Florida

BULK RATE
U. S. POSTAGE
-PAID
Tallahassee, Fla.
Permit No. 88

RECEIVED
JUL 28 8 37 AM '65
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

Refer to This Number In All Correspondence: 47-04-A-192620

A-92620

CAPITAL CITY COUNTRY CLUB INC
GOLF TERRACE IN
TALLAHASSEE FLA

BX 67 AC

(INSERT ZIP CODE IF NOT SHOWN)

		(General nature of business or activity)
1.	CAPITAL CITY COUNTRY CLUB, INC. (Give exact name of corporation)	2. Private club

3. P. O. Box 67 (Street or Post Office Box of principal place of business) Tallahassee (City) Leon (County) Florida (State)

4. a	Leo Foster (Officers-Name)	President (Title)	1902 Golf Terrace (Address)	Tallahassee, Fla.
b	Joe Cordell	Vice- Pres.	P O Box 3046 M S S	Tallahassee, Fla.
c	Jerry Williams	Treas.	2225 N. Monroe	Tallahassee, Fla.
d	M. P. Briley	Secretary	822 N. Monroe	Tallahassee, Fla.
e				
f				
g				

5. a	Julian M. Proctor (Directors - Name) (Law requires at least (3) three)	P O Box 230 (Address)	Talla. Fla.
b.	Fred Dillman	P O Box 3026	Talla. Fla.
c	R. C. Johnston	1407 Wekewa Nene	Talla. Fla.
d.			
e.			
f.			

6. R. E. Logan, Manager (Resident Agent Name) 1733 Belvedere (Address) Talla. Fla.

I hereby acknowledge acceptance of the appointment as resident agent upon whom service of process may be made. (Signature of resident agent)

Insurance companies are not to complete item 6 pursuant to Section 624.0221, Florida Statutes.

7. Last meeting of Directors June 17, 1965 (Month - Day - Year) 8. Corporation Active? Yes (Yes or No) 9. If inactive, inactivity began (Month - Day - Year)

10. If inactive, will corporation begin business in the future? (Yes or No) 11. Date Incorporated 8-5-57 (Month - Day - Year) 12. If foreign corporation, Date Qualified in Fla. (Month - Day - Year)

13. If foreign corporation, give the number of States in which you do business

14. We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

By President or V-President

Attest: Secretary

STATE OF Florida
COUNTY OF Leon

Personally appeared before me J. C. Cordell and M. P. Briley who deposes and says that he executed this certificate for and in behalf of said corporation and that the statement herein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 29th day of June 1965.

(Notary Seal) Notary Public, State of Florida at Large
My Commission Expires Sept. 10, 1965
Signature of Notary taking acknowledgment

Send Original to. TOM ADAMS, SECRETARY OF STATE, TALLAHASSEE, FLORIDA

CORP 40, 8 66 (SEE INSTRUCTIONS ON BACK OF LAST COPY) ORIGINAL

POSTMASTER
(Check Reason for Non-Delivery)
( ) Moved, left no address
( ) Unclaimed
( ) No such address
( ) Refused
( ) Closed for season
( ) Refused
RETURN REQUESTED

Corporation Report for Foreign and Domestic Corporations

(Not For Profit and Exempt (Section 608.32(2), Florida Statutes)

State of Florida
TOM ADAMS
SECRETARY OF STATE
Tallahassee, Florida

BULK RATE
U. S. POSTAGE
PAID
Tallahassee, Fla.
Permit No. 88

FILED
1966 JUN 17 PM 12:
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

CAPITAL CITY COUNTRY CLUB INC
P O BOX 67
TALLAHASSEE FLA

Refer to This Number in All Correspondence
47-04-A-192620

1966

FILED
JUN 17 1966
TOM ADAMS
SECRETARY OF STATE

(General nature of business of activity)

1. CAPITAL CITY COUNTRY CLUB, INC. (Give exact name of corporation) 2. PRIVATE CLUB

3. P. O. BOX 67 (Street or Post Office Box of principal place of business) TALLAHASSEE (City) LEON (County) FLORIDA (State)

4.a.	JOE CORDELL (Officers-Name)	President (Title)	P. O. Box 3046 MSS (Address)	Tallahassee, Fla.
b	FRED DILLMAN	Vice-President	P. O. Box 3026	Tallahassee, Fla.
c.	M. P. BRILEY	Secretary	822 N. Monroe St.	Tallahassee, Fla.
d.	James P. Burgess	Treasurer	2308 Delgado Dr.	Tallahassee, Fla.
e.	R. C. Johnston		1407 Wekewa Nene	Tallahassee, Fla.
f.				
g.				

5.a	Mallory Horne (Directors - Name) (Law requires at least (3) three)	102½ S. Monroe St. (Address)	Tallahassee, Fla.
b	Jap Dove	938 Carlton	Tallahassee, Fla.
c.	John Hosford	1318 W. Indian Head	Tallahassee, Fla.
d.			
e			
f.			

6. (Resident Agent Name) (Address)

Insurance companies are not to complete item 6 pursuant to Section 624.0221, Florida Statutes

7. Last meeting of Directors June 16, 1966 (Month - Day - Year) 8. Corporation Active? yes (Yes or No) 9. If inactive, inactivity began (Month - Day - Year)

10. If inactive, will corporation begin business in the future? (Yes or No) 11. Date Incorporated 8-6-57 (Month - Day - Year) 12. If foreign corporation, Date Qualified in Fla (Month - Day - Year)

13. If foreign corporation, give the number of States in which you do business.

14. We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

J. M. Cordell
By President or V-President

Attest: M. P. Briley
Secretary

STATE OF Florida
COUNTY OF Leon

Personally appeared before me J. M. Cordell and M. P. Briley who deposes and says that he executed this certificate for and in behalf of said corporation and that the statement herein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 27th day of June 1966

(Notary Seal)

Josephine C. Hollibaugh
Signature of Notary taking acknowledgment
Notary Public, State of Florida at Large
My Commission Expires Nov. 1, 1969
Bonded By American Fire & Casualty Co

Corporation Report
for Foreign and Domestic Corporations

(Not For Profit and Exempt (Section 608.3212), Florida Statutes)

826220

State of Florida
TOM ADAMS
SECRETARY OF STATE
Tallahassee, Florida

Refer to This Number in All Correspondence

CAPITAL CITY COUNTRY CLUB INC
P O BOX 67
TALLAHASSEE FLA

47-04-A-126220 1967

					(General nature of business or activity)
1.	Capital City Country Club (Give exact name of corporation)				2. Private Club
3.	P. O. Box 67 (Street or Post Office Box of principal place of business)	Tallahassee (City)	Leon (County)	Florida (State)	
4. a.	Joseph E. Hosford (Officers-Name)	President (Title)	P. O. Box 3242 (Address)	Tallahassee, Fla.	
b.	Jep Dove	Vice-Pres.	939 Carlton Dr.	Tallahassee, Fla.	
c.	Harold Cummins	Secretary	P. O. Box 149	Tallahassee, Fla.	
d.	Sidney Mendelson	Treasurer	P. O. Box 1230	Tallahassee, Fla.	
e.					
f.					
g.					
5. a.	Ryals Lee (Directors - Name) (Law requires at least (3) three)	P. O. Box 1134 (Address)	Tallahassee, Fla.		
b.	Bernard Shiell	P. O. Box 1657	Tallahassee, Fla.		
c.	Julian C. Smith	P. O. Box 404	Tallahassee, Fla.		
d.					
e.					
f.					
6.	(Resident Agent Name)	(Address)			

Insurance companies are not to complete item 6 pursuant to Section 624.0221, Florida Statutes

7. Last meeting of Directors Jan 18, 1967 (Month - Day - Year) 8. Corporation Active? yes (Yes or No) 9. If inactive, inactivity began (Month - Day - Year)

10. If inactive, will corporation begin business in the future? (Yes or No) 11. Date Incorporated 8-6-57 (Month - Day - Year) 12. If foreign corporation, Date Qualified in Fla (Month - Day - Year)

13. If foreign corporation, give the number of States in which you do business

14. We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

Joseph E. Hosford
By President or V-President

Attest: H. V. Cummins
Secretary

STATE OF Florida
COUNTY OF Leon

Personally appeared before me Joseph E. Hosford & H. V. Cummins who deposes and says that he executed this certificate for and in behalf of said corporation and that the statement herein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 26 day of June 1967.

(Notary Seal)

Maurice A. Reybourn
Signature of Notary taking acknowledgment

Notary Public, State of Florida at Large
My Commission Expires [illegible]

Send Original to: TOM ADAMS, SECRETARY OF STATE, TALLAHASSEE, FLORIDA.

A-92620

Corporation Report
for Foreign and Domestic Corporations

(Not For Profit and Exempt (Section 608.32(2), Florida Statutes)

State of Florida
TOM ADAMS
SECRETARY OF STATE
Tallahassee, Florida

Refer to This Number in All Correspondence

CAPITAL CITY COUNTRY CLUB INC
P O BOX 67
TALLAHASSEE FLA

47-04-A-192620 1968

1. Capital City Country Club, Inc. (Give exact name of corporation)				2. Country Club (General nature of business or activity)
3. P. O. Box 67 (Street or Post Office Box of principal place of business)		Tallahassee, (City)	Leon, (County)	Florida (State)
4. a. Joseph E. Hosford (Officers-Name)	Pres. (Title)	Tallahassee, Fla. (Address)		
b. Jep H. Dove	V. Pres.	"	"	
c. Harold V. Cummins	Secy.	"	"	
d. Julian C. Smith	Treas.	"	"	
e.				
f.				
g.				
5. a. SAME (Directors - Name) (Law requires at least (3) three)		(Address)		
b.				
c.				
d.				
e.				
f.				
6. Harold V. Cummins (Resident Agent Name)		Tallahassee, Fla. (Address)		

Insurance companies are not to complete item 6 pursuant to Section 624.0221, Florida Statutes.

7. Last meeting of Directors 8/15/68 (Month - Day - Year) 8. Corporation Active? YES (Yes or No) 9. If inactive inactivity began (Month - Day - Year)

10. If inactive, will corporation begin business in the future? (Yes or No) 11. Date Incorporated 6/13/58 (Month - Day - Year) 12. If foreign corporation, Date Qualified in Fla (Month - Day - Year)

13. If foreign corporation, give the number of States in which you do business.

14. We, the undersigned, certify the above statement of facts to be true and correct as shown by our books.

Joseph E. Hosford
By President or V. President

Attest: H. V. Cummins
Secretary

STATE OF Florida
COUNTY OF Leon

Personally appeared before me Joseph E. Hosford and H. V. Cummins who deposes and says that he executed this certificate for and in behalf of said corporation and that the statement herein contained is true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this 16 day of September 19 68

(Notary Seal)

Josephine C. Hallbeck
Signature of Notary taking acknowledgment
Notary Public, State of Florida at Large
My Commission Expires Jan. 1, 1969
Bonded by American Casualty Co

Send Original to: TOM ADAMS, SECRETARY OF STATE, TALLAHASSEE, FLORIDA.
(SEE INSTRUCTIONS ON BACK OF LAST COPY)

COSP 40 4-67

ORIGINAL

GEORGIA *v.* RACHEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 147. Argued April 25–26, 1966.—Decided June 20, 1966.

Respondents were arrested on various dates in 1963 when they sought service at Atlanta restaurants. They were charged under the Georgia criminal trespass statute and petitioned for removal of the prosecutions to the Federal District Court under 28 U. S. C. § 1443. The petition alleged that the arrests and prosecutions were racially motivated. Under subsection (1) of § 1443, which pertinently provides for removal where the action is "[a]gainst any person who is denied or cannot enforce" in the state courts "a right under any law providing for . . . equal civil rights," respondents alleged that they were denied and could not enforce in the Georgia courts their rights under federal law. The federal law specifically invoked was the First Amendment and the Due Process Clause of the Fourteenth Amendment. But the removal petition also alleged facts that stated a claim for removal under the Civil Rights Act of 1964, enacted while this case was on appeal. The Federal District Court refused to sustain removal and remanded the cases to the state court, finding the facts alleged insufficient under § 1443. The Court of Appeals, however, reversed on the basis of the 1964 Act as construed in *Hamm* v. *City of Rock Hill*, 379 U. S. 306. In *Hamm*, this Court held that the Civil Rights Act of 1964 precluded state trespass prosecutions in peaceful "sit-in" cases even though the prosecutions were instituted before the Act's passage. In terms of the language of § 1443 (1), the Court of Appeals held that, if the allegations in the removal petition were true, prosecution in the state court, under a statute similar to the state statutes in *Hamm*, denied respondents a right under a law (the Civil Rights Act of 1964) providing for equal civil rights. Hence, the court remanded the case to the District Court with directions that respondents be given an opportunity to prove that their prosecutions resulted from orders to leave public accommodations "for racial reasons," in which case the District Court under *Hamm* would have to dismiss the prosecutions. *Held:*

1. Removal of the state court trespass prosecutions can be had under § 1443 (1) upon the allegation in the removal petition that

the trespass prosecutions stem exclusively from the respondents' refusal to leave places of public accommodation covered by the Civil Rights Act of 1964 when they were asked to leave solely for racial reasons. Pp. 788–805.

(a) The phrase in § 1443 (1) "any law providing for . . . equal civil rights," means any law providing for specific civil rights stated in terms of racial equality. Thus, although broad First Amendment and Due Process contentions do not support a removal claim under § 1443 (1), the Civil Rights Act of 1964 is a law providing for equal civil rights in that it confers specific rights of racial equality. Section 201 (a) guarantees equal enjoyment of places of public accommodation without discrimination on the ground of race. Pp. 788–793.

(b) The unique language of § 203 of the Act bars any "attempt to punish" any person for peaceably seeking service in a place of public accommodation. As construed in *Hamm*, that language prohibits even a prosecution based upon a refusal to leave such premises when the request to leave was made for racial reasons. Pp. 793–794.

(c) If respondents were asked to leave solely for racial reasons, the mere pendency of prosecutions would enable a federal court to make a firm prediction that they would be denied their rights in the state courts, since the burden of having to defend the prosecutions would itself constitute the denial of a right conferred by the Civil Rights Act of 1964. Pp. 794, 804–805.

(d) Such a basis for prediction is the equivalent of a state statute authorizing the predicted denial, a requirement established by the leading cases interpreting subsection (1) of § 1443. *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313. Pp. 794–804.

2. Since the Federal District Court remanded the case to the state court without a hearing, respondents have had no opportunity to show that they were ordered to leave the facilities covered by the Act solely for racial reasons. If the District Court finds that allegation true, respondents have a clear right to removal under § 1443 (1) and dismissal of the proceedings. Pp. 805–806.

342 F. 2d 336, affirmed.

George K. McPherson, Jr., and *J. Robert Sparks*, Assistant Solicitors General of Georgia, argued the cause

for petitioner. With them on the brief were *Arthur K. Bolton*, Attorney General, and *Lewis R. Slaton, Jr.*, Solicitor General.

Anthony G. Amsterdam argued the cause for respondents. With him on the brief were *Donald L. Hollowell, Jack Greenberg* and *James M. Nabrit III*.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents questions concerning the scope of a century-old federal law that permits a defendant in state court proceedings to transfer his case to a federal trial court under certain conditions. That law, now 28 U. S. C. § 1443 (1964 ed.), provides:

> "§ 1443. *Civil rights cases.*
>
> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

The case arises from a removal petition filed by Thomas Rachel and 19 other defendants seeking to transfer to the United States District Court for the Northern District of Georgia criminal trespass prosecutions pending against them in the Superior Court of Fulton County, Georgia. The petition stated that the

defendants had been arrested on various dates in the spring of 1963 when they sought to obtain service at privately owned restaurants open to the general public in Atlanta, Georgia. The defendants alleged:

> "their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

Each defendant, according to the petition, was then indicted under the Georgia statute making it a misdemeanor to refuse to leave the premises of another when requested to do so by the owner or the person in charge.[1] On these allegations, the defendants maintained that removal was authorized under both subsections of 28 U. S. C. § 1443. The defendants maintained broadly that they were entitled to removal under the First Amendment and the Due Process Clause of the Four-

[1] The statute under which the defendants were charged, Ga. Code Ann. § 26–3005 (1965 Cum. Supp.), provides:

"*Refusal to leave premises of another when ordered to do so by owner or person in charge.* It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

teenth Amendment. Specifically invoking the language of subsection (1), the "denied or cannot enforce" clause, their petition stated:

> "petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States . . . in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination."

Invoking the language of subsection (2), the "color of authority" clause, the petition stated:

> "petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States."

On its own motion and without a hearing, the Federal District Court remanded the cases to the Superior Court of Fulton County, Georgia, finding that the petition did not allege facts sufficient to sustain removal under the federal statute. The defendants appealed to the Court of Appeals for the Fifth Circuit.[2]

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[2] We reject the State's contention that the appeal was untimely. The notice of appeal was filed 16 days after the order of remand. Although Rule 37 (a)(2) of the Federal Rules of Criminal Procedure requires that an appeal be taken within 10 days after entry of the order appealed from, that rule does not govern an appeal taken prior to verdict, finding of guilty or not guilty by the court, or plea of guilty. This Court promulgated Rules 32–39 under authority of the Act of February 24, 1933, which authorized only rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty. 47 Stat. 904, as amended, 18 U. S. C. § 3772 (1964 ed.). See 327 U. S. 825. In 1940, Congress authorized the Court to prescribe rules for criminal proceedings prior to verdict, finding of guilty or not guilty by the court, or plea of

While the case was pending in that court, two events of critical significance took place. The first of these was the enactment into law by the United States Congress of the Civil Rights Act of 1964, 78 Stat. 241. The second was the decision of this Court in *Hamm* v. *City of Rock Hill,* 379 U. S. 306. That case held that the Act precludes state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by the Act, even though the prosecutions were instituted prior to the Act's passage.[3] In view of these intervening developments in the law, the Court of Appeals reversed the District Court. In terms of the language of § 1443 (1), the court held that, if the allegations in the petition were true, prosecution in the courts of Georgia under that State's trespass statute, substantially similar to the state statutes involved in *Hamm,* denied the defendants a right under a law providing for equal civil rights—the Civil Rights Act of 1964. The case was therefore returned to the District Court, with directions that the defendants be given an opportunity to prove that their prosecutions had resulted from orders to leave places of public accommodation "for racial reasons." Upon such proof, the court held that *Hamm* would then require the District Court to order dismissal of the prosecutions. 342 F. 2d 336, 343.

We granted certiorari to consider the applicability of the removal statute to the circumstances of this case. 382 U. S. 808. No issues touching the constitutional

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guilty. 54 Stat. 688, as amended, 18 U. S. C. § 3771 (1964 ed.). But this authorization required that the rules be submitted to Congress before they could take effect. Only Rules 1–31 and 40–60 were so submitted. 327 U. S. 824.

[3] "The Supremacy Clause, Art. VI, cl. 2, requires this result where 'there is a clear collision' between state and federal law . . . " *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 311.

power of Congress are involved. We deal only with questions of statutory construction.[4]

The present statute is a direct descendant of a provision enacted as part of the Civil Rights Act of 1866. 14 Stat. 27. The subsection that is now § 1443 (1) was before this Court in a series of decisions beginning with *Strauder* v. *West Virginia*, 100 U. S. 303, and *Virginia* v. *Rives*, 100 U. S. 313, in 1880 and ending with *Kentucky* v. *Powers*, 201 U. S. 1, in 1906.[5] The Court has not considered the removal statute since then, one reason being that an order remanding a case sought to be removed under § 1443 was not appealable after the year 1887.[6] In § 901 of the Civil Rights Act of 1964, however, Congress specifically provided for appeals from remand orders in § 1443 cases, so as to give the federal reviewing courts

[4] For a remarkably original and comprehensive discussion of the issues presented in this case and in *City of Greenwood* v. *Peacock*, *post*, p. 808, see Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793 (1965).

[5] The intervening cases were: *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[6] Prior to 1875, a remand order was regarded as a nonfinal order reviewable by mandamus, but not by appeal. *Railroad Co.* v. *Wiswall*, 23 Wall. 507. In 1875, Congress provided for review "by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472. Twelve years later, however, Congress closed off the appellate avenue in the following language: "and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553. Compare *Gay* v. *Ruff*, 292 U. S. 25, 28–31. In the case of *In re Pennsylvania Co.*, 137 U. S. 451, this Court held that the 1887 statute was also intended to bar review by mandamus. Until its amendment in 1964, the modern version of the statutory bar, 28 U. S. C. § 1447 (d) (1964 ed.), prohibited review of a remand order "on appeal or otherwise" in cases removed pursuant to any statute.

a new opportunity to consider the meaning and scope of the removal statute.[7] 78 Stat. 266, 28 U. S. C. § 1447 (d) (1964 ed.). The courts of appeals in four circuits have

[7] Section 901 of the Civil Rights Act of 1964 established an exception to the nonreviewability rule of 28 U. S. C. § 1447 (d) for cases removed pursuant to 28 U. S. C. § 1443, by making remand orders in these cases "reviewable by appeal or otherwise." 28 U. S. C. § 1447 (d) (1964 ed.). We have no doubt that Congress thereby intended to open the way for immediate appeal. See the remarks of: Representative Kastenmeier, 110 Cong. Rec. 2770; Senator Humphrey, 110 Cong. Rec. 6551; Senator Kuchel, 110 Cong. Rec. 6564; Senator Dodd, 110 Cong. Rec. 6955–6956.

Mr. Kastenmeier had originally introduced a bill amending § 1443 itself, which he described as making it "easier to remove a case from a State court to a U. S. district court, whenever it appears that strict impartiality is not possible in the State court." 109 Cong. Rec. 13126, 13128. In later defending the final bill which simply made remand orders appealable in § 1443 cases, he said on the House floor: "Mr. Chairman, what we have done is probably the most modest thing possible in this field. The subcommittee had before it a slightly more ambitious section dealing with this problem, and would have amended 1443 and 1447, but the committee took the most conservative approach and provided merely for an appeal of the remand decision." 110 Cong. Rec. 2773.

The statements of the leaders speaking for the bill on the floor of the Senate are typified by the following remarks of Senator Dodd:

"Some have thought that it would be better for Congress to specify directly the kinds of cases which it thinks ought to be removable, rather than simply permitting appeals and allowing the courts to consider the statute again in light of the original intention of the Congress in 1866. It seems to me, however, that the course we have chosen is more appropriate, considering the rather technical nature of the statute with which we are dealing.

"It would be extremely difficult to specify with precision the kinds of cases which ought to be removable under section 1443. This is true because of the many and varied circumstances which can and do arise in civil rights matters. Accordingly, it seems advisable to allow the courts to deal case by case with situations as they arise, and to fashion the remedy so as to harmonize it with the other statutory remedies made available for denials of equal civil rights." 110 Cong. Rec. 6956.

now had occasion to give extensive consideration to various aspects of the removal statute.[8] In the case before us, the Court of Appeals for the Fifth Circuit dealt only with issues arising under the first subsection of § 1443, and we confine our review to those issues.

Section 1443 (1) entitles the defendants to remove these prosecutions to the federal court only if they meet both requirements of that subsection. They must show both that the right upon which they rely is a "right under any law providing for . . . equal civil rights," and that they are "denied or cannot enforce" that right in the courts of Georgia.

The statutory phrase "any law providing for . . . equal civil rights" did not appear in the original removal provision in the Civil Rights Act of 1866. That provision allowed removal only in cases involving the express statutory rights of racial equality guaranteed in the Act itself. The first section of the 1866 Act secured for all citizens the "same" rights as were "enjoyed by white citizens" in a variety of fundamental areas.[9] Section 3,

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[8] In addition to this case and *City of Greenwood* v. *Peacock*, *post*, p. 808, from the Fifth Circuit, see *Baines* v. *City of Danville*, 357 F. 2d 756 (C. A. 4th Cir.); *City of Chester* v. *Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *New York* v. *Galamison*, 342 F. 2d 255 (C. A. 2d Cir.).

The statistics on the number of criminal cases of all kinds removed from state to federal courts in recent years are revealing. For the fiscal years 1962, 1963, 1964, and 1965, there were 18, 14, 43, and 1,192 such cases, respectively. Of the total removed criminal cases for 1965, 1,079 were in the Fifth Circuit. See Annual Report of the Director of the Administrative Office of the United States Courts 213–217 (1965).

[9] Section 1 of the Civil Rights Act of 1866 provided in relevant part:

"[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full

the removal section of the 1866 Act, provided for removal by "persons who are denied or cannot enforce . . . the rights secured to them by the first section of this act . . . ." [10]

The present language "any law providing for . . . equal civil rights" first appeared in § 641 of the Revised Statutes of 1874.[11] When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections.[12] Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—"rights secured to them by the first section of this act." The new language it chose, however, does not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1874. On the contrary, Congress' choice of the open-ended phrase "any law providing for . . . equal civil rights" was clearly appropriate to permit removal in cases involving "a right under" both existing and future statutes that provided for equal civil rights.

There is no substantial indication, however, that the general language of § 641 of the Revised Statutes was intended to expand the kinds of "law" to which the removal section referred. In spite of the potential breadth of the phrase "any law providing for . . . equal civil

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and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27.

[10] The relevant provisions of § 3 of the Civil Rights Act of 1866, 14 Stat. 27, are included in the Appendix to this opinion.

[11] The relevant provisions of § 641 of the Revised Statutes of 1874 are included in the Appendix to this opinion.

[12] The guarantees of § 1 of the Civil Rights Act of 1866 were carried forward as §§ 1977 and 1978 of the Revised Statutes, now 42 U. S. C. §§ 1981 and 1982 (1964 ed.).

rights," it seems clear that in enacting § 641, Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866. Prior to the 1874 revision, Congress had not significantly enlarged the opportunity for removal available to private persons beyond the relatively narrow category of rights specified in the 1866 Act, even though the Fourteenth and Fifteenth Amendments had been adopted and Congress had broadly implemented them in other major civil rights legislation.[13] Moreover, § 641 contained an explicit cross-reference at the end of the section to § 1977 of the Revised Statutes, which carried forward the principal rights created in § 1 of the 1866 Act. In addition, the note in the margin of § 641 pointed specifically to the removal provision of the Civil Rights Act of 1866 and to §§ 16 and 18 of the Civil Rights Act of 1870.[14] The latter sec-

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[13] See, *e. g.*, second Civil Rights Act, Act of May 31, 1870, 16 Stat. 140, as amended by Act of February 28, 1871, 16 Stat. 433; third Civil Rights Act, Act of April 20, 1871, 17 Stat. 13. Section 1 of the Civil Rights Act of 1871, now 42 U. S. C. § 1983 (1964 ed.), established civil remedies for "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." When in 1874 the revisers relocated § 1 of the 1871 Act as § 1979 of the Revised Statutes, they expanded the section to include the deprivation of rights, privileges, and immunities secured by the "Constitution and laws" of the United States, in contrast to their reference merely to "law" in § 641 of the Revised Statutes, the civil rights removal provision. At least in some circumstances, therefore, it appears that the Revised Statutes may have specifically distinguished between "rights secured by the Constitution" and "rights secured by any law providing for equal civil rights." See also Revised Statutes § 629, Sixteenth (1874), which drew an explicit distinction between rights secured by the Constitution and rights secured by the laws of the United States. The marginal note to the latter section refers to "rights secured by the Constitution and laws" of the United States.

[14] See *Slaughter-House Cases*, 16 Wall. 36, 83, 96–97 (dissenting opinion of Field, J.).

tions were concerned solely with the re-enactment, in somewhat expanded form, of the 1866 Act. Finally, the limitation of § 641 to laws comparable to the Civil Rights Act of 1866 comports with the relatively narrow mandate of the revising commissioners "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings." Act of June 27, 1866, c. 140, 14 Stat. 74. We conclude, therefore, that the model for the phrase "any law providing for . . . equal civil rights" in § 641 was the Civil Rights Act of 1866.

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." [15] That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected. More important, the Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities," preceding the specific enumeration of rights to be included in § 1.[16] Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against "discrimination in civil rights or immunities." There was sharp controversy in the Senate,[17] but the bill passed. After similar controversy in the House,[18]

[15] Cong. Globe, 39th Cong., 1st Sess., p. 474.

[16] *Ibid.*

[17] See, *e. g., id.*, at 476–477 (remarks of Senator Saulsbury); 505–506 (remarks of Senator Johnson).

[18] See, *e. g., id.*, at 1121–1122 (remarks of Representative Rogers); 1157 (remarks of Representative Thornton); 1271–1272 (remarks of Representative Bingham).

however, an amendment was accepted striking the phrase from the bill.[19]

On the basis of the historical material that is available, we conclude that the phrase "any law providing for . . . equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands. As the Court of Appeals for the Second Circuit has concluded, § 1443 "applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . . ." "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *New York* v. *Galamison,* 342 F. 2d 255, 269, 271. See also *Gibson* v. *Mississippi,* 162 U. S. 565, 585–586; *Kentucky* v. *Powers,* 201 U. S. 1, 39–40; *City of Greenwood* v. *Peacock, post,* p. 825.

But the defendants in the present case did not rely solely on these broad constitutional claims in their removal petition. They also made allegations calling into play the Civil Rights Act of 1964. That Act is clearly a law conferring a specific right of racial equality, for in

[19] See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11–29 (1955).

§ 201 (a) it guarantees to all the "full and equal enjoyment" of the facilities of any place of public accommodation without discrimination on the ground of race.[20] By that language the Act plainly qualifies as a "law providing for . . . equal civil rights" within the meaning of 28 U. S. C. § 1443 (1).

Moreover, it is clear that the right relied upon as the basis for removal is a "right under" a law providing for equal civil rights. The removal petition may fairly be read to allege that the defendants will be brought to trial solely as the result of peaceful attempts to obtain service at places of public accommodation.[21] The Civil Rights Act of 1964 endows the defendants with a right not to be prosecuted for such conduct. As noted, § 201 (a) guarantees to the defendants the equal access they sought. Section 203 then provides that, "No person shall . . . (c) punish or *attempt to punish* any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." (Emphasis supplied.) 78 Stat. 244. In *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 311, the Court held that this section of the Act "prohibits prosecution of any person for seeking service in a covered establishment, because of his race

[20] Section 201 (a) provides:

"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."

[21] Section 1446 of Title 28 requires that a removal petition contain "a short and plain statement of the facts" that purportedly justify removal. The instant petition satisfies that requirement. Since the petition predated the enactment of the Public Accommodations Title of the Civil Rights Act of 1964, it could not have explicitly alleged coverage under that Act. It recites facts, however, that invoke application of that Act on appeal. See *United States* v. *Schooner Peggy,* 1 Cranch 103; *Hamm* v. *City of Rock Hill,* 379 U. S. 306; *Linkletter* v. *Walker,* 381 U. S. 618, 627.

or color." Hence, if the facts alleged in the petition are true, the defendants not only are immune from conviction under the Georgia trespass statute, but they have a "right under" the Civil Rights Act of 1964 not even to be brought to trial on these charges in the Georgia courts.

The question remaining, then, is whether within the meaning of § 1443 (1), the defendants are "denied or cannot enforce" that right "in the courts of" Georgia. That question can be answered only after consideration of the legislative and judicial history of this requirement.

When Congress adopted the first civil rights removal provisions in § 3 of the Civil Rights Act of 1866, it incorporated by reference the procedures for removal established in § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756. The latter section, in turn, permitted removal either at the pre-trial stage of the proceedings in the state court or after final judgment in that court.[22] There can be no doubt that post-judgment removal was a practical remedy for civil rights defendants invoking either the "denied or cannot enforce" clause or the "color of authority" clause of the 1866 removal provision, in order to vindicate rights that had actually been denied at the trial.[23] The scope of pre-trial removal, however, was unclear.[24]

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[22] The relevant provisions of § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756, are included in the Appendix to this opinion. Section 5 of the 1863 Act was amended in certain respects by the Act of May 11, 1866, 14 Stat. 46.

[23] The "color of authority" clause of the Civil Rights Act of 1866 was limited to federal officers and those assisting them. See *City of Greenwood* v. *Peacock, post,* pp. 814–824. In addition, federal officers might also invoke the "denied or cannot enforce" clause.

[24] In view of the large numbers of federal officers and agents potentially involved in enforcement activities under the Civil Rights Act of 1866, see *City of Greenwood* v. *Peacock, post,* pp. 816–820, pre-trial removal would have been of obvious utility under the "color of authority" clause of § 3 of the Civil Rights Act of 1866. Cf. *Tennessee* v. *Davis,* 100 U. S. 257, 261–262 (removal under § 643 of

Congress eliminated post-judgment removal when it enacted § 641 of the Revised Statutes of 1874.[25] The compilation of the Revised Statutes coincided with the

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the Revised Statutes of 1874); *Hodgson* v. *Millward,* 12 Fed. Cas. 285 (No. 6568 (C. C. E. D. Pa.)) (removal under § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756), approved in *Braun* v. *Sauerwein,* 10 Wall. 218, 224. No such obvious role for pre-trial removal is evident under the "denied or cannot enforce" clause.

The obscure legislative history of § 3 of the Civil Rights Act of 1866 indicates only that the Reconstruction Congress did not intend the language of the "denied or cannot enforce" clause of § 3 to be read to its fullest possible extent. In his veto message accompanying the bill President Johnson construed the clause so broadly as to give the federal courts jurisdiction over all cases affecting a person who was denied any of the various rights conferred by § 1, whether or not the right in question was in issue in the particular case. For example, in the President's view, a state court defendant under indictment for murder, who happened to be denied a contractual right under § 1, would be able to remove his case for trial in the federal court. In urging passage of the bill over the President's veto, Senator Trumbull, the floor manager of the bill, rejected the President's construction of the "denied or cannot enforce" clause:

"The President objects to the third section of the bill . . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

"So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict

[*Footnote 25 on p. 796*]

end of the Reconstruction period. During Reconstruction itself, removal under § 3 of the Civil Rights Act of 1866 had been but one measure established by Congress for the enforcement of the numerous statutory rights created under the Civil War Amendments. In other enactments, Congress had taken relatively more drastic steps to enforce those rights.[26] But by the end of the

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with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, the presumption being that the judge of the court, when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid." Cong. Globe, 39th Cong., 1st Sess., p. 1759.

Cf. *Blyew* v. *United States,* 13 Wall. 581. It is clear that Senator Trumbull's reference to a person "discriminated against" was a reference to a person who is denied his rights under the bill within the meaning of the "denied or cannot enforce" clause of § 3. See Cong. Globe, 39th Cong., 1st Sess., p. 475.

[25] In 1870, this Court invalidated under the Seventh Amendment post-judgment removal with respect to civil cases tried by a jury. *The Justices* v. *Murray,* 9 Wall. 274. See also *McKee* v. *Rains,* 10 Wall. 22.

[26] See, *e. g.,* § 14 of the amendatory Freedmen's Bureau Act of July 16, 1866, 14 Stat. 176, which re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in § 1 of the Civil Rights Act of 1866, and provided for the enforcement of those rights under the jurisdiction of military tribunals. See also § 1 of the Reconstruction Act of March 2, 1867, 14 Stat. 428, which divided the rebel States into five military districts and placed them under martial law.

Reconstruction period, many of these measures had expired, and by eliminating post-judgment removal, Congress had substantially truncated the original civil rights removal provision. Pre-trial removal was retained, but the scope of the provision had never been clarified. It was in this historic setting that the Court examined the scope of § 641. In a series of cases commencing with *Strauder* v. *West Virginia, supra,* and *Virginia* v. *Rives, supra,* decided on the same day in the 1879 Term, the Court established a relatively narrow, well-defined area in which pre-trial removal could be sustained under the "denied or cannot enforce" clause of that section.

In *Strauder,* the removal petition of a Negro indicted for murder pointed to a West Virigina statute that permitted only white male persons to serve on a grand or petit jury. Since Negroes were excluded from jury service pursuant to that statute, the defendant claimed that the "probabilities" were great that he would suffer a denial of his right to the "full and equal benefit of all laws and proceedings in the State of West Virginia. . . ." 100 U. S., at 304. The state court denied removal, however, and the defendant was convicted.[27]

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[27] In 1874, a petition for removal could be filed in the state court in which proceedings were pending. Rev. Stat. § 641. If the state court denied removal, that determination could be preserved for review by this Court on review of the final judgment of conviction. An alternative procedure was also available. A petition could be filed in the federal trial court to which the state court had denied removal. See *Virginia* v. *Rives,* 100 U. S. 313; *Virginia* v. *Paul,* 148 U. S. 107, 116. In 1948, removal procedure was simplified. The petition is now filed in the first instance in the federal court. After notice is given to all adverse parties and a copy of the petition is filed with the state court, removal is effected and state court proceedings cease unless the case is remanded. 28 U. S. C. § 1446 (1964 ed.). See generally, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 4, p. 153 *et seq.* (April 25, 1966).

This Court held that pre-trial removal should have been granted because, in the language of § 641, it appeared even before trial that the defendant would be denied or could not enforce a right secured to him by a "law providing for . . . equal civil rights." The law specifically invoked by the Court was § 1977 of the Revised Statutes, now 42 U. S. C. § 1981. That law, the Court held, conferred upon the defendant the right to have his jurors selected without discrimination on the ground of race. Because of the direct conflict between the West Virginia statute and § 1977, the Court in *Strauder* held that the defendant would be the victim of "a denial by the statute law of the State." 100 U. S., at 312.

In *Virginia* v. *Rives*, however, the defendants could point to no such state statute as the basis for removal. Their petition alleged that strong community racial prejudice existed against them, that the grand and petit jurors summoned to try them were all white, that Negroes had never been allowed to serve on county juries in cases in which a Negro was involved in any way, and that the judge, the prosecutor, and the assistant prosecutor had all rejected their request that Negroes be included in the petit jury. Hence, the defendants maintained, they could not obtain a fair trial in the state court. But the only relevant Virginia statute to which the petition referred imposed jury duty on *all* males within a certain age range. Thus, the law of Virginia did not, on its face, sanction the discrimination of which the defendants complained. This Court held that the petition stated no ground for removal. Critical to its holding was the Court's observation that § 641 of the Revised Statutes authorized only pre-trial removal. The Court concluded:

> "the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for . . . equal civil rights . . .

of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. . . . In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." 100 U. S., at 319–320.

The Court acknowledged that even though Virginia's statute did not authorize discrimination in jury selection,

the officer in charge of the selection might nevertheless bring it about.

> "But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong." 100 U. S., at 321–322.

The Court distinguished the situation in *Strauder:*

> "It is to be observed that [§ 641] gives the right of removal only to a person 'who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights.' And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641." 100 U. S., at 321. (Emphasis in original.)

Strauder and *Rives* thus teach that removal is not warranted by an assertion that a denial of rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts. A state statute authorizing the denial affords an ample basis for such a prediction.

The doctrine announced in *Strauder* and *Rives* was amplified in *Neal* v. *Delaware,* 103 U. S. 370, and *Bush* v. *Kentucky,* 107 U. S. 110. In both cases, the Court reversed convictions on the ground that jury selection

had been conducted pursuant to a policy of racial discrimination. Yet in both cases the Court also held that a pre-trial removal petition alleging such discrimination stated no ground for removal. In *Neal* the petition relied upon a Delaware constitutional provision, adopted prior to the advent of the Fourteenth and Fifteenth Amendments, that purportedly sanctioned discriminatory jury selection. But the Delaware court in which the petition had been filed held that the subsequent Amendments rendered the state provision void. Hence, unlike *Strauder*, the *Neal* case involved no law of the State upon which to found a suitable prediction that rights of equality would be denied in the courts of the State. In *Bush*, the petition relied upon a Kentucky jury exclusion statute drawn along racial lines that had been enacted after the adoption of the Fourteenth Amendment. But prior to Bush's trial, the Kentucky Court of Appeals had held, in another case, that the statute was unconstitutional. This Court noted that the judicial declaration was binding upon all inferior Kentucky courts and concluded that, "After that decision, so long as it was unmodified, it could not have been properly said in advance of a trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for . . . equal civil rights . . . ." 107 U. S., at 116. In both *Neal* and *Bush*, then, the Court held that in the absence of a presently effective state law authorizing the predicted denial, the state court was the proper forum for the resolution of the claims that rights of equality would be denied, even though, as the Court also held, the state courts had ultimately failed to correct the denials that in fact took place at the defendants' trials in those two cases.

Four subsequent decisions, also involving claims of racial discrimination in jury selection, reiterated the principles announced in *Strauder* and *Rives*, and amplified in *Neal* and *Bush*.[28] The final removal case decided by this Court was *Kentucky* v. *Powers*, 201 U. S. 1. In that case, which involved alleged discrimination on a political basis, the defendant was about to undergo his fourth trial, having been successful on appeal after three prior verdicts of guilty. He could therefore enhance his prediction that rights would be denied by pointing to instances of illegality in the three prior proceedings against him. But the petition for removal resembled those in the cases that followed *Strauder* in that it pointed to no state enactment that authorized the predicted denial. Accordingly, restating the *Strauder-Rives* doctrine, this Court held that no case for removal had been made out.

In the line of cases from *Strauder* to *Powers*, the Court interpreted § 641 of the Revised Statutes of 1874. That statute has come down to us, in modified form, as § 1443. But in its first subsection, the present removal statute still requires that a petitioner be one who "is denied or cannot enforce in the courts of" a State the rights he seeks to vindicate by removing the case to federal court. There is no suggestion that the modifications in the statute since 1874 were intended to effect any change in substance. Hence, for the purposes of the present case, we are dealing with the same statute that confronted the Court in the cases interpreting § 641.[29]

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[28] *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[29] Since *Kentucky* v. *Powers*, 201 U. S. 1, the federal courts have consistently applied the *Strauder-Rives* doctrine to deny removal in a variety of circumstances. See, *e. g.*, *Kentucky* v. *Wendling*, 182

The *Strauder-Rives* doctrine, as consistently applied in all these cases, required a removal petition to allege, not merely that rights of equality would be denied or could not be enforced, but that the denial would take place in the courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law. This requirement served two ends. It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of prejudging their

F. 140 (C. C. W. D. Ky.); *White* v. *Keown*, 261 F. 814 (D. C. D. Mass.); *Ohio* v. *Swift & Co.*, 270 F. 141 (C. A. 6th Cir.); *New Jersey* v. *Weinberger*, 38 F. 2d 298 (D. C. D. N. J.); *Snypp* v. *Ohio*, 70 F. 2d 535 (C. A. 6th Cir.); *Hull* v. *Jackson County Circuit Court*, 138 F. 2d 820 (C. A. 6th Cir.); *Steele* v. *Superior Court*, 164 F. 2d 781 (C. A. 9th Cir.); *Lamson* v. *Superior Court*, 12 F. Supp. 812 (D. C. N. D. Cal.); *California* v. *Lamson*, 12 F. Supp. 813 (D. C. N. D. Cal.); *Washington* v. *American Society of Composers*, 13 F. Supp. 141 (D. C. W. D. Wash.); *Bennett* v. *Roberts*, 31 F. Supp. 825 (D. C. W. D. N. Y.); *North Carolina* v. *Jackson*, 135 F. Supp. 682 (D. C. M. D. N. C.); *Texas* v. *Dorris*, 165 F. Supp. 738 (D. C. S. D. Tex.); *Louisiana* v. *Murphy*, 173 F. Supp. 782 (D. C. W. D. La.); *McDonald* v. *Oregon*, 180 F. Supp. 861 (D. C. D. Ore.); *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (D. C. W. D. Pa.); *Rand* v. *Arkansas*, 191 F. Supp. 20 (D. C. W. D. Ark.); *Petition of Hagewood*, 200 F. Supp. 140 (D. C. E. D. Mich.); *Van Newkirk* v. *District Attorney*, 213 F. Supp. 61 (D. C. E. D. N. Y.); *City of Birmingham* v. *Croskey*, 217 F. Supp. 947 (D. C. N. D. Ala.); *Arkansas* v. *Howard*, 218 F. Supp. 626 (D. C. E. D. Ark.); *Alabama* v. *Robinson*, 220 F. Supp. 293 (D. C. N. D. Ala.); *Levitt & Sons, Inc.* v. *Prince George County Congress of Racial Equality*, 221 F. Supp. 541 (D. C. D. Md.); *Olsen* v. *Doerfler*, 225 F. Supp. 540 (D. C. E. D. Mich.).

brethren of the state courts. Thus, the Court in *Strauder* and *Rives* concluded that a state enactment, discriminatory on its face, so clearly authorized discrimination that it could be taken as a suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict.

In *Rives* itself, however, the Court noted that the denial of which the removal provision speaks "is primarily, *if not exclusively,* a denial . . . resulting from the Constitution or laws of the State . . . ." 100 U. S., at 319. (Emphasis supplied.) This statement was reaffirmed in *Gibson* v. *Mississippi,* 162 U. S. 565, 581. The Court thereby gave some indication that removal might be justified, even in the absence of a discriminatory state enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be "denied or cannot enforce" the specified federal rights in the state court. Such a basis for prediction exists in the present case.

In the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964, as construed in *Hamm* v. *City of Rock Hill,* if the allegations of the removal petition are true. The removal petition alleges, in effect, that the defendants refused to leave facilities of public accommodation, when ordered to do so solely for racial reasons, and that they are charged under a Georgia trespass statute that makes it a criminal offense to refuse to obey such an order. The Civil Rights Act of 1964, however, as *Hamm* v. *City of Rock Hill,* 379 U. S. 306, made clear, protects those who refuse to obey such an order not only from conviction in state courts, but from *prosecution* in those courts. *Hamm* emphasized the precise terms of § 203 (c) that prohibit any "attempt to punish" persons for exercising rights of equality conferred upon them by the Act. The

explicit terms of that section compelled the conclusion that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution . . . ." 379 U. S., at 311. The 1964 Act therefore "substitutes a right for a crime." 379 U. S., at 314. Hence, if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be "denied or cannot enforce in the courts of [the] State" the right to be free of any "attempt to punish" them for protected activity. It is no answer in these circumstances that the defendants might eventually prevail in the state court.[30] The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 as construed in *Hamm* v. *City of Rock Hill, supra.*

Since the Federal District Court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish that they were ordered to leave the restaurant facilities solely for racial reasons. If the Federal District Court finds that allegation true, the defendants' right to removal under § 1443 (1) will be clear.[31] The *Strauder-Rives* doctrine requires no more, for the denial in the courts of the State then clearly appears without any detailed analysis of the likely behavior of any particular state court. Upon such a finding it will be apparent that the conduct of the defend-

[30] As pointed out in the separate opinion of Judge Bell in the Court of Appeals for the Fifth Circuit, 342 F. 2d 336, 343, 345, the Supreme Court of Georgia has in at least one case applied the doctrine of *Hamm* v. *City of Rock Hill* to set aside convictions under the state trespass statute. *Bolton* v. *Georgia,* 220 Ga. 632, 140 S. E. 2d 866.

[31] In addition to their racial allegation, the defendants must also show that the restaurant facilities in question were establishments covered by the Civil Rights Act of 1964.

ants is "immunized from prosecution" in any court, and the Federal District Court must then sustain the removal and dismiss the prosecutions.

For these reasons, the judgment is *Affirmed.*

[For Appendix to opinion of the Court, see facing page.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS join, concurring.

As I indicate in my opinion in the *Peacock* cases, *post,* p. 842, equal civil rights of a citizen of the United States are "denied" within the meaning of 28 U. S. C. § 1443 (1) (1964 ed.) when he is prosecuted for asserting them. Section 201 of the Civil Rights Act of 1964 (78 Stat. 243, 42 U. S. C. § 2000a (1964 ed.)) gave these defendants a right to equal service in places of public accommodation. Section 203 (78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.)) gave them a right against intimidation, coercion, or punishment for exercising those rights. And we held in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, that §§ 201 and 203 precluded state criminal trespass convictions of sit-in demonstrators even though the sit-ins occurred

APPENDIX TO OPINION OF THE COURT.

Comparative Table of Civil Rights Removal Legislation.

Habeas Corpus Suspension Act Act of March 3, 1863, c 81, § 5, 12 Stat 756	Civil Rights Act of 1866 Act of April 9, 1866, c 31, § 3, 14 Stat 27	Revised Statutes of 1874 § 641	Title 28, United States Code § 1443 (1964 ed.)
	SEC 3 *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act, [1] and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever,	SEC 641 When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States,	§ 1443. *Civil rights cases.* Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof,
SEC 5 *And be it further enacted*, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending . [T]he cause shall proceed therein in the same manner as if it had been brought in said court by original process And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any state court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or term of said court at which the same shall have taken place, from such court to the next circuit court of the United States to be held in the district in which such appeal shall be taken [A]nd it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered *Provided* That no such appeal or writ of error shall be allowed in any criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the state court.	or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof	or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending [2]	(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law

[1] Section 1 of the Civil Rights Act of 1866, 14 Stat 27, is reproduced in note 9, *supra*

[2] The provisions of § 641 of the Revised Statutes of 1874 were carried forward as § 31 in the compilation of the Judicial Code of 1911, c 231, 36 Stat 1096 Aside from insignificant changes in punctuation, the only alteration introduced in 1911 was the substitution of "district court" for "circuit court" in the section Section 31 was carried forward without change as § 74 of Title 28 of the United States Code, as codified in 1926 Section 74 became § 1443 in the revision of Title 28 in 1948

and their prosecution had been instituted prior to the effective date of the 1964 Act.

Congress, in other words, gave these defendants the right to enter the restaurants in question, to sit there, and to be served—a right that was construed by this Court to include immunity from prosecution after the effective date of the Act for acts done prior thereto.

It is the right to equal service in restaurants and the right to be free of prosecution for asserting that right—not the right to have a trespass conviction reversed—that the present prosecutions threaten. It is this right which must be vindicated by complete insulation from the State's criminal process if it is to be wholly vindicated. It is this right which the defendants are "denied" so long as the present prosecutions persist.

Georgia claims that *Hamm* v. *City of Rock Hill, supra,* does not cover cases of sit-ins prosecuted for disorderly conduct or other unlawful acts. Of course that is true. But one of the functions of the hearing on the allegations of the removal petition will be to determine whether the defendants were ejected on racial grounds or for some other, valid, reason. The Court of Appeals correctly ruled that "in the event it is established that the removal of the appellants from the various places of public accommodation was done *for racial reasons,* then under authority of the Hamm case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings." 342 F. 2d 336, 343. (Emphasis added.)

If service was denied for other reasons, no case for removal has been made out. And if, as is intimated, any doubt remains as to whether the restaurants in question were covered by the 1964 Act, that too should be left open in the hearing to be held before the District Court—a procedure to which the defendants do not object.

CITY OF GREENWOOD *v.* PEACOCK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 471. Argued April 26, 1966.—Decided June 20, 1966.*

Various state criminal charges were brought against the individual petitioners, members of groups engaging in civil rights activities in Mississippi in 1964, and they filed petitions to remove their cases to the Federal District Court alleging under 28 U. S. C. § 1443 (1) that they were denied or could not enforce in the state courts rights under laws providing for the equal civil rights of citizens, and under 28 U. S. C. § 1443 (2) that they were being prosecuted for acts done under color of the authority of the Constitution and laws of the United States. The § 1443 (1) removal claims were fundamentally based on allegations (1) that the individual petitioners were arrested because they were Negroes or were helping Negroes assert their rights and that they were innocent of the charges against them, or (2) that they would be unable to obtain fair state trials. The § 1443 (2) removal claims were based on the contention that the various federal constitutional and statutory provisions (including 42 U. S. C. §§ 1971 and 1981) invoked in the removal petitions conferred "color of authority" on the individual petitioners to commit the acts for which they are being prosecuted. The District Court on motion remanded the cases to the city police court for trial. The Court of Appeals reversed, holding that a valid removal claim under § 1443 (1) had been stated by allegations that a state statute had been applied before trial so as to deprive an accused of his equal civil rights where the arrest and charge thereunder were effected for reasons of racial discrimination, and remanded the cases to the District Court for a hearing on the truth of the allegations. The court rejected the § 1443 (2) contentions, holding that provision available only to those who have acted in an official or quasi-official capacity under federal law. *Held:*

1. The individual petitioners had no removal right under 28 U. S. C. § 1443 (2) since, as the legislative history of that provision makes clear, that provision applies only in the case of federal

*Together with No. 649, *Peacock et al.* v. *City of Greenwood*, also on certiorari to the same court.

officers and persons assisting such officers in performing their duties under a federal law providing for equal civil rights. Pp. 814–824.

2. Section 1443 (1) permits removal only in the rare situation where it can be clearly predicted by reason of the operation of a pervasive and explicit law that federal rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. Such not being the case here, the individual petitioners are not entitled to removal under § 1443 (1). Pp. 824–828.

(a) Some of the rights invoked by the removal petitions, such as those of free expression under the First Amendment, clearly cannot meet the statutory definition of "equal civil rights." P. 825.

(b) Neither the two federal laws specifically referred to in the removal petitions (42 U. S. C. §§ 1971, 1981), nor any others confer an absolute right on private citizens to commit the acts involved in the charges against the individual petitioners or grant immunity from state prosecution on such charges. *Georgia* v. *Rachel, ante,* p. 780, distinguished. Pp. 826–827.

(c) Removal under § 1443 (1) cannot be supported merely by showing that there has been an illegal denial of civil rights by state officials in advance of trial, that the charges against the defendant are false, or that the defendant cannot obtain a fair trial in a particular state court. Pp. 827–828.

3. Section 1443 (1) does not work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law, as the line of decisions from *Strauder* v. *West Virginia,* 100 U. S. 303, to *Kentucky* v. *Powers,* 201 U. S. 1, makes clear. If changes are to be made in the long-settled interpretation of § 1443 (1), it is for Congress, not this Court, to make them. Pp. 832–835.

347 F. 2d 679, 986, reversed.

Hardy Lott argued the cause for petitioner in No. 471 and for respondent in No. 649. With him on the briefs was *Aubrey H. Bell.*

Benjamin E. Smith argued the cause for respondents in No. 471 and for petitioners in No. 649. With him on the briefs were *William Rossmore, Fay Stender, Jack Peebles, Claudia Shropshire* and *George Crockett.*

Louis F. Claiborne argued the cause for the United States, as *amicus curiae*, by special leave of Court. With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar, David L. Norman* and *Louis M. Kauder.*

MR. JUSTICE STEWART delivered the opinion of the Court.

These consolidated cases, sequels to *Georgia* v. *Rachel, ante*, p. 780, involve prosecutions on various state criminal charges against 29 people who were allegedly engaged in the spring and summer of 1964 in civil rights activity in Leflore County, Mississippi. In the first case, 14 individuals were charged with obstructing the public streets of the City of Greenwood in violation of Mississippi law.[1] They filed petitions to remove their cases to the United States District Court for the Northern District of Mississippi under 28 U. S. C. § 1443 (1964 ed.).[2] Alleging

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[1] The defendants were charged with violating paragraph one of § 2296.5 of the Mississippi Code (1964 Cum. Supp.), Laws 1960, c. 244, § 1, which provides:

"It shall be unlawful for any person or persons to wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment."

[2] "*Civil rights cases.*

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal

that they were members of a civil rights group engaged in a drive to encourage Negro voter registration in Leflore County, their petitions stated that they were denied or could not enforce in the courts of the State rights under laws providing for the equal civil rights of citizens of the United States, and that they were being prosecuted for acts done under color of authority of the Constitution of the United States and 42 U. S. C. § 1971 *et seq.* (1964 ed.).[3] Additionally, their removal petitions alleged that the statute under which they were charged was unconstitutionally vague on its face, that it was unconstitution-

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civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." 28 U. S. C. § 1443 (1964 ed.). See *Georgia* v. *Rachel, ante*, p. 780.

[3] The removal petitions specifically invoked rights to freedom of speech, petition, and assembly under the First and Fourteenth Amendments to the Constitution, as well as additional rights under the Equal Protection, Due Process, and Privileges and Immunities Clauses of the Fourteenth Amendment. 42 U. S. C. § 1971 (a)(1) (1964 ed.), which guarantees the right to vote, free from racial discrimination, provides:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

42 U. S. C. § 1971 (b) (1964 ed.) provides:

"No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . ."

See also § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I).

ally applied to their conduct, and that its application was a part of a policy of racial discrimination fostered by the State of Mississippi and the City of Greenwood. The District Court sustained the motion of the City of Greenwood to remand the cases to the city police court for trial. The Court of Appeals for the Fifth Circuit reversed, holding that "a good claim for removal under § 1443 (1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination." *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 684. Accordingly, the cases were remanded to the District Court for a hearing on the truth of the defendants' allegations. At the same time, the Court of Appeals rejected the defendants' contentions under 28 U. S. C. § 1443 (2), holding that removal under that subsection is available only to those who have acted in an official or quasi-official capacity under a federal law and who can therefore be said to have acted under "color of authority" of the law within the meaning of that provision.[4]

In the second case, 15 people allegedly affiliated with a civil rights group were arrested at different times in July

[4] ". . . § 1443 (2) . . . is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity." *Peacock* v. *City of Greenwood,* 347 F. 2d 679, 686 (C. A. 5th Cir.). In reaching this conclusion, the Court of Appeals relied strongly on the decision of the District Court in *City of Clarksdale* v. *Gertge,* 237 F. Supp. 213 (D. C. N. D. Miss.). The Court of Appeals for the Fourth Circuit has also adopted this construction of § 1443 (2). *Baines* v. *City of Danville,* 357 F. 2d 756, 771–772. The Courts of Appeals for the Second and Third Circuits have refused to grant removal under § 1443 (2) on allegations comparable to those in the present case. *New York* v. *Galamison,* 342 F. 2d 255 (C. A. 2d Cir.); *City of Chester* v. *Anderson,* 347 F. 2d 823 (C. A. 3d Cir.). See also *Arkansas* v. *Howard,* 218 F. Supp. 626 (D. C. E. D. Ark.).

and August of 1964 and charged with various offenses against the laws of Mississippi or ordinances of the City of Greenwood.[5] These defendants filed essentially identical petitions for removal in the District Court, denying that they had engaged in any conduct prohibited by valid laws and stating that their arrests and prosecutions were for the "sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi. As grounds for removal, the defendants specifically invoked 28 U. S. C. §§ 1443 (1)[6] and 1443 (2).[7] The District Court held that the cases

[5] The several defendants were charged variously with assault, interfering with an officer in the performance of his duty, disturbing the peace, creating a disturbance in a public place, inciting to riot, parading without a permit, assault and battery by biting a police officer, contributing to the delinquency of a minor, operating a motor vehicle with improper license tags, reckless driving, and profanity and use of vulgar language.

[6] Under § 1443 (1), the defendants alleged that they had been denied and could not enforce in the courts of the State rights under laws providing for equal civil rights, in that the courts and law enforcement officers of the State were prejudiced against them because of their race or their association with Negroes, and because of the commitment of the courts and officers to the State's declared policy of racial segregation. The defendants also alleged that the trial would take place in a segregated courtroom, that Negro witnesses and attorneys would be addressed by their first names, that Negroes would be excluded from the juries, and that the judges and prosecutors who would participate in the trial had gained office at elections in which Negro voters were excluded. The defendants also urged that the statutes and ordinances under which they were charged were unconstitutionally vague on their face, and that the statutes and ordinances were unconstitutional as applied to the defendants' conduct.

[7] Under § 1443 (2), the defendants alleged that they had engaged solely in conduct protected by the First Amendment, by the Equal Protection, Due Process, and Privileges and Immunities Clauses of

had been improperly removed and remanded them to the police court of the City of Greenwood. In a *per curiam* opinion finding the issues "identical with" those determined in the *Peacock* case, the Court of Appeals for the Fifth Circuit reversed and remanded the cases to the District Court for a hearing on the truth of the defendants' allegations under § 1443 (1). *Weathers* v. *City of Greenwood,* 347 F. 2d 986.

We granted certiorari to consider the important questions raised by the parties concerning the scope of the civil rights removal statute. 382 U. S. 971.[8] As in *Georgia* v. *Rachel, ante,* p. 780, we deal here not with questions of congressional power, but with issues of statutory construction.

I.

The individual petitioners contend that, quite apart from 28 U. S. C. § 1443 (1), they are entitled to remove their cases to the District Court under 28 U. S. C. § 1443 (2), which authorizes the removal of a civil action or criminal prosecution for "any act under color of authority derived from any law providing for equal rights . . . ." The core of their contention is that the various federal constitutional and statutory provisions invoked in their removal petitions conferred "color of authority" upon them to perform the acts for which they

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the Fourteenth Amendment, and by 42 U. S. C. § 1981 (1964 ed.), which provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[8] The City of Greenwood, petitioner in No. 471, challenges the Court of Appeals' interpretation of § 1443 (1); the individual petitioners in No. 649 challenge the court's interpretation of § 1443 (2).

are being prosecuted by the State. We reject this argument, because we have concluded that the history of § 1443 (2) demonstrates convincingly that this subsection of the removal statute is available only to federal officers and to persons assisting such officers in the performance of their official duties.[9]

The progenitor of § 1443 (2) was § 3 of the Civil Rights Act of 1866, 14 Stat. 27. Insofar as it is relevant here, that section granted removal of all criminal prosecutions "commenced in any State court . . . against any *officer*, civil or military, *or other person*, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof . . . ." (Emphasis added.)

The statutory phrase "officer . . . or other person" characterizing the removal defendants in § 3 of the 1866 Act was carried forward without change through successive revisions of the removal statute until 1948, when the revisers, disavowing any substantive change, eliminated the phrase entirely.[10] The definition of the persons en-

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[9] The provisions of what is now § 1443 (2) have never been construed by this Court during the century that has passed since the law's original enactment. The courts of appeals that have recently given consideration to the subsection have unanimously rejected the claims advanced in this case by the individual petitioners. See, in addition to the present case in the Fifth Circuit, 347 F. 2d 679, the following cases: *New York* v. *Galamison*, 342 F. 2d 255 (C. A. 2d Cir.); *City of Chester* v. *Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *Baines* v. *City of Danville*, 357 F. 2d 756 (C. A. 4th Cir.). See note 4, *supra*.

[10] See Rev. Stat. § 641 (1874); Judicial Code of 1911, c. 231, § 31, 36 Stat. 1096; 28 U. S. C. § 74 (1926 ed.); 28 U. S. C. § 1443 (1952 ed.). Although the 1948 revision modified the language of the prior provision in numerous respects, including the elimination of the phrase "officer . . . or other person," the reviser's note states

titled to removal under the present form of the statute is therefore appropriately to be read in the light of the more expansive language of the statute's ancestor. See *Madruga* v. *Superior Court,* 346 U. S. 556, 560, n. 12; *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U. S. 222, 227–228.

In the context of its original enactment as part of § 3 of the Civil Rights Act of 1866, the statutory language "officer . . . or other person" points squarely to the conclusion that the phrase "or other person" meant persons acting in association with the civil or military officers mentioned in the immediately preceding words of the statute. That interpretation stems from the obvious contrast between the "officer . . . or other person" phrase and the next preceding portion of the statute, the predecessor of the present § 1443 (1), which granted removal to "any . . . person" who was denied or could not enforce in the courts of the State his rights under § 1 of the 1866 Act. The dichotomy between "officer . . . or other person" and "any . . . person" in these correlative removal provisions persisted through successive statutory revisions until 1948, even though, were we to accept the individual petitioners' contentions, the two phrases would in fact have been almost entirely co-extensive.

It is clear that the "other person" in the "officer . . . or other person" formula of § 3 of the Civil Rights Act of 1866 was intended as an obvious reference to certain categories of persons described in the enforcement provisions, §§ 4–7, of the Act. 14 Stat. 28–29. Section 4 of the Act specifically charged both the officers

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simply that "Changes were made in phraseology." H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A134. The statutory development of the civil rights removal provision is set out in the Appendix to the Court's opinion in *Georgia* v. *Rachel, ante.*

and the agents of the Freedmen's Bureau,[11] among others, with the duty of enforcing the Civil Rights Act. As such, those officers and agents were required to arrest and institute proceedings against persons charged with vio-

[11] By the Act of March 3, 1865, 13 Stat. 507, Congress established a Bureau under the War Department, to last during the rebellion and for one year thereafter, to assist refugees and freedmen from rebel states and other areas by providing food, shelter, and clothing. The Bureau was under the direction of a commissioner appointed by the President with the consent of the Senate. Under § 4 of the Act, the commissioner was authorized to set apart for loyal refugees and freedmen up to 40 acres of lands that had been abandoned in the rebel states or that had been acquired by the United States by confiscation or sale. The section specifically provided that persons assigned to such lands "shall be protected in the use and enjoyment of the land." 13 Stat. 508. The Act was continued for two years by the Act of July 16, 1866, c. 200, § 1, 14 Stat. 173. In addition, § 3 of the latter Act amended the 1865 Act to authorize the commissioner to "appoint such agents, clerks, and assistants as may be required for the proper conduct of the bureau." The section also provided that military officers or enlisted men might be detailed for service and assigned to duty under the Act. 14 Stat. 174. Further, § 13 of the amendatory Act of 1866 specifically provided that "the commissioner of this bureau shall at all times co-operate with private benevolent associations of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction; and he shall furnish such protection as may be required for the safe conduct of such schools." 14 Stat. 176. Section 14 of the amendatory Act of 1866 established, in essentially the same terms for States where the ordinary course of judicial proceedings had been interrupted by the rebellion, the rights and obligations that had already been enacted in § 1 of the Act of April 9, 1866 (the Civil Rights Act), and provided for the extension of military jurisdiction to those States in order to protect the rights secured. 14 Stat. 176–177. By the Act of July 6, 1868, 15 Stat. 83, the Freedmen's Bureau legislation was continued for an additional year.

lations of the Act.[12] By the "color of authority" removal provision of § 3 of the Civil Rights Act, "agents" who derived their authority from the Freedmen's Bureau legislation would be entitled as "other persons," if not as "officers," to removal of state prosecutions against them based upon their enforcement activities under both the Freedmen's Bureau legislation and the Civil Rights Act.[13] Section 5 of the Civil Rights Act, now 42 U. S. C. § 1989 (1964 ed.), specifically authorized United States commissioners to appoint "one or more suitable persons" to execute warrants and other process issued by the commissioners.[14] These "suitable persons" were, in turn, spe-

[12] "SEC. 4. *And be it further enacted,* That . . . the officers and agents of the Freedmen's Bureau . . . shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before [the circuit] court of the United States or territorial court as by this act has cognizance of the offence." Act of April 9, 1866, 14 Stat. 28.

The same authorization was extended to district attorneys, marshals, and deputy marshals of the United States, and to commissioners appointed by the circuit and territorial courts of the United States. In order to expedite the enforcement of the Act, § 4 also authorized the circuit courts of the United States and superior territorial courts to increase the number of commissioners charged with the duties of enforcing the Act.

[13] Section 3 of the Civil Rights Act of 1866 provided for removal by any "officer . . . or other person" for acts under color of authority derived either from the Act itself or from the Freedmen's Bureau legislation. See p. 815, *supra.* Thus, removal was granted to officers and agents of the Freedmen's Bureau for enforcement activity under both Acts. The Civil Rights Act, however, made no specific provision for removal of actions against freedmen and refugees who had been awarded abandoned or confiscated lands under § 4 of the Freedmen's Bureau Act. See note 11, *supra.*

[14] Section 5 also provided that, "should any marshal or deputy marshal refuse to receive such warrant or other process when

cifically authorized "to summon and call to their aid the bystanders or posse comitatus of the proper county." [15] Section 6 of the Act provided criminal penalties for any individual who obstructed "any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them," or who rescued

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tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence." 14 Stat. 28. The Civil Rights Act of 1866 was passed over the veto of President Johnson. Because of the hostility between Congress and the President, it was feared that the United States marshals, who were appointed by the President, would not enforce the law. In § 5, therefore, Congress provided severe penalties for recalcitrant marshals. At the same time Congress ensured the availability of process servers by providing for the appointment by the commissioners of other "suitable persons" for the task of enforcing the new Act. Cf. *In re Upchurch*, 38 F. 25, 27 (C. C. E. D. N. C.).

[15] Section 5 of the Civil Rights Act of 1866 provided:

". . . And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued." Act of April 9, 1866, 14 Stat. 28. Cf. *Davis* v. *South Carolina*, 107 U. S. 597, 600.

or attempted to rescue prisoners "from the custody of the officer, other person or persons, or those lawfully assisting." [16] Finally, § 7 of the Act, now 42 U. S. C. § 1991 (1964 ed.), awarded a fee of five dollars for each individual arrested by the "person or persons authorized to execute the process"—*i. e.*, the "one or more suitable persons" of § 5. Thus, the enforcement provisions of the 1866 Act were replete with references to "other persons" in contexts obviously relating to positive enforcement activity under the Act.[17]

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[16] This aspect of § 6 thus draws a threefold distinction: "officers," "other persons" (probably the "one or more suitable persons" referred to in § 5), and those "lawfully assisting" them. We have no doubt that the general "officer . . . or other person" language in § 3 of the Act comprehended all three of these categories.

[17] "It thus appears that the statute contemplated that literally thousands of persons would be drawn into its enforcement and that some of them otherwise would have little or no appearance of official authority." *Baines* v. *City of Danville*, 357 F. 2d 756, 760 (C. A. 4th Cir.). No support for the proposition that "other person" includes private individuals not acting in association with federal officers can be drawn from the fact that the "color of authority" provision of the Civil Rights Act of 1866 was carried forward together with the "denied or cannot enforce" provision as § 641 of the Revised Statutes of 1874, whereas other removal provisions applicable to federal officers and persons assisting them were carried forward in § 643. Prior to 1948 the federal officer removal statute, as here relevant, was limited to revenue officers engaged in the enforcement of the criminal or revenue laws. The provision was expanded in 1948 to encompass all federal officers. See 28 U. S. C. § 1442 (a)(1) (1964 ed.). At the present time, all state suits or prosecutions against "Any officer of the United States . . . or person acting under him, for any act under color of such office" may be removed. Thus many, if not all, of the cases presently removable under § 1443 (2) would now also be removable under § 1442 (a)(1). The present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation. Indeed, there appears to be redundancy even within § 1442 (a)(1) itself. See Wechsler, Federal Jurisdiction and

The derivation of the statutory phrase "For any act" in § 1443 (2) confirms the interpretation that removal under this subsection is limited to federal officers and those acting under them. The phrase "For any act" was substituted in 1948 for the phrase "for any arrest or imprisonment or other trespasses or wrongs." Like the "officer . . . or other person" provision, the language specifying the acts on which removal could be grounded had, with minor changes, persisted until 1948 in the civil rights removal statute since its original introduction in the 1866 Act. The language of the original Civil Rights Act—"arrest or imprisonment, trespasses, or wrongs"—is pre-eminently the language of enforcement. The

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the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 221, n. 18 (1948).

The limitation of 28 U. S. C. § 1443 (2) to official enforcement activity under federal equal civil rights laws draws support from analogous provisions in the removal statutes available to federal revenue officers. Long before 1866, federal statutes had guaranteed certain federal revenue officers the right to remove to the federal court state court proceedings instituted against them because of their official actions. These statutes characteristically used the "officer . . . or other person" formula in defining those entitled to the benefit of removal. The Customs Act of 1815, the primordial officer removal statute, described the "other person" as one "aiding or assisting" the revenue officer. Act of Feb. 4, 1815, c. 31, § 8, 3 Stat. 198. See also the Act of March 3, 1815, c. 94, § 6, 3 Stat. 233. The removal clause of a subsequent statute, the Force Act of 1833, was less specific with regard to the scope of the "other person" language, but it focused upon the possibility that persons other than federal officers or their deputies might find themselves faced with the prospect of defending titles claimed under the federal revenue laws against suits or prosecutions in state courts. Act of March 2, 1833, c. 57, § 3, 4 Stat. 633. Thus, when Congress desired to grant removal of suits and prosecutions against private individuals, it knew how to make specific provision for it. Cf. Act of Jan. 22, 1869, 15 Stat. 267 (Habeas Corpus Suspension Act of 1863, 12 Stat. 755, amended to permit removal of suits or prosecutions against carriers for losses caused by rebel or Union forces).

words themselves denote the very sorts of activity for which federal officers, seeking to enforce the broad guarantees of the 1866 Act, were likely to be prosecuted in the state courts. As the Court of Appeals for the Second Circuit has put it, " 'Arrest or imprisonment, trespasses, or wrongs,' were precisely the probable charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced . . . ." *New York* v. *Galamison,* 342 F. 2d 255, 262.

The language of the "color of authority" removal provision of § 3 of the Civil Rights Act of 1866 was taken directly from the Habeas Corpus Suspension Act of 1863, 12 Stat. 755, which authorized the President to suspend the writ of habeas corpus and precluded civil and criminal liability of any person making a search, seizure, arrest, or imprisonment under any order of the President during the rebellion.[18] Section 5 of the 1863 Act provided for the removal of all suits or prosecutions "against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." 12 Stat. 756. See *The Mayor* v. *Cooper,* 6 Wall. 247; *Phillips* v. *Gaines,* 131 U. S. App. clxix. Since the 1863 Act granted no rights to private individuals, its removal provision was concerned solely with the protection of federal officers and persons acting

[18] Act of March 3, 1863, c. 81, §§ 1, 4, 12 Stat. 755, 756. See also the amendatory Act of May 11, 1866, 14 Stat. 46.

under them in the performance of their official duties.[19] Thus, at the same time that Congress expanded the availability of removal by enacting the "denied or cannot enforce" clause in § 3 of the Civil Rights Act of 1866, it repeated almost verbatim in the "color of authority" clause the language of the 1863 Act [20]—language that was clearly limited to enforcement activity by federal officers and those acting under them.[21]

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[19] The provision in § 5 of the Act of March 3, 1863, specifically extending removal to criminal as well as civil proceedings, was added on the Senate floor. Cong. Globe, 37th Cong., 3d Sess., 538. The debates focused on the need to protect federal officers against state criminal prosecutions. See, *e. g., id.*, at 535 (remarks of Senator Clark); *id.*, at 537–538 (remarks of Senator Cowan).

[20] Although, in the revenue officer removal provision of the Revenue Act of 1866, Act of July 13, c. 184, § 67, 14 Stat. 171, Congress expressly characterized the "other person" as one "acting under or by authority of any [revenue] officer," that statute obviously drew on the comparable characterization of the "other person" in the Customs Act of 1815, *supra*, note 17. And the "title" clause included in the 1866 revenue officer removal provision was obviously derived from the Force Act of 1833, *supra*, note 17. Thus, the same legislative inertia that led the Reconstruction Congress not to qualify "other person" in the Civil Rights Act of 1866 also led it to retain such a qualification in the revenue officer removal provision enacted later the same year. Compare § 16 of the Act of February 28, 1871, 16 Stat. 438 ("title" clause included in the officer removal provision of a civil rights statute). Cf. *City of Philadelphia* v. *The Collector*, 5 Wall. 720; *The Assessor* v. *Osbornes*, 9 Wall. 567.

[21] The language "arrest or imprisonment, trespasses, or wrongs" is, of course, easily read as describing the full range of enforcement activities in which federal officers might be engaged under the Civil Rights Act. In a case arising under § 5 of the Habeas Corpus Suspension Act of 1863, this Court disallowed removal of an action of ejectment brought in a Virginia state court by the heir of a Confederate naval officer whose land had been seized under the Confiscation Act of July 17, 1862, 12 Stat. 589. The confiscated land had been sold at public auction, and the rights to the land subsequently vested in a man named Bigelow, against whom the action of ejectment was

For these reasons, we hold that the second subsection of § 1443 confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights.[22] Accordingly, the individual petitioners in the case before us had no right of removal to the federal court under 28 U. S. C. § 1443 (2).

II.

We come, then, to the issues which this case raises as to the scope of 28 U. S. C. § 1443 (1). In *Georgia* v. *Rachel*, decided today, we have held that removal of a state court trespass prosecution can be had under § 1443 (1) upon a petition alleging that the prosecution stems exclusively from the petitioners' peaceful exercise of their right to equal accommodation in establishments covered by the Civil Rights Act of 1964, § 201, 78 Stat. 243, 42 U. S. C. § 2000a (1964 ed.). Since that Act

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brought. In denying removal under § 5 of the 1863 Act, Mr. Justice Strong for a unanimous Court stated, "The specification [in § 5] of arrests and imprisonments . . . followed by more general words, justifies the inference that the other trespasses and wrongs mentioned are trespasses and wrongs *ejusdem generis*, or of the same nature as those which had been previously specified." *Bigelow* v. *Forrest*, 9 Wall. 339, 348–349.

[22] The second phrase of 28 U. S. C. § 1443 (2), "for refusing to do any act on the ground that it would be inconsistent with such law," has no relevance to this case. It is clear that removal under that language is available only to state officers. The phrase was added by the House of Representatives as an amendment to the Senate bill during the debates on the Civil Rights Act of 1866. In reporting the House bill, Representative Wilson, the chairman of the House Judiciary Committee and the floor manager of the bill, said, "I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to [the rights created by § 1 of the bill] on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." Cong. Globe, 39th Cong., 1st Sess., 1367.

itself, as construed by this Court in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 310, specifically and uniquely guarantees that the conduct alleged in the removal petition in *Rachel* may "not be the subject of trespass prosecutions," the defendants inevitably are "denied or cannot enforce in the courts of [the] State a right under any law providing for . . . equal civil rights," by merely being brought before a state court to defend such a prosecution. The present case, however, is far different.

In the first place, the federal rights invoked by the individual petitioners include some that clearly cannot qualify under the statutory definition as rights under laws providing for "equal civil rights." The First Amendment rights of free expression, for example, so heavily relied upon in the removal petitions, are not rights arising under a law providing for "equal civil rights" within the meaning of § 1443 (1). The First Amendment is a great charter of American freedom, and the precious rights of personal liberty it protects are undoubtedly comprehended in the concept of "civil rights." Cf. *Hague* v. *C. I. O.,* 307 U. S. 496, 531–532 (separate opinion of Stone, J.). But the reference in § 1443 (1) is to *"equal* civil rights." That phrase, as our review in *Rachel* of its legislative history makes clear, does not include the broad constitutional guarantees of the First Amendment.[23] A precise definition of the limitations of the phrase "any law providing for . . . equal civil rights" in § 1443 (1) is not a matter we need pursue to a conclusion, however, because we may proceed here on the premise that at least the two federal statutes specifically referred to in the removal petitions, 42 U. S. C. § 1971 and 42 U. S. C. § 1981, do qualify under the statutory definition.[24]

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[23] See *Georgia* v. *Rachel, ante,* at 788–792. See also *New York* v. *Galamison,* 342 F. 2d 255, 266–268 (C. A. 2d Cir.).

[24] See note 3 and note 7, *supra.*

The fundamental claim in this case, then, is that a case for removal is made under § 1443 (1) upon a petition alleging: (1) that the defendants were arrested by state officers and charged with various offenses under state law because they were Negroes or because they were engaged in helping Negroes assert their rights under federal equal civil rights laws, and that they are completely innocent of the charges against them, or (2) that the defendants will be unable to obtain a fair trial in the state court. The basic difference between this case and *Rachel* is thus immediately apparent. In *Rachel* the defendants relied on the specific provisions of a preemptive federal civil rights law—§§ 201 (a) and 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a (a) and 2000a–2 (c) (1964 ed.), as construed in *Hamm* v. *City of Rock Hill*, *supra*—that, under the conditions alleged, gave them: (1) the federal statutory right to remain on the property of a restaurant proprietor after being ordered to leave, despite a state law making it a criminal offense not to leave, and (2) the further federal statutory right that no State should even attempt to prosecute them for their conduct. The Civil Rights Act of 1964 as construed in *Hamm* thus specifically and uniquely conferred upon the defendants an absolute right to "violate" the explicit terms of the state criminal trespass law with impunity under the conditions alleged in the *Rachel* removal petition, and any attempt by the State to make them answer in a court for this conceded "violation" would directly deny their federal right "in the courts of [the] State." The present case differs from *Rachel* in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a

policeman. Second, no federal law confers immunity from state prosecution on such charges.[25]

To sustain removal of these prosecutions to a federal court upon the allegations of the petitions in this case would therefore mark a complete departure from the terms of the removal statute, which allow removal only when a person is "denied or cannot enforce" a specified federal right "in the courts of [the] State," and a complete departure as well from the consistent line of this Court's decisions from *Strauder* v. *West Virginia*, 100 U. S. 303, to *Kentucky* v. *Powers*, 201 U. S. 1.[26] Those cases all stand for at least one basic proposition: It is *not* enough to support removal under § 1443 (1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will

[25] Section 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–2 (c) (1964 ed.), the provision involved in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 310, and *Georgia* v. *Rachel*, *ante*, at 793–794, 804–805, explicitly provides that no person shall "punish or attempt to punish any person for exercising or attempting to exercise any right or privilege" secured by the public accommodations section of the Act. None of the federal statutes invoked by the defendants in the present case contains any such provision. See note 3 and note 7, *supra*.

[26] See also *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213; *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286. Cf. *Georgia* v. *Rachel*, *ante*, at 797 *et seq.*

be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under § 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel, ante; Strauder* v. *West Virginia,* 100 U. S. 303.

What we have said is not for one moment to suggest that the individual petitioners in this case have not alleged a denial of rights guaranteed to them under federal law. If, as they allege, they are being prosecuted on baseless charges solely because of their race, then there has been an outrageous denial of their federal rights, and the federal courts are far from powerless to redress the wrongs done to them. The most obvious remedy is the traditional one emphasized in the line of cases from *Virginia* v. *Rives,* 100 U. S. 313, to *Kentucky* v. *Powers,* 201 U. S. 1—vindication of their federal claims on direct review by this Court, if those claims have not been vindicated by the trial or reviewing courts of the State. That is precisely what happened in two of the cases in the *Rives-Powers* line of decisions, where removal under the predecessor of § 1443 (1) was held to be unauthorized, but where the state court convictions were overturned because of a denial of the defendants' federal rights at their trials.[27] That is precisely what has happened in

[27] *Neal* v. *Delaware,* 103 U. S. 370; *Bush* v. *Kentucky,* 107 U. S. 110.

countless cases this Court has reviewed over the years—cases like *Shuttlesworth* v. *Birmingham,* 382 U. S. 87, to name one at random decided in the present Term. "Cases where Negroes are prosecuted and convicted in state courts can find their way expeditiously to this Court, provided they present constitutional questions." *England* v. *Medical Examiners,* 375 U. S. 411, 434 (DOUGLAS, J., concurring).

But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See *Dombrowski* v. *Pfister,* 380 U. S. 479. If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. *Thompson* v. *Louisville,* 362 U. S. 199. If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. *Fay* v. *Noia,* 372 U. S. 391. If their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. *Townsend* v. *Sain,* 372 U. S. 293.

Other sanctions, civil and criminal, are available in the federal courts against officers of a State who violate the petitioners' federal constitutional and statutory rights. Under 42 U. S. C. § 1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and

statutory rights as well.[28] *Monroe* v. *Pape*, 365 U. S. 167. And only this Term we have held that the provisions of 18 U. S. C. § 241 (1964 ed.), a criminal law that imposes punishment of up to 10 years in prison, may be invoked against those who conspire to deprive any citizen of the "free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." [29] *United States* v. *Guest*, 383 U. S. 745, 756.

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[28] "*Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983 (1964 ed.).

[29] "*Conspiracy against rights of citizens.*

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 241 (1964 ed.).

Criminal penalties for violations of federal rights are also imposed by 18 U. S. C. § 242 (1964 ed.), which provides:

"*Deprivation of rights under color of law.*

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than

But the question before us now is not whether state officials in Mississippi have engaged in conduct for which they may be civilly or criminally liable under federal law. The question, precisely, is whether the individual petitioners are entitled to remove these state prosecutions to a federal court under the provisions of 28 U. S. C. § 1443 (1). Unless the words of this removal statute are to be disregarded and the previous consistent decisions of this Court completely repudiated, the answer must clearly be that no removal is authorized in this case. In the *Rachel* case, decided today, we have traced the course of those decisions against the historic background of the statute they were called upon to interpret. And in *Rachel* we have concluded that removal to the federal court in the narrow circumstances there presented would not be a departure from the teaching of this Court's decisions, because the Civil Rights Act of 1964, in those narrow circumstances, "substitutes a right for a crime." *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 315.

We need not and do not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute, from *Strauder* v. *West Virginia,* 100 U. S. 303, to *Kentucky* v. *Powers,* 201 U. S. 1. But we decline to repudiate those decisions, and we decline to do so not out of a blind adherence to the principle of *stare decisis,* but because after independent consideration we have determined, for the reasons expressed in this opinion and in *Rachel,* that those decisions were correct in their basic conclusion that the provisions of § 1443 (1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law.

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are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." See *United States* v. *Price,* 383 U. S. 787.

It is worth contemplating what the result would be if the strained interpretation of § 1443 (1) urged by the individual petitioners were to prevail. In the fiscal year 1963 there were 14 criminal removal cases of all kinds in the entire Nation; in fiscal 1964 there were 43. The present case was decided by the Court of Appeals for the Fifth Circuit on June 22, 1965, just before the end of the fiscal year. In that year, fiscal 1965, there were 1,079 criminal removal cases in the Fifth Circuit alone.[30] But this phenomenal increase is no more than a drop in the bucket of what could reasonably be expected in the future. For if the individual petitioners should prevail in their interpretation of § 1443 (1), then every criminal case in every court of every State—on any charge from a five-dollar misdemeanor to first-degree murder—would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race[31] and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court. On motion to remand, the federal court would be required in every case to hold a hearing, which would amount to at least a preliminary trial of the motivations of the state officers who arrested and charged the defendant, of the quality of the state court or judge before whom the charges were filed, and of the defendant's innocence or guilt. And the federal court might, of course, be located hundreds of miles away from the place where the charge was brought. This hearing could be followed either by a full trial in the federal court, or by a remand order. Every remand order would be

[30] Annual Report of the Director of the Administrative Office of the United States Courts 214, 216 (1965). See *Georgia* v. *Rachel*, *ante*, p. 788, n. 8.

[31] Such removal petitions could, of course, be filed not only by Negroes, but also by members of the Caucasian or any other race.

appealable as of right to a United States Court of Appeals and, if affirmed there, would then be reviewable by petition for a writ of certiorari in this Court. If the remand order were eventually affirmed, there might, if the witnesses were still available, finally be a trial in the state court, months or years after the original charge was brought. If the remand order were eventually reversed, there might finally be a trial in the federal court, also months or years after the original charge was brought.

We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared.[32] And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.[33]

But before establishing the regime the individual petitioners propose, Congress would no doubt fully consider many questions. The Court of Appeals for the Fourth Circuit has mentioned some of the practical questions that would be involved: "If the removal jurisdiction is

[32] See *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359–380; 389–412 (separate opinion of MR. JUSTICE BRENNAN).

[33] See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 348–350; *The Moses Taylor*, 4 Wall. 411, 428–430; *The Mayor* v. *Cooper*, 6 Wall. 247, 251–254; *Railway Co.* v. *Whitton*, 13 Wall. 270, 287–290; *Tennessee* v. *Davis*, 100 U. S. 257, 262–271; *Strauder* v. *West Virginia*, 100 U. S. 303, 310–312. A number of bills enlarging the right of removal to a federal court in civil rights cases are before the present Congress. See, for example: S. 2923, S. 3170, H. R. 12807, H. R. 12818, H. R. 12845, H. R. 13500, H. R. 13941, H. R. 14112, H. R. 14113, H. R. 14770, H. R. 14775, H. R. 14836 (89th Cong., 2d Sess.).

to be expanded and federal courts are to try offenses against state laws, cases not originally cognizable in the federal courts, what law is to govern, who is to prosecute, under what law is a convicted defendant to be sentenced and to whose institution is he to be committed . . . ?" *Baines* v. *City of Danville*, 357 F. 2d 756, 768–769. To these questions there surely should be added the very practical inquiry as to how many hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced.

We need not attempt to catalog the issues of policy that Congress might feel called upon to consider before making such an extreme change in the removal statute. But prominent among those issues, obviously, would be at least two fundamental questions: Has the historic practice of holding state criminal trials in state courts—with power of ultimate review of any federal questions in this Court—been such a failure that the relationship of the state and federal courts should now be revolutionized? Will increased responsibility of the state courts in the area of federal civil rights be promoted and encouraged by denying those courts any power at all to exercise that responsibility?

We postulate these grave questions of practice and policy only to point out that if changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them. Fully aware of the established meaning the removal statute had been given by a consistent series of decisions in this Court, Congress in 1964 declined to act on proposals to amend the law.[34]

[34] Section 903 of H. R. 7702, 88th Cong., 1st Sess., would have amended 28 U. S. C. § 1443 to enlarge the availability of removal in civil rights cases. H. R. 7702, however, did not emerge from the Judiciary Committee of the House of Representatives. Cf. *Georgia* v. *Rachel*, *ante*, p. 787, n. 7.

All that Congress did was to make remand orders appealable, and thus invite a contemporary judicial consideration of the meaning of the unchanged provisions of 28 U. S. C. § 1443. We have accepted that invitation and have fully considered the language and history of those provisions. Having done so, we find that § 1443 does not justify removal of these state criminal prosecutions to a federal court. Accordingly the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE FORTAS concur, dissenting.

These state court defendants who seek the protection of the federal court were civil rights workers in Mississippi. Some were affiliated with the Student Non-Violent Coordinating Committee engaged in getting Negroes registered as voters. They were charged in the state courts with obstructing the public streets. Other defendants were civil rights workers affiliated with the Council of Federated Organizations which aims to achieve full and complete integration of Negroes into the political and economic life of Mississippi. Some alleged that, while peacefully picketing, they were arrested and charged with assault and battery or interfering with an officer. Others were charged with illegal operation of motor vehicles, or for contributing to the delinquency of a minor or parading without a permit. Some were charged with disturbing the peace or inciting a riot.

All sought removal, some alleging in their motions that the state prosecution was part and parcel of Mississippi's policy of racial segregation. Others alleged that they were wholly innocent, the state prosecutions being for the sole purpose of harassing them and of punishing them for exercising their constitutional rights

to protest the conditions of racial discrimination and segregation. In all these cases the District Court remanded to the state courts. The Court of Appeals reversed (347 F. 2d 679; 347 F. 2d 986) holding that the allegations were sufficient to make out a case for removal and that hearings on the truth of the allegations were required.

I agree with that result. As I will show, the federal regime was designed from the beginning to afford some protection against local passions and prejudices by the important pretrial federal remedy of removal; and the civil rights legislation with which we deal supports the mandates of the Court of Appeals.

I.

The Federal District Courts were created by the First Congress (1 Stat. 73) which designated a few heads of jurisdiction for the District Courts (§ 9) and for the Circuit Courts (§ 11)—some being concurrent with those of the state courts, others being exclusive. These categories of jurisdiction—later enlarged—were largely for the benefit of plaintiffs. There was concern that the rivalries, jealousies, and animosities among the States made necessary and appropriate the creation of a dual system of courts.

Lack of trust in some of the state courts for execution of federal laws was reflected in the First Congress that established the dual system. Thus Madison said:

> ". . . a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States, it is true, they might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrass-

ments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature, and the Legislature is itself the last resort in civil cases." 1 Ann. Cong. 813.

Though federal question jurisdiction was originally limited to a few classes of cases, the creation of diversity jurisdiction (§ 11, 1 Stat. 78) was a significant manifestation of this same feeling. As Chief Justice Marshall said in *Bank of United States* v. *Deveaux,* 5 Cranch 61, 87:

> "The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

And see *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347.

The alternative—the one India took—was to let the state courts be the arbiters of federal as well as state rights with ultimate review in the Federal Supreme Court. But the federal court system was the choice we made and those courts have functioned throughout our history. In the years since 1789, the jurisdiction of the federal courts where federal rights are in issue has been steadily expanded (see Hart & Wechsler, The Federal Courts and the Federal System 727–733 (1953)), particularly with the creation of a general "federal question" jurisdiction in 1875. 18 Stat. 470.

While the federal courts were for the most part custodians of rights asserted by plaintiffs, from the very beginning they were also the haven of a restricted group of defendants as well. I refer to § 12 of the Judiciary Act of 1789, 1 Stat. 79, which permitted removal of cases from a state court to a federal court on the ground of diversity of citizenship. Thus from the very start we have had a removal jurisdiction for the protection of defendants on a partial parity with federal jurisdiction for protection of plaintiffs.

The power of a defendant to remove cases from a state court to a federal court was not greatly enlarged until passage of the first Civil Rights Act,[1] § 3 of which provided:

> ". . . the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons *who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be* any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal,

[1] Act of April 9, 1866, 14 Stat. 27. There were a handful of other removal statutes passed in the interim. See, *e. g.*, Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts); Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), see *Tennessee* v. *Davis*, 100 U. S. 257; Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers—civil or military—for acts done during the existence of the Civil War under color of federal authority).

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> has been or shall be commenced in any State court, against any such person, for any cause whatsoever . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . ." (Emphasis added.)

With the coming of the Civil War it became plain that some state courts might be instruments for the destruction through harassment of guaranteed federal civil rights. We have seen this demonstrated in the flow of cases coming this way. But the minorities who are the subject of repression are not only those who espouse the cause of racial equality. Jehovah's Witnesses in many parts of the country have likewise felt the brunt of majoritarian control through state criminal administration. Before them were the labor union organizers. Before them were the Orientals. It is in this setting that the removal jurisdiction must be considered.

The removal laws passed from time to time have responded to two main concerns: First, a federal fact-finding forum is often indispensable to the effective enforcement of those guarantees against local action.[2]

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[2] Madison, whose views on the establishment of the federal court system prevailed, said in the debates:

"[U]nless inferior tribunals were dispersed throughout the republic . . . appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. . . . An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would

The federal guarantee turns ordinarily upon contested issues of fact. Those rights, therefore, will be of only academic value in many areas of the country unless the facts are objectively found. Secondly, swift enforcement of the federal right is imperative if the guarantees are to survive and not be slowly strangled by long, drawn-out, costly, cumbersome proceedings which the Congress feared might result in some state courts. The delays of state criminal process, the perilous vicissitudes of litigation in the state courts, the onerous burdens on the poor and the indigent who usually espouse unpopular causes—these threaten to engulf the federal guarantees. It is in that light that 28 U. S. C. § 1443 (1) should be read and construed.

II.

The critical words, so far as the present cases are concerned, are "denied or cannot enforce in the courts or judicial tribunals" of the State or locality where they may be those rights which, in the most recent version of the removal statute,[3] are characterized as those secured

be the mere trunk of a body, without arms or legs to act or move." 5 Elliot's Debates 159 (1876).

His victory "destroyed the ability of the states to sabotage the Union through their judiciary systems." 3 Brant, James Madison 42 (1950). Cf. *England* v. *Medical Examiners*, 375 U. S. 411, 416–417.

[3] 28 U. S. C. § 1443 (1964 ed.) provides:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

by "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." [4]

It is difficult to discern whether the Court ascribes different meanings to the words "is denied" and "cannot enforce" as used in the statute. In my view, it is essential that these two aspects of § 1443 (1) be distinguished. The words "is denied" refer to a *present* deprivation of rights while the language "cannot enforce" has reference to an *anticipated* state court frustration of equal civil rights. *Virginia* v. *Rives*, 100 U. S. 313, and subsequent decisions of this Court which the majority discusses, were concerned with claims of the "cannot enforce" variety.[5]

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[4] Whatever the full reach of the statutory language "any law providing for the equal civil rights of citizens," the wrongs of which these defendants and those in *Georgia* v. *Rachel, ante*, p. 780, complain (with the possible exception of pure First Amendment claims) are well within its coverage. See, *e. g.*, 42 U. S. C. §§ 1971, 1973i (b) (1964 ed. & Supp. I) (statutes adopted under Congress' power to assure equal access to the vote to all citizens, regardless of "race, color, or previous condition of servitude," U. S. Const., Amendment XV); 42 U. S. C. § 1981 (1964 ed.) (guaranteeing all persons the right not to be subjected to "punishment, pains, penalties . . . [or] exactions" not suffered in like circumstances by "white citizens"); 42 U. S. C. §§ 2000a, 2000a–2 (1964 ed.) (discussed in *Georgia* v. *Rachel, supra*). I doubt that any meaningful distinction could be drawn for removal purposes between, for example, rights secured by 42 U. S. C. § 1981 and those guaranteed by the Equal Protection Clause, which largely reiterated § 1981 in constitutional terms. But it is unnecessary, on my view of these cases, to settle this question. I therefore do not reach the highly questionable propositions relied upon by the majority in restricting the scope of the rights which § 1443 (1) encompasses.

[5] Strictly speaking, the Court in *Virginia* v. *Rives, supra*, drew no distinction between the "is denied" and the "cannot enforce" clauses. It is clear, if only in retrospect, that the Court was there concerned solely with a claim of an *anticipated* inability to enforce equal civil rights because of the state court's tolerance of the exclusion of Negroes from the jury. The Court held that pretrial removal

The Court dealt, in those cases, with the issue of unequal administration of justice in the process of jury selection. The concern was that removal might be permitted on merely a speculation that the state court would not, *in the future,* discharge its obligation to follow the "law of the land." Whatever the correctness of those decisions as to the "cannot enforce" clause, they have no application whatever to a claim of a present denial of equal civil rights.

A.

A defendant "is denied" his federal right when "disorderly conduct" statutes, "breach of the peace" ordinances, and the like are used as the instrument to suppress his promotion of civil rights. We know that such laws are sometimes used as a club against civil rights workers.[6] Senator Dodd who was the floor manager for that part of the Civil Rights Act of 1964 which restored the right of appeal from an order remanding a removed case (§ 901, 78 Stat. 266, 28 U. S. C. § 1447 (d) (1964 ed.)) stated: [7]

> "I think cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation, ought to be removable under this section."

The examples are numerous. First is the case of prosecution under a law which is valid on its face but

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could not reach "a judicial [as opposed to a legislative] infraction of the constitutional inhibitions, after trial or final hearing has commenced." 100 U. S., at 319. Fairly read, *Rives* applies only to claims for removal arising under the "cannot enforce" clause of § 1443 (1).

[6] See, *e. g., Edwards* v. *South Carolina,* 372 U. S. 229; *Henry* v. *City of Rock Hill,* 376 U. S. 776 (*per curiam*); *Cox* v. *Louisiana,* 379 U. S. 536; *Shuttlesworth* v. *Birmingham,* 382 U. S. 87.

[7] 110 Cong. Rec. 6955 (1964).

applied discriminatorily.[8] Second is a prosecution under, say, a trespass law for conduct which is privileged under federal law.[9] Third is an unwarranted charge brought against a civil rights worker to intimidate him for asserting those rights,[10] or to suppress or discourage their promotion. The present charges are initiated by prosecutors for the purpose, defendants allege, of deterring or punishing the exercise of equal civil rights. The Court of Appeals said:

> ". . . we do not read these cases [*Rives* and *Powers*] as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged *denial of rights, as here, had its inception in the arrest and charge.* They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials

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[8] Administration of a law which appears fair on its face violates the Equal Protection Clause if done in a way which is racially discriminatory (*Yick Wo* v. *Hopkins*, 118 U. S. 356) or which prefers the proponents of certain ideas over others (*Niemotko* v. *Maryland*, 340 U. S. 268, 272; *Cox* v. *Louisiana*, *supra*, at 553–558; and see *id.*, at 580–581 (BLACK, J., concurring)). Both standards combine in the case of discriminatory enforcement directed against civil rights demonstrators. And see 42 U. S. C. § 1981 (1964 ed.).

[9] See, *e. g.*, *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 310; *Georgia* v. *Rachel*, *ante*.

[10] Cf. authorities cited, note 8, *supra*. Various federal statutes make it a crime to interfere with or punish the exercise of federally protected rights. See, *e. g.*, § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I); § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.). See *infra*, at 847–848 and note 12.

> of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process." 347 F. 2d 679, 684. (Emphasis added.)

I agree with that conclusion.

There are two ways which § 1443 (1) may be read, either of which leads to the conclusion that these cases are covered by the "is denied" clause. As Judge Sobeloff said, dissenting in *Baines* v. *City of Danville,* 357 F. 2d 756, 778, the clause in question may be paraphrased in either of the following ways:

> "Removal is permissible by:
>
> "(i) any person who is denied [,] or cannot enforce [,] in the courts of such State a right under any law . . . .
>
> "or
>
> "(ii) any person who is denied [,] or cannot enforce in the courts of such State [,] a right under any law . . . ."

If the latter construction is taken, a right "is denied" by state action at any time—before, as well as during, a trial. I agree with Judge Sobeloff that this reading of the provisions is more in keeping with the spirit of 1866, for the remedies given were broad and sweeping:

> "If a Negro's rights were denied by the actions of such state officer, the aggrieved party was permitted to have vindication in the federal court; either by filing an original claim or, if a prosecution had already been commenced against him, by removing the case to the federal forum." *Id.,* at 781.

Yet even if the "is denied" clause is read more restrictively, the present cases constitute denials of federal civil

rights "in the courts" of the offending State within the meaning of § 1443 (1), for the local judicial machinery is implicated even prior to actual trial by issuance of a warrant or summons; by commitment of the prisoner, or by accepting and filing the information or indictment. Initiation of an unwarranted judicial proceeding to suppress or punish the assertion of federal civil rights makes out a case of civil rights "denied" within the meaning of § 1443 (1). Prosecution for a federally protected act is punishment for that act. The cost of proceeding court by court until the federal right is vindicated is great. Restraint of liberty may be present; the need to post bonds may be present; the hire of a lawyer may be considerable; the gantlet of state court proceedings may entail destruction of a federal right through unsympathetic and adverse fact-findings that are in effect unreviewable. The presence of an unresolved criminal charge may hang over the head of a defendant for years.

In early 1964, for example, the Supreme Court of Mississippi affirmed convictions in harassment prosecutions arising out of the May 1961 Freedom Rides. See *Thomas* v. *State,* 252 Miss. 527, 160 So. 2d 657; *Farmer* v. *State,* 161 So. 2d 159; *Knight* v. *State,* 248 Miss. 850, 161 So. 2d 521. More than another year was to pass before this Court reached and reversed those convictions.[11] *Thomas* v. *Mississippi,* 380 U. S. 524 (1965).

Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights. We said in *NAACP* v. *Button,* 371 U. S. 415, 433, respecting some of these fed-

[11] And see *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) (nearly two years from arrest to our reversal of convictions); *Fields* v. *South Carolina,* 375 U. S. 44 (1963) (three and a half years from arrest to our reversal of convictions); *Henry* v. *City of Rock Hill,* 376 U. S. 776 (1964) (more than four years from arrest to our reversal of convictions).

eral rights, that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." In a First Amendment context, we said: "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister*, 380 U. S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right.

The threshold question—whether initiation of the state prosecution has "denied" a federal right—is resolvable by the federal court on a hearing on the motion to remove. As noted, it is in substance a plea in bar to the prosecution, a plea grounded on federal law. If the motion is granted, the removed case is concluded at that stage, as a case of misuse of a state prosecution has been made out. Cf. *O'Campo* v. *Hardisty*, 262 F. 2d 621; *De Busk* v. *Harvin*, 212 F. 2d 143. In other words, the result of removal is not the transfer of the trial from the state to the federal courts in this type of case. If after hearing it does not appear that the state prosecution is being used to deny federal rights, the case is remanded for trial in the state courts. 28 U. S. C. § 1447 (c) (1964 ed.). But the removal statute meanwhile serves a protective function. Filing of the petition removes the case and auto-

matically stays further proceedings in the state court. 28 U. S. C. § 1446 (e) (1964 ed.). Moreover, if the defendant is confined, the removal judge must, without awaiting a hearing, issue a writ to transfer the prisoner to federal custody, 28 U. S. C. § 1446 (f) (1964 ed.), and he may then enlarge him on bail.

The Court holds in *Rachel* that a hearing must be held as to whether, in the particular case, the trespass prosecution constitutes a denial of equal civil rights. Inexplicably, no such hearing is to be held in the present cases. For reasons not clear, a baseless prosecution, designed to punish and deter the exercise of such federally protected rights as voting, is not seen by the majority to constitute a denial of equal civil rights. This seems to me to overlook two very important federal statutes. The first, 42 U. S. C. § 1981 (1964 ed.) (the present version of § 1 of the Civil Rights Act of 1866 to which the original removal statute referred), provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The other, § 11 (b) of the Voting Rights Act of 1965, 79 Stat. 443, 42 U. S. C. § 1973i (b) (1964 ed., Supp. I), provides:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or . . . urging or aiding any person to vote or attempt to vote . . . ."

Those sections make clear beyond debate that, if the defendants' allegations are true, these state prosecutions themselves constitute a denial of "a right under any law providing for the equal civil rights of citizens." [12]

B.

Defendants also allege that they "cannot enforce" in the courts of Greenwood, the locality in which their cases are to be tried, their equal civil rights. This, unlike a claim of present denial of rights, rests on prediction of the future performance of the state courts; as such, it admittedly falls within the *Rives-Powers* doctrine.

[12] Compare the language of § 203 of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–2 (1964 ed.), relied upon by the Court in *Rachel* as creating a right to be free from a wrongful prosecution: "No person shall . . . (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by [the public accommodations sections], or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by [the public accommodations sections]."

The majority appears to distinguish this case from *Rachel* on the ground that in the latter case, the defendants were "authorized" by the Civil Rights Act of 1964 to enter a restaurant and receive equal accommodation. In my judgment, that is a distinction without substance for purposes of § 1443 (1). A person "is denied" rights which § 1443 (1) protects when the very prosecution of him is in violation of a federal statute assuring equal civil rights. That is true whether the act for which he is being prosecuted is specifically authorized by statute or, rather, is merely one of the innumerable acts which members of the community daily perform without either statutory authorization or police interference.

It must be apparent that the action by the Revisers of 1874 in eliminating the previous provision for post-trial removal is irrelevant to interpretation of the "is denied" clause. Even on the majority's own interpretation of the statute, where "*any* proceedings in the courts of the State will constitute a denial" of rights secured by a federal statute assuring equal civil rights, an appropriate basis will have been shown for a "firm prediction" of such denial. *Georgia* v. *Rachel*, *ante*, at 804.

I agree with the majority that, in providing for appeal of remand orders in civil rights removal cases, Congress meant for us to reconsider that line of cases.[13] Unlike the majority, however, I believe that those cases, to the extent that they limit removal to instances where the inability to enforce equal civil rights springs from a state statute or constitutional provision compelling the forbidden discrimination, should not be followed.[14] That construction of § 1443 (1) resulted, I think, from a misreading of the removal provisions of the Act of 1866.

[13] The irrationality of the *Rives-Powers* requirement that removal be predicated on a facially unconstitutional statute was known to Congress when it amended the law to make possible appeal from an order remanding the case to the state court. As then-Senator Humphrey, floor manager of the Civil Rights Act of 1964, put it: "[T]he real problem at present is not a statute which is on its face unconstitutional; it is the unconstitutional application of a statute. When a State statute has been unconstitutionally applied, most Federal district judges presently believe themselves bound by these old decisions . . . . *Enactment of* [*the appeal provision*] *will give the appellate courts an opportunity to reexamine this question.*" 110 Cong. Rec. 6551 (1964). (Emphasis added.) Similar invitations to overrule the *Rives-Powers* line of cases were uttered by Senator Dodd (110 Cong. Rec. 6955–6956) and Congressman Kastenmeier (110 Cong. Rec. 2770) and it is fair to assume that Congress did not reinstate the right to appeal from a remand order merely to allow civil rights litigants the brutal luxury of an appeal, the inevitable outcome of which would be an affirmance.

[14] The majority's view of the *Rives-Powers* doctrine is none too clear. In *Rachel*, it dispenses with the broad statement of that doctrine that there be a facially unconstitutional state statute or constitutional provision, for it permits removal on a showing that a state statute is unconstitutional only in application to those seeking relief. The Court explains this by reliance on language in *Rives* which the Court thought warranted the conclusion that in certain circumstances, removal might be justified even in the absence of a discriminatory state statute. In this case, however, the majority appears to adopt the whole sweep of the *Rives-Powers* doctrine, and makes the absence of facially unconstitutional state action fatal to the petition for removal.

I think that the words "cannot enforce" should be construed in the spirit of 1866. Senator Lane speaking for the first Civil Rights Act said: [15]

> "The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision."

Senator Trumbull, who was the Chairman of the Judiciary Committee and who managed the bill on the floor, many times reflected the same view. He stated that the person discriminated against "should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him." Cong. Globe, 39th Cong., 1st Sess., 1759.

It was not the existence of a statute, he said, any more than the existence of a custom discriminating against the person that would authorize removal, but whether, in either case, it was probable that the state court would fail adequately to enforce the federal guarantees. *Ibid.*

The Black Codes were not the only target of this law. Vagrancy laws were another—laws fair on their face which were enforced so as to reduce free men to slaves "in punishment of crimes of the slightest magnitude" (*Id.*, at 1123), laws which declare men "vagrants because they have no homes and because they have no employment" in order "to retain them still in a state of real servitude." *Id.*, at 1151.

In my view, § 1443 (1) requires the federal court to decide whether the defendant's allegation (that the state court will not fairly enforce his equal rights) is true.[16]

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[15] Cong. Globe, 39th Cong., 1st Sess., 602.

[16] In support of its contrary result, the Court cites the number of removal petitions filed in the year 1965. I am unaware of any

If the defendant is unable to demonstrate this inability to enforce his rights, the case is remanded to the state court. But if the federal court is persuaded that the state court indeed will not make a good-faith effort to apply the paramount federal law pertaining to "equal civil rights," then the federal court must accept the removal and try the case on the merits.

Such removal under the "cannot enforce" clause would occur only in the unusual case. The courts of the States generally try conscientiously to apply the law of the land. To be sure, state court judges have on occasion taken a different view of the law than that which this Court ultimately announced. But these honest differences of opinion are not the sort of recalcitrance which the "cannot enforce" clause contemplates. What Congress feared was the exceptional situation. It realized that considerable damage could be done by even a single court which harbored such hostility toward federally protected civil rights as to render it unable to meet its responsibilities. The "cannot enforce" clause is directed to that rare case.

Execution of the legislative mandate calls for particular sensitivity on the part of federal district judges; but the delicacy of the task surely does not warrant a

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relevance this figure has in the interpretation of a statute enacted in 1866. Indeed, if any contemporary incidents are to provide guidance, I should think we would be aided by the debates and votes in Congress on the Civil Rights Act of 1964. Opponents of the provision allowing appeals from a remand order warned of possible dilatory tactics and disruptions of the judicial processes—state and federal—which might result; this was virtually the only expressed basis of opposition to this proposed amendment. See, *e. g.*, H. R. Rep. No. 914, 88th Cong., 1st Sess., 59, 67, 111–112 (minority reports); 110 Cong. Rec. 2769–2784 (*passim*) (House); *id.*, at 13468, 13879 (Senate). Proposals to delete the appeal provision were decisively rejected, 118–76 in the House (*id.*, at 2784) and in the Senate on two occasions, 51–31 (*id.*, at 13468) and 66–25 (*id.*, at 13879).

refusal to attempt it. I am confident that the federal district judges would exercise care and good judgment in passing on "cannot enforce" claims. A district judge could not lightly assume that the state court would shirk its responsibilities, and should remand the case to the state court unless it appeared by clear and convincing evidence that the allegations of an inability to enforce equal civil rights were true. Cf. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 854–863, 911–912 (1965). A requirement that defendants seeking removal demonstrate a basis for "firm prediction" of inability to enforce equal civil rights in the state court is the only necessary consequence of the revision of 1874 which silently deleted the provision for post-trial removal from the statute. In this way, the legitimate interests of federalism which *Rives* sought to protect would be respected without emasculating this statute.

III.

The Court takes considerable comfort from the availability to defendants of numerous other federal remedies, such as direct review in this Court, federal habeas corpus, civil actions under 42 U. S. C. § 1983 (1964 ed.), and even federal criminal prosecutions. But it is relevant to note when these alternative remedies were conferred. The extension of the habeas corpus remedy to state prisoners was enacted in 1867 by the Thirty-ninth Congress, the same body which enacted the removal statute we here consider. 14 Stat. 385. The criminal statutes involved in our recent decisions in *United States* v. *Price*, 383 U. S. 787, and *United States* v. *Guest*, 383 U. S. 745, were first enacted in 1866 and 1870. 14 Stat. 27; 16 Stat. 141, 144. The civil remedy provided by 42 U. S. C. § 1983 was enacted in 1871. 17 Stat. 13. If any inference is to be

drawn from the existence of these coordinate remedies, it is that Congress was concerned, at the time this removal statute was passed, to protect from state court denial the equal civil rights of United States citizens. Rather than take comfort from the broad array of possible remedies, we should take instruction from it.

Moreover, the Court's many rhetorical questions respecting implementation of removal, if it were allowed, are answered in *Tennessee* v. *Davis*, 100 U. S. 257, 271–272, a case decided the same day as *Rives:*

> "The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered [that] the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, *grows entirely out of the division of powers between that government and the govern-*

ment of a State; that is, a division of sovereignty over certain matters. *When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding."* (Emphasis added.)

IV.

The federal court in a removal case plainly must act with restraint. But to deny relief in the cases now before us is, in view of the allegations made, to aggravate a wrong by compelling these defendants to suffer the risk of an unwarranted trial and by allowing them to be held under improper charges and in prison, if the State desires, for an extended period pending trial. The risk that the state courts will not promptly dismiss the prosecutions was the congressional fear. The Court defeats that purpose by giving a narrow, cramped meaning to § 1443 (1). These defendants' federal civil rights may, of course, ultimately be vindicated if they persevere, live long enough, and have the patience and the funds to carry their cases for some years through the state courts to this Court. But it was precisely that burden that Congress undertook to take off the backs of this persecuted minority and all who espouse the cause of their equality.

Ida PHILLIPS, Plaintiff-Appellant,

v.

MARTIN MARIETTA CORPORATION, Defendant-Appellee.

No. 26825.

United States Court of Appeals
Fifth Circuit.
Oct. 13, 1969.

Appeal from the United States District Court for the Middle District of Florida at Orlando; George C. Young, Judge.

On petition for rehearing of 411 F.2d 1.

Reese Marshall, Jacksonville, Fla., for appellant.

David R. Cashdan, Philip B. Sklover, Attys. (Equal Employment Opportunity Commission), Washington, D. C., amici curiae.

J. Thomas Cardwell, George T. Eidson, Jr., Orlando, Fla., for appellee.

Before GEWIN, McGOWAN* and MORGAN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing En Banc is also denied.

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

JOHN R. BROWN, Chief Judge, with whom AINSWORTH and SIMPSON, Circuit Judges, join, dissenting:

I dissent from the Court's failure to grant rehearing en banc.[1]

I.

Without regard to the intrinsic question of the correctness of the Court's decision and opinion, this is one of those cases within the spirit of F.R.A.P. 35 and 28 U.S.C.A. § 46 which deserves consideration by the full Court.

As the records of this Court reflect, we have within the very recent months had to deal extensively with Title VII civil rights cases concerning discrimination in employment on account of race, color, sex and religion.[2] Court decisions on critical standards are of unusual importance. This is so because, except for preliminary administrative efforts at conciliation and the rare pattern or practice suit by the United States,[3] effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general[4] to vindicate, not individual, but public rights.

This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down standards not only for Trial Courts, but hopefully also for the guidance of administrative agents in the field, as well as employers, employees, and their representatives.

The full Court should look at the issue here posed. And now in the light of the standard erected—sex if coupled

* From the D.C. Circuit, sitting by designation.

1. Presumably because it was *amicus* only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons the private plaintiff, Ida Phillips, who has the awesome role of private Attorney General without benefit of portfolio, or more important, an adequate purse, presumably felt that she had fulfilled her duty when the Court ruled. Subsequently, on a poll being requested. F.R.A.P. 35; 5th Circuit Rule 12, the Government filed a strong brief attacking the Court's decision. Likewise, the private plaintiff's counsel filed a persuasive brief. This merely emphasizes that it has been members of this Court, not the parties, who have raised questions about the Court's decision. This is in keeping with 28 U.S.C.A. § 46 and F.R.A.P. 35.

2. These include the following and those cited therein:
Jenkins v. United Gas Corp., 5 Cir., 1968, 400 F.2d 28; Oatis v. Crown Zellerbach Corp., 5 Cir., 1968, 398 F.2d 496; Pettway v. American Cast Iron Pipe Co., 5 Cir., 1969, 411 F.2d 998; Local 189, United Papermakers and Paperworkers, 5 Cir., 1969, — F.2d — [July 28, 1969]; United States v. Hayes Internat'l. Corp., 5 Cir., 1969, 415 F.2d 1038 [August 19, 1969]; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir., 1969, 408 F.2d 228; Dent v. St. Louis-S. F. Ry., 5 Cir., 1969, 406 F.2d 399.
Also pending before a panel of this Court are two analogous cases under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*, involving equality of compensation to women: No. 26960, Schultz v. First Victoria Nat'l. Bank; and No. 26971, Shultz v. American Bank of Commerce.

3. See § 707(a), 42 U.S.C.A. § 2000e–6(a).

4. See Pettway v. American Cast Iron Pipe Co., note 2, *supra*, 411 F.2d at 1005; Jenkins v. United Gas Corp., note 2, *supra*, 400 F.2d at 32–33.

with another factor is acceptable—it is imperative that the full Court look at it.

II.

Equally important, the full Court should look to correct what, in my view, is a palpably wrong standard.

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may.[5] The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

It is the fact of the person being a mother—*i. e.*, a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man.

How the Court strayed from that simple proposition is not easy to define. Not a little of the reason appears to be a feeling that the Court in interpreting § 703(a) (1), 42 U.S.C.A. § 2000e-2(a) (1), prohibiting sex discrimination,[6] is bound to accept the contention of one of the parties, rather than pick and choose, drawing a middle line, or for that matter reaching independently an interpretation sponsored by no one, Thus, after noting that in the Trial Court and here the Employer did not "choose to rely on the 'bona fide occupational qualification' section of the Act,[7] but, instead, defended on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'" (Phillips v. Martin Marietta Corp., 5 Cir., 1969, 411 F.2d 1, 2–3), the Court virtually acknowledges the patent discrimination based on biology. The Court states: "Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the 'bona fide employment disqualification' provision of the statute." 411 F.2d at 4.

But in what immediately followed the Court then does a remarkable thing. Referring to EEOC (appearing only as *amicus*), it states: "The Commission, however, in its appearance before us has rejected this possible reading[8] of the

5. The man would qualify even though as widower or divorcé he had sole custody of and responsibility for pre-school children.

6. Section 703(a) (1) reads as follows:
"(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."
42 U.S.C.A. § 2000e-2(a) (1).

7. Section 703(e) states:
"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. * * *."
42 U.S.C.A. § 2000e-2(e).

8. Such a reading is certainly not rejected by EEOC on this rehearing. The supplemental brief (pp. 9-10) recognizes the employer's right to claim and prove the § 703(e) "business necessity" exemption. (See note 7, *supra*)

statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, * * * we have no hesitation in choosing the latter." 411 F.2d at 4.

It is this self-imposed interpretive straightjacket which, I believe, leads the Court to the extremes of "either/or" outright per se violation with no defense or virtual complete immunity from the Act's prohibitions. This it does through its test of "sex plus": "[1] A per se violation of the Act can only be discrimination based solely on one of the categories *i. e.*, in the case of sex; women vis-a-vis men. [2] When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin."[9] 411 F.2d at 3-4 (Emphasis supplied).

Reducing it to this record the Court characterizes the admitted discrimination in this way. "The discrimination was based on a *two-pronged* qualification, *i. e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of these *two elements* that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." 411 F.2d at 4 (Emphasis supplied).

If "sex plus" stands, the Act is dead.[10] This follows from the Court's repeated declaration[11] that the employer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. And it bears repeating that on the Court's reading, one of these would constitute a complete defense to a charge of § 703(a) (1) violation *without* putting on the employer the burden of proving "business justification" under § 703(e) (note 7, *supra*).

In addition to the intrinsic unsoundness of the "sex plus" standard, the legislative history refutes the idea that Congress for even a moment meant to allow "nonbusiness justified" discrimination against women on tbe ground that they were mothers or mothers of pre-school children. On the contrary, mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude.

In the first place, working mothers constitute a large class[12] posing much

9. By supplemental brief (p. 4, n. 1) EEOC agrees with [1] on "per se" violations.

10. Of course the "plus" could not be one of the other statutory categories of race, religion, national origin, etc.

11. See, *e. g.*, "As was acknowledged in Cooper, [Cooper v. Delta Airlines, Inc., 274 F.Supp. 781 (E.D.La.1967)] *supra*, 42 U.S.C. § 2000e-2(a) does not prohibit discrimination on any classification except those named within the Act itself. Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." 411 F.2d at 4.

12. Statistics compiled by the Wage and Labor Standards Administration of the United States Department of Labor in-

discussed problems of economics and sociology. And with this large class and the known practice of using baby-sitters or child care centers, neither an employer nor a reviewing Court can—absent proof of "business justification" (note 7, *supra*)—assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employee.[13]

In this and the related legislation on equality of *compensation* for women[14] one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.[15]

Congress could hardly have been so incongruous as to legislate sex equality

dicate that working mothers comprise an important and increasing segment of the Nation's labor resources. In the most recent compilation (March 1967), there were 10.6 million working mothers in the labor force with children under 18 years of age. This is an increase of 6 million over 1950 and an increase of 9.1 million over 1940. Of the total of working mothers in March 1967, 38.9% were mothers of children under 6 years of age and 20.7% were mothers with children under 3 years of age. In numerical terms, 4.1 million working mothers had children under 6 and 2.1 million working mothere had children under 3. Who are the Working Mothers, United States Department of Labor, Wage and Labor Standards Administration, p. 2–3 (Leaflet 37, 1968).

13. The brief of EEOC points out:

"In answering the question: 'What arrangements do working mothers make for child care?', the Department of Labor responded:

'In February 1965, 47 percent of the children under 6 years of age were looked after in their own homes and thirty percent were cared for in someone else's home, hut only 6 percent received group care in day care centers or similar facilities.'

Who are Working Mothers, *supra* [Note 12].

Furthermore, it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment. On August 8, 1969, President Nixon stated in his address to the Nation on welfare reforms:

'As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single ideal to which this Administration is more firmly committed than to the enriching of a child's first five years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.' Text of Nixon's Address to the Nation Outlining His Proposals for Welfare Reform, N. Y. Times, August 9, 1969, at 10, Col. 6."

Brief for EEOC at 11–12.

14. Equal Pay Act of 1963, 77 Stat. 56, effective June 11, 1964, 29 U.S.C.A. § 206. See pending cases, note 2 *supra*.

15. Thus, President Kennedy, in signing the Equal Pay Act, summarized the conditions which necessitated such a law, as follows:

"[T]he average woman worker earns only 60 percent of the average wage for men * * * Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children * * * and for the protection of the family unit * * * Today one ont of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. I believe they bear the heaviest burden of any gronp in our nation. * * *"

[Remarks of the President at signing the Equal Pay Act on June 10, 1963, XXI Cong.Q. No. 24, p. 978 (June 14, 1963).]

At the Senate Hearings, Secretary of Labor Wirtz pointed out:

"Women's earnings, in many families, are a substantial factor in meeting liv-

in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.[16]

A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done.

> ing costs. *Married women*, for example, *accounted for over one-half of the total number of women workers in 1962*. Nearly 900,000 working women had husbands who, for various reasons, were not in the labor force, primarily because they were disabled or retired. The proportion of working wives is materially higher among families in the low-income groups." [1963 Senate Hearings, p. 16]
>
> See also Representative Green (109 Cong.Rec. 9199):
>
> "There are approximately 25 million working women in the labor force today, and we are simply asking, by this legislation, to look at the facts as they face us in 1963, in instances where there is unequal pay. * * * Women are the heads of 4.6 million families in the United States; one-tenth of all the families in this country. Nearly one million working women have husbands who are not employed, mainly because they are disabled or retired. Nearly 6 million working women are single. The proportion of married women who work is materially higher in the low-income families, and, according to the testimony that was presented to the committee, some 7.5 million women workers supplement the income of male wage earners who make less than $3,000 a year. Women's wages average less than two-thirds of the wages paid men."

16. Too much emphasis cannot be given to the employer's right to claim and prove the § 703(e) "business justification" exemption (see note 7, *supra*). This was not done, but on remand it should be open to the employer here.

Michael LEFTON et al., Petitioners,
v.
The CITY OF HATTIESBURG, MISSISSIPPI, Respondent.
No. 21441.

United States Court of Appeals
Fifth Circuit.
June 5, 1964.

Proceeding to compel District Court judge to accept petition to remove civil rights prosecutions from state court. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that while district judge might require separate removal petitions, filing fees and removal bonds were not necessary and local rule requiring that

See also In re High-Low Tank Car Serv. Stations, Inc., 254 F.2d 363, 365 (7th Cir. 1958). But, as the trustee in the present case properly assumes, federal law does not govern since the homestead exemption is a creature of state law, available in bankruptcy under § 6 of the Bankruptcy Act only if "prescribed by the State laws in force at the time of the filing of the petition * * *."

The State of Virginia has apparently adopted by statute the distinction upon which the trustee relies. In that State a homestead claim must be asserted before the filing of the bankruptcy petition if the proceeding is voluntary, but not if the bankruptcy is involuntary. 3 Remington on Bankruptcy § 1298.1 at 200 (Henderson rev. 1957).

4. 1 Collier on Bankruptcy ¶ 6.03 at 796–97 (14th ed. 1962); Haskins, Homestead Exemptions, 63 Harv.L.Rev. 1289 (1950).

petition be signed by local counsel should be waived, but that no formal order need issue where it appeared that district judge would act accordingly.

Order accordingly.

1. Courts ⇐404

Court of Appeals, in proceeding for mandamus to require action of a district court judge, may order that the district judge be made a respondent and fix a time for him to file answer. U.S.Ct.App. 5th Cir., Rule 13a, 28 U.S.C.A.

2. Courts ⇐361

Neither state law nor local rules promulgated by federal district court can provide answer to question involving interpretation of federal statute.

3. Courts ⇐359, 361

In civil rights cases, federal courts should use that combination of federal law, common law, and state law as will be best adapted to the object of the civil rights laws, and must use common law powers to facilitate, and not to hinder, proceedings in vindication of civil rights. 42 U.S.C.A. § 1988.

4. Removal of Cases ⇐82

District court could properly accept joint removal petition on behalf of 40-odd petitioners who were arrested at same time and place and charged with violating same statute, although state officials had charged each petitioner individually and separately, in order to facilitate, and not hinder, proceedings in vindication of civil rights. 28 U.S.C.A. § 1446(a); 42 U.S.C.A. § 1988.

5. Courts ⇐404

District court's refusal to accept joint removal petition on behalf of 40-odd petitioners who were individually and separately charged in state court would not be such gross abuse of discretion as to move Court of Appeals to grant mandamus, if requiring separate petitions would not so delay matters as to operate to deprive petitioners of effective access to federal courts. 28 U.S.C.A. § 1446 (a).

6. Costs ⇐309

Filing fees are not to be collected in connection with criminal removal petitions. 28 U.S.C.A. § 1914.

7. Removal of Cases ⇐88

Removal bonds may not be required in criminal cases. 28 U.S.C.A. § 1446 (d).

8. Attorney and Client ⇐3
Criminal Law ⇐641(1)

The district court has broad discretion concerning admission to practice before it, but its rules may not be allowed to operate in such way as to abridge right of any class of litigants to use federal courts or to deny the Sixth Amendment right of criminal defendants to counsel of their choice. 28 U.S.C.A. § 1654; U.S.C.A.Const. Amend 6.

9. Attorney and Client ⇐10

Generally, courts may require that local counsel be associated in some way with litigation in local courts, but if no local counsel are available, court rule requiring local counsel should be waived.

10. Attorney and Client ⇐10

Where local counsel are associated in case to comply with court rules, non-local counsel chosen by parties may nevertheless take lead in direction and argument of case.

11. Attorney and Client ⇐32

Principle that state may not, by invoking power to regulate professional conduct of attorneys, infringe rights of individuals and public to be fairly represented in lawsuits authorized by Congress to effectuate basic public interest applies with special force in federal courts, and particularly where basic public interest involved is protection of fundamental constitutional rights.

12. Attorney and Client ⇐32

Where litigation is not brought for private gain, any regulation of practice of law must show sufficient substantial regulatory interest to justify potential and actual inhibitory effects of regulation on constitutionally protected right to litigate.

13. Attorney and Client ⇐10

Requirement of local rules that removal petitions be signed by member of local bar should be waived, or admission pro hac vice allowed, where petitioners who seek to remove civil rights prosecutions from state courts are unable to find local counsel.

14. Courts ⇐404

No formal order designating district judge as respondent was necessary in proceeding for mandamus to compel district judge to accept removal petition, where it appeared that there was no reason why petitions could not be filed and district judge's memorandum indicated that he would act upon expression of Court of Appeals' views.

Bruce C. Waltzer, Benjamin E. Smith, New Orleans, La., William M. Kunstler, Arthur Kinoy, New York City, Jack Peebles, New Orleans, La., for petitioners.

Before RIVES, BELL and WRIGHT,* Circuit Judges.

J. SKELLY WRIGHT, Circuit Judge:

This proceeding involves the access of litigants to the federal courts. Over forty defendants in criminal prosecutions in a state court of Mississippi seek to remove the causes into the United States District Court under 28 U.S.C. § 1446. The clerk of the United States District Court for the Southern District of Mississippi, acting under local court rules, refuses to accept for filing the single removal petition covering all 40-odd state prosecutions, and the defendants seek a mandamus against the judge of the District Court to require that such filing be permitted. The application for mandamus states that the District Court practice "limits and prohibits any effective use of the criminal removal provisions covering civil rights cases in that district."

It appears from the papers before us that the petitioners were charged with violations of H.B. 546, 1964 Sess.Miss. Leg., a statute which denounces picketing and demonstrations in the environs of public buildings. The statute, set out in the margin,[1] was enacted by the Mississippi Legislature on April 8, 1964. The 40-odd petitioners were arrested in Hattiesburg, Mississippi, on April 10. According to the sworn removal petition:

> "Petitioners are members of the Student Non-Violent Coordinating Committee, affiliated with the Conference of Federated Organizations, both Civil Rights groups, and were at the time of their arrests, engaged in a voter registration drive in Forrest County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the Federal Constitution and the Civil Rights [statute]."

On April 13, the verified removal petition was refused filing by the District Court, through its clerk, for the following reasons·

* Of the D.C.Circuit, sitting by designation.

1. "AN ACT to prohibit the unlawful picketing of state buildings, courthouses, public streets, and sidewalks.

"Be it enacted by the Legislature of the State of Mississippi:

"Section 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi or any county or municipal government located therein or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto.

"Section 2. Any person guilty of violating this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

"Section 3. This act shall take effect and be in force from and after its passage."

(1) The petition was in behalf of more than one individual.

(2) It was not accompanied by a filing fee of $15.00 per individual.

(3) It was not accompanied by a removal bond of $500.00 per individual.

(4) It was not signed by a member of the bar of the Southern District of Mississippi.

[1] Petitioners' "Alternative Petition for a Writ of Mandamus," seeking to require the judge of the District Court to have the petition filed, was filed in this court on April 13 under Rule 13a.[2] We have authority under Rule 13a to order that the District Judge be made a respondent in these mandamus proceedings and to fix a time for him to file an answer. Out of deference to judicial decorum, however, we did not do so, but ordered that the application for mandamus be held in abeyance to permit the petitioners to take such further action in the District Court as they deemed advisable, or to file supplemental papers with us. At the same time, we also issued a *per curiam* [3] setting forth the considerations

2. Rule 13a of this court reads:

"(a) Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk with proof of service on the respondent judge or judges and on all parties to the action in the district court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the extraordinary writ of mandamus or prohibition should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition may be accompanied by supporting brief or memorandum. Upon receipt of the prescribed docket fee the clerk shall docket the petition and submit it to the court.

"(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the district court. All parties other than the petitioner shall also be deemed respondents with the judge or judges named respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter but the petition shall not thereby be taken as admitted. If briefs are required, the clerk shall advise the parties of the dates on which they are to be filed. The proceeding shall be given preference over ordinary civil cases.

"(c) Form of Papers; Number of Copies. All papers may be typewritten. Four copies, including an original, shall be filed with the clerk, but the clerk may direct that additional copies be provided."

3. The *per curiam* reads:

"This is an application for writ of mandamus, seeking to secure the filing in the District Court of a petition removing a number of criminal causes from the City Court of Hattiesburg, Mississippi, to the District Court, under 28 U.S.C. § 1446. The petition alleges that the District Court clerk, acting under local rules of court, refused to file the criminal removal petition for these reasons: (1) It was in behalf of more than one individual. (2) It did not have attached a removal bond of $500 for each. We note that Congress has provided in the removal statute that 'A defendant *or defendants* desiring to remove any * * * criminal prosecution * * * shall file *a* verified petition * * *.' 28 U.S.C. § 1446(a) (emphasis added). The statute also provides for removal bonds only for *civil* cases. 28 U.S.C. § 1446(d). The Reviser's Notes state: '[T]he requirement for cost bonds is limited to civil actions in conformity with the more enlightened trend of modern procedure to remove all unnecessary impediments to the administration of criminal justice.' 28 U.S.C.A. § 1446 Note. The stated grounds for refusal to file, whether or not authorized by local rule of court, would thus seem to be improper under the governing Act of Congress.

"The application before us also recites that the criminal removal 'petition did not contain the signature of an attorney licensed to practice before the United

which moved us in making our decision not to invoke immediately the process of Rule 13a. Thus we intended that the petitioners and the District Court have the advantage of our views on the matter so that they could act accordingly. Subsequently, the petitioners have filed supplemental pleadings and affidavits in this court, copies of which have been sent to the District Judge and the prosecution below; the District Judge has favored us with memoranda of points and authorities, copies of which have been sent to petitioners' counsel.

In order to render unnecessary formal mandatory procedure under Rule 13a, it appears that a fuller expression of our understanding of the governing law may now be appropriate. We shall consider *seriatim* each of the reasons advanced by the District Court for refusal to accept the removal petition for filing.

I.

[2] With reference to the number of persons who may join in a single petition, the removal statute provides:

> "A defendant or defendants desiring to remove any * * * criminal prosecution from a State court shall file * * * a verified petition * * *." 28 U.S.C. § 1446(a).

The primary question presented in these proceedings is whether the 40-odd petitioners who were arrested at the same time and place and charged with violating the same state statute are required to bring separate, individual removal proceedings under the federal removal statute because the Mississippi officials have charged each petitioner individually and separately. Since this question involves the interpretation of a federal statute, neither state law nor local rules promulgated by the District Court can provide the answer.

On its face the removal statute authorizes the removal of any "criminal prosecution from a State court," irrespective of the number of "defendants desiring to remove." The statute speaks in terms of a single prosecution with one or more defendants. Thus the language of the statute, strictly interpreted, would seem to require a separate petition for removal for every state criminal prosecution.

[3, 4] In civil rights cases, however, Congress has directed the federal courts to use that combination of federal law, common law, and state law as will be best "adapted to the object" of the civil rights laws. Rev.Stat. § 722 (1875), applying to Title XIII, Rev.Stat.; 42 U.S.C. § 1988; see 28 U.S.C. § 1443, formerly Rev.Stat. § 641 (1875); 42 U.S.C.A. § 1988 Note. Therefore a federal court is required to use common law powers to facilitate, and not to hinder, "[p]roceedings in vindication of civil rights." 42 U.S.C. § 1988. To facilitate, and not to hinder, "proceedings in vindication of civil rights," under the circumstances of this case, we think it would be quite appropriate for a District Court to accept the joint removal petition herein presented.

States District Court, Southern District of Mississippi, as required by local rules promulgated March 6, 1940,' and 'That the individuals bringing this removal action and their attorneys are unable to obtain the assistance and/or association of any attorneys, contacted to date, to assist in this matter.' It does not appear whether this was an additional ground for refusal to file the petition. See 28 U.S.C. § 1654; Brasier v. Jeary, 8 Cir., 256 F.2d 474 (1958); Kovrak v. Ginsburg, 3 Cir., 280 F.2d 209 (1960). It also does not appear whether the attorney who did sign the petition had requested admission to the District Court bar *pro hac vice*, or waiver of the rule because of unavailability of local counsel. We cannot assume that, if local counsel are unavailable, the District Court would close its doors on these litigants or their attorney, who is a member of the United States Supreme Court bar. Unless supplemental affidavits showing this to be in fact the case should be presented to us, we would have no occasion to grant the writ.

"The application will be held in abeyance for fifteen days and jurisdiction will be retained. Applicant may file supplemental affidavits, or take such further action in the District Court as he deems advisable. If no further papers have been filed within the indicated period, the application will be denied."

[5] On the present record, however, if the District Court declines to do so and insists upon separate petitions, and further assuming that such a requirement does not so delay matters as to operate to deprive the petitioners of effective access to the federal courts, we would not find the requirement to be such a gross abuse of discretion as to move us to mandamus. We commend this decision to the informed discretion of the District Court.

II.

[6] 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.

The former statute provided for fees in criminal proceedings:

> "Upon the institution of any suit or proceeding, whether by original process, removal, indictment, information, or otherwise, there shall be paid by the party or parties so instituting such suit or proceeding * * the sum of $5." Former 28 U.S.C. § 549 (1940 ed.).

The present statute does not authorize fees in criminal proceedings:

> "The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $15 * * *." 28 U.S.C. § 1914 (1948 ed.).

III.

[7] The Act of Congress providing for removal bonds does not authorize them in criminal cases:

> "Each petition for removal of a civil action or proceeding * * * shall be accompanied by a bond * * *." 28 U.S.C. § 1446(d).

If there were any doubt as to whether this limitation was intentional, the Reviser's Notes are clear: "[T]he requirement for cost bond is limited to civil actions in conformity with the more enlightened trend of modern procedure to remove all unnecessary impediments to the administration of criminal justice." 28 U.S.C.A. § 1446 Note. Therefore such bonds may not be required.

IV.

[8–10] The District Court has a broad discretion concerning admission to practice before it. See 28 U.S.C. § 1654. But, of course, such rules may not be allowed to operate in such a way as to abridge the right of any class of litigants to use the federal courts or to deny the Sixth Amendment right of criminal defendants to counsel of their choice. Generally, courts may, if they deem it necessary, require that local counsel be associated in some way with litigation in the local courts. *Cf.* Piorkowski v. Arabian American Oil Company, S.D.N.Y., 131 F. Supp. 553 (1955). However, as the District Judge below has commendably noted, if no local counsel are available, a court rule requiring local counsel should be waived. Moreover, where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the parties may nevertheless take the lead in the direction and argument of the case. See United States v. Bergamo, 3 Cir., 154 F.2d 31 (1946).

[11] Federal as well as state courts must be guided in this matter of local rules by the recent decisions of the Supreme Court concerning regulation of attorneys. The Court has said that "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 84 S.Ct. 1113, 1117. This principle applies with special force where it is a federal court, and not a state, whose regulations may interfere with lawsuits authorized by Congress. And where, as here, the basic public interest involved is the protection of fundamental constitu-

tional rights of the petitioners, courts must give special heed to the teachings of the Supreme Court to permit neither indirect nor direct "means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.*, 84 S.Ct. at p. 1117. And since this is a criminal case, the constitutional right of the accused to the assistance of counsel of his own choice reinforces this principle.

[12] In the removal petition at hand, and in the class of cases likely to raise similar problems, "litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country." N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963). In this context where the litigation is not brought for private gain, any regulation of the practice of law must show sufficient "substantial regulatory interest," *id.*, 371 U.S. at 444, 83 S.Ct. 328, 9 L.Ed.2d 405, to justify the potential and actual inhibitory effects of the regulation on the constitutionally protected right to litigate. *Ibid.*

[13] For these reasons, as we indicated in our earlier memorandum and as the District Judge below agrees, waiver of local rules, or admission to the bar *pro hac vice*, should be allowed when, as herein alleged, the non-local counsel "was unable to find counsel admitted [locally] who would sign the pleadings with him." The Supreme Court has recently taken judicial notice of a similar circumstance in a not unrelated proceeding:

> "* * * Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. * * *" N.A.A.C.P. v. Button, supra, 371 U. S. at 443, 83 S.Ct. at 343, 9 L.Ed.2d 405.

Such a situation is unworthy of the proud tradition of the Southern bar. We are pleased to note that, after the filing of the above mentioned affidavit, the judges of the District Court were able to secure the names of members of the local bar available to associate themselves with the original counsel for the petitioners herein. It is commendable that the District Court helped secure for petitioners the assistance of counsel familiar with the local practice. Otherwise original counsel would have had to proceed alone. And it is commendable that gentlemen of the local bar have agreed to perform their duties as lawyers in rendering such service.

[14] It thus appears that there is no reason why petitioners may not now file a removal petition or petitions for the criminal prosecutions here involved, without payment of fees or bond, and with the signatures of local counsel available. No formal order need issue, therefore, designating the District Judge as respondent on the petition for mandamus, as the District Judge's memorandum indicates that he will act upon an expression of our views. See Maryland v. Soper (No. 2), 270 U.S. 36, 44, 46 S.Ct. 192, 70 L.Ed. 459 (1926). For the reasons herein stated, we reserve decision on the question of invoking Rule 13a(b) of our rules, and retain jurisdiction until the matter is finally settled.

GRIFFIN B. BELL, Circuit Judge (concurring specially):

In concurring I do wish to add a word with respect to part one of the opinion having to do with several persons joining in a single petition under the removal statute.

The wisdom of requiring a separate petition for each defendant seeking removal is made manifest by the facts of this case. Many persons are involved. Each is charged separately in the state court. The facts as now developed before us without dispute indicate that Michael Lefton whose name appears in the style

of this case was released by juvenile authorities in Hattiesburg after having been taken into custody. He therefore is not a party seeking removal as he has never been charged in the state court. Moreover, his name is "Lofton".

It goes without saying that a separate petition on behalf of each person seeking removal would tend to effectuate a more orderly procedure in the District Court, and this is all the more true in this day of mass arrests. This requirement should, of course, be balanced against the onerous task of preparing multiple petitions, but this, as Judge Wright leaves it, is procedural and something best left to the discretion of the District Court.

In essence the ultimate concern in matters of the type involved in these removal proceedings is to determine the truth of the allegations with respect to deprivation of constitutional rights. The removal statute may not be used to thwart local law enforcement. The duty first falls on the state courts and state officers to accord and protect constitutional rights. Art. 6, Cls. 2 and 3, U.S. Const. It is failure or abdication there which gives rise to the proceeding in the federal court.