

The Haynsworth and Carswell Nominations – 1969-1970

Chief Justice Earl Warren announced his retirement in 1968 and President Johnson nominated Associate Justice Abe Fortas to replace him. But LBJ's withdrawal from the campaign made him a lame duck and opened up the opportunity for conservative senators to express their distaste for the actions of the Warren Court. As one of the staunch liberals on that court, a Fortas nomination presented a wealth of opportunity for many senators. Senate Judiciary Committee chair Eastland told Johnson he "had never seen so much feeling against a man as against Fortas." Fortas was the first nominee for Chief Justice ever to appear before the Senate and he was greeted with substantial hostility. Revelations that he had accepted \$15,000 in speaking fees from American University's (A.U.) law school doomed his nomination. Not only did his payments exceed fees paid by A.U. to any other speaker by a factor of seven but it turned out that the money had not come directly from the university. It emanated from private sources connected to a number of major American companies. The potential for conflict of interest and this apparent lack of ethical sensitivity fueled the opposition, leading to a filibuster. When another Fortas scandal came to light, he resigned his seat on the Court.¹

The new Nixon administration was well aware of the controversies and rumors surrounding Fortas. The new attorney general John N. Mitchell informed Chief Justice Warren of all that they knew about the Fortas troubles and suggested that impeachment proceedings were a possibility. As a result, Warren helped persuade Fortas to resign. As John P. Frank writes in his book about the Judge Clement Haynsworth nomination, which followed the Fortas resignation, "it is the only time in history a justice has resigned under pressure from the press and the executive branch of the government." Frank went on to suggest that the "politicization of the

¹ Laura Kalman, *Abe Fortas*, Yale University Press, 1990

Fortas nomination by the Republicans undoubtedly contributed to a willingness by the Democrats to politicize the Haynsworth nomination a little later.”²

Nixon nominated Warren Burger of Minnesota to be Chief Justice. His nomination sailed through the Senate and he was sworn in on June 23, 1969. To replace Fortas, he nominated Appeals Court Judge Clement Haynsworth of South Carolina on August 21.

In the 1968 campaign, Nixon employed a “southern strategy” to capture former states of the confederacy that had always been solidly Democratic. LBJ’s civil rights legislation created the environment for that kind of strategy to work. But implicit in it was a level of racism used to capture and solidify white support for the Republicans. Kevin Phillips, a Nixon strategist, discussed it in an interview in a 1970 *New York Times* article:

*From now on, the Republicans are never going to get more than 10 to 20 percent of the Negro vote and they don't need any more than that...but Republicans would be shortsighted if they weakened enforcement of the Voting Rights Act. The more Negroes who register as Democrats in the South, the sooner the Negrophobe whites will quit the Democrats and become Republicans. That's where the votes are. Without that prodding from the blacks, the whites will backslide into their old comfortable arrangement with the local Democrats.*³

Part of that strategy has been described as a way to fend off a threat from Gov. Ronald Reagan on the right, a potential presidential candidate in 1972. Another part of that strategy led the new president to conclude that his next Supreme Court nomination had to be from the south.

² John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 4, 6

³ Kevin Phillips quotation, James Boyd, "Nixon's Southern strategy: 'It's All in the Charts'." The New York Times, May 17, 1970

Thus, the Haynsworth nomination. Because of Haynsworth nomination, the next three months would substantially change the course of Birch Bayh's life.

The summer of 1969 was eventful for the country in a variety of ways. On July 16, Apollo 11 lifted off toward the first manned landing on the Moon. While the country waited with bated breath for the four days it would take until its landing on the lunar surface, an event at home dominated the headlines.

On July 18, Sen. Ted Kennedy left a party in Chappaquiddick, Massachusetts celebrating his brother Bob's presidential campaign of the previous year. But he didn't leave alone. One of Bobby Kennedy's former aides, Mary Jo Kopechne, was with him and they were in an auto accident that would end Kopechne's life and change the political fortunes of Ted Kennedy forever. They drove off the side of a bridge, their car submerged in the murky waters late at night. Kennedy got out of the car and made his way back to Edgartown, where he got to his hotel and went to sleep. Mary Jo Kopechne, still in the car, drowned. Kennedy's bizarre behavior and his culpability in her death became a national scandal. Birch felt badly for his friend and colleague, knowing that even if a friend did something wrong, it was okay to feel badly for him. From Birch's standpoint, he worried about Ted and assumed his behavior was the result of the trauma of the accident, reminding him of the auto accident he and Marvella had been in years earlier and how disoriented he felt at the time.

The day after the Kennedy news broke, the country turned its attention back to outer space. All Americans old enough to comprehend what was happening knows where they were when Neil Armstrong stepped onto the Moon, the first time a human had ever done so. Armstrong was a Purdue University graduate and became a Bayh friend. There is no question that on July 20, he was the most popular man in the world. An estimated 500 million people

worldwide watched in awe as he took his historic first steps on the Moon at 10:56 pm ET, the largest television audience for a live broadcast at that time.

Birch's life was consumed by the Haynsworth nomination. When allies from organized labor came to him to discuss rulings Haynsworth had made that hurt workers in South Carolina, a closer look at his career was warranted. This was not the kind of thing Birch wanted to pursue. Birch felt that confronting the wildly popular Nixon Administration was foolhardy. Originally, he agreed to ask questions of Haynsworth that were important to labor leaders. But looking at the line-up of Democrats on the Judiciary Committee, it began to come clear that if Haynsworth needed to be opposed, it would be up to Birch to lead the effort. Chairman Eastland was supportive of the conservative, southern jurist as were the next two in line by seniority, John McClellan and Sam Ervin. Tom Dodd followed but was under an ethical cloud himself and in no condition to step up in opposition. Phil Hart was known as "the conscience of the Senate" and would be an ideal leader of the opposition but he was up for re-election in 1970 and did not want to risk controversy in an election year; particularly given that he had been a strong supporter of Fortas. Ted Kennedy was under a serious cloud because of Chappaquiddick. That left Birch next in seniority and he felt that if opposition was necessary, it had to be his to lead. He felt he had no choice, saying "I couldn't punt on it."

Opposing Haynsworth might be a doomed effort from the outset. The last time the Senate had rejected a Supreme Court nominee was decades ago, in 1930. Judge John Parker, chief judge on the Fourth Circuit, the same court Haynsworth sat on, was defeated largely because of two issues. The first was based on comments he had made when a candidate for elective office, arguing that America shouldn't allow Negroes to vote. The second was his ruling that 'yellow-dog' contracts that prohibited the signer from joining a union were valid. The

coalition that successfully opposed Parker was almost exactly the same as the one that would assemble against Haynsworth, though the specific issues may have been different. Ironically, Parker and Haynsworth were very close personally, with Haynsworth expressing extreme admiration and devotion for Parker, who was very much his mentor as well as his friend.⁴

Clement F. Haynsworth, Jr. of Greenville, South Carolina was a 56-year old federal judge sitting on the Fourth Circuit Court of Appeals. As a southerner and a conservative, he engendered a certain level of opposition because of rulings on civil rights and on matters of importance to organized labor. But it was unlikely that the level of that opposition was sufficient to keep him from being confirmed. Neither partisanship nor liberal versus conservative conflict would be enough to turn away a Supreme Court nominee of a newly elected president. Ultimately, his greatest source of problems came from a lack of sensitivity on ethical issues and an unwillingness to treat those issues with candor. Ethical sensitivity may also have been insufficient to defeat him by itself except that the nomination was to fill the vacancy created by the resignation of Justice Abe Fortas, where ethical issues were front and center. Some would argue that the ethical issues provided ample cover for those senators who wanted to vote against the nominee based on philosophy but otherwise wouldn't be able to justify such a position.

Even before the nomination was official, a Chicago newspaper ran an article that foreshadowed much of what was yet to happen. It disclosed that Haynsworth had joined a ruling favoring a textile company. He had owned stock in a vending company, Carolina Vend-a-Matic, which did considerable business with the textile firm. In his confirmation hearings before

⁴ Judge Parker's nomination rejection, Stephen L. Wasby and Joel B. Grossman, "Judge Clement F. Haynsworth, Jr.; New Perspective on his Nomination to the Supreme Court", Duke Law Journal, February 1990, page 75

the Senate Judiciary Committee, he admitted that he had remained a director of Carolina Vend-a-Matic through 1963 even though he had told the Senate a few months earlier that, “of course when I went on the bench [in 1957] I resigned from all business associations I had, directorships and things of that sort.” It was later discovered that he had purchased stock in another company, Brunswick Corp., just after he was involved in a decision affecting the company but before that decision was announced.⁵

The Brunswick case came to light because of the digging done by a few AFL-CIO lawyers and they passed their information to Bob Keefe. And then it came to light that there were three other cases where Haynsworth sat in judgment over matters concerning companies in which he held stock.

Organized labor also became energized over a case concerning collective bargaining. On a case ultimately overturned by the Supreme Court, Judge Haynsworth ruled on a “question of when authorization cards signed by union members could be used to give a union collective bargaining rights where, due to unfair labor practices, it was impractical to hold an election.” His ruling was that the cards could not be used, an unpopular view with which other federal courts had also disagreed.⁶ Keefe called Birch at the Brown Hotel in London while he was on an Inter-Parliamentary Union trip, telling him that labor folks wanted some questions to be asked of Haynsworth when the hearings convened. Birch told him to tell them he would be willing to ask the questions but could not commit more than that.

⁵ Haynsworth quotation about corporate directorships, Kenneth Auchincloss, Newsweek magazine, The Nomination is Rejected, December 1, 1969, page 22

⁶ Haynsworth quotation on collective bargaining, John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 20

Birch questioned Judge Haynsworth about these matters during the Committee hearings. Ownership of Brunswick stock was clearly a problem for Haynsworth and Birch used other witnesses to emphasize that a judge should recuse himself from any case in which he has a clear personal stake. While Haynsworth insisted he had made up his mind on the case before he purchased the stock, he acknowledged it to be a mistake. Birch always felt that had Haynsworth simply stated that he had also made a mistake in the Carolina Vend-a-Matic matter and should have recused himself, he would have been confirmed. But the Judge steadfastly insisted that he had done no wrong, drawing a line in the sand that caused many senators to cross over in opposition. This was reminiscent of the Rutherford Poats nomination in which Birch's opposition arose because the nominee refused to respond honestly to the questions before him.

Senator Bayh: I am concerned and I suppose I should ask the question, if you had to do it over again whether you would still maintain that kind of relationship with Carolina Vend-a-Matic.

You feel that there is absolutely nothing that was improper here?

Judge Haynsworth: I do not know what you mean by that kind of relationship. I was a stockholder as I have said.

Senator Bayh: Stockholder, vice president, and your wife is secretary and you are on the board of directors and you own \$450,000 worth of stock. You were doing business with one of the litigants.⁷

Then there was the Darlington Mills Case. The National Labor Relations Board (NLRB) found that Darlington Mills "had been closed because of anti-union animus and ruled the

⁷ Bayh questioning of Haynsworth, John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 54-5

Deering Milliken Company was liable for Darlington's unfair labor practices and accordingly ordered back pay for discharged Darlington workers and other remedies." The decision to close the company had come right after the Textile Workers Union of America won the right to represent workers in their bargaining negotiations. Haynsworth voted with the 3-2 majority on the Fourth Circuit Court of Appeals to set aside the order, stating that the company could close its operations regardless of any motives it might have had concerning organized labor. The ruling by the Court and Haynsworth's role in it confirmed the suspicions by labor leaders that the Nixon Administration was anti-labor and reinforced their enthusiasm to keep him off the court.⁸

The Washington Post summed up a portion of the debate as follows.

In the labor-management field, there was no question in terms of his background, his professional and personal associations, Haynsworth had come to the Court of Appeals as a "management man."

He had large stock holdings, valued last month at more than \$1 million. He was a director of several corporations and owned a one-seventh interest in Carolina Vend-a-Matic, whose sales rose from \$20,000 a year in 1950 to more than \$3 million in 1963 when he sold out his holdings for \$437,000.

His law clients had included such firms as J.P. Stevens Co., a textile manufacturer that had fought unionization and that was described by an emotional labor lawyer, Stephen J.

⁸ Haynsworth and Textile Workers, Stephen L. Wasby and Joel B. Grossman, "Judge Clement F. Haynsworth, Jr.; New Perspective on his Nomination to the Supreme Court", *Duke Law Journal*, February 1990, page 78

*Schlossberg, as “the classic violater (sic) of federal labor laws, which has in effect...told Congress by its behavior...it does not recognize federal labor law.”*⁹

Civil rights leaders were equally incensed by Haynsworth’s decisions. He affirmed a decision by officials in Prince Edward County, Virginia to close the public schools rather than integrate them. He also ruled to uphold the constitutionality of tuition grants that were given to white students who were seeking to enroll in schools that were not integrated. Joseph L. Rauh, counsel to the Leadership Conference on Civil Rights, described the nominee as “a sort of laundered segregationist.”¹⁰ The labor and civil rights coalition, comprised of 125 religious, labor, welfare and civil rights groups, virtually camped out in the Bayh Senate office during most of the three months of the battle against Haynsworth nomination.

The group issued a statement that the Haynsworth nomination was “a deadly blow at the image of the U.S. Supreme Court.” They saw African-Americans as feeling that they would be lost in “a swamp of delay and technicalities.” Rather than a judge who was pressing forward to ensure civil rights for minorities, Haynsworth was “for the status quo or for inching along.” They were reacting to a case in which a hospital applied for federal aid after declaring that it intended to “deny admission to some potential patients because of race, creed or color.” The court had ruled the hospital could not discriminate but Haynsworth dissented “on the ground that there was no state action involved in this private hospital and that, hence, it was in no obligation not to discriminate.”¹¹

⁹ Richard Harwood, “Haynsworth’s Defeat, *The Washington Post*, November 23, 1969, page A1 and A7

¹⁰ Alfonso A. Narvaez, “Clement Haynsworth Dies at 77; Lost Struggle for High Court Seat”, *The New York Times*, November 23, 1989

¹¹ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 58

On the issue of financial conflicts of interest, there was a severe difference of opinion among legal experts as well as senators and their staffs on just what was required. How direct did the relationship need to be between the judge and the company? If the judge's investments were with a company that did business with the company at issue, was recusal required? Suppose the financial interest was minor? How did you define minor? Wasn't a judge required to fulfill his or her duties as much as possible? Shouldn't a conflict only be direct and substantial?

John Frank, the author of a book on the Haynsworth nomination, also testified at the hearings. He addressed the claims of a conflict in the Vend-a-Matic case with the views that Haynsworth's interests were not "direct" enough in the case before his court to have recused himself. "It is my abiding conviction...that the criticism directed to the disqualification or nondisqualification of Judge Haynsworth is a truly unjust criticism which cannot be fairly made."

When Birch responded to Frank with questions about the more direct relationship to Brunswick, Frank acknowledged that a judge should not sit when he had an investment with a company that is directly involved in a matter before him.¹²

White House Press Secretary Ron Ziegler responded to the various charges about the ethical issues by saying that White House knew all of these facts and did not expect them to be "interpreted" the way they were. He said there had been a "full review" of Haynsworth's background and after the charges surfaced there was a further review, according to wire service reports by the UPI. "The President did not learn anything additional of major significance in Judge Haynsworth's background," Ziegler went on to say.

¹² John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 42-43

The Nixon White House put on a full court press, having donors and local politicians around the country put pressure on Republican senators. It turned out to be a ham-handed effort, likely hurting their cause rather than helping it. Several Republicans who opposed Haynsworth were determined to stay silent on the issue before the vote in order to avoid embarrassing the President. As an example, two senators who told the President they were going to vote no but would keep their intentions silent, found themselves deluged with pro-Haynsworth mail. Many home-state supporters and contributors called them, telling them it was a question of Party loyalty. The senators, Chuck Percy (R-IL) and Len Jordan (R-ID), were soured by the experience and stood fast in their opposition to the nominee. Jordan said, “few issues have generated more pressure on my office than has the confirmation of Judge Haynsworth. Support of the President is urged as if it were a personal matter rather than an issue of grave constitutional importance.”¹³

One issue that impacted the debate and shouldn't have was based on a rumor that Deering Milliken, in the case against the Textile Workers Union, had offered a bribe, in effect, to throw large contracts to Carolina Vend-a-Matic if the Court's decision went well. Voting for Deering in the case would have represented more than a simple conflict of interest. Haynsworth had been vindicated in this matter after a Justice Department investigation by none other than attorney general Robert Kennedy in 1963. But the story floated around the Senate and had its effect. The noted Washington, DC newspaper columnists Tom Braden and Frank Mankiewicz jumped into the debate with tremendous energy. They spent a great deal of time in the Bayh office

¹³ Kenneth Auchincloss, Newsweek magazine, The Nomination is Rejected, December 1, 1969, page 22

during those few months and wrote a vicious column early in September about the Vend-a-Matic matter. “He decided an important case in favor of a company doing \$100,000 worth of business a year with his company, an act in which he says – incredibly – that he saw no impropriety and sees none now.” Also, he “participated along with attorney general Mitchell and the White House in a shabby attempt to make it seem that attorney general Robert Kennedy approved of his behavior, a claim they knew to be false when they made it.”¹⁴ Mankiewicz had credibility on the latter issue since he was the former press secretary to RFK and the man most America remembered from his announcement of Kennedy’s death less than two years before.

On September 7, there was an event that would not only have a major impact on the Haynsworth nomination but would affect all senators and untold events to come. Senate Minority Leader Everett Dirksen died after surgery at Walter Reed Hospital. The post was not filled until late September, well after the Haynsworth hearings had begun. Hugh Scott of Pennsylvania became the new Republican leader with Dirksen’s seat in the Judiciary Committee taken by Michigan senator Robert Griffin.

The passing of Dirksen signaled a change in the Senate. Birch never forgot the time early in his career when Dirksen discussed the importance of helping him get re-elected, a level of cooperation across the political aisle that would be unheard-of in the Senate of the 21st century. Described as one who’s “face looks like he slept in it,” Dirksen had a mellifluous voice that drew attention to his colorful phrases. Often when he rose to speak on the Senate floor, a murmur would circulate in the press galleries, “Ev’s up!” He had maintained a close friendship with both

¹⁴ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 29

Presidents Kennedy and Johnson. He remarked during the latter's administration when he was in the hospital and absent when three Republican bills were narrowly defeated. "To my bedridden amazement," he stated in the colorful manner only he could portray, "my pajama-ruffled consternation, yes, my pill-laden astonishment, I learned they were victims of that new White House telephonic half-Nelson known as the Texas twist." But he also showed a remarkable ability not only to compromise but to change his mind in a very public way. His support for the nuclear test ban treaty, the Vietnam War, the 1964 Civil Rights Act and the 1965 Voting Rights Act was indispensable. Once, when asked how he could explain his aggressive support for a bill he had violently attacked only a few months before, he replied, "On the night Victor Hugo died, he wrote in his diary: 'Stronger than all the armies is an idea whose time has come.'" ¹⁵ He was remembered by many for his sarcastic remark about the Senate's big spending, saying, "A million here, a million there, pretty soon we're talking about real money." His like would not be seen again and his departure from the Senate would have a marked impact on events to come.

By the time the hearings began, the momentum seemed to shift to the opposition and it never shifted back. Sen. Jacob Javits, a New York Republican, announced his likely opposition on September 15 but predicted that the judge would be confirmed. Sen. Griffin echoed that prediction and announced his support, though with "great want of enthusiasm." It was a position he would not maintain. Birch also predicted the success of the nomination as late as September 24, the same day that a poll listed as many as twenty five senators in opposition. The following

¹⁵ E. W. Kenworthy, "Dirksen Dead in Capital at 73", *The New York Times*, September 8, 1969

day, however, Chairman Eastland expressed pessimism about the nomination's chances to Sen. Mathias of Maryland.¹⁶

Haynsworth, however, had a number of enthusiastic supporters, from among his colleagues on the Fourth Circuit as well as judges on other Courts of Appeal outside the Fourth and from distinguished law professors like Charles Alan Wright of the University of Texas Law School. The credentials and endorsements of these supporters provided ample cover for those senators who preferred to support the nominee.

The Senate Judiciary Committee began its hearings on September 16. Birch took the lead in zeroing in on the ethical issues. Haynsworth finished his testimony on September 23 by apologizing for the implications of the Brunswick case. At the end of the hearings, Birch had still not made up his mind to vote against Haynsworth, much less take on the mantle of leadership. He finally did so on October 3, including in his remarks the portion of the Canon of Judicial Ethics that calls on a judge to avoid even the appearance of impropriety. On October 8, the drama heightened when two Republican leaders in the Senate, Robert Griffin of Michigan and Margaret Chase Smith of Maine announced their opposition.¹⁷

Many years later, Birch described his role in the Haynsworth matter as "hard duty." He talked about questioning the judge while he sat there, his wife, children, maybe even his parents sitting behind him. "I didn't want to be against the guy," he remembered, but when giving him every opportunity to tell the committee that, in hindsight, he should have recused himself, the

¹⁶ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 35

¹⁷ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 70-1

judge instead kept repeating, “I haven’t done anything wrong.” Had the judge simply admitted that if he had to do it over again he might have acted differently, he could have been home free.

As the leader of the opposition, Birch had allies in the labor and civil rights movement. The AFL-CIO dedicated 40 full-time lobbyists to the effort and full-throated efforts across the country were mounted by the NAACP, The Urban League and the Leadership Conference on Civil Rights. AFL-CIO President George Meany made an early commitment to go all out to defeat the nominee after receiving a report on Haynsworth’s labor decisions from the AFL’s labor counsel Thomas Harris. Meany sent a private wire to the President urging him not to make the nomination. Once it was made, Meany asked his chief lobbyist, Legislative Director Andrew J. Biemiller, for a prediction on their prospects in fighting the nomination. Biemiller told him there were eight votes in opposition early on and they might be able to double or triple that number. Despite that, Meany made the commitment to go all the way in. He aligned with NAACP President Roy Wilkins and Joseph L. Rauh, Jr., counsel to the Leadership Council on Civil Rights.¹⁸

At the conclusion of the hearings and after the Judiciary Committee favorably reported the nomination to the Senate floor, five Democratic senators stood in opposition and advised the president to withdraw the nomination; Bayh, Hart, Kennedy, Burdick and Tydings. Birch developed a five point set of claims, called a bill of particulars, that all centered around the judge’s ethical problems.

They claimed that (1) on at least four occasions, Judge Haynsworth sat on cases involving corporations in which he had a financial interest; (2) the Canon of Judicial Ethics

¹⁸ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 30

required that a judge avoid investments in those kinds of enterprises which are liable to be involved in litigation; (3) Vend-a-Matic and five other cases involving its customers where Haynsworth's participation showed a lack of sensitivity to ethical considerations and demonstrated an appearance of impropriety; (4) as a trustee of Vend-a-Matic, Haynsworth failed to report on the retirement funds he shared in, a violation that Birch conceded was most likely an oversight; (5) the judge showed a lack of candor, prompting him to add to his recommendation that nominees for the highest court in the land show greater sensitivity to potential ethical problems.

Sen. Griffin, previously a Haynsworth supporter and still the Assistant Senate Minority Leader, opposed Haynsworth for several reasons; lack of candor, refusal to disqualify himself in the Vend-a-Matic case; and, finally, the matter of the Grace Lines case. This was a matter where an injured seaman filed a claim against Grace Lines for \$30,000 and the court awarded him only \$50. Haynsworth, judge on that court, owned stock in the parent company of Grace Lines. Griffin spoke about the obvious distress of the injured seaman after this came to light.

In the U.S. Senate there is a tradition that presidential nominees appearing before a committee for confirmation be introduced or accompanied by their respective state senators. Most often, the nominations are initiated by one or both of those senators but are at the least nominees both senators can support. In the case of Haynsworth, South Carolina Senators Fritz Hollings and Strom Thurmond were enthusiastic supporters. Hollings had become friendly with future Attorney General Mitchell when he was governor of South Carolina and, as he finished his term, was someone Mitchell wanted in his law firm. With the death of Sen. Olin Johnson, Hollings chose a Senate seat over a return to the practice of law. In May, Hollings met with President Nixon to recommend Haynsworth for the vacancy created by the Fortas' resignation.

Nixon was reminded at that meeting that he had met Haynsworth years earlier. Having a Democrat like Hollings promote the nomination was the seal of approval needed by the White House, while the support of Thurmond's would be downplayed as he was viewed by the public and his Senate colleagues as the most racist member of the Senate.¹⁹

Birch's opposition affected his relationship with Hollings in a major way, something that probably never fully healed. A relationship that had begun very friendly between two personable and gregarious senators had already been damaged during the nomination of Rutherford Poats, another Hollings-sponsored nominee. Birch remembered riding on the plane with Hollings to the Dirksen funeral and it was obvious that there were problems between them.

On October 9, Hollings challenged Birch to a televised debate, referring to Birch's nine-page bill of particulars he issued in opposition to the Haynsworth nomination. The next day, after Birch refused the debate, Hollings sent him a telegram.

I HAVE YOUR REFUSAL TO DEBATE. AS YOU KNOW WE HAVE RECEIVED INVITATIONS TO APPEAR ON VARIOUS UNIVERSALLY RESPECTED NATIONAL TELEVISION PROGRAMS SUNDAY. I AM ANXIOUS TO ACCEPT THESE INVITATIONS BECAUSE I BELIEVE THAT AN ANSWER TO YOUR CHARGES AGAINST JUDGE HAYNSWORTH IS THE ONLY WAY WE CAN PROTECT THE REPUTATION OF THE UNITED STATES SENATE AND OF THE COURT. I HAVE BEEN BEGGING FOR WEEKS THAT THE DEBATE BE LIMITED TO THE FLOOR OF THE SENATE. HOWEVER, IT WAS YOU WHO TOOK THE DEBATE FROM SENATORIAL PROCESSES TO THE HEADLINES AND TELEVISION AND NOW THERE IS NO ALTERNATIVE BECAUSE BOTH PUBLIC OPINION AND SENATE OPINION IS FORMULATING. NOT TOO LONG AGO, THE HIT AND RUN TACTIC OF QUESTIONABLE CHARGE

¹⁹ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 23, 32

AND INUENDO (SIC) BECAME KNOWN AS “MCCARTHYISM.” LET’S NOT HAVE IN AN AGE OF “TELL IT LIKE IT IS” A REVIVAL OF “MCCARTHYISM.” SOME HAVE SUGGESTED THAT WE ALLOW THE REPUBLICANS TO FIGHT THIS OUT. HOWEVER, I AM SURE THAT YOU AGREE WITH ME THAT WE LOVE OUR COUNTRY MORE AND HONOR THE CHANGE (SIC) OF SERVING IN THE UNITED STATES SENATE MORE THAN ANY POLITICAL PARTY CONSIDERATION. I URGE YOU TO RECONSIDER IN THE NAME OF FAIR PLAY AND IN THE INTEREST OF THE GOOD NAME OF THE SENATE.

FRITZ HOLLINGS

That evening, Birch had a reply drafted, typed, signed and hand delivered to the Hollings’ office.

Dear Fritz:

I have just received your telegram relative to our debating the Haynsworth matter on national television. In re-reading it a second and third time, I feel very much as I did in response to your first inquiry.

Fritz, so many sources have been responsible for various statements and allegations throughout this entire distasteful affair that I am returning your wire without disclosing its contents in the hopes that someone other than yourself was the author.

I have too much respect for you and for the service you have performed and will continue to perform for your state in the Senate to let others goad us into this type of personal acrimony.

Best regards,

Birch Bayh

Nothing more was said about the matter publicly by either party but Birch knew the experience affected his relationship with Hollings for the rest of his career. Hollings later

publicly blamed the White House for the defeat of Haynsworth, complaining that the White House was late in putting its strategy for confirmation in play and ultimately played too rough.

Tom Connaughton, a lawyer from South Bend, Indiana, who joined the Bayh office in May, 1969, as an intern, was assigned to the Constitutional Amendments Subcommittee. His first experiences were covering Judiciary hearings, then the extension of the Voting Rights Act of 1965. He found the Judiciary Committee a very smoky place, because of Eastland's ever-present cigars and Phil Hart's cigarettes. His full immersion came with the Haynsworth nomination.

During the Haynsworth hearings, Connaughton and others on the Bayh staff were digging into his past, to find out as much as possible about what shares he had and where he had sat on cases. He recalled that Judge Haynsworth spoke with a stutter, making it difficult for him to clearly answer questions from the committee members. As the questioning from Bayh and his colleagues became increasingly sharp, the tension on the committee grew and Haynsworth's presentation became awkward.

Connaughton believed that Nixon officials should have said, "Look, these were relatively small cases and deals compared with the Supreme Court decisions." It would have added perspective to the instances where he held stock that created the appearance of a conflict. Or, had Haynsworth responded, "I overlooked these and I should have been more careful and I can assure you that I'll be more careful in the future," that would have been the end of it. But they and he kept insisting that he had not done anything wrong. And the more the staff dug, the more cases they found that were troubling. Connaughton later said, "I have no reason to think that Judge Haynsworth ever decided something because he had those shares of stock. I think he was

an honorable man. But at any rate, it went on and then Birch decided -- and that was pretty traumatic -- would he really oppose him or not, and he decided yes, he would oppose him.”

Tom Connaughton, Bob Keefe and other staffers pulled an all-nighter preparing the bill of particulars and giving a detailed explanation to Birch’s opposition to Haynsworth. At about 1 o’clock in the morning, Ken Young, of the AFL-CIO, called to say, “I’ve got another case we’ve discovered that the judge sat on.” This was the Grace Lines case. Tom was skeptical but Young insisted, “Don’t worry. It’s a good case and if you look, he had Grace Lines stock.” Grace Lines was added to the bill of particulars, though Tom felt uneasy about it. He went home at 5 AM and two hours later got a phone call from the office telling him, “Get your tail back in here, we’ve got a problem.” The Grace Lines case was not applicable to what was being said; Birch had to admit the error and Haynsworth opponents were charged with “sloppy staff work.”

Birch knew that the nomination made in late August was in serious trouble by early October. When *Newsweek*’s Congressional Correspondent Sam Shaffer approached him on October 7 and said, “I’m convinced you have it won. Do you intend to win it?” Birch answered in the affirmative. The next issue of the magazine predicted the rejection of the nominee.²⁰

By October 9, reported head counts showed at least 40 senators opposed to Haynsworth. That same day, *The Washington Post* urged withdrawal of the nomination.²¹ On October 20, President Nixon stated that he would not withdraw the nomination even if Haynsworth asked him to. The floor battle was headed by Birch and Sen. Sam Ervin, who had been one of the attorneys for Deering Milliken in the Darlington case. Both men found themselves accused of their own conflicts during the debate. Ervin’s came from his prior association with Deering

²⁰ “Top of the Week,” *Newsweek* magazine, December 1, 1969, page 3

²¹ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 86

Milliken and Birch's came from the amount of labor money that had been contributed to his 1968 campaign. One of the testiest of moments came during a colloquy on the Senate floor between Birch and Spessard Holland of Florida over the issue of labor money in a Bayh campaign. John Frank described the exchange as the "bluntest passage on the record."

Mr. Bayh: The Senator has read two editorials referring to campaign contributions to the Senator from Indiana; and both editorials reach the conclusion, or at least the inference that the Senator from Indiana cannot in good conscience oppose the nomination on ethical grounds because of obligations he has to organized labor as the result of contributions. I just wonder. Does the Senator from Florida associate himself with these inferences and conclusions?

Mr. Holland: Since the Senator puts it that way, the Senator from Florida does think the Senator from Indiana should have disqualified himself and should not have attempted, under his present situation, to have spoken for the interests which are backing him and backing him strongly in this effort. The Senator from Florida had not proposed to say that unless questioned, but I have never been one of those who run from a question and I must say I have been grievously disappointed in the position taken in this matter by the Senator....

Mr. Bayh: Does the Senator feel, after reading the record, that it is impossible for a man in good conscience to disagree with the qualifications of Judge Haynsworth on ethical standards? Does the Senator believe that if a man proposes ethics as his basis for opposition rather than philosophy, labor, or civil rights, that man is being devious?

Mr. Holland: The Senator from Florida does not look into the mind of the Senator from Indiana or the mind of anyone else. The Senator from Florida simply says that when the record in the Senate shows immense financial support obtained by his friend from Indiana from the sources named, and when the Senator from Indiana has fought the battle of these particular people here

against the nomination of Judge Haynsworth, he feels the Senator from Indiana has followed a highly unfortunate course, and the Senator from Florida has said so simply because the Senator asked. ²²

The Senate debate was intense for everyone close to it with the galleries packed almost daily. In opposition, Sen. Hart described the Haynsworth decisions on civil rights and labor as “unacceptable.” In support of the nominee, Republican Sen. Marlow Cook of Kentucky argued that Haynsworth was being “subjected to a character assassination that is unjustified.” Cook argued that Haynsworth was “a man of honesty and a man of integrity.” ²³ The stakes were high, in part because of the Nixon pressure tactics but for other reasons as well. Democratic Sen. Thomas Dodd of Connecticut was under a cloud for his own ethical issues and knew full well that a vote in opposition could result in retribution from the Justice Department, who had not yet brought an action against him. Others knew that their 1970 re-election campaigns could be affected, especially in those states where the President was particularly popular, such as Tennessee, where Democrat Al Gore, Sr. would be up or Maryland, vice president Spiro Agnew’s state, where Democrat Joseph Tydings faced a tough re-election. Shortly after Haynsworth was nominated by Nixon, Tydings announced support for the nomination. But he later changed his mind as revelations from the labor and civil rights organizers came to light.

Just before the Senate was to vote on November 21, two of the Senate’s most influential Republicans, John J. Williams of Delaware and John Sherman Cooper of Kentucky announced their opposition. Their reason was the Brunswick case. Sen. Charles M. Mathias of Maryland

²² John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, page 61

²³ http://www.upi.com/Audio/Year_in_Review/Events-of-1969/War-Protests/12303189849225-3/#title "Supreme Court: 1969 Year in Review, UPI.com"

soon followed suit for the same reason. There is no question that there would not have been so many Republican senators voting against Haynsworth had it not been for the ethical issues. Seventeen Republicans ended up voting no, including the new leader, Hugh Scott. The nomination was defeated by a vote of 55-45.

The big loser in this battle was President Nixon and there were many stalwart and distinguished supporters of Judge Haynsworth who were more than chagrined by the result. Future Supreme Court Justice Lewis Powell, another southern nominee, one who successfully found his way to the court, wrote about the Haynsworth nomination in the foreword of John Frank's book about the nomination in this manner. "The defeat of this eminently qualified jurist was 'purely political' and reflected adversely on the Senate rather than on Clement Haynsworth."²⁴

The winners in this battle were clearly the leaders of organized labor and of the civil rights movement, Meany, Biemiller, Rauh, and the leader in the Senate, Birch Bayh. Labor and civil rights efforts made it a local issue in many states, turning on the pressure from home just as the Nixon Administration had done among Republican donors and Party officials. John Frank issued this description: "By his victory, Bayh, a young second-term senator at the time, established himself nationally as a major tactician. From the standpoint of one wishing to defeat a major nomination, his tactics were flawless. First and foremost, he raised the doubts, and then he kept them alive."²⁵

²⁴ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, Foreword p. x

²⁵ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 92-3

Another of Connaughton's recollections is a reminder of the way the Senate operated in that era. After the vote was over and Haynsworth's nomination was defeated, Birch and Tom were leaving the Senate floor when Marlow Cook, who was a leading supporter of Haynsworth, came over to Birch and put his arm around him, saying, "Let's find something we can work on tomorrow or next week together." And they did.

Birch once described the Haynsworth matter as "the most distasteful thing I have ever had to do in the Senate" but there is no question that his role thrust him into the national spotlight in a greater manner than ever before. He might have thought he had already experienced it with the passage of the 25th Amendment or because of the plane crash, but this was different. Articles sprung up everywhere; he was in demand on television news shows across the country, invited to college campuses as never before. Over six feet tall with dazzling blue eyes, 41 years old with a full head of dark hair without any gray, an athlete's physique and an "aw shucks" demeanor, he was being noticed for not just his image and appearance but for his effectiveness, leadership and his ability to articulately address the issues and state his case. Reflecting on that period, he recounted that the Haynsworth defeat made him a national senator, "though that wasn't my intention."

Yet there is always the other side of the coin. Birch felt instinctively, and the mail to his office confirmed it, that his role in the Haynsworth matter was not popular at home. Indiana had, moreover, given Nixon the largest margin of any state only a year earlier. And there was a late night phone call at home with the unidentified caller saying, "Too bad you didn't die in that plane crash with Ted Kennedy."

Jay Berman, in discussing the Haynsworth matter, said that Birch had learned during the 25th Amendment experience that he could rely on the weight and integrity of the American Bar

Association (A.B.A.). Once Labor had raised issues against the judge, Birch was able to receive candid opinions from A.B.A. leaders that helped inform his own thinking on the matter. Jay added that, “We won because of Birch Bayh’s leadership efforts.”

On January 19, 1970, President Nixon nominated G. Harrold Carswell to fill the vacancy on the Supreme Court that Judge Haynsworth had also been nominated for. The 50-year-old judge from the Fifth Circuit Court of Appeals had been a Florida District Court Judge when confirmed for the Fifth Circuit only the previous year. Birch knew nothing about Carswell and dearly hoped that this nomination would be an easy one to support. Southern senators quickly announced their support for Carswell but criticisms began to be heard almost immediately about his high reversal rate as a District Court Judge, an astonishing 58%.

A few days later, Birch was in Los Angeles speaking at the California Democratic Conference, this time on the environment and pollution. His national activities and profile were on the rise. This speech was followed by one on Electoral College reform before the California State Legislature. Press releases that month demonstrate his broad range of interests and despite his desire to enter any number of battles in support of those interests, the growing concerns about the Carswell nomination kept intruding. He was speaking out on issues of ethics and judicial reform, of unrest at the Indiana State Reformatory and the need to provide food aid to the victims of war in Eastern Nigeria, soon to be known as Biafra. He expressed concerns about the Administration’s policies toward Israel, on the need to establish a White House Office of Consumer Affairs and his continued efforts to gain support for an 18-Year-Old-Vote Amendment, Electoral College Reform and the Equal Rights Amendment.

Birch knew that he might jeopardize his legislative priorities if he was to take on the Nixon Administration once again. Plus, in order to wage a successful battle against the Carswell

nomination, he would be posing a challenge to the moderate Senate Republicans, making life difficult for them by asking for their support in opposing the President again. He was aware that mounting another controversial campaign might ultimately work to his disadvantage as he sought support for his own legislative proposals.

Birch's instinct was that the Carswell nomination was looking considerably worse than Haynsworth's but he wanted to avoid another battle if he could. And, he believed it was doomed to defeat. He told Richard Harris, author of a book on the Carswell nomination called Decision, "When a bad thing is before the Senate and it has the support of the President, any effort to defeat it has to be immense to succeed. At the time, there seemed no chance that an effort of that magnitude could be pulled off – even though the Carswell nomination was clearly bad – because the senators' mood was 'God, don't put us through that again!' Also, there were other things for me to consider. One was that I had spent eight years here trying to build an image of myself as someone who isn't divisive, who isn't vindictive, who can get along with all factions. If I took on Carswell after having taken on Haynsworth, that could all vanish, because a lot of people would figure I was just out for blood."²⁶

Jay Berman recalled a meeting during the Haynsworth debate in the office of Sen. J. William Fulbright, who was concerned about the ethical issues surrounding Haynsworth. Jay was totally in awe of Fulbright, truly one of the Senate's giants. But it was a comment made by Fulbright that would resonate over the years. He talked about how he felt he knew Richard Nixon and that, "If you beat this guy, the next guy is going to be worse."

²⁶ Richard Harris, Decision, pages 12-13

Bob Keefe remembered that Birch was seriously reluctant to take a leadership role on the Carswell nomination as he had with Haynsworth, despite what was becoming increasingly obvious to everyone; how bad Carswell was. He said that Birch wanted Joe Tydings to lead the battle and for a while it seemed like Tydings would.

On February 25, Aaron Henry, head of the NAACP in Mississippi, testified before the Subcommittee on Constitutional Rights about renewing the Voting Rights Act of 1965. Birch was presiding as Chair that day. Henry didn't talk about the attempts on his own life or the bombing of his home or the threats he continually faced. He talked about what so many others had gone through during the civil rights battles in the deep South, the deaths of civil rights workers, black and white, and how effective the Voting Rights Act had been. His stoicism and quiet bravery provided resounding evidence that there were good reasons to reauthorize the Act. The attempts by the Nixon Administration to gut the effects of the Act were providing solid evidence of the continued southern strategy, the same strategy that had resulted first in the Haynsworth nomination and now Carswell. After that, as Birch returned to his office, he muttered to an aide, "How can you listen to these stories and then let Carswell go on the Court?"

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One of the first news items that soured many senators on the nomination came from reports about Carswell's campaign for the Georgia legislature in 1948. He had given a speech saying, "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

²⁷ Richard Harris, Decision, pages 7-9

on the part of anyone to break down and to weaken this firmly established policy of our people....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.”²⁸ Senators would be among the first to forgive political missteps and statements made at a much younger age that they would love to take back. The question hanging over the Senate was whether or not Carswell still had those views and, if not, did his record support such a change in viewpoint.

A leading Republican who ultimately voted against Carswell characterized the White House as rubbing “the Senate’s nose in the mess it had made of the Haynsworth nomination. I learned that the Justice Department had rated Carswell way down below Haynsworth and a couple of other candidates,” this senator said later. “That made it clear that the choice of Carswell was vengeance – to make us sorry we hadn’t accepted Haynsworth – and, at the same time, it was an attempt to downgrade the Supreme Court and implement the Southern strategy. The Attorney General obviously believed that we had no stomach for another fight after Haynsworth, and that we would accept any dog, so he took this opportunity to show his disdain for the Senate. He and a lot of the other fellows downtown seem to feel that they, and they alone, constitute the government of the United States.”²⁹

Birch always felt that after Haynsworth, Nixon had communicated to Attorney General Mitchell to find him another southerner to nominate to the Supreme court but not one who owns any stock. Nonetheless, he still felt that, “The last thing I needed was another fight.” He was

²⁸ Richard Harris, Decision, pages 14-16

²⁹ Richard Harris, Decision, pages 11-12

concerned that the principle reason Carswell would be confirmed was because Haynsworth was not and for that, he knew he would hold himself responsible.

Another piece of evidence circulated that confirmed to many the suspicion that Carswell remained a racist, though he continually disavowed that campaign statement made 32 years earlier. As a private lawyer, he had drawn up “incorporation papers for a white-only fraternity known as the Seminole Boosters, of which he was a principal subscriber and charter member. Then, in 1956, while he was serving as a United States Attorney in Florida, he helped incorporate a Tallahassee golf course that was being transferred, on a ninety-year lease at a dollar a year, from a public, city-owned facility, which had been built with \$35,000 of federal money, to a private club – a move that was clearly made to circumvent a Supreme Court decision handed down about six months before prohibiting segregation in municipal recreation facilities.”³⁰

Tom Connaughton remembered a meeting in which Congressman Charlie Rangel and Clarence Mitchell, along with two or three other very prominent African-Americans came to the office. They felt very strongly about what they knew about Carswell, that he was a racist as well as a conservative in his approach toward labor law. They appealed by saying “Birch, you've got to do this. We've got nobody else to turn to. You've got to help us with this.” That had a major impact on Birch as to whether or not he would lead the opposition. Tom also recalled Yale Law students coming to see Birch, wanting to help. Ten or fifteen of them started researching all Carswell’s cases when he had been overturned and they were putting together all of that material. They first uncovered his high reversal rate. Birch would often tell that story to students over the

³⁰ Richard Harris, Decision, page 18

years to illustrate how they can make a difference. Those students provided the manpower to research the cases that the Bayh staff could not do by themselves.³¹

Birch was invited to give a speech at Washington's Statler Hilton hotel to the Leadership Conference on Civil Rights, subbing for Sen. Tydings, who had the flu. Like Aaron Henry, they were in town to urge extension of the Voting Rights Act. It soon became abundantly clear that the dominant issue at the convention was the Carswell nomination. Birch began his prepared remarks on the Voting Rights Act and soon set them aside, turning to the Carswell nomination. He "launched into a free-swinging attack on Carswell's nomination. The audience was with Bayh from the start, and as he warmed up they stayed with him. In conclusion, he shouted that Carswell not only could be defeated but *had* to be defeated, and the audience rose to its feet and stamped, cheered, whistled, and applauded for several minutes."³²

As a Bayh Senate aide, I witnessed a great deal during this period as I had begun Birch driving to and from the office. The Haynsworth nomination had been exciting beyond belief; being close to those events was, at the time, unimaginable. But they didn't come close to the experiences during Carswell. The level of excitement generated by the drama, the national attention, the constant television appearances were intoxicating. I remember going to the Statler Hilton for the Leadership Conference on Civil Rights speech. On the way, Birch told me he saw no way we could win the Carswell vote. But the electricity created by this event added a level of enthusiasm that made us both feel optimistic. On the way back to the office, he told me we could win it after all.

³¹ Richard Harris, Decision, pages 23-24

³² Tom Connaughton's experience in the Carswell debate as told during an interview with him and the author on August 27, 2015

That night, Birch had trouble sleeping. Clarence Mitchell, of the Leadership Conference on Civil Rights, had given Birch his personal assessment of the Carswell speech when a candidate for the legislature. He said it was his experience that if a person believes what Carswell did, even though he was only 28-years-old, that person rarely changes his mind. Yet Birch was dogged by the conclusion that they couldn't win such a battle. At 2 o'clock in the morning, he found himself reaching a conclusion. With all the unrest in the country - riots, assassinations and violent confrontations with police - he always told Evan that we didn't solve our problems in that manner, that we worked within the system. But if his face was black, how could he tell his son to work within the system when sitting atop that system - for life - is G. Harrold Carswell? He made a personal commitment to take on the nomination once again, assuming they probably wouldn't muster more than 25 votes. But he had to try.

The next morning at the office, Birch met with his staff to discuss the nomination. Once they were done, he "got up from his desk, smiled, and said, "O.K., let's crank it up."

He wasn't the first senator to oppose Carswell. At the end of the hearings on February 3, there was public opposition by AFL-CIO President George Meany and by Sen. William Proxmire of Wisconsin, the first senator to announce opposition, Sen. Walter Mondale of Minnesota, John Gardner, former HEW Secretary and head of the Urban Coalition and Sen. Charles Goodell of New York. Goodell was a Republican appointed by Gov. Nelson Rockefeller to fill the vacancy created by the assassination of Robert Kennedy and had previously voted against Haynsworth.³³

Senator Edward Brook, a Republican from Massachusetts who was the first African American popularly elected to the U.S. Senate, was a key opponent to the Carswell nomination.

³³ Richard Harris, Decision, pages 23-24, page 60

He was the eighteenth senator to announce opposition and only the second Republican to do so when he took the floor to announce his opposition. Birch was there to listen. Brooke's Massachusetts colleague, Ted Kennedy, had already announced his opposition. Brooke had been a convenient Bayh ally in the Haynsworth debate, contributing greatly to the task of rounding up seventeen Republicans to vote no. Brooke had delayed a decision until he was convinced there was ample evidence to warrant opposition and he wanted to be sure that there was at least one third of the Senate with him, enough to show blacks and young people crying out for a no vote that they were being heard. He also knew that such a stance, particularly after Haynsworth, would make any influence he had at the White House evaporate.

Brooke felt that the 1948 speech reflected deeply held views. Carswell may only have been 28 years old but by that age Brooke had already spent five years in the military in World War II. He considered himself to be a fully grown adult by then. Looking for a change in Carswell's views, Brooke couldn't find it. He found the opposite. When Birch asked for the floor, Brooke yielded. The Indiana Senator talked about the problem of convincing the disenfranchised and discontented that there was hope for them within the system. He feared the violence that would erupt if people were not convinced. "The thing that concerns me is how are these people going to look at the system if they know that a man who unfortunately has this background is sitting at the very top of it?" Brooke nodded and added, "I do not think this nation can afford G. Harrold Carswell on the Supreme Court."³⁴

There were the issues of Carswell's 1948 speech and the high rate that his decisions were overturned, a reversal rate of nearly 60%, twice that of other judges on the Fifth Circuit with the

³⁴ Richard Harris, Decision, pages 14-18

higher court reversals being unanimous 17 times. There was the role he played incorporating the Tallahassee golf course to protect its whites-only status. When he was asked about the latter issue, he denied any memory of it. Soon, articles ran about a meeting the previous night when Carswell was asked about the matter, a meeting in which leaders from the A.B.A. actively discussed his participation in it.

When this surfaced, Jim Flug of Kennedy's staff asked one of the participants, Charles A. Horsky, for a memorandum describing the event. What became known as the Horsky memo, it described the meeting the night before Carswell's hearing in which they asked about the golf club episode. They showed him the Certificate of Incorporation with his name on it as incorporator. Carswell had sworn to the committee on two occasions that he was unfamiliar with the matter and the fact that the Horsky meeting had taken place the night before his hearings was a bombshell.³⁵

Senators began hearing rumors about Carswell that were extremely damning as well as other quotes that did him no good. Average people were speaking up about experiences they had had with the judge or knew about him. Birch was hearing from lawyers who recounted times in the courtroom, after the court reporter was excused, when Carswell excoriated people using racist terms. All of these rumors and revelations reinforced the feelings of those who were in opposition or leaning in that direction. Then there was the revelation about a speech Carswell had given only two months before his nomination.

“Carswell had been the principal speaker before the Georgia State Bar Association and began his speech with an anecdote. ‘I was out in the Far East a little while ago, and I ran into a

³⁵ Richard Harris, Decision, page 134

dark-skinned fella,' he reported. 'I asked him if he was from Indo-China and he said, 'Naw, suh, I'se from outdo 'Gawgee'.'" ³⁶

The Nixon Administration demonstrated a remarkable lack of learning from the previous nomination battle. Their ham-handed efforts were repeated as before, often characterized by overkill that turned possible supporters against them. One misfire that didn't help them in the Senate was a letter the President sent to Sen. William Saxbe of Ohio. It contended that the Senate had no right to substitute its own judgment in a nomination over the president's. ³⁷

The White House had worked with other jurists to gain support for Carswell. One of them was Judge Elbert B. Tuttle, retired chief judge of the Fifth Circuit Court. He had written a letter of support for Carswell but later withdrew that support after the evidence against the nominee mounted. Rumors circulated that Carswell had the support of Judge John Minor Wisdom, another judge of the Fifth Circuit with a reputation exceeding or close to that of Judge Tuttle. It was known that the Administration had dangled the prospect of a Supreme Court nomination before Judge Wisdom. Jim Flug of Ted Kennedy's staff and Bill Wise, Birch's press secretary, pursued another rumor that Wisdom was not, in fact, supportive. The latter rumor turned out to be the accurate one. ³⁸

Sen. Quentin Burdick, Democrat from North Dakota, a state with neither many blacks nor a strong labor presence, was initially persuaded to vote for Carswell. When he learned of

³⁶ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 102-103

³⁷ Richard Harris, Decision, page 156

³⁸ Richard Harris, Decision, pages 110-113

Carswell's outsized reversal rate, the withdrawal of Tuttle's support and that Wisdom had not, in fact, supported him, he made the decision to vote no.³⁹

While the number of senators opposing the nomination was clearly growing, Birch was concerned they were running out of time. Senators Eastland and Hruska, the two leaders for Carswell, were pressing for an early vote, to try and get the matter to the floor ahead of the Voting Rights Act and before the opposition got too much of a head of steam.⁴⁰ Voting Rights became the order of business on March 1 and by being prepared to object to a Saturday session, the Bayh forces were able to gain a critical delay. Birch knew they needed a month or so to have a chance of building the kind of support necessary in order to win. Help arrived for the anti-Carswell forces from two unlikely sources.

Sen. Strom Thurmond was the first to provide that help by filibustering against the Direct Election Amendment in the Judiciary Committee, delaying committee action on the Supreme Court nomination. When the committee finally reported the nomination, its consideration was delayed by Sen. James Allen, who decided to filibuster the Voting Rights Act, meaning the nomination would not be considered until after the Voting Rights Act was dealt with. These two delays ultimately provided the anti-Carswell forces more than a month to build up a head of steam. After the vote, Tydings asked and answered a question. "You know who defeated Carswell? Thurmond and Allen."

Thus the month of March, 1970 was consumed by Birch and his allies marshalling their forces in the hopes of defeating the nomination. An early April vote was likely following the

³⁹ Richard Harris, Decision, pages 112-113

⁴⁰ Richard Harris, Decision, pages 110-111

Easter recess, which began on March 27. During the recess, Birch was scheduled to travel with other senators to the Interparliamentary Union meetings in Monaco.

The anti-Carswell forces did their work. The coalition of organizations opposing the nomination were similar to those opposed to Haynsworth; organized labor and civil rights. Joe Rauh was actively engaged as before. Staff members to senators in opposition were a key group in and of themselves. A key addition to this effort was Marian Wright Edelman, a young lawyer heading up the Washington Research Project, a DC-based civil rights group. Marian Wright Edelman knew a great deal about Carswell before he was nominated. She had opposed his elevation to the Fifth Circuit the previous summer and was frustrated by the lack of support from other civil rights leaders in that effort. Now she found the necessary support. Her research on Carswell was critical, as was her ability to motivate others within the movement.

At one point, the anti-Carswell forces were assisted in an almost unimaginable way. When the news of Tuttle's change of heart on Carswell erupted to roil the debate shortly after it had begun on March 16, one of Carswell's chief supporters shot himself in the foot, severely wounding the nomination itself. Roman Hruska of Nebraska, responding to questions just off the Senate floor said, "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there." Jay Berman later described the Hruska comment as the "kiss of death."

On March 22, Sen. Fred Harris of Oklahoma suggested a way to solve the difficulties presented to senators by the Carswell nomination. It might be recommitted to the Judiciary Committee for "further study." This was traditionally a graceful procedure to allow senators an

ideal way out of an awkward dilemma and to avoid having to vote no on the floor. Theoretically, it was easier to vote for recommittal than to provide outright opposition with the explanation that there were too many unanswered questions, even though it was a likely burial ground for the nomination. Two days later, Sen. Griffin told John Ehrlichman at the White House that the nomination was in trouble, which Ehrlichman refused to believe.⁴¹

On March 25, Birch met with the other leaders of the anti-Carswell forces in Majority Leader Mansfield's office. They discussed recommittal and most still felt they needed more time in order to prevail. When Birch brought up the possibility of a filibuster, Sen. Javits strenuously objected, saying he would 'not filibuster against my own President.' Phil Hart opposed filibusters in principle and the matter was dropped. Agreement was reached to schedule a recommittal vote on April 6. Sen. Fulbright of Arkansas offered to introduce the motion but Brooke objected, saying that Fulbright's opposition was not yet known and it would send out all sorts of danger signals. He suggested Birch make the motion, saying, "As surprising as it may seem, you should do it because they don't dislike you downtown. They feel you're simply doing what a liberal senator should do." Later that day, Birch introduced the motion in the form of a unanimous-consent agreement and it was adopted. Fulbright immediately spoke on the floor that he would support recommittal without mentioning how he felt about the nomination itself. Sen. Mark Hatfield followed by offering his support for recommittal but added that he would vote against the nomination and read from the telegram he had sent the President urging him to withdraw it.

⁴¹ Richard Harris, Decision, pages 127-130

In a radio interview, Hatfield's Oregon colleague, Bob Packwood, attacked recommitment with the charge that there were six to eight senators that wanted recommitment because they "didn't have the guts to vote against him." He opposed both recommitment and confirmation.⁴²

One of the eight senators attending the Interparliamentary Conference in Monaco with Birch was Minority Leader Hugh Scott. Scott remained in Monaco until April 4 with the recommitment vote scheduled for April 6. Birch, accompanied by Marvella on the trip, was too worried about the matter and returned to DC on April 1. On the flight, he was given a message during a refueling stop that Marvella's father had died. Indeed, unimaginably, her father had killed her stepmother and himself. Marvella didn't get word until after Birch left Monaco and quickly made arrangements to return to Washington. She was given the sad news by Sen. John Sparkman, the chair of the delegation and father of Marvella's close friend Jan Shepard.⁴³

Marvella's father, Delbert Hern, had first shown evidence of mental illness shortly after Birch's nomination for the Senate in 1962. While Marvella was visiting in Oklahoma, he took an overdose of pills and ended up hospitalized, largely for depression. After the successful campaign that fall, Marvella went home, only to see her father under the influence of alcohol for the first time in her life. When Birch was sworn in the following January, Marvella's parents were there for the celebration, along with Birch's father and sister, Mary Alice, an actress who was just completing a tour of *Auntie Mame*. The only thing that marred the night was the drunken behavior of Delbert in front of everyone. It was then that Marvella's mother, Bernett, revealed that he had begun drinking shortly after Marvella had left home, was drinking when he

⁴² Richard Harris, Decision, pages 131-132

⁴³ Richard Harris, Decision, pages 168-169

tried to commit suicide and had a severe problem. These issues, along with the physical effects of the automobile accident in 1954 and the stressful life in which they found themselves, resulted in Marvella developing serious sleep issues. By this time, she was taking tranquilizers at night and estrogen shots and thyroid medication during the day.⁴⁴

In April 1964, Bennett died and Marvella heard from relatives about the problems in her parents' marriage. Her father had fallen in love with a younger woman and wanted to marry her. There was reason to suspect domestic abuse. A week after Bennett's funeral, Delbert left Enid, Oklahoma to be with his lover, whom he married five weeks later.

These events were incredibly hard on his only child, Marvella. He continued drinking to excess. Of course, no one knows what goes on inside a marriage but the result of their last day was that Hern shot and killed his wife and himself. Marvella and Birch traveled to Oklahoma, spending most of the weekend of April 4-5 there, returning to DC on Sunday night the 5th for the Monday April 6 recommittal vote. When they arrived at Marvella's home in Enid, they were greeted by prominent, fresh blood stains on the living room carpet.⁴⁵

On one of the Sunday talk shows, Tydings debated Sen. Ed Gurney of Florida on the nomination. Afterward, Tydings received a call from Sen. Margaret Chase Smith of Maine at the studio congratulating him on his performance. This was an ominous sign, since Smith's attitude on Carswell was unknown and it was generally considered that leaving her alone was the best strategy. Birch wished that he had known about the Smith phone call at the time but did not.

⁴⁴ Geoff Paddock, "A Shining Example; The Journey of Marvella Hern Bayh", *Traces*, Fall 2013, page 49

⁴⁵ Marvella Bayh & Mary Lynn Kotz, Marvella, Pages 122-123

By the time of recommittal, it became clear to Birch that a vote for recommittal and a vote to oppose were not the same thing, just as Packwood had said earlier. He concluded that there were a number of senators who would oppose recommittal because they preferred an up or down vote on the nomination. He also knew that the White House was likely to equate a no on recommittal as a yes on confirmation. His instincts were also to leave those particular senators alone. The White House was working over-time to win on recommittal and won four votes (Hiram Fong, Tom Dodd, Chuck Percy and Bob Packwood) that convinced them they would win confirmation, just as Birch predicted. All four had individually promised Birch that they would vote against Carswell's confirmation on the floor.

Hugh Scott told Mike Mansfield that Carswell would win on recommittal and lose on the floor, causing Mansfield to go to Birch and suggest he call for a vote on confirmation right after the recommittal vote. Hruska was "so flabbergasted by the Bayh motion – a clear sign that Scott hadn't mentioned it to him – that he jumped up and shouted, 'The Nebraska from Senator objects!'"

Birch also knew that there would be some absences. Karl Mundt of South Dakota was for Carswell but hospitalized from a severe stroke he had suffered months earlier. Clinton Anderson of New Mexico was against Carswell but scheduled to be absent because of a glaucoma operation. Claiborne Pell of Rhode Island (against Carswell) and Wallace Bennett of Utah (for Carswell) were in the Far East on Senate business, which was known quite a bit in advance.⁴⁶

⁴⁶ Richard Harris, Decision, pages 177-180, page 189, pages 195-6

The Monday vote on recommitment was at 1 PM and failed 52-44. Knowing which senators were supporting recommitment and would oppose Carswell as well as those who intended to vote no on both, allowed Birch and his allies, particularly Ed Brooke, to begin to feel optimistic. He predicted to his staff that the nomination would fail by a vote of 51-45.

Birch had flown to Houston the afternoon before the final vote to speak to the Texas League of Women Voters. Returning early the next morning, he had to go to a hospital and give his father a shave; he had suffered an angina attack while Birch was in Texas. Given the events involving Marvella's father and now his own, his emotions were frayed beyond description; however, he knew that he had to focus during the time remaining before the vote and deal not just with his own strategy but the possible strategies of the pro-Carswell forces as well. He had previously developed a paper arguing that in case of a tie vote, a vote by the Vice President in this matter would be out of order on nominations to the federal courts, a point of order that had to be recognized. The Bayh team realized that there was questionable legal substance to the argument but it might cause a delay in the Vice President casting a vote. Birch would then take the floor to filibuster on the issue, causing a greater delay to allow AFL-CIO lobbyist Andy Biemiller to fly to New Mexico in a chartered jet and bring back Senator Clinton Anderson to break the tie.

Prior to the vote, Ed Brooke pointed out to Birch that Margaret Chase Smith had entered the chamber and suggested that he huddle with her for some last-minute lobbying. Birch disagreed and told him to leave her alone. "I was not close to her at all," Birch remembered, but felt in his gut that she would be fine, that she would do what she thought was right, and lobbying by Brooke or anyone else could be counter-productive. Brooke did approach Smith to tell her that the White House was telling others that she had agreed to vote for Carswell. He assured her

that he was not going to try and persuade her but thought she should be aware of what was being said. Unbeknownst to Brooke, she went to a phone and called chief White House lobbyist Bryce Harlow to ask him if the story was true. Harlow tried to obfuscate; she slammed down the phone and returned to her seat on the floor.

Birch's final speech before the vote was described in an article in *Women's Wear Daily*. "In ringing tones he told his colleagues: 'Today we have the opportunity to tell our children and their children that the advise and consent responsibility given to us by our Founding Fathers nearly two centuries ago still has meaning today.' That was a direct slap at President Nixon's letter demanding that his nominee be rubber-stamped forthwith."⁴⁷

Vice President Agnew entered the chamber and took his seat as presiding officer, calling the Senate to order and announced that the matter before the Senate was to advise and consent to the nomination to the Supreme Court of Judge G. Harrold Carswell. With the galleries filled to capacity and about as many staff on the floor as could be jammed along the back walls, the scene was intensely dramatic. The corridors outside the chamber were as crowded as they had ever been with far more people than could fit into the galleries trying to wedge their way close to the action. Most of the senators were on the floor as the buzzers for the quorum call echoed throughout the Senate buildings.

The one o'clock vote commenced and the first four senators cast votes for the nominee. Because the roll was called alphabetically, Birch Bayh was the fifth vote cast and the first to vote "no." At the end of the first roll call, only 90 senators had voted and the nomination was losing, 46-44. As the remaining six senators made their way to the podium to cast their votes, five of

⁴⁷ Robert Barr, "Bayh – Could Be Household Word in White House race", *Women's Wear Daily*, April 10, 1970, pages 1, 11

the final six voted “no.” Birch always gave the credit for that 51st vote to Margaret Chase Smith, the Republican from Maine.

The galleries erupted in cheers and Sen. Russell called for the Vice President to clear the galleries, which he did. But it didn’t matter as everyone was leaving for celebrations in the hall outside the chamber.⁴⁸

Thirteen of forty-one GOP Senators voted no. The three whose votes made the largest difference were Cook of Kentucky, Prouty of Vermont and Smith of Maine. For Cook it was the falsehoods in Carswell’s testimony about the golf club. Smith felt the same and was concerned about his confusion when discussing a matter one night and providing different testimony the next morning. Three southern border state senators voting no were Fulbright of Arkansas, Gore of Tennessee and Spong of Virginia.

John Frank wrote, “Carswell must be viewed historically as a bad legal joke. Like Fortas, he helped to dig his own grave with his mouth. Want of candor to a senatorial committee is rarely rewarded, and Carswell was almost disgustingly wanting in candor. But he was so demonstrably incompetent that he might well have lost no matter how much truth he told; and I believe that he, unlike Haynsworth, really was a racist. Political triumph in Carswell’s case goes partly to the senators, particularly to Senator Bayh, but also very markedly to Joseph Rauh and Marian Wright Edelman, the civil rights leaders who organized the country.”⁴⁹

The day before the vote, Marlow Cook went to a White House Medal of Honor ceremony and was moved by the sacrifices of the men being celebrated. He felt voting for Carswell was

⁴⁸ Richard Harris, Decision, pages 200-202

⁴⁹ John P. Frank, Clement Haynsworth, the Senate, and the Supreme Court, pages 116-117, 135

not representative of the excellence in service to the country they deserved. After the vote, he revealed to a group of Senate aides that he had received a “letter from a former law partner in Kentucky, who had appealed to him to reject Carswell as the only way to stop the deep discontent among Negroes from bursting into a bloody upheaval. Cook paused thoughtfully, then grinned and added, ‘I hope they send the Attorney General’s name up next, so we can turn him down, too.’”

The Nixon staff, once again, did an awful job managing the nomination and lobbying the Senate. As with the Haynsworth nomination, they over-reached and shot themselves in their feet. Senators were not pleased to be lobbied by Chief Justice Warren Burger, which Richard Harris insisted took place but Burger later denied. It would be a clear violation of judicial ethics. Bob Dole of Kansas fought hard for Carswell and, when the vote was over, described the White House aides as “those idiots downtown.”⁵⁰

The day of the vote, April 8, Marvella asked me to write down my recollections of the events leading up to the vote, which I did and gave her a copy. What I wrote provides me with details that I have long since forgotten.

I have been asked by Mrs. Bayh to give my account of the events leading up to the defeat of Judge Carswell’s nomination as one who has spent a good deal of time throughout the last few days before the vote with Senator Bayh.

The weekend of April 4th and 5th, while the Bayhs were in Oklahoma, it was clear that the Monday (6th) vote for re-committal to Judiciary would fail. I picked up the Bayhs at National Airport on Sunday evening and we talked about the appearance of Senators Tydings and Gurney

⁵⁰ Richard Harris, Decision, page 204, 173, 100

on “Face The Nation” earlier that day. The next morning when I picked up the Senator he made the reply; “Well, Bob, we’re going to lose this one.”

I attended the Monday re-committal vote and left disappointed, but not surprised. A few hours after the vote, the Senator was due at the Sheraton Park Hotel for a Convention of the United Mine Workers – District 50. We sped there with columnist Mary McGrory in the back seat interviewing the Senator.

The Convention was similar to a National Party Convention. It was loud and boisterous – but warm. It was one of the most tremendous responses I’ve ever seen the Senator receive. His speech was extemporaneous. The hall was quiet during the speech. McGrory agreed with me that the crowd readily grasped hold of the “mediocrity” argument. They cheered the Senator on and after much pushing and shoving, the three of us left in good moods.

Conversation continued at McGrory’s apartment over a gin and tonic. The Senator felt confident that our 44 votes for recommitment plus Dodd, Fong and Packwood would give us 47, and with Percy we’d have a tie. Our talk centered on the whole drawn-out battle and how Senators like Hatfield and Cooper had decided as they did. I tried to convince McGrory that Birch had begun rolling the anti-Carswell ball and not her favorite – Ed Brooke. At 5:40 PM we rushed off for WTOP-TV with a promise by Mary that she would light a candle till the vote on Wednesday was over.

The Senator did a spot on the Martin Agronsky show and proceeded upstairs to the offices of Tom Braden and Frank Mankiewicz. After about 20 minutes there, we were all convinced our chances were good for the showdown.

Tuesday evening we took off for Dulles Airport in rush-hour traffic. I asked the Senator how things looked and he assured me it looked good. He said Percy would be with us and that

he'd heard rumblings from Mrs. Smith and Cook that sounded good. His best comment was; "I had the audacity to tell Keefe coming down the stairs that we'd get 50 or 51 votes. I was elated. When we got to Dulles after a real race we were three minutes early for the flight. The Senator was in a good mood and we laughed about the fact that I'd meet him twelve hours later, to Houston and back.

Wednesday morning at 6:00 AM I met him at Dulles. The Washington Post predicted a 48-46 edge for Carswell opponents with Cook and Smith as the keys to a tie. Not wanting a role for Agnew, the Senator said there was one discrepancy in the Post report. He said if we got either Cook and/or Smith, Prouty would come around. This would make it 51-45 if we got all 3. And it was.

By 6:30 we were eating breakfast at a Waffle Shop just off Pennsylvania Avenue (522 10th Street NW).⁵¹ Coming out, the Senator mused; "Senator Bayh and his right hand man, Bob Blaemire, were seen rounding up anti-Carswell votes at 6:30 AM at the Waffle Shop on Pennsylvania Avenue." Surprisingly enough we were in good moods despite the hour. We got to the office and both slept till 9:00 AM. I then found out and told the Senator that Percy announced for us and I wished him luck. We headed out to see how Col. Bayh was doing and then back to the office as early as we could.

After the victory, Mrs. Bayh and I pushed our way to the Old Supreme Court Chambers where the Senator was being interviewed. Once in the hall, we were mobbed. Mary McGrory came up to say; "How about that candle, Birch?"

As we prepared to go to the airport again, our staff mobbed "The Boss" on the Senate steps and he was thoroughly pleased. In the car he said; "This is a great day for the Senate."

⁵¹ John De Ferrari, Historic Restaurants of Washington, DC, page 135

His excitement was somewhat dampened by the sickly condition of his father but when he left for the gate, he was jubilant and happy.

The Nixon staff was irate by this second defeat of a Supreme Court nomination. Efforts were mounted by them to make as many of the disloyal senators as possible pay dearly for the Carswell vote. In Texas, Ralph Yarborough was defeated in the Democratic primary. In the fall, Albert Gore, Sr. was defeated for re-election in Tennessee as was Joseph Tydings in Maryland. In Nevada, a challenge to the re-election of Howard Cannon failed narrowly. In Florida, Carswell resigned from the bench to run for the U.S. Senate. Newspapers ran a photo of Carswell during his campaign holding up a bumper sticker saying, “Bye, Bye, Bayh – Heah Come De Judge.” He was defeated 2-1 in the primary.

Ironically, Nixon’s view softened with time. In his autobiography, he said, “Looking back I have no quarrel with some of those senators who voted against Carswell because of their belief that he lacked the superior intellectual and judicial qualities to be a Supreme Court Justice. But I still believe that many of the senators who voted against him used the issue of his competence as camouflage for their real reason, which was their disapproval of his constitutional philosophy.” He also acknowledged that they had missed Carswell’s 1948 statement extolling segregation when researching his past.⁵² Nixon could not have known about another aspect of Carswell’s life that was revealed some years later. In 1976, he was arrested after making homosexual advances to an undercover officer in a men’s bathroom at a Tallahassee shopping mall. And three years after that he was attacked and beaten by a man he had invited to a hotel

⁵² Richard M. Nixon, RN: The Memoirs of Richard Nixon, pages 422-423

room in which he was staying.⁵³ No one in the Bayh operation had any inkling about this side of Judge Carswell and any hints about homosexuality at the time would have surely scuttled the nomination. Even rumors about homosexuality in 1970 would have deterred him from being chosen.

Jay Berman commented that, “I honestly believe that no other senator would have come up with the tactical way to beat this guy.” Birch had created outside public furor over the nomination that created pressure on his colleagues. And, again, the A.B.A. was helpful. But Jay’s summation of the affair was that “Birch Bayh’s approach to Carswell was genius” and he hasn’t received enough credit for the manner in which he got it done.

There was no question that Birch raised his national profile with the Carswell victory as well as respect among Washington’s politicians. Few had thought it possible to turn back a Nixon Supreme Court nomination a second time. He was clearly in charge of the strategy, coordinating the activities of staff and marshalling the resources of the allied groups. Because of his leadership in the Haynsworth effort, Carswell opponents naturally gravitated to him and he took advantage of their energies in an expert manner. This was unprecedented. When had the Senate had two successive victories against a newly elected president in this manner, both engineered by the same person?

⁵³ “G. Harrold Carswell, Nixon Nominee, Tallahassee, Florida,” *The Baltimore Sun*, August 1, 1992

Joyce Murdoch, Deb Price, *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (2002), p. 187

Carswell’s arrest, UPI report reprinted in the *Sarasota Herald-Tribune*, September 12, 1979, pg. 23

In a period of less than 5 months, only 138 days, the Senate had twice denied the President a Supreme Court nomination, with both efforts engineered by the same member of the Senate. It was hard to exaggerate the difficulty in this, nor its rarity.