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Book Review

Decision. By Richard Harris. E.P. Dutton & Co.; 1971. Pp. 220. \$5.95.

LEARNING NOT TO PLAY CONSTITUTIONAL MAKE BELIEVE

The President "shall nominate and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court." U.S. Const. art. II, sec. 2.

I.

In our nation's formative years, our colonial forefathers found a need to impose dependable legislative restraints upon the executive's capacity to foist upon the public an unworthy judge. As agents of the King of England, the governors and proprietors of the American colonies were entrusted with the power to name the judges who were to dispense the King's justice. Like the Maryland Charter of 1632, which empowered the proprietor to appoint judges "of what kind, for what cause, and with what power soever,"¹ the authority initially vested in the colonial chief executives was devoid of any checks or balances which might assure a good choice.

Through the prism of history, we know that the colonial executive's unfettered power to appoint whomever he chose to the bench served as an invitation to corruption. Judgeships often were bought and sold like tobacco on the open market, dangled before members of the legislative assembly as enticement to support measures favored by the governor, and offered as political patronage. One governor even had the temerity to appoint his own son to the colony's supreme court. It is no wonder that Benjamin Franklin tartly complained about "attornies' clerks" being appointed as chief justices at the pleasure of the King. We, of course, need not look beyond current events to know that there is no surer way of undermining the quality and integrity of the bench than to premise the appointment of its members primarily upon political considerations.

A system that produced in the judiciary marionettes tied to the hands of the royal governor was understandably repugnant to the eighteenth century colonial assemblies which were thirsting for political power of their own. The goal of wresting from reluctant governors a share of the appointment power was added to the assemblies' primary objectives of controlling provincial funds, sharing in decisions concerning war and preventing their own dissolution. The effort at first was largely indirect. One tactic was to withhold the salaries of judges

1. MD. CHARTER OF 1632, at 4.

whose appointments they disapproved. There was also an effort to set limited judicial qualifications and to subject tenure to good behavior rather than the pleasure of the King. There also began a quest for a share in the appointing authority itself.

Paradoxically, the effort of the colonial legislatures to gain control over judicial selection from the royal governors was given significant assistance by the home government in England. In the precursor of our present constitutional system for selecting Supreme Court judges, the English government around the turn of the eighteenth century ordered its governors not to make judicial appointments without the advice and consent of the appointed, quasi-executive, upper house of the legislature known as the council. This concept was first embodied in the Massachusetts Charter of 1692. By 1752 all governors were required to obtain some measure of council concurrence.

The frailties of the system that had vested in one man, the executive, the power to appoint judges was not forgotten after independence. Framers of seven of the original state constitutions vested the power to appoint judges solely in their state legislatures. In four other states, including Maryland, the advice and consent of a chamber of the legislature was required. Thus, at the birth of our nation, legislative consent, if not control, became the *modus operandi* of judicial selection. The theory that the appointment of judges was solely an executive prerogative was put to rest. Some 200 years ago.²

II.

On January 19, 1970, President Nixon nominated G. Harrold Carswell to be an Associate Justice of the Supreme Court. Six weeks later, at a time when Senate opposition to the nomination was intensifying, the President, in a letter addressed to Senator Saxbe of Ohio and released to the public, asserted that the federal Constitution and history precluded the Senate from blocking his nomination.

In his letter the President stated that centrally at issue in the Carswell nomination was "the constitutional responsibility of the President to appoint members of the Court — and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own selective judgment for that of the one person entrusted by the Constitution with the power of appointment." The President, turning next to history, wrote "the right of choice in naming Supreme Court justices . . . has been freely accorded to my predecessors of both parties." And rhetorically he questioned why he should not be accorded the same right.³

There is a mythology about the constitutional powers of the President. It is that the Constitution, like Aladdin's lamp, need only be

2. For a general discussion of the appointment of judges in the colonial period see J. BURNS, *CONTROVERSIES BETWEEN ROYAL GOVERNORS AND THEIR ASSEMBLIES IN THE NORTH AMERICAN COLONIES* (1923); GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* (1848).

3. Letter from Richard M. Nixon to Senator William B. Saxbe, April 1, 1970, reprinted in part in 116 *CONG. REC.* 10431 (1970).

massaged in the right places to bring forth an all-powerful Presidential genie. While gradually expanding the authority of the President, the mythology has worked to atrophy many of the constitutionally intended roles of Congress. It has given us too many Congressmen who are less their own men or their constituents' than the President's; it has produced a veritable executive wing within the legislative branch. It has knocked asunder our system of checks and balances. It has served to convince the average man that the President is *the* government. Much of the mythology is of the President's own making. The most prominent example of this is the false notion advanced by the executive branch for generations that the commander-in-chief clause vests in the President the power to engage our troops in combat abroad. The President's self-aggrandizing Carswell letter concerning his judicial appointment authority is another source of such mythology.

It is impossible to reconcile President Nixon's assertion that his predecessors had been given free rein in selecting justices with historical fact. Twenty-three nominees, or approximately one in five selected by the President, from George Washington's choice of John Rutledge to be Chief Justice in 1795 to Lyndon Johnson's choice of Abe Fortas in 1968, failed to win Senate confirmation. President Tyler had four of his nominees rejected. Fillmore and Grant each failed to obtain Senate approval for three of their selections.

President Nixon's theory that he alone has the power to appoint under the Constitution is nonsense. The assertion runs against the textual grain of the Constitution itself. Article 2, section 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court." Clearly, in framing this provision there was contemplated a sharing of this selection power. And, as we shall see, those who met in Philadelphia and who composed this scheme intended the Senate to exercise its share of responsibility as an independent body.

III.

James Madison's notes of the Constitutional Convention are beyond question the best evidence we have of what the framers of our Constitution intended its provisions to mean.⁴ A perusal of the proposals, debates, committee recommendations and votes recorded in Madison's notes pertaining to the selection of Supreme Court judges illustrates how far contemporary understanding of the Constitution has strayed from the original intent.

Madison's notes challenge most of the common assumptions on what the correlative responsibilities of the Senate and the President were intended to be. They refute the theory that the Senate's role is merely a perfunctory one and that the appointment of justices is essentially an executive prerogative, the argument of President Nixon in the Saxbe letter.

4. Madison's notes are found in FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (rev. ed. 1937).

The debates also show that there is no constitutional basis to support the notion that Senators are not to exercise their own subjective judgment in passing upon a nominee, or that Senators are to repress their philosophical preferences in favor of the President's, or that the President's nominee should be considered presumptively qualified. These misconceptions about the Senate's role have not been propagated by the President alone. They also have been advanced frequently on the floor of the Senate when a President's nominee has run into Senate opposition. Many Senators honestly believe that these limitations on the Senate's "advice and consent" are implicit in the Constitution. They have been taken in. False notions often repeated have a way of gaining credibility. Other Senators favoring a President's choice sometimes have employed these notions to divert attention from the nominees' unsatisfactory qualifications. Still others have used these notions as facades behind which to seek refuge from the hard and often politically hazardous task of opposing the choice of the President.

The view usually subscribed to by those in the Senate who believe that the body was intended to exercise its judicial appointment power freely, independently and assertively is, in the words of Senator Sam Ervin, that "[t]he Senate's role in the selection of Supreme Court Justices is plainly equal to that of the President."⁵ This view is close to the mark. If fault can be found, it is with the modesty with which the Senate's role is assessed. There is reason to believe that the framers contemplated the Senate's authority to go beyond this. To cast a broader shadow, so to speak.

The delegates at the Constitutional Convention consistently adhered to the view that the paramount responsibility in the appointment of Supreme Court judges would be borne by the Senate. Senate participation was at all times considered by the framers to be the essential element in the selection process. That the President was accorded any role at all in the process was a product of an eleventh hour concession, a concession that Professor Max Farrand attributes to the delegates growing tired.⁶ However, the President clearly was given the exclusive right to nominate. But, Madison's record suggests, it was the Senate, in exercising its authority "to advise and consent," that was intended to do the actual appointing.

When the main work of the Constitutional Convention began on May 29, 1787, Governor Randolph introduced the Virginia Plan in which there was a resolution calling for a supreme tribunal "to be chosen by the National Legislature."⁷ On June 13, at the conclusion of the first round of debates on the resolution, the delegates, led by Charles Pinkney of South Carolina, Roger Sherman of Connecticut and James Madison, agreed unanimously to amend the provision and to vest this appointment authority in "the second branch of the National Legisla-

5. See the separate views of Senator Ervin in SENATE COMM. ON THE JUDICIARY, NOMINATION OF ABE FORTAS, S. EXEC. REP. NO. 8, 90th Cong., 2d Sess. 31 (1968).

6. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 171 (1913).

7. 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 21 (rev. ed. 1937).

ture."⁸ From this point until practically the end of the Convention, the prevailing view remained that the selection of Supreme Court judges was to be exclusively a function of the Senate.

In contrast, at no time did the Convention favor vesting the power exclusively in the executive. Such a view was suggested by James Wilson of Pennsylvania at the beginning of the debates on June 5;⁹ as part of the New Jersey Plan introduced by William Patterson on June 15;¹⁰ and again by Wilson in the form of a motion on July 18.¹¹ But the idea never gained acceptance, probably because, as John Rutledge of South Carolina put it, "the people will think we are leaning too much toward Monarchy."¹²

Wilson's motion of July 18 carries special significance for the purpose of this discussion. Wilson moved to strike from the provision dealing with who should appoint Supreme Court members the words "second branch of the National Legislature" and to insert the words "National executive."¹³ Gouverneur Morris, one of Wilson's fellow delegates from Pennsylvania, seconded the motion. Luther Martin of Maryland, Roger Sherman of Connecticut, George Mason and Edmund Randolph of Virginia and Gunning Bedford of Delaware all spoke in opposition to Wilson's motion. Other than the two who sponsored the motion, only Nathaniel Ghorum of Massachusetts expressed a preference for it.¹⁴ And when the vote was taken, the motion was defeated six delegations to two.¹⁵ Thus, when the Convention was presented with a clear choice between depositing the authority to appoint Supreme Court judges in the Senate or in the executive, the delegates voted heavily in favor of the Senate.

There was in the Constitutional Convention a spirit of compromise. We remember it best through the scheme of congressional representation it produced. This determination to assuage both sides of a controversy was not without its impact on the manner in which Supreme Court judges were to be appointed. While the delegates were in the process of rejecting executive control in favor of legislative control of this appointment power, a third position employing the advice and consent concept found in some state constitutions began to gain acceptance.

This method of selection first was introduced on June 5 by Alexander Hamilton.¹⁶ At the time it attracted no more serious attention, and probably fewer chuckles, than Benjamin Franklin's sardonic proposal to allow the organized bar to appoint the judges on the ground that they would surely appoint the best among them in order to get rid of them and divide their practice.¹⁷

8. *Id.* at 233-37.

9. *Id.* at 19.

10. *Id.* at 244.

11. 2 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 41 (rev. ed. 1937).

12. 1 FARRAND, *supra* note 7, at 119.

13. 2 FARRAND, *supra* note 11.

14. *Id.* at 41-44.

15. *Id.* at 44.

16. 1 FARRAND, *supra* note 7, at 128.

17. *Id.* at 120.

When Ghorum and Morris moved on July 18 "[t]hat the Judges be nominated and appointed by the Executive, by and with the advice and consent of the Senate,"¹⁸ it was apparent that this position had gained additional support. It came primarily from those who, like Ghorum and Morris, initially favored vesting the authority solely in the President. After that proposition was soundly defeated, they naturally switched to a position that would preserve for the President some share of authority. Other supporters, such as Madison, moved toward the center from the side favoring Senate control. However, enough supporters of exclusive Senate control held their ground to prevent the proposal from obtaining a majority — the vote was four delegations to four — and consequently the provision granting the power solely to the Senate was left standing.¹⁹

By the end of the debate on July 18, it was clear that those who favored Senate control had prevailed. The proposal for exclusive executive control had been defeated and abandoned by its supporters in favor of joint responsibility. Some measure of Senate participation in the appointment process thus had been assured. And complete Senate control appeared probable.

The activities of the Convention three days later reconfirmed the will of the body to provide the Senate with a firm hand in the appointment process. On July 21, consideration began of a motion made earlier by Madison that "the judges should be nominated by the Executive, and such nomination should become an appointment if not disagreed to within [certain unnumbered days] by two-thirds of the second branch."²⁰ When Elbridge Gerry of Massachusetts objected to the concept of requiring two-thirds of the Senate to reject a nominee, Madison amended his motion to let a majority reject a nominee.²¹ Madison's motion, as George Mason noted in objecting to it, obviously would have made the Senate's share of authority strictly second-rate.²² The Senate, in effect, would have been empowered only to negate a nomination; Senate approval would not have been required. The great gray unknowns would have been carried to the bench on the crest of Senate lassitude, not support. Moreover, under Madison's motion, even if fifty percent of the Senate strenuously opposed a nomination, the nominee would have nevertheless taken his seat. It is no surprise that the Convention would have no part of this. And Madison's proposal was defeated six delegations to three,²³ the motion obtaining less support than the "advice and consent" motion that had narrowly failed three days earlier.

Exclusive Senate control of the appointment of Supreme Court members was supported twice more after the defeat of Madison's motion. First, by six delegations to three at the close of the Conven-

18. 2 FARRAND, *supra*. note 11, at 44.

19. *Id.*

20. *Id.* at 80.

21. *Id.* at 82.

22. *Id.* at 82, 83.

23. *Id.* at 83.

tion on July 21,²⁴ this date marking the end of the Convention's general debate on the matter. And again, on August 6, by the Committee of Detail, to which all the resolutions that had been passed by the Convention had been referred for the purpose of arranging them in the form of a constitution.²⁵ Since two of the five committee members, Wilson and Ghorum, were originally the most assertive critics of vesting this authority in the Senate, and since this committee took the liberty of changing the substance of many other resolutions, it was of no small moment that the committee decided to keep intact the resolution vesting the authority solely in the Senate.

After the Committee of Detail submitted its report, the Convention proceeded to pass on each of its recommendations. However, it did not reach the one dealing with the selection of Supreme Court judges. On the last day of August, the Convention, anxious to adjourn, referred the matter, along with all other pending resolutions, to a Committee of Eleven, composed of one representative from each delegation.²⁶

On September 4, the Committee of Eleven reported to the Convention. Its report represented the first departure from the Convention's previous position vesting the selection of high court judges solely in the Senate. The Committee recommended that "the President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . judges of the Supreme Court."²⁷

Even without hard evidence of what the Committee intended in devising this scheme, it would nevertheless seem certain that its members would not have turned their backs on the previously expressed will of their delegations. They could hardly have ignored the fact that the last expression of Convention intent was a vote of six delegations to three favoring exclusive Senate selection. Or that the only time the Convention considered a proposal involving advice and consent, the matter divided the Convention, four delegations favoring exclusive Senate control and four favoring "advice and consent." Given the fact that most differences were being resolved through compromise, it is reasonable to assume that the Committee of Eleven intended its proposal to represent a compromise between these two positions.

Such a compromise might be reflected in the fact that the Committee did not reiterate the earlier proposal "that the judges be nominated and appointed by the Executive, by and with the advice and consent of the Senate," which had been favored by only half the Convention. Instead, the Committee rearranged the phraseology and placed the "Senate" immediately before the verbs "shall appoint."

Fortunately, what was intended by the recommendation of the Committee of Eleven need not be left to conjecture. On September 5, two days after the Committee's proposal, Wilson, who from the start had strongly opposed giving this authority to the Senate, rose and de-

24. *Id.*

25. *Id.* at 183.

26. *Id.* at 481.

27. *Id.* at 498.

nounced that part of the report that gave the Senate "the virtual appointment to offices; among others the offices of the judiciary department."²⁸ The President "cannot even appoint a tide-waiter without the Senate," Wilson argued.²⁹

After Wilson concluded, Gouverneur Morris took the floor to defend the Committee's report. Morris' views deserve special attention. From the start he had demonstrated a keen interest in the subject. He along with Ghorum was the sponsor of the "advice and consent" proposal upon which the recommendation of the Committee of Eleven was based. Most significantly, he was a member of this Committee, and knew the Committee's intent. His words represent the best evidence of what the Committee contemplated, and what the scheme found in our Constitution means.

Morris sought to convince Wilson that the Committee's report took some of the Senate's power away. He noted that prior to the Committee's report, the Senate "had the appointment without any agency whatever of the President."³⁰ And he succinctly stated the way the Committee's recommendation changed this, and what in fact the proposal before the Convention was intended to mean: "They [the Senate] are now *to appoint* Judges nominated to them by the President."³¹ Morris' interpretation was the only one offered in explanation of the Committee's proposal. It also constituted the last observation on this subject in the Convention. On the following day, September 7, the Convention unanimously agreed to adopt the proposal of the Committee of Eleven.³² One week later the work of the Convention was brought to an end.

IV.

Alexander Hamilton was not one to belittle the intended powers of the President. Indeed, Hamilton's reputation for leaning toward monarchy was not without foundation. He asserted that "the British government was the best in the world," and he favored giving the executive extensive powers, including an absolute veto over all legislation. However, when it came to the role of the President in selecting Supreme Court judges, Hamilton acknowledged that under the new Constitution, the President's role was limited.

Hamilton's views on this subject are entitled to much weight. Not only because they contrast with his general views favoring a strong President, but also because, like Morris, he was among the dozen or so delegates who took an active part in molding the scheme found in our Constitution. As noted earlier, he was the first delegate to propose that the President and the Senate share in the selection of judges. And

28. *Id.* at 522.

29. *Id.* at 523.

30. *Id.* (emphasis added).

31. *Id.* (emphasis added).

32. *Id.* at 539.

he was on the exclusive Committee of Five that put the Constitution into its final form.³³

In the Federalist Papers, Hamilton reiterated Morris' views on the appointment of judges stated earlier on the Convention floor — that the President's role was to nominate; the Senate's, to appoint. Hamilton expressed this interpretation through a comparison of the President's power over the selection of judges with that of the Governor of New York. Hamilton equated the vote of the Senate with the act of appointing, and concluded that because the President could not share in this act, the President's authority was less than that of the New York Governor:

The Governor *claims*, and has frequently *exercised*, the right of nomination, and is *entitled* to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale and confirm his own nomination.³⁴

Hamilton's views could be used to call into question conventional wisdom about the role of the vice president in the nominating process. Article 1, section 3 of the Constitution provides, "[t]he Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." In both the Haynsworth and Carswell matters, it was widely assumed that if there was a tie, Vice President Agnew would exercise his authority under this section of the Constitution and cast the vote that would confirm the nomination. Only Senator Bayh of Indiana was prepared to challenge this assumption.

Article 1, section 3 does not make an exception to the tie-breaking power of the Vice President for votes on Supreme Court nominations. No tie vote has ever occurred in the United States Senate on the confirmation of a Supreme Court nominee, so no precedent exists.³⁵ But the language of the Constitution seems clear.

Venturing beyond the language, however, one can find evidence that the framers might not have intended the result that a literal reading of the Constitution could have produced in 1970. As noted, Hamilton believed that a tie vote would defeat the president's nominee.³⁶ His view negates the idea of vice presidential tie-breaking. Further, the strong vote in the Convention against Madison's proposal that a majority of Senators be required to reject a President's nominee indicates the framers' intent that a positive action by the members of the Senate be required to nominate. Most persuasive is the thrust of all the debates and votes on Supreme Court nominations, in the direction of giving the Senate, not the President, the last word. In the

33. *Id.* at 590 n.3.

34. THE FEDERALIST No. 69 (A. Hamilton).

35. The Senate's Parliamentarian has informally expressed the view that the Vice President could cast his vote in the case of a tie over a Supreme Court nominee.

36. See text accompanying note 34 *supra*.

modern political context — where the Vice President is the President's man — the exercise of the tie-breaking authority would reinstate the very executive power the framers sought to curb.³⁷

V.

This constitutional history should be kept in mind when reading *Decision*, Richard Harris' panoramic account of the factors that motivated the rejection of the Carswell nomination,³⁸ lest one get the impression that what the Senate did was beyond the call of duty.

Not that there were no heroes. With Carswell coming on the heels of a difficult, protracted effort that blocked the Haynsworth nomination, Senators were reluctant to fight again. With boldness, perseverance and an admirable capacity for hard work, Senator Bayh proved equal to the task. And deservedly, Bayh is portrayed by Harris to be, above all others, the conquering hero.

There were other paladins as well. Senator Tydings of Maryland was the first to assume responsibility for organizing the opposition and he alone carried this burden during the early and most politically sensitive stages of the effort. Later Senators Bayh, Brooke of Massachusetts and Javits of New York joined in. But for Tydings, Carswell most likely would have been confirmed shortly after the Judiciary Committee hearings. Senator Gore of Tennessee had the courage to oppose the nomination, knowing that his decision meant almost certain political suicide. His will be a special place in our pantheon for political heroes. And so too did the votes of Senators Spong of Virginia, Cook of Kentucky and Fulbright of Arkansas reflect an extra element of political courage.

Many other Senators also contributed to the effort, mostly by participating in an extended debate designed to gain time to convince still others to join the opposition. But ironically, as influential as any other factor in Carswell's defeat was the unimaginative, crude and bungling manner in which his proponents managed his case. Harris suggests that this "flailing incompetence" was perhaps the central cause of Carswell's downfall. Assistant Attorney General Rehnquist set the tone. About three weeks after the nomination he asserted in a letter to the editor of the *Washington Post* that to oppose Carswell was to be for such unsavory, un-American objectives as a "further expansion of the constitutional rights of criminal defendants, pornographers and of demonstrators."³⁹ Rehnquist's outlandish attempt to tie Carswell's opponents to unpopular groups — not to mention the very troubling implication that as Assistant Attorney General he thought that persons within these categories were not entitled to constitutional safeguards — only angered those in the Senate whom he was trying to convince.

37. As adopted by the Convention, the Constitution provided for separate election of the President and Vice President. Though the Vice Presidents selected under the original language of article 2, section 1 were in no sense the "President's men," they were still in the executive branch, not the legislative.

38. DECISION was first serialized in THE NEW YORKER.

39. The *Washington Post*, Feb. 14, 1970, § A, at 14.

Rehnquist's letter represents one of the few noteworthy matters that was by-passed in Harris' account.

Harris did not overlook Senator Hruska of Nebraska's classic, nationally televised blunder about seating Carswell because mediocrity was entitled to a little representation. Among those in the middle of the Carswell imbroglio, it is widely agreed that Hruska's comment may well have constituted the fatal blow to Carswell's chances. Harris has little admiration for Hruska — in an earlier work, Harris described Hruska as "a man who has apparently long lived with the harrowing fear that somewhere someone may be helping the helpless"⁴⁰ — and one imagines that Harris must have taken special pleasure in recounting this episode.

Another mistake made by proponents of the nomination was the President's attempt to boost the chances of his nominee by deprecating the role of the Senate in the appointment process. A Senate of sheep is what the President wanted. But his Saxbe letter produced more boos than baahs. Harris reports that "the reaction among Senators was uniform indignation." Illustrative was Senator Packwood of Oregon's sarcastic observation that "[t]he Senate doesn't like to do very much, but it doesn't like to be told that it doesn't have the right to do very much." More tersely, Senator Brooke called the President's letter "shameful." But most significantly, according to Harris, the President's letter turned around some Senators, such as Margaret Chase Smith of Maine, who had been inclined to support the nomination.

By and large, however, credit for Carswell's defeat belongs more to those outside of government than within. Indeed, perhaps no contemporary event reveals so well the difference that private individuals can make. Harris makes this point well. A reporter for a television station in Jacksonville, Florida, searching the files of a defunct newspaper of a small town in Georgia, uncovered Carswell's infamous 1948 speech in which he said, "I yield to no man as a fellow candidate, or as a fellow citizen, in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed." The FBI, which investigated the nominee's background, failed to discover his attitude on race. A member of a privately funded civil rights research project in Washington, D.C., travelled to Tallahassee and found that Carswell, while serving as a United States Attorney, had helped to change a public golf course to a private golf course to avoid integration. A young lawyer in the Justice Department, jeopardizing his professional livelihood, called Senator Tydings' office and volunteered the information — Carswell's open hostility from the bench toward a 1964 drive to register black voters and toward the civil rights lawyers who supported this effort — that motivated Tydings actively to oppose the nomination. One phone call from Tydings' office brought Professor Leroy Clark to the Judiciary Committee hearings where he dramatically testified about the perils undertaken by civil rights lawyers in Carswell's court.

40. R. HARRIS, *THE FEAR OF CRIME* 30 (1968).

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. . . . 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. . . . Judge Carswell was the most hostile Federal District Court Judge I have ever appeared before with respect to civil rights matters.⁴¹

A professor at Rutgers Law School stepped forward and organized a nationwide law school lobbying effort against the nomination and coordinated his efforts with Senate staffs. A group of students at Columbia Law School studied Carswell's public decisions and found that nearly sixty percent were reversed, a reversal rate nearly double the average of the other district court judges in the Fifth Circuit. After Attorney General Mitchell claimed that the study was fragmentary, the students undertook a monumental study, covering some 15,000 cases, which showed that of the sixty-seven judges in the Circuit, only six were reversed more often than Judge Carswell, and that the longer Carswell had been on the bench the more often he had been reversed.

Added to this was the opinion of Dean Pollock of Yale that Carswell had "more slender credentials than any nominee for the Supreme Court put forth in this century,"⁴² the nationwide ground swell of opposition from the legal community, the reluctance of some of the most respected judges in the Fifth Circuit to endorse their own colleague and the evidence suggesting that Carswell sought deliberately to deceive the Senate Judiciary Committee regarding his role in establishing a segregated golf course. Together, this made a witches' brew that should have soured the palate of every Senator.

Yet, notwithstanding the strength of the case against confirmation, few in the Senate thought that the nomination could be blocked. And, indeed, Carswell came within three votes of obtaining confirmation. That forty-five Senators voted to put Carswell on the Court is enough to make one shudder. The fact that a narrow majority in the Senate lived up to their constitutional responsibility to refuse to confirm a bad nomination should not prompt the throwing of garlands. Too many in the Senate do not demand enough of themselves, because they have learned that we, the electorate, do not demand enough of the Senate.

The Carswell story is well behind us now. And with the help of Harris' chronicle, one may assess its significance beyond keeping one man off the Court. In this regard, Senator John Sherman Cooper of Kentucky has observed that the manner in which the Senate conducted itself during the Carswell proceedings "showed the people, including the people in Congress, what the Supreme Court should be

41. 116 CONG. REC. 8652 (1970).

42. SENATE COMM. ON THE JUDICIARY, NOMINATION OF G. HARROLD CARSWELL, S. EXEC. REP. NO. 14, 91st Cong., 2d Sess. 37 (1970).

and what the Senate could be.”⁴³ What the Senate could be is a body of independent, strong-willed legislators who are unwilling to play make-believe with their constitutional responsibilities. Most of the Senate did not accept the notion that their constitutional responsibility for selecting a Supreme Court Justice was less than the President’s. And for the good of the Senate and the Court, let us hope that this is not forgotten.

On the day that Carswell was defeated, those who worked in the opposition were exhilarated. There was a feeling that the Senate had done something extraordinary. However, beyond keeping Carswell off the Court, the importance of the event well might be that it represented a step toward the time when it will be extraordinary for a Carswell not to be rejected — or to be nominated in the first place.

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43. DECISION at 210.

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