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THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY AND PRESIDENTIAL NOMINATIONS TO THE SUPREME COURT, 1965-1971: A STUDY OF ROLE AND FUNCTION OF A LEGISLATIVE SUBSYSTEM

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THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY AND PRESIDENTIAL NOMINATIONS TO THE SUPREME COURT, 1965-1971: A STUDY OF ROLE AND FUNCTION OF A LEGISLATIVE SUBSYSTEM

CHAPTER ONE

THE SENATE COMMITTEE ON THE JUDICIARY: PRELIMINARY CONSIDERATIONS

I. PERCEPTIONS OF THE IMPORTANCE OF THE SELECTION OF JUSTICES

The collective voices of the Justices of the Supreme Court of the United States, making themselves heard by means of key Court decisions, have proved to be determinative with regard to varied aspects of the political, economic, social, and personal lives of citizens. Such an assumption underlies the importance that is attached to the process of selection of the Justices for the Court. Walter Clark, an early twentieth-century Chief Justice of North Carolina, stated the matter in classic form: "If five lawyers can negative the will of 100,000,000 men (now more than 200,000,000), then the art of government is reduced to the selection of those five lawyers."[1] While Clark's

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[1]Quoted by C. A. Beard, The Supreme Court and the Constitution (Englewood Cliffs, N. J.: Prentice-Hall, Inc., A Spectrum Book, 1962), p. 41.

evaluation may properly be considered both an overstatement and an oversimplification, it does serve to bring into focus a key phase of the American political process, and his view appears to be consistent with present-day feeling about the selection process as well as the performance of the Court itself. Seeing the need for the Court "to be a strong force in the vital center that provides cohesion for a democratic society," Philip B. Kurland of the University of Chicago Law School has concluded that whether it will be able to do so will depend largely on its personnel, and "its personnel will depend largely upon a recognition by the President and the Senate of the importance of choosing Justices . . . by appropriate standards."[2]

The Senate Judiciary Committee functions primarily in relation to the judicial selection process as a vehicle through which the Senate institutionalizes its advise-and-consent function. In much the same manner as the Senate routes its legislative tasks through the hands of standing committees, it also channels nominations to committees. The Judiciary Committee performs in a manner similar to that of other committees dealing with Executive appointments, but with a significant difference. Whereas, for example, the Committee on the Armed Services processes key nominations in the Department of Defense, or the Committee on Foreign Relations those to the diplomatic corps, the Judiciary Committee handles nominations to an entire branch of government, that is, the complete Federal judicial system.

The Committee on the Judiciary of the United States Senate from

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[2]Philip B. Kurland, Politics, the Constitution, and the Warren Court (Chicago: The University of Chicago Press, 1970), pp. xxiii, xxv.

time to time has become the crossroads of action in the process of selection of Justices. In view of the duty of the Senate to perform its function of advice and consent with reference to such appointments, it becomes the duty of the Judiciary Committee to study the nominations, to conduct hearings, and to make reports to the parent chamber with recommendations either for or against confirmation of the appointments. Members of the Committee, adjudging the selection function to be of crucial importance, have appeared to be especially aware of their own potential for influencing the long range impact of Court decisions through screening presidential nominations to the Court. Particularly against the background of the development of the principle of judicial supremacy in American political life, appointments to the Supreme Court are understandably viewed as extremely critical in their impact on the operation of the system as a whole.

A prominent feature of the Committee's handling of nominations to the Supreme Court in contemporary times is an overriding concern with the judicial philosophy of the prospective Justices. Consequently, the philosophical predispositions of the nominees have received very close attention from various members of the Committee during the hearings. Members who questioned nominees at length typically did so in such form that it indicated a desire to ascertain clearly their general philosophical attitudes, especially with reference to their views of interpretation of the Constitution, believing that their ideological predispositions inevitably would be reflected in national policy. The Committee chairman, Senator James O. Eastland, probing Judge Harry A. Blackmun's attitude toward the Constitution, manifested this kind of concern when he asked:

> Do you think it proper for a Justice of the Supreme Court in interpreting the Constitution and the laws of

> the United States to take into account his own personal idea of what constitutes enlightened social, economic, and political policy?[3]

Senator Sam J. Ervin, Jr., of North Carolina, expressing a concern for the "highest judicial attribute, judicial self-restraint," elicited from Judge Blackmun an assent to the idea that the Founding Fathers in framing the Constitution "intended what they said." Blackmun further affirmed that such an assumption was the "starting point of constitutional interpretation and construction."[4] Among the Senators evidencing an equal (if opposite) concern for an open and progressive approach to constitutional interpretation and judicial performance was Senator Philip A. Hart of Michigan, who drew from Blackmun the view that the very nature of the work of the Supreme Court required of the Justices some interpretation beyond the words of the Constitution, which requires an understanding of the contemporary society which gives rise to the concrete problem that is presented.[5] Senator Edward M. Kennedy of Massachusetts, seeking to mitigate the nominee's commitment to "strict construction," suggested that Blackmun would not attempt to represent any philosophical approach, but would only be representing his own best judgment in terms of the particular factual situation. To this suggestion Blackmun agreed.[6]

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[3]U. S. Congress. Senate. Committee on the Judiciary, Ninety-first Congress, Second Session. Hearings before the Judiciary Committee on the Nomination of Harry A. Blackmun As Associate Justice of the U. S. Supreme Court (Washington: U. S. Government Printing Office, 1970), p. 33. (Hereinafter cited as Blackmun Hearings).

[4]Ibid.

[5]Ibid., p. 35.

[6]Ibid., p. 40.

The overriding concern with "judicial philosophy", especially by the "conservative" wing of the Judiciary Committee, not only was expressed by Senator John L. McClellan of Arkansas, but he also stated a rationale of that concern. He declared his disappointment with a number of Supreme Court decisions that he felt were based on unsound interpretation of the Constitution and ill-informed views of public interest. He insisted to Solicitor General Thurgood Marshall, during the hearings on his nomination to the Court, that it was indispensable to get a statement of the philosophical views of the nominee in advance of confirmation because that mistakes had been made in the past through failure to do so.[7] Senator McClellan carried through with the same style of questioning and propounding the doctrine of "judicial restraint" through all of the hearings from Thurgood Marshall (1967) to William H. Rehnquist (1971).[8]

II. AN ARENA FOR CONTENDING IDEOLOGIES

A majority of the currently sitting Justices came to the Court during the period 1965-1971, a relatively short time span. Inasmuch as the Court's functioning during the preceding decade was considered to have been "activist" rather than "restrained," a high degree of interest

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[7] U. S. Congress. Senate. Committee on the Judiciary, Ninetieth Congress, First Session. Hearings before the Committee on the Judiciary on the Nomination of Thurgood Marshall as Associate Justice of the U. S. Supreme Court (Washington: U. S. Government Printing Office, 1967), p. 14. (Hereinafter cited as Marshall Hearings.)

[8] U. S. Congress. Senate. Committee on the Judiciary, Ninety-second Congress, First Session. Hearings before the Committee on the Judiciary on the Nominations of William H. Rehnquist and Lewis F. Powell, Jr., as Associate Justices of the U. S. Supreme Court (Washington: U. S. Government Printing Office, 1971), p. 18. (Hereinafter cited as Rehnquist and Powell Hearings.)

accompanied the nomination of each of the new Justices.[9] It fell to the Senate Judiciary Committee to consider ten nominations to the Court, four submitted by President Lyndon B. Johnson and six by President Richard M. Nixon. The Committee, after conducting hearings on all of the Johnson nominations, recommended approval of three--Abe Fortas and Thurgood Marshall as Associate Justices, and, later, Abe Fortas for Chief Justice. Eventually, on the request of Fortas, President Johnson withdrew Fortas' name from consideration for Chief Justice. Since Chief Justice Earl Warren's retirement was intended to coincide with the qualifying of his successor, a vacancy on the Court did not materialize immediately. Consequently, Johnson's fourth nomination, Homer Thornberry for Associate Justice, lapsed without formal action by the Judiciary Committee or the full Senate.

President Nixon, during his first three years in office, had occasion to fill four vacancies on the Court. Inasmuch as the Senate rejected two of his choices outright, Nixon made altogether six nominations. All six received favorable recommendations from a majority of the Judiciary Committee. The Senate confirmed the nominations of Warren Earl Burger as Chief Justice and Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist, but rejected Clement F. Haynsworth, Jr., and G. Harrold Carswell as Associate Justices.

The nominations submitted by President Johnson were generally in line with the "liberal" trends evidenced in both the executive and judicial branches of the period. Those of President Nixon were in accord with his

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[9]William F. Swindler, "The Supreme Court, the President and Congress," International and Comparative Law Quarterly, 19:678, 685-687 (October 1970).

announced intention to nominate persons with "strict constructionist" views of the Constitution,[10] and they also coincided with his so-called "Southern Strategy" to gain or retain support for his reelection to the Presidency in 1972.[11]

An unusual degree of controversy accompanied some of the nominations made during the period 1965-1971. Strong opposition was offered to the appointment of Fortas as Chief Justice and of Marshall, Haynsworth, Carswell, and Rehnquist as Associate Justices. The appointments of Burger as Chief Justice and Fortas, Blackmun, and Powell as Associate Justices were relatively free of controversy. Conflict was perhaps inevitable in view of existing strong competing views of the role and performance of the Court as presided over by Chief Justice Warren. Opposing theories of "judicial activism" and "judicial restraint" were critically examined.[12] Criticism of the Marshall and Fortas nominations were framed in terms of the threat to the principle of separation of powers, the judicial invasion of social and political areas that the Supreme Court had avoided theretofore, and the "permissiveness" of the Court with regard to Communists and persons charged with criminal actions.[13] Criticisms of the Haynsworth, Carswell, and Rehnquist nominations were advanced on the grounds of conflict

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[10] New York Times, October 3, 1968, p. 1.

[11] "If It Is McGovern vs. Nixon: Parties' Strategy State by State," U. S. News and World Report, July 3, 1972, pp. 14-17.

[12] Marshall Hearings, pp. 155-158. These doctrines were reviewed thoroughly by Senator Sam Ervin, North Carolina.

[13] Criticisms made by Senators in debate were reflected in many editorials: Congressional Record 114:25435 (August 2, 1968) and many similar instances.

of interest, lack of judicial qualifications, questionable ethics, and racist attitudes.[14] Both the Committee phase and the Senate phase of the selection process saw Senators taking sides which reflected fundamental ideological differences.

Sharp sensitivity to the ideological factor as a prime consideration in the Executive nominations to the Court became very pronounced in connection with the selection of a successor to Chief Justice Earl Warren. Committee members evidenced a conviction that the judicial philosophy of appointees could have profound impact on national life. Warren's retirement announcement in June 1968 specified that the retirement would become effective at such time as a successor should be approved.[15] Opponents of the Fortas nomination for Chief Justice were not slow to charge that the Warren retirement was contrived and timed so that President Johnson, before leaving office, could nominate a successor to Warren whose views would be ideologically compatible with those of Warren and Johnson. Conservative legislators[16] and editors[17] demanded that Johnson forego naming a new Chief Justice. The explicit rationale was that a successor President might well hold different ideological views from those of Johnson and Warren. That legislators and editors should make such a direct connection between judicial ideology and judicial retirement is not unique. Schmidhauser and Berg have

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[14] Congressional Record 115:29234 (October 8, 1969). The issues were brought up repeatedly also in hearings before the Committee.

[15] New York Times, June 22, 1968, p. 1.

[16] E.g., Senator Strom Thurmond, Congressional Record 114:18796 (June 26, 1968).

[17] E.g., The Shreveport (La.) Times, June 27, 1968, p. 4.

described a sense of ideological mission that historically has typified the outlook of most Justices of the U. S. Supreme Court:

> Aside from . . . a handful of justices who found the Court too confining, most members of the Supreme Court were impelled by a strong sense of the ideological importance of their position to remain active in service as long as possible . . . In spite of the ravages of age, many judges remained doggedly on duty because they were determined to fulfill a particular ideological mission. . . . Those judges who feared that the President would nominate ideologically unsuitable persons usually sought to remain on the Court until a more acceptable appointing authority appeared on the scene.[18]

This attitude was to be found among the less able judges as well as among their abler colleagues, while those who reached an advanced age convinced that the President would appoint an ideologically sound successor were content to resign or retire.[19] The ideologically conservative members of the Senate Judiciary Committee placed Chief Justice Warren's contingent retirement announcement in the latter category.

The years of greatest turbulence, 1968-1970, saw the processing of the Fortas (for Chief Justice), Haynsworth, and Carswell nominations. In 1970 ten of the sixteen members of the 1965 Committee were still assigned and sitting. An eleventh member, Senator Strom Thurmond, joined the Committee as a Republican in 1967 and served thereafter, being actively involved in the processing of all the controversial nominations. During the stormiest period, therefore, membership on the Committee was approxi-

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[18]John R. Schmidhauser and Larry L. Berg, The Supreme Court and Congress: Conflict and Interaction, 1945-1968 (New York: The Free Press, 1972), pp. 71-72. These authors based their observations on an exhaustive study by Charles Fairman, "The Retirement of Federal Judges," Harvard Law Review 51:397-443 (1937-1938).

[19]Schmidhauser and Berg, The Supreme Court and Congress, pp. 73-74.

mately seventy percent constant. "Transient" members (Senator Jacob Javits, New York, 89th Congress, and Senator George Smathers, Florida, 90th Congress) tended not to be actively engaged in the hotly contested nominations. Senator Robert P. Griffin of Michigan did not join the Committee until 1969, but he was actively involved in all nominations beginning with Fortas in 1968. Departures from the Committee (Senator Olin D. Johnston, South Carolina, by death, 1965) and arrivals (Senators Edward J. Gurney, Florida, and John V. Tunney, California, both in 1971)[20] did not materially affect the ultimate decisions of either the Committee or the full Senate. Possibly the most significant change was due to the death of Senator Everett M. Dirksen in 1969 and his replacement as Senate Minority Leader by Senator Hugh Scott, who was already on the Committee but as a relatively junior minority member.

During the period embraced by this research the Committee on the Judiciary became an arena of contending ideologies. Membership on the Committee is attractive not only to Senators in general, but it seems to be particularly attractive to those with relatively strong ideological inclinations. Donald R. Matthews' ranking and classification of Senate committees in the categories of "top," "interest," and "pork" committees placed the Judiciary Committee sixth among Senate committees overall and second among the "interest" committees.[21] Other analyses of committee

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[20]Committee membership is reported from year to year in the Congressional Directory (Washington: U. S. Government Printing Office).

[21]Donald R. Matthews, U. S. Senators and Their World (New York: Random House, A Vintage Book, 1960), pp. 149, 154. Matthews' rankings are based on preferences in committee assignments as indicated by inter-committee transfers.

attractiveness also rate the Judiciary Committee relatively high.[22] The attractiveness of the Committee for Senators with strong ideological orientations may be readily understood by reference to the areas of jurisdiction of the Committee as defined in the Rules of the Senate. Included in its jurisdiction are the following areas which might readily spark ideological responses: judicial proceedings, criminal and civil; constitutional amendments; federal courts and judges; protection of trade and commerce against unlawful restraints and monopolies; civil liberties; and apportionment of Representatives.[23]

An ideological spectrum of Committee members is easily identifiable on the basis of ratings by various groups and sources. The Americans for Democratic Action rates legislators annually from the perspective of a "liberal" philosophy, while the Americans for Constitutional Action do the same from the "conservative" viewpoint. The Congressional Quarterly voting studies includes a rating based on support or opposition to the "conservative coalition" in Congress. For the period 1965-1971 these three sources produced highly similar identifications among members of the Senate Judiciary Committee. For comparative purposes Table 1 reproduces the parallel ratings by the Americans for Constitutional Action (ACA) and the Congressional Quarterly voting studies for the 89th and 91st Congresses. A preliminary division based on averages of the ratings shown

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[22]E.g., William L. Morrow, Congressional Committees (New York: Charles Scribner's Sons, 1969), p. 42.

[23]U. S. Congress. Senate. Committee on Rules and Administration, Ninety-second Congress, First Session. "Rule xxv, Sec. 1(1)," Senate Manual Containing the Standing Rules, Orders, Laws and Resolutions Affecting the Business of the U. S. Senate (Washington: U. S. Government Printing Office, 1971).

TABLE 1

IDEOLOGICAL SPECTRUM OF SENATE JUDICIARY COMMITTEE

	89th Congress		91st Congress	
	CQ	ACA	CQ	ACA
Hruska	84	100	92	87
Thurmond	--	--	86	96
Eastland	93	71	70	88
Ervin	93	68	87	78
McClellan	75	65	83	79
Dirksen	77	85	--	--
Griffin	75	67	65	74
Fong	64	65	50	39
Smathers	34	41	--	--
Scott	38	35	61	60
Cook	--	--	59	67
Byrd	--	--	50	50
Burdick	11	23	25	22
Dodd	08	21	24	21
Mathias	--	--	24	13
Javits	11	15	--	--
Long (Mo.)	15	04	--	--
Bayh	10	11	03	11
Kennedy	11	08	03	05
Hart	05	00	04	09
Tydings	03	00	07	12

Source: Congressional Quarterly Almanac, Vol. XXII, 1966, pp. 1022, 1411; Vol. XXIV, 1969, p. 832; Vol. XXVI, 1970, p. 1147.

in Table 1 might well be made as follows:

"conservative"	-	70% to 100%
"middle-of-the-road"	-	30% to 69%
"liberal"	-	0% to 29%

Voting patterns in the non-unanimous Committee actions correspond very closely to these identifications.[24] A cluster of "conservative" Senators invariably voted together, namely, Eastland, Ervin, McClellan, and Thurmond, opposing the nominations of Marshall and Fortas (1968) and supporting Haynsworth, Carswell, and Rehnquist. In the later cases this group was joined by Hruska, although the controlling factor in his voting quite well may have been rigid adherence to a norm of support of presidential prerogative. A cluster of "liberal" Senators likewise invariably voted together, namely, Bayh, Kennedy, Hart, and Tydings. A third cluster of four Senators--Dodd, Hruska, Scott, and Cook (1969 and onward)--invariably voted in the Committee to approve presidential choices. The last group spanned the ideological spectrum from very "conservative" (Hruska) to quite "liberal" (Dodd), with Scott and Cook falling into the "middle-of-the-road" category. Senators voting sometimes with the liberal and sometimes with the conservative group included Burdick, a "liberal," and Fong of the "middle-of-the-road" group. Groups formed on the basis of the foregoing ideological identifications proved to be more stable than groups identified according to political party.[25]

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[24]See Appendix I for a complete record of votes cast in the Committee on all nominations to the Court 1965-1971.

[25]See Appendix II for voting behavior according to political party identification.

Passage of time (1965-1971) saw an intensification of ideological voting according to the analyses of both the Americans for Constitutional Action and the Congressional Quarterly voting studies. The conservative group tended to vote even more conservatively, and the middle-of-the-road group tended to desert the middle of the road, moving nearer to one or the other of the strongly ideological groups. The liberal group remained fairly constant in ideological stance.

Overall a recognizable conservative shift appears to have occurred in the Committee as a result of changes in membership. Conservative Republican Strom Thurmond (ACA rating 96%) replaced liberal Republican Jacob Javits (ACA rating 15%), and "middle-of-the-road" Democrat Robert Byrd (ACA rating 31%) replaced liberal Democrat Edward V. Long (ACA rating 4%). Other additions to the membership affecting the moderately conservative shift were Republicans Marlow Cook (ACA rating 67%) and Robert P. Griffin (ACA rating 74%). An important change boosting the liberal group occurred when Republican Charles McC. Mathias (ACA rating 7%) succeeded Republican Everett M. Dirksen (ACA rating 87%). Additions to the Committee in 1971 pretty well offset each other when liberal Democrat John V. Tunney (CQ rating 0%) and conservative Republican Edward J. Gurney (CQ rating 82%) joined the body.

III. LEADERSHIP ROLES

Common analysis of leadership roles in Congressional committees identifies the committee chairman as the primary locus of power and control. Rigid or loose control will greatly depend upon the views and abilities of the chairman, the prestige he enjoys among his colleagues on

the committee, the degree of consensus normally achieved within the committee, and the degree of autonomy permitted in subcommittees.[26] The leadership performance of Senator James O. Eastland, Chairman of the Senate Judiciary Committee, has taken on a dual nature. His interest has centered on select categories of subject matter falling within the jurisdiction of his Committee. In regard to two specific areas--civil rights and judicial selection--he has asserted his prerogative by retaining control of such business, processing these items under his own chairmanship in the full Committee, not entrusting them to subcommittees. Also he has retained the chairmanship of the Subcommittee on Internal Security, the Senate's counterpart of the House Committee on Internal Security (formerly known as the House Committee on Un-American Activities). He has also maintained a seat as a senior majority member on the Subcommittee on Constitutional Amendments (Senator Birch Bayh, Chairman) and the Subcommittee on Criminal Law and Procedures (Senator John L. McClellan, Chairman).[27]

Committee leadership and control are affected to an indeterminate extent by the presence of other "leaders" on the committee. The role of the Judiciary Committee's ranking minority member, Senator Roman Hruska, has posed no particular challenge to the leadership of Senator Eastland in the matter of judicial selection. On the contrary, his performance has been on the whole supportive of Eastland's position. Of the

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[26]Malcolm E. Jewell and Samuel C. Patterson, The Legislative Process in the United States (New York: Random House, 1966), pp. 226-227; also, Morrow, Congressional Committees, p. 74.

[27]1972 Congressional Staff Directory (Washington: The Congressional Staff Directory, 1972), pp. 165-169.

nine Committee votes (from Fortas, 1965, to Rehnquist, 1971) Hruska has voted with Eastland on all except two, namely, the votes on Thurgood Marshall for Associate Justice and Abe Fortas for Chief Justice. On these two nominees Eastland opposed the presidential choices while Hruska supported the President, as he did on all other nominations to the Court.[28]

Leadership in the Committee is shared to some extent with other key party leaders who are members of the Committee. For many years the Senate Minority Leader has been regularly a member of the Judiciary Committee. Until his death in 1969 Senator Everett M. Dirksen occupied a seat on the Committee, and since Dirksen's death Senator Hugh Scott, already a member of the Committee, has served as Minority Leader. The Committee membership has also included the Senate Majority Whip since 1969--Senator Edward M. Kennedy, 1969-1970, and Senator Robert C. Byrd, 1971 and after. Senator Robert P. Griffin joined the Committee in 1969, and was also made Minority Whip the same year. Since these party leaders have held to their own particular goals and ambitions, which are only partially lodged in the life of the Judiciary Committee, it may be hypothesized that the leadership influence of the Chairman has been somewhat diluted and that Committee integration has suffered commensurately. Integration has been defined as

> . . . the degree to which there is a working together or mutual support among roles and subgroups. Conversely, it is also defined as the degree to which a committee is able to minimize conflict among the roles and

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[28]Votes in the Committee were reported in all cases by the Congressional Quarterly Almanac from year to year. The almost parallel voting of Senators Hruska and Eastland was gleaned from the various volumes for the years 1965-1971.

> subgroups by heading off or resolving the conflicts that arise.[29]

Internal conflicts in the Senate Judiciary Committee seem not to be primarily conflicts among leaders as much as it has been between ideological groupings. The operation of the Committee in relation to the process of judicial selection indicates the existence of subgroups and competing roles that clearly cluster around ideological attitudes. Consequently, Committee integration tends to break down in the judicial selection process. The attractiveness of the Committee is partly due to its providing an arena for advancing an ideological view and for combating the opposing view. The conciliator can expect to find himself in a difficult situation, becoming a target rather than effectively functioning as a conciliator.

Overall the Committee touched upon a number of significant issues in processing the Supreme Court nominations of Presidents Johnson and Nixon. Should a "lame duck" President nominate Justices to fill vacancies, or should such vacancies be left for a successor President to fill? To what extent are purely partisan or political considerations acceptable or unacceptable as legitimate factors influencing the selection process? In becoming a battleground for contending ideologies, the role and function performance of the Committee may have undergone a profound shift. The question may be legitimately raised whether the Committee genuinely assists the parent chamber in the performance of its larger advise-and-consent duty. The Committee wrestled vigorously with the problems related

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[29]Richard F. Fenno, Jr., "The House Appropriations Committee as a Political System: The Problem of Integration," American Political Science Review 56:310 (June 1962).

to evaluating nominees, but thus far it is questionable whether it has been able to establish universally acceptable norms for governing its own procedure, and whether it has been able to define generally acceptable qualitative criteria for evaluation of nominees. Further investigation and analysis will be necessary to determine whether the Committee has made a contribution toward a greater degree of rationality to the governmental process or whether it may become a quagmire of irrationality in which an important political function may repeatedly become bogged down.

CHAPTER TWO

THE SENATE JUDICIARY COMMITTEE AND EXECUTIVE COMMUNICATIONS AND INTERACTIONS

The United States Senate's performance of its constitutionally designated advice-and-consent duty as a device for participating in the Executive exercise of the treaty-making and appointment powers has developed its own historical peculiarities. George H. Haynes' classic description of President George Washington's primeval attempt to obtain the advice and consent of the Senate on a treaty concludes with the analysis that the two institutions of Senate and Presidency have indeed achieved no standard means for prior consultation and advice at the pre-negotiation or pre-nomination stages of the two joint functions.[1]

Although under the provisions of the Constitution primary initiative in the selection of Justices to the Supreme Court belongs to the President and only an advice-and-consent role to the Senate (or a senatorial veto), during the twentieth century the Presidents have found in the Senate Judiciary Committee a ready-made agency of initial support for nominations. During the period 1895-1971 the Committee

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[1]George H. Haynes, The Senate of the United States, Vol. 2, (Boston: Houghton Mifflin Co., 1938), p. 62.

majority recommended favorable consideration on 51 of 52 nominations reported to the Senate.[2] Only Judge John J. Parker (1930) received an unfavorable report by an 8-9 vote in the Committee.[3] While the record reflects the fact that a majority of the Committee voted favorably on 98% of presidential nominations to the High Court during this 76-year period, recent instances involving nominations that proved to be quite controversial have seen substantial minority votes cast in committee. The non-unanimous Committee actions on nominations during the period 1965-1971 were reported with almost one-third of the Committee votes cast in dissent. Table 2 lists these actions indicating partisan support and opposition as well as the overall division within the Committee.

TABLE 2

SENATE JUDICIARY COMMITTEE APPROVALS OF NOMINATIONS TO THE SUPREME COURT BY LESS-THAN-UNANIMOUS VOTES, 1965-1971

Year	President	Nominee	Support		Opposition		Overall Division
			Dem.	Repub.	Dem.	Repub.	
1967	Johnson	Marshall	7	4	4	1	11-5
1968	Johnson	Fortas	7	3	3	3	10-6
1969	Nixon	Haynsworth	5	5	5	2	10-7
1970	Nixon	Carswell	6	7	4	0	13-4
1971	Nixon	Rehnquist	5	7	4	0	12-4

Source: Congressional Quarterly Almanac for years involved.

[2]The 1968 nomination of Judge Homer Thornberry is not included.

[3]Joseph Harris, The Advice and Consent of the Senate (Berkeley, Calif.: University of California Press, 1953), p. 129.

I. PRE-NOMINATION COMMUNICATIONS AND INTERACTIONS

1. Methods Non-standardized. The pre-nomination phase of the selection of Justices for the United States Supreme Court has included communications and interactions between the Executive branch (either the White House directly or the Department of Justice) and the Senate Judiciary Committee that have varied greatly in manner and extent. With reference to their performance in the pre-nomination stage of selection of judges for courts inferior to the Supreme Court the initiative of Senators is well known, and in this connection the custom of "senatorial courtesy" has become well established. The term "senatorial courtesy" implies that in practice a method of pre-nomination advice has evolved as an influential aspect of the appointment process as it applies especially to the Federal District Courts and to certain administrative posts. However, with reference to the appointment of Justices to the Supreme Court no clear-cut comparable practice has developed.

The irregularities of communications and interactions at the pre-nomination stage have reflected the diverse personalities of the Presidents and Senate leaders and the basic harmony (or disharmony) prevailing at any given period. Consequently, during the past twenty years a variety of identifiable attitudes have controlled. Presidents John F. Kennedy and Lyndon B. Johnson evidently approached such appointments with a basic disregard for genuine prior consultation with the Senate, including the Judiciary Committee. Presidents Dwight D. Eisenhower and Richard M. Nixon, on the other hand, have given considerable weight to the views at least of select Senators, as well as to "outside" interests such as

the American Bar Association. President Nixon's approach seems to have taken into consideration in a distinctive fashion the political objectives of his nominations. His pursuit of the "Southern strategy" in his plans for his campaign for re-election offered an opening for more than ordinary consultation with Senators from Southern states and especially those members of the Senate Judiciary Committee upon whom he could count for support for his nominations to the Supreme Court.

2. Executive Initiative in Making Nominations. A survey of the news media of a particular selection period will reveal that suggestions come to the President from many quarters, especially if he delays his nomination even for a few days after a vacancy occurs. The Presidents all seem to have had their distinctive approaches. Presidents John F. Kennedy and Lyndon B. Johnson characteristically made their choices personally and quickly when vacancies occurred (or perhaps even prior to the vacancies). An un documented source reports that Kennedy had his advisers to prepare in advance a list of acceptable potential appointees. The list supposedly included Professor Paul Freund of Harvard Law School, Judge William H. Hastie (a black person) of the U. S. Court of Appeals, Third Circuit, Judge Walter B. Schaefer of the Illinois Supreme Court, Chief Justice Roger J. Traynor of the California Supreme Court, Deputy Attorney General Byron R. White, and Secretary of Labor Arthur J. Goldberg. The choice of White to succeed Justice Charles Whittaker was made primarily in consultation with the President's brother Attorney General Robert F. Kennedy.[4] The replacement of retiring Justice Felix

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[4]James E. Clayton, The Making of Justice: The Supreme Court in Action (New York: E. P. Dutton & Co., Inc., 1964), pp. 50-52; Harold W. Chase, Federal Judges: The Appointing Process (Minneapolis: The University of Minnesota Press, 1972), p. 51.

Frankfurter by Secretary Goldberg apparently had long been settled in the President's thinking, because the nomination was made within an hour of the time Frankfurter's letter of retirement reached the President's desk.[5] The Kennedy manner, then, was a quick personal choice, followed by communication of the nomination to the Senate, but without prior consultation with the Senate or the American Bar Association.

President Lyndon B. Johnson's personal approach to making his selections was even more pronounced than Kennedy's. Johnson did not wait for vacancies to "occur," but proceeded to create them. Without the "manipulation" approach it is entirely possible that Johnson might have had no opportunity to fill a vacancy prior to Chief Justice Warren's retirement. The subsequent developments strongly suggest that Johnson had specific nominees in mind for each of the vacancies he contrived. Having long desired to honor his old friend Abe Fortas, he presented his name to the Senate as soon as he managed to persuade Justice Arthur Goldberg to accept the appointment to the post of United States Ambassador to the United Nations. Similarly, his desire to appoint Solicitor General Thurgood Marshall to be the first black Justice to sit on the Court was made possible of fulfillment by first appointing Ramsey Clark as Attorney General. The new Attorney General's father, Associate Justice Tom C. Clark, seems to have had no ethical alternative than to accept this gentle nudge and retire from the Court at the end of its current term in order to preclude possible conflict of interest.[6] President

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[5]Arthur J. Goldberg, former Associate Justice of the U. S. Supreme Court, personal interview, June 4, 1973.

[6]New York Times, March 1, 1967, p. 1, and June 14, 1967, p. 1.

Johnson, following Chief Justice Warren's declaration of intent to retire, permitted a couple of names (Cyrus R. Vance, former Deputy Secretary of Defense, and Henry H. Fowler, Secretary of the Treasury) to be "floated" temporarily, but reportedly decided that they were too valuable in administrative posts.[7] He proceeded soon once more to honor his old friend Justice Abe Fortas by naming him for the Chief Justiceship and another old friend, Judge Homer Thornberry, to replace Fortas as Associate Justice.[8] Johnson made his choices largely on the basis of his own counsel and his own personal preferences, and then formally communicated his nominations to the Senate and to the Judiciary Committee.

In contrast to the approaches of Kennedy and Johnson, the two most recent Republican Presidents characteristically delayed their nominations for several days (or even weeks) and relied heavily on advice from various sources. President Eisenhower's approach might almost be described as "non-involvement," with the possible exception of the selection of California's Governor Earl Warren to be Chief Justice. Eisenhower delegated the task of judicial selection, including nominations to the Supreme Court, to his Attorney General.[9]

President Nixon's choice of a Chief Justice posed the small problem of choosing among many prominent men favorably and persuasively mentioned from several sources. Profiting from the troubles of Justice Abe Fortas which resulted in the withdrawal of his name from consideration

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[7]Ibid., July 1, 1968, p. 15 (quoting Time magazine).

[8]Ibid., June 27, 1968, p. 1.

[9]Chase, The Federal Judges, p. 95.

for Chief Justice and ultimately his resignation from the Court, President Nixon deliberately and publicly ruled out the nomination of a personal friend, avoiding the charge of "cronyism," or a member of his administration, especially the Department of Justice, to preclude a possible charge that the Attorney General had engineered Fortas' removal in order to obtain the post either for himself or for a member of his staff. The ultimate choice of U. S. Court of Appeals Judge Warren Earl Burger seems to have been made on the basis of close consultation between President Nixon and Attorney General John Mitchell.[10]

3. Senatorial Initiative in Suggesting Nominations. During the first Nixon administration several members of the Senate Judiciary Committee availed themselves of opportunities to propose names to the President. The President's desire to appoint a Southern "strict constructionist" (presumably Republican) having been well publicized in the 1968 presidential campaign,[11] two consequences became apparent. The field of choice was drastically narrowed (notwithstanding Attorney General John Mitchell's statement that he had a list of 150 to 160 potential nominees for the President's consideration after the Senate rejected Judge Haynsworth),[12] and Southern Senators in good standing with the President were in a particularly advantageous position to suggest candidates for the Supreme Court vacancies. The nomination of U. S. Court of Appeals Judge Clement F. Haynsworth, Jr., despite the formal sponsorship of South

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[10] New York Times, May 22, 1969, p. 1.

[11] Ibid., October 3, 1968, p. 1, and November 2, 1968, p. 1.

[12] Ibid., December 21, 1968, p. 31.

Carolina's Democratic Senator Ernest F. Hollings, was in all probability on the suggestion of Senate Judiciary Committee member Senator Strom Thurmond, South Carolina's Republican Senator to whom President Nixon was supposed to be considerably in debt politically from the 1968 presidential election.[13] Similarly, later, Florida's Republican member of the Judiciary Committee, Senator Edward J. Gurney, apparently was the key source of the nomination of U. S. Court of Appeals Judge G. Harrold Carswell.[14] Still later, Arkansas member of the Judiciary Committee, Senator John L. McClellan, was the prime source of the name of Little Rock attorney Herschel H. Friday as one of the original "front-runners" for one of the seats on the Court left vacant by the deaths of Justices John M. Harlan and Hugo Black.[15] After the rejection of Judge Carswell the President's expression of bitter disappointment also implied that he would at least temporarily abandon his effort to place a Southern judge on the Supreme Court.[16] By moving swiftly and broadening his field (i.e., to include non-Southern judges among potential nominations) the President precluded the likelihood that members of the Judiciary Committee or other Senators could advance names for his consideration in large numbers.

4. Department of Justice Initiative. Following the Senate's rejection of Haynsworth and Carswell, President Nixon reverted to the

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[13]Ibid., August 27, 1969, p. 40; also, Robert Sifley, Administrative Assistant to Senator Strom Thurmond, personal interview, June 1, 1973.

[14]New York Times, January 27, 1970, p. 1.

[15]Ibid., October 18, 1971, p. 20; Senator John L. McClellan, personal interview, June 11, 1973.

[16]New York Times, April 10, 1970, p. 1.

more traditional reliance upon the recruitment of prospects by the Attorney General. The Department of Justice became again the primary source of nominees, although Louis M. Kohlmeier, Jr., declares (but without documentation) that Chief Justice Warren Burger was the prime source of the name of U. S. Court of Appeals Judge Harry Blackmun.[17] The renewed prominence of the Department of Justice in the recruitment of Justices was a sign of a new note of caution or deliberateness in the selection process. More careful screening of personal histories of potential nominees might avoid repetition of later disclosures of points of vulnerability through investigations conducted by news media or other private groups. The Attorney General's recommendation of Judge Blackmun for the post still vacant in the spring of 1970 became a firm proposal after a thorough survey of Blackmun's judicial record and the history of his financial investments as well as his personal life and background.[18] The President himself held a personal interview with Blackmun and was well satisfied with the appraisal which the Justice Department had submitted to him.[19] The American Bar Association's Standing Committee on the Federal Judiciary evidenced a parallel caution in the preparation of its evaluation for the Senate Judiciary Committee by submitting first a preliminary evaluation which adjudged Blackmun as meeting "high standards of professional competence, temperament and integrity," but it indicated the intention

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[17]Louis M. Kohlmeier, Jr., "God Save This Honorable Court" (New York: Charles Scribner's Sons, 1972), pp. 168-169.

[18]Blackmun Hearings, pp. 7-27; see also New York Times April 16, 1970, p. 1.

[19]New York Times, April 15, 1970, p. 1.

of pursuing its investigation in greater depth in order to submit a more conclusive later report.[20] Shortly after the confirmation of Blackmun, Attorney General Mitchell, upon the urging of the American Bar Association, entered into an agreement with the Association's Standing Committee on the Federal Judiciary to submit future potential nominations to the Supreme Court for preliminary screening and evaluation by the Committee prior to public announcement of the President's final choices.[21] While the Attorney General hoped thus to assure stronger support for future nominees and to avoid the embarassment of the charge of proposing unqualified or mediocre candidates, the agreement obviously had the effect of delegating a portion of the Executive role to the American Bar Association, possibly even to the point of granting it a veto over potential nominees.

The new arrangement under which the Justice Department specifically shared with the American Bar Association its initiative in the pre-nomination phase of the selection process was put to the test in filling the vacancies left by the deaths of Associate Justices Black and Harlan in the fall of 1971. Attorney General Mitchell transmitted to the American Bar Association committee a narrowed list of six names for evaluation. However, within hours after the list had been submitted, names of the candidates were disclosed by the news media.[22] The Attorney General's immediate reaction was to announce that the arrangement between

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[20] Blackmun Hearings, p. 9.

[21] American Bar Association Journal 57:1176 (December 1971).

[22] Ibid., p. 1175; see also New York Times, October 14, 1971, p. 1.

the Justice Department and the American Bar Association for prior clearance of potential nominees was terminated forthwith.[23] Without prior consultation with either the Bar Association committee or the Senate Judiciary Committee President Nixon went on national television and announced his nomination of Lewis F. Powell, Jr., an attorney of Richmond, Virginia, and past president of the American Bar Association, and Assistant Attorney General William H. Rehnquist to fill the two vacancies.[24] The President evidently relied entirely on the Department of Justice, specifically the Attorney General and his deputy, Richard Kleindienst.[25]

II. POST-NOMINATION COMMUNICATIONS AND INTERACTIONS

If the experiences in judicial selection during the 1965-1971 period point up a single significant lesson, it probably would be that a presidential preference for filling a Supreme Court vacancy may not be able to sustain itself on the basis of presidential prestige alone. The controversial nominations of this period involved many communications and interactions between the Executive officials and the Senate Judiciary Committee. Such communications and interactions obviously would fall into two categories, namely, supportive and opposition actions. Table 3 provides a tabulation of identifiable specific communications derived from a survey of the New York Times and the records of Committee Hearings dealing with the Fortas (1968), Haynsworth, and Carswell nomina-

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[23] American Bar Association Journal 57:1175 (December 1971); also New York Times, October 21, 1971, p. 1.

[24] American Bar Association Journal 57:1175 (December 1971); also New York Times, October 22, 1971, p. 1.

[25] New York Times, October 22, 1971, p. 24.

TABLE 3

EXECUTIVE--SENATE JUDICIARY COMMITTEE COMMUNICATIONS AND INTERACTIONS (Intended to influence the outcome of Senate consideration of the nominations of Fortas (1968), Haynsworth (1969), and Carswell (1970).

Source of Communication	Number of Occasions of Communications concerning: Fortas (1968)	Haynsworth (1969)	Carswell (1970)
President (or "White House")	3	18	9
Vice-President	1	1	0
Department of Justice	5	4	4
Department of Treasury	1	0	0
Department of Defense	1	0	0
Senate Judiciary Committee			
(1) Supportive	10	31	15
(2) Opposition	15	20	20

Sources: Survey of the New York Times covering the periods concerned and the Committee Hearings dealing with the nominations surveyed.

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tions. Obviously all the communications originating with the Executive branch may be regarded as supportive of the nominations. In addition to communications reported by members of the Senate Judiciary Committee, many other Senators, individuals and groups, issued statements or took actions calculated to influence the outcome of the Committee hearings and the Senate's disposition of the nominations. The tabulations reported in Table 3 cover time spans as follows: the executive communications

tabulated include those identifiable throughout the entirety of each selection period, that is, from the date of the formal announcement of the nomination until final Senate action; the time span of the communications and actions by members of the Judiciary Committee extends only to the beginning of formal debate in the Senate on the motion to advise and consent, while statements made in formal debate on the Senate floor are not included.

1. White House Supportive Communications. President Johnson had experienced no great difficulty in obtaining both Committee and full Senate approval of his first two nominations, Abe Fortas and Thurgood Marshall, to be Associate Justices. Although Southern conservatives dragged out the hearings on Marshall their foot-dragging was done apparently with no expectation of blocking the confirmation.[26] A different kind of confrontation rapidly developed, however, when Chief Justice Earl Warren submitted to President Johnson his letter announcing his intention to retire from the Court with the effective date to be "at the pleasure" of the President. Even before Johnson announced his choice of Warren's successor widespread speculation centered upon Fortas as the President's probable first choice for the post, and such speculation immediately stimulated protest statements from several Senators. Senators Strom Thurmond of South Carolina and Hiram L. Fong of Hawaii, both Republican members of the Judiciary Committee, raised the issue of an appointment by a "lame duck" President. Meanwhile two other Republican Senators, Robert P. Griffin of Michigan and John Tower of Texas, had criticized the timing

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[26]Senators Philip Hart and James O. Eastland, personal interviews, June 1 and June 6, 1973, respectively.

of the retirement and announced that they would fight any effort by Johnson to appoint a successor to Warren, and after the Fortas nomination was announced Senator Griffin very early suggested that the nomination would be filibustered.[28] On the other hand Senator Jacob Javits of New York, formerly a Republican member of the Judiciary Committee, declared that it was Johnson's "duty" to appoint a successor in the event of Warren's retirement.[29] With the appearance of intense opposition to presidential choices, the Senate Judiciary Committee became during the period 1965-1971 a center of interaction during the post-nomination phase of each of the hotly contested nominations. Such opposition forced the Executive in each instance to endeavor to counter the attacks on his nominee and to provide support for him in the course of the Senate's deliberations.

The history of twentieth century appointments to the Court indicates that the President enjoys an initial advantage in the selection process. Prior to the Haynsworth rejection the Senate had turned down only Judge Parker in 1930. Even including the nominations of Fortas for Chief Justice and Haynsworth and Carswell for Associate Justice the Judiciary Committee has reported all nominations favorably except that of Parker. Nevertheless, President Johnson carefully phrased his announcement of Fortas' nomination, presenting him as a great jurist and public servant.[30] The President caustically commented later that

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[27] New York Times, June 23, 1968, p. 1.

[28] Ibid., June 22, 1968, p. 1, and June 27, 1968, p. 1.

[29] Ibid., June 25, 1968, p. 1.

[30] Ibid., June 27, 1968, p. 1.

some Senators who were opposing the nomination on the basis of his so-called "lame duck" status were at the same time urging him to proceed with appointments to Federal District Courts in their own states.[31] As the discussion of the nomination dragged out in the Committee Johnson pointedly and emphatically committed himself to continue to fight for the Fortas nomination. He publicly asked Majority Leader Mike Mansfield and Minority Leader Everett Dirksen (who was also the ranking Republican member of the Judiciary Committee) to act to get the nomination out of the Committee and to the Senate floor for action. He severely criticized the coalition of conservative Democrats and Republicans that were threatening to filibuster the matter, and he estimated that 60% to 70% of the people were backing his selection of Fortas for the Chief Justiceship. Johnson cited the case of the nomination of Louis D. Brandeis in 1916 as an example of one that had been tied up for months in the Judiciary Committee, yet it was eventually approved. Following up the President's statement a Department of Justice spokesman estimated that sufficient support existed in the Senate to invoke cloture successfully in the event the opposition made good its threat to filibuster the nomination.[32]

Vice-President Hubert H. Humphrey in an interview supported Majority Leader Mansfield's effort to bring the nomination out of the Committee to the Senate floor, and severely criticized the opposing coalition. He surmised that Republican presidential candidate Richard M. Nixon and South Carolina's member of the Judiciary Committee, Senator

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[31]Ibid., August 1, 1968, p. 16.

[32]Ibid., September 7, 1968, p. 1.

Strom Thurmond, may have had "some little arrangement" in mind to name a different Chief Justice after the November election.[33] President Johnson seems never to have genuinely anticipated the possibility of the defeat of the Fortas nomination, and on a backward look it appears that he may not have exerted himself as fully as he could have in order to use the full influence of his position to support Fortas.

President Richard Nixon, on the other hand, in support of both Haynsworth and Carswell came personally to the support of his candidates in many attempts to bolster their chances of Senate confirmation. He issued at least five separate statements of firm confidence in the judicial ethics and personal integrity of Haynsworth, four separate counter-attacking denials of charges by Senators opposing the nomination, and a strong letter to Senator Hugh Scott, a member of the Senate Judiciary Committee who had become the Republican Leader in the Senate after the death of Senator Dirksen. He conferred with various members of the Committee and other Senators who for several weeks were undecided about their final votes. Nixon's press secretary issued at least four supportive statements on behalf of the President during the final days of the debate on Haynsworth.[34] Vice-President Spiro T. Agnew on one occasion declared that the opposition to Haynsworth was a "tempest in a teapot" and characterized the nominee as "clean as a hound's tooth."[35]

In his support of Judge Carswell's nomination during the

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[33]Ibid., September 9, 1968, p. 40.

[34]Ibid., August 19 to November 21, 1969.

[35]Ibid., October 6, 1969, p. 27.

Judiciary Committee and Senate consideration of the selection President Nixon followed very much the same line as his support of Haynsworth. In one of his several statements he declared that he would have made the nomination even if he had known previously of Carswell's famous 1948 "white supremacy" speech while he was a candidate for the Georgia state legislature.[36] One of the President's more remarkable efforts on behalf of Judge Carswell was in reply to a letter from Republican Senator William B. Saxbe of Ohio in which Saxbe had remarked upon the "less than whole hearted" support which Nixon seemed to be giving Carswell. Nixon's reply contended that the President's appointive powers were being threatened by those Senators seeking to defeat the Carswell nomination. He expressed the view that "[I]t is the duty of the President to appoint and of the Senate to advise and consent," and charged that "those who wish to substitute their own philosophy or their own subjective judgment" for the President's choice were jeopardizing the constitutional division of powers between the legislative and executive branches of the government. He declared that the opposition was seeking to deny him "the same right of choice in naming Supreme Court Justices" which had been "freely accorded" his predecessors.[37]

Both Johnson and Nixon on occasion utilized national television to enhance the prospects of their nominees. It was at a televised news conference that Johnson first (1965) presented Abe Fortas as a nominee. After experiencing the defeats on Haynsworth and Carswell and encountering

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[36]Ibid., January 31, 1970, p. 15.

[37]Ibid., April 2, 1970, p. 1.

adverse publicity on potential candidates Herschel Friday and Mildred Lillie, Nixon decided to request prime time to present Lewis F. Powell, Jr. and William Rehnquist as his replacements for Justices Harlan and Black.[38]

2. Department of Justice Supportive Actions and Communications.

The Attorney General's office has served not only as the executive agency for screening potential nominees to the Court and for proposing acceptable candidates for the President's consideration, but after the announcement of a nomination the Justice Department has also served as the usual channel of communication with the Senate Judiciary Committee in support of the nominee. Such communication frequently is through the lower levels of administrative assistants. Aides to Senators and aides to the Attorney General or his Deputy are easily accessible to each other, and they are able to communicate more freely than officials at the higher levels. A "commitment" or comment by an administrative aide may be repudiated by a Senator with no great damage done. Meanwhile such informal communications may serve as valuable "trial balloons" or soundings on positions.[39]

During the post-nomination stage of the selection process support for the nomination comes from the Department of Justice to the Judiciary Committee in four major identifiable forms, namely, (1) introducing the nominee to members of the Committee, (2) furnishing an information summary about the nominee, (3) supplying special items of information as requested,

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[38]Presidential news conference televised by the Columbia Broadcasting System, July 29, 1965, and special telecast October 22, 1971.

[39]Malcolm Hawk, Assistant to the Deputy Attorney General, former Administrative Assistant to Senator Roman Hruska, ranking minority member of the Senate Judiciary Committee, in a personal interview, June 7, 1973.

and (4) issuing public statements calculated to influence the Senate.

Usually the nominee has been invited to Washington (if he was not already there as in the case of Judge Warren Earl Burger), and the Attorney General or his Deputy has escorted him on a series of "courtesy calls" on all members of the Senate Judiciary Committee. Such action has provided opportunity for the nominee at his relaxed best to make a favorable first impression on the individual Senator under circumstances that would entail the least amount of pressure on either the nominee or the Senator. Occasionally the Justice Department has deferred to a Senator to perform the escort service, as when Senator Ernest F. Hollings, Democrat of South Carolina, escorted Republican Judge Haynsworth. Hollings as escort suggested a non-partisan element in selection, whereas had Republican Senator Strom Thurmond performed the escort duty certain liberal members of the Judiciary Committee might have been alienated from the very start.[40] Senator Edward J. Gurney, Republican of Florida, a member of the Judiciary Committee, served as escort for Judge Carswell.[41]

The Department of Justice has also normally furnished the Committee a memorandum of basic information about the nominee (even if he was already a nationally known figure such as Secretary of Labor Arthur Goldberg), which memorandum would include a biographical summary, the record of professional and public service, information on the nominee's family and private affiliations, and evidences of scholarly productivity.[42] The report

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[40] New York Times, September 5, 1969, p. 73.

[41] Ibid., January 27, 1970, p. 1.

[42] Marshall Hearings, pp. 3-5, and others.

of the Federal Bureau of Investigation's background check traditionally was routine, but the controversial nominations of 1965-1971 catapulted this report into a status of primary importance. The FBI report normally has been considered to be a factor positively supporting the President's man, giving him a "clean bill of health" and laying to rest any possible questions about the nominee's public and private record. However, the FBI check suffered a blow to its credibility when an inquiring reporter turned up Judge Carswell's "white supremacy" speech of 1948, which item the FBI had not found. The actual management of the report between the Department of Justice and the Senate Judiciary Committee is under carefully controlled rules. The Department agent visits the Chairman of the Committee with a summary of the file in hand. The agent discusses orally specific items of information with the Chairman, but under no circumstances is any part of the file left with the Chairman.[43] The benefit of the FBI report to the Committee as a whole or to the full Senate depends upon the discretion in the first place of the agent of the Department of Justice and in the second place the discretion of the Chairman of the Committee.

The Department of Justice frequently has issued supportive statements to the general public in defense of nominations that have encountered serious challenge. The Department's most impressive efforts, however, have usually been presented directly to the Senate Judiciary Committee during the hearings on the nominations. During the weeks that Justice

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[43]Senator James O. Eastland, personal interview, June 6, 1973, and John Duffner, Executive Assistant Attorney General, personal interview, June 6, 1973.

Fortas' nomination for promotion to Chief Justice was under challenge two massive memorandums were prepared for his support. The first was a 30-page document dealing with the propriety and precedents of contingent resignations and retirements.[44] The document was supplemented by the personal appearance of Attorney General Ramsey Clark before the Committee, where he argued at length that the President had ample precedent and authority to nominate and the Senate proper authority to confirm the nomination of Fortas for the Chief Justiceship on the basis of the open-date retirement as submitted by Chief Justice Warren. He argued that the opposition's question as to whether a vacancy existed was irrelevant to the proceedings.[45] In support of Fortas' record of opinions and votes as a member of the Supreme Court the Department of Justice prepared, on the request of Senator Philip Hart of the Judiciary Committee, a 27-page summary of what the Department considered to be the most significant cases in which Fortas had participated as Associate Justice. The memorandum attempted to summarize in each of the selected cases the constitutional rationale of Fortas' views.[46] This memorandum was supplemented by the personal appearance of Deputy Attorney General Warren Christopher who also testified at length on the constitutional propriety and correctness of Fortas' record on the Court in the face of severe criticism from conservative

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[44]U. S. Congress. Senate. Committee on the Judiciary, Ninetieth Congress, Second Session. Hearings before the Committee on the Judiciary on the Nomination of Abe Fortas as Chief Justice of the United States (Washington: U. S. Government Printing Office, 1968), pp. 365-394. (Hereinafter cited as Fortas Hearings II).

[45]Ibid., pp. 8-39.

[46]Ibid., pp. 1115-1123.

members of the Committee regarding Fortas' views on criminal procedure and obscenity issues.[47]

Somewhat similar attempts were made by the Department of Justice to provide documentary support for the Haynsworth nomination. The Department supplied the Judiciary Committee with a comprehensive analysis of the conflict-of-interest charges that had been brought against Haynsworth. While the memorandum acknowledged that the Judge had erred in buying the Brunswick stock shortly after participating in a case in which the decision was favorable to the Brunswick Corporation, it minimized that incident as well as other items as not being substantial enough to have warranted the Judge's self-disqualification from the cases, much less did the incidents warrant the Senate's rejection of the nomination.[48] Assistant Attorney General William H. Rehnquist furnished the Judiciary Committee a letter explaining that Haynsworth did not recall the pending Brunswick decision when he bought the stock on the advice of his broker and that the results of the case could not have affected the market price of the stock.[49] In support of Judge Haynsworth the Department of Justice also enlisted the expertise of Professor John P. Frank, a nationally recognized scholarly authority on judicial disqualification, to testify before the Committee. Professor Frank's analysis concluded that Haynsworth acted in accord with the standards of judicial ethics and that he had not sat on cases in which a conflict of interest occurred as defined in terms

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[47] Ibid., pp. 315-354.

[48] New York Times, November 1, 1969, p. 16.

[49] Ibid., September 21, 1969, p. 1.

of the American Bar Association's Canons of Judicial Ethics.[50]

Efforts to provide supportive materials for the Carswell nomination were numerous but mostly generalizations along the line of expression of confidence in his personal integrity and denials of charges that he was a racist. Appeals for endorsements from large numbers of Southern judges were only partially successful.[51] The Department of Justice requested and received a second affirmative evaluation from the American Bar Association's Standing Committee on Federal Judiciary, although on the second evaluation the ABA Committee's favorable report was by less than unanimous vote.[52] The most vigorous effort originating in the administration seems to have been President Nixon's letter to Senator Saxbe expressing his impatience and irritation toward those Senators attempting to deny him the normal prerogative of making appointments to the Court, but of course that specific assertion had no bearing on the merits of the nominations as such.

In connection with the Judiciary Committee hearings on the nomination of Judge Harry A. Blackmun three special communications were initiated by the Justice Department. First, the Department provided a complete chronological compilation of decisions of the United States Court of Appeals for the Eighth Circuit in which Judge Blackmun had participated

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[50]U. S. Congress. Senate. Committee on the Judiciary, Ninety-first Congress, First Session. Hearings before the Senate Committee on the Judiciary on the Nomination of Clement F. Haynsworth, Jr., to be an Associate Justice of the United States Supreme Court (Washington: U. S. Government Printing Office, 1969), pp. 108-136. (Hereinafter cited as Haynsworth Hearings).

[51]New York Times, January 22, to April 8, 1970.

[52]Ibid., February 22, 1970, p. 27.

(compiled by the Legislative Reference Service of the Library of Congress), with an indication of the subject matter of the cases, action on appeal ("certiorari denied," "certiorari granted," etc.) and whether Judge Blackmun wrote the opinion for the Court. Dissenting or concurring opinions by Blackmun, if any, were noted, and per curiam opinions were identified. The communication included a similar list of three-judge U. S. District Court opinions in which Judge Blackmun participated as a member of the Court of Appeals.[53] Also in connection with the Blackmun hearings the Department of Justice supplied the Judiciary Committee with a complete list of Judge Blackmun's investments, dates of purchase and sale, with cost and sale prices, during the period of his service on the Court of Appeals, plus a summary of his current stock holdings.[54] Finally, the Department compiled a list of cases on which Judge Blackmun sat involving litigants in which he had even a minute financial interest, plus a list of cases in which litigants were represented by his former law firm.[55]

Department of Justice support of William H. Rehnquist in the face of challenges to his record on civil rights matters was unique in that Rehnquist primarily defended himself. Attorney General Mitchell issued a single statement denying that Rehnquist had ever been a member of any right-wing organization.[56] In three separate forms Rehnquist provided

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[53] Blackmun Hearings, pp. 76-134.

[54] Ibid., pp. 21-26.

[55] Ibid., pp. 18-21.

[56] New York Times, November 18, 1971, p. 33.

"self-help" and defense against various charges. In his testimony before the Senate Judiciary Committee he declared that in the event of his confirmation he could and would disregard his own personal preferences and feelings in interpreting the Constitution. He further described his performance as the "president's lawyer's lawyer" as an attorney-client relationship and that interpretations of laws on such issues as wire-tapping were specifically tailored to represent the client's views. He declined to elaborate on his own views.[57] Prior to his appearance before the Senate Judiciary Committee Rehnquist submitted to the Committee a compilation of his writings and statements which both liberals and conservatives immediately evaluated as indicating that Rehnquist would perform as "an unvarying conservative."[58] Finally, in reply to a series of written questions submitted to him by Senators Birch Bayh, Edward M. Kennedy, Philip A. Hart, and John V. Tunney, Rehnquist returned a 30-page point-by-point denial of charges of anti-Negro activities and of any affiliation with right-wing organizations.[59]

The judicial selection process is one in which both the executive and legislative branches of the government see high stakes involved. Although historically the President has found the Senate Judiciary Committee to be his first line of support in achieving confirmation of his choices to the Supreme Court, in recent experience the Committee has been the point of origin of strongest opposition to the President's nominees

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[57] Rehnquist and Powell Hearings, pp. 16-86.

[58] New York Times, November 3, 1971, p. 47.

[59] Rehnquist and Powell Hearings, pp. 483-492.

also. Factors other than procedural relationships have produced clashes not only between the two branches of government, but also within the Senate itself and its subordinate unit, the Committee on the Judiciary.

CHAPTER THREE

THE SENATE JUDICIARY COMMITTEE, THE AMERICAN BAR ASSOCIATION AND THE LEGAL COMMUNITY

Although the power to appoint Federal judges is constitutionally vested in the President of the United States, acting by and with the advice and consent of the Senate, extra-governmental groups are also vitally interested in the judicial selection process. Among these none is more intensely interested than the legal community, especially as it has constituted itself into the American Bar Association. The contemporary selection process, for good or for ill, experiences the impact of the organized legal community's most prestigious body. The legal profession has developed an organization and asserted a prerogative that neither the President nor the Senate can easily ignore. The communications and interactions of the President, the Senate, and the legal community in connection with the selection of justices to the United States Supreme Court during the period 1965-1971 suggest that a dynamic triangular interrelation has come into being, but the norms controlling the functioning of the American Bar Association as a member of the triad have not yet been settled. Having no constitutional role, the Bar Association seeks an extra-constitutional role that will have the effect of a constitutional role. Much of the history of the relation of the American Bar

Association to the executive and legislative branches of the government indicate an effort to establish an identity within the American body politic and to achieve and exercise a role in the political process with a special interest in judicial selection.

I. THE ABA: A STRONGHOLD OF CONSERVATISM

It is generally held that the ABA Committee on Federal Judiciary is representative of a relatively conservative element of American life. Consistent with this assumption, it seems also to have demonstrated some degree of bias toward presidential prerogative in the judicial selection process. In no case since the ABA Committee has been submitting evaluations of presidential nominations to the Supreme Court has it reported an evaluation of less than "Qualified" for any nominee. Even in the face of a considerable flow of protests from lawyers against the nomination of Judge G. Harrold Carswell, the ABA's "second look" evaluation reaffirmed its "Qualified" rating of the nominee. While obviously there is no necessary connection between 100% approvals of presidential nominations to the Court and any particular ideological position, this fact would seem to be consistent with a bias toward presidential prerogative in the selection of Supreme Court Justices.

In sampling its positions taken on public issues during the period 1965-1971, specific instances of the American Bar Association actions reflecting a conservative stance are numerous. On January 30, 1965, ABA President Lewis F. Powell, Jr. (now an Associate Justice on the Court), in his address to the mid-year convention of the Association stressed the view that recent decisions of the Supreme Court had favored

criminals at the expense of public safety.[1] In its mid-year session of 1966 the Association approved a committee report that spelled out the legality of the United States' participation in the Vietnam War, justifying its findings on the basis of both constitutional and international law.[2] The ABA's Free Press and Fair Trial Advisory Commission in October 1966 reported the results of a twenty-month study headed by Associate Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court. The Commission proposed drastic new rules to curb the news media in the release and publication of data on crime suspects and urged contempt of court penalties for newsmen and others making prejudicial statements during trials. It suggested giving defendants the power to exclude the press and the public from pre-trial hearings and those portions of a trial taking place without a jury.[3] The proposal was approved two years later by the ABA House of Delegates.[4] In 1969 the Association approved a resolution on wiretapping that took essentially the same position as the 1968 Omnibus Crime Bill.[5] In 1970 the convention of the Bar Association authorized a special committee under the chairmanship of Chief Justice Roger J. Traynor of the California Supreme Court to draft new standards for conduct of criminal trials.[6] The following year the annual

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[1] New York Times, January 30, 1965, p. 1.

[2] Ibid., February 22, 1966, p. 1.

[3] Ibid., October 2, 1966, pp. 1 and 81.

[4] Ibid., October 2, 1968, pp. 1 and 81.

[5] Ibid., July 14, 1969, p. 52. Contrast the much more liberal views of former Attorney General Ramsey Clark expressed before the same convention, Ibid., July 9, 1969, p. 9.

[6] Ibid., April 12, 1970, p. 37.

convention approved unanimously guidelines that proposed disciplinary action, including disbarment, be taken against defense lawyers who permitted court room behavior "purposefully calculated to annoy or irritate." It rejected the contention of some lawyers that their clients were political prisoners often tried for their ideology and that the best defense was to turn the trial into a political forum, declaring that such a position was "fundamentally wrong, unethical and destructive of the lawyer's image."[7]

The essential conservatism of the American Bar Association has been a conclusion reached by entirely independent routes by such scholars as Harold W. Chase,[8] John R. Schmidhauser,[9] and Joel B. Grossman.[10]

The endemic conservatism of the American Bar Association has several implications for the judicial selection process. The President has traditionally found support for his choices for Justices in the reports of the American Bar Association's Committee on Federal Judiciary. Only with reluctance does it rate judicial nominations as "Unqualified," and in endorsing the Carswell nomination the ABA Committee may even have altered its rating scale in order to avoid awarding a low rating to the

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[7]Ibid., July 7, 1971, p. 1.

[8]Chase, The Federal Judges, pp. 160-161.

[9]John R. Schmidhauser, The Supreme Court: Its Politics, Personalities, and Procedures (New York: Holt, Rinehart and Winston, 1963), pp. 77-78.

[10]Joel B. Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection (New York: John Wiley and Sons, Inc., 1965), pp. 83-92.

nominee.[11] The ABA Committee would tend naturally to use its influence toward manning the Federal Courts, especially the Supreme Court, with people whose legal qualifications and ideological image would conform closely to its own likeness. And, finally, the conservative wing of the Senate Judiciary Committee (and of the Senate) could normally expect to find in the ABA Committee an agency of such congeniality that it could hope to use the ABA evaluations in the effective promotion of the nominations which they themselves are inclined to favor.

II. THE ABA: IN SEARCH OF A ROLE

The earliest attempt of the American Bar Association to establish a channel of communication with the judicial selection agencies was in the form of a Special Committee on Judicial Appointments in 1932. The Committee did not function during the two-year span of its existence, since neither the Senate Judiciary Committee nor the Department of Justice saw fit to communicate with the ABA agency with reference to judicial appointments.[12] John R. Schmidhauser and Larry L. Berg find the reason for this failure in the suspicious attitudes of the early New Deal Congress and Administration toward an agency which they supposed to be dedicated to the vested interests of conservative big business.[13]

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[11] American Bar Association. Annual Reports of the American Bar Association (Chicago: The American Bar Association), 82:434 (1957) and 91:164 (1966). (Hereinafter cited as ABA Reports). See also Congressional Record 116:10166 (April 2, 1970).

[12] ABA Reports 59:261 (1934).

[13] John R. Schmidhauser and Larry L. Berg, The Supreme Court and Congress: Conflict and Interaction, 1945-1968 (The Supreme Court in American Life series, Samuel Krislov, General Editor) (New York: The Free Press, 1972), p. 88.

After World War II the American Bar Association renewed its effort to penetrate the judicial selection machinery, creating in 1945 the Special Committee on the Federal Judiciary, later redesignated as the Standing Committee on Federal Judiciary.[14] Under the leadership of John G. Buchanan an approach was made to the Department of Justice suggesting the Attorney General accept the assistance of the ABA Committee in evaluating the qualifications of prospective nominees to the Federal Courts. Douglas McGregor, Assistant Attorney General, received representatives of the Committee politely, commented on the novelty of the suggestion, and stated that he would present the matter to the Attorney General for his consideration. Chairman Buchanan reported in 1947 that the Justice Department by that year had not initiated contact with the ABA Committee on any prospective nominee, but that the Committee on its own initiative had submitted recommendations to the Attorney General on two or three occasions.[15] Efforts to establish a working relationship with the Attorney General's office were without success until 1952. During the period 1947-1952 when the ABA Committee learned of a vacancy in the Federal Courts it would canvass the lawyers and judges of the particular community and send (unsolicited) to the Attorney General a list of qualified persons for his consideration, which list was always compiled without regard to the political party affiliations of the persons suggested. However, often the ABA's first knowledge of an existing vacancy was upon the public announcement of a nomination.[16]

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[14] ABA Reports 70:175 (1947).

[15] ABA Reports 72:256 (1947).

[16] Bernard G. Segal (Past President of the ABA and Past Chairman of the Standing Committee on Federal Judiciary), "Federal Judicial Selection--Progress and Promise of the Future," Massachusetts Law Quarterly 46:139 (1961).

The first real breakthrough in communication with the Department of Justice came in 1952 with the appointment of Ross L. Malone, a very active member of the ABA and a Fellow of the American College of Trial Lawyers, to be Deputy Attorney General. He entered into an agreement to submit to the ABA Committee for its investigation, report, and recommendation the name of each prospective judicial nominee except those proposed for appointment to the Supreme Court. However, as it turned out, actually there were no additional judges appointed during the remainder of the Truman Administration.[17]

Early in the first administration of President Dwight D. Eisenhower the ABA Committee made effective contact with Attorney General Herbert Brownell and Deputy Attorney General William P. Rogers and obtained a renewal of the agreement made with Malone, but with two clearly specified stipulations. The Attorney General specifically reserved the nomination of Justices to the Supreme Court as a personal prerogative of the President, with no commitment to consult the ABA, and the ABA Committee agreed to cease submitting lists of qualified persons and perform its evaluations only on those prospective nominees that were actually under consideration.[18] The ABA Committee achieved, temporarily, the final step in seeking a role in the selection process when President Eisenhower, in what appears almost as an afterthought, dealt with criteria for judicial selection in a press conference. In response to a question about selecting a successor to retiring Justice Sherman Minton, he said in part: "And I believe that we

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[17] ABA Reports 77:215 (1952).

[18] ABA Reports 78:224 (1953).

must never appoint a man who doesn't have the recognition of the American Bar Association."[19] Eisenhower did in fact thereafter follow the practice of requiring ABA evaluations for his nominees to the Supreme Court, beginning with William J. Brennan, Jr.

In its efforts to achieve a working relationship with the Senate Judiciary Committee the ABA Committee on Federal Judiciary met with success in the early stages of its contacts. The President of the Bar Association made a very strategic selection when he chose Senator Forrest C. Donnell of Missouri as a member of the ABA Committee on Federal Judiciary. The Senator enjoyed ready access to the Chairman of the Senate Judiciary Committee, Senator Alexander Wiley of Wisconsin. Chairman Buchanan of the ABA Committee, with fellow committee member Senator Donnell by his side, outlined the ABA's objectives to Senator Wiley. Senator Wiley's Judiciary Committee had already established the practice of consulting the presidents of state Bar Associations with regard to nominees to District and Circuit Courts, and he readily agreed to refer all nominations to Federal judgeships to the ABA Committee for comment.[20] Since 1947, with the exception of the nomination of Tom C. Clark to be Associate Justice,[21] chairmen of the Senate Judiciary Committee have regularly followed the practice of referring all nominations to Federal courts, including the Supreme Court, to the ABA Committee for an evaluation of their qualifi-

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[19] ABA Reports 82:433 (1957).

[20] ABA Reports 72:257 (1947).

[21] ABA Reports 74:118 (1949).

cations.[22]

In summary, a survey of the Annual Reports of the Standing Committee on Federal Judiciary, submitted to the American Bar Association from 1947 to 1971, relationships with the Senate Judiciary Committee and the Department of Justice have been as follows:

(1) The Senate Judiciary Committee has referred all nominations to the Federal bench, except the Clark nomination, to the ABA Committee for comment. The Senate Committee has occasionally disregarded the ABA Committee's evaluation of a nominee as "Unqualified" and reported the nomination favorably to the Senate.

(2) The Eisenhower Administration from the start submitted nominations to the lower Federal Courts to the ABA Committee, and beginning with Brennan (1956) included all nominations to the Supreme Court as well. In the early Eisenhower years the Administration ignored a few "Unqualified" evaluations and proceeded with the appointments.[23]

(3) The Kennedy Administration regularly referred all nominations to Federal Courts to the ABA Committee, but did not provide for evaluation of nominees to the Supreme Court prior to their selection. On a few occasions President Kennedy disregarded "Unqualified" evaluations of nominations to the lower Courts.[24]

(4) The Johnson Administration referred all nominations (except

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[22]ABA Reports 95:200 (1971); also, Bernard G. Segal, "Federal Judicial Selection--Progress and Promise of the Future," Massachusetts Law Quarterly 46:138 (1961).

[23]ABA Reports 81:440 (1956).

[24]ABA Reports 95:712 (1971).

one) to the ABA Committee, also withholding prior notice on his nominations to the Supreme Court. President Johnson also disregarded a few "Unqualified" evaluations of nominees to lower Federal Courts.[25]

(5) The Nixon Administration (through 1971) referred all nominations to the Federal District Courts and Courts of Appeal to the ABA Committee for evaluation, but his first four nominations to the Supreme Court (Burger, Haynsworth, Carswell, and Blackmun) were not so referred. The Senate Judiciary Committee requested ABA Committee evaluations on the four Supreme Court nominees, and all four received ABA endorsement. President Nixon (through 1971) consistently declined, however, to nominate to any Federal Court a person who in fact had not been evaluated by the ABA Committee as "Qualified" or better.[26] In 1970 Attorney General John Mitchell entered into a formal agreement to submit prospective nominees for the Supreme Court for evaluation by the ABA Committee prior to the President's announcement of the nominations.[27] The agreement was terminated by the Attorney General after about a year following an unsatisfactory experience in connection with the filling of the vacancies left by the deaths of Justices Hugo Black and John M. Harlan.[28]

From time to time during the years from 1952 to 1971 the ABA Committee on Federal Judiciary assessed its position in the judicial selection process and adjudged that it was gradually achieving an improved

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[25] ABA Reports 90:443 (1965); ABA Reports 91:158 (1966).

[26] ABA Reports 95:711 (1970).

[27] Ibid.

[28] American Bar Association Journal 57:1175 (December 1971).

role. The Committee defined its general objective as to "help in procuring a better federal judiciary."[29] By 1958 it had adjudged that

> [t]he system [had] worked well. It [had] been reinforced with improved procedures and was operating efficiently and effectively . . .
>
> In increasing measure the Department of Justice [had] called upon the facilities of [the] Committee prior to any formal reference, for informal investigations of the qualifications of individuals who might be considered for nomination.[30]

Although the ABA Committee was aware that it had attained no official status, it considered its relationship with the Department of Justice and the Senate Judiciary Committee as one of continuing "close cooperation."[31] In 1959 the ABA Committee estimated that it had "achieved a substantial measure of success in two major undertakings." It reported that it had "erected a structure of communication" with the legal community throughout the county through which the "views and opinions of judges and lawyers, assembled and digested, were channeled to the President through the Attorney General." Further, it reported that "liaison with the Department of Justice [had] grown steadily," and that "the Committee's recommendation [was] sought as a matter of paramount concern on every person being considered for the Federal judiciary."[32] When President Lyndon B. Johnson, in 1965, elevated a Federal District Court judge to the Court of Appeals without obtaining prior comment, the

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[29] ABA Reports 74:393 (1949).

[30] ABA Reports 83:349-350 (1958).

[31] ABA Reports 83:732 (1958).

[32] ABA Reports 84:275-276 (1959).

ABA Committee vigorously protested the "unnecessary disregard of accepted procedures which had become traditional."[33]

Obviously the ABA Committee on Federal Judiciary has come to see its performance as of substantial value in the judicial selection process. The rationale of the ABA position was summarized by Bernard G. Segal as follows:

> To us as lawyers it seems clear that the opinions of lawyers, through the Organized Bar, should be sought and should carry weight with the President in the appointment of judges. Government seeking a scientist for highly skilled work in a critical scientific area would be expected to solicit the advice of the professional community of scientists. In the process of judicial appointments, government is seeking a lawyer for highly skilled work in the critical areas of litigation and justice; it would seem equally appropriate that it officially solicit the recommendations of the professional community of lawyers. . . . The Organized Bar is a professional agency especially qualified by experience and training to occupy a respected position of advising on judicial selection.[34]

The ABA Committee offers itself to serve as a buffer whereby the Department of Justice or the President could attribute to the American Bar Association reluctance to make a poor appointment.[35] Lawrence E. Walsh, Chairman of the ABA Committee in 1970, assessed the committee's role at that time as

> one of the agencies with a recognized role in the process of selection of Supreme Court Justices. . . The committee is expected to report to the Senate, and, if given the opportunity, to the President regarding qualifications of potential nominees.[36]

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[33] ABA Reports 90:443 (1965).

[34] Segal, "Federal Judicial Selection," pp. 140-141.

[35] ABA Reports 91:154 (1966).

[36] Lawrence E. Walsh, "Selection of Supreme Court Justices," American Bar Association Journal 56:555 (June 1970).

While the ABA Committee disavows competency in any area other than professional qualifications and accepts its role as consultant in relation to the Executive and Legislative branches,[37] the Bar Association's Standing Committee on Judicial Selection, Tenure and Compensation has urged a much more activist role in the recruitment of potential judges and in working specifically for their appointments.[38] It also produced a resolution, which was approved by the Bar Association in its 1966 mid-year meeting, which urged

> that all state and local bar associations . . . initiate and actively pursue a program for obtaining commitments from the Senators, in their respective states, and more especially . . . from all candidates for the United States Senate, in which they agree to cooperate in the program whereby the President of the United States, through the Attorney General, refers to the Standing Committee on Federal Judiciary of the ABA for investigation and report, persons under consideration for nomination as judges in the Federal courts, and to withhold support from any person reported by the Committee to be not qualified for such nomination.[39]

Whether the ABA performs as a recruiting agency in the process of judicial selection or merely as a buffer between the President and the Senate to provide a basis for presidential rejection of "Unqualified" candidates, the Association functions in a political context in which the Senate and its Committee on the Judiciary interact with the Executive branch in the application of certain formal powers of influence over the Supreme Court through the exercise of the power of appointment.

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[37]Lawrence E. Walsh, letter to the Senate Judiciary Committee, dated January 26, 1970, ABA Reports 95:210 (1970).

[38]ABA Reports 95:216 (1970).

[39]ABA Reports 91:166 (1966).

III. SENATE AND BAR: COMMITTEE INTERACTION

The United States Senate and its Committee on the Judiciary have, since 1947, welcomed the participation of the American Bar Association's Standing Committee on Federal Judiciary in the processing of presidential nominations to the Supreme Court. Members of the Judiciary Committee consistently have acknowledged that the ABA has a legitimate interest in the selection of judges and have considered the ABA Committee reports to have a degree of value for the Senate Committee. However, Senators generally hold that while the views of the ABA Committee constitute a worthwhile factor, it is only one of many factors to be considered in connection with decisions to advise and consent to presidential nominations to the Court.[40]

The reports of the hearings of the Senate Judiciary Committee on nominations to the Court reveal, of course, that the ABA Committee evaluations are regularly entered into the record. The very format of the entries during the period 1965-1971 reflects the changes that have occurred in the dynamics of the selection process. The Chairman of the Committee, in the cases of Abe Fortas and Thurgood Marshall to be Associate Justices, entered the bare minimum, a total of eight words each reporting the evaluation, "highly acceptable from the viewpoint of professional qualifications."[41] At the hearings on the Fortas nomination to be Chief Justice,

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[40]This summary of attitudes is derived from interviews with certain Senators and administrative assistants; see bibliography.

[41]U.S. Congress. Senate. Committee on the Judiciary, Eighty-ninth Congress, First Session. Hearings before the Committee on the Judiciary on the Nomination of Abe Fortas as Associate Justice of the U. S. Supreme Court (Washington: U. S. Government Printing Office, 1965), p. 1. See also Marshall Hearings, p. 1.

Homer Thornberry to be Associate Justice, and Warren E. Burger to be Chief Justice, the Chairman entered the short but complete letters from the ABA Committee.[42] The hearings on the Haynsworth nomination included not only the usual letter but also eventually the personal appearance of Lawrence E. Walsh, Chairman of the ABA Committee, to reaffirm the written report and to urge the Senate Committee to recommend the nomination favorably to the full Senate.[43] The ABA report for the Carswell hearings took two new turns: the report disavowed any competence in areas other than purely professional competence, and it explained the rationale of a new rating scale of simply "Qualified" or "Unqualified."[44] The entry into the record of the hearings on the Blackmun nomination required part of three pages, and it included not only the formal letter of endorsement but also a memorandum specifying in great detail the scope and method of the ABA Committee's investigation.[45] The reports on the evaluations of William H. Rehnquist and Lewis F. Powell, Jr., supplied the formal letters and included the description of the scope and method of the investigation, but they also added to both evaluations by elaborating upon the nominees' education, experience, reputation within their respective legal communities, public offices held,

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[42]U.S. Congress. Senate. Committee on the Judiciary, Ninety-First Congress, First Session. Hearings before the Senate Committee on the Judiciary on the Nomination of Warren E. Burger to be Chief Justice of the United States (Washington: U. S. Government Printing Office, 1969), p. 1. See also Fortas Hearings II, pp. 1, 65.

[43]Haynsworth Hearings, pp. 1, 137-162.

[44]U.S. Congress. Senate. Committee on the Judiciary, Ninety-First Congress, Second Session. Hearings before the Judicary Committee on the Nomination of G. Harrold Carswell as Associate Justice of the U. S. Supreme Court (Washington: U. S. Government Printing Office, 1970), p. 2. (Hereinafter cited as Carswell Hearings).

[45]Blackmun Hearings, pp. 2-4.

professional activities, and, in the Rehnquist case, a defense of his position on civil liberties.[46]

The variations in format of the ABA Committee evaluations seem to reflect the conflicting pressures experienced by the President, the Senate, and the bar in connection with the selection of Justices during this period. The process saw a greatly increased emphasis on the ABA evaluations, especially in support of the Nixon nominations to the Court, and at the same time the evaluations were given greater prominence in the records of the Judiciary Committee hearings.

Elements of the legal community other than the American Bar Association have made their views known to the Senate Judiciary Committee on all of the nominations included in this research. Endorsements of the Fortas nomination (1965) came from the Bar Association of the City of New York, the District of Columbia, and Memphis, Tennessee.[47] Marshall drew a formal endorsement of the New York State Bar Association.[48] The second Fortas nomination (1968), which was made an occasion of an opposition filibuster, attracted a personal endorsement by William T. Gossett, President of the ABA, and a telegram signed by 480 deans and professors of law representing sixty-eight law schools of various states offered in support of the nomination and condemning the "lame-duck" characterization of the appointment.[49] A second massive endorsement of Fortas came in the form

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[46] Rehnquist and Powell Hearings, pp. 1-7.

[47] Fortas Hearings I, pp. 34-35.

[48] Congressional Record 113:24639 (August 30, 1967), reported by Senator Jacob Javits of New York.

[49] Fortas Hearings II, pp. 3-6.

of a newly organized Lawyers Committee on Supreme Court Nominations. Senator Albert Gore of Tennessee entered the Lawyers Committee's resolution into the Congressional Record, describing the group as one including seven past presidents of the American Bar Association, many past and present presidents of state Bar Associations, and twenty deans of law schools, representing the District of Columbia and all states of the Nation except Mississippi.[50] The Burger hearings drew letters of endorsement from seven past presidents of the ABA, six of whom appeared at the hearings prepared to testify. Lwkewise, letters of endorsement were submitted by twenty-four past presidents of the Federal Bar Association in support of Burger.[51]

The hearings on the Haynsworth nomination were unique in a couple of respects. Senator Ernest F. Hollings of South Carolina, appearing before the Committee testifying in support of the nominee, invoked the ABA's Canons of Judicial Ethics dealing with the matter of conflict of interest and concluded that there was no conflict of interest in any of Haynsworth's behavior on the bench. Also Lawrence E. Walsh, Chairman of the ABA's Committee on Federal Judiciary, along with two other lawyers who had participated in the investigation of the nominee's qualifications, appeared in person and reaffirmed the ABA's appraisal of Haynsworth. Walsh also indicated that his committee had studied the ABA's Canons of Judicial Ethics in the light of the charges of conflict of interest that had been brought against Haynsworth and had concluded that no conflict of interest was involved and, furthermore, it had been "his duty to sit as a member of the

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[50] Congressional Record 114:26885-26886 (September 16, 1968).

[51] Burger Hearings, pp. 25-36.

court" in the cases specified.[52]

In connection with the Carswell nomination Chairman James O. Eastland of the Senate Judiciary Committee requested that the ABA Committee make a "second round" evaluation of Carswell in view of the fact that considerable opposition to the nomination had emerged. Chairman Walsh obliged Eastland with a reaffirmation of the earlier endorsement based on a "fresh investigation." The second review of the Carswell nomination appears to have been a move on the part of Chairman Eastland to strengthen the case of Carswell in the confirmation process, but it may have had the opposite effect. The second evaluation did indeed reaffirm the endorsement, but the vote on the second round was less than unanimous.[53]

The Senate Judiciary Committee's written Executive Reports to the full Senate invariably invoked the American Bar Association's endorsement. In the earlier cases (e.g., the Marshall nomination) the reference to the endorsement appears to be routine.[54] As the nominations become more controversial in nature the Committee's Executive Reports (representing majority views) took on the nature of an elaborate defense of the nominee, in which case the report gave increased emphasis to the endorsement of the ABA Committee. The 14-page majority report on the nomination of Fortas for Chief Justice devoted a full page to

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[52]Haynsworth Hearings, pp. 137-162.

[53]New York Times, February 22, 1970, p. 27.

[54]U. S. Congress. Senate. Committee on the Judiciary, Ninetieth Congress, First Session. Executive Report No. 13: Nomination of Thurgood Marshall (Washington: U. S. Government Printing Office, 1967), p. 2. (Hereinafter cited as Executive Report No. 13).

underscoring the ABA endorsement,[55] and the 22-page report supporting the nomination of Haynsworth devoted two pages to elaborate upon the ABA position.[56] In writing the 9-page majority report recommending the confirmation of G. Harrold Carswell, Senator Eastland summarized the ABA endorsement in one paragraph, but he supplemented it with four pages of personal endorsements by law school deans and professors, sitting judges, other court officials, and practising attorneys.[57]

Minority and individual views attached to the Committee's Executive Reports in some instances made reference to the ABA evaluations. Senator Eastland devoted three pages of a 5-page statement of his individual views to the discussion of the ABA Canons of Judicial Ethics and an analysis of Abe Fortas' behavior as a Justice in the light of those Canons, claiming that Fortas' violation of them disqualified him for promotion to Chief Justice.[58] Senator Birch Bayh's 15-page statement of opposition to the Haynsworth nomination included four pages invoking the ABA Canons.[59]

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[55]U. S. Congress. Senate. Committee on the Judiciary, Ninetieth Congress, Second Session. Executive Report No. 8: Nomination of Abe Fortas (Washington: U. S. Government Printing Office, 1968), p. 2. (Hereinafter cited as Executive Report No. 8).

[56]U. S. Congress. Senate. Committee on the Judiciary, Ninety-first Congress, First Session. Executive Report No. 91-12: Nomination of Clement F. Haynsworth, Jr. (Washington: U. S. Government Printing Office, 1969), pp. 2, 3, 6, and 14. (Hereinafter cited as Executive Report No. 91-12).

[57]U. S. Congress. Senate. Committee on the Judiciary, 91st Congress, 2nd Session. Executive Report No. 91-14: Nomination of George Harrold Carswell (Washington: U. S. Government Printing Office, 1970), pp. 2-7. (Hereinafter cited as Executive Report No. 91-14: Carswell).

[58]Executive Report No. 8: Fortas, pp. 15-18.

[59]Executive Report No. 91-12: Haynsworth, pp. 31, 36-28.

Although the action of the Senate Judiciary Committee was by unanimous vote in reporting the nominations of Blackmun and Powell, some individual views were attached to the majority report which commended the ABA Committee upon the expansion of the scope and improvement of the method of accomplishing its background investigations.[60]

The foregoing sampling of occasions and ways in which the various members of the Judiciary Committee invoked (or failed to note) the role and reports of the ABA agency strongly suggests that the Senators tend to take their individual positions on bases other than the recommendations of the ABA Committee. The committee's views are then used to reinforce the individual or group views whenever possible. With reference to the nominations studied in this research, the ABA Committee evaluation was in every instance invoked to support the nomination. However, opposition views also made use of the authority of the American Bar Association through invoking its Canons of Judicial Ethics to substantiate charges of ethical breaches by various nominees. At the committee stage of processing nominations the authority of the American Bar Association appears to be viewed by individual Senators as a source of support for their positions but not as a controlling influence in arriving at those positions.

IV. SENATE AND BAR: ON THE SENATE FLOOR

When the Senate Judiciary Committee welcomed the ABA Standing

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[60]U. S. Congress. Senate. Committee on the Judiciary, 91st Congress, 2nd Session. Executive Report No. 91-18: Nomination of Harry A. Blackmun (Washington: U. S. Government Printing Office, 1970), p. 4 (Hereinafter cited as Executive Report No. 91-12: Blackmun); and Executive Report No. 92-17: Nomination of Lewis F. Powell, Jr. (Washington: U. S. Government Printing Office, 1971), p. 5 (Hereinafter cited as Executive Report No. 92-17: Powell).

Committee on Federal Judiciary's participation in the judicial selection process, the resulting relationship became that of both cooperation and competition. The experience of controversy in connection with some of the nominations during the period 1965-1971 saw the Senate Committee's majority invoking the support of the ABA Committee, while the minority found the ABA endorsement to be obstacles that had to be surmounted.

The executive branch also experienced the dual relationship of cooperation and competition. When the Attorney General finally welcomed the ABA participation, it was doubtless with the expectation of finding the arrangement to be useful in reinforcing the Executive vis-a-vis the Senate in the selection process, especially in the selection of judges concerning which the voices of Senators were practically determinative.

The ultimate question which both the Senate and the President had to face was, "Shall the American Bar Association be accorded a veto in the selection of judges?" At stake is the redistribution of the power to appoint, which is constitutionally vested in the President and the Senate. To the extent that either the President or the Senate admitted the ABA Committee into the circle participating in the selection process it necessarily meant the dilution of the total authority exercised by the constitutional agencies in favor of the extra-constitutional agency. The unpredictable factor turned out to be that neither the Presidency nor the Senate could be certain whether its own power was being diluted rather than reinforced.

In practice the American Bar Association has sought a role of "advice-and-consent" as explicit as that which the Constitution confers upon the Senate. This fact does not necessarily mean that the ABA would

hope to supplant the Senate in the judicial selection process. It does seem to aspire to a co-equality (almost) with the Senate in the process. Such a status for the ABA would require not just the two-way concurrence of executive and legislative branches, but it would require a three-way concurrence of the executive, the legislative, and the bar.

The prescription of the basic roles of the three agencies might be set out as follows:

Constitutional Roles:

(1) ". . . the President shall . . . . nominate . . . and . . . . appoint . . .

(2) ". . . the Senate . . . . . advise and . . . . consent . . .

Source: U. S. Constitution, Art. II, Sec. 2.

Extra-Constitutional Role:

(1) The American Bar Association, Standing Committee on Federal Judiciary

"This committee should not be without a function. . .

"This committee is one of the agencies with a recognized role in the selection of Supreme Court Justices . . .

"The committee is expected to report to the Senate, and, if given the opportunity, to the President regarding the professional qualifications of potential nominees."

Source: Lawrence E. Walsh, Chairman, ABA Committee, American Bar Association Journal 56:555 (June 1970).

Always implicitly, and sometimes explicitly, this question of a dichotomous/trichotomous exercise of the appointment power underlay the Senate debates on the controversial nominations.

Senate debate on Supreme Court nominations during the period 1965-1971 at some point eventually saw the invoking of the endorsements

of the ABA Committee on the Federal Judiciary. As would be expected, the more controversial the nomination the longer debate continued, and the longer debate continued the more often would the ABA endorsement be invoked. Two important variations of the ABA role entered into the debate, namely, the invocation of the ABA Canons of Judicial Ethics both in support of and in opposition to a particular nomination and the attempt to discredit the ABA endorsement itself (a kind of reverse invocation of the endorsement for the purpose of opposing the nominee). For the purpose of this study an exhaustive survey of the debates on the nominations of Fortas (for Chief Justice) and Haynsworth was undertaken. The massive debate on the Fortas nomination centered around the themes of the "lame-duck" appointment, "cronyism," separation of powers, judicial ethics, executive manipulation of the Court, and the question of whether a vacancy existed on the Court. The Haynsworth debate concerned judicial ethics and conflict of interest, decisions on cases dealing with civil rights and labor-management relations, and professional qualifications. Interwoven among these the endorsement of the American Bar Association and other elements of the legal community was a frequently recurring consideration.

Tables 4 and 5 summarize the occasions during the Fortas and Haynsworth debates in which Senators engaging in the debates invoked the authority of the American Bar Association, plus a few additional elements of the legal community.

The final week of the Fortas debate took on the nature of a filibuster, and as normally occurs in a filibuster the opposition did more debating than did the supporters of the nomination. The opposition made as

TABLE 4

OCCASIONS OF INVOCATION OF THE VIEWS OF THE LEGAL COMMUNITY IN SENATE DEBATE ON THE FORTAS NOMINATION FOR CHIEF JUSTICE, 1968

Invoked:	ABA Committee on Federal Judiciary	ABA Canons of Ethics	ABA Past and Present Presidents	Lawyers Committee on Supreme Court
In Support	6	1	1	3
In Opposition	6	4	0	0

Source: Congressional Record, surveyed for the period of debates, July 10, 1968, to October 1, 1968.

TABLE 5

OCCASIONS OF INVOCATION OF THE VIEWS OF THE LEGAL COMMUNITY IN SENATE DEBATE, HAYNSWORTH NOMINATION, ASSOCIATE JUSTICE, 1969

Invoked:	ABA Committee on Federal Judiciary	ABA Canons of Ethics	ABA Past and Present Presidents	ABA Committee Chairman Walsh Testimony
In Support	20	7	5	11
In Opposition	1	7	0	1

Source: Congressional Record, surveyed for the period of debates, October 1, 1969, to November 21, 1969.

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many efforts to discredit the ABA Committee action as did the supporters to invoke the endorsement of the committee. On the other hand the ABA Canons of Judicial Ethics provided the opposition a source of ammunition to support their charges of unethical conduct by Fortas. Additional massive efforts at support for Fortas came from the legal community in two

forms which Senators read into the Congressional Record. Early in the struggle a group of 480 deans and professors of law, representing 68 law schools had sent the Senate Judiciary Committee a lengthy telegram arguing the invalidity of the "lame-duck" objection to the Fortas appointment.[61] Later a spontaneously formed Lawyers Committee on Supreme Court Nominations constituted itself as a group of about 300 attorneys to support the Fortas nomination. Senator Albert Gore of Tennessee read their telegram into the Congressional Record and described the group as

> probably the largest group of distinguished lawyers that has ever been formed to express their views on a single issue. Included in this group are lawyers from the District of Columbia and every state in the Nation except Mississippi. Seven past presidents of the American Bar Association, many past and present presidents of state Bar Association, and twenty law school deans.[62]

Many of the occasions of invoking the endorsement of the ABA Committee were in the nature of brief references. During the Fortas debates Senator Daniel Inouye of Hawaii gave a full analysis of the positive weight which supporters of Fortas felt ought to be given the committee evaluation. Not only did he reiterate the evaluation that Fortas was "highly qualified from the viewpoint of professional qualifications," but he proceeded to elaborate on the credentials of the committee itself. He pointed out that in addition to the Chairman the committee included a member from each circuit of the Federal Courts of Appeal, and described those members as "highly prominent members of the bar with broad experience and an extensive background in courtroom work." A current list of members of the committee

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[61] Congressional Record 114:28165 (September 25, 1968).

[62] Ibid., 114:26885-26886 (September 16, 1968).

was provided for the record. Inouye elaborated on the special qualifications of the current chairman, Albert E. Jenner of Chicago, referring specifically to his service as senior trial counsel to the Warren Commission. He detailed the scope and method of the committee's background check of nominees and emphasized that in his view the committee never hesitated to oppose nominees it considered to be unqualified to serve in the Federal judiciary. He concluded his analysis:

> The action taken by this distinguished committee documents dispassionately and without coloration, the essential requirement of any judicial appointment--professional competence. I accept the judgment of the committee and urge Senators to do likewise.[63]

The inadequacies of the ABA Committee evaluation were voluminously analyzed by Senator Robert P. Griffin of Michigan as an important phase of his opposition to the Fortas nomination for Chief Justice. He deplored "the opinion of many that the 'advice and consent of the American Bar Association'--not the Senate"--was all that should be required for confirmation of Supreme Court Justices. He declared that "[O]ver and over again, a refrain is heard that the Senate should routinely confirm the pending Supreme Court nominations because, after all, the ABA had determined that the nominees are 'qualified.'" Griffin proceeded to describe the "meeting" of the ABA Committee on the Federal Judiciary, minus one regular member, and plus Leon Jaworski of Houston, Texas, via a conference telephone call on the same morning that President Johnson announced the nominations of Fortas and Thornberry. The twelve-man committee had received notice of the pending anncuncement early the same morning. A one-hour meeting resulted in the

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[63]Ibid. 114:21217 (July 15, 1968).

endorsement of both Fortas (for Chief Justice) and Thornberry (to replace Fortas). The role of Jaworski was to furnish an investigation of Thornberry. Griffin asserted that the process was one in which one Johnson crony vouched for the qualification of another Johnson crony "because [Jaworski] knew [Thornberry] better than the others," i.e., better than the regular members of the ABA Committee knew him. Such a background check, Griffin felt, was wholly inadequate as a basis for approving a Supreme Court nomination. Referring to the ABA Committee's letter disavowing competence in political, ideological, or other considerations which the President or the Congress might see fit to consider, Griffin expressed the view that it was in poor form for certain ABA leaders to criticize the Senate because it was in fact giving attention to important considerations other than purely professional competence. He concluded: "[I]t is nonsensical to suggest--as some have suggested--that ABA approval should somehow preclude all further Senate inquiry, even as to matters admittedly not covered by the ABA."[64]

In the Senate debate on the nomination of Judge Carswell to be Associate Justice, Senator John Sherman Cooper of Kentucky, speaking in support of Carswell, precipitated a debate on the merits of the ABA endorsement by invocation the American Bar Association, as well as the Florida State Bar Association. Both groups, declared Cooper, had analyzed the decisions and opinions of Carswell as a sitting judge and had found them to be fair and rooted in the law. Senator Joseph D. Tydings of Maryland then challenged the adequacy of the ABA Committee's investigation, particularly on the ground that the committee had rendered its decision without the

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[64]Ibid. 114:26790-26791 (September 13, 1968).

information available from the reports of numerous lawyers who had practised before Judge Carswell which were highly critical of his unjudicial behavior on the bench. Tydings summed up his criticism, saying:

> The point is, the American Bar Association checked with the top lawyers of the top firms who appeared before Judge Carswell without any type of examination in depth, and once the ABA Committee was on record, without having heard the testimony, they did not have enough courage to reverse themselves.
>
> [I]n the Florida State law school in Judge Carswell's own hometown, a majority of the full-time faculty said he was unfit to go on the Supreme Court.[65]

Senator Cooper replied:

> [T]he American Bar Association. . . did inquire of lawyers in Florida who practised before him and knew his record. In addition, there are a number of statements in this record written by lawyers saying that they have been in his court when civil rights cases were being tried, and they found him unbiased and fair toward clients and litigants.[66]

Tydings expressed the view that the ABA's procedures were not only weak in respect to Carswell, but that in connection with the Fortas nomination for Chief Justice he also called the attention of the Senate to the inadequacies of the evaluation.[67]

Senator Spessard Holland of Florida entered the debate not only to support Carswell but also to support the judgment of the ABA. He listed, in rebuttal to criticisms of Senators Tydings and Bayh and in order to indicate massive support of Carswell, the endorsements of the officials of the Florida Bar Association, all members of the Florida State Supreme Court,

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[65]Ibid 116:S5293-S5296 (April 8, 1970), daily edition.

[66]Ibid.

[67]Ibid. 116:S5298 (April 8, 1970), daily edition.

all members of the District Court of Appeals of the Northern District of Florida, a large number of circuit judges of the state of Florida, both of the Federal District judges of the Northern District of Florida, all six sitting Federal District judges of the Southern District of Florida, 50 sitting Federal District judges from the Fifth Circuit of the U. S. Court of Appeals, the present deans of the law schools of Florida State University and the University of Florida plus some former deans, and, finally, 11 of Carswell's colleagues on the bench of the Fifth Circuit.[68] Each side of the debate, over a period of three months, marshalled pages and pages of lists of lawyers endorsing or opposing the nomination.[69] The present stage of research reveals no basis for evaluating such massing and counter-massing of endorsements. The only sure conclusion from such a thing is the rather obvious one, namely, that not only were the Senate and legal community divided on the merits of the Carswell nomination, but also equally divided on the merits of the endorsement of the ABA Committee, at least in this particular case. It is no wonder that the next nomination (Blackmun) saw a much more deliberate and cautious approach by all parties directly concerned--the President, the Attorney General, the Senate Judiciary Committee, and perhaps most of all the American Bar Association's Standing Committee on Federal Judiciary. The Senate Committee in accepting the ABA Committee as a participating agency has also accepted

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[68]Ibid., S 5302.

[69]From January 20 to April 8, 1970, various Senators entered lists into the Congressional Record: (1) In support of Carswell, pp. 4991-4993, 5278, 7514-7515, 7654, 8072-8075, 8806-8811, 9957, 10253, 10255-10256, 10534-10535, 10755; (2) in opposition, pp. 6224, 7662-7663, 7850-7852, 9825, 10087, 10193-10199, 10194.

for itself the task of defending itself against the encroachments upon its own authority that is inherent in the arrangement. The same observation applies, of course, to the Executive in dealing with the ABA Committee.

Thus far the relationships of the Senate and the Executive with the American Bar Association have been fairly harmonious, but during the experiences in the controversial nominations unavoidable strains in the relationships have occurred. In no final sense have the relationships with the Bar Association become standardized, but rather they are in a process of development and clarification.

CHAPTER FOUR

THE SENATE JUDICIARY COMMITTEE AND EXTERNAL PRESSURES

In connection with its processing nominations to the Supreme Court during the period 1965-1971 the Judiciary Committee experienced varying degrees of pressure from "outside" groups and individuals. Groups which actively asserted efforts to influence the outcome of Committee recommendations and the Senate vote on confirmation were those which perceived the Supreme Court as an institution capable of making decisions that directly affected public policy or ideological values. Attitudes of pressure groups toward particular nominees reflected attitudes toward the contemporary Court, based on their perceptions of the manner in which decisions of the Court impinged upon the interests of the groups. Support of, or opposition to, specific nominees reflected group evaluation of the individual based on the assumption that confirmation of the candidate and his accession to a seat on the Supreme Court would support decisions which would provide increased protection or increased threat to the interests of the groups. The dynamics of the selection process thus depended upon the expectations (perceptions) of the probable output of the Court as public policy evaluated in terms of political, ideological, or social consequences.

I. THE GENERAL PATTERN OF GROUP ACTIVITY

Interest groups manifesting direct concern with manning of the Court fall into a few main categories such as economic groups, ideological or doctrinaire groups, racially oriented groups, professional groups, academic groups, and women's groups. Pressures from such easily identifiable groups were supplemented by testimony and communications from individual citizens. A special category of "pressure" occurred from time to time as members of the House of Representatives appeared before the Committee in opposition to certain nominees. The weight of group influence varied greatly, depending upon the size of the group, the degree of group integration, political skill, and intensity of effort. The procedure of the Committee permitted ready access by groups of all kinds, and no information has been discovered to indicate that the Committee deliberately acted to preclude any specific group from being heard. While many groups and individuals presented testimony before the Committee in its open sessions, others achieved access to individual members of the Committee, and their views, although not incorporated into the Committee's reports to the Senate, were relayed by individual Senators to the full Senate during debate on the nominations.

Table 6 shows the distribution of pressure efforts based on actual appearances of interest group representatives and the presentation of testimony at the Committee hearings on the nominations. The table reveals immediately two obvious aspects of group activity in relation to the Committee procedure. First, many of the nominees attracted very little if any active attention of interest groups either in support or opposition. Only a few

TABLE 6

INTEREST GROUP APPEARANCES AT JUDICIARY COMMITTEE HEARINGS ON NOMINATIONS TO THE SUPREME COURT, 1965-1971

Nominees	Categories of Groups									
	Labor		Civil Rights		Professional		Women's		Doctrinaire	
	S	O	S	O	S	O	S	O	S	O
Fortas (1965)									0	3
Marshall									0	1
Fortas (1968)									0	2
Burger					2	0				
Haynsworth	0	8	0	7						
Carswell	0	3	0	4	1	0	0	3		
Blackmun										
Powell					0	2	0	2		
Rehnquist	0	2	0	3	0	2	0	2		

Note: Figures listed under each category represent the occasions and appearances of group representatives in support (S) or opposition (O).

Source: U. S. Congress. Senate. Committee on the Judiciary. Hearings pertaining to the various nominees (Washington: U. S. Government Printing Office).

"professional" witnesses representing certain doctrinaire groups appeared in connection with the Fortas and Marshall hearings. "Courtesy" appearances by members of the Bar Association of the District of Columbia and the Federal Bar Association formally supported the Burger nomination. The Blackmun hearings attracted no interest group appearances whatever.

Secondly, interest group representatives appeared primarily in an opposition stance, and they concentrated mostly upon the Haynsworth, Carswell, and Rehnquist nominations. The opposition registered against this specific group of nominees did not imply opposition to the Warren Court, but, conversely, it did express objection to the presidential objective of "balancing" the make-up of the Court by nominating "conservatives" and "strict constructionists."

II. ORGANIZED LABOR

The Haynsworth nomination to replace Associate Justice Abe Fortas was the first to draw strong opposition from labor groups. Three of the eight days of public hearings were devoted mostly to the testimony of labor representatives. Seven of nine witnesses making appearances presented testimony filling 188 pages of the record, or about one-third of the total recorded testimony. The Committee gave more time to the labor groups than it did to Haynsworth himself, whose testimony occupied part of three sessions and contributed 110 pages of the record. Viewed over all it would probably be a fair statement to say that organized labor used its heaviest weapons in an all-out effort to defeat the Haynsworth nomination.[1] Those labor representatives who appeared were as follows:

George Meany, President, AFL-CIO

Andrew J. Biemiller, Legislative Director, AFL-CIO

Thomas E. Harris, Associate General Counsel, AFL-CIO

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[1]A key administrative assistant (who for obvious reasons preferred not to be named) of one of the Senators leading the opposition, in an interview with this researcher, made the interesting observation that the Haynsworth defeat was a case of a "labor lynching."

Elliot Bredhoff, General Counsel, Industrial Union Department, AFL-CIO

Stephen I. Schlossberg, General Counsel, United Automobile Workers

Irving Abramson, General Counsel, International Union of Electrical Workers, AFL-CIO

William Pollock, General President, Textile Workers Union, AFL-CIO

Paul Sawitty, Vice President, Textile Workers Union

Patricia Eames, General Counsel, Textile Workers Union[2]

Elements of organized labor were also represented in the Committee hearings in opposition to the Carswell nomination as follows:

Thomas E. Harris, Associate General Counsel, AFL-CIO

Lawrence Gold, Attorney, AFL-CIO

Stephen I. Schlossberg, General Counsel, United Automobile workers[3]

Testimony in opposition to William H. Rehnquist was presented to the Committee by:

Andrew J. Biemiller, Legislative Director, AFL-CIO

Kenneth A. Meiklejohn, Legislative Representative, AFL-CIO

William Dodds, Political Action Director, United Automobile Workers, on behalf of President Leonard Woodcock[4]

The labor movement's opposition to Carswell and Rehnquist was generally on grounds other than a charge of an anti-labor bias on the part of the nominees. In fact representatives of the AFL-CIO and United Automo-

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[2]Haynsworth Hearings, pp. 162-210, 332-353, 358-423, 481-519.

[3]Carswell Hearings, pp. 212-221, 233-238.

[4]Rehnquist and Powell Hearings, pp. 400-419, 419-421.

bile Workers specifically stated that no record existed that demonstrated an anti-labor bias on the part of Carswell. Similarly, the United Automobile Workers specifically stated that no record existed that demonstrated an anti-labor bias on the part of Carswell. Similarly, the United Automobile Workers, although opposing the Rehnquist nomination, excluded any allegation of an anti-labor bias. Andrew J. Biemiller, Legislative Director of the AFL-CIO, in an oblique fashion, seemed to imply that organized labor would likely encounter adverse decisions by Rehnquist on the Court. Biemiller said in part:

> He . . . shows an inability to distinguish, as the courts must distinguish, between peaceful demonstrations which are an essential form of communication which the First Amendment is designed to protect and mob action which, of course, is intolerable. The American labor movement has suffered sufficiently from judges who do not understand that there is such a thing as constitutionally protected peaceful picketing.[5]

The opposition to the Haynsworth, Carswell, and Rehnquist nomination was in multi-faceted form. In his testimony at the Haynsworth hearings George Meany, President of the AFL-CIO, summed up labor's basic formula of opposition: (1) Haynsworth's decisions as a federal judge prove him to be anti-labor; (2) he had demonstrated on the bench lack of ethical standards that disqualified him from consideration for promotion; and (3) he had demonstrated "indifference" to the legitimate aspirations of Negroes.[6] The principal feature of Meany's analysis of Haynsworth's anti-labor bias centered on ten labor-management cases that were appealed from the Fourth Circuit Court of Appeals to the Supreme Court. His research

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[5]Ibid., p. 402.

[6]Haynsworth Hearings, p. 163.

indicated that in every instance the Supreme Court reversed the Haynsworth decisions, and the reversals were mostly by unanimous decisions of the high Court.[7] He discounted the importance of Senator Sam Ervin's report that Judge Haynsworth had rendered thirty-seven pro-labor decisions which had never been appealed to the Supreme Court.[8] The extent to which the Senate Judiciary Committee or the Senate itself was impressed by the charge of an anti-labor bias by Haynsworth is most difficult to assess. Only five Committee members (Ervin, McClellan, Cook, Hart, and Mathias) interrogated George Meany and his counsel, Harris. Predominantly the questions indicated a lack of sympathy with the charge. Of the Committee members who eventually voted, either in the Committee or on the Senate floor, in favor of labor's position on Haynsworth, that is, against confirmation, none had "helped" Meany and Harris with "supportive" type questions which Committee members frequently produce with the apparent hope of undergirding the position of the witnesses with whose positions they are sympathetic. Senator Philip Hart expressed himself, however, to the witnesses that their testimony had been very helpful "to some of us."[9]

Concerning the issue of rights of Negroes, Meany simply stated the fact of the AFL-CIO's official position on the Haynsworth record, but deferred to representatives of Civil Rights organizations and to certain black Congressmen as primary witnesses in that particular area.

The issue of judicial ethics was designated as a cause of major

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[7]Ibid., p. 164.

[8]Ibid., pp. 195-196.

[9]Ibid., p. 187.

objection to Haynsworth's confirmation. Centering around key cases such as Darlington Manufacturing Co. v. NLRB, Maryland Casualty Co. v. Baldwin, and Brunswick v. Long, the charges made in the testimony were that the judge had sat on cases involving litigants in which he had a personal financial interest, and that he had failed to inform the litigants of his interest or to disqualify himself from sitting.[10]

Other witnesses representing units of organized labor followed the general pattern of Meany's testimony. Elliot Bredhoff, General Counsel, Industrial Union Department, AFL-CIO, in his prepared statement made reference to Meany's charge of an anti-labor bias, but his oral testimony did not touch on the anti-labor issue.[11] He identified the main issue before the Committee and the Senate as "to decide Judge Haynsworth's sensitivity to and his appreciation and concern for the proprieties and ethical conduct expected of federal judges."[12] Specific occasions drawing criticism centered on the Darlington case, the purchase of stock in the Brunswick Corporation, and other cases in which stock ownership was designated as the basis of interest conflict.[13] Testimony of Stephen I. Schlossberg, General Counsel, United Automobile Workers of America, followed essentially the same pattern. He summed up by pointing not only to Judge Haynsworth's anti-unionism, but also to his lack of moral sensitivity and lack of candor concerning his conflicts of interest.

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[10]Ibid., pp. 192-193.

[11]Ibid., pp. 332-352.

[12]Ibid., p. 333.

[13]Ibid., p. 334.

He stated:

> Haynsworth's decisions, his investments, his judicial conduct and his lifetime close association with socially backward, irresponsible and reactionary economic interests in the South raise very serious doubts concerning his ability to administer justice objectively and impartially.[14]

During the hearings Senators Ervin and Hruska counterattacked the anti-labor charge and insisted that it be aired even though Schlossberg had barely referred to it. Both went to great length to refute the charge. Senator Ervin declared that Haynsworth had rendered more than three times as many pro-labor decisions as anti-labor decisions. His analysis of the ten cases that Meany mentioned as reversed by the Supreme Court concluded that many of those cases had been remanded on points that were essentially in agreement with the Haynsworth positions.[15] Senator Hruska entered into the record of the hearings extended lists of cases, some with summary analyses, which also purported to demonstrate that Haynsworth had actually made far more pro-labor than anti-labor decisions.[16] In authoring the Committee's executive report to the Senate on the Haynsworth nomination he also included the same list of cases.[17]

Other witnesses that majored on the issue of conflict of interest were Irving Abramson, General Counsel, International Union of Electrical, Radio and Machine Workers, and Patricia Eames, General Counsel, Textile Workers Union of America.[18] The charge of an anti-labor bias was advanced

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[14]Ibid., p. 355.

[15]Ibid., pp. 378-384.

[16]Ibid., pp. 380-390.

[17]Senate Executive Report No. 91-12, pp. 20-21.

[18]Ibid., pp. 495-509.

in a unique fashion in testimony by William Pollock, General President of the Textile Workers Union of America. He asserted that a "conspiracy" existed among the giant corporations of the Southern textile industry. He described the conspiracy and Judge Haynsworth's relation to it as follows:

> Its aim is to deny more than half a million American textile workers their right to form and join unions as set forth in the National Labor Relations Act.
>
> We believe that Judge Haynsworth is imbued with the philosophy behind this conspiracy, and has been responsive to its objectives, first as a partner in a law firm that represented many of these textile corporations and later as a federal judge.[19]

As indicated earlier the testimony of representatives of organized labor gave surprisingly little emphasis to the anti-labor charges. The responses by Senators Ervin and Hruska seem to have discouraged prospects that this specific issue would be openly supported with massive effort. Labor union witnesses tended to move rather quickly from the anti-labor charge and throw the weight of their testimony into a major effort to elucidate the charges of violations of standards of judicial ethics. Although a couple of Senators (Hart and Mathias) evidenced sympathy with the witnesses' viewpoints, at no time in the Committee hearings did any Committee member undertake seriously to support openly the charge of an anti-labor bias. Like the labor representatives themselves, the Senators who strongly opposed the Haynsworth nomination chose to emphasize the issues of judicial ethics and the charge of an anti-civil rights bias.[20]

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[19] Ibid., p. 484.

[20] See especially the testimony and interrogation of Elliot Bredhoff, Haynsworth Hearings, pp. 314-332; the Senate Executive Report No. 91-12 (Individual Views of Mr. Bayh), pp. 25-47; and Congressional Record, November 13, 1969, pp. 34049-34077; November 18, 1969, pp. 34570-34576; and November 20, 1969, pp. 35166-35177 (principal speeches of Senator Bayh and exhibits submitted by him during formal Senate debate).

In opposing the Carswell and Rehnquist nominations representatives of labor unions took a positive stand, but their efforts were less massive and were designed primarily to support the objections of civil rights groups. Stephen Schlossberg stated: "The UAW does not oppose [Carswell] because he is an anti-labor judge. We are not that parochial in our opposition to judges."[21] His objection to Carswell was based on two issues: professional mediocrity and an anti-civil rights bias.[22] Similarly, Thomas E. Harris disclaimed any serious charge of an anti-labor bias. He indicated that as a federal judge Carswell simply had no extensive record of hearing labor cases. He also emphasized the lack of stature and an anti-Negro bias.[23]

Andrew J. Biemiller, Legislative Director for the AFL-CIO, and William Dodds, Political Action Director, United Automobile Workers, testified before the Judiciary Committee in opposition to the nomination of William H. Rehnquist. Biemiller's fear of an anti-labor bias was implicit rather than explicit in his charge that Rehnquist was "one of the prime theoreticians of and apologists for the [Nixon] administration's root and branch assault on the constitutional system of checks and balances."[24] He explicitly charged that the administration's central aim was the achievement of unbridled executive power as demonstrated through: (1) its insistence upon the right of "unregulated and

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[21] Carswell Hearings, p. 213.

[22] Ibid., pp. 212-221.

[23] Ibid., pp. 234-235.

[24] Rehnquist and Powell Hearings, p. 400.

unreviewable wiretapping," (2) its attempt to "downgrade the Senate's role in the process of judicial confirmation, (3) its refusal to use the "$12 billion Congress appropriated to stimulate the economy," (4) its efforts to act unilaterally "to breathe new life into the Subversive Activities Control Board," and (5) its campaign to intimidate the press, "culminating in the Pentagon papers litigation."[25] Identifying Rehnquist as a prime agent of the President in such activities, Biemiller obviously was utilizing the occasion not only to oppose Rehnquist himself, but it was a classic example of opposing the Executive by contesting his exercise of the appointment power. Out of Rehnquist's performance in the Department of Justice Biemiller interpreted the nominee's attitude toward street demonstrations and wire-tapping policy as a direct assault on the Bill of Rights.[26] William Dodds of the United Automobile Workers supported essentially the same views as Biemiller of the AFL-CIO.[27]

In debate on the floor of their chamber Senators Eastland and Cook supported Haynsworth and referred in detail to the anti-labor charge. Eastland, in opening formal debate, read into the Congressional Record a letter from the Teamsters Union which stated that the union neither opposed nor supported confirmation.[28] He also invoked the name and testimony of Louis B. Fine, identified as a noted Virginia lawyer of the Jewish faith, a past-President of the Virginia Bar Lawyers Association,

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[25]Ibid., p. 401.

[26]Ibid., p. 409.

[27]Ibid., p. 420.

[28]Congressional Record 115:34049 (November 13, 1969).

who declared that he had represented the Teamsters Union, the Painters Union, the Carpenters Union, and the Longshoremers Union in Judge Haynsworth's court. Fine's testimony, as reported by Eastland, was that criticism made by labor was unfounded and that labor had nothing to fear from Judge Haynsworth. Senator Cook expressed disappointment that legal counsel for the AFL-CIO and President George Meany had judged the nominee on a mere ten cases that had gone up to the Supreme Court. They did not take into consideration, Cook said, cases decided at the Court of Appeals level. He reported that Haynsworth had made about 40 pro-labor decisions with a 4 to 1 record in favor of labor.[30]

The load of opposition to Haynsworth in Senate floor debate was carried by Senator Birch Bayh, the only Committee member to make what might be considered major speeches. Bayh majored on the ethical issues and never initiated debate on the anti-labor charge. The only Senator who did major on the charge of an anti-labor bias was Senator Lee Metcalf of Montana. He reviewed the cases cited by George Meany in the Committee hearings, plus a few others, and found an anti-labor vote in 13 out of 17 cases. Metcalf's conclusion was that a statistical analysis showed "overwhelmingly" that Haynsworth was hostile to labor.[31]

Organized labor, of course, carries on sustained lobbying activities as well as maintaining constant contact with a number of Senators with reference to all kinds of legislation in which the unions have signi-

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[29]Ibid. 115:34051.

[30]Ibid. 115:34272-34273 (November 14, 1969).

[31]Ibid. 115:34425-34432 (November 17, 1969).

ficant stake. James O'Brien, political director of United Steel Workers, has described the close relationship between the union and Senator Lee Metcalf of Montana and Metcalf's dependence upon unions as his primary source of campaign funds.[32] Andrew J. Biemiller, the AFL-CIO's political director, has claimed credit for the defeat of the Haynsworth nomination by persuading Senator Birch Bayh to lead a determined opposition effort.[33] Also Biemiller stated that a most useful tactic in the same effort to defeat Haynsworth was to get Senators to "lobby" other Senators.[34] Ken Young, deputy director of legislation for the AFL-CIO, has described the technique of "helping" a Senator (unidentified) to vote against the Carswell nomination by stimulating a massive flow of mail from the Senator's home state, especially from elements of the legal community.[35] The foregoing illustrations of union tactics seem to indicate that organized labor's efforts at influencing legislation or action on nominations takes the form of well-organized and highly disciplined procedures, which is precisely the way that Haynes Johnson and Nick Kotz of the Washington Post have described it.[36]

Thus the battle lines on the Haynsworth nomination were drawn on lines that omitted the open charge of anti-labor bias as far as members

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[32]Haynes Johnson and Nick Kotz, The Washington Post National Report: The Unions (New York: Pocket Books, a division of Simon and Schuster, 1972), p. 72.

[33]Ibid., p. 94.

[34]Ibid.

[35]Ibid., pp. 109-110.

[36]Ibid., p. 111.

of the Judiciary Committee were concerned. Nevertheless, on the matters of judicial behavior, conflict of interest, or professional competence, Senators did "take sides" and these issues were debated in terms that corresponded very closely with organized labor's positions.

An objective measurement of the impact of organized labor's opposition to the Haynsworth, Carswell, and Rehnquist nominations might well prove to be impossible to achieve. Members of the Senate Judiciary Committee responded to labor's charges sympathetically or unsympathetically, seemingly on the basis of predilections founded on factors other than the actual testimony, especially as that testimony dealt with the charge of an anti-labor bias. Both in Committee and later in floor debate for all practical purposes this charge all but dropped from sight. The issues of judicial behavior, conflict of interest, professional competence, or ideological predisposition became decisive issues.

III. CIVIL RIGHTS GROUPS

Civil Rights groups appeared before the Senate Judiciary Committee and consistently opposed the nominations of Haynsworth, Carswell, and Rehnquist. The task of preparing and presenting testimony was undertaken by the Leadership Conference on Civil Rights. The organization was declared by its legislative chairman, Clarence Mitchell, to be "a combination of over 125 different organizations interested in the area of civil rights."[37] Mitchell, along with the Leadership Conference's counsel, Joseph Rauh, appeared before the Committee during its hearings on all three of the nominees being opposed. From time to time individuals and

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[37] Haynsworth Hearings, p. 423.

representatives of other specific groups appeared also.

1. The Haynsworth Nomination.

In the case of the Haynsworth nomination Mitchell spoke in general terms and summed up his evaluation of the candidate as one who resisted the course of the law following the Supreme Court's 1954 decision in Brown v. Board of Education ordering racial desegregation of public schools. He asserted that Haynsworth's dissenting opinions in civil rights cases showed that he was not for "pressing forward," that he was for the "status quo" or for "inching along," and that he "would not have society move until forced to do so by inescapable requirements of the law and by specific pinpointed arguments of that law."[38] Rauh produced more extended and detailed testimony, taking up case by case seven different occasions during the period 1962-1968 in which Haynsworth took anti-civil rights positions either in dissent or in voting with the majority in his court. Six of the Haynsworth votes were interpreted as clearly toward subverting the decision in Brown v. Board of Education or at best "foot-dragging" in the matter of racial integration of public schools.[39] The seventh decision involved a hospital which was receiving Hill-Burton funds but eventually was found to be discriminating against Negro physicians, Negro nurses, and Negro patients.[40]

Senators reacted to the charges in varied manners during and after the hearings. In support of the civil rights witnesses Senators Bayh,

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[38]Ibid., p. 424.

[39]Ibid., pp. 431, 433, 426, 428, 439, and 443.

[40]Ibid., p. 430.

Hart, and Kennedy produced "supportive" questions, while Senators Ervin and Hruska argued against the validity of the interpretations of Haynsworth votes in the cases cited. Senator Hruska submitted a memorandum filling five pages of the record of the hearings purporting to demonstrate Judge Haynsworth's "even-handed" attitude in civil rights cases.[41] Authoring the Committee's executive report to the Senate and urging the confirmation of Haynsworth, Hruska also listed 17 "pro-civil rights" opinions of Judge Haynsworth, some of which were accompanied by explanatory comment.[42] A one-page joint statement of individual views of Senators Bayh, Burdick, Hart, Kennedy, and Tydings, attached to the Committee's executive report concluded that Haynsworth did not meet standards requisite to appointment to the Supreme Court. While they expressed the view that the country was entitled to "a justice who will promote the ideals of the Constitution, contribute to the harmony and peace of the nation, and provide insights and sensitivities that will make the whole Court even greater than its parts," no specific reference was made to Judge Haynsworth's civil rights record on the bench.[43] Senator Bayh prepared a separate 29-page statement of his individual views dealing with the judicial ethics and conflict of interest issues, but again he was silent on the matter of Haynsworth's civil rights record.[44]

In debate on the Senate floor Senators Eastland and Hruska continued

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[41] Ibid., pp. 459-463.

[42] Senate Executive Report No. 91-12, pp. 17-19.

[43] Ibid., p. 24.

[44] Ibid., pp. 25-53.

to defend Haynsworth against the charge of an anti-civil rights bias. Eastland's reference to supportive statements by the Jewish lawyer, Louis Fine, past-President of the Virginia Bar Lawyers Association, and John Bolt Culbertson, a liberal South Carolina Democrat, who was active as a member of Americans for Democratic Action and who had frequently represented labor and civil rights causes before Judge Haynsworth. Both had declared, according to Eastland, that the anti-Negro charge was groundless.[45] Senator Hruska also emphasized Haynsworth's "clean" record regarding civil rights cases. He invoked the analysis of Professor G. W. Foster, University of Wisconsin Law School, who had served as a consultant on school desegregation to the U. S. Commission on Civil Rights and who had participated in the drafting of the original desegregation guidelines of the Department of Health, Education and Welfare. Hruska asserted (citing Foster):

> Haynsworth's decisions, including those in the racial area, have been consistent with those of other sensitive and thoughtful judges who faced the same problems at the same time. And it simply cannot be said that his record in the racial field makes him out of step with the directions of the Warren Court.[46]

Somewhat surprisingly the Bayh-Hart-Kennedy-Mathias-Tydings group which vigorously led the opposition to Haynsworth barely mentioned the anti-civil rights charge during Senate debate. In fact Bayh was the only member of this group of the Judiciary Committee who made major speeches at all in connection with the Haynsworth nomination. The single major speech on the civil rights issue was made by Senator Jacob Javits, a former

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[45]Congressional Record 115:34051 (November 13, 1969).

[46]Ibid. 115:34057 (November 13, 1969).

member of the Committee.[47] Javit's speech was supplemented by a relatively short speech by Edward Brooke, the black Senator from Massachusetts.[48] The obvious inference is that the opposition leadership decided that success in blocking confirmation would probably lie in an emphasis on the charges of unethical conduct and conflict of interest. Of course, that decision proved to be the correct strategy.

2. The Carswell Nomination.

The fight against the Carswell nomination, in contrast to the strategy which defeated confirmation of Haynsworth, was pitched directly upon the issues of his anti-civil rights record plus the charge of the mediocrity of his performance as a federal judge. It was not difficult for the Leadership Conference on Civil Rights to make a case. Clarence Mitchell, director of the Washington Bureau of the NAACP and legislative chairman of the Leadership Conference, established the formula of opposition to Carswell in his testimony before the Committee. In summary Mitchell's point was that Judge Carswell early in his public life had stated positively his belief in "white supremacy" and that his subsequent career was consistent with his earlier declaration. Three specific occasions were cited: (1) Carswell's 1948 speech as a candidate for the Georgia State Legislature which became known as his "white supremacy" speech; (2) his participation as an incorporator of a private golf course in Tallahassee, converting it from a public facility in order to prevent Negroes from using it; and (3) his court decisions in "defiance" of the

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[47] Ibid. 115:34275-34277 (November 14, 1969).

[48] Ibid. 115:34447-34448 (November 17, 1969).

Supreme Court's decision in Brown v. Board of Education.[49]

Mitchell's testimony was supplemented by that of Joseph L. Rauh, general counsel for the Leadership Conference on Civil Rights and vice chairman for civil rights of Americans for Democratic Action. Rauh reviewed Carswell's record on civil rights matters beginning with the "white supremacy" speech. He indicated that the statement was indeed uttered prior to the decision in Brown v. Board of Education (1954), but he further indicated that in 1948 such a statement was even then a violation of the "separate but equal" doctrine of Plessy v. Ferguson (1896),[50] not to mention the 14th Amendment to the Constitution. He analyzed the golf course matter as a possible violation of federal law, possibly a conspiracy to "injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."[51] Rauh cited the testimony of three witnesses who had previously testified before the Committee concerning the charge that Carswell had characteristically evidenced hostility toward civil rights lawyers who appeared in his court, concluding that the testimony had gone unrebutted.[52] The bulk of Rauh's testimony consisted of a detailed analysis of fifteen civil rights cases in which Carswell had been unanimously reversed, concluding that the judge's handling of such cases was consistently with the view to delaying the enforcement of the decisions

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[49]Carswell Hearings, pp. 267-278.

[50]Ibid., p. 278.

[51]Ibid., p. 279.

[52]Ibid.

of the Supreme Court since 1954.[53]

During the Committee hearings Senators reacted to the testimony in the familiar "supportive" or "rebuttive" fashion. The Carswell hearings had been in progress for nearly a week when the civil rights representatives appeared. By that time the Senators clustering into subgroups in support of or in opposition to the nomination were well identified. The Bayh-Hart-Kennedy-Tydings subgroup supplied supportive questions or statements during the testimony of the civil rights witnesses. Senators Eastland and McClelland did not attend those portions of the hearings at which Mitchell and Rauh testified. Senator Ervin, present for part of their testimony, offered no substantive questions or comment. Senator Hruska, supplying the rebuttal effort, offered no questions or comment at the time, but he submitted a memorandum, "Analysis and Comment Concerning Judge Carswell's Record in Civil Rights and Criminal Cases." The memorandum listed eight "pro-civil rights" decisions by Judge Carswell, ten "neutral" civil rights decisions, and five "anti-civil rights" decisions. Hruska's information asserted that Carswell's decisions in habeas corpus cases had been affirmed more often than they had been reversed, and 36 of 44 decisions in criminal cases (82%) had been affirmed.[54]

3. The Rehnquist and Powell Nominations.

Both Lewis F. Powell, Jr., and William H. Rehnquist experienced opposition from various groups on grounds of their attitudes on civil rights. The opposition to Powell was expressed by a series of groups of

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[53]Ibid., pp. 283-307.

[54]Ibid., pp. 310-320.

lawyers (predominantly balck) and will be noted below in a summary of opposition by professional groups.[55] Those groups generally recognized primarily on the basis of their orientation to civil right neither opposed nor endorsed the Powell nomination.[56]

The Rehnquist nomination was squarely opposed in the Committee hearings by the National Association for the Advancement of Colored People, Americans for Democratic Action, and the Leadership Conference on Civil Rights. All three organizations were represented jointly in the Committee hearings by Clarence Mitchell and Joseph L. Rauh. Mitchell's testimony centered upon a resolution adopted by the Southwest Area (Arizona) NAACP Conference (which resolution Senator Hruska entered into the record of the hearings).[57] Mitchell emphasized four specific charges: (1) that Rehnquist had appeared as a witness before the Phoenix City Council in 1964 in opposition to a proposed public accommodations ordinance; (2) that in 1964 he had personally denounced persons who had gathered at the Arizona State Capitol in the interest of civil rights legislation; (3) that he had written a letter to the editor of the Arizona Republic opposing proposals to end de facto segregation of the schools of the city of Phoenix; and (4) that he had personally engaged in action to harass poor and black citizens who were attempting to vote during the 1968 Presidential election.[58] Rauh's

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[55] Infra, pp. 102-103.

[56] Rehnquist and Powell Hearings, p. 290.

[57] Ibid., pp. 187-194.

[58] Ibid., pp. 184, 290.

testimony supplemented that of Mitchell on the specific charges. He added observations that Rehnquist was not a judicial "passivist" but an "activist" who would use his activism to put over his views as a political conservative.[59] Rauh's contribution was to the effect that Rehnquist had demonstrated a disregard for the Bill of Rights. He specified: (1) that Rehnquist had repeatedly criticized Supreme Court decisions protecting civil liberties; (2) that his testimony before Senate Committees concerning government surveillance of citizens raised no constitutional question; (3) that he had justified "qualified martial law" in controlling the May Day 1971 events in Washington; and (4) that he believed in "untrammeled wire-tapping for domestic as well as foreign subversion and without any limits."[60] The strong emphasis on the "Bill of Rights" issue in this case was unique in the testimony of the civil rights representatives, inasmuch as they usually restricted their testimony to items more specifically limited to rights of black citizens and other minority groups.

The responses to the testimony of civil rights groups by members of the Committee were comparable to earlier actions. In the Committee Senator Birch Bayh and Senator Philip Hart participated in the questioning in a "supportive manner," that is, eliciting information concerning Rehnquist's attitude toward civil rights issues, while Senator Hruska in particular endeavored to rebut the charges. Senator Marlow Cook characteristically produced questions which appeared to be designed to clarify

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[59]Ibid., p. 303.

[60]Ibid., pp. 311-313.

objective facts and to achieve an appraisal "unclouded" by previously assumed stances toward the nomination.

Senate debate scarcely dealt with the Powell nomination, but a determined effort was made under Senator Bayh's leadership to separate the two nominations and even to have the final action on the Rehnquist nomination to be held in abeyance until January 1972, but to proceed with the Powell confirmation immediately. In the debate Bayh drew heavily upon statements by Mitchell, Rauh, and others who supplied materials that testified to the anti-civil rights record of Rehnquist.[61] He invoked "a majority" of the professors of the University of Wisconsin Law School as writing that " Rehnquist's long held views on civil rights . . . are in basic respects contrary to the Supreme Court's."[62] Meanwhile he had attached a statement of his individual views to the Committee's executive report to the Senate in which he compiled 13 pages of analysis of the various charges related to Rehnquist's civil rights record, relying mostly on the statements of persons and newspaper reports concerning the 1962-1964 era of racial changes that were occurring in Phoenix and Maricopa County, Arizona.[63]

The pro-Rehnquist group of members of the Judiciary Committee seemed to sense that they had a winner, perhaps due to a dearth of record as much as from the actual record. Counter-affidavits and statements

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[61] Congressional Record 117:44880ff (December 6, 1971).

[62] Ibid. 117:44644 (December 3, 1971).

[63] U. S. Congress. Senate. Committee on the Judiciary, Ninety-second Congress, First Session. Executive Report No. 92-16: Nomination of William H. Rehnquist. (Washington: U. S. Government Printing Office, 1971), pp. 31-42.

were brought out in the hearings that absolved the nominee from charges of a racist attitude in the Phoenix affairs. For example, Federal District Court Judge Walter E. Craig of Arizona flatly contradicted all such allegations.[64] In his formulation of the Committee's executive report to the Senate, Senator Eastland devoted seven pages to a defense of Rehnquist's civil rights record.[65] Opening formal debate on confirmation Eastland entered into the record 31 separate letters from "important people" of Arizona who not only endorsed the nomination but denied the charges of racist behavior.[66] Committee members Hruska, McClellan, Fong, and Cook joined the debate in support of Rehnquist, each making major speeches which specified the inadequacy of the anti-civil rights charges made against the nominee.[67] Other Senators, of course, made major speeches, especially in support of the nomination. Among these were the Senators from Arizona, Paul J. Fannin and Barry Goldwater, Hollings of South Carolina, Hansen of Wyoming, Tower of Texas, Buckley of New York, Percy of Illinois, Baker of Tennessee, and Allott of Colorado. In opposition to the nomination Senators Humphrey and Mondale of Minnesota, Muskie of Maine, and Javits of New York made speeches, but most of their statements seem almost to have been pro forma, and the record gives the impression that most of the task of opposition was left almost to the single-handed efforts of Senator Bayh

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[64] Rehnquist and Powell Hearings, pp. 179-200.

[65] Senate Executive Report No. 92-16, pp. 6-13.

[66] Congressional Record 117:44862-44868 (December 6, 1971).

[67] Formal debate continued from December 6 to December 10, 1971, Congressional Record 117:44862-46196.

of Indiana. The frequency and volume with which Bayh spoke eventually drew from Senator Dole of Kansas a rather sarcastic reference to Bayh's "lonely vigil" and a plea for getting on with the vote, the outcome of which was (to Dole) already obvious.[68]

IV. MISCELLANEOUS GROUPS

No other single category of interest groups seems to be comparable to organized labor and civil rights groups either in the intensity of effort or the effectiveness of impact in the attempt to influence the decision of the Senate Judiciary Committee or the Senate. However, a variety of groups from time to time offered their views which deserve at least identification.

1. Organizations of the Legal Profession.

In connection with the Haynsworth nomination at least four separate groups of black lawyers (or law students) made efforts to influence the proceedings. Among these the Black American Law Students Association, represented by J. Otis Cochran, actually appeared to give testimony.[69] Organized groups of black lawyers which submitted prepared written statements to the Judiciary Committee but did not send representatives to testify included:

> The National Conference of Black Lawyers, Floyd B. McKissick, President
>
> The Old Dominion Bar Association of Virginia, Henry L. Marsh III, President

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[68] Congressional Record 117:S21071 (December 9, 1971), daily edition.

[69] Haynsworth Hearings, p. 580.

The Southeastern Lawyers Association[70]

The theme of these groups was opposition to the appointment primarily on grounds of Judge Haynsworth's anti-civil rights record. This specific charge was supplemented or elucidated by such phrases as "unfit professionally and personally," "hostility to freedom," "would reverse the movement for racial equality," and "resistance to the U. S. Supreme Court's decisions in school desegregation cases."

The National Lawyers Guild also submitted a statement, prepared by the Guild's president, Victor Rabinowitz, in opposition to the Haynsworth nomination. This statement also emphasized the civil rights issue as the primary basis for opposition.[71]

The Carswell nomination drew both opposition and support from specific groups within the legal profession. The endorsement of the Florida Bar Association has been previously noted in this dissertation.[72] The Association's president, Mark Hulsey, Jr., stated that the Board of Governors (41 members) of the Florida Bar Association (11,373 members) had unanimously endorsed Carswell for the Associate Justiceship. Hulsey also offered a rebuttal of the feminist charges against Carswell arising out of his action in connection with the Ida Phillips case.[73] He cited Judge Carswell's action in the case of Brooks v. the City of Tallahassee (1961) as an instance of the judge's initiative in rendering pro-civil

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[70]Ibid., pp. 612-620.

[71]Ibid., p. 614.

[72]Supra, Chapter Three, p. 71.

[73]Carswell Hearings, pp. 102-104.

rights decisions.[74]

A relatively new organization (established in 1968) called the National Conference of Black Lawyers was represented before the Committee by Leroy D. Clark, associate professor of law at New York University Law School, in opposition to Carswell. Clark had in previous years coordinated the preparation of civil rights cases in Florida, supervising the efforts of a number of civil rights lawyers. He reviewed a number of anti-civil rights decisions of Carswell and also described him as "the most hostile Federal District Court judge I have ever appeared before with respect to civil rights matters."[75] Clark did not specify whether he was speaking for himself as an individual or whether he had a mandate from the National Conference of Black Lawyers.

Lawyer groups submitted to the Judiciary Committee numerous prepared statements with reference to the nominations of Lewis F. Powell, Jr., and William H. Rehnquist. Both drew endorsements from their respective state Bar Associations. However, none of these supplied representatives to testify in person before the Committee. In opposition to the Powell nomination the Old Dominion Bar Association of Virginia was represented in person by Henry L. Marsh III, chairman of the Association's Committee on Judicial Appointments. His statement was essentially to the effect that Powell, as President of the Richmond School Board, had impeded the progress of school desegregation during the period 1961-1969.[76]

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[74]Ibid., p. 106.

[75]Ibid., pp. 221-227.

[76]Rehnquist and Powell Hearings, pp. 386-388.

In opposition to both Powell and Rehnquist the president of the National Lawyers Guild, Catherine Roraback, stated:

> The views expressed by both men make it clear that they would be incapable of dealing fairly and impartially with issues arising out of the most pressing problems of our times: the struggle of blacks, other third-world people, women and other oppressed groups for social, political and economic equality.[77]

In view of Powell's writings she declared that he was totally lacking in understanding of and regard for the Fourth Amendment prohibition against unreasonable searches and seizures.[78] She detected in Rehnquist's public record a grave inconsistency in opposing forced integration (by busing) of public schools in Phoenix, Arizona, on the ground that it would constitute a serious breach in personal liberties while at the same time he supported government wire-tapping policies which, according to Mrs. Roraback, were bona facie instances of unconstitutional breaches of personal liberties.[79]

Among the elements of the legal profession one important group was never involved as a pressure group, the American College of Trial Lawyers. Although individual lawyers associated with the group were occasionally cited in Senate debate, at no point with reference to any nomination did the organization as such take a stand and perform in the usual fashion of an interest group. Perhaps just as surprising is the fact that on only one occasion during Senate debate was the position of the National Bar Association invoked. Senator Philip A. Hart cited the

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[77] Ibid., p. 456.

[78] Ibid., p. 457.

[79] Ibid., p. 459.

approval of this group in support of the nomination of Abe Fortas to be Chief Justice.[80]

In Senate debate there was no dearth of reference to the position of elements of the legal profession, but these were almost altogether in connection with the recommendations of the American Bar Association, ad hoc groups of practising lawyers, or members of law school faculties.[81]

2. Pressure from Women's Groups.

Representatives of women's groups who appeared before the Judiciary Committee were invariably in opposition to the nominees. Carswell was the first to draw such opposition. The Honorable Patsy Mink, Congresswoman from Hawaii, representing women in general [". . . women constitute a majority of this Nation . . ."] based her objection to Carswell on his decision in the case of Ida Phillips v. Martin Marietta Corporation (1969), in which decision he had favored the company in denying employment to an applicant, Ida Phillips, on the ground that she had pre-school age children.[82]

The National Organization for Women (NOW) was represented at the hearings by the organization's president, Mrs. Betty Friedan. Her testimony likewise centered upon the "anti-feminine" attitude of Judge Carswell which she perceived in his handling of the Ida Phillips case.[83]

Attending the hearings on the last day but not given the opportunity to testify, Dr. Jo-Ann Gardner, representing Focus on Equal Employment

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[80] Congressional Record 114:28927 (October 1, 1968).

[81] Chapter Three of this Dissertation deals with these sources in detail.

[82] Carswell Hearings, pp. 81-82.

[83] Ibid., pp. 88-101.

for Women Coalition Groups, Bipartisan, National (Chapters in Boston, Washington, Pittsburgh, Utica, Kalamazoo, Minneapolis, and Los Angeles) submitted a statistical analysis of the economic status of working mothers, presumably in opposition to the Carswell nomination.[84]

At the Rehnquist-Powell hearings the National Women's Political Caucus was represented by Barbara Greene Kilberg, attorney for the group. The position of the organization was to oppose both nominees, not because they were male, but as a protest against the social attitude in general which relegated women to second class citizenship. The Caucus strongly pressed for the withdrawal of both nominations and the appointment of at least one woman to the Supreme Court.[85] Mrs. Wilma Scott Heide, president of National Organization for Women denounced both Rehnquist and Powell as representatives of the typical American male attitude that was oblivious to the real needs and legitimate aspirations of women.[86]

What of the impact of the testimony and statements of the various representatives of women's rights? In the Committee most members were silent. A few (Senators Hart, Bayh, Kennedy, and Cook) asked polite questions and expressed polite concern for women's rights. The probability is that the defeat of the Carswell nomination was on grounds other than those advanced by the women's groups. Of course the efforts to defeat the Powell and Rehnquist nominations were fruitless in any case. A survey of Senate debate on all three of the nominations reveals that

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[84]Ibid., pp. 309-310.

[85]Rehnquist and Powell Hearings, pp. 419-422.

[86]Ibid., pp. 423-441.

no Senator invoked the views of the women's organizations in speaking against any of the nominees which the organizations opposed.

3. Pressure from Doctrinaire Groups.

A few groups evidently of right-wing ideological orientation appeared before the Judiciary Committee in opposition to the nominations of Fortas and Marshall to be Associate Justices and of Fortas for Chief Justice. Regularly sending representatives to testify before the Committee was the "Liberty Lobby." In all instances the gist of the testimony was that Fortas and Marshall were under the direct or indirect influence of Communist front groups and that they were not committed to the preservation of the Constitution of the United States.[87] A former research assistant for the Judiciary Committee's Subcommittee on Internal Security, Charles Callas, testified on his own behalf against both the Fortas nominations on the ground of Fortas' alleged Communist connections.[88] Other individuals included Dr. Marjorie Shearon, editor of Challenge to Socialism, opposing Fortas (1965),[89] and Benjamin Ginzburg, a retired civil servant,[90] both of whom alleged that Fortas had Communist connections. Two other groups, the Conservative Society of America and the Council Against Communist Aggression, were represented by their respective presidents, Kent Courtney and Marx Lewis.[91] They presented the familiar charges

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[87] Fortas Hearings I, p. 22; Marshall Hearings, pp. 181-187; Fortas Hearings II, pp. 283-291.

[88] Fortas Hearings I, pp. 23-34; Fortas Hearings II, pp. 83-89.

[89] Fortas Hearings I, p. 22.

[90] Fortas Hearings II, pp. 89-97.

[91] Ibid., pp. 75-83.

of Fortas' alleged Communist connections also.

Contesting the Fortas nomination for Chief Justice, the National Organization for Decent Literature sent its attorney, James J. Clancy, to the Committee hearings. His testimony emphasized Fortas' record on the Supreme Court allegedly supporting the right of unrestricted distribution of pornographic materials.[92]

In the Committee sessions members of the Committee gave little serious attention to this type of testimony. No Committee member ever referred to these organizations either in executive reports to the Senate, in their attached individual views, or in debate on the Senate floor. Two members of the House of Representatives, Congressmen John M. Ashbrook of Ohio and John M. Rarick of Louisiana placed into the Congressional Record testimony of some of the witnesses listed above, but Senator Jack Miller of Iowa was the only Senator who took note of any of these groups and their testimony during Senate debate. In opposing the nomination of Fortas for Chief Justice he reviewed the testimony of James J. Clancy who represented Citizens for Decent Literature.[93]

Overall, it may be concluded that such doctrinaire groups and individuals did not carry great weight with the Senators either in the Committee or on the floor of the Senate. They did not cite them as qualified authorities on the qualifications of judicial nominees.

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[92]Ibid., pp. 291-315.

[93]Congressional Record 114:23488 (July 26, 1968).

V. PRESSURE FROM THE HOUSE OF REPRESENTATIVES

Recognizing the fact that the House of Representatives has no direct role in the process of judicial selection, nevertheless on occasion members of that chamber availed themselves of the opportunity to appear before the Judiciary Committee to present testimony relating to the confirmation or rejection of nominations under consideration by the Committee. The traditions of the Senate have come to include "courtesy" appearances by Senators of the home states of nominees, and in connection with all the nominations studied in this research the Senators in fact did appear and offer their supportive comments. The single exception to this norm was in the case of the Fortas nomination to be Chief Justice, in which instance Senator Howard Baker of Tennessee registered his opposition to the nomination. His opposition was announced, however, on the floor of the Senate and not before the Committee.[94] Similar to the tradition of such appearances by Senators, members of the House of Representatives have also been accorded the courtesy of opportunity to state their views concerning nominees from their home states. In connection with the Supreme Court nominations a variety of patterns of action are identifiable. Early in the Committee hearings on the Carswell, Blackmun, Powell, and Rehnquist nominations members of the House of Representatives made "courtesy" appearances and supplied supportive statements. Representative Don Fuqua of Florida appeared on behalf of Judge Carswell,[95] Representatives Clark MacGregor and Albert H. Quie of

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[94] Congressional Record 114:28252-28263 (September 26, 1968).

[95] Carswell Hearings, p. 5.

Minnesota on behalf of Judge Blackmun,[96] Representative John J. Rhodes of Arizona on behalf of Rehnquist,[97] and Representative David E. Satterfield of Virginia on behalf of Lewis F. Powell, Jr.[98] MacGregor, Rhodes, and Satterfield made it clear that they were authorized to report the unanimous approval of their respective state delegations in the House of Representatives.

A different category of appearances by members of the House of Representatives were the occasions on which individuals or groups appeared to register their strong opposition to the Senate Judiciary Committee. Those nominations attracting such testimony were Haynsworth, Carswell, Rehnquist, and Powell. In each of these cases genuine opposition was mounted by a few individual members, while the "black caucus" under the leadership of Representative John Conyers of Michigan made determined efforts to contribute to the defeat of these four nominees. Congresswoman Patsy Mink's opposition to Carswell has been previously noted.[99] Representative William F. Ryan of New York testified against the confirmation of Clement F. Haynsworth, Jr. He developed his testimony around Haynsworth's record of dealing with civil rights issues, concluding that the record was at best "foot-dragging" and at worst outright obstruction of the implementation of Supreme Court decisions concerning desegregation of public schools.[100] The most concerted efforts in

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[96] Blackmun Hearings, pp. 4-5.

[97] Rehnquist and Powell Hearings, p. 14.

[98] Ibid., p. 109.

[99] Supra, p. 104; Carswell Hearings, pp. 81-88.

[100] Haynsworth Hearings, pp. 314-332.

opposition to the Haynsworth, Carswell, Rehnquist, and Powell nominations were mounted by the "black caucus" group. In every instance a full case history of the nominee's civil rights record or philosophy was developed and interpreted as the basis of rejection of the nominee. In the appearances before the Judiciary Committee Representative Conyers was accompanied by at least one or as many as six other members of the "black caucus."[101]

What of the impact of the testimony by members of the "other house"? If success is to be measured by rejection of the nominees by the Senate, the record, of course, turned out to be two successes and two failures. No indication exists, however, that Congressional opposition alone would have been the determining factor in connection with the various nominations. In fact, of course, this source of opposition never stood alone, and doubtless the concerted efforts of the "black caucus" and the opposition efforts of other groups were mutually reinforcing, sufficient to insure the defeat of the Haynsworth and Carswell nominations, but insufficient to achieve the rejection of Powell and Rehnquist.

VI. COMMITTEE RESPONSES TO "OUTSIDE" PRESSURE: AN EVALUATION

The degree to which individual Senators were responsive to specific group pressures would be most difficult to document with certainty. Frequently, however, the correspondence of views between certain Senators and "outside" groups is readily apparent. The affinity of a given Senator for the position of an interest group would be manifested by such factors

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[101] Haynsworth Hearings, pp. 473-481; Carswell Hearings, pp. 206-212; Rehnquist and Powell Hearings, pp. 349-386.

as the substance of questions put to witnesses before the Committee, the wording and tone of such questions, and the substance of debate on the senate floor.

The Committee's executive reports to the full Senate, plus the attached views of individual Senators, reveal some response to group pressures. The formal reports of the Committee, always expressing the majority views, occasionally invoked the endorsement of specific interest groups. Senator Philip A. Hart, who authored the majority endorsement of Judge Thurgood Marshall, cited the approval of the NAACP;[102] Senator Roman Hruska pointed out that Chairman Lawrence Walsh of the American Bar Association's Standing Committee on Federal Judiciary had appeared personally before the Senate Judiciary Committee to urge the approval of Judge Clement F. Haynsworth, Jr.;[103] and Senator James O. Eastland invoked the endorsements of a number of law professors to support the nomination of William H. Rehnquist.[104]

Minority views prepared jointly by Senators Philip A. Hart, Joseph D. Tydings, Edward M. Kennedy, and Birch Bayh in opposition to the Haynsworth nomination cited the opposition of a number of deans of law school, the Chicago Council of Lawyers, the NAACP, and the American Civil Liberties Union.[105] The same group, with Senator John V. Tunney replacing Senator Tydings, in a 30-page memorandum attached to their minority views opposing the confirmation of William H. Rehnquist, took the unusual step of listing the following specific groups as objecting

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[102] Senate Executive Report No. 13, p. 3.

[103] Senate Executive Report No. 91-12, p. 2.

[104] Senate Executive Report No. 92-16, pp. 3-5.

[105] Senate Executive Report No. 91-14, pp. 15-19.

to the nomination:

The National NAACP

The Leadership Conference on Civil Rights

The AFL-CIO

The United Automobile Workers

The Congressional Black Caucus

The National Bar Association (an organization of Negro lawyers)

The National Legal Aid and Defenders Association

The Washington Council of Lawyers

The National Catholic Conference for Interracial Justice

A number of law professors[106]

In floor debate on the Rehnquist nomination on December 10, 1971, Senator Bayh specifically invoked five of the groups listed above, plus the American Civil Liberties Union and the Chicago Council of Lawyers.[107]

Interest groups that became involved in the selection process did so more often in opposition rather than in support of nominees. In most instances a public announcement or press release was the first signal of a group's intentions. The appearance of witnesses before the Senate Judiciary Committee provided the opportunity for full expression of the case from the group's viewpoint. Once a group of Senators, preferably clustered around members of the Judiciary Committee, was identified as inclined or committed to opposition of a given candidate, the groups continued contact, feeding information and making suggestions regarding

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[106] Senate Executive Report No. 92-16, p. 55.

[107] Congressional Record 117:S21239-S21242 (December 10, 1971), daily edition.

mobilizing fresh and diverse aggregates of opposition.[108] While the presence of strong opposition by interest groups doubtless contributed to the defeat of the Haynsworth and Carswell nominations, it probably would be going too far to say that such groups were totally responsible for their defeats. Further, the defeat of the Fortas nomination for Chief Justice can scarcely be attributable to group opposition in any sense. The explanation of the Fortas rejection is probably to be found in the area of partisan politics and the efforts of a bi-partisan ideological coalition's determined effort rather than in the action of politically active interest groups.

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[108] Richard Harris, Decision (New York: Ballentine Books, 1970), pp. 33, 51, 78.

CHAPTER FIVE

COMMITTEE PROCEDURE

I. THE COMMITTEE AND THE "CANDIDATE": CONFRONTATION?

Viewing the Senate Judiciary Committee's overall performance in its processing of nominations to the federal judiciary during the first half of the twentieth century, it probably would not be an unfair judgment to characterize the performance as quite perfunctory. This judgment would be accurate especially at levels below the Supreme Court, at which levels the task is regularly delegated to subcommittees. As an example, in the case of Thurgood Marshall's appointment to the Court of Appeals a three-member subcommittee was designated to conduct the hearings. Of those three members one never attended the hearings at all, and the other two appeared one at a time in separate sessions to question the nominee. The subcommittee never made a report, and pressure from the administration was finally brought to bear so that the full Committee eventually made a recommendation for the approval of the nominee.[1] For the first half of the century the perfunctory approach applied even to

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[1] U. S. Congress. Senate. Subcommittee of the Committee on the Judiciary of the United States Senate, Eighty-seventh Congress, Second Session. Hearings on the Nomination of Thurgood Marshall of New York to be United States Circuit Judge of the Second Circuit (Washington: U. S. Government Printing Office, 1962); see also Harold W. Chase, Federal Judges: The Appointing Process (Minneapolis, Minr.: University of Minnesota Press, 1972), p. 21.

the handling of Supreme Court nominations. Subcommittees conducted hearings on these through 1940, including that of Frank Murphy. Although since the nomination of Robert H. Jackson in 1941 the full Committee has participated in the hearings, besides Jackson himself no other nominee appeared in person to testify until John M. Harlan's appearance in 1954. James A. Thorpe of the University of Wisconsin, in a summary study of the experiences of those nominees who appeared before the Committee or a Subcommittee from 1925 to 1968, indicated that of those nominated prior to 1950 Stone, Hughes, Parker, and Frankfurter were the only ones to which the Committee gave its diligent attention.[2] The well-known controversial nomination of Louis D. Brandeis (1916) would properly be added to Thorpe's list, but, of course, the practise of inviting nominees to appear had not been initiated up to that time.

The Committee hearings are the heart of the Judiciary Committee's performance in processing nominations. The contemporary process is characterized by the following prominent features: (1) the appearance of and testimony by the nominee himself; (2) the submitting, either by personal testimony or by written statements, of views of interested individuals and groups;[3] (3) the gathering of pertinent information about the nominee on the initiative of the Committee or its individual members; and (4) with respect to controversial nominations, the alignment of the Committee into internal subgroups working in support of, or in

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[2]James A. Thorpe, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," Journal of Public Law (Emory University) 18:371-402 (1969). (Hereinafter cited as: Thorpe, "Appearance of Nominees.")

[3]See Chapter Four of this dissertation for a full treatment of this phase of the process.

opposition to, specific nominations.[4]

Over a period of some thirty years, that is since the nomination of Professor Felix Frankfurter in 1939, the procedural norms of the Senate Judiciary Committee have undergone a one hundred eighty degree reversal with respect to the personal appearance of Supreme Court nominees before the Committee hearings. Table 7 lists all nominees since 1925, indicating their appearance or non-appearance as well as some additional qualifying features of the nominations. Prior to Harlan F. Stone's appearance before the Subcommittee of the Judiciary Committee in 1925 not only had no nominee previously appeared, but there seems to have been a general feeling that such an appearance would have been a breach of propriety. The office was supposed to "seek the man," and testifying in one's own behalf smacked of "politicking" in such a manner as to be unworthy of the post.

The Committee's phase of the selection process is completed with the preparation of an Executive Report which is submitted to the full Senate, with recommendation that the nomination be confirmed or rejected. Dissenting views of individual Senators are usually attached to the Executive Report as "individual views."

George H. Haynes, in his classic study of the United States Senate, described the difficulties of President Herbert Hoover in connection with his three nominations in 1930. The Hughes nomination was vigorously opposed by a handful of Senators on the grounds that he had "demeaned" the Supreme Court by his resignation in 1916 to be the Republican

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[4]See Appendix I of this dissertaion for such alignments.

TABLE 7

THE APPEARANCE OF SUPREME COURT NOMINEES BEFORE THE SENATE JUDICIARY COMMITTEE, 1925-1971

Nominees Who Appeared	Year	Nominees Who Did Not Appear
Stone	1925	
	1930	Hughes (for Chief Justice)
	1930	Parker (his offer to appear rejected)
	1930	Roberts
	1932	Cardozo
	1937	Black
Reed	1938	
Frankfurter	1939	
Douglas (volunteered)	1939	
Murphy (volunteered)	1940	
Jackson	1941	
	1941	Stone (elevated to Chief Justice)
	1942	Byrnes
	1942	Rutledge
	1945	Burton
	1946	Vinson (Chief Justice)
	1949	Clark
	1949	Minton (Summoned; declined)
	1954	Warren (Chief Justice; serving on recess appointment)
Harlan	1954	
Brennan	1957	(Serving on recess appointment)
Whittaker	1958	
Stewart	1958	(Serving on recess appointment)
White	1962	
Goldberg	1962	
Fortas	1965	
Marshall	1967	
Fortas (Chief Justice)	1968	
Thornberry	1968	
Burger (Chief Justice)	1969	
Haynsworth (Rejected)	1969	
Carswell (Rejected)	1970	
Blackmun	1970	
Powell	1971	
Rehnquist	1971	

Note: Warren, Brennan, and Stewart received initial recess appointments by President Dwight D. Eisenhower. Hearings and confirmations occurred in the next session of Congress.

Sources: Thorpe, "Appearance of Nominees," pp. 371-398; U. S. Congress. Senate. Committee on the Judiciary. Hearings (as applicable); Leon Friedman and Fred L. Israel, The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions (4 Vols.) (New York: Chelsea House Publishers in association with R. R. Bowker Company, 1969), Chart I, pp. 3204-3213.

candidate for President and that as a practising attorney he was a "tool" of the Wall Street "barons," but his nomination was nevertheless eventually confirmed by the Senate. Judge John J. Parker's nomination was opposed by the National Association for the Advancement of Colored People and organized labor, and it was ultimately rejected by the Senate.[5] In the light of the controversies around Hughes and Parker, Haynes proceeded to predict future difficulties in connection with processing nominations to the Court if the practice of calling nominees before the Senate Judiciary Committee should become standard practice. He suggested:

> It may prove a more difficult task in the future for the President to find strong men and able jurists, of the caliber of those who have built up the Supreme Court's prestige, who will allow their names to be placed in nomination, if they must first be subjected to an inquisition in committee hearings as to their past records, pertinent or not pertinent to Supreme Court service, as to their personal investments, and as to the opinions which they hold upon complicated and controverted economic and social questions likely to be involved in litigation before the Court, and then must have their nominations made the subject of bitter debate on the floor of the Senate, where racial, sectional, and political considerations may bulk so big that questions of the nominee's character and fitness are half forgotten.[6]

Whether Haynes' prediction that strong men and able jurists would be reluctant to have their names placed in nomination might indeed be questioned (Abe Fortas, 1965, may have been the original reluctant nominee of modern times), but his prophetic description of Committee

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[5]George H. Haynes, The Senate of the United States, Vol. 2 (Boston: Houghton Miflin Co., 1938), p. 79; Joel B. Grossman and Stephen Wasby, "Haynsworth and Parker: History Does Live Again," South Carolina Law Review 24:345-359 (1971).

[6]Haynes, The Senate of the United States, p. 79.

proceedings two or three decades away was remarkably accurate.

The practise of inviting the nominee to appear before the Committee seems to have become an established norm,[7] but certainly not on the basis of a single precedent. The 1925 appearance of Harlan W. Stone, nominated to an Associate Justiceship, was the first such occasion, but it must be regarded as an abberation from the normal procedure of the time. The next five nominees (1930-1937) not only did not appear before the Judiciary Committee or a subcommittee, but the willingness of Parker to appear in order to attempt to clarify his position with regard to racial and labor issues was rebuffed by the Committee. Solicitor General Stanley F. Reed's appearance (1937), although a very casual affair, may have been the real beginning of the precedent. Felix Frankfurter appeared (1939), but seemingly somewhat under protest and against his better judgment. William O. Douglas (1939) and Frank Murphy (1940) volunterred to appear and presumably strengthened the precedent. Robert H. Jackson (1941) appeared in response to an invitation.[8] The period 1941-1954 was a period of retrogression with regard to the practise of requiring the personal appearance of nominations to the Supreme Court. Of the seven nominations of this period only Sherman Minton was "summoned," but he successfully declined to appear.[9] The fact that James F. Byrnes and Harold H. Burton were active Senators and Sherman Minton a former Senator

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[7]All Senators interviewed as a part of the research for this dissertation expressed the view that refusal to appear before the Senate Judiciary Committee would probably be fatal to the chances of confirmation of any future nominee.

[8]Thorpe, "Appearance of Nominees," p. 377.

[9]Ibid., p. 383.

and a sitting judge may account partly for the casual manner in which they were readily confirmed. A nominee for Chief Justice had never appeared before the Committee until Abe Fortas' nomination to the post in 1968. Stone (elevated from Associate Justice), Vinson, and Warren successfully stood on the precedent of non-appearance by nominees for Chief Justice. Beginning with the 1954 appointment of Harlan as Associate Justice nominees have subsequently appeared before the Committee without exception. Even Warren Earl Burger, nominated to the Chief Justiceship followed in Fortas' footsteps with no visible sign of demurring. Probably it was the Committee itself rather than the nominees that actually initiated the new policy of requring all nominees to appear. In proposing an explanation of the post-1954 policy the most obvious fact to consider would be the emergence of the Court as a force in determining policy on social issues, specifically race relations. The decision in Brown v. Board of Education of Topeka, Kansas (1954) requiring the racial desegregation of public schools abruptly precipitated a general awakening to the fact that the Court could be an activist institution for the achievement of political and social change, contesting both the executive and legislative branches in the assertion of initiative in the exercise of governing power. The 1954 milestone marked a dramatic upsurge in the general public awareness of and Senate attention to Supreme Court Nominations.[10] While the decision in Brown v. Board of Education need not be identified as the sole cause of the changes, the

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[10]Senator Philip Hart, in a research interview by this writer, June 1, 1973, indicated that the intensified attention to nominations became very apparent with the 1958 appearance of Potter Stewart.

nation subsequently has become more acutely aware of clashing ideologies and the Senate more meticulous in the performance of its advice-and-consent duty in connection with nominations to the Court.

The reaction of members of the Senate, especially the Committee on the Judiciary, has been to assert their prerogative to examine nominees to their own full satisfaction. The examinations have taken a turn to attempt to ascertain the nominee's "judicial philosophy" or ideological stance with the hope of being able to appraise beforehand the impact of any given appointee upon the Court's future actions as they might affect public policy. Ostensibly the Judiciary Committee explores the qualifications of the nominees, with the objective of determining their qualitative fitness to serve on the Court.[11] However, in the Committee's hearings the question of the nominee's competency in law is rarely a matter of investigation. Among the ten nominees included within the scope of this dissertation the professional competence of only one, Carswell, became an item for serious discussion in the Committee process.[12] The legal competence of Solicitor General Thurgood Marshall was obliquely called in question by Senator Strom Thurmond, but even a cursory reading of the text of the Committee Hearings would be sufficient to suggest that the question of competence was clumsily managed and was raised as a smokescreen in lieu of Thurmond's genuine objections to the nomination, that is,

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[11]The definition of satisfactory, universally acceptable criteria to assess fitness has not yet been achieved by the Senate nor by the Judiciary Committee. Chapter Seven of this dissertation is devoted to the search for criteria.

[12]"Individual Views of Messrs. Bayh, Hart, Kennedy, and Tydings," Senate Executive Report No. 91-14, p. 13.

the political ideology (and probably the race) of Marshall.[13] The Judiciary Committee's procedure does not usually provide for its own independent inquiry into professional qualifications, but rather relies on the judgments of the President, the American Bar Association, other sitting judges in Federal and State courts, individual lawyers who have reason to believe they can evaluate the nominee's qualifications, and on the general reputation or national stature of the nominee.[14] Assuming that the hearings are thorough, they can provide opportunity for individual members of the Committee to evaluate other elements of qualification, such as strength of personality, personal integrity, and ability to endure pressure.[15] However, even with reference to personal integrity Committee members are usually forced to rely on information received from outside sources rather than from statements elicited from the nominee himself. A glaring exception to this generalization would be the Committee's opportunity to evaluate the veracity of Judge G. Harrold Carswell when he denied having a clear recollection of the articles of incorporation of a racially segregated golf course in Tallahassee, Florida, although certain members of the Judiciary Committee obtained certain knowledge of the fact that Carswell had personally examined the document on the evening before he was questioned about it.[16]

Regardless of the merits or demerits of the procedure, the require-

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[13] Marshall Hearings, pp. 161-176.

[14] Former Associate Justice Arthur Goldberg, personal interview, June 4, 1973; see also Chapter Three of this Dissertation.

[15] Senator John L. McClellan, personal interview, June 11, 1973.

[16] Carswell Hearings, pp. 11-13; Richard Harris, Decision, p. 40.

ment that nominees appear personally before the Committee to be questioned as to their qualifications and views has apparently become standard procedure. Committee Chairman James O. Eastland emphasized the view that never again will consideration be given a nominee who should decline to appear.[17] One key Committee member's administrative assistant, in a research interview, not only declared that in the future nominees will have to appear, but they will have to do so as often as required by the Committee. He emphasized his view by expressing surprise that the matter was even a matter was even a matter of inquity.[18]

II. TACTICS AND TIMING: SPEEDY ACTION OR DELAY?

Senators are well aware of time as a factor affecting prospects for confirmation or defeat of a nomination. Quick action is much more likely to result in confirmation, hence speedy action is a goal of supporters of the nominee. Conversely, delay was discovered to be a valuable device for use in opposition, providing time for marshalling information, organizing and coordinating efforts among Senators, and for influencing and appealing to public opinion. Figure 1 sets forth a comparative glimpse of the time lapse involved in the processing of the nine nominations upon which the Senate took final action, 1965-1971. It is immediately apparent that some nominations were processed with dispatch while others were long drawn-out affairs. The list easily divides into three categories based on time lapsed, as follows:

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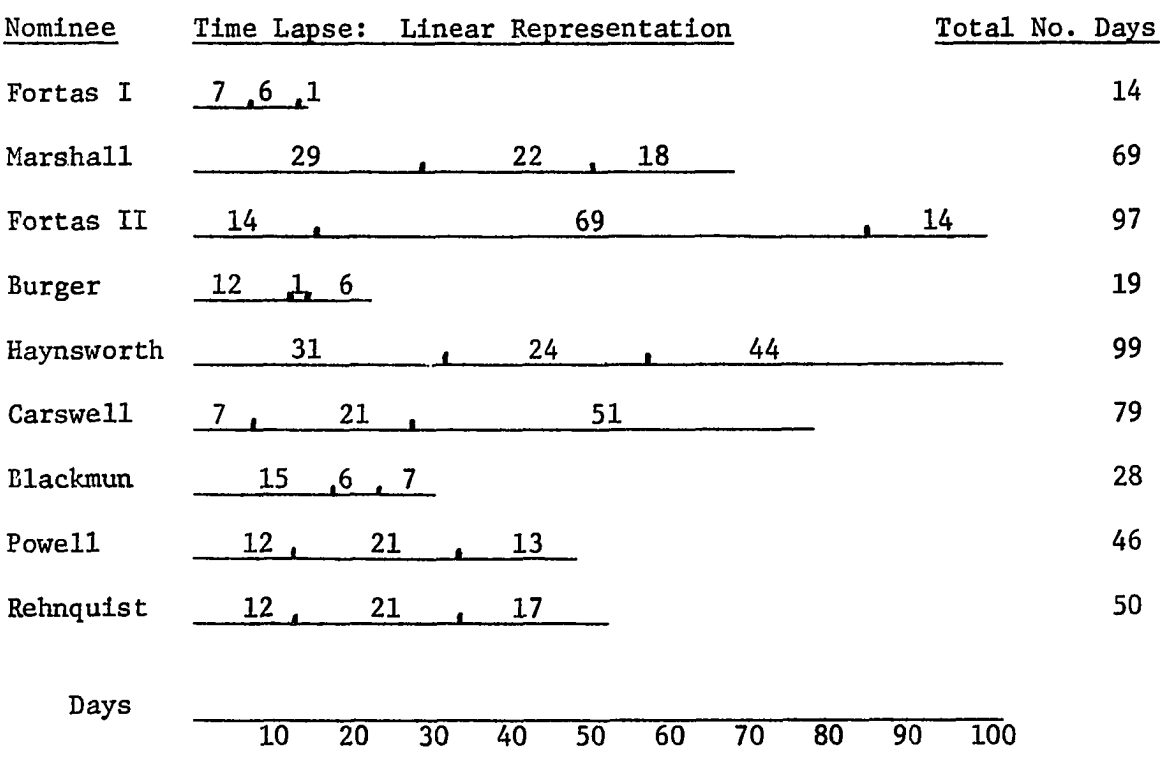
[17]Senator James O. Eastland, personal interview, June 6, 1973.

[18]Kenneth Davis, Administrative Assistant to Senator Hugh Scott, personal interview, May 31, 1973.

FIGURE 1

TIME LAPSE IN SENATE ACTION ON NOMINATIONS, 1965-1971



Note: Each line representing time lapse is divided into three segments:
First Segment: From the date of the first public announcement of the nomination to the start of the Committee hearings.
Second Segment: From the start of the Committee hearings to the formal Committee Executive Report to the full Senate.
Third Segment: From the Senate's receipt of the Executive Report to the final disposition of the nomination by the Senate.

Sources: (1) New York Times for dates of public announcements.
(2) Committee Hearings for date of start of hearings.
(3) Senate Executive Reports for dates the nominations were reported to the Senate.
(4) Congressional Record, for dates of final Senate action.

(1) Nominations Unopposed		(2) Nominations approved Over Opposition		(3) Nominations Defeated	
Fortas I	14 days	Marshall	69 days	Fortas II	97 days
Burger	19 "	Rehnquist	50 "	Haynsworth	99 "
Blackmun	28 "			Carswell	79 "
Powell	46 "				

The Powell nomination was essentially unopposed although 46 days lapsed from first to last, only four days fewer than the number devoted to Rehnquist. The time indicated for the Powell nomination is to be explained by the fact that the two nominations, Powell and Rehnquist, were treated simultaneously and as a package for the most part. They were separated only in the final stages of the process when they became the order of business of the Senate in executive session, but the group opposing the Rehnquist nomination would much have preferred the Senate to act early on the unopposed Powell nomination, leaving Rehnquist the lone target of their opposition.[19]

The Fortas nomination for Associate Justice (1965) was processed in a mere 14 days, but the short time span probably was not a matter of procedural strategy by either the Executive or the Judiciary Committee. It more properly should be viewed as the last of the "perfunctory" performances of the Judiciary Committee and the Senate in processing such nominations. The Burger and Blackmun nominations may be considered as occasions maximizing speedy action. President Nixon announced the Burger nomination without prior leakage. Public speculation had centered a great deal on the possibility that Associate Justice Potter Stewart might be the President's choice for the Chief Justiceship.[20] The Committee hearings

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[19] Congressional Record 117:45200 (December 7, 1971).

[20] New York Times, May 21, 1969, p. 1.

occupied only one day, the nomination was reported favorably (even orally!) to the Senate, and the Senate confirmed the nomination within six days. The quick action may be viewed as a tactical device in the light of the long-drawn out opposition to the Fortas nomination the previous summer and fall, followed by the renewed controversy over Fortas in the spring of 1969. One analyst of the action on the Burger nomination has suggested that the liberal wing of the Senate Judiciary Committee and of the Senate may have been in such a state of temporary demoralization and disarray following the Fortas resignation that it simply was not possible to mount an organized and convincing opposition to Burger.[21] Similarly, the nomination of Judge Harry A. Blackmun, following the rejection of Haynsworth and Carswell, was handled with dispatch. The nomination was announced within five days of the Senate vote on Carswell, the Judiciary Committee began its hearings within two weeks, completing its Executive Report within six days, and the Senate voted one week later. However, speedy action alone could not provide a sufficient explanation of the Senate's acceptance of Blackmun so quickly. The unhappy experience of Haynsworth before the Judiciary Committee and the Senate debate on his nomination had brought into new focus such considerations as conflict of interest, self-disqualification, and judicial ethics. The charge of "lack of candor" levelled against Haynsworth provided additional guidelines for Blackmun's appearance before the Committee. He provided the Committee with an unsolicited list of his stock holdings, as well as a list of cases on which he had sat involving parties in which

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[21]Louis M. Kohlmeier, Jr., "God Save This Honorable Court" (New York: Charles Scribner's Sons, 1972), p. 125.

he had some small pecuniary interest. He also stressed the fact that in all such cases he had conferred with the Chief Judge of the Eighth Circuit regarding self-disqualification. Senator Birch Bayh, who had led the opposition to both Haynsworth and Carswell, commended Blackmun on his adherence to high standards of judicial behavior and expressed the hope that future nominees would also adhere to the "Blackmun standard."[22] However, it might fairly be judged that Blackmun's action before the Judiciary Committee was a careful application of a "Bayh standard" which emerged in connection with the Haynsworth hearings.[23]

While speedy action is desirable from the standpoint of the appointing authority and supporters of the nomination, delay is available to the opposition as a useful tactic and is not difficult to apply. In connection with the nominations of Fortas for Chief Justice and Haynsworth for Associate Justice serious tactical errors may have been committed by the Executive and the conservative leadership of the Committee, thus contributing to the defeat of the two nominations. "Leaks" of the impending nominations of both Fortas (1968) and Haynsworth provided opportunity for opposition to begin mobilizing even before the formal Presidential choices were revealed. A full week before President Johnson announced his choice of Fortas to succeed retiring Chief Justice Earl Warren speculation centered upon Fortas as the probable nominee. Various Senators, including some members of the Judiciary Committee, announced their opposition to Fortas or to any "lame duck" nomination offered

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[22] Blackmun Hearings, pp. 43-49.

[23] A. Mitchell McConnell, Jr., "Haynsworth and Carswell: A New Senate Standard of Excellence," Kentucky Law Journal 58:26-27 (1970).

by President Johnson.[24] On the date that the Fortas nomination was announced 19 Republican Senators, already prepared, issued a statement that they would oppose the nomination even to the point of filibuster.[25] On the other hand, had the President announced his choice on the same day that Warren's contingent retirement was revealed, the outburst of charges of connivance between Johnson and Warren would likely have been more vociferous than ever.

Tactical errors in timing of the Haynsworth nomination seem to have been committed by both President Nixon and Senator Everett M. Dirksen, Senate Minority Leader and ranking Republican member of the Judiciary Committee. Either the President or the Attorney General permitted Haynsworth's name to be leaked several days ahead of the formal announcement,[26] and immediately prior to the beginning of a three-week vacation adjournment by the Congress. Similarly, Senator Everett Dirksen erred in timing in obtaining the unanimous consent of the Senate to permit the filing of the up-coming (but not yet announced) nomination during the previously agreed upon adjournment.[27] The NAACP Legal Defense and Education Fund began issuing opposition statements, and Senator Jacob Javits declared that the expected nomination of Haynsworth would be a blow to civil rights causes.[28] Thus the time lapse permitted opposition to be

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[24]New York Times, June 22, 1968, p. 1; June 23, 1968, p. IV, 3.

[25]Ibid., June 27, 1968, p. 1.

[26]Ibid., August 13, 1969, p. 1.

[27]Congressional Record 115:23277 (August 11, 1969).

[28]New York Times, August 13, 1969, p. 1; August 19, 1969, p. 1.

mounted, and Judge Haynsworth began issuing defensive statements three days before President Nixon formally announced the nomination.[29] Fate may have provided the real intervention in the form of the death of Senator Dirksen, which resulted not only in the removal from the scene of an influential Haynsworth supporter,[30] but also it occasioned a further one-week delay in the start of the Judiciary Committee's hearings on the nomination.[31] Despite the delays, however, Senate Majority Leader Mike Mansfield predicted that the Senate would confirm Haynsworth in time for the opening of the new term of the Supreme Court on October 6, 1969.[32] Mansfield apparently anticipated another uneventful experience in a repeat of the speedy confirmation that had occurred with respect to Chief Justice Burger. The conservative leadership of the Judiciary Committee also miscalculated the effect of the delays, expecting that the nomination would be processed in an unchallenged pro forma performance. Only after the Haynsworth defeat did the Attorney General and the conservative leadership of the Committee conclude that pro forma confirmations obviously could no longer be counted upon.

Hearings on the Carswell nomination were begun within seven days of the President's public announcement of his choice. The Judiciary Committee actually used 21 days before reporting the nomination to the full

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[29]Ibid., August 16, 1969, p. 15.

[30]Clyde Quinn, Executive Assistant to Senator Dirksen in 1969, personal interview, June 5, 1973.

[31]New York Times, September 9, 1969, p. 6.

[32]Ibid., September 7, 1969, p. 82.

Senate. Again a tactical error occurred when conservative Senator Strom Thurmond engaged in a one-man "filibuster" in the Committee itself to prevent a vote and a report on Senator Bayh's proposed constitutional amendment providing for the direct popular election of the President. The Thurmond action cost the Carswell supporters about a week of delay.[33] This meant that although the Judiciary Committee might have reported the nomination within 14 days or less, with good prospects for success on the part of the Carswell supporters, the nomination actually was in the hands of the Committee for a total of 21 days. One week of this time lapse was due to an opposition use of a delaying tactic. Senator Joseph D. Tydings exercised a prerogative available to him under the Committee's rules of procedure and demanded a one-week delay in the final vote in the Committee.[34] Committee Chairman James O. Eastland, hoping for a quick Committee endorsement of Carswell, but partly frustrated by his own conservative colleague, eventually succeeded in bringing the hearings to a close even though it meant that some witnesses present to testify against the nomination were not given the opportunity to do so.[35] The attempt to achieve quick action on the Senate floor was also frustrated by a one-man filibuster by Senator James B. Allen of Alabama, a Carswell supporter, when he used several days on the Senate floor to oppose the 1970 Voting Rights Act.[36] Senator Tydings' analysis of the ultimate defeat

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[33]Richard Harris, Decision, p. 71.

[34]Ibid.

[35]Carswell Hearings, p. 307.

[36]Richard Harris, Decision, p. 104.

of the Carswell nomination was that it was made possible because the "speed" strategy of the Attorney General and the conservative leadership was partially (and perhaps fatally) undercut by the inadvertent delays caused by Carswell supporters, namely Senators Thurmond and Allen.[37]

The use of time as an opposition device in connection with the Marshall nomination might best be described as stalling. Evidently there was never any genuine expectation that the nomination would be defeated, and the delaying tactics appeared to be "demonstrative" in nature rather than serious efforts to prevent confirmation.[38] The Committee waited almost a full month to begin hearings and consumed 22 more days before reporting the nomination to the Senate. The interrogation of the nominee covered a wide spectrum of questions, and a great amount of time was devoted to inquiry into minutiae of details of constitutional law and history. Lengthy debate in the Senate added 18 days, making the processing of the Marshall nomination the most extended occasion among all those finally approved by the Senate over strong opposition.

The Fortas nomination for Chief Justice, while it was in the hands of the Committee, consumed a record time of sixty-nine days. Hearings were held in two separate series, the first of which extended from July 11 to 23, 1968. Fortas himself appeared on four straight days, Tuesday through Friday, July 16 to 19.[39] (Two days were devoted

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[37]Ibid.

[38]Senator Philip A. Hart, personal interview, June 1, 1973.

[39]Fortas Hearings II, pp. 103-254.

to the abortive Thornberry nomination.) The Committee retained custody of the nomination, and additional hearings were held September 13 to 16, 1968, with additional witnesses appearing. Fortas himself was requested to return for further questioning, but he declined to appear the second time.[40] A majority of the Judiciary Committee eventually terminated its phase of the process and reported the nomination favorably to the Senate. However, the delaying tactics were merely transferred to the Senate floor where the nomination was filibustered to death.[41] Fortas' request that President Johnson withdraw his name from consideration brought the matter to a close on the 97th day after the original public announcement of the nomination.[42]

The tandem nominations of Lewis F. Powell, Jr., and William H. Rehnquist precipitated a unique interplay of tactics, on the one hand designed to delay and on the other hand designed to expedite action. Both nominations were strongly supported by the conservative leadership of the Judiciary Committee, which determined to consider and report both nominations simultaneously. The liberal opposition to Rehnquist hoped to separate the two nominations and, by allowing an expeditious confirmation of Powell, to develop sufficient opposition to the more vulnerable Rehnquist to accomplish his rejection. The conservatives were willing to sacrifice speed in processing the Powell nomination in order to preserve the "package." The liberals were willing to sacrifice delay with

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[40] Ibid., p. 1285.

[41] Congressional Record 114:28933 (October 1, 1968).

[42] New York Times, October 3, 1968, p. 1.

reference to Powell in order to achieve delay on consideration of Rehnquist.[43]

A determined group inside the Senate Judiciary Committee has no difficulty in achieving some measure of delay. The right of any member of the Committee to request a one-week delay on a nomination is always available, but it is used carefully and infrequently. Resort to this rule is made only when other means of opposition appear to be expiring. In the Carswell case it proved to be crucial, along with the self-defeating mini-filibuster by Senator Strom Thurmond. The "filibuster" in the Committee, as employed by Senator Thurmond, is always available. The procedure is one of interminable questioning rather than speechmaking (as on the Senate floor). Witnesses may be called and recalled, and various Committee members, with their questions phrased according to their own individual perceptions, may go over and over essentially identical issues.

The tactic of delay is viewed by opponents of the nomination as a means of buying time that may be used to marshal data, publish information, and influence the Senate and public opinion. The longer the delay the more that public opinion becomes a factor. A feedback from the public can substantially influence Senators as they make up their minds on the final vote whether to advise and consent to the nomination. Prolonged delay, furthermore, can create a general atmosphere of doubt as to the fitness of the nominee regardless of his actual qualifications. The positive side of delay is that it may force individual Senators to face squarely questions of fitness that otherwise they might pass upon too casually, possibly even irresponsibly.

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[43] Congressional Record 117:45200 (December 7, 1971).

III. INTERNAL SUBGROUP BEHAVIOR: SUPPORT AND OPPOSITION

On the occasions when nominations have proved to be controversial subgroups within the Judiciary Committee have formed quite quickly. These subgroups have been identified previously according to "conservative-liberal" voting records as follows: (1) Conservatives who regularly voted together in the Judiciary Committee were Senators Eastland, Ervin, McClellan, Thurmond, and, usually, Hruska; and (2) Liberals were Senators Bayh, Hart, Kennedy, and Tydings (replaced in 1971 by Tunney).[44] Other members tended to perform as basically "uncommitted," subject to the emergence of additional information or to the persuasion of their colleagues. In processing the controversial nominations the conservative and liberal subgroups squared off against each other in supportive or opposition stances, reversing their stances and behavior depending upon their views of the specific nominee. The Bayh subgroup acted supportively in relation to the Fortas (1968) and Marshall nominations, and opposed Haynsworth, Carswell, and Rehnquist. With reference to all five of these nominations the Eastland subgroup assumed the opposite stance and behavior.[45] Certain common patterns of action in the Committee phase were observable in the performance of both subgroups.

One of the most obvious aspects of the proceedings in the Committee hearings on the nominations was the practise of various Senators to propose

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[44] See Chapter One, Pages 12-14 above.

[45] Appendix II sets out in greater detail the formation of coalitions and voting patterns of members of the Committee in relation to the various nominees concerning which non-unanimous decisions were made in the Committee.

questions that would be either supportive or damaging to the nominee. Table 8 presents a statistical summary of the categories of questions and statements made by members of the Judiciary Committee during the appearances of Fortas (1968), Haynsworth, and Carswell. The summary is based on an actual count and an analysis of the content of pertinent sections of the records of the hearings dealing with this particular selection of nominees, all of whom eventually failed of confirmation by the full Senate.

TABLE 8

SUPPORT-OPPOSITION BEHAVIOR OF SUBGROUPS OF THE JUDICIARY COMMITTEE IN THE INTERROGATION OF NOMINEES DURING COMMITTEE HEARINGS

Category of Questions or Statements	Fortas (1968)	Haynsworth	Carswell
Supportive	22 (9%)	130 (36%)	80 (35%)
Opposition	218 (75%)	160 (45%)	102 (46%)
Neutral	50 (16%)	65 (19%)	43 (19%)
	290 (100%)	355 (100%)	255 (100%)

A striking feature of the interrogation procedure was the relatively small number of questions that could be evaluated as neutral or intended primarily to elicit information, for example, only 16% of those placed to Fortas (1968), and Haynsworth and Carswell each 19%. A second feature of the proceedings during the "confrontation" of the Committee and the controversial candidate is the fact of opposition domination of the interrogation at that stage. A less detailed survey of the proceedings

of the Marshall and Rehnquist hearings confirms this general pattern. Nominees with a record of prior judicial experience--Marshall, Fortas, Haynsworth, and Carswell--were more easily attacked than defended. The nature of the vast majority of questions indicate that for the most part the Senators participating actively in the interrogation of the nominees made up their minds quite early whether they would support or oppose the nominee, and their questions and statements conformed to the apparent early evaluation of the nominee. Interrogation occurred thereafter primarily with the objective of bringing out the virtues or the failings of the nominees, depending upon the position taken by the particular Senator.

1. Supportive Techniques and Actions in the Committee.

It may be fairly considered that any given nominee usually enjoyed an early initial advantage in the simple fact that he was the President's choice. The task of supporters was that of maintaining the original advantage, while the task of the opposition Senators was to overcome and destroy the initial advantage and to undermine the nomination. Supportive actions took the form of heading off, beating off, and neutralizing attacks. If no serious attacks appeared to be imminent, as in the Burger and Blackmun nominations, supportive efforts were low-keyed. If no issues were raised by opposition groups, it was better to let sleeping issues lie. Whether serious opposition might be raised would usually become evident during the period between the announcement of the President's choice for a justiceship and the beginning of Committee hearings.

The initial advantage of the supporting groups was underscored

by the appearance of Senators from the home states of the nominees at the start of the hearings to present the nominee to the Committee and to make commendatory statements on the President's choice. Usually those Senators were viewed as chief "sponsors" of the nominations, although it was thoroughly understood that the principle of "senatorial courtesy" does not operate at Supreme Court level as it does at Federal District Court level. Thus Senators Jacob Javits (New York), Albert Gore (Tennessee), Ernest Hollings (South Carolina), Edward Gurney (Florida), and Barry Goldwater and Paul Fannin (Arizona) successively introduced nominees Marshall, Fortas, Haynsworth, Carswell, and Rehnquist, respectively, as "distinguished Americans" with "magnificent records as public servants" whose confirmation would "grace" the Supreme Court. Senator Gore of Tennessee not only introduced Fortas in 1968, but he also sat by his side through at least two days of intensive interrogation.[46]

The most direct method of support available to a member of the Judiciary Committee in participating in the questioning of a nominee was that of a direct and specific statement. Such statements nearly always occurred early in the contribution of a particular member of the Committee. Senator Hruska, leading off the interrogation of Judge Carswell made a sweeping endorsement of the nominee, saying:

> Now, the Nation is entitled to have a man who is a man of wide experience and of proper preparation both academically and professionally. I do not know that there is any record of any present member of the Supreme Court that is as wide and as deep as the experience of this nominee in the field of jurisprudence.[47]

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[46] Fortas Hearings II, pp. 102-175.

[47] Carswell Hearings, p. 9.

Likewise, Senator Ervin began his interrogation of Judge Haynsworth with a statement which included an element that appeared to be a "prior conclusion":

> O ver the years I have been familiar with the decisions of the U. S. Court of Appeals of the Fourth Circuit and have read your opinions in the cases it has decided. I am compelled to say that as a lawyer I have reached the honest and abiding conviction from reading your opinions that you have discharged your duties as a member of the U. S. Court of Appeals for the Fourth Circuit with what Edmund Burke called "the cold neutrality of the impartial judge." I know of no higher tribute that can be paid to any occupant of a judicial office.[48]

Senator Bayh paid tribute to Judge Marshall in similar terms:

> L et me say that my analysis of the background of the nominee and the record of his accomplishments persuades me that the President has made a wise choice indeed, and the country would be well served by a man of his competence.[49]

Occasionally a Committee member would express indirect endorsement of a nominee by the simple device of "No questions" when his turn for interrogation came up. The context translated such non-interrogation into an evaluation that implied an unreserved acceptance of the nominee as being beyond reasonable doubt.[50]

Some contributions were obviously framed so as to illuminate the qualifications of the candidate, who would then modestly deprecate the matter. While Justice Fortas (1968) was under fire before the Judiciary Committee with regard to his performance in an extra-judicial advisory role in relation to President Lyndon B. Johnson, Senator Philip

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[48] Haynsworth Hearings, p. 49.

[49] Marshall Hearings, p. 16.

[50] Cf. Senator Quentin Burdick's non-interrogation of Judge Blackmun, Blackmun Hearings, p. 51, and Senator Fong with reference to Judge Marshall, Marshall Hearings, p. 16.

Hart suggested that the President probably in fact exercised great self-restraint in consulting Fortas "because if there was a mind as talented as yours (Fortas') and as many tough problems as are at his elbow, he must have had to have bitten his tongue many times not to have called you."[51] Committee Chairman James O. Eastland assisted in putting William H. Rehnquist's best foot forward by giving prominence to the fact that Rehnquist had received in the shortest possible time the highest possible rating as a practising lawyer by Martindale's Legal Directory.[52]

Supportive action often took place as an effort to pre-empt the field of interrogation on certain items that were likely to become favorite issues of the opposition. This would be possible especially if potential opposition had in some fashion "tipped its hand" and indicated the nature of its intended emphasis. In connection with the Fortas nomination for Chief Justice the opposition soon indicated that it would do battle on the ground that Chief Justice Warren's contingent retirement did not in fact create a vacancy. Supportive action was taken when a majority of the Judiciary Committee succeeded in getting Attorney General Ramsey Clark invited to present an exhaustive summary of precedents in which the Senate had proceeded to confirm appointments that became effective simultaneously with the resignation of the previous incumbent.[53] Prior to this appearance before the Committee

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[51] Fortas Hearings II, p. 170.

[52] Rehnquist and Powell Hearings, p. 16.

[53] Fortas Hearings II, pp. 8-40.

questions had been raised regarding Judge Haynsworth's record in connection with his sitting on labor and civil rights cases and a possible conflict of interest. Chairman Eastland made a strong effort to lay those issues to rest at the very beginning of the hearings, with the objective of assisting Haynsworth to get through them without a seriously tarnished image.[54] Eastland's efforts were supplemented by the questioning of Senators McClellan and Ervin with the obvious hope of putting such issues out of reach of a successful resurrection by the opposition.[55] Judge G. Harrold Carswell's famous "white supremacy speech" of 1948 was the very first item in the friendly and supportive interrogation by Senator Roman Hruska in leading off the hearings on his nomination to the Court.[56]

Candidates undergoing difficult interrogation by unfriendly members of the Committee frequently were offered supportive questions or comment by other members. Nominees facing questions bearing on cases before the Court or which might some time come before the Court regularly declined to answer those questions in such a way as to commit themselves to a given interpretation of the Constitution. Senator Philip Hart, in an effort to support Judge Marshall's refusal to comment on the case of Miranda v. Arizona provided the classic supportive position, stating to Marshall:

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[54] Haynsworth Hearings, pp. 39-44.

[55] Ibid., pp. 44-57.

[56] Carswell Hearings, p. 10.

> [Y]ou are hung by a dilemma. You do not want to box yourself in by a statement here, because after you read the briefs and records and arguments, you may find that your intellectual training suggests that you might have been wrong here, that there is additional illumination developed as a result of the argument. . . . If as a judge later you discover that if you had known now what you knew then, your answer would have been different, you are inhibited from reaching a right judgment as a judge because you are afraid somebody in this Committee will confront you with your previous statement.[57]

These and other types of supportive actions strongly suggest that attitudes and conclusions formed early in the selection of a given nominee governed the performance of Senators supporting that nominee throughout the Committee phase of the proceedings. Decisions were reached early, and participation in the Committee hearings was with the view to support decisions. This observation applies to both "liberal" and "conservative" subgroups.

2. Opposition Techniques and Actions in the Committee.

Just as subgroups within the Judiciary Committee formed early in support of nominees, also others formed in immediate opposition. Whether in support or in opposition the members so asserting themselves were those who most actively participated in the interrogation of nominees and other witnesses. The ideological "middle-of-the-road" group were less active in the overall Committee proceedings. If there was a "wait-and-see" group in the Committee, the "middle-of-the-road" members constituted it. In Committee voting they almost always joined the majority in approving a favorable report to the full Senate. A noteworthy exception to this general observation was the role of Senator

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[57] Marshall Hearings, p. 13.

Joseph D. Tydings with reference to the Haynsworth nomination. In the early stages of the hearings he expressed himself in terms that indicated admiration and support of the nominee, but in the end he voted against confirmation both in the Committee and on the Senate floor.[58] His early enthusiasm for Haynsworth was undercut by later revelations, and Tydings apparently underwent a rare but actual change of mind on the nomination during the Committee hearings.

In some respects opposition techniques and actions were the opposites of supportive techniques and actions. Missing, however, was the direct and immediate repudiation of any nominee by a member of the Committee on the stated lack of merit or qualification. The nearest thing to such a stand was that taken by Senator Ervin in reference to the Fortas nomination for Chief Justice. Nevertheless, Ervin's point was stated in terms of a parliamentary question as to whether a vacancy actually existed on the Court and whether the Senate could properly proceed to the consideration of the nominee.[59]

Lack of professional qualification was scarcely mentioned in the Committee phase. In the Marshall hearings Senator Strom Thurmond may have been attempting to demonstrate the nominee's lack of knowledge of Constitutional Law and History. He posed about sixty detailed and complex questions dealing with obscure points in Congressional debate on the post-Civil War Amendments. In many instances Marshall

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[58] Haynsworth Hearings, p. 59; for the vote in the Committee see Appendix I of this Dissertation; for the vote on the Senate floor see the Congressional Record 115:35396 (November 21, 1969).

[59] Fortas Hearings II, p. 6.

could only answer "I don't know," or "I would have to research the point." As an example of the lengths to which Senator Thurmond carried this technique the following extract from the hearings is informative:

> Senator Thurmond: What constitutional difficulties did Representative John Bingham (1866) of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of Article IV, Section 2, through the necessary and proper clause of Article I, Section 8?
>
> Judge Marshall. I don't understand the question.
>
> Senator Thurmond. Now, on the 14th Amendment, what committee reported out the 14th Amendment, and who were its members?
>
> Judge Marshall. I don't know, sir.
>
> Senator Thurmond. What purpose did the framers have, in your estimation, in referring to the incident involving former Representative Samuel Hoar in Charleston, S. C., in December 1844, as showing the need for the enactment of the original version of the 14th Amendment, first section?
>
> Judge Marshall. I don't know, sir.[60]

Senator Thurmond's interrogation of Judge Marshall was the only recorded occasion of an attempt at direct discrediting of the professional qualifications of a nominee during an appearance before the Judiciary Committee. Senator Birch Bayh and others presented data to the Senate which purported to demonstrate the lack of qualification of Judge G. Harrold Carswell, but their action was taken during the full Senate phase of the process rather than in the Committee.

A tactic heavily drawn upon in opposition to Marshall and Fortas (1968) was to question their views upon and their fidelity to

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[60] Marshall Hearings, pp. 163-164.

the Constitution. Both Marshall and Fortas had records of judicial performance behind them when they appeared before the Judiciary Committee. The "conservative" members of the Committee repeatedly confronted them with questions dealing with the "activism" of the Warren Court, suggesting that the Court had frequently "amended" the Constitution under the guise of "interpreting" it. Both nominees declined to comment on Supreme Court decisions concerning which they were questioned. Senator Ervin openly charged Marshall with being deliberately evasive on fair questions.[61] After laboriously interrogating Marshall on the case of Miranda v. Arizona as applied to suspects in a line-up, Ervin repudiated the Supreme Court's ruling in several cases and summed up the "conservative" concern over the nominees' "judicial philosophy" by declaring that:

> [T]he road to destruction of constitutional government in the United States is being paved by the good intentions of judicial activists, who, all too often, constitute a majority of the Supreme Court. A judicial activist in my book is a man who has good intentions but who is unable to exercise the self-restraint which is inherent in the judicial process when it is properly understood and applied, and who is willing to add to the Constitution things that are not in it and to subtract from the Constitution things which are in it. I am much concerned, because the easiest way to destroy the Constitution of the United States is to have the Supreme Court manned by judges who will not exercise judicial self-restraint. As Chief Justice Stone said, the members of the Supreme Court have the power under the Constitution to restrain the President and the Congress in their actions, but there is really no power on earth to restrain the members of the Supreme Court in their action except their own self-restraint.[62]

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[61] Ibid., pp. 54.

[62] Ibid., p. 156.

> The term "living Constitution" really indicates a dead Constitution, that is, no Constitution. And we are ruled by the personal notions of the temporary occupants of the Supreme Court.[63]

One very significant thing about the line of questioning by the Eastland-McClellan-Ervin-Thurmond group is that the general practise of examining a nominee's professional qualification and fitness without a close scrutiny of his "constitutional philosophy" was deliberately and overtly abandoned. "Constitutional philosophy" or "judicial philosophy" became the primary area of inquiry, while the more technical matters of professional qualification and fitness were left, for all practical purposes, to the Executive and to the American Bar Association. When later nominees, Haynsworth, Carswell, and Rehnquist, appeared before the Judiciary Committee the "liberal" group implicitly acknowledged and followed the new approach to examining nominees (except that eventually the professional qualification of Carswell was also called in question).

Opposition to Fortas (1968) in the Committee also took the form of questions concerning the issue of separation of powers. Fortas was the only nominee who faced this issue among those surveyed in this study. Senator Eastland led off on the direct interrogation of Fortas by bringing up assertions that he had participated in Executive decision-making sessions dealing with such things as framing legislation designed to head off transportation strikes, basic policy in regard to the war in Vietnam, and the use of Federal troops to quell race riots in Detroit.[64]

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[63] Ibid., p. 158.

[64] Fortas Hearings II, pp. 103-104.

The tenor of the questions was such as to convey a serious doubt about the propriety of the action of the Justice while he was a member of the Court and to suggest a serious breach of the principle of separation of powers. Senator Ervin also alluded to the same charges, quoting an article by Fred Graham of the New York Times which stated that "As one of Johnson's closest friends, and one of the shrewdest lawyers in Washington, Fortas' instinct for making the wheels turn did not vanish when he donned the robes."[65] Ervin's broaching of the matter was obviously done in a derogatory manner, reflecting his open opposition to the nomination. However, he apparently unwittingly provided an opening for Fortas to present a carefully researched summary of the history of Presidential consultations with Supreme Court Justices on policy matters, beginning with George Washington and John Jay and going through Franklin D. Roosevelt's calling upon Justice Owen Roberts to serve on the special commission to investigate the state of affairs surrounding the Japanese attack on Pearl Harbor.[66] Senator Ervin's rebuttal appeared in his statement of individual views attached to the Committee's Executive Report to the Senate. In that statement he quoted the late Justice Roberts as stating that he regretted ever having accepted such extra-judicial assignments by the President.[67] Fortas encountered innumerable questions about Supreme Court decisions which had been handed down both before and during his tenure on the Court. The "conservative" group on the Committee re-

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[65] Ibid., p. 164.

[66] Ibid., pp. 164-165.

[67] Senate Executive Report No. 8, p. 34.

peatedly emphasized such issues as obscenity (Thurmond),[68] permissiveness toward criminals (Thurmond),[69] and encroachments upon states rights (Ervin[70] and McClellan).[71]

The "liberal" approach to opposing nominees during their appearances before the Judiciary Committee took the form of probing into Judge Clement Haynsworth's ethical conduct and conflicts of interest, Judge G. Harrold Carswell's racial attitudes, and the racial attitudes and law enforcement procedures of Assistant Attorney General William H. Rehnquist. In all these instances, just as the "conservative" opposition to Marshall and Fortas, the opposing Senators (with the exception of Tydings' views on Haynsworth) took their opposition stances early in the hearings and presented their questions with the apparent objective of showing up the nominee in an unfavorable light. Inasmuch as Senator Birch Bayh led the fight to prevent confirmation of all three of these nominees, the approach will be illustrated by sampling his interrogation of them.

Prior to his regular turn at interrogating the nominee Senator Bayh served notice to Judge Haynsworth that he would examine in three areas: Haynsworth's law firm relationships, the Vend-a-matic Corporation in which Haynsworth held stock, and the criteria for self-disqualification in cases in which conflict of interest might be merely a matter of doubt.[72]

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[68] Fortas Hearings II, pp. 299-309.

[69] Ibid., pp. 180-209.

[70] Ibid., pp. 149-161.

[71] Ibid., pp. 224-231.

[72] Haynsworth Hearings, p. 57.

The matter of the law firm relationships was pursued extensively, with the nominee being requested to furnish a list of textile firms which the firm had represented while the nominee was with the firm and a separate list of those represented by the firm after he had been appointed to the Federal bench. Bayh's interrogation depicted a pattern of interrelationships, focusing on the Darlington Mills case, which in his estimation constituted a breach of judicial propriety and judicial ethics. His position was essentially that Haynsworth had violated the American Bar Association's Canons of Ethics as well as the standards of the Fourth Circuit U. S. Court of Appeals by failure to disqualify himself from certain cases, especially the Darlington case.[73] Supporters of Haynsworth considered that Bayh's intensive pursuit of these matters were far-fetched and amounted to "nit-picking" and distortion of facts.

Senator Bayh's opposition to Judge Carswell during the Committee hearings was based primarily on the question of his racial attitudes. Beginning with Carswell's 1948 "white supremacy" speech as a candidate for the Georgia State Legislature, Bayh questioned whether Carswell's subsequent professed change of heart was genuine or superficial. He went thoroughly into the Judge's attitudes in presiding over civil rights cases that came before his court and his extra-judicial activities in connection with the converting of a municipal golf course into a private country club with the objective of excluding Negroes from using the facilities.[74] The interrogation produced a pattern of reasoning upon which

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[73] Ibid., pp. 80-100.

[74] Carswell Hearings, pp. 34-48.

he based his conclusions that Judge Carswell's career since 1948 did not substantiate his repudiation of his early "white supremacy" speech and that in fact his performance on the Federal bench was basically one of "foot-dragging" as much as possible on the implementation of legislative acts and Supreme Court decisions relating to expansion of civil rights for Negroes.[75]

In his confrontation with William H. Rehnquist before the Judiciary Committee, Senator Bayh brought out the issue of Rehnquist's views on governmental use of wire-tapping as a technique for law enforcement, especially in matters relating to national security. Bayh quoted Rehnquist on a speech which he had made before the student body of Brown University defending a broad Executive power to use electronic surveillance methods. When asked specifically about his current views, Rehnquist declined to express them on the ground that his previous expressions (in the Brown University speech as well as in a brief presented to the U. S. Supreme Court) had been made in a lawyer-client relationship (the "President's lawyer's lawyer") and that additional clarification would be inappropriate.[76]

In the civil rights area Bayh pressed Rehnquist on his writings and activities in connection with the racial integration of public schools and other accommodations and his role in connection with alleged harassment of black voters in Phoenix, Arizona. Rehnquist never denied that

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[75]"Individual Views of Messrs. Bayh, Hart, Kennedy, and Tydings," Senate Executive Report No. 91-14, pp. 13-31.

[76]Rehnquist and Powell Hearings, pp. 63-69.

some harassment had occurred, but he did deny that he had participated. He defined his role as that of chairman of a Lawyers Committee the duty of which was to provide legal counsel for persons who did act as Republican challengers at the polls.[77] He expressed a mild change of attitude toward the enforcement of equal rights to public accommodations since 1964. Bayh succeeded in eliciting from Rehnquist what must have been a rather weak statement on the matter, as follows:

> I think the Phoenix ordinance permitting segregation of public accommodations worked very well in Phoenix. It was readily accepted, and I think I have come to realize since then, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then.[78]

Rehnquist was able to compensate partially for his earlier attitudes by revealing that his children attended racially integrated public schools and that his son played football and basketball on racially integrated high school teams.[79]

3. Techniques of Support and Opposition: Summary Statement

In the formal processing of judicial nominations the initial battleground in controversial cases was the Committee hearings, especially at the point of the appearance of the nominee himself. As has been previously observed, supporting and opposition groups formed quite early, sometimes even before the nomination was submitted to the Judiciary Committee (e.g., Fortas, 1968). The interrogation process followed along three general lines: first, questions were offered that seemed to be

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[77]Ibid., p. 71.

[78]Ibid., p. 70.

[79]Ibid., p. 70.

designed purely for information-gathering ends, but these were in a decided minority; secondly, the interrogation was dominated by questions that were inherently hostile to the nominee and "loaded" so as to produce a pattern of responses that created an unfavorable image; and, finally, supportive questions and statements were supplied by a "friendly" group of Senators in every case.

The significance of the hearings process, with the nominee present to testify, may be summed up in a two-fold observation. Primarily the process furnished a forum for the marshalling of data and ideas that were selectively presented with the view, on the one hand, to help the candidate, or, on the other hand, to hurt him. These data and ideas were presented in a manner intended to influence public opinion and ultimately the Senate in taking final action on the nomination. Secondarily, the Committee phase produced relatively little of objective information that indisputably proved or disproved the fitness of a particular nominee to serve on the Supreme Court.

CHAPTER SIX

THE SENATE AND THE JUDICIARY COMMITTEE: INTERDEPENDENCE AND INTERACTION

The committee system in the United States Congress is generally recognized to be an arrangement by means of which the parent bodies distribute the legislative work load, encourage the development of expertise in specialized fields, establish priorities in creating agendas, and achieve in-depth evaluation of legislative measures before finally disposing of them. The Congress' dependence upon its legislative committees is a well established feature of its method of operation, not only with reference to non-controversial legislation but with respect to controversial issues as well. The early Wilsonian conclusion that the Congress delegates both its deliberative and legislative functions to its committees and subcommittees need not be accepted as nearly as absolute as described by that conclusion.[1] However, most of the time a measure recommended by a committee for passage enjoys an advantage as it approaches final disposition.

Considering the functioning of the Senate Judiciary Committee in processing Presidential nominations to the Supreme Court, the question

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[1]Woodrow Wilson, Congressional Government: A Study in American Politics (New York: Meridian Books, 1956; originally published 1885), pp. 62, 208.

becomes one of evaluating the extent to which the Senate depends upon the Committee in taking final action on the nominations to the Court. Does the full Senate actually depend upon the Judiciary Committee to furnish it with information and guidance that will be genuinely helpful to the parent chamber in the performance of its advice-and-consent duty? The basic hypothesis at this point is that the Senate action does indeed depend upon the Committee's action and that the degree of internal cohesion in the Committee as it brings its recommendations will be reflected in a comparable degree of internal cohesion in the parent chamber in making final disposition of the nominations.

I. INSTITUTIONAL COHESION: COMMITTEE AND SENATE

1. Traditional Dependence upon the Committee.

Committee Chairman James O. Eastland affirmed that at the very least the Committee performs as an agency necessary to the gathering of information upon which other Senators may base their own decisions and cast their votes.[2] Superficially at least the record of the Senate and its Judiciary Committee's interdependence and interaction during the twentieth century suggests that in practise the Senate has traditionally depended upon the Committee even more heavily than that implied by Senator Eastland. During the period 1900 to 1964 the Committee handled 41 Presidential nominations to the Supreme Court, recommending favorable consideration of all but one, namely, Judge John J. Parker (1930). The Senate sustained the Committee's recommendation in 100% of these occasions. The

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[2]Personal Interview, June 4, 1973.

Parker nomination is the single instance thus far in the twentieth century in which the Committee has submitted an unfavorable report to the Senate. Consequently, it seems inconceivable that the Senate would confirm any nomination to the Supreme Court which had encountered a majority negative vote in the Committee. The Senate's dependence upon the Committee appears to be absolute in this negative sense.

The period 1965-1971 has seen the Senate's dependence upon the Committee maintained, although this dependence has emerged as something less than absolute. Of the nine nominations reported to the Senate during this period all received recommendations for favorable action. However, the Senate sustained only 66 2/3 per cent (6 out of 9) of these recommendations. Even some of the nominations that were ultimately approved turned out to be quite controversial. The degree of internal cohesion in the Committee appears to have been reflected in a comparable cohesion, or erosion of cohesion, in the Senate. For the purpose of this analysis Committee cohesion may be measured primarily by the votes cast in the Committee by the sixteen members (seventeen during the 91st Congress) in reporting recommendations to the Senate. It may be measured secondarily by the votes cast by members of the Committee in the roll call votes by means of which the Senate took final action on nominations. Probably the ultimate test of Committee cohesion was in the voting of Committee members on the Senate floor, because numbers of them changed their minds between the time of the Committee's action and the final floor action.

In measuring Committee cohesion the following variations are suggested:

Strong Committee Cohesion: Unanimous approval

Moderate Committee Cohesion: 1-5 dissenting votes

Weak Committee Cohesion: 6 or more dissenting votes

2. Strong Institutional Cohesion.

Four of the six nominees confirmed received unanimous action in the Committee, and these actions were followed by heavily lopsided affirmative votes in the Senate.[3] They were:

Fortas (1965): Voice vote; no dissenting votes recorded.

Burger (1969): Roll call vote, 74-3.

Blackmun (1970): Roll call vote, 94-0.

Powell (1971): Roll call vote, 89-1.

A number of additional factors seem to have contributed further to ready Senate acceptance of these nominees, factors which would support the Committee recommendations but which could not carry a nomination through successfully against a negative Committee vote, or perhaps even in the face of determined opposition originating in the Committee. Among such supporting factors should be included: (1) the absence of significant interest group opposition; (2) speedy action by the Judiciary Committee and Senate leadership; (3) unquestionable personal integrity; (4) scholarly achievements and professional stature. Solidarity of view in the Committee was followed by near unanimous action in the Senate. Strong Committee cohesion is a ground for strong cohesion in the parent chamber.

3. Moderate Institutional Cohesion.

If Committee cohesion becomes eroded, either during the Committee

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[3] Congressional Record 111:20079 (August 11, 1965); 115:15195-15196 (June 9, 1969); 116:15117 (May 12, 1970); and 117:44857 (December 6, 1971).

phase or during consideration by the full Senate, the nomination will encounter significant opposition. However, if Committee cohesion remains moderately strong, that is, no more than four or five Committee members come out in opposition to the nominee, the Senate will still accept the positive recommendation of the Committee, but with reduced solidarity in the Senate itself. Among the nine nominations acted upon during the period 1965-1971 two instances of this pattern occurred with votes distributed as follows:

Nominee	Committee Vote	Senate Vote[4]
Marshall (1967)	11-5	69-11 (79-13)
Rehnquist (1971)	12-4	68-26 (70-27)

The moderate breakdown in Committee cohesion was reflected in the Senate roll call votes. Despite the determined efforts of the Committee's deviationist subgroups only a relatively small minority of Senators were induced to cast negative votes or to engage actively in opposition to the nomination during action on the Senate floor.

4. Weak Institutional Cohesion.

The occasions upon which the cohesion of the Judiciary Committee hopelessly broke down, either during the Committee phase or while the nominations were under consideration by the full Senate, the Senate itself became polarized, and the nominations were defeated. The defeat of the Fortas nomination for Chief Justice must be treated in a category by

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[4]Figures in parentheses include the announced preferences of Senators who, for various reasons, did not actually participate in the roll call votes. See the Congressional Record 113:24656 (August 30, 1967) and 117:46197 (December 10, 1971). For the vote in the Committee, see Appendix I of this dissertation.

itself, but the other two defeats, Haynsworth and Carswell, fall into the following pattern:

Nominee	Committee Vote[5]	Senate Vote[6]
Haynsworth (1969)	10-7 (8-9)	45-55
Carswell (1970)	13-4 (8-9)	45-51 (47-52)

Committee cohesion was quite weak at the time of the vote on the Haynsworth nomination (10-7), but it experienced further erosion after the nomination was reported to the Senate. Senators Hugh Scott and Thomas E. Dodd, having voted to report the Haynsworth nomination favorably, changed their minds and in the full Senate voted in opposition. In the final analysis the Committee had become polarized to the extent of 8 "Yeas" and 9 "Nays." The Senate roll call vote reflected this polarization in its 45-55 rejection of the nominee.

Voting in the Committee on the Carswell nomination the members maintained moderately strong cohesion (13-4), but the Committee cohesion experienced drastic erosion after the nomination was reported to the Senate. Of the 13 Senators originally supporting the nomination in the Committee, five (Burdick, Cook, Dodd, Fong, and Mathias) eventually changed their minds and joined the opposition. Again polarization of the Committee (8-9) was reflected in the final Senate roll call vote (45-51) and the rejection of the nominee. Mathematically the five members of the Judiciary Committee

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[5]Figures in parentheses indicate the final division within the Senate Judiciary Committee at the time of the Senate roll call vote. For the vote in the Committee see Appendix I of this dissertation.

[6]Figures in parentheses include the announced preferences of Senators who, for various reasons, did not actually participate in the roll call vote. See the Congressional Record 115:35396 (November 21, 1969) and 116:10769 (April 9, 1970).

alone who changed their minds made the difference between the approval and the rejection of Carswell, even apart from votes cast by other Senators who may have been influenced by the switch of votes of the members of the Committee.

II. INSTITUTIONAL COHESION AND PARTY POLITICS

While a large measure of internal institutional cohesion has characterized both the Senate and its Committee on the Judiciary in acting upon nominations to the Supreme Court, nevertheless it must be recognized that in recent years this cohesion has suffered significant erosion. In view of the controversies occurring around certain of the nominations in the period 1965-1971, it may be fairly questioned whether partisan politics in the Committee, or in the Senate, or in both, precipitated the strong opposition that appeared against certain of the choices of the Presidents concerned. Has the erosion of Committee and Senate cohesion been due primarily to this factor? The hypothesis proposed at this point is that at most party politics has constituted only a secondary factor, not the primary factor, that could account for the erosion of the traditionally strong institutional cohesion which has characterized such actions.

1. The Traditional Party Role.

Generally Presidents have preferred to nominate to the Supreme Court persons affiliated with their own respective political parties, and the general rule has been that the Senate has acknowledged this Presidential practise as a norm governing the process, especially during the twentieth century. Table 9 summarizes the twentieth century nominations, including both those confirmed and those rejected, indicating the party

TABLE 9

PARTY AFFILIATIONS OF PRESIDENTS AND THEIR NOMINEES TO THE SUPREME COURT, TWENTIETH CENTURY

Nominees Confirmed	Senate Controlled by President's Party	Senate Controlled by Opposition Party
President's Party	31 (62%)	7 (14%)
Opposition Party	7 (14%)	1 (2%)
Nominees Not Confirmed		
President's Party	2 (4%)	2 (4%)
Opposition Party	0 (0%)	0 (0%)

Sources: Leon Friedman and F. L. Israel, The Justices of the United States Supreme Court, 1789-1969 (New York: Chelsea House in Association with Bowker, 1969), Chart I, pp. 3208-3212; The Congressional Record for nominees confirmed and rejected since 1969. The Thornberry nomination to be Associate Justice is not included in this recapitulation, but nominations of sitting Justices nominated for elevation to Chief Justice are included as separate actions. Charles Evans Hughes is counted twice.

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of the President, the party of the nominees, and the majority party in the Senate at the time the nominations were made.

Of 50 nominations offered during the twentieth century 42 were of the Presidents' own respective political parties. It might be considered remarkable that 8 of 50 (16%) were from the opposition party. However, all of the nominations proposed from the opposition party occurred prior to the specific period 1965-1971, which has been identified in this dissertation as a period of controversy over Supreme Court nominations.[7]

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[7]See Appendix III of this Dissertation.

Republican Presidents named six Democrats to the Court, and Democratic Presidents two Republicans. Seven of these eight occasions were at points in time when the Senate was controlled by a majority of Senators of the Presidents' own political parties. The single exception was that of Republican President Dwight D. Eisenhower's nomination of Democrat William J. Brennan, Jr. (1956).[8] There has been no suggestion that the Democrat-controlled Senate in any sense pressured President Eisenhower to appoint a Democrat. In fact, during the period 1955-1960, the six-year portion of the Eisenhower administrations during which the Senate was controlled by the Democratic majority, Justices John M. Harlan, Charles E. Whittaker, and Potter Stewart, all Republicans, were confirmed by the Democratic Senate with no threat of rejection of any of them. Thus partisan politics could scarcely be regarded even as a potential threat to the institutional cohesion of the Judiciary Committee and the Senate on the issue of Supreme Court nominations at least through the Eisenhower administrations. This observation is further underscored by the fact that even the rejection of Judge John J. Parker (1930) and of Justice Abe Fortas (for elevation to Chief Justice, 1968) occurred while the Senate Judiciary Committee and the full Senate were dominated by Senators of Presidents Herbert C. Hoover and Lyndon B. Johnson's own political parties, respectively.

The tradition of institutional solidarity and a non-partisan selection process carried over to a great extent even into the more turbulent era of the Johnson and Nixon administrations as indicated by the actions in both the Committee and in the full Senate on the nominations

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[8]See Appendix III of this Dissertation.

of Fortas (1965), Burger, Blackmun, and Powell. These four nominations were favorably reported by unanimous votes in the Committee and confirmed by nearly unanimous votes in the Senate.

2. Nominations Opposed but Confirmed: The Party Factor.

With opposition appearing in the context of a moderate erosion of institutional cohesion in processing the Marshall and Rehnquist nominations, did party politics manifestly constitute a factor in the opposition? Table 10 sets out the partisan distribution of roll call votes on the Marshall and Rehnquist nominations, both of which were approved over moderate opposition. As indicated in Table 10, Republican Senators were recorded by the roll call vote as almost solidly approving the Democratic nominee Thurgood Marshall, with a lone Republican voting in

TABLE 10

PARTISAN PATTERNS IN SENATE ROLL CALL VOTES:
MARSHALL AND REHNQUIST NOMINATIONS

	Marshall		Rehnquist	
	"Yeas"	"Nays"	"Yeas"	"Nays"
Democratic Senators	37	10 (13)	29	23 (24)
Republican Senators	32	1	39 (41)	3
Totals	69	11 (14)	68 (70)	26 (27)

Source: Congressional Record 113:24656 (August 30, 1967) and 117:46197 (December 10, 1971).

Note: Figures in parentheses included announced preferences of Senators who, for various reasons, did not vote.

opposition. Obviously the basis of the opposition to the appointment of Marshall did not lie in a partisan reluctance of Republicans to confirm him as Associate Justice. Party cohesion suffered among Senators of Marshall's own party. The preference of Democratic Senators split 7-4 in the Judiciary Committee and 37-13 in the Senate, registering a negative vote by 26% of the Democratic Senators voting or who otherwise announced their preferences. Thus the opposition to Marshall, with a moderate breakdown in Committee and Senate cohesion, must be attributed to factors other than partisan preferences.

The roll call vote on the Rehnquist nomination also saw an almost solid Republican approval registered, with only three Republicans dissenting. The three dissenters--Senators Edward Brooke (Massachusetts), Clifford Case (New Jersey), and Jacob Javits (New York)--did not include the lone dissenter on the Marshall vote, that is, Senator Strom Thurmond (South Carolina). The pattern of Democratic voting on the Rehnquist nomination manifested a wide divergence of attitude toward the nominee, with 29 Democratic Senators supporting and 24 opposing him. The opposition votes among the Democrats also was a completely different group from those who opposed Judge Marshall. While it had been the subgroup of Eastland, Ervin, McClelland (all Democrats), and Thurmond (Republican), in the Judiciary Committee who had opposed Marshall, it was the subgroup of Bayh, Hart, Kennedy, and Tunney (all Democrats) who led the opposition to Rehnquist. On the two nominations, of course, the two subgroups reversed themselves in the Senate roll call votes. Although it might be contended that a relatively high degree of Democratic opposition appeared against Rehnquist, it still stands that a majority of Democratic

Senators voted to confirm the Republican nominee Rehnquist.[9] No evidence has been uncovered from news media, the records of the Senate debates, the records of the Committee hearings, nor from the Executive Reports of the Committee that party politics constituted the primary basis of opposition votes against Rehnquist by Democratic Senators. The confirmation vote of 68-26 indicates that the majority of Senators apparently reverted to the old tradition of confirming the President's choice in the absence of overriding reasons for opposition. Thus the erosion of internal cohesion in the Judiciary Committee and of the Senate itself must be accounted for on grounds other than purely partisan politics.

3. Nominations Opposed and Defeated: The Party Factor.

The more serious erosion of institutional cohesion in connection with action on the Haynsworth and Carswell nominations, both of whom were Republicans and both of whom were rejected by the Senate, requires analysis in the light of party politics to determine whether this might have been the factor accounting for the failure of confirmation. Table 11 provides a breakdown on these two nominations.

In the Senate roll call votes the parties experienced cleavage both among members of the Judiciary Committee and in the full Senate. In the Committee and in the parent chamber a majority of Democrats voted against the nominees and a majority of Republicans voted for them. Does this pattern of partisan voting indicate the pre-eminence of party politics

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[9] Congressional Record 113:24656 (August 30, 1967) and 117:46197 (December 10, 1971). The roll call votes recorded at these locations provide the basis of the foregoing analysis of partisan voting on the Marshall and Rehnquist nominations, respectively.

TABLE 11

PARTISAN PATTERNS OF SENATE ROLL CALL VOTES:

HAYNSWORTH AND CARSWELL NOMINATIONS

	Haynsworth		Carswell	
	"Yeas"	"Nays"	"Yeas"	"Nays"
Democratic Senators	19	38	17	38 (39)
Republican Senators	26	17	28 (30)	13
Totals	55	45	45 (47)	51 (52)

Source: Congressional Record 115:35396 (November 21, 1969) and 116:10769 (April 9, 1970).

Note: Figures in parentheses include the announced preferences of Senators, who, for various reasons, did not vote.

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as determinative in the final disposition of these nominations?

The rejection of the two Republican nominees may well be explained on the basis of "defections" in the ranks of Republican Senators. In the case of Haynsworth the Committee action saw not only an immediate polarization of the Committee itself, voting only by a margin of 10-7 to recommend favorable consideration of the nominee, but two Republicans--Senators Robert Griffin (Michigan) and Charles Mathias (Maryland)--sided with the opposition. They were eventually joined by Senator Hugh Scott (Pennsylvania). After the death of Senator Everett M. Dirksen in the fall of 1969, Senators Scott and Griffin had become Minority Leader and Minority Whip, respectively, and the Senate experienced the unique occasion upon which the top Republican leaders in the Senate, both of whom were activist members of the Judiciary

Committee, had moved into opposition to a Supreme Court nominee representing their own party. There are no means by which the influence of these two key party "defections" may be analyzed in terms of other defections, but doubtless others did occur among their fellow-Republicans. Judge Haynsworth was opposed with an all-out effort by organized labor, and both Senators Scott and Griffin were vulnerable to the pressures of labor union.[10] Whether they made their decisions on the basis of outside pressures or on information which emerged during and after the Committee hearings it is probably impossible to ascertain. In any case, the breakdown of Republican support for Haynsworth in the Committee was followed by the defection of 14 additional Republican Senators. Among those 14 Republicans were Senators John Sherman Cooper (Kentucky), Jack Miller (Iowa), William Saxbe (Ohio), Len Jordan (Idaho), and John J. Williams (Delaware), all of whom deviated from the support of the party nominee on this single occasion but "returned to the fold," along with Scott and Griffin, in the later vote on the Carswell nomination.[11] The Committee's recommendation for favorable action on the nomination received further blows by the announcements of the opposition of a number of additional Republican Senators for various reasons. Margaret Chase Smith (Maine) declared that a convincing case had been made against

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[10]Burt Wides, Administrative Assistant to Senator Philip Hart, Malcolm Hawk, Administrative Assistant to Senator Roman Hruska, 1969, and Clyde Quinn, Administrative Assistant to Senator Robert Griffin: Research Interviews, June 1, 3, and 8, 1973, respectively. See also "The Boss (George Meany) Describes the Machine," Washington Post, April 12, 1972, p. 8.

[11]Congressional Record 115:35396 (November 21, 1969); 116:10769 (April 9, 1970).

Haynsworth on the grounds of substandard judicial ethics.[12] Edward Brooke (Massachusetts) concluded that the nominee's attitude toward civil rights was intolerable.[13] Senator John J. Williams (Delaware) was convinced that the nominee had participated in cases in which he had a significant conflict of interest.[14]

In the Committee and Senate action on the Carswell nomination party groups experienced loss of cohesion almost as drastic as that which occurred in connection with the Haynsworth nomination. Democratic division on Carswell, both in the Committee and on the Senate floor, corresponded very closely to the division on Haynsworth. Of the 38 Democratic Senators who voted against Haynsworth, 35 voted against Carswell. These clustered around the nucleus subgroup of the Judiciary Committee consisting of Senators Bayh, Hart, Kennedy, and Tydings, who were later joined by Senators Dodd and Burdick of the Committee. Republican voting in the Committee and on the Senate floor was much less stable than it had been on Haynsworth. While only Senator Scott changed his position between the Committee vote and the Senate roll call vote on Haynsworth, three Republican members of the Committee--Senators Cook (Kentucky), Fong (Hawaii), and Mathias (Maryland)--switched after voting to report the Carswell nomination favorably. However, along with Senators Scott and Griffin who supported Carswell five other Senators who had opposed Haynsworth voted finally in support of Carswell.[15] The critical

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[13]Ibid., 115:34567-34569 (November 18, 1969).

[14]Ibid., 115:28986-28987 (October 7, 1969).

[15]For the Committee vote see Appendix I of this dissertation; for the Senate roll call vote see Congressional Record 116:10769 (April 10, 1970).

action among Republican members of the Committee appears to have been the "defection" of Senators Cook, Fong, and Mathias. The change of mind by these three created the margin that meant the difference between confirmation and rejection, that is, on the assumption that the Vice President would have cast the deciding vote to break a tie.

Party politics as the basis of the defeat of the Haynsworth and Carswell nominations might sound more plausible had the patterns of Democratic voting been more one-sided. However, roughly one-third of the Democratic Senators voted affirmatively in the two instances. Similarly, Republican partisanship might sound more convincing had Republican Senators voted in more one-sided blocs, but as it turned out more than one-third of Republican Senators deserted the two Republican nominees. Indeed the loss of Republican votes on both nominees was more than compensated for by the gains in Democratic votes in favor of the two. Haynsworth lost 17 Republican votes but gained 19 Democratic votes. Carswell lost 13 Republican votes but gained 17 Democratic votes. Obviously the rejection of the two nominees is not to be accounted for on the basis of polarization of the Senate or the Judiciary Committee along party lines. Partisan politics probably was not absent from the proceedings on either Haynsworth or Carswell, but the aspect of the proceedings that proved to be fatal to each one in turn was not that Democrats solidly opposed them but that Republicans failed to support them. In so doing the large body of Republican Senators who deserted the two nominees reflected the action of Republican members of the Judiciary Committee who eventually joined the opposition. Had the Republican Senators supported the nominees <u>en bloc</u> either Haynsworth or Carswell would have been confirmed, assuming

that the division of Democratic Senators had held firmly.

4. The Fortas Nomination (1968): Filibuster and Defeat.

In the case of the Senate's rejection of Abe Fortas to be Chief Justice party politics in the Senate seems to have taken on a more pronounced aspect than in connection with Haynsworth and Carswell. To be sure, the Senators who announced their early opposition to Fortas considered that the nomination itself was an attempt by President Lyndon Johnson to manipulate the Court in a highly partisan and objectionable fashion.[16] The announcement of the retirement of Chief Justice Earl Warren, the timing of which was to be contingent upon the qualification of his successor, precipitated immediate speculation that President Johnson probably intended to promote Fortas to succeed Warren. Senators Hiram L. Fong (Hawaii) and Strom Thurmond (South Carolina), both Republican members of the Judiciary Committee, protested against the naming of any person to the post by President Johnson.[17] Senator Robert Griffin (Michigan), not yet a member of the Judiciary Committee but soon to become a member as well as soon to become Republican Whip in the Senate, led a broad movement among Republican Senators to prevent the President from making an appointment prior to the presidential election the following November. Senators Fong and Thurmond joined forces with Griffin, and on the day that Fortas' nomination was made public Griffin announced that 19 of the 36 Republicans in the Senate had agreed to oppose the nomination, possibly resorting to filibuster.[18] Delaying tactics were

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[16] See Chapter Two, page 23, above.

[17] New York Times, June 23, 1968, p. 1.

[18] Ibid., June 27, 1968, p. 1.

employed to prevent the reporting of the nomination by the Committee until after the parties' national conventions had made their presidential nominations during the summer.[19]

When the Committee acted upon the nomination, Senators Fong and Thurmond were joined by Senator Howard Baker, Republican, and Senators Eastland, Ervin, and McClellan, Democrats, in voting against the nominee in the Committee.[20] The Senate debates brought out additional indications of partisan aspects of the opposition. Senator Griffin charged that Lyndon Johnson, while he was Majority Leader during the Eisenhower administrations, had deliberately encouraged the Senate to drag its feet on approving a number of Federal judgeships to which President Eisenhower had made nominations, but which, in fact, were never filled until Democrat John F. Kennedy was in position to fill them.[21] Senator Fong made similar charges against Johnson concerning his blocking the appointment of Republicans to fill judgeships in the newly admitted state of Hawaii. He charged that those judges who had been serving in the territorial courts were cast off and that, for a two-year period in order to keep places open for filling by a Democratic President, sitting judges from the mainland were sent to Hawaii on loan to man the courts.[22] Thus in leading the attack on the Fortas nomination neither Senator Griffin nor Senator Fong made any serious attempt to gloss over the fact that at least partly

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[19]Ibid., July 20, 1968, p. 1.

[20]See Appendix I of this dissertation.

[21]Fortas Hearings II, p. 62.

[22]Congressional Record 114:28167-28170 (September 25, 1968) and Fortas Hearings II, pp. 61-62.

their partisanship was something in the nature of vengeance upon the partisanship of Lyndon Johnson while he was Senate Majority Leader.

The final rejection of the nomination of Fortas for Chief Justice was accomplished by means of a filibuster and the defeat of a cloture motion, after which Fortas requested that the President withdraw his name from consideration. A complete analysis of the vote on the cloture motion would be impossible without specific statements by the Senators. Doubtless many of the 45 votes for cloture would properly be considered as votes for Fortas, and many of the 43 votes against cloture also votes against Fortas. However, some Senators avowedly voted on the cloture motion with other attitudes. Senator John Sherman Cooper (Kentucky), for example, declared that he would vote for cloture but, given the opportunity, he would vote against Fortas.[23] On the other hand, Senator Everett M. Dirksen (Illinois), ranking Republican on the Judiciary Committee, declared that he would vote against cloture, but, given the opportunity, he would vote for Fortas.[24] Eleven Senators were recorded as not voting, and, of these, two were announced as favoring cloture and five as opposing it, thus bringing the known preferences to 46 "Yeas" and 48 "Nays."[25] Did Republicans defeat Fortas by means of partisan bloc voting? Possibly. Democrats, however, voting against cloture totaled 18 Senators, thus indicating that the failure of confirmation was just as easily attributable to the failure of Democratic Senators to support the nominee of their party. In order to

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[23] Congressional Record 114:28928 (October 1, 1968).

[24] Ibid., 114:28933.

[25] Ibid.

account for the defeat not only of Fortas but also of Haynsworth and Carswell at least one other factor must be explored.

III. INSTITUTIONAL COHESION AND IDEOLOGICAL CONSIDERATIONS

1. Changing Attitudes on Ideological Considerations.

The judicial selection process offers the Executive an opportunity to attempt to modify the Supreme Court's general impact upon various aspects of the life of the country by choosing Justices whose ideology or "judicial philosophy" corresponds closely to his own. President Richard M. Nixon, while he was a candidate for the Presidency, had openly declared that, given the opportunity to appoint Supreme Court Justices, he would choose men who were "strict constructionists" in their views of the Constitution.[26] While President Johnson did not go on public record in a similar fashion, there can be little doubt that in practise he did select for the Court men whose political views were congenial to his own. Generally the Senate has acknowledged the President's prerogative in this respect, but in recent years Senators have challenged nominees specifically on the grounds of their ideologies or "judicial philosophies." Such challenges have occurred upon occasions when Senators have felt that the specific choices made by the Presidents have violated the limits of tolerance as viewed by the challengers. Senator Birch Bayh stated his own view to the effect that the President should be accorded a great deal of leeway, but that he also considered that the nomination of an "extremist," whether of the "left" or the "right," should not go unchallenged by the Senate.[27] Senator

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[26] New York Times, Aug. 19, 1969, p. 1; Blackmun Hearings, p. 34.

[27] Senator Birch Bayh, personal interview, June 8, 1973.

Robert C. Byrd (West Virginia), member of the Committee on the Judiciary and Senate Majority Whip, acted upon essentially this same norm when he made "the extreme liberalism of the nominee" the theme of his major anti-Marshall speech on the floor of the Senate.[28] Similarly, Senator Bayh and others attacked the nomination of William H. Rehnquist on the ground of his "constitutional philosophy," stating that he had no understanding nor appreciation for personal liberties guaranteed under the Bill of Rights.[29]

In the processing of nominations to the Supreme Court during the period 1965-1971, the question becomes: Did the presence of ideological considerations significantly affect action either in the Committee on the Judiciary or in the full Senate or both? The matter will be pursued at this point starting with the hypothesis that the ideological factor was determinative in both the support of and opposition to certain nominees and that the controversial nominations became such primarily on the basis of clashing ideologies among Senators and among pressure groups holding a strong interest in the judicial appointments.

2. The Ideological Spectrum Among Senators.

Numerous agencies have categorized United States Senators along an ideological spectrum, that is, "conservative" or "liberal," based on votes cast on legislative measures over a period of time. Among these agencies have been the American for Democratic Action, the Committee on Political Education (AFL-CIO), the National Farmers Union, the Americans

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[28] Congressional Record 113:24654 (August 30, 1967).

[29] Ibid., 117:45200-45205 (December 7, 1971).

for Constitutional Action, and the Congressional Quarterly Service.[30] Whether the legislator is scored by a "liberal" standard or a "conservative" standard the various ratings are reasonably consistent with each other. For the purpose of this dissertation a composite ideological rating for all Senators of the 1967-1971 period has been prepared from two of these sources as a working basis, namely, the scores calculated by the Congressional Quarterly Almanac and the Americans for Constitutional Action.[31] On the basis of this composite scale all Senators of the period were assigned ratings within three categories as follows: Scores 60-100, Conservative; scores 30-59, Middle-range; and scores 00-29, Liberal.

The composite ideological ratings of the Senators may be utilized in testing the hypothesis stated above with the expectation of demonstrating that (1) the breakdown in institutional cohesion in both the Senate Judiciary Committee and in the full Senate reflected an ideological cleavage, and (2) the cleavage in the Committee was closely paralleled by the cleavage in the parent chamber. The present analysis will be based on the Committee and Senate actions on the Marshall, Haynsworth, Carswell, and Rehnquist nominations. Although the nomination of Justice Abe Fortas for elevation to Chief Justice clearly falls into the controversial category, the action on his nomination is excluded from this analysis due to the fact that the Senate's roll call vote was on a cloture

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[30]Barone, Ujifusa, and Matthews, The Justices, included a variety of ratings on each Senator holding office during the years 1968-1970; see also "Voting Studies," The Congressional Quarterly Almanac, Vol. XXII, 1966, p. 1022, Vol. XXIII, 1967, p. 111, Vol. XXV, 1969, p. 1057, Vol. XXVI, 1970, p. 1147, and Vol. XXVII, 1971, p. 90.

[31]See Appendix IV of this dissertation.

motion rather than on the merits of the nomination itself.

3. Composite Ideological Ratings: Distribution on Roll Call Votes on Key Supreme Court Nominees.

From the composite ideological ratings of all Senators voting average ideological ratings may be calculated for each group voting "Yea" and "Nay" in the roll call votes on the four subject nominees included in this analysis. Table 12 lists the averages of the composite ideological ratings of members of the Judiciary Committee parallel with the averages of ratings of all Senators voting on the four subject nominations, indicating separately each group of Senators who voted "Yea" and "Nay" in order to obtain a comparison of the average composite rating of each group on each occasion. Table 12 reveals that the ideological ratings fall into a pattern with the blocs of Senators voting together, both in the Committee and in the full Senate, manifesting a distinct ideological grouping. Those Senators voting "Yea" on Marshall show a relatively low (or "liberal") average rating, and those voting "Nay" a relatively high (or "conservative") average, while on the other three nominees the ideological groupings are reversed, that is, the groups voting "Yea" show a relatively high (or "conservative") average and the groups voting "Nay" a relatively low (or "liberal") average rating. In order to demonstrate more directly the fact of the ideological cleavage in the Committee and the full Senate as well as the parallelism of the cleavages in the Committee and the parent body, Figure 2 depicts in the form of a simple graph the distribution of ideological clusters in the same four roll call votes, with the average composite ideological rating of each "liberal" and "conservative" cluster, both as members of the Judiciary Committee

TABLE 12

THE IDEOLOGICAL FACTOR IN SENATE ACTION ON FOUR KEY NOMINATIONS TO THE UNITED STATES SUPREME COURT: THE LIBERAL-CONSERVATIVE CLEAVAGE

Nominee	Average of Composite Ratings of Senators Voting "Yea"		Average of Composite Ratings of Senators Voting "Nay"	
	Members of Judiciary Committee	All Senators	Members of Judiciary Committee	All Senators
Marshall (1967)	31%	40%	76%	73%
Haynsworth (1969	74%	69%	22%	25%
Carswell (1970)	73%	71%	23%	22%
Rehnquist (1971)	64%	60%	07%	12%

Sources: Appendix IV of this dissertation lists the composite ideological ratings of all Senators participating in the roll call votes. For the roll call votes themselves, see Congressional Record 113:24656 (August 30, 1967); 115:35396 (November 21, 1969); 116:10769 (April 9, 1970); and 117:46197 (December 10, 1971).

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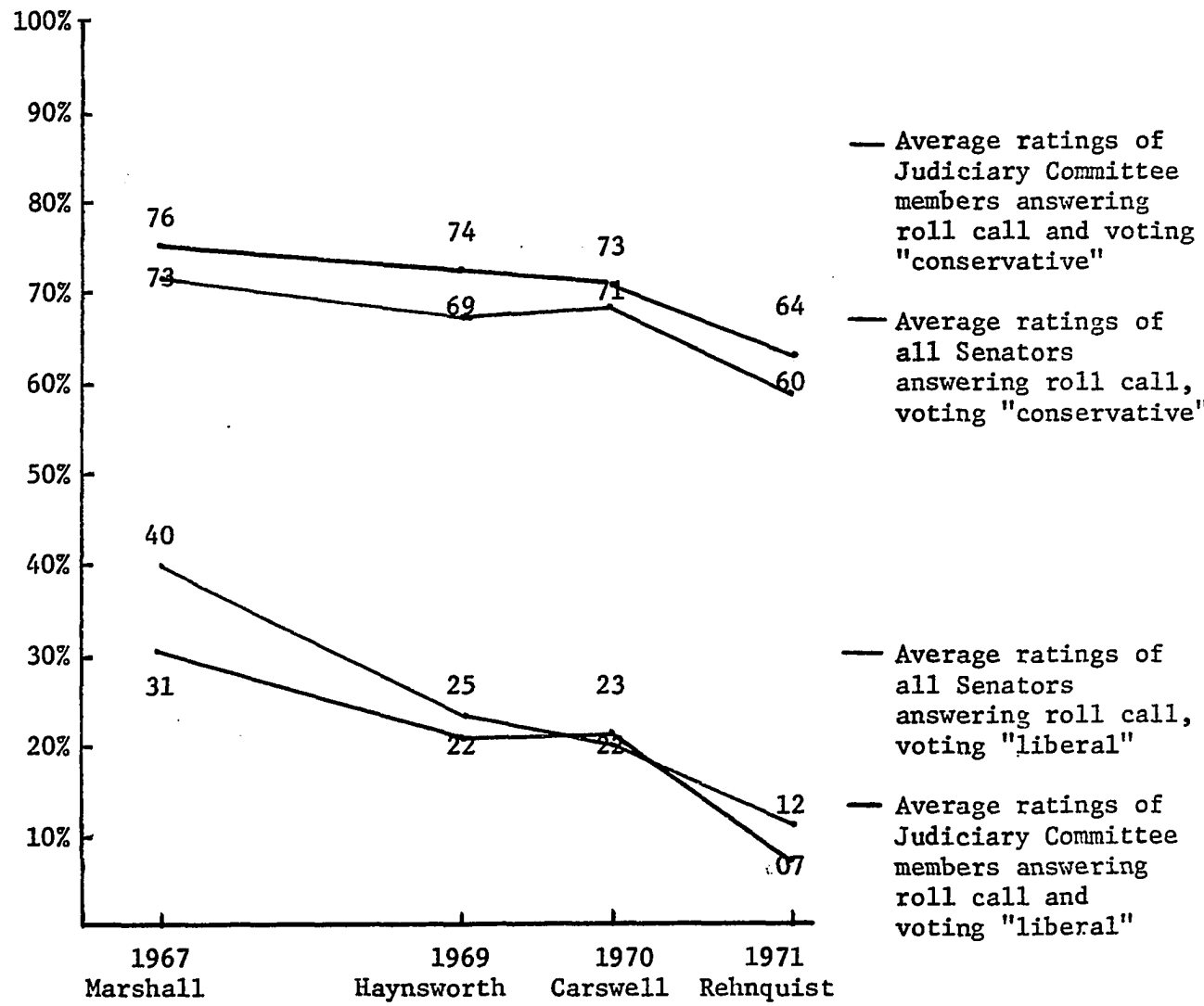
and as members of the parent chamber, plotted in linear form. The figure demonstrates the accuracy of the hypothesis stated above, that is, (1) the breakdown in institutional cohesion in both the Senate Judiciary Committee and in the full Senate reflected an ideological cleavage, and (2) the cleavage in the Committee was closely paralleled by the cleavage in the parent chamber.

FIGURE 2

THE IDEOLOGICAL FACTOR IN SENATE ACTION ON FOUR KEY NOMINATIONS TO THE UNITED STATES SUPREME COURT: THE LIBERAL-CONSERVATIVE CLEAVAGE



The cleavage between the "conservative" and "liberal" groups within the Judiciary Committee was typically a little greater than that between the "liberal" and "conservative" divisions of all Senators parti-

cipating in the votes. This fact suggests that although the stances taken by "conservative" and "liberal" groups of the Committee furnished cues for other Senators, the influence of the Committee encountered some limits. The "conservatism" within the full Senate was never as pronounced as the "conservatism" within the pilot group of the Committee. Likewise, the "liberalism" within the full Senate was typically less pronounced than the "liberalism" within the pilot group in the Committee. The single exception to the latter observation was in the vote on Carswell, in which instance the average of the composite ideological ratings of all Senators voting "Nay" (i.e., "liberal") dropped one percentage point lower than even that of the "liberal" group of the Committee.

Each of the roll call votes as depicted in Figure 2 requires a brief analysis. The Marshall nomination incurred the narrowest cleavage of the four both among the members of the Committee and among all Senators voting. The relatively high average of the composite ideological ratings of the group voting "Nay" (i.e., "conservative") on the Marshall nomination--76% among Committee members and 73% among all Senators--is the reflection of the fact that only the quite "conservative" members of the Committee and the full Senate voted in opposition to Marshall in the 69-11 roll call vote that confirmed the nomination. Likewise, the relatively high average of the composite ideological ratings of Senators voting "Yea" (i.e., "liberal") on the Marshall nomination reflects the fact that many "conservative" Senators (e.g., Baker, Boggs, Carlson, Hansen, and Hruska) and all of the Senators of middle range ratings voted in support of Marshall.[32] Although it

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[32]Congressional Record 113:24656 (August 30, 1967).

clearly allows for an ideological factor in the voting, this kind of cleavage suggests that a purely ideological argument can hardly expect to be an effective approach to defeat a particular nomination. This observation is further illustrated by the action on the Rehnquist nomination, which also was opposed by "liberal" Senators primarily on ideological grounds. The low (i.e., "liberal") average of composite ideological ratings of the groups voting against Rehnquist--07% among Committee members and 12% among all Senators--reflects the fact that only the relatively "liberal" members of the Judiciary Committee and of the full Senate voted in opposition to Rehnquist on the 68-26 roll call vote that confirmed the nomination. Also the relatively low average ratings of the bloc of Senators voting "Yea" (i.e., "conservative") on the Rehnquist nomination reflects the fact that many "liberal" Senators (e.g., Burdick, Eagleton, Mathias, Pastore, and Proxmire) and nearly all of the Senators of the middle range ratings voted in support of Rehnquist.[33] Again the insufficiency of a purely ideological argument as an approach to defeat a nomination is demonstrated.

The presence of an ideological factor in the action on the Haynsworth and Carswell nomination, both in the Judiciary Committee and in the full Senate, is quite evident from the distribution of average composite ideological ratings represented in Figure 2. However, a significant difference appeared in these two instances in contrast to the voting patterns on the Marshall and Rehnquist nominations. Senators of middle range ratings, who could not be induced to vote against Marshall

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[33]Ibid., 117:46197 (December 10, 1971).

or Rehnquist on the basis of almost purely ideological arguments, experienced cleavage in voting on both Haynsworth and Carswell. With reference to these two nominations Table 13 represents the votes of members of the Judiciary Committee according to their composite ideological ratings. In the roll call votes on both nominations all members of the Committee with ideological ratings of 60% or more (relatively "conservative") voted "Yea" on both nominations, while all members with ratings of 29% or less (relatively "liberal") voted "Nay." The five Committee members with ideological ratings in the middle range of 30-69% split 3-2 on both nominations, although on the two occasions the five Senators lined up differently.

Table 14 represents the distribution of votes of all Senators participating in the roll call votes on Haynsworth and Carswell, according to their composite ideological ratings. Among Senators with ratings of 60-91% (relatively "conservative") the roll call vote produced 33 "Yeas" and only 5 "Nays" on Haynsworth and 34 "Yeas" and only 2 "Nays" on Carswell. Among Senators with ratings of 03-29% (relatively "liberal") the roll call votes produced 38 "Nays" and only one "Yea" on Haynsworth, and 38 "Nays" and zero "Yeas" on Carswell. The cleavage between quite "conservative" and quite "liberal" Senators on the Haynsworth and Carswell nominations is very obvious. However, neither group was able to bring Senators of the middle range ideological ratings intact as a group to its support. Among those Senators with ratings of 30-69% the roll call votes produced 11 "Yeas" and 12 "Nays" on both Haynsworth and Carswell. A more complete cleavage among this group of Senators would have been

TABLE 13

IDEOLOGICAL DISTRIBUTION OF VOTES OF MEMBERS OF THE SENATE JUDICIARY COMMITTEE: HAYNSWORTH AND CARSWELL

Composite Ideological Ratings	Haynsworth		Carswell		
	Yeas	Nays	Yeas	Nays	
90-91	1	0	1	0	
80-89	3	0	3	0	"Conservative"
70-79	1	0	1	0	
60-69	0	0	0	0	
50-59	3	2	3	2	Middle range ratings
40-49	0	0	0	0	
30-39	0	0	0	0	
20-29	0	3	0	3	
10-19	0	2	0	2	"Liberal"
00-09	0	2	0	2	

Sources: Congressional Record 115:35396 (November 21, 1969) and 116:10769 (April 9, 1970) for record of roll call votes on the nominations. See Appendix IV of this dissertation for composite ideological ratings for all Senators voting.

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impossible.[34] The cleavage among the Senators of middle range ratings indicates that factors other than purely ideological considerations were

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[34]Ibid., 115:35396 (November 21, 1969) and 116:10769 (April 9, 1970).

TABLE 14

IDEOLOGICAL DISTRIBUTION OF VOTES OF ALL SENATORS IN ROLL CALL VOTES ON HAYNSWORTH AND CARSWELL

Composite Ideological Ratings	Haynsworth		Carswell		
	Yeas	Nays	Yeas	Nays	
90-91	2	0	2	0	
80-89	17	0	16	0	"Conservative"
70-79	6	4	8	1	
60-69	8	1	8	1	
50-59	5	3	4	4	
40-49	3	2	4	1	Middle range ratings
30-39	3	7	3	6	
20-29	0	12	0	12	
10-19	0	15	0	14	"Liberal"
00-09	1	11	0	12	

Sources: Congressional Record 115:35396 (November 21, 1969) and 116:10769 (April 9, 1970) for record of roll call votes on the nominations. See Appendix IV of this dissertation for composite ideological ratings for all Senators voting.

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present in these two cases. Those factors have been perceived repeatedly as problems of judicial ethics, conflict of interest, anti-labor bias, racist attitudes, or professional mediocrity. Senators included in this middle range category differed greatly in their evaluations of the two

nominees. Senators who were scarcely influenced by quite "conservative" or "liberal" ideological attitudes cast their votes according to their perceptions of the two nominees, avowedly on the considerations of fitness and qualifications. A good example of the differences in perception and voting by such Senators is found in the statements and voting of Senators John Sherman Cooper (composite ideological rating: 45%) and Marlow Cook (composite ideological rating: 58%), both of Kentucky, who voted "Nay" and "Yea," respectively, on Haynsworth, but reversed themselves on Carswell.[35]

Did the full Senate rely heavily upon its Committee on the Judiciary in its evaluation of the nominees and in the performance of its advice and consent duty with respect to the nominations of the Johnson and Nixon administrations to the Supreme Court? The foregoing analysis indicates that the parent chamber did indeed rely upon its Committee, and in so doing it followed the traditional pattern of interdependence and interaction. Strong internal cohesion in the Committee was reflected by almost unanimous approval of the nominees by the Senate. When internal cohesion in the Committee became moderately eroded, specific opposition to the nominees appeared in the full Senate but not in sufficient strength to preclude their confirmation. Polarization in the Committee was accompanied by polarization in the full Senate, and the roll call votes disposed of the nominations by very narrow margins. In the two instances of such polarization included in this study both nominations were defeated,

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[35]Ibid., 115:35164 (November 20, 1969); 115:35157 (November 20, 1969); 116:10755-10760 (April 8, 1970). See also McConnell, "Haynsworth and Carswell: A New Senate Standard of Excellence," Kentucky Law Journal 58:20, 24 (1970).

but it is not necessary to predict defeat of a nomination in the event of a polarization of the Committee on a future occasion. However, extreme polarization of the Committee would indicate that a very narrow margin in the final roll call vote would be expected to recur.

CHAPTER SEVEN

THE SEARCH FOR CRITERIA OF JUDICIAL SELECTION

The many persons and institutions involved in the judicial selection process univerally profess to adhere to high standards of excellence for Supreme Court Justices. The traditional reverence for the Supreme Court and the deference accorded the Justices create a demand that the very cream of the legal profession be chosen to man the high bench. The Court's role in interpreting the statutes and the Constitution has such far-reaching impact upon the life of the country that the appointment of any but the very ablest lawyers and judges is viewed as a disservice to the country. Alongside this universally professed demand for exceptional qualification in Justices, the Senate has traditionally acknowledged the prerogative of the President to nominate persons from his own political party and of his own ideological persuasion. A prime problem in the selection process is that of adhering to high standards while at the same time operating within a genuinely political context. Nevertheless, during the period 1965-1971 a large number of persons seriously addressed themselves to the task of identifying and applying acceptable criteria for judging the qualifications of potential nominees to the Court.

I. THE CONTEXT OF THE SEARCH, 1965-1971

Fundamentally the new surge of interest in criteria for judicial qualifications emerged as one aspect of the controversy which erupted in connection with the nomination of Associate Justice Abe Fortas to be elevated to Chief Justice, and it became even more intense the following spring during the inquiry into Fortas' off-bench activities. Inside the Congress the Senate Judiciary Committee became the focal point of legislative interest and activity proposing to upgrade the quality of judicial performance both on and off the bench. Outside of the Congress a number of other agencies also asserted a direct interest in the issues of judicial selection and judicial behavior. Among these agencies were the National Judicial Conference, the American Bar Association's Standing Committee on Federal Judiciary, the Judicial Conferences of a couple of circuits of the United States Courts of Appeals, and many individual judges and lawyers.

Among the members of the Senate Judicairy Committee there seems to have existed a commingled concern, on the one hand, about judicial behavior, both on-bench and off-bench, and, on the other hand, about criteria for judicial selection. Although these concerns are actually separate issues they were handled almost as interchangeable and inseparable. This dual concern reflected the successive crises in the judiciary represented in the pressure-contrived resignation of Justice Abe Fortas in the spring of 1969 and in the Senate's rejection of Judge Clement F. Haynsworth, Jr., in the fall of the same year. Standards of judicial conduct were issues in both crises. Against the background of the events

of this critical year moves were made both in the federal judiciary and in the United States Senate to deal with the difficulties.

The federal judiciary, treasuring the principle of judicial independence, attempted to define standards of judicial conduct in such a fashion as to preserve its independence. The position of the federal judiciary received some support from outside elements of the American legal community. For example, Professor L. Ray Patterson of Vanderbilt University Law School stated that judges were moving in the right direction by drawing up their own standards of judicial conduct.[1] Even in the Senate Judiciary Committee Senator Sam Ervin, a former member of the Supreme Court of North Carolina, raised the question whether a congressional statute might constitute an infringement upon the principle of judicial independence.[2] Prompted by Chief Justice Earl Warren, a special committee of the National Judicial Conference, chaired by Judge Robert A. Ainsworth, Jr., of the Fifth Circuit, United States Court of Appeals, issued a set of strict guidelines which forbade all federal judges (except Justices of the Supreme Court) to accept outside fees--reflecting the Fortas controversy--and which required them to file with a committee of the Judicial Conference annual reports of their investments and other assets--remarkably prophetic of the Haynsworth controversy![3]

The new guidelines of judicial conduct were not warmly received by many federal judges, and some expressed the feeling that Chief Justice

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[1] New York Times, July 15, 1969, p. 23.

[2] Ibid.

[3] Ibid., June 11, 1969, p. 1.

Warren had "rammed through" the new rules without adequate notice to the judiciary.[4] In the Second Circuit of the U. S. Court of Appeals nine judges of the Court of Appeals and forty-three judges of the Federal District Courts formally requested a suspension of the guidelines until further study and analysis could be given them.[5] Meanwhile the Justices of the Supreme Court disregarded outgoing Chief Justice Earl Warren's urgings that they voluntarily submit to the new rules, except that Justice Thurgood Marshall indicated that he, although not bound by the rules, would voluntarily submit his financial disclosure not to the Judicial Conference but to the Supreme Court itself.[6] Incoming Chief Justice Warren E. Burger gave the new guidelines something less than his wholehearted support,[7] and shortly after the opening of the Supreme Court session in the fall of 1969 the new guidelines were suspended by the National Judicial Conference.[8]

In the United States Senate certain members of the Judiciary Committee introduced a number of bills during the summer of 1969 to set statutory guidelines for governing judicial conduct, even over the protest of members of the judiciary, such as ex-Judge Simon H. Rifkind of New York, that federal judges had not been behaving in a manner to arouse public indignation.[9] Senator Robert P. Griffin (Michigan), who

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[4]Ibid., June 13, 1969, p. 1.

[5]Ibid., July 3, 1969, p. 1.

[6]Ibid., July 18, 1969, pp. 1, 54.

[7]Ibid., Oct. 1, 1969, p. 8.

[8]Ibid., Nov. 25, 1969, p. 1.

[9]Ibid., July 15, 1969, p. 1.

the previous fall had led the filibuster against the Fortas nomination to be Chief Justice, declared that the rules issued by the National Judicial Conference did not go far enough and that the Congress was morally obligated and constitutionally competent to enact legislation setting standards for non-judicial activities and requiring financial disclosures by federal judges.[10] Senator Griffin sponsored a bill requiring judges to file with the Comptroller General confidential reports on outside income, while Senator Philip A. Hart introduced one that required public disclosure.[11] Senator Joseph D. Tydings, Chairman of the Judiciary Committee's Subcommittee on the Improvement of Judicial Machinery, proposed legislation that would set forth specific guidelines for judicial conduct and that would create a Judicial Board to dispose of complaints against judicial impropriety through uniform application of the rules of conduct. Tydings' bill would also have required all federal judges to disclose all financial assets and outside business connections.[12] Probably the most drastic of the several proposed measures was that of Senator Sam Ervin that would have barred all federal judges from performing for pay any kind of non-judicial task.[13] Senator Hugh Scott, Minority Whip and a member of the Judiciary Committee, sought to slow down the spate of bills directed at the judiciary by calling attention to the work of the Subcommittee on the Improvement of Judicial Machinery, and Senator Everett M.

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[10]Ibid., July 15, 1969, p. 23.

[11]Ibid., May 24, 1969, p. 18.

[12]Ibid., May 5, 1969, p. 28.

[13]Ibid., Feb. 26, 1969, p. 16.

Dirksen, Minority Leader and ranking Republican member of the Judiciary Committee, took the stand that the judiciary should be permitted to police themselves without interference from Congress.[14]

The American Bar Association concerned itself with the judiciary when its in-coming president, Bernard G. Segal, announced the appointment of a new nine-man committee of judges and lawyers to draft a new code to replace the Association's 1923 Canons of Judicial Ethics. Chief Justice Roger J. Traynor of the California Supreme Court was designated to chair the committee.[15] Senator Tydings warned Judge Ainsworth, Chairman of the Committee of the National Judicial Conference, that his committee ought to act quickly to come up with definitive guidelines or see the ABA's committee pre-empt the Judicial Conference in its own bailiwick. He also implied that Congressional action would be taken unless the Judicial Conference acted on its own soon.[16]

The nomination of Judge Clement F. Haynsworth, Jr., to fill the vacancy left by the resignation of Associate Justice Abe Fortas occurred during the period of general concern over judicial ethics. Haynsworth himself, about two months before his nomination to the Supreme Court was announced, had testified regarding criteria of judicial ethics before Senator Tydings' Subcommittee on the Improvement of Judicial Machinery.[17] It is not surprising that the next nomination--remarkable, indeed, that

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[14]Ibid., May 28, 1969, p. 36.

[15]Ibid., Sept. 14, 1969, p. 60.

[16]Ibid., Nov. 25, 1969, p. 1.

[17]Haynsworth Hearings, p. 94.

it should happen to be Haynsworth!--would be examined in minute detail against the background of the suggested criteria that had emerged during the intervening months. The nomination was rejected, of course, after more than three months of consideration, on the grounds of conflict of interest and questionable judicial ethics.[18] Likewise, every subsequent nomination to the Supreme Court has undergone careful examination, and standards of excellence in judicial competence, character, and conduct have been pointed subjects for discussion in the proceedings of the Senate Judiciary Committee and in debate on the Senate floor.

II. LIABILITIES: NEGATIVE CRITERIA

The study of negative criteria is essentially a study of certain factors which have actually proved to be liabilities to nominees. Genuinely damaging characteristics are those that can be concretized sufficiently to convince Senators that a candidate does not measure up, that he is objectively incapable of rising to the task, or that he is possessed of characteristics that would be subjectively offensive to the American public's sense of propriety.

1. Personal Liabilities.

Lack of Stature. "Stature" is a general term denoting the esteem in which an individual is held by the public. In the context of judicial selection most of the time the usage of the term seems to have applied specifically to an individual's standing within the narrower community of the legal profession. The most serious assertion of "lack of stature" occurred in relation to the Carswell nomination. Among the many persons

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[18] Congressional Record 115:35396 (November 21, 1969).

who were highly critical of Carswell were Professor Gary Orfield, Professor of Politics and Public Affairs at Princeton University, and Professor William Van Alstyne of Duke University Law School, who based their evaluations primarily on Carswell's career and opinions as a Federal District Court judge. Referring to his intellectual capacity and his whole personality, as well as to his professional competence, Van Alstyne summed up his opinion in a pithy statement, as follows: "There is, in candor, nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court of the United States."[19] Responding to such evaluations, Senator J. William Fulbright, for example, emphasized the risk to the prestige of the Senate itself if by any chance it might confirm the nomination of Carswell to the Court.[20] On a later occasion when the name of Senator Robert C. Byrd of West Virginia was being discussed as a possible nominee to the Court, early enthusiasm among Senators rallying to his support in the traditional fashion of accepting any Senator nominated to high office gave way to more sober consideration and regretful statements that Byrd simply was not of sufficient stature to fill the post.[21] Similarly, it was on this basis that members of the Judicary Committee and others issued withering blasts at the Administration when the names of Hershel Friday, Mildred Lillie, and others were leaked or "floated" as possible successors to Associate Justices Hugo Black and John M. Harlan.[22] A threat to the prestige of

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[19]Carswell Hearings, pp. 113-124, 133-136.

[20]Congressional Record 116:9610-9611 (March 26, 1970).

[21]New York Times, Oct. 12, 1971, p. 1.

[22]Ibid., Oct. 16, 1971, p. 28.

the Senate will be a forceful argument in any event that might jeopardize this traditional institutional value.

"Cronyism." The term "crony" or "cronyism" is used to place an unsavory connotation upon an intimate companionship. Personal relationship as a liability was encountered in the nominations of Justice Abe Fortas to become Chief Justice and of Judge Homer Thornberry to be an Associate Justice. While the charge of "cronyism" was not sufficient to create an obstacle to the Fortas nomination in 1965, it added emotional content to the struggle over his nomination for Chief Justice. It has been suggested that the nomination of Fortas to be Chief Justice encountered plenty of obstacles on its own, but that to carry the additional load of the nomination of another "crony," Thornberry, a "third rate Texas 'pol'," constituted an impossible burden.[23] Although "cronyism" was not directly invoked in the dissenting views attached to the Judiciary Committee's Executive Report on the Fortas nomination,[24] it was invoked in press releases,[25] and in debate on the Senate floor.[26]

President Nixon demonstrated an awareness of the vulnerability of a personal friend as a nominee when he deliberately and publicly stated that he would not propose as the replacement of Chief Justice Earl Warren such longtime associates as Herbert Brownell, Thomas E. Dewey, and John

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[23]Lawrence Baskir, Administrative Assistant to Senator Sam Ervin, personal interview, June 1, 1973.

[24]Senate Executive Report No. 8, pp. 15-45.

[25]New York Times, June 28, 1969, p. 1.

[26]Congressional Record 114:27919 (September 24, 1968).

Mitchell.[27] Perhaps there was some risk involved in the nomination of Harry A. Blackmun to be Associate Justice, in view of the life-long friendship between him and Chief Justice Warren E. Burger, but in the absence of other concrete objections the relationship between Burger and Blackmun was not made into an issue.[28]

The use made of the term "cronyism" is the ground of its significance, and its use becomes a matter of tactics rather than substance. In order to be useful as a tactic it must be used in conjunction with other concrete objections to a nomination. The fact that the issue was not raised in connection with the Blackmun nomination seems to indicate that "cronyism" standing alone would not be a very useful weapon for opposing a nomination if it were the only objection offered.

Lack of Candor. The problem of lack of candor is esentially an allegation of the presentation of false or misleading testimony. Both Judge Clement F. Haynsworth, Jr., and Judge G. Harrold Carswell had trouble on this point.

Senator Robert Griffin of Michigan, in the statement of his dissenting views attached to the Judiciary Committee's Executive Report to the Senate, presented an exhaustive summary of the grounds for questioning Judge Haynsworth's candor. In an appearance before the Judiciary Committee's Subcommittee on Improvement of Judicial Machinery (Senator Joseph D. Tydings, Chairman) on June 2, 1969, Judge Haynsworth reported that at the time he went on the bench as a judge of the United States

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[27] New York Times, May 23, 1969, p. 1.

[28] Blackmun Hearings, p. 40.

Court of Appeals in 1957 he had resigned all of his business associations and directorships. The matter did not become an issue before the Subcommittee, but in his appearance before the full Committee in September 1969, while he was under consideration for Associate Justice, minutes of the Vend-A-Matic Company board proceedings were produced showing that Haynsworth had been re-elected annually as a Vice-president from 1957 to 1963 and that he had drawn over $2,000 annually in director's fees.[29] Senator Griffin's conclusion left no doubt that the issue of "lack of candor" was a serious obstacle in the way of confirmation. Other individual views of Senators paralleled those of Senator Griffin.[30]

It was after the conclusion of the Committee hearings on the Carswell nomination that the issue of personal veracity came into focus. The nominee's role as an incorporator of a private country club in Tallahassee came under inquiry before the Committee. Members of the Committee later learned that on the evening before he gave his testimony Judge Carswell had been afforded the opportunity to look over the articles of incorporation bearing his name, but in response to a question from Senator Birch Bayh on January 28, 1970, Carswell stated that he had not looked at the articles. Other Senators were made aware of this discrepancy before the final vote on the Senate floor.[31]

Doubtless exercising extreme care in the wake of the defeats of

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[29] Senate Executive Report No. 91-12, pp. 40-42.

[30] Ibid., p. 26.

[31] Carswell Hearings, p. 68; Richard Harris, Decision (New York: Ballentine Books, 1971), pp. 40, 144-145; Congressional Record 116:10167-10169 (April 2, 1970).

Haynsworth and Carswell, Judge Harry A. Blackmun appeared to bend over backward to avoid any appearance of lack of candor. He provided a complete disclosure of his financial situation and a list of all cases on which he had sat involving firms in which he personally held stock.[32] His frank discussion of all of these matters prompted Senator Birch Bayh to identify Blackmun's openness as the criterion for a new "Blackmun standard" of judicial conduct.[33]

Any instance of obvious lack of candor or a deliberate attempt to mislead members of the Committee or other Senators will likely continue to be viewed with genuine disfavor by those Senators convinced of such an attempt, and to the extent that it is known and believed in the Senate such a development will constitute a hazard to confirmation.

Lack of Judicial Temperament. The concept of judicial temperament has long been an element in the American Bar Association's evaluation of prospective Federal judges. Although the term may convey different ideas to different people, it seems as a rule to have the connotation of personal dignity, a sense of propriety and fairness, courtesy, and the capability of judging without rancor. The idea of lack of judicial temperament is intended actually to convey the positive presence of undesirable traits, such as partiality, impatience, temper outbursts, undignified behavior, prejudicial attitudes, and discourtesy. Sitting judges are much more readily evaluated on this point than persons not occupying the bench.

Among the nominees to the Supreme Court included in this research

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[32] Blackmun Hearings, pp. 22-26, 45-55.

[33] Ibid., p. 49.

the judicial temperament of only one, Judge G. Harrold Carswell, was called into question. The charge was seriously levelled by a number of witnesses who testified at the Committee hearings. Professor John Lowenthal, Rutgers University Law School,[34] Norman Knopf, an attorney in the Department of Justice,[35] and Professor Leroy D. Clark, New York University Law School, all of whom had appeared as practising lawyers in civil rights cases before Judge Carswell, gave adverse testimony concerning the judge's unjudicial demeanor. Clark, for example, reported that Carswell displayed a constant attitude of hostility, unnecessarily shouting at civil rights lawyers and deliberately disrupting their remarks.[36]

The adverse testimony regarding Judge Carswell's alleged unjudicial temperament carried weight in the Judiciary Committee. It was cited in the dissenting views of Senators Bayh, Hart, Kennedy, and Tydings, that were attached to the Committee's Executive Report to the Senate, as one of the major grounds urged as a basis for rejection of the nomination.[37] Among the key Senators whose votes ultimately meant the defeat of Judge Carswell--Marlow Cook (Kentucky), Hiram Fong (Hawaii), and Charles Mathias (Maryland)--the testimony concerning his lack of judicial temperament carried much weight, possibly making the difference between defeat and confirmation.[38]

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[34] Carswell Hearings, pp. 139-141.

[35] Ibid., p. 177.

[36] Ibid., p. 277.

[37] Senate Executive Report No. 91-14, pp. 13, 17-20.

[38] A Mitchell McConnell, Jr., "Haynsworth and Carswell: A New Senate Standard of Excellence," Kentucky Law Journal 59:22-23 (1970).

2. Substantive Biases.

The charge of bias essentially is that a nominee is possessed of prejudice to such an extent that as a judge he would not be capable of rendering impartial decisions. Some charges of bias would be more serious than others on the basis of their substance, as well as on account of the strength of the groups perceiving their interests to be threatened.

Anti-Labor Bias. Although both Judge Carswell and Assistant Attorney General Rehnquist encountered positive opposition from organized labor, it was Judge Clement F. Haynsworth, Jr., who actually was seriously charged with an anti-Labor bias.[39] President George Meany of the AFL-CIO levelled the charge against him as one of three major reasons for urging the Judiciary Committee to recommend unfavorable consideration of the nomination. Meany summed up by stating that in his twelve years on the bench Haynsworth had sat on seven cases involving labor-management relations and that on all seven occasions Haynsworth had taken the anti-Labor position.[40] Thomas E. Harris, Associate General Counsel of the AFL-CIO, declared: "Haynsworth always holds against the union if it is possible to do so and that judged by the standards of the Supreme Court he was not a very good judge in labor cases, because he was reversed all the time."[41] A total of eight witnesses representing organized labor appeared at the hearings and offered testimony in opposition to Haynsworth. Similarly, a variety of such witnesses also appeared to oppose the nominations of Judge G.

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[39]J. B. Grossman and Stephen Wasby, "Haynsworth and Parker: History Does Live Again," South Carolina Law Review 23:345 ff. (1971).

[40]Haynsworth Hearings, p. 163.

[41]Ibid., p. 171.

Harrold Carswell and Assistant Attorney General William H. Rehnquist.[42]

The seriousness of a charge of an anti-Labor bias does not necessarily lie in the accuracy of the charge itself, but it may lie in the forcefulness with which the unions press the charge and the extent to which Senators are impressed with the charge or feel the political pressure of the unions. Probably no President would openly grant organized labor a veto over judicial appointments, but if one is to act rationally in the selection process one must take into account the hazard of strong labor opposition and weigh it against other factors when making a nomination.

Anti-Minorities Bias. The charge of bias against minorities, especially blacks and Mexican-Americans, will be examined seriously by Senators evaluating nominees against whom the charge is levelled. The charge was encountered in the contemporary period by nominees Haynsworth, Carswell, Rehnquist, and, to a much lesser extent, by Lewis F. Powell, Jr. Again Carswell was the one who had the most difficulty with the problem. His disavowal of his famous "white supremacy" speech of 1948 eventually was overridden in the minds of a majority of the members of the Senate Judiciary Committee and of the full Senate, and his alleged racist attitude was among the prime reasons for his rejection.[43] Haynsworth had previously come under heavy fire on a similar charge, but it was more on general grounds of not being "innovative" rather than on concrete actions that suggested bias in the area of civil rights.[44] Rehnquist later

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[42]See Chapter Four of this dissertation for a full treatment of the role of organized labor in the selection of Justices to the Court.

[43]Senate Executive Report No. 91-14, pp. 28-31.

[44]Senate Executive Report No. 91-12, p. 48.

was charged with participating in efforts to restrict black voting in Phoenix, Arizona, but apparently his defense against the charge was adequate to convince a majority of Senators that at least a reasonable doubt existed.[45] In contrast, the charge against Judge Carswell was much more carefully substantiated and even expanded to describe him not merely as a Southern "strict-constructionist" judge but as a "reactionary activist" who used his judicial position actually to try to turn back the calendar in race relations.[46] The minority views of Senators Birch Bayh, Philip Hart, Edward Kennedy, and Joseph Tydings, attached to the Committee's Executive Report to the Senate, analyzed his record in civil rights cases as being "one of obstruction and delay, amounting too often to an improper refusal to follow the mandates of the Constitution and the clear guidelines of higher courts."[47]

As with the charge of an anti-labor bias, it is not necessarily the objective accuracy of the charge that determines the magnitude of the hazard in the way of confirmation by the Senate. The seriousness of the charge lies in the extent that Senators perceive the matter as concretely and substantially true. While the nomination of Lewis F. Powell, Jr., was before the Judiciary Committee two witnesses appeared against him on the grounds of a civil rights bias,[48] but Powell's explanation of his involvement in the race relations adjustments since 1954 was sufficiently

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[45] Senate Executive Report No. 92-16, pp. 8-9.

[46] Senator Birch Bayh, personal interview, June 8, 1973.

[47] Senate Executive Report No. 91-14, p. 20.

[48] Rehnquist and Powell Hearings, pp. 289-349, 386-399.

convincing that he received the unanimous endorsement of the Judiciary Committee and an 89-1 confirmation vote on the Senate floor.[49] Thus when allegations of an anti-civil rights bias are perceived as not well-founded, the issue makes little impact, but if racist attitudes are perceived as concrete and substantial, it is highly unlikely that a nomination would on future occasions meet with approval and confirmation by the Senate.

Anti-Civil Liberties Bias. In the context of issues affecting attitudes toward appointments to the Supreme Court the Senators used the term "civil liberties" in referring to the broad range of rights guaranteed under the Bill of Rights--the right peaceably to assemble, the protection of rights against unreasonable search and seizure, the right to due process of law, and others.

Three of the Nixon nominees--Haynsworth, Carswell, and Rehnquist--encountered a charge of anti-civil liberties bias on a significant scale. The criticism of Judge Haynsworth, summarized in Senator Philip Hart's statement of individual views appended to the Judiciary Committee's Executive Report to the Senate, stated the charge of bias altogether against the background of the judge's participation in cases, early and more recently, dealing with civil rights matters as pertaining to Negroes.[50] Against Judge Carswell the charges were quite similar but with the addition of a voluminously supported charge of insensitivity to the rights of

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[49] Congressional Record, December 6, 1971, p. 44857.

[50] Senate Executive Report No. 91-12, p. 48.

women[51] and of "disdain for the writ of habeas corpus."[52]

An anti-civil liberties bias as charged against William H. Rehnquist obviously could not be based on a judicial record, as were the others, but the charge nevertheless was strongly pressed. A variety of sources furnished information upon which the opposition group based its views, that is speeches, published journal articles, his performance as Assistant Attorney General in handling dissenters against government policy, and testimony before the Judiciary Committee. The opposition concluded:

> That the nominee gives short shrift to individual liberty when it hinders the pursuit of order and authority cannot be explained as merely the result of "strict construction." On the contrary, his approach to Constitutional interpretation seems strangely elastic. The Bill of Rights, and decisions upholding them against competing interests, are read as narrowly as possible, with little heed to their underlying concerns. But provisions and precedents conferring Executive power and declaring the general purposes of government are read loosely and expansively to justify the most intrusive kinds of official interference with those rights.[53]

In debate on the Senate floor statements in opposition to Rehnquist also climaxed on the point of his lack of understanding of and appreciation for the Bill of Rights freedoms. During the last hour of the debate Senator George McGovern (South Dakota) stated:

> No man can be worthy of appointment to the Supreme Court who has demonstrated such misunderstanding of the Bill of

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[51] Carswell Hearings, pp. 82, 454; the testimony is that of Representative Patsy Mink (Hawaii), and the document is the case of Ida Phillips v. Martin Marietta Corporation.

[52] Ibid., pp. 281-307; also, Senate Executive Report No. 91-14, pp. 26-28.

[53] "Individual Views of Messrs. Bayh, Hart, Kennedy, and Tunney," Senate Executive Report No. 92-16, pp. 24-25.

> Rights as William Rehnquist. His is a record of contempt toward the very heart of this free society, the notion that individual freedom and expression is the foundation of America. Whereas the Bill of Rights is based on the protection of individual freedom against the encroachments of Government, Mr. Rehnquist has consistently sought to narrow that freedom and increase those encroachments to the point where this Government would have a free hand to suppress its people.[54]

The charge of such a bias as levelled at Rehnquist was sufficiently impressive to convince twenty-seven Senators who voted or paired negatively at the time of the roll call vote. Since this charge largely constituted the case against him, and since civil liberties can be perceived and interpreted according to a wide variety of views, the charge was not sufficient to block the confirmation.

The Marshall and Fortas (1968) nominations encountered difficulties due to an inverted perception of civil liberties issues by certain Senators. As members of the Judiciary Committee probed deeply into such matters as "coddling criminals" and "obscenity," their questions were based on the view that certain Supreme Court decisions designed to strengthen protection of civil liberties (e.g., Mapp v. Ohio, Escobedo v. Illinois, and Miranda v. Arizona) had gone so far as to threaten the rights of law abiding citizens to receive adequate protection from criminal activity. Senator John L. McClellan's concern seems to have been along this vein when he asked Solicitor General Thurgood Marshall:

> Do you believe that society, in an effort to accord the fullest possible reach of individual rights, however idealistic, to all citizens, must sacrifice its security, its safety, and indeed its very well-being, in order to provide every conceivable so-called right to suspects in criminal cases?[55]

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[54] Congressional Record 117:46188 (December 10, 1971).

[55] Marshall Hearings, p. 6.

In a bumbling sort of way Senator Strom Thurmond expressed a similar viewpoint in his famous question as shouted at Justice Abe Fortas:

> Does not that decision, Mallory--I want that word to ring in your ears--Mallory--the man happened to be from my home state, incidentally--shackle law enforcement? Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality. And who I was told later went to Philadelphia and committed another crime, and somewhere else another crime, because the courts turned him loose on technicalities.
>
> Is not that type of decision calculated to bring the courts and the law and the administration of justice in disrepute? Is not that type of decision calculated to encourage more people to commit rapes and serious crimes? Can you as a Justice of the Supreme Court condone such a decision? I ask you to answer that question.[56]

"Civil liberties" as thus conceived from the viewpoint of some quite "conservative" members of the Judiciary Committee constituted a grave barrier precluding any probable meeting of the minds between the nominees and the Senators pursuing this line of interrogation. However, the issue in this inverted form, although seriously injected into the Committee's deliberations, did not become the basis of the defeat of any nominee, not even the filibustered Fortas nomination for Chief Justice.

Substantive liabilities constitute the ultimate issues in a contested nomination, and they can become very difficult if not insurmountable obstacles in the way of confirmation by the Senate. The foregoing analysis of such substantive liabilities as biases in the areas of labor-management relations, minority rights, and civil liberties will make their most formidable impact only when they are demonstrated to be concrete and based on almost indisputable information and when they

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[56] Fortas Hearings II, p. 191.

are found in combination with a variety of other discrediting factors.

3. Professional Liabilities: Low Ratings.

With the universal endorsement of the American Bar Association, deans and faculties of many law schools, sitting judges, and ad hoc committees and individual lawyers, a nomination could almost count on clear sailing in the Senate, but with the legal community rising up in massive protest, or even seriously divided, a nomination has normally experienced trouble. An exception to this generalization was the nomination of Associate Justice Abe Fortas to become Chief Justice, in which instance the massive endorsements of the legal community[57] could not overcome the tightly controlled filibuster that eventually achieved the withdrawal of his name from consideration.

Diverse elements of the legal community were usually in general agreement on their evaluations of various nominees. However, exceptions to this rule also occurred, especially with reference to the Carswell and Rehnquist nominations. What seems to have been a general, massive expression of protest against the Carswell nomination arose from the legal community, although the protest was partially offset by significant numbers of endorsements by groups of lawyers and law professors from Florida and other parts of the South.[58] On the other hand Carswell failed to gain the usual unanimous endorsements of his colleagues, the sitting judges of his Circuit, forfeiting the approval of more than 25% of them.[59]

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[57] Fortas Hearings II, pp. 3-6.

[58] Senate Executive Report No. 91-14, pp. 2-7.

[59] Congressional Record 116:10166-10167 (April 2, 1970).

The American Bar Association's Standing Committee on Federal Judiciary probably has been the most influential element of the legal community participating in the selection process. Although a high rating by the ABA Committee did not guarantee clear sailing for any nominee--for instance, Fortas (1968) or Haynsworth--a low or an unenthusiastic rating proved to be almost an insurmountable obstacle, notwithstanding the fact that neither the Executive nor the Senate at this point concedes an actual veto to the American Bar Association. The ABA Committee endorsed the nomination of Judge Carswell, but in so doing it also altered its rating scale to the choice of a bare "Qualified" or "Unqualified," unanimously awarding Carswell the simple "Qualified" rating.[60] In view of the many expressions of protest against the Carswell nomination Senator James O. Eastland, Chairman of the Senate Judiciary Committee, requested a second round evaluation by the ABA Committee, and it obliged with a repeat endorsement about three weeks after the original one.[61] Whether the ABA Committee was genuinely embarrassed by its perfunctory background check and endorsement of Carswell may never be more than a matter for conjecture, but some Senators interpreted the revision of the rating scale to a bare "Qualified" or "Unqualified" as an accommodation to the President and to the nominee in order to avoid a clearly low evaluation.[62]

During the short time lapse between the Senate's rejection of

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[60] New York Times, Jan. 27, 1970, p. 1.

[61] Ibid., Feb. 21, 1970, p. 27.

[62] Congressional Record 116:10166 (April 2, 1970).

Carswell and the President's announcement of Blackmun as his third choice for the vacant post, the ABA Committee made two important procedural changes. It revised its rating scale again, this time to a three-fold choice of "Not Qualified," "Not Opposed," and "Meets high standards of professional competence, temperament and integrity." Furthermore, the committee submitted to the Senate Judiciary Committee along with its endorsement of Blackmun an elaborate description of its evaluative process.[63] The careful and exhaustive evaluative process suggests that the ABA Committee was concerned not only with the substance of the report on Blackmun but also with an attempt to recover something of its loss of credibility resulting from the Carswell experience.

The role of the ABA Committee in connection with filling the vacancies left by the departure of Justices Hugo Black and John M. Harlan indicates that the Committee indeed did regain much of its credibility in the eyes of the Senate and the public. Operating on the basis of Attorney General John Mitchell's short-lived commitment to submit names of prospective nominees for evaluation prior to announcing them publicly, the committee received first the name of Republican Representative Richard Poff of Virginia, later that of Democratic Senator Robert C. Byrd of West Virginia, and finally a list of six names which included Attorney Hershel H. Friday of Little Rock, Arkansas, and Judge Mildred L. Lillie of the California Court of Appeals. In the face of adverse public reaction and having been informed that at best he could expect to receive only the unenthusiastic "Not opposed" endorsement of the ABA Committee,

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[63] Blackmun Hearings, pp. 9-12.

Congressman Poff asked that his name be removed from consideration.[64] Although Senator Byrd had never actually practised law--he had earned his law degree from American University attending evening classes after he became a Senator--he at first received the warm endorsement of a number of Senators,[65] but these quickly cooled,[66] and the White House staff was reported to have informed the President that the ABA Committee would not award Byrd its highest rating.[67] When it became public knowledge that the ABA Committee had been asked to concentrate its attention upon Friday and Lillie as prospects (from the list of six), again numerous protests from the legal community were heard. Professor L. E. Tribe of the Harvard School of Law declared that of the six prospects on the list Judge Lillie's opinions were the "least able."[68] An ad hoc organization of young law firm associates in New York City within a 24-hour period produced a petition with 1,300 signatures from fifty-two law firms expressing "dismay" at the entire list of six.[69] Thirty-five members of the Harvard Law School faculty issued a statement that at least half of the list of six did not measure up to the minimum qualifications to serve on the Supreme Court.[70] Sometime after the President announced his choice of Lewis F. Powell, Jr., and William H. Rehnquist, the ABA

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[64] New York Times, Oct. 4, 1971, pp. 1, 30.

[65] Ibid., Oct. 11, 1971, p. 1.

[66] Ibid., Oct. 12, 1971, p. 1.

[67] Ibid., Oct. 11, 1971, p. 25.

[68] Ibid., Oct. 19, 1971, p. 23.

[69] Ibid., Oct. 20, 1971, p. 18.

[70] Ibid., Nov. 2, 1971, p. 1.

Committee chairman, Lawrence E. Walsh, confirmed to the press that both Friday and Lillie had received low ratings by the Committee.[71]

While both the President and the Senate still refuse to concede to the American Bar Association a formal veto over nominations to the Supreme Court, it may prove to be the case that the general legal community has discovered a capability of exercising such a veto. Regardless of the substantive accuracy of low ratings of prospective appointees, such ratings awarded by a cross-section of the legal community have become objective liabilities involving political risks that the President can scarcely afford to accept.

III. JUDICIAL QUALITIES: POSITIVE CRITERIA

1. Prior Judicial Experience: A Qualitative Criterion?

Would the oft-heard suggestion that appointments to the Supreme Court be made from judges of the federal bench or high level State courts provide a guarantee of highest quality of Justices? The arguments in favor of prior judicial experience usually center on the notion that the Supreme Court ought not to be a position for "on-the-job" training and that prior experience would help to equip the Justice to perform more adequately. On the other hand the irrelevance of the requirement has been expressed repeatedly by reference to judicial records of the great Justices who served without prior judicial experience and the poor ones who met the criterion.[72] Justice Felix Frankfurter's well known statement, "[C]orrelation between prior judicial experience and fitness for

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[71]Ibid., November 2, 1971, p. 1.

[72]Kurland, Politics, the Constitution, and the Warren Court, p. xxv.

the functions of the Supreme Court is zero,"[73] has become a kind of maxim in the literature dealing with the Court. Numerous evaluations of the performance of Supreme Court Justices have been made, based partly on the factor of prior judicial experience. These studies invariably agree that great Justices appeared with greater frequency among appointees without prior judicial experience. Combining the results of the judgments of Justice Frankfurter and Professor John P. Frank, Stuart Nagel calculated that 41 percent of those without prior judicial experience earned ratings of "great" or "near great" while only 12 percent of those having had prior experience fell into the same categories.[74] Apparently if the individual does not possess qualities inherent to greatness, practice will not produce greatness.

On the other hand, "on-the-job" training could conceivably permit some growth in comprehension of law and the concepts of justice as well as provide the opportunity for sharpening reasoning and literary skills within limits. Prior judicial experience can furnish a field of information from which empirical data may be extracted and upon which judgments may be made as to quality of performance. Furthermore, the record can reveal the general philosophy and assumptions that guide the individual in judicial decision-making.

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[73]Felix Frankfurter, "The Supreme Court in the Mirror of the Justices," University of Pennsylvania Law Review 105:795 (April 1957).

[74]Stuart Nagel, "Characteristics of Supreme Court Greatness," American Bar Association Journal 56:958 (October 1970); Albert P. Blaustein and Roy M. Mersky, "Rating Supreme Court Justices," American Bar Association Journal 58:1183-1189 (November 1972); John P. Frank, The Marble Palace: The Supreme Court in American Life (New York: Alfred A. Knopf, 1958), p. 47.

Four of President Nixon's nominees were selected from the U. S. Courts of Appeals. The record of Judge Haynsworth produced the issues that defeated him. The empirical calculation of Judge Carswell's reversal rate helped to defeat him. The universally high regard expressed by their fellow-judges doubtless contributed to the ready confirmation of Burger and Blackmun.

What value, then, may be assigned to prior judicial experience among the considerations of judicial selection? Its procedural value would seem to be greater than its substantive value. Prior judicial experience, although not in itself a quality of judicial excellence, provides some basis for determining the presence or absence of quality in prospective nominees. It is a pre-condition from which may be derived information that will make possible the application of objective qualitative criteria.

2. Abstract Qualities: An Inadequate Approach.

Often the proposed criteria of judicial selection are couched in terms so abstract and imprecise as to be of little practical value. Against the background of the process of choosing successors to Associate Justices Black and Harlan an editorial of the New York Times suggested that Justices ought to be people of "stature," to possess "breadth of vision," and to have a "profound understanding of man and society."[75] Three days later the same source produced an equally elusive list of characteristics, namely, "detachment," "moral sensitivity," "historical understanding," "scholarship," "humility," and "perspective."[76] Suggestions from M. G. Paulsen,

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[75] New York Times, September 24, 1971, p. 40.

[76] Ibid., Sept. 27, 1971, p. 35.

Dean of the Law School of the University of Virginia, expressed a few weeks later, included "great ability," "a sense of history," "respect for relevant legal materials," and "an understanding of the nation's needs."[77]

After President Nixon's list of six potential nominees had been reported by the press in October 1971, Republican Senator Jacob Javits of New York, a former member of the Committee on the Judiciary, declared that another Senate fight would erupt if unsuited persons should be nominated. He proceeded to outline his concept of suitable persons as those having "a love of freedom, human dignity and justice," a "high level of professional competence," "high intellectual quality," and "an appreciation of the Constitution's safeguards of personal liberties and its limitations on the power of the judiciary." He added, a little surprisingly in view of the last element of his criteria, that the qualities he suggested did not deal with ideology but with "ability, judicial temperament, discernment and understanding."[78] Professor Philip B. Kurland of the University of Chicago Law School quoted the late Chief Justice Charles Evans Hughes as designating "strength of character" and "intellectual power" as prime qualities. Professor Kurland added his own criteria as "breadth of vision" and "capacity for disinterested judgment."[79]

The weakness of such proposals is, of course, the abstract nature of most of the concepts. Certain items in the preceding lists could be

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[77]Ibid., Oct. 18, 1971, p. 37.

[78]Ibid., Oct. 21, 1971, p. 24.

[79]Kurland, Politics, the Constitution, and the Warren Court, p. xxv.

applied fairly objectively, such as the editor's concept of "scholarship," Dean Paulsen's "respect for relevant legal materials," Senator Javits' "ability" and "judicial temperament," and Chief Justice Hughes' "intellectual power," but the rest fade into ephemeral idealism that would be difficult to objectify. The positive significance of such concepts of criteria really is that they underscore the seriousness with which a variety of individuals view the selection process and the desirability of achieving some generally acceptable standard for evaluating potential Justices.

3. American Bar Association Criteria: A Minimum Formula.

The participation in the judicial selection process by the American Bar Association's Committee on Federal Judiciary, whether at the request of the Attorney General or the Senate Judiciary Committee has concentrated on a three-fold field of inquiry: the professional competence, the personal integrity, and the judicial temperament of the prospective appointee.[80] Given an adequate background investigation and an appraisal of the nominee by the ABA Committee, the reporting of seriously unfavorable results likely would cause a name to be dropped from consideration. Viewed against the background of the processing of a variety of nominations during the Johnson and Nixon administrations, the indications are that the Senate and its Judiciary Committee have been confronted with the necessity of making the basic criteria of the ABA Committee their own minimum criteria. In fact the senatorial attitude may have progressed beyond the acceptance of minimum standards to a demand for more exceptional standards.[81] Only

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[80] ABA Reports 95:207 (1970); also Carswell Hearings, p. 1.

[81] Blackmun Hearings, p. 41.

time will tell, but it appears that any nominee in the foreseeable future can expect to undergo rigorous scrutiny and evaluation.

Professional Competence. The testing of the professional competence of a lawyer is within the realm of the possible with a fair degree of certainty as to the accuracy of an appraisal. Thus far no better approach to testing competence has been advanced than that of the nearly universal and enthusiastic approval of members of the legal profession. Even though Judge Benjamin Cardozo was at the bottom of President Hoover's list of potential nominees to replace Justice Oliver Wendell Holmes, Jr., the demand of the legal profession prevailed, and when Hoover sent the name to the Senate it was immediately and unanimously approved.[82] The verdict of history has been that the verdict of the legal profession and of the Senate was justified.

The legal community has also been confronted with the necessity of taking more seriously its advisory role as a result of the 1965-1971 experiences. The casual background check given the Carswell nomination was challenged most effectively, and, even more important, the event demonstrated the fact that the ABA Committee's evaluation was not beyond question. A direct outcome of the event was the revision of the Committee's method of making the background check, the reporting of the scope and method of the check, and the improving of the rating scale in connection with the very next (Blackmun) nomination referred to it.[83]

Along with the American Bar Association, the role of which has

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[82]Henry J. Abraham, The Judicial Process (Second Edition) (New York: Oxford University Press, 1968), pp. 64-65.

[83]Blackmun Hearings, pp. 9-12.

become almost institutionalized over the past twenty-five years, other elements of the legal community have discovered a place in the evaluation process that is more than a mere addendum to the role of the American Bar Association. The many members of the Federal Bar Association that rallied to endorse the nomination of Judge Warren E. Burger for the position of Chief Justice could only have been a source of reassurance for the members of the Judiciary Committee and the Senate, not to mention the Executive, in proceeding to the confirmation of the nominee.[84] However, deans and faculties of law schools around the country discovered that their voices carried weight, whether lifted in protest, as against Carswell,[85] or in support, as in the nomination of Blackmun.[86] Even law students found a role during the processing of the Carswell nomination that bore fruit for time to come. It was when 100 students of Columbia University Law School put themselves at the disposal of the subgroup led by Senator Birch Bayh to engage in research on the background of Judge Carswell that the relatively poor record of his reversal rate was turned up as an empirically derived obstacle that stubbornly refused to be explained away.[87] Tremendously significant as a by-product of the research done on Carswell by the law students is the fact that on the occasion of the very next nomination to the Supreme Court the Legislative Reference Service of the Library

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[84] Burger Hearings, pp. 25-36.

[85] Congressional Record 116:6224, 7662-7663, 7850-7852, 10087, 10193-10199, 10194 (January 20 to April 7, 1970).

[86] Blackmun Hearings, pp. 9, 27-31.

[87] Congressional Record 116:7496 (March 16, 1970).

of Congress furnished the Department of Justice precisely the same information on Judge Blackmun.[88] For whatever such information may be worth it is now available to a single Senator, whether a member of the Judiciary Committee or not, and the chances are good that any sitting judge named to the Supreme Court in the future will also have spread on the record the complete story of his decisions.

The development of procedural aspects of the evaluative process has produced two important conclusions: (1) methods are available for bringing massive information to the attention of the Senate and to the public that will demonstrate the professional standing of the nominee as appraised by the legal community, and (2) a seriously divided legal community should be considered prima facie evidence that the professional competence of the nominee is not beyond question.

Personal Integrity. Personal integrity, viewed as a quality of character that motivates an individual to adhere to a high moral standard, and considered as a requisite quality for judicial fitness, embraces the entire range of private and public life. In its simplest form it could be a matter of simple truthfulness. For example, did Judge Carswell examine the articles of incorporation of the country club in Tallahassee or did he not examine them?[89] Did Judge Haynsworth resign from all of his business associations and directorships when he went on the federal bench or did he not resign them?[90] In its more complicated form integrity

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[88] Blackmun Hearings, pp. 76-134.

[89] Carswell Hearings, p. 68; Richard Harris, Decision, pp. 144-145.

[90] Senate Executive Report No. 91-12, pp. 40-42.

could involve the understanding of and adherence to such standards as the American Bar Association's Canons of Judicial Ethics and the statutory requirements for self-disqualification of judges, the understanding and avoidance of conflict of interest, or the sensitivity to and avoidance of the appearance of impropriety. These issues were raised frequently in the hearings of the Senate Judiciary Committee, and have been the subject matter of a large number of legislative proposals designed to provide judges with more concrete guidelines by means of which they may more properly make personal decisions that have a bearing on their judicial performance.[91]

Personal integrity is one of the characteristics that is universally demanded as a qualification for judges. Inasmuch as integrity is personal and involves internal quality of character, its visibility may be low, and accuracy of evaluation may require as its basis a performance with continuous exposure to the public over a considerable period of time. Certainty may depend upon general and widespread agreement by people who have been in position to arrive at a fair evaluation. As is the case with regard to professional competence, a widespread protest against a nomination on the ground of lack of integrity would at least imply that the integrity of the person is not beyond question.

Judicial Temperament. The concept of judicial temperament is the most abstract of the criteria included in the formula of the American Bar Association's Committee on Federal Judiciary, and consequently a greater

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[91]Cf. Senator Quentin Burdick's bill, "S. 1064 - A Bill to Broaden and Clarify the Grounds for Judicial Disqualifications," from a mimeographed collection of papers provided this researcher by the staff of Senator Burdick, 1973.

degree of the possibility (if not probability) of error is involved. In the event of the proposal to elevate a sitting judge a record is available and witnesses could be found to corroborate or to contest an announced evaluation on this point. Totally inadequate as a source of information are personal friends and colleagues sustaining close contact with the nominee and holding some vested interest in the nomination, even if the interest be nothing more than community pride. Extraordinally inadequate is such a procedure as that on the occasion upon which the ABA Committee on Federal Judiciary for all practical purposes delegated its evaluative role to a single individual, Leon Jaworsky of Houston, Texas, to report on Judge Homer Thornberry, an instance in which a friend and associate rated a friend and associate.[92] Lawyers who have practised before a sitting judge probably are as good a source of information as may be found for determining the fitness of a potential appointee on the matter of temperament. From this kind of source came damaging testimony at the Judiciary Committee's hearings on the Carswell nomination.[93] On the other hand, a lawyer who represents a judicial philosophy somewhat at variance from that of the nominee and who has occasionally been a loser before the judge would seem to be in position to provide especially credible favorable testimony to his judicial temperament. Such an occasion occurred when John Bolt Culbertson, an attorney for Americans for Democratic Action and a civil rights activist in South Carolina, testified concerning Judge Haynsworth: "I may not always agree with his decisions, but he is an honest

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[92] Congressional Record, September 13, 1968, pp. 26790-26791.

[93] Carswell Hearings, pp. 139-141, 177, 227.

man, he has perfect judicial temperament, he is both competent, industrious, and able."[94]

Judicial temperament, like some other abstract qualities, may be difficult to define, but it is not difficult to recognize. Once the quality is accepted as a criterion it becomes the task of the evaluators, whether a committee of the American Bar Association or of the United States Senate, to locate and consult with credible witnesses. The task is more precarious, but not impossible, if the candidate has never before served in a judicial capacity.

Achievement or Distinction. Beyond the expressed criteria of the American Bar Association has arisen a demand for achievement or distinction in candidates for the United States Supreme Court. Out of the experiences in judicial selection during the Johnson and Nixon administrations has been distilled the demand that minimum criteria be considered as only minimum criteria. Various Senators have expressed themselves as supporting a new standard of excellence that would include, but also exceed, the minimum criteria. A generally desirable, but vaguely defined, requirement that a nominee should meet the criterion of stature, achievement, or distinction has emerged out of a feeling that the dignity and distinction of the Supreme Court must be preserved.

This demand for achievement has not only been accepted, but procedural criteria for its measurement have been suggested. A. Mitchell McConnell, formerly Chief Legislative Assistant to Senator Marlow W. Cook of Kentucky, who also served with the Senator during the turbulent

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[94] Haynsworth Hearings, p. 224.

period of 1969-1970, has drawn together a summary procedure for evaluating achievement or distinction. He suggests that achievement could be measured by: (1) writings, but the absence of publications should not within itself be fatal; (2) reputation at the bench and bar; (3) quality of opinions if a sitting judge, (4) appellate briefs if a practising lawyer; (5) articles or books if a law professor; and (6) acknowledged expertise in certain areas of law, such as labor relations, civil rights, or criminal law.[95]

The obvious value which would accrue through the appointment to the Supreme Court of persons generally recognized as "distinguished" would be the support of its legitimacy in the political life of the United States and the increase of public confidence in the quality of justice which the Court has historically symbolized.

IV. PROBLEMS IN APPLICATION OF CRITERIA

1. The Lack of Defined Criteria.

The Senate Judiciary Committee as a unit has never adopted specific criteria of judicial qualifications. Individual Senators may have done so, but this situation leaves the Committee as a whole without a generally accepted yardstick which all of its members are bound to honor. In the process of judicial selection it seems to be a procedural norm to operate without authoritative substantive norms. The Committee members thus retain a great degree of flexibility in their choices, not being bound to vote approval of a nominee who meets the minimum requirements

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[95] A. Mitchell McConnell, "Haynesworth and Carswell: A New Senate Standard of Excellence," pp. 32-33.

of an agreed standard. While in practise the Committee gives some recognition to the criteria of the ABA Committee on Federal Judiciary, members feel quite free to inject considerations other than the bare requirements of competence, integrity, and temperament. Thus Marshall was attacked on the ground of his "liberalism,"[96] Fortas on his alleged breaching of the principle of separation of powers,[97] Haynsworth on his alleged anti-labor bias,[98] Carswell on his racist attitudes,[99] and Rehnquist on his centralist philosophy.[100] The Judiciary Committee has adopted no pre-specified criteria probably because as a unit it finds it expedient to "play it by ear," thus preserving a maximum degree of flexibility in its capacity to support or to oppose a particular nominee. This flexibility leaves room for opposition by reason of political or ideological unacceptability.

2. The Priority of Ideology.

That the ideological factor pervades the selection process has been demonstrated earlier.[101] During the period covered by this study Senators have overtly accepted the proposition that the "judicial philosophy" of a nominee not only is a legitimate concern but for some it has become the overriding concern.[102] No "conservative," not even Senator

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[96] Congressional Record 113:24654 (August 30, 1967).

[97] Fortas Hearings II, pp. 102ff.

[98] Haynsworth Hearings, p. 163.

[99] Senate Executive Report No. 91-14, pp. 28-31.

[100] Congressional Record 117:45201 (December 7, 1971).

[101] See Chapter Six, Section III, of this dissertation.

[102] Fortas Hearings II, pp. 107, 126-169.

Strom Thurmond, seriously questioned the competence, integrity, or temperament of Judge Thurgood Marshall. No "liberal," not even Senator Birch Bayh, seriously questioned the qualifications of Assistant Attorney General William H. Rehnquist on those points. However, both nominees were strenuously opposed on ideological or philosophical grounds while their opponents openly acknowledged their full qualification on the basis of the standards of competence, integrity, and temperament. Once again it is apparent that the adoption of minimum specified criteria would reduce the flexibility of individual Senators' reactions to a given nomination.

3. Subjectivity of Perceptions.

Senators, like other people, achieve their basic values and perceptual framework at a much earlier stage in life than that stage at which they are called upon to advise and consent to nominations to the Supreme Court. The prior values and perceptual framework may serve as filters in observing the qualities of prospective appointees to the Court. "Objective" criteria may be "subjectively" applied, and the judgment of different Senators will contradict each other on the basis of the same item of information. While acknowledging the value of minimum criteria--competence, integrity, or temperament--weakness on any one point, or even limited combinations of weaknesses, may be overlooked or explained away in the context of a political climate that seems to make the confirmation of a particular nominee desirable and possible. Terms such as "impropriety," "mediocrity," "progressive," or "substantial interest" may appear to one Senator to be perfectly clear in their application, while to another the terms may appear to be completely irrelevant in a given case. "Personal

integrity" doubtless is a quality espoused by everyone concerned. While a Senator might conceivably acquiesce in the nomination of a person whose competence might be rated "mediocre," one would never dare publicly to consent to the appointment of one whose integrity might be classified as "mediocre." Nevertheless, conscientious men can differ in their perceptions of the conscientiousness of other men. In the final analysis integrity is personal and subjective, and the evaluation of the characteristic by objective and outward criteria can miss the reality.

The Search for Criteria: Summary Statement.

All nominees to the United States Supreme Court are considered and confirmed or rejected on the basis of some sort of criteria. The individualism and the political and ideological pluralism that characterize the one hundred persons occupying the Senate chamber would probably make impossible the precise definition of elements of criteria for judicial selection. Consequently, there has usually been something of an ad hoc quality about the criteria that have been applied. Even when commonly recognized standards are fully met, the question of the suitability of the candidate against the background of the more ultimate goals of the participants is never far from the scene. The political realities which constitute the very atmosphere breathed by the participants may easily precipitate disequilibrium in senatorial relationships even when formal qualifications appear to have been met. The nominee is considered as an individual himself, a judgment of his appointment will be made in terms of the impact of his decisions upon senatorial values, and this judgment itself will become an additional variable upon which a vote for confirmation may depend. Hence, objective criteria will have a usefulness which at best is limited.

CHAPTER EIGHT

CONCLUSION

For more than half of the twentieth century the selection of Justices for the U. S. Supreme Court was accomplished with relatively little visibility or interest on the part of the general public. Even the United States Senate, constitutionally responsible to advise with the President on nominations and to consent to appointments, for the most part went along, leaving the responsibility mostly a matter of presidential prerogative. The Senate Judiciary Committee, responsible to the parent chamber for studying the nominations and making recommendations for disposition of them, until recent decades delegated its task to a subcommittee, the actions and recommendations of which were rarely questioned. The third quarter of the twentieth century, however, has seen the selection process become one of consuming interest to large numbers of the electorate. The casual approach to manning the Court became a dynamic process of political interaction. The task remains in the analysis of the changes that have come about in the selection process to consider at least three things: (1) an identification of the major substantive and procedural developments of the period; (2) an appraisal of the responses to influences arising from the Judiciary Committee; and (3) the assessment of the significance of these developments in their

impact upon the substance and processes of American political life.

I. DEVELOPMENT OF NORMS OF COMMITTEE ACTION

The Judiciary Committee, during the period 1965-1971, developed new attitudes and approaches to its function in the process of selection of Justices. The Committee's phase of the process, as well as that of the full Senate, was transformed from a matter of casual approval to one of dynamic, in-depth consideration of nominations, and, consequently, the advise-and-consent function achieved a greater degree of importance than in earlier decades. The change was produced, not as a result of internal agreement on Committee procedure and goals, but as the result of conflicting values and goals of internal subgroups of the Committee and from a fundamental power adjustment between the executive and legislative branches.

1. Substantive Norms: More Rigid Application.

Substantive norms of concern to the Judiciary Committee are of two categories: (1) criteria of qualification for appointment to a judicial post, and (2) standards of ethics for sitting judges. Such criteria and standards have long existed, of course, but their adequacy was challenged in the course of processing nominations to the Supreme Court in the contemporary period. Criteria of qualification had been loosely applied, and standards of judicial ethics were not of serious concern. Concern for both sets of norms was awakened in a general way by the post-1954 activism of the Supreme Court, intensified especially in the context of the controversy that raged around the off-bench activities of Associate Justice Abe Fortas in the early months of 1969, and continued long after his

resignation from the Court.

The Senate and its Committee on the Judiciary had for some twenty years accepted as its own criteria of judicial qualification the American Bar Association's minimum standards of professional competence, personal integrity, and judicial temperament. The advance made through initiative originating in the Judiciary Committee was three-fold: (1) a more rigid application of the ABA's triad of qualities, (2) a requirement that a nominee be of a stature something above the average of his peers, and (3) the discovery of independent channels and methods of appraising the nominees.

The Judiciary Committee performed at the center of various movements to upgrade standards applying to judicial selection and conduct. The Subcommittee on Improvement of Judicial Machinery (Senator Joseph D. Tydings, Chairman) engaged in extensive hearings on proposed legislation dealing with guidelines for standards of judicial conduct. It is worth noting that Tydings' effort was not a matter of partisan effort to tar the reputation and the record of Justice Fortas, inasmuch as both Tydings and Fortas were politically and ideologically quite congenial to each other. It is further worth recalling that liberal Democratic Senator Tydings invited conservative Republican Judge Clement F. Haynsworth, Jr., to testify before the Subcommittee as an expert witness concerning standards of judicial ethics,[1] and that Haynsworth apparently earned Tydings' sincerely expressed pleasure upon his nomination to the Supreme Court.[2]

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[1] Haynsworth Hearings, p. 94.

[2] Ibid., p. 58.

The Judiciary Committee (through the Tydings Subcommittee) was deeply involved in a move to define standards of judicial ethics before the Haynsworth nomination was announced. Inasmuch as Haynsworth himself was involved in the efforts to upgrade the standards it should have come as no great surprise to him that he might be faced with intensive probings of the level of his personal judicial ethics. It is a matter of considerable irony that before the Subcommittee Haynsworth had supported a rigid standard of ethics and had testified that his own conduct followed that standard, but that before the full Committee two months later at the hearings on his nomination to the Court it was revealed that his conduct did not in fact correspond to the earlier espoused standard and that he still considered the quality of his ethics to be adequate.[3]

The confrontation between the President and the Senate over the nominations of Haynsworth and Carswell are to be accounted for at least partly on the assumption that the movement within the Judiciary Committee for more rigid application of the overlapping criteria of integrity--as a prerequisite for confirmation and as a quality of conduct of a sitting judge--was not taken seriously by the President, the rejected nominees, nor by some members of the Committee and other Senators. The intentions of the reform-minded group, however, were plainly stated by Senator Birch Bayh:

> . . . I, personally, think that we . . . have . . . an obligation to set, once for all, uniform standards and criteria which will be applied specifically to each prospective judicial nominee.
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> I suggest that we consider the development of a

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[3]Ibid., p. 65.

> standard set of questions dealing with personal, business, professional, and financial matters which will be applied to all nominees to the Federal Judiciary. I think it would be an opportune time for this committee, and the Senate, to put the President, future Presidents, and all prospective nominees on notice that we in the Senate Judiciary Committee are determined to ask these questions before the fact . . . and not silently await some future date when our lack of foresight may bring embarassment to a member of the judiciary, to the judicial system of this country, and perhaps seriously further erode the confidence of the people of this country in our Government.[4]

The Judiciary Committee as such did not go on record supporting Senator Bayh's position, and it repeated its non-action by recommending not only the nomination of Haynsworth but of Carswell also. The subgroup led by Senator Bayh, however, for all practical purposes did pursue the more rigid application of the standards, and in the long run the full Senate sustained the higher standards by the rejection of both Haynsworth and Carswell.[5] The next nominee, Judge Harry A. Blackmun, was very careful to espouse those standards and to bend every effort to meet them in the eyes of the Judiciary Committee.[6] The demand for a more rigorous application of criteria was tested again in a preliminary fashion when the President floated his "list of six" as potential successors to Justices John M. Harlan and Hugo Black, but with the ABA Committee supporting the demand for rigid application of the criteria the President found it advisable to upgrade his choices for the Court by naming William H. Rehnquist

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[4]Ibid., p. 80.

[5]Victor S. Navasky, Kennedy Justice (New York: Atheneum, 1971), p. 241, arrived at essentially the same evaluation of the role of the Senate.

[6]Blackmun Hearings, p. 51.

and Lewis F. Powell, Jr.

The significant feature of the occasions of processing the most recent presidential nominations to the Supreme Court is that it was out of the Judiciary Committee that the demand for a more rigorous application of substantive criteria emerged. The demands have been effectively made, and the responses from the executive branch have been positive.

2. Procedural Norms: More Adequate Methods.

From a procedural standpoint the transformation of the Judiciary Committee's function from a casual to a dynamic process means that polite and pro forma confirmation of nominations to the Court has given way to greater thoroughness. Whereas earlier in this century a nomination was practically assured of automatic confirmation, nowadays all it is assured of is rigorous attention and consideration.

Among the procedural norms the requirement that a nominee appear before the Committee for questioning has become fixed. Although Sherman Minton successfully declined to appear before the Committee in 1949, Clement F. Haynsworth, Jr., was required to appear for two rounds of questioning in 1969. Earl Warren as a nominee for Chief Justice did not appear, but Abe Fortas did, and the latter's refusal to appear for a second round could well help to account for the failure of his confirmation. Warren E. Burger as a nominee for Chief Justice appeared without objection. It is probable that the Judiciary Committee has been able to make the appearance of the nominee an inescapable and standard practice. The value of the face-to-face meeting as developed in the period 1965-1971 is that the Committee has asserted the will and the capability of using the hearings as its primary approach to information-gathering as well as providing

an opportunity for sizing up the personality, strength of character, and the intellectual capacity of the nominee.

Procedurally the Committee (and subgroup) learned how to draw upon wider sources for compiling information. It discovered that inquiring reporters may turn up information missed by the Federal Bureau of Investigation (e.g., Judge Carswell's 1948 "white supremacy" speech). It has discovered that it can call upon volunteer agencies for research effort (e.g., the 100 Columbia University law students' accomplishment in compiling Carswell's reversal rate). It has come to grant more ready access to groups and individuals that believe they have information or viewpoints pertinent to the evaluation of the nominee. Finally, the Committee (or subgroups) have discovered a capability for stimulating widespread feedback of opinion from the general public and special publics that can provide useful information and viewpoints.

The evolution in procedural norms might be described as achieving a capability for thoroughness that was missing most of the time in earlier decades. Primary credit for this advance seems to belong to the Committee subgroups that refused to acquiesce in pro forma reporting of nominations for which background investigations had been inadequate. The most important product of the advance in procedural method is that from the Committee now comes genuinely independent evaluations of nominees. The President may nominate, the Attorney General may press for confirmation, the ABA Committee may declare a nominee qualified, but it remains for the Senate, acting primarily through its Committee on the Judiciary, to evaluate the personal stature, the achievement, and the

overall political suitability of a particular person to occupy a seat on the Supreme Court. A new and strong attitude prevails in the Committee that no more will casual confirmations occur through the Committee's default on its responsibility.

II. ADJUSTMENTS IN THE DYNAMICS OF LEGISLATIVE-EXECUTIVE INTERACTION

1. The Tradition of Executive Prerogative.

The twentieth century Presidents have characteristically enjoyed immense prestige and almost unchallenged prerogative in the selection of Justices. The appointees were chosen on the basis of personal, political, and ideological congeniality with the President, and a majority of the Senate consented, scarcely questioning the presidential prerogative. The lackadaisical manner of handling the nominations was interrupted only rarely with such exceptional performances as those dealing with the nominations of Louis D. Brandeis, Harlan F. Stone (1925), and John J. Parker. By default of other potential key participants the President enjoyed practically a free hand in manning the Court for decades.

2. The Challenge to Presidential Prerogative.

The emergence of a challenge to presidential prerogative among members of the Senate Judiciary Committee occurred mainly because of the perceptions of two major threats in the exercise of unhindered privilege of choice with respect to selection of Justices. Some perceived certain nominations as constituting a threat to the integrity of the selection process, and some perceived other nominations as threatening the integrity of the Supreme Court itself. This sense of threat precipitated a reaction

that resulted in a significant adjustment of relationships in the presidential and senatorial roles in the selection process.

The perceived threat to the selection process developed first in connection with the nominations by President Lyndon B. Johnson. It has been previously observed that had nature been permitted to take its course President Johnson might well have served his entire time in office without an opportunity to fill a vacancy on the Court. Hence, his procedure was perceived as that of contriving vacancies. There was no great objection to his persuading Associate Justice Arthur Goldberg to leave the Court or the designating of Abe Fortas as his successor. As the layman perceived their performances on the bench there was little basis for a substantive choice between the two. The fact that Fortas was an intimate companion ("crony") of the President was at the time no substantive reason for opposing the nomination.

The perceived contrivance of the second vacancy, resulting in the departure of Associate Justice Tom C. Clark and the seating of Judge Thurgood Marshall, was perceived as also a substantive threat by the conservative wing of the Judiciary Committee and other Senators. The removal of an ideologically moderate Justice and the seating of a liberal black Justice put a large segment of the Senate on guard. Therefore, when the next move, as perceived by conservative Senators, combined the features of "manipulation" (the timely departure of Chief Justice Earl Warren) and "cronyism" (the promotion of Fortas to Chief Justice and the nomination of Judge Thornberry, "a third rate Texas 'pol'"), the opposition mounted a challenge on both procedural and substantive grounds, and the challenge was carried to a successful conclusion by means of filibuster.

The first significant breach in the untrammeled exercise of the presidential prerogative had been achieved. Furthermore, it should be noted that the challenge to presidential prerogative, in this instance, received at least the implicit blessing of presidential candidate Richard M. Nixon.

With a serious movement already taking place in several areas for the upgrading of ethical standards of the Federal Judiciary--in the Judiciary Committee's Subcommittee on Improvement of Judicial Machinery, in the National Judicial Conference, in the American Bar Association, and through numbers of legislative proposals by individual Senators--the liberal wing of the Judiciary Committee was on guard when President Nixon nominated Judge Haynsworth, and even more on guard at the nomination of Judge Carswell. The latent challenge to presidential prerogative emerged in full force on the ground of the threat to the integrity of the Supreme Court, the threat being based on the substandard ethics of Haynsworth and the mediocrity and racism of Carswell. Later, in 1971, President Nixon again was perceived as threatening the quality of the Court in the floating of the "list of six" potential nominees, none of whom was deemed eminently fitted for the Court. And once again the challenge forced the President to upgrade the quality of his choices.

The effective challenge to the exercise of unrestrained presidential prerogative in the years 1965-1971 requires a number of summary observations:

(1) The challenges originated primarily among Senators most directly responsible in the process of judicial selection, that is, among members of the Judiciary Committee.

(2) The presidential prerogative was not destroyed, but an actively concerned Senate succeeded in establishing some general limits to its exercise.

(3) It is not necessary to assign to the challengers (whether "conservative" or "liberal") of presidential prerogative significantly purer motives than those of the Presidents themselves. The challenges may properly be understood as political in nature, that is, concerned with the exercise of power and authority and with the concomitant privileges of the "authoritative allocation of values."

3. A Redress of Executive-Legislative Power Relations.

The more recent experiences in the selection of Justices may also be viewed within the framework of a struggle for the preservation of the more general principles of separation of powers and checks and balances, or the restoration of the co-equality of the three branches of government. The general loss of prestige and initiative by the legislative branch, especially since 1933, has been voluminously analyzed, and the gain in executive initiative (even in the legislative process) has been abundantly recognized. With Senators perceiving presidential appointments as threatening the integrity (and independence?) of the judiciary, they were spurred to combat on this issue the further slippage of governmental power toward the executive branch. Occasioned by presidential appointments to the Supreme Court, such fighting back will most likely occur if the Senators perceive the President's actions as endeavoring to convert the Court into his tool for control of public policy. (Within limits even the challenging groups still acknowledge presidential prerogative on nominating persons with philosophies generally congenial

to his own.)

Occasions perceived as bald attempts to convert the Supreme Court into a "presidential preserve" have met strongest resistance. The classic instance of such action so perceived was President Franklin D. Roosevelt's famed "Court-packing" plan proposed to the Congress in 1937. The plan found little support in the Congress or with the general public despite Roosevelt's landslide victory at the polls the previous November. Much more subtle, yet perceived by Senators as genuinely manipulative, was President Johnson's action in "contriving" vacancies on the Court and his "strategy" to perpetuate the trends of the decisions of the Warren Court into the future. With the charge of "cronyism" further stimulated by the nomination of Judge Homer Thornberry, the entire procedure provoked a small rebellion which was carried to the point of filibuster. The actions taken by President Nixon were against the unique background of the overtly and publicly declared intention to change the balance of the Court. In a sense he was perceived as declaring that the Court not only would be changed and the "imbalance" of judicial philosophy redressed but that it would be done within the context of a contest for bald political power. Many Senators were prepared to accept and answer such a challenge.

The resistance to presidential nominations to the Supreme Court during the period 1965-1971 may be interpreted, then, as a part of a wider struggle to redress the relative imbalance of governing power as it had developed between the legislative and executive branches. The specific nominations seriously challenged and the circumstances under which they were made stimulated a vigorous counter-action which originated primarily

with subgroups within the Senate Judiciary Committee.

4. The Judiciary Committee as the Key to Change.

With the Senate for decades apparently having somewhat lost sight of the stakes involved in the appointment of Justices of the Supreme Court, Senators became reasonably comfortable with the President's choices and his exercise of leadership in judicial selection. Long practice establishes strong precedent. Therefore, to shake the Senate out of its lethargy required disturbing issues and an innovative leadership. The 1965-1971 period saw the issues arise in response to attitudes toward the Supreme Court itself, and the innovative leadership arose among the younger and more liberal members of the Senate Judiciary Committee.

The first phase of resistance to presidential prerogative occurred under the leadership of the older and more conservative Senators as they attempted to slow the movement toward liberalization of public policy in social areas. The group efforts were directed toward blocking the nomination of Thurgood Marshall primarily on ideological grounds. The same group opposed the elevation of Fortas to Chief Justice for essentially the same reasons. Failing in the first effort and succeeding in the second (by resorting to filibuster), the conservative group broke the encrusted precedent of quiet acquiescence and started the movement which resulted in the restoration of the Senate to a more vital role in the selection process.

The younger and more liberal subgroup took its cue from the older conservative leadership and succeeded in prodding the Senate further to assume its full responsibility in evaluating nominations to the Court. As has already been observed, the liberal subgroup made its drive on the

ground of the need to upgrade criteria of judicial qualification. The senatorial disinterest was thoroughly demolished in the contesting of the Nixon nominations.

Did the Senate in reassuming a greater degree of responsibility for the quality of nominations to the Court essentially take its cue from the Committee on the Judiciary? This question must be answered in the affirmative. The Senate had traditionally accepted the recommendations of its Committee, and essentially it continued to do so. Of course the filibuster of the Fortas nomination must be viewed as an exception, in which case a majority of the Senate was prevented from following the lead of a majority of the Committee. Although the Senate rejected two nominations which had received favorable recommendations by majority votes in the Committee, eventually a majority of the Committee reversed their earlier stands, and a majority of the Senate followed suit. Senator James O. Eastland's assessment that the Senate at least depended upon the Committee as an information-gathering unit was a rather modest appraisal of the influences emerging out of the Committee, because the Senate at large also responded to the dynamics of leadership that asserted itself through subgroups of the Committee. In so following the leadership of the Committee the Senate experienced a renaissance of genuinely responsible action in the performance of its advise-and-consent duty with respect to the selection of Justices for the Supreme Court of the United States.

APPENDIX I

COMMITTEE ACTIONS: GROUPINGS IN NON-UNANIMOUS VOTING ON NOMINATIONS

1967 Marshall	1968 Fortas	1969 Haynsworth	1970 Carswell	1971 Rehnquist
For Confirmation	For Confirmation	For Confirmation	For Confirmation	For Confirmation
Democrats	Democrats	Democrats	Democrats	Democrats
Bayh	Bayh	Byrd	Burdick	Burdick
Burdick	Burdick	Dodd	Byrd	Byrd
Dodd	Dodd	Eastland	Dodd	Eastland
Hart	Hart	Ervin	Eastland	Ervin
Kennedy	Kennedy	McClellan	Ervin	McClellan
Long (Mo.)	Smathers		McClellan	
Tydings	Tydings			
Republicans	Republicans	Republicans	Republicans	Republicans
Dirksen	Dirksen	Cook	Cook	Cook
Fong	Hruska	Fong	Fong	Fong
Hruska	Scott	Hruska	Griffin	Gurney
Scott		Scott	Hruska	Hruska
		Thurmond	Mathias	Mathias
			Scott	Scott
Against Confirmation	Against Confirmation	Against Confirmation	Thurmond	Thurmond
			Against Confirmation	Against Confirmation
Democrats	Democrats	Democrats		
Eastland	Eastland	Bayh	Democrats	Democrats
Ervin	Ervin	Burdick		
McClellan	McClellan	Hart	Bayh	Bayh
Smathers		Kennedy	Hart	Hart
		Tydings	Kennedy	Kennedy
Republicans	Republicans		Tydings	Tunney
		Republicans		
Thurmond	Baker		Republicans	Republicans
	Fong	Griffin		
	Thurmond	Mathias	None	None

Source: Congressional Quarterly Almanac for the years involved.

APPENDIX II

SENATE JUDICIARY COMMITTEE VOTING PATTERNS BY POLITICAL PARTY: SUPREME COURT NOMINATIONS

Senators Voting to Approve All Nominees	Democrats Voting to Approve All Democrats	Democrats Voting to Approve All Republicans	Democrats Voting to Disapprove All Non-unanimous Republicans	Democrats Voting to Disapprove All Non-unanimous Democrats
Democrats	Bayh (3)	Byrd (6)	Bayh (3)	Eastland (2)
Byrd (6)	Burdick (3)	Eastland (6)	Hart (3)	Ervin (2)
Dodd (7)	Dodd (3)	Ervin (6)	Kennedy (3)	McClellan (2)
Long (Mo.) (1)	Hart (3)	Dodd (4)	Tunney (1)	
	Kennedy (3)	McClellan (6)	Tydings (2)	
Republicans	Long (1)			Republicans Voting to Disapprove All Non-unanimous Democrats
	Smathers (3)			
Cook (6)	Tydings (3)			
Dirksen (3)				
Gurney (2)				Thurmond (2)
Hruska (9)				
Scott (9)				

Republicans Voting to Approve All Republicans	Republicans Voting to Approve All Democrats	Senators Voting as Conservative Coalition	Senators Voting as Liberal Coalition
		Democrats	**Democrats**
Cook (5)	Dirksen (3)	Byrd (3/3)	Bayh (5/5)
Fong (6)	Hruska (3)	Eastland (5/5)	Burdick (4/5)
Griffin (2)	Scott (3)	Ervin (5/5)	Hart (5/5)
Gurney (2)		McClellan (5/5)	Kennedy (5/5)
Hruska (6)		Smathers (1/1)	Long (1/1)
Mathias (4)			Tunney (1/1)
Scott (6)		**Republicans**	Tydings (4/4)
Thurmond (6)			
		Baker (1/1)	**Republicans**
Republicans Voting to Disapprove One Republican	Republicans Voting to Disapprove One Democrat	Cook (3/3)	
		Fong (4/5)	Griffin (1/2)
		Griffin (1/2)	Mathias (1/2)
		Gurney (1/1)	
		Hruska (3/5)	
		Mathias (1/2)	
Griffin	Baker	Scott (3/5)	
Mathias	Fong	Thurmond (5/5)	

Source: Congressional Quarterly Almanac for the years involved. All numbers adjacent to names indicate number of occasions.

APPENDIX III

JUSTICES OF THE SUPREME COURT APPOINTED FROM THE OPPOSITION PARTY: TWENTIETH CENTURY

Year	Nominee	President Making Appointment	Majority Party in the Senate
1910	Lurton (Dem.)	Taft (Repub.)	Republican
1910	White (Dem.)	Taft (Repub.)	Republican
1911	Lamar (Dem.)	Taft (Repub.)	Republican
1922	Butler (Dem.)	Harding (Repub.)	Republican
1930	Cardozo (Dem.)	Hoover (Repub.)	Republican
1941	Stone (Repub.)	Roosevelt (Dem.)	Democrat
1945	Burton (Repub.)	Truman (Dem.)	Democrat
1956	Brennan (Dem.)	Eisenhower (Repub.)	Democrat

Source: Leon Friedman and F. L. Israel, The Justices of the United States Supreme Court, 1789-1969 (New York: Chelsea House in Association with Bowker, 1969), Chart I, pp. 3208-3212.

APPENDIX IV

COMPOSITE IDEOLOGICAL RATINGS OF ALL SENATORS PARTICIPATING IN ROLL CALL VOTES ON FOUR KEY NOMINATIONS TO THE U. S. SUPREME COURT

Aiken 48
Allen 87
Allott 86
Anderson 31
Baker 72
Bartlett 29
Bayh 12
Beall 62
Bellmon 62
Bennett 81
Bentsen 73
Bible 68
Boggs 68
Brewster 07
Brock 79
Brooke 15
Buckley 79
Burdick 24
Byrd (Va.) 85
Byrd (W.Va.) 59
Cannon 53
Carlson 63
Case 14
Chiles 52
Church 32
Clark 04
Cook 58
Cooper 45
Cotton 84
Cranston 07
Curtis 91
Dirksen 59
Dodd 21
Dole 80
Dominick 80
Eagleton 09
Eastland 77
Ellender 73
Ervin 82
Fannin 89
Fong 51
Fulbright 31
Gambrell 80
Goldwater 67
Goodell 10
Gore 20
Gravel 07
Griffin 57
*Gruening --
Gurney 86
Hansen 87
Harris 08
Hart 04
Hartke 19
Hatfield 31
Hayden 39
*Hickenlooper --
Hill 69
Holland 87
Hollings 58
Hruska 90
Hughes 07
Humphrey 11
Inouye 08
Jackson 20
Javits 14
Jordan (N.C.) 72
Jordan (Ida.) 79
Kennedy (Mass.) 05
Kennedy (N.Y.) 02
Kuchel 36
Lausche 68
Long (Mo.) 18
Long (La.) 69
Magnuson 21
Mansfield 23
Mathias 21
McCarthy 10
McClellan 83
McGee 24
McGovern 10
McIntyre 31
Metcalf 10
Miller 78
Mondale 03
Monroney 52
Montoya 22
Morse 14
Morton 46
Moss 10
Mundt 72
Murphy 67
Muskie 06
Nelson 06
Packwood 45
Pastore 21
Pearson 66
Pell 10
Percy 32
Prouty 51
Proxmire 22
Randolph 35
Ribicoff 13
Roth 80
Russell 46
Saxbe 38
Schweiker 33
Scott 50
*Smathers --
Smith (Me.) 71
Smith (Ill.) 46
Sparkman 61
Spong 62
Stafford 35
Stennis 85
Stevens 37
Stevenson 14
Symington 22
Taft 51
Talmadge 83
Thurmond 89
Tower 77
Tunney 06
Tydings 10
Weicker 48
Williams (N.J.) 07
Williams (Del.) 77
Yarborough 16
Young (N.D.) 81
Young (Ohio) 13

*Cast no votes on the key nominees although a member of the Senate at the time of at least one roll call vote.

Sources: Michael Barone, Grant Ujifusa, and Douglas Matthews, The Almanac of American Politics: The Senators, The Representatives--Their Records, States and Districts, 1972 (Boston: Gambit, Inc., 1972); and "Voting Studies," The Congressional Quarterly Almanac, Vol. XXII, 1966, p. 1022, Vol. XXIII, 1967, p. 111, Vol. XXV, 1969, p. 1057, Vol. XXVI, 1970, p. 1147, and Vol. XXVII, 1971, p. 90.

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