

REMARKS BY PJ MODE*

There were two important events in January 1970. First, I joined Senator Birch Bayh's staff as his senior lawyer and chief counsel of the Subcommittee on Constitutional Amendments. Second, on January 19, President Richard Nixon, continuing to pursue his "Southern strategy" for reelection, nominated G. Harrold Carswell of Florida for a seat on the U.S. Supreme Court.¹ Carswell had been a district judge for eleven years and had been elevated to the Fifth Circuit by Nixon only a few months before, over strong opposition from the Leadership Conference on Civil and Human Rights on account of his racist record.² Early in his career, Carswell had happily announced himself a white supremacist for life, and his judicial record in civil rights cases was one of interminable delay, followed by unconscionable rulings, all the while abusing lawyers who were Black or represented civil rights interests.³ The civil rights community and organized labor were implacably opposed.⁴

The problem was that no one thought there was any chance of defeating him. The Senate had just months before rejected another Southern judge, Clement Haynsworth of South Carolina, in a bruising fight led by Birch Bayh, and everyone was certain that the next Nixon appointee would sail through the Senate.⁵ No one could see anywhere near fifty votes.

Through Birch's legislative skill, we managed to create some delay one bite at a time: five weeks from committee hearings to floor debate, a one-

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1. See Robert B. Semple Jr., *Southerner Named to Supreme Court; Carswell, 50, Viewed as Conservative*, N.Y. TIMES (Jan. 20, 1970), <https://www.nytimes.com/1970/01/20/archives/southerner-named-to-supreme-court-carswell-50-viewed-as.html> [<https://perma.cc/UB2B-WHUX>].

2. See *id.*

3. See Anthony Lewis, *The Significance of Judge Carswell*, N.Y. TIMES (Mar. 7, 1970), <https://www.nytimes.com/1970/03/07/archives/the-significance-of-judge-carswell.html> [<https://perma.cc/5ZFN-X3L5>].

4. See *id.*; see also Paul Delaney, *Lobby in Senate Fights Carswell*, N.Y. TIMES (Mar. 10, 1970), <https://www.nytimes.com/1970/03/10/archives/lobby-in-senate-fights-carswell-civil-rights-coalition-finds-votes.html> [<https://perma.cc/6GSM-RYNV>].

5. See Semple, *supra* note 1.

week debate, and two and a half weeks to final vote.⁶ That provided some chance to build support.

And when lawyers began to look at Carswell's judicial record, we were able to open an entirely new front. It turned out that, even putting aside the racism, he was patently unqualified. He was lazy and unprofessional. His writing was mechanical and incomprehensible. His output of written opinions averaged sixteen pages a year, and those he did write were reversed at an alarming rate.⁷ A group of Columbia Law students did an astounding statistical study of 15,000 decisions by every district court judge in the Fifth Circuit over an eleven-year period—without LexisNexis and computers—and found his reversal rate was 59 percent, three times the average rate.⁸ He ranked sixty-first of the sixty-seven judges on the circuit—and he was getting worse as time went on!⁹

In the meantime, we had been working with a group of the nation's most distinguished, establishment, white-shoe lawyers. At a press conference we set up on March 11, they released a statement signed by 457 law school deans, professors, and establishment lawyers from around the country opposing Carswell.¹⁰ The statement concluded that aside from Carswell's record of "white supremacy and ugly racism, he does not have the legal or mental qualifications essential for service on the Supreme Court or any high court in the land, including the one where he now sits."¹¹ The story ran on page one of the *New York Times* and everywhere else.¹² We were immediately flooded with support from others around the country. Thereafter, anytime we needed to, we could generate support from the Salt Lake City Bar Association, to regional editorial boards in Hawaii, to the dean and faculty of the University of Arkansas School of Law.

The opening day of debate, five days later, brought us unexpected good luck. Frustrated by questions of Carswell's competence, Senator Roman Hruska of Nebraska came off the Senate floor for a radio interview, in which he said, "Even if he were mediocre, there are a lot of mediocre judges and

6. See 116 CONG. REC. 39,905 (1970); see also John Paul Hill, *Nixon's Southern Strategy Rebuffed: Senator Marlow W. Cook and the Defeat of Judge G. Harrold Carswell for the U.S. Supreme Court*, 112 REG. KY. HIST. SOC'Y 613, 620–31 (2014) (delineating Carswell's confirmation process in the Senate Committee on the Judiciary).

7. See 116 CONG. REC. 7493–94 (discussing Judge Carswell's judicial record); see also Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 276 (1998).

8. See 116 CONG. REC. 7494, 7504, 9607–10.

9. See *id.* at 9607; see also Fred P. Graham, *Carswell's Credo Is Restraint*, N.Y. TIMES (Jan. 21, 1970), <https://www.nytimes.com/1970/01/21/archives/carswells-credo-is-restraint.html> [<https://perma.cc/KVY8-MRAK>].

10. See 116 CONG. REC. 7854; see also Fred P. Graham, *Carswell Review Urged on Senate*, N.Y. TIMES (Mar. 13, 1970), <https://www.nytimes.com/1970/03/13/archives/carswell-review-urged-on-senate-457-in-law-field-ask-new-hearings-a.html> [<https://perma.cc/RZ7B-2U32>].

11. 116 CONG. REC. 4962.

12. See, e.g., Graham, *supra* note 10.

people and lawyers, and they are entitled to a little representation, aren't they?"¹³ Because there was audio, the statement had a massive impact.

The final vote on April 8 was 51 to 45.¹⁴ The four absentees were evenly split.¹⁵ In the end, Nixon did not nominate another Southern racist to fill this seat. Instead, he chose a virtually unknown judge from Minnesota, a dependable conservative named Harry Blackmun.¹⁶

The most essential element in this victory was Birch Bayh's political and legislative experience and skill: in gaining delay, in exploiting errors on the other side, in motivating and huddling with the team of establishment lawyers and deans, in sensing how and where to focus the vast network of supporters we'd built.

But most of all, Birch showed moral leadership by stepping up when no one wanted to. Phillip Hart of Michigan and Joseph Tydings of Maryland were up for reelection.¹⁷ Ted Kennedy was maintaining a low profile as he sought to recover from the Chappaquiddick incident the previous July.¹⁸ Birch had just led the bruising Haynsworth fight, and he was rightly fearful of damaging bipartisan relationships essential to his most important objective, the passage of electoral reform.¹⁹ At a time before the "mediocrity" issue had come into focus, at a time when it seemed to all of us that this was a losing fight—and knowing that he would pay a price for the decision—he nevertheless stepped up because he could not stand aside and see a white supremacist take a seat on the Supreme Court.

13. 116 CONG. REC. 10,950.

14. *Id.* at 10,769.

15. *See id.*

16. *See* Warren Weaver Jr., *Blackmun Approved, 94-0; Nixon Hails Vote by Senate*, N.Y. TIMES (May 13, 1970), <https://www.nytimes.com/1970/05/13/archives/blackmun-approved-940-nixon-hails-vote-by-senate-supreme-court.html> [<https://perma.cc/75MU-7CKV>].

17. *See* Eileen Shanahan, *Tydings Loses to Beall in Maryland Senate Race*, N.Y. TIMES (Nov. 4, 1970), <https://www.nytimes.com/1970/11/04/archives/tydings-loses-to-beall-in-maryland-senate-race-mandel-wins.html> [<https://perma.cc/QME6-BLWX>]; *see also* Richard L. Madden, *Tighter for Civil Rights*, N.Y. TIMES (Dec. 27, 1976), <https://www.nytimes.com/1976/12/27/archives/fighter-for-civil-rights.html> [<https://perma.cc/9BM7-XWHN>].

18. *See* Lorraine Boissoneault, *Why the True Story of 'Chappaquiddick' Is Impossible to Tell*, SMITHSONIAN MAG. (Apr. 2, 2018), <https://www.smithsonianmag.com/history/why-true-story-chappaquiddick-impossible-tell-180968638/> [<https://perma.cc/F6KK-F74R>] (discussing the July 18, 1969, incident, in which Senator Edward Kennedy was involved in a car crash on Chappaquiddick Island, Massachusetts).

19. *See* Warren Weaver Jr., *Senate Unit Asks Popular Election of the President*, N.Y. TIMES (Apr. 24, 1970), <https://www.nytimes.com/1970/04/24/archives/senate-unit-asks-popular-election-of-the-president-amendment-to.html> [<https://perma.cc/477H-X2Z9>].