



EDWARD M. KENNEDY ORAL HISTORY PROJECT

Interviewer's Briefing Materials **Edward M. Kennedy Interview, 1/6/2007**

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Miller Center Documents¹

- Edward M. Kennedy Judicial Nominations Timeline 1962-1986.
- Checklist for Interview Series on Judicial Nominations.

Secondary Source Materials

- "Labor to Oppose Senate Confirmation of Judge Haynsworth," *The New York Times*, 08/21/1969.
- John P. MacKenzie, "Kennedy Disputes Testimony RFK 'Cleared' Haynsworth," *The Washington Post*, 09/18/1969.
- Adam Clymer, *Edward Kennedy: A Biography* (New York: William Morrow and Company, 1999) pp. 160-163.
- Richard Harris, *Decision* (New York: E.P. Dutton & Co., 1971) pp. 36-40, 58-63.
- "Individual Views of Messrs. Bayh, Hart, Kennedy and Tydings," Nomination of George Harrold Carswell, Report to the Judiciary Committee, 02/27/1970, John F. Kennedy Presidential Library.
- EMK Senate staff, "Brief Q&A on Carswell," John F. Kennedy Presidential Library.
- "Floor Statement of Senator Edward M. Kennedy on the Nomination of George Harrold Carswell to the Supreme Court," 03/18/1970, John F. Kennedy Presidential Library.
- Spencer Rich, "Kennedy Swaps Sharp Blasts Over Rehnquist," *The Washington Post*, 11/06/1971.
- Thomas P. Ronan, "Senator Kennedy Hints Opposition to Rehnquist," *The New York Times*, 11/17/1971.
- "Foes of Rehnquist Appeal to Senate," *The New York Times*, 12/01/1971.
- "Rehnquist Confirmed by Senate 68-26," *The New York Times*, 12/11/1971.
- Mark Sherman and Pete Yost, "FBI Ran Checks on Critics of Rehnquist Nomination," *The Boston Globe*, 01/04/2007.
- Robert A. Katzmann, *Courts and Congress* (Washington, D.C.: Brookings Institution Press, 1997) pp. 18-45.

¹ These are original documents created by Miller Center researchers for the Edward M. Kennedy Oral History Project. Please acknowledge credit for any use of these materials.

- Carolyn Osolinik and Walter Sheridan Memo to EMK on the Rehnquist Nomination, 07/11/1986, John F. Kennedy Presidential Library.
- Walter Sheridan Memo to Carolyn Osolinik on Rehnquist and Watergate, 08/26/1986, John F. Kennedy Presidential Library.
- Unknown author, “Rehnquist the Plumber?” 1986, John F. Kennedy Presidential Library.

Oral History Interviews

- Charles Mathias interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 03/10/2006.
- Edward Brooke interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 08/16/2006.
- Robert Byrd interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 06/05/2006.
- Alan Simpson interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 05/10/2006.
- John Danforth interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 10/25/2005.
- Melody Barnes interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 08/06/2006.

Documents Provided by Senator Kennedy

- “Haynsworth Overview.”
- “Carswell Overview.”
- “Rehnquist I Overview.”
- “Rehnquist II Overview.”
- Selected briefing materials.

JUDICIAL NOMINATIONS TIMELINE: 1962-1986

Prepared by Anne Mariel Peters and Rob Martin

Miller Center of Public Affairs, University of Virginia, 01/05/2007

1962

November Edward Moore Kennedy (EMK) is elected to the U.S. Senate in a special election to take the seat his brother, John F. Kennedy (JFK), had vacated after winning the 1960 presidential election. EMK is assigned to the Judiciary Committee and reportedly develops a good working relationship with the committee's chairman, Senator James O. Eastland (D-MS). (Adam Clymer, *Edward M. Kennedy: A Biography*, New York: William Morrow and Company, 1999, pp. 46-47; Theo Lippman, *Senator Ted Kennedy: The Career Behind the Image*, USA: W.W. Norton and Company, 1975, p. 4)

1965

January Robert Francis Kennedy (RFK) is sworn into the Senate on the 4th.

June On the 28th, Abe Fortas is nominated by President Lyndon B. Johnson (LBJ) to replace Arthur Goldberg as Associate Justice on the Supreme Court. Fortas is a close friend and adviser of LBJ. (*1965 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1965, p. 74; "Supreme Court Nominations," www.senate.gov)

August On the 5th, Fortas participates in a three-hour Senate session during which he successfully defends himself against allegations of his involvement in Communist activity, the Owen Lattimore case, and the Walter Jenkins affair. (*The Washington Post*, 8/6/1965)

On the 10th, the Judiciary Committee unanimously approves the Fortas nomination. (Denis Steven Rutkus and Maureen Bearden, "CRS Report for Congress: Supreme Court Nominations, 1789-2005: Actions by the Senate, the Judiciary Committee, and the President," Congressional Research Service, The Library of Congress, 01/05/2006; *The New York Times*, 8/11/1965)

On the 11th, Fortas is confirmed by voice vote after Senators Carl T. Curtis (R-NE), Strom Thurmond (R-SC), and John J. Williams (R-DE) speak against the nomination. (*1965 Congressional Quarterly Almanac*, p. 1430)

September On the 2nd, EMK signals to LBJ via Attorney General Nicholas Katzenbach that he would like LBJ to nominate Boston municipal judge and friend of Joseph P. Kennedy (JPK) Francis X. Morrissey for a federal judgeship. LBJ reportedly tells Katzenbach that the nomination would be a favor to JPK, and LBJ aide Marvin Watson warns LBJ to frame the nomination in terms of "Senator Kennedy's interest and belief that this man was qualified." (Clymer, p. 74)

On the 24th, EMK meets with LBJ at the White House. They call JPK to inform him that Morrissey will be nominated.

On the 26th, LBJ announces Morrissey's nomination as a federal district judge in Massachusetts. The Morrissey nomination is received poorly; Morrissey's qualifications are assailed by *The Boston Globe*, members of the American Bar Association (ABA), and the senior judge on the court to which Morrissey has been nominated. During a tough closed door meeting with Senate Minority Leader Everett Dirksen (R-IL), Morrissey admits that his law practice has been "inconsequential" and that it was "very stupid" of him to attend Southern Law School. (Clymer, pp. 74-75)

October

On the 12th, Rep. John McCormack (D-MA) and EMK lead eight witnesses in their praise of Morrissey. Dirksen and an ABA representative claim that Morrissey is not qualified for the position in terms of legal training and experience. (1965 *Congressional Quarterly Almanac*, p. 1432)

On the 15th, Morrissey is recommended 6-3 by the Judiciary Committee. EMK votes in favor. (*The New York Times*, 9/30/1965)

After *The Boston Globe* publishes a series of stories that contradict Morrissey's Senate testimony, senators that were less concerned with Morrissey's qualifications become angered by his apparent lies. Senator Joseph Tydings (D-MD) presses EMK and RFK to withdraw the nomination. RFK and EMK meet with Dirksen, who is threatening to use reports that EMK and Morrissey had met with a deported Mafia don on Capri in 1961, and RFK tells him, "You hate the Kennedys." (Clymer, pp. 75-76; Burton Hersh, *The Education of Edward Kennedy*, New York: William Morrow and Company, Inc., 1972, pp. 247-248)

On the 20th, EMK privately tells LBJ that he intends to back down on the Morrissey nomination. According to LBJ domestic policy advisor Joseph Califano, LBJ did not actively lobby for the Morrissey nomination until he was sure it would be defeated. (Clymer, p. 76)

On the 21st, EMK agrees to send the Morrissey nomination back to the Judiciary Committee. After EMK leaves that night for Vietnam, RFK has Morrissey write LBJ and ask that the nomination be withdrawn. (Clymer, p. 77; *The New York Times*, 10/22/1965)

1967

June

On the 13th, U.S. Solicitor General Thurgood Marshall is nominated by LBJ to succeed Associate Justice Tom C. Clark, who is retiring from the Supreme Court. Marshall was previously appointed by JFK as a justice for the Second Circuit of the U.S. Court of Appeals. Marshall also served as counsel to the National

Association for the Advancement of Colored People (NAACP) for twenty-five years, arguing thirty-two cases in front of the U.S. Supreme Court. RFK lauds the nomination and introduces Marshall with Senator Jacob Javits (R-NY). (1967 *Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1967, p. 1150; *The New York Times*, 6/14/1967, 7/13/1967; U.S. Senate Homepage)

July During a confirmation hearing on the 13th, Marshall is questioned by Senator John McClellan (D-AR) about his views on wiretapping, confessions, and the right to counsel at police line-ups. Marshall refuses to give his views, claiming that to do so would prejudice appeals cases already on the Supreme Court docket. Joined by Senators Birch Bayh (D-IN), Philip Hart (D-MI), Hiram Fong (R-HI), and Roman Hruska (R-NE), EMK says that he will vote favorably on the Marshall nomination. (*The New York Times*, 7/13/1967)

August On the 3rd, the Judiciary Committee votes 11-5 in favor of the Marshall nomination. EMK votes in favor. (1967 *Congressional Quarterly Almanac*, p. 1165; *The New York Times*, 8/4/1967)

On the 30th, Marshall is confirmed by the Senate 69-11. EMK and RFK vote in favor of the nomination. Marshall, as the first African-American to serve on the Supreme Court, joins an unprecedented number of African Americans appointed by LBJ this year to executive departments, agencies, federal courts, the diplomatic service, and the government of the District of Columbia. (1967 *Congressional Quarterly Almanac*, pp. 804, 41-S; *The New York Times*, 8/30/1967)

1968

June On the 5th, RFK is assassinated in Los Angeles.

On the 13th, Chief Justice Earl Warren informs LBJ of his intention to retire from the Court contingent on the confirmation of his successor. (1968 *Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1968, p. 531)

On the 26th, the Senate receives LBJ's nomination of Fortas for Chief Justice and of Federal Circuit Judge Homer Thornberry for Associate Justice. If both are confirmed, Thornberry will take Fortas's seat. (Congressional Research Service, p. CRS-21)

July Beginning on the 11th, confirmation hearings are held for Fortas and Thornberry. Senator Robert P. Griffin (R-MI) protests what he perceives to be political manipulation to ensure that the "lame duck" LBJ can appoint two new justices, denying the next president the opportunity. It is widely suspected that Griffin will attempt to mount a filibuster. (Congressional Research Service, p. CRS-21; *The New York Times*, 7/13/1968)

On the 12th, Dirksen sides with LBJ's nominations, and chides Griffin for attempting to block the Fortas and Thornberry nominations solely on the basis that the two men are close acquaintances of LBJ. (*The New York Times*, 7/13/1968)

September On the 10th, EMK returns to the Senate for the first time since RFK's assassination. He spends most of the day at a closed-door confirmation session for Fortas, whom he supports. (*The New York Times*, 9/11/1968)

On the 13th and 16th, further confirmation hearings are held for Fortas and Thornberry. During the course of the confirmation hearings, Griffin has rallied a coalition of Republicans and Southern Democrats against the nomination. He makes allegations of cronyism, claiming that there is legally no vacancy on the Court and that Warren's contingent retirement is meant to force two Democratic Court appointments to the Court. (*1968 Congressional Quarterly Almanac*, pp. 94, 531; Congressional Research Service, p. CRS-21)

On the 17th, the Senate Judiciary Committee approves the Fortas nomination 11-6, setting the stage for a filibuster in the full Senate debate the following week. EMK votes to approve, as does Dirksen. (Congressional Research Service, p. CRS-21; *The New York Times*, 9/18/1968)

From the 25th to the 30th, Senate debate occurs on the Fortas nomination after a surprise motion by Senate Majority Leader Mike Mansfield (D-MT). Griffin's filibuster begins on the 25th. (*1968 Congressional Quarterly Almanac*, pp. 531, 536; Congressional Research Service, p. CRS-21)

On the 27th, after many of his Republican colleagues have sided with Griffin, Dirksen abandons his support of the Fortas nomination, claiming himself "neutral." (*1968 Congressional Quarterly Almanac*, p. 531)

On the 29th, Mansfield's motion to invoke cloture is read and signed by twenty-six senators. (*1968 Congressional Quarterly Almanac*, p. 531)

October On the 1st, Mansfield's motion to invoke cloture is voted down 45-43; EMK votes in favor. (*1968 Congressional Quarterly Almanac*, pp. 94, 531; Congressional Research Service, p. CRS-21)

At the request of Fortas, LBJ withdraws the nomination on the 2nd. Withdrawal messages for both Fortas and Thornberry are received in the Senate on the 4th. (Congressional Research Service, p. CRS-21; *1968 Congressional Quarterly Almanac*, p. 531)

1969

January EMK defeats Senator Russell Long (D-LA) for the post of Senate Majority Whip.

May On the 5th, some Republicans call for the resignation of Fortas following the disclosure that he had received (and later returned) a \$20,000 fee from the family foundation of convicted securities manipulator Louis Wolfson. There are no statements of support for Fortas from the senators who sought his confirmation. EMK suggests that Fortas might consider explaining the situation to the Judiciary Committee. (*The New York Times*, 5/6/1969)

On the 15th, Fortas resigns. (*The New York Times*, 5/16/1969)

On the 23rd, Federal Circuit Judge Warren Burger is nominated by President Richard Nixon to replace Warren.

June On the 3rd, the Judiciary Committee votes unanimously in favor of the Burger nomination. (*1969 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1969, p. 126)

On the 9th, the Senate approves the Burger nomination 74-3; EMK votes in favor. (Rutkus and Bearden, Congressional Research Service, 01/05/2006)

July The accident at Chappaquiddick occurs on the 18th.

August On the 18th, Federal Circuit Judge Clement F. Haynsworth is nominated by Nixon to fill Fortas' empty seat as Associate Justice. Haynsworth is the federal judge who had voted for EMK in his law school moot court final years earlier. At the time of the nomination, Nixon addresses allegations that during the Kennedy administration, Haynsworth voted to overturn the guilty conviction of a company to which he had financial ties. Nixon claims that then-Attorney General RFK had concluded that the charges against Haynsworth were without basis. Haynsworth's nomination is immediately opposed by the NAACP, the American Jewish Congress, and the Americans for Democratic Action. All are unhappy with Haynsworth's opinions in several civil rights cases before the Fourth Circuit Court of Appeals. (Henry B. Hogue, "Supreme Court Nominations Not Confirmed, 1789-2004," Congressional Research Service, Library of Congress, 03/21/2005, p. CRS-21; *The Wall Street Journal*, 8/19/1969)

On the 20th, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) announces its opposition to the Haynsworth nomination based on two cases in which Haynsworth sided with textile mill owners against the right of workers to organize. Both of Haynsworth's rulings were subsequently overturned by the Supreme Court. However, *The New York Times* proclaims that the chances that Haynsworth will not be confirmed are remote, as no senators have avowed outright opposition to his nomination. Labor

leaders initially ask Senator Philip Hart (D-MI) to lead the fight against Haynsworth in the Senate. When Hart declines, labor leaders reportedly consider EMK, but turn instead to Senator Birch Bayh (D-IN) to lead the fight in the Senate. (John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court*, University Press of Virginia, Charlottesville, Virginia, 1991, p. 30; *The New York Times*, 8/21/1969; *Newsweek*, 10/20/1969)

September From the 16th to the 26th, confirmation hearings are held for Haynsworth, who is introduced by Senator Ernest Hollings (D-SC) and Strom Thurmond (R-SC). Thirteen leaders from the civil rights and labor community agree to testify against Haynsworth, including NAACP President Roy Wilkins. (Hogue, Congressional Research Service, p. CRS-21; *The New York Times*, 9/7/1969)

On the 17th, EMK and Bayh reportedly enter a heated argument with three Haynsworth supporters, Senators Sam Ervin, Jr. (D-NC), Roman Hruska (R-NE), and James Eastland (D-MS), about RFK's 1964 clearance of Haynsworth. While the three Haynsworth supporters argue that RFK had cleared Haynsworth of any ethical impropriety, EMK and Bayh argue that RFK had only found insufficient evidence to support charges of bribery. (Frank, p. 39; *The Washington Post*, 9/18/1969)

The Washington Post reports on the 22nd that Haynsworth had failed to recuse himself from a case against Brunswick, a company in which he owned stock. *The Chicago Daily News* and *The New York Times* had previously reported questions of impropriety concerning Haynsworth's relationship with the Vend-a-Matic company. (Frank, p. 43)

October On the 5th, Joe Rauh of the NAACP and Clarence Mitchell of the Leadership Conference on Civil Rights argue that a study of Haynsworth's judicial rulings suggests that he has "actively opposed desegregation."

On the 9th, the Judiciary Committee approves Haynsworth 10-7. EMK votes against the nomination, and along with Senators Quentin Burdick (D-ND), Joseph Tydings (D-MD), Bayh and Hart, he requests that Nixon withdraw the Haynsworth nomination. (1969 *Congressional Quarterly Almanac*, p. 346; Hogue, Congressional Research Service, p. CRS-21)

November Beginning on the 13th, Senate debate on the Haynsworth nomination occurs. (Hogue, Congressional Research Service, p. CRS-21)

On the 21st, the Haynsworth nomination is rejected 45-55. This is the first time since 1930 that the Senate has voted down a Supreme Court nomination. EMK votes with the majority, which includes the Republican Senate leadership, Senate Minority Leader Hugh Scott (R-PA), Chair of the Republican Conference Margaret Chase Smith (R-ME), and the Minority Whip, Robert Griffin (R-MI). Haynsworth's chief aide and brother, Harry Haynsworth, later suggests that they

could not compete with the resources of the opposition Senators, which he suspects had been pooled under the effective control of EMK aide Jim Flug. (Frank, p. 43, 93; *1969 Congressional Quarterly Almanac*, pp. 337, 29-S; Clymer, pp. 160-161; Hogue, Congressional Research Service, p. CRS-21)

1970

January

On the 19th, the nomination of Federal Circuit Judge G. Harrold Carswell for Associate Justice is received in the Senate. The nomination is Nixon's second attempt to fill Fortas' vacant seat. Civil rights groups immediately come out against the nomination, although unions are largely indifferent. Most senators, like Nixon, think that the nomination will pass because they believe that the Senate cannot withstand another judicial nominations battle. Furthermore, little is actually known about the details of Carswell's judicial record. As a result, there is no early action in the Senate against the nomination. Civil rights lawyer Marian Wright Edelman begins conducting some preliminary research on Carswell, finding a controversial 1948 speech and evidence of Carswell's involvement in incorporating a public golf course into an all-white golf club when he was a U.S. attorney in Florida. She shares this information with Rauh, who is counsel to the Leadership Conference on Civil Rights and vice president of Americans for Democratic Action. (Richard Harris, *Decision*, New York: E.P. Dutton, 1971, pp. 26-27, 36-38; Clymer, p. 161; Hogue, Congressional Research Service, p. CRS-21)

On the 23rd, Flug holds a brief meeting on the Carswell nomination with Hart, Tydings, Bayh, and civil rights and labor lobbyists. Bayh reportedly argues that a senator is needed to lead the fight against Carswell. However, Bayh and Hart have been wounded by prior judicial battles, Tydings has a difficult election coming up, and EMK is still less than a year removed from Chappaquiddick. Flug is reportedly the only attendee at the meeting who believes that Carswell can be defeated. The meeting ends without a leader being designated. (Clymer, p. 161; Frank, p. 106; Harris, p. 37)

After launching a very brief preliminary investigation, Flug sends EMK a memo on the 24th calling Carswell "a mediocre candidate with no indications of particular intelligence, leadership, insight, or respect among his brethren." (Frank, p. 106) Flug suggests that Carswell is a white supremacist and adds that further evidence is being compiled. (Clymer, p. 161) Flug also points out that a former Democratic Florida governor, LeRoy Collins, has been touting Carswell publicly, but privately claims that Carswell is not really Supreme Court caliber and that he has not examined his judicial record. He suggests that EMK join with Bayh and Hart to persuade Eastland to postpone the hearings, allowing more time for investigation. The same day, a Justice Department employee named Norman Knopf phones Tydings' office and claims that he has information against Carswell. Knopf later reveals that, as a federal elections observer, Carswell used

intimidating tactics against minorities and Northern lawyers sent to supervise Florida elections. (Harris, pp. 37-38)

On the 27th, confirmation hearings for Carswell begin after Eastland turns down all requests for a postponement. EMK questions Carswell sharply on his attempt to convert the public golf course into a whites-only club. Carswell denies any recollection of his name on the incorporation documents from the club. EMK also asks Carswell for a list of the clients he had represented in private practice who later appeared before him in court. Griffin angrily interrupts EMK and claims that the request is nothing more than “a fishing expedition.” (Harris, p. 60; Hogue, Congressional Research Service, p. CRS-21)

While the hearings are in progress, Flug sends EMK a memo entitled “How to Beat Carswell,” claiming, “I smell blood. I think it can be done if we can get the full civil-rights apparatus working, which it’s beginning to do...” Flug then lays out a projected head count of senators who could be expected to oppose Carswell based on his civil rights record, along with swing votes. Overall, Flug expects only thirty-nine senators to support Carswell; they are primarily very conservative Republicans and Southern Democrats. (Harris, pp. 58-59)

According to EMK biographer Adam Clymer, Flug meets with some resistance from Eastland’s staff when he orders Carswell’s unpublished opinions. (Clymer, pp. 162-163)

February On the 3rd, hearings for Carswell end. By now, only a few influential public figures have stated their opposition to Carswell: George Meany, the head of the AFL-CIO, Senators William Proxmire (D-WI) and Walter Mondale (D-MN), and John Gardner, former Secretary of Health, Education, and Welfare and now director of the Urban Coalition. Carswell opponents now try to buy time to conduct further research and organize by delaying the floor debate until after March 1st, the day scheduled to debate the extension of the Voting Rights Act of 1965. (Harris, p. 60)

On the 4th, Flug and Thomas Bennett, legislative aid to Senator Gaylord Nelson (D-WI), hold an anti-Carswell meeting for thirty Senate staffers. Rauh presents the case against Carswell, and Flug then goes through the same projected head count he had sent EMK. Flug later claims, “That was dangerous, since no guy likes to be told how his boss is going to vote before his boss has voted... But it worked, because after Rauh spoke everybody saw that Carswell was a terrible choice and then the theoretical vote count showed that he could be stopped...” (Harris, p. 80)

On the 5th, Senator Charles Goodell (R-NY) denounces Carswell’s nomination on the Senate floor. This surprise statement encourages Carswell opponents, who believed that the nominee could not be defeated without Republican opposition. (Harris, pp. 60-70)

On the 16th, the Judiciary Committee votes 13-4 in favor of Carswell. EMK votes against the nomination, and is joined by Hart, Tydings, and Bayh. The four senators write a minority report arguing that Supreme Court nominees ought to “evidence some degree of achievement and eminence in law,” and that Carswell’s record indicates that he is insensitive to civil rights. (*1970 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1970, pp. 158-159) EMK takes the lead in negotiating the common language in the senators’ minority report. (Hogue, Congressional Research Service, p. CRS-21)

March

In the March issue of the *Yale Law Journal*, Professor Charles L. Black, Jr. emphasizes the role of the Senate in checking presidential power through advice and consent. Later in the month, the Yale, University of Virginia, and Howard Law Journals are joined by twenty-one Stanford University law professors and the American Federation of Teachers issue statements opposing Carswell. (Harris, pp. 94, 114)

On the 10th, Bayh agrees to lead the Democrats in the floor fight against Carswell. Senator Edward Brooke (R-MA), who is African-American, agrees to round up Republican opposition. Tydings also decides to take a lead in the opposition. (Clymer, p. 163)

Beginning on the 13th, Senate debate on the Carswell nomination occurs. (Hogue, Congressional Research Service, p. CRS-21)

After the press reports that several prominent judges, including Elbert Tuttle, have reconsidered their decisions to testify on Carswell’s behalf, Hruska defends Carswell in a radio interview arguing, “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises and Frankfurters and Cardozos and stuff like that there.” (Frank, p. 112)

On the 25th, Bayh meets with Carswell opponents in Mansfield’s office to discuss prolonging the floor vote by two more weeks. Senator Jacob Javits (R-NY) says that he will not participate in a filibuster as a delay tactic, as does Hart. The idea of a filibuster is dropped.

The Washington Post runs a front-page story describing a meeting that took place in Carswell’s Washington hotel on January 26th, during which ABA committee members Charles Horsky and Norman Ramsey met with Carswell to ask about his role in the incorporation of the segregated golf club. Upon Flug’s request, Horsky drafts a memo of the encounter that is circulated to EMK and Tydings. The memo reveals that Horsky had showed the papers from the Certificate of Incorporation on which the names and signatures of the incorporators of the club appeared, Carswell being one of them. Thus, Carswell had lied about his knowledge of the papers during his confirmation hearings. (Harris, pp. 133-134)

April On the 6th, Bayh's motion to recommit the nomination to the Judiciary Committee is defeated; EMK votes in its favor.

On the 8th, the Carswell nomination is rejected 51-45; EMK votes against it. (1970 *Congressional Quarterly Almanac*, pp. 20-S, 21-S; Clymer, p. 163; Hogue, Congressional Research Service, p. CRS-21)

On the 14th, Federal Circuit Judge Harry Blackmun is nominated to fill Fortas' vacant seat as Associate Justice. Blackmun espouses a conservative interpretation of the Constitution and is a close friend of Burger, who is rumored to have helped the White House select the nominee. (U.S. Senate Homepage; *The Wall Street Journal*, 4/15/1970)

On the 30th, the Judiciary Committee completes its hearings on the Blackmun nomination after a friendly, day-long session that produces no opposition. Blackmun is praised by both conservatives, who laud his strict constructionist approach, and liberals, who believe that their efforts have resulted in the selection of a superior jurist. When EMK asks Blackmun to respond to a list of Nixon policies that EMK claims are eroding individual rights, Blackmun remarks that while many of these issues are political or economic, some of them could indeed fall under the jurisdiction of the Court. Blackmun claims that his opinions on the Eighth Circuit reflect sensitivity to civil rights and labor issues, and says that the Court will continue to be "the real bastion of freedom and liberty." EMK proclaims that the Blackmun nomination "vindicates what the Senate did on the two earlier nominations." (*The New York Times*, 4/30/1970; *The Wall Street Journal*, 4/30/1970)

May On the 5th, the Judiciary Committee recommends Blackmun 17-0 for confirmation. (*The New York Times*, 5/6/1970)

On the 12th, Blackmun is confirmed 94-0 by the Senate after less than an hour of debate. EMK votes in favor of the nomination. (*The New York Times*, 5/13/1970; Frank, p. 123)

1971

January EMK loses his Majority Whip post 31-24 to Senator Robert Byrd (D-WV).

October On the 22nd, former ABA president Lewis Powell, Jr. and Assistant Attorney General William H. Rehnquist are nominated by Nixon to replace Associate Justices Hugo Black and John Marshall Harlan II, respectively. The nominations are reportedly met with cautious approval in the Senate. Other candidates that Nixon had floated in the summer before making his final decision include Byrd, as well as Rep. Richard Poff (R-VA), a former judge with a reportedly poor record on civil rights. (*The New York Times*, 10/22/1971; U.S. Senate Homepage)

November On the 3rd, EMK questions Rehnquist on his position with regards to wiretaps and electronic surveillance. As Assistant Attorney General, Rehnquist had reportedly provided the Nixon Administration with the legal justification for the use of wiretapping and electronic surveillance. Pundits speculate that liberals are devoting all of their energies to Rehnquist, knowing that they will not succeed in defeating the Powell nomination. (Milton Gwirtzman, "Edward Kennedy and Judicial Nominations," p. 18; *The Wall Street Journal*, 11/4/1971)

On the 5th, EMK criticizes Rehnquist, claiming that the nominee's record on civil liberties and civil rights is not satisfactory. EMK has also said that Rehnquist was Nixon's "lawyers' lawyer during the time when the President made perhaps more legal errors than... any predecessor." White House Communications Director Herbert H. Klein calls EMK's allegations "irresponsible." (*The Washington Post*, 11/6/1971)

On the 9th, EMK rebukes Rauh for accusing Rehnquist of lying about participation in the rightist John Birch Society. EMK calls Rauh's attacks "unwarranted," indicating that Rehnquist's integrity should remain unchallenged without sufficient evidence, and that EMK's primary point of disagreement is with Rehnquist's judicial philosophy. (*The Washington Post*, 11/10/1971; *The New York Times*, 11/11/1971)

On the 16th, EMK tells guests at a Brandeis University dinner that the Senate will have to endure another divisive confirmation battle over Rehnquist. (*The New York Times*, 11/17/1971)

On the 23rd, the Judiciary Committee endorses Powell unanimously and Rehnquist 12-4. With Bayh taking the lead against Rehnquist, Senator John Tunney (D-CA), Hart and EMK also vote against the nomination. Burdick was also expected to vote against the Rehnquist nomination, but changed his position. (*The New York Times*, 11/24/1971)

On the 30th, Bayh, Hart, Tunney, and EMK ask the full Senate to reject the Rehnquist nomination. Their minority report expresses concern that "Mr. Rehnquist's record reveals a dangerous hostility to the great principles of individual freedom under the Bill of Rights and equal justice for all people." (*The New York Times*, 12/1/1971)

December *Newsweek* reports that Rehnquist had written a memo as a law clerk to Justice Robert Jackson reaffirming *Plessy v. Ferguson*. Rehnquist claims that he had written the memo as a statement of Jackson's views, but the claim is questioned by Jackson's former personal secretary.

On the 7th, Powell is confirmed by the Senate 89-1. EMK votes in favor. (*1971 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1971, p. 65-S; *The Washington Post*, 12/7/1971)

On the 10th, Rehnquist is confirmed by the Senate 68-26. EMK votes against the nomination. (*1971 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1971, p. 67-S; *The New York Times*, 12/11/1971)

1975

November Although there has been speculation in favor of a female nominee, Federal Circuit Judge John Paul Stevens is nominated by President Gerald Ford for Associate Justice on the 28th. The appointment would replace William O. Douglas, one of the most outspoken civil libertarians in the Court's history. Pundits predict a quick confirmation because Stevens is seen as a centrist. (*1975 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1975, p. 536; *The New York Times*, 11/29/1975; U.S. Senate Homepage)

December On the 3rd, Senator Charles McC. Mathias, Jr. (R-MD), Bayh, Burdick, Hart, Tunney, and EMK ask Eastland in writing for a full investigation into the health, tax returns, and former law practice of Stevens. (*The New York Times*, 12/4/1975)

Following three days of hearings, Stevens is unanimously recommended by the Judiciary Committee on the 11th. (*The New York Times*, 12/12/1975)

On the 17th, Stevens is confirmed 98-0 by the Senate. EMK votes in favor of the nomination. (*The New York Times*, 12/18/1975)

1986

June On the 20th, Rehnquist is nominated by President Ronald Reagan to replace Burger as Chief Justice. On the 24th, Federal Circuit judge Antonin Scalia is nominated to replace Rehnquist as Associate Justice. (U.S. Senate Homepage; *The Washington Post*, 6/18/1986)

July On the 29th, the Judiciary Committee opens confirmation hearings for Rehnquist. Senator Howard Metzenbaum (D-OH) and EMK suggest that Rehnquist was "less than candid" in his statements during his 1971 confirmation hearings. EMK says that Rehnquist has an "appalling record on race," and that he is "too extreme" to be Chief Justice. Senator Orrin Hatch (R-UT) claims that EMK's accusations are "somewhat ridiculous" and too old to take seriously, and witness and former Carter Attorney General Griffin Bell urges the committee to approve the nomination. (*The New York Times*, 7/30/1986; *The Washington Post* 7/30/1986)

On the 30th, EMK and Metzenbaum question Rehnquist about allegations that he harassed and intimidated voters by inquiring into their personal qualifications and

reading abilities at minority precincts in Phoenix during the early 1960s. Rehnquist denies the allegations. He has acknowledged that he did make such inquiries as a Republican lawyer in the 1950s and 1960s, but that these inquiries were meant to instruct other Republican workers on applicable laws and settle disputes over qualifications of Republican challengers. Other ethical concerns arise around this time, including whether Rehnquist had given truthful testimony in his 1971 confirmation hearing regarding the alleged intimidation of minority voters. Other questions include Rehnquist's failure to recuse himself from a lawsuit against the Secretary of Defense regarding military surveillance of civilians. (*The New York Times*, 7/31/1986)

Also on the 30th, Rehnquist acknowledges that a deed on a Vermont vacation home that he purchased in 1974 contained a restrictive covenant prohibiting lease or sale of the property to "any member of the Hebrew race." Rehnquist claims he was unaware of the restriction until several days ago, and that he would like to void the restriction if possible under Vermont law. (*The Washington Post*, 7/31/1986)

On the 31st, EMK claims that Rehnquist once owned a house in Phoenix with a deed forbidding the sale to non-whites. Rehnquist claims that he did not know about the existence of this provision on the deed. Metzenbaum and EMK engage in a heated exchange with Republicans, suggesting that both the Arizona and Vermont deeds might be relevant to Rehnquist's qualifications. (*The New York Times*, 8/1/1986)

Also on the 31st, Reagan invokes executive privilege and refuses to release internal memoranda pertaining to civil rights, civil liberties, and surveillance authored by Rehnquist during his time at the Justice Department. EMK accuses Reagan of "stonewalling" to protect advice given by Rehnquist to Nixon and his attorney general, John N. Mitchell. (*The New York Times*, 8/1/1986)

Also on the 31st, EMK tells reporters that Rehnquist has agreed to have his medical records examined by a physician to be selected by the Judiciary Committee, and to make his personal doctor available for testimony. Until his records are examined, there will be no questioning on Rehnquist's health. Rehnquist was hospitalized in 1982 after suffering adverse effects from a drug intended to ease back pain. (*The Wall Street Journal*, 8/1/1986)

August

On the 7th, Senator Paul Simon (D-IL) and EMK request and receive access to additional memos dating from Rehnquist's time as head of the Office of Legal Counsel under Nixon. While other Democrats are circumspect about the contents of the documents, EMK claims that he is certain that the documents will reveal that Rehnquist was very much involved in shaping government policy towards surveillance of domestic groups during the antiwar period and the use of the Army and the FBI during the May Day protests in 1971. (*The New York Times*, 8/8/1986)

On the 15th, the Judiciary Committee votes 13-5 in favor of the Rehnquist nomination and unanimously in favor of the Scalia nomination. Senators Joseph Biden (D-DE), Patrick Leahy (D-VT), Metzenbaum, Simon, and EMK vote against Rehnquist. EMK reportedly reminds the committee that Carswell was recommended 13-4 by the committee before his nomination was defeated on the floor. (*The New York Times*, 8/15/1986)

On the 26th, Metzenbaum, Cranston, Simon, and EMK request that the FBI re-open its investigation into Rehnquist's handling of a trust account set up for a relative in the 1960s. The inquiry would determine whether or not Rehnquist defrauded his ill brother-in-law by keeping the trust a secret from him. (*The Washington Post*, 8/27/1986)

September On the 15th, Senate Majority Leader Dole proposes a motion to invoke cloture and limit debate on the Rehnquist confirmation. Liberal Democrats, led by EMK, refuse to agree to a time limit, requesting a "full and complete debate," though not a formal filibuster. Democrats say support for Rehnquist is eroding, though Dole claims he will have sufficient cloture votes. (*The Washington Post*, 9/16/1986)

On the 17th, the Senate votes to confirm Rehnquist 65-33 and Scalia 98-0. EMK votes against the Rehnquist nomination and in favor of Scalia. Mathias, who had voted for Rehnquist in committee, switches his vote in the full Senate, claiming to be convinced by new evidence that Rehnquist had helped to shape surveillance policy under Nixon, thereby leading Mathias to believe that Rehnquist had not been truthful in his 1971 confirmation hearings. Rehnquist receives more negative votes than any other justice who has been confirmed to the Supreme Court to date. (*1986 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1986, p. 45-S; *The New York Times*, 9/18/1986)

CHECKLIST FOR INTERVIEW SERIES ON JUDICIAL NOMINATIONS

Prepared by Anne Mariel Peters and Rob Martin

Miller Center of Public Affairs, University of Virginia, 10/18/2006

Evaluating the Nominee

- Standards used to assess a nominee
 - Judicial philosophy
 - Judicial qualifications
 - Predictability
- Contextual factors
 - Ideological, racial, and gender composition of the Court
 - Ideology of the departing justice
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- Building support within the full Senate
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Retrospective

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