



EDWARD M. KENNEDY ORAL HISTORY PROJECT

Interviewer's Briefing Materials **Edward M. Kennedy Interview, 2/12/2007**

Robert A. Martin, Research Director

Miller Center Documents¹

- Edward M. Kennedy Judicial Nominations Timeline.
- Omnibus Judgeship Act of 1978 – Background.
- EMK Chairmanship of the Judiciary Committee 1979-1980.

Secondary Source Materials

- Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1997) pp. 236-238, 260-264.
- Mark Gitenstein, *Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* (NY: Simon & Schuster, 1992) pp. 55-67.
- Robert Bork, *The Tempting of America: The Political Seduction of the Law* (NY: The Free Press, 1990) pp. 267-293.
- Joe Klein, "The Old Frontier: Teddy's Bork Crusade," *New York*, 10/19/1987.
- Ethan Bronner, "Kennedy Raps Administration for Trying to 'Muzzle' Questioning of Souter," *The Boston Globe*, 08/07/1990.
- Adam Clymer, *Edward Kennedy: A Biography* (New York: William Morrow and Company, 1999) pp. 493-500, 526-527, 539-541.
- Anna Quindlen, "Trouble with Teddy," *The New York Times*, 10/19/1991.
- Adam Clymer, "Kennedy Assailed on Effectiveness," *The New York Times*, 10/21/1991.
- "Kennedy Remarks on Judge John Roberts Prior to Senate Vote," press release, 09/27/2005.
- Thomas Oliphant, "Kennedy's Doubts on Roberts May Prove Right," *The Boston Globe*, 9/29/2005.
- Edward M. Kennedy, "Transcript for November 6," *Meet the Press*, 11/06/2005.
- Edward Kennedy, "Roberts and Alito Misled Us," *The Washington Post*, 8/30/2006.

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.

Oral History Interviews

- Alan Simpson interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 05/10/2006.
- Melody Barnes interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 08/06/2006.
- Warren Rudman interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 5/16/2006.
- John Danforth interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 10/25/2005.
- Orrin Hatch interview, Kennedy Oral History Project, Miller Center of Public Affairs, University of Virginia, 05/24/2006.
- Griffin Bell interview, Carter Oral History Project, Miller Center of Public Affairs, University of Virginia, 03/23/1988.

Documents Provided by Senator Kennedy

- “Robert Bork.”
- “David Souter.”
- “Clarence Thomas.”
- “Breyer – Circuit Court.”
- “Breyer – Supreme Court.”
- “John Roberts.”
- “Samuel Alito.”
- Selected briefing materials.

Other

- Lloyd N. Cutler memo to President Jimmy Carter, “Breyer Appointment to First Circuit,” 11/24/1980.
- “Statement of Senator Edward M. Kennedy Senate Judiciary Committee Hearings on the Nomination of Judge David H. Souter to the U.S. Supreme Court September 13, 1990,” John F. Kennedy Presidential Library, 11/21/2006.
- “Literacy Test,” John F. Kennedy Presidential Library, 11/21/2006.
- “One Person, One Vote,” John F. Kennedy Presidential Library, 11/21/2006.
- “Wrap Up on Civil Rights,” John F. Kennedy Presidential Library, 11/21/2006.
- “State of the Constitutional Right to Privacy re Women,” John F. Kennedy Presidential Library, 11/21/2006.
- “Chronology: Professor Anita Hill,” John F. Kennedy Presidential Library, 11/21/2006.
- “Judge Stephen Breyer: Q&A,” John F. Kennedy Presidential Library, 11/21/2006.

EMK JUDICIAL NOMINATIONS TIMELINE

Prepared by Anne Mariel Peters and Rob Martin

Miller Center of Public Affairs, University of Virginia, 02/06/2007

1962

November Edward Moore Kennedy (EMK) is elected to the U.S. Senate in a special election to fill 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. (*1969 Congressional Quarterly Almanac*, p. 7-S)

July The accident at Chappaquiddick 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 Bayh 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 Thurmond. 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 get into a heated argument with three Haynsworth supporters, Senators Sam Ervin, Jr. (D-NC), Hruska, and Eastland, about RFK's 1964 clearance of Haynsworth. While the three Haynsworth supporters argue that then-Attorney General 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 charge in a study that Haynsworth has "actively opposed desegregation."

On the 9th, the Judiciary Committee approves Haynsworth 10-7. EMK votes against the nomination, and along with Senator Quentin Burdick (D-ND), Bayh, Hart, and Tydings, 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, and Nixon is reportedly furious. EMK votes with the majority, which also includes the Republican Senate leadership, Senate Minority Leader Hugh Scott (R-PA), Chair of the Republican Conference Margaret Chase Smith (R-ME), and Griffin. Haynsworth's chief aide and brother, Harry Haynsworth, later complains that they could not compete with the resources of the opposition Senators, which he suspected had been pooled under the effective control of EMK aide Jim Flug. (Frank, p. 43, 93) Clymer suggests that the reason for Haynsworth's rejection is Democratic retaliation for Republican efforts to filibuster the Fortas nomination for Chief Justice and the subsequent Republican pressure that forced Fortas to resign. (1969 *Congressional Quarterly Almanac*, pp 337, 29-S; Adam Clymer, *Edward M. Kennedy: A Biography*, New York: William Morrow and Company, 1999, 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 during his time as 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 reportedly 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 to the nomination. 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. Both nominations are met with cautious approval in the Senate. Other candidates that Nixon had floated before making his final decision included Byrd, as well as Rep. Richard Poff (R-VA), a former judge with a reportedly poor record on civil rights. (Milton Gwirtzman, "Edward Kennedy and Judicial Nominations," p. 16; *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. (*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 Joseph Rauh of the Leadership Conference on Civil Rights 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 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)

1979 Following the retirement of Eastland, EMK becomes Chairman of the Judiciary Committee. (Senate Judiciary Committee Homepage, <http://judiciary.senate.gov/chairman.cfm>)

1981 Thurmond replaces EMK as Chairman of the Senate Judiciary Committee. (1981 *Congressional Quarterly Almanac*, p. 407)

- August* On the 19th, Arizona Court of Appeals judge Sandra Day O'Connor is nominated by President Ronald Reagan to replace the moderate-to-conservative Potter Stewart as Associate Justice. (*1981 Congressional Quarterly Almanac*, p. 409; U.S. Senate Homepage)
- September* On the 15th, the Senate Judiciary Committee approves the nomination 17-0. EMK votes in favor. (*1981 Congressional Quarterly Almanac*, p. 410)
- On the 21st, the O'Connor nomination is approved by the Senate 99-0. EMK votes in favor. O'Connor is the first woman to serve on the Supreme Court. (*1981 Congressional Quarterly Almanac*, pp. 409, 47-S)

1986

- June* On the 20th, Rehnquist is nominated by Reagan to replace Burger as Chief Justice and, on the 24th, Federal Circuit judge Antonin Scalia is nominated to replace Rehnquist as Associate Justice. EMK, like most Democrats, "reserves judgment," although Minority Whip Alan Cranston (D-CA) deems Rehnquist an "ideological extremist." (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 5th, confirmation hearings for Scalia begin. Scalia emerges confident and unscathed. EMK questions Scalia on his views on *Roe v. Wade*, to which Scalia responds that although he has no agenda for the Court, he will not say that he will never overrule a Supreme Court precedent. EMK says, "The nomination of Judge Scalia presents none of the troubling issues with respect to truthfulness, candor, judicial ethics and full disclosure that have marred the nomination of Justice Rehnquist." (*The Washington Post*, 8/6/1986)

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)

1987

July On the 1st, Reagan announces his nomination of Federal Circuit judge Robert H. Bork to replace Powell. Bork has spoken out strongly against Supreme Court precedents important to liberals, including *Brown v. Board of Education*, *Griswold v. Connecticut*, and *Roe v. Wade*. EMK calls Archibald Cox to tell him that he will lead the fight against Bork, and asks Cox to help. Cox, whom acting Attorney General Bork had reportedly fired from his position as the first Watergate special prosecutor, declines; he does not want his opposition to Bork to seem like a personal vendetta. (Clymer, pp. 416-417)

Within an hour of the announcement, EMK delivers a controversial floor speech calling for the Senate to reject Bork's nomination. EMK claims, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police would break down citizens' doors in midnight raids..." During the speech, EMK invokes two key arguments against Bork: his involvement in Nixon's Saturday Night Massacre and his "extremist" judicial interpretation, particularly with regards to civil rights. Although EMK is later criticized for the speech, none of Bork's proponents issue an immediate rebuke, assuming that the speech would be self-defeating. EMK claims that the statement had to "sound the alarm and hold people in their places until we could get the material together." Bork, who watched the speech from the White House, later wrote, "Not one line of that tirade was true...this was a

calculated personal assault by a shrewd politician...As it turned out, Kennedy set the themes and the tone for the entire campaign.” Former Judiciary Committee chief counsel Mark Gitenstein claims that EMK’s “unqualified” attack forced undecided moderates to delay their opposition to Bork, as well as worrying civil rights leaders. Although Gitenstein claims that there is little evidence that the civil rights community had encouraged EMK’s speech, he also notes that there is general agreement within and without the White House that EMK represents the civil rights and civil liberties community. (*1987 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1987, p. 271; Robert Bork, *The Tempting of America*, New York: The Free Press, 1990; Clymer, pp. 417-419; Mark Gitenstein, *Matters of Principle*, New York: Simon and Schuster, 1992, pp. 56, 70; Michael Pertschuk and Wendy Schaetzel, *The People Rising*, USA: Thunder’s Mouth Press, 1987, pp. 26-27, 123-124)

On the 2nd, EMK hires Anthony Podesta, People for the American Way (PFAW) founding president and a veteran of EMK’s 1980 campaign, to organize opposition to the Bork nomination. (Clymer, p. 420) He also calls prominent civil rights lawyer Bill Taylor to coordinate constitutional law scholars and law school deans that are opposed to Bork. Taylor is joined by Herman Schwartz of American University, Laurence Tribe of Harvard, Walter Dellinger of Duke, Philip Kurland of Chicago, and PFAW’s John Haber and Seidman. Although the ABA has given Bork its highest rating, the opposition to Bork within the legal community is strong, and many lawyers and scholars even take it upon themselves to organize against the nominee. This high level of participation stands in stark contrast to previous confirmation proceedings. (Pertschuk, pp. 189-190; Norman Vieira and Leonard Gross, *Supreme Court Appointments*, Carbondale: Southern Illinois University Press, 1998, p. 143)

On the 7th, the Bork nomination is received by the Senate. EMK, Metzenbaum, and Senate Judiciary Committee Chairman Biden decide to postpone the hearings until after August recess. Biden, who is running for president, tells civil rights groups that he, not EMK, is in charge, and that he will lead the fight against Bork. One year ago, Biden had said that while somebody like EMK would vote against someone like Bork, Biden would vote for him. Biden later explains that he would not oppose Bork to replace a more conservative justice, but that Powell’s swing status is a complicating factor. (Clymer, p. 420; *The Washington Post*, 10/24/1987; Congressional Research Service, p. CRS-21)

On the 9th, *The New York Times* reports that “civil rights activists had been keeping files on Judge Bork in anticipation of this moment.” (*The New York Times*, 7/9/1987)

On the 11th, NARAL holds its annual convention in Washington and maps out a national campaign against the Bork nomination. (Bork, p. 285)

On the 27th, Democratic Whip Alan Cranston (D-CA) decides that Bork opponents should abandon a filibuster strategy. EMK and Biden agree, and Neas tells the Leadership Conference on Civil Rights (LCCR) to stop talking about a filibuster. (Gitenstein, p. 276)

July/August At EMK's private meeting with Bork, Bork later writes in his book that EMK is accompanied by several aides and "seemed mildly depressed and was mostly silent... Every so often, Kennedy looked up at me –about three or four times, I suppose—and said, 'Nothing personal.'" (Bork, pp. 280-281)

Later in the summer, Senators Arlen Specter (R-PA), Biden, and EMK study Bork's writings and discuss them with law professors. Tribe plays Bork for EMK and Biden in mock-hearings. (Clymer, p. 421)

August Early in the month, EMK meets with twenty "Block Bork" coalition leaders to discuss strategy. They decide to "freeze the Senate" by urging no position on the Bork nomination until the end of the confirmation hearings. There is also a desire within the coalition to keep pressure low-profile to prevent undecided senators from bucking. EMK encourages the coalition members to hold weekly meetings with key Judiciary Committee staffers, something they had already been doing since Powell's resignation. Pertschuk claims that although EMK welcomes the "Block Bork" coalition as trusted allies, some coalition members are concerned about being perceived as part of EMK's apparatus. The coalition consists of more than three hundred national organizations, including PFAW, the 190-member umbrella group of the LCCR and NARAL. LCCR lobbyists already have a close relationship with EMK and his chief counsel Carolyn Osolinik. PFAW has a close relationship with Judiciary Committee members, and PFAW's legal director, Ricki Seidman, later becomes an EMK aide and Labor Committee staffer. (Pertschuk, pp. 95-102, 125)

While vacationing in Massachusetts during the Senate recess, EMK makes hundreds of calls to black political leaders and ministers, particularly in the South, and directly lobbies his Senate colleagues with Bork briefing books and phone calls to their VIP constituents. The annual conferences of the NAACP and the National Education Association are subsequently used as anti-Bork platforms. EMK also calls each of thirty executive members of the AFL-CIO and holds a conference call with forty state labor leaders to organize opposition. According to Podesta, EMK worked harder at organizing the anti-Bork forces than he had for his 1980 presidential campaign. (Clymer, pp. 420-421; Pertschuk, p. 27; Bork, p. 283; *The Washington Post*, 10/24/1987)

In a press release, the AFL-CIO claims that Bork is "a man moved not by deference to the democratic process but by an overriding commitment to the interests of the wealthy and powerful in our society. He has never shown the least concern for working people, minorities, the poor, or for individuals seeking the protection of the law to vindicate their political and civil rights." (Bork, p. 286)

On the 12th, EMK sends a letter to 6,200 black political leaders reportedly arguing that Bork is an opponent of civil rights.

Between the 13th and the 17th, Boston pollster Thomas Kiley surveys voters on the Bork nomination for the American Federation of State County and Municipal Employees (AFSCME). He concludes that Bork is vulnerable on three grounds: civil rights, privacy and individual freedom, and big business versus the individual. Furthermore, he concludes that voters will be turned against Bork if they perceive him as not “fair-minded,” and that the best way to increase voter skepticism is to attack Bork’s record on civil rights. A Roper poll of voters in twelve southern states shows that fifty-one percent oppose confirmation. Bork opponents use these figures to help win over swing votes in the Senate—the Southern Democrats, who now represent large black constituencies. Focus groups have also indicated that the public is indifferent to Bork’s role in Watergate. (Pertschuk, pp. 134, 142, 154; Vieira, p. 152; *The Washington Post*, 10/24/1987)

On the 31st, the American Civil Liberties Union (ACLU) sends a cable claiming that “Detailed research reveals Bork far more dangerous than previously believed... We risk nothing short of wrecking the entire Bill of Rights... His confirmation would threaten our system of government... Time is short...” (Bork, pp. 287-288)

September On the 2nd, Biden releases a report on Bork attacking his record on civil rights and antitrust law. (Bork, pp. 287, 291)

On the 11th, EMK delivers a speech at Georgetown Law School, railing against Bork’s argument that the *Griswold v. Connecticut* decision invented a right to privacy without a constitutional basis, in addition to attacking Bork’s contempt for judicial precedent. Reagan deems attacks on Bork as “pure politics,” defending Bork’s commitment to individual freedom and equality. (Clymer, p. 422; *The Washington Post*, 9/12/1987)

On the 13th, *The Washington Post* reports that EMK has been urged not to repeat his initial outburst against the nomination during the confirmation hearings. It is also reported that three committee members are considered genuinely undecided: Senators Howell Heflin (D-AL), Dennis DeConcini (D-AZ), and Specter. Specter is considered the most likely to oppose the nomination, but Heflin, a former chief justice of the Alabama Supreme Court, is viewed as the most important vote by both sides. (*The Washington Post*, 9/13/1987)

Prior to and during the confirmation hearings, PFAW runs sixty-second television ads featuring actor Gregory Peck, who claims that Bork “defended poll taxes and literacy tests, which kept many Americans from voting.” (Bork, p. 288)

On the 15th, confirmation hearings begin for Bork. *The Washington Post* calls the give and take between Bork and EMK “electrifying and instructive.” (*The Washington Post*, 9/16/1987) EMK gives Bork a scathing greeting, not covered or re-capped by CBS, in which he portrays Bork as hostile to women and blacks, irreverent to judicial precedence, and the superiority of the executive to the legislative branch. EMK then jostles Bork until he admits having made an “intellectual mistake” by writing articles for *The New Republic* and the *Chicago Tribune* attacking civil rights. The exchanges frequently reach the level of “profound constitutional debate,” but Bork’s cold, technical discussion of essentially political issues is often overpowered by EMK’s media-ready sound bites accusing Bork of being “an activist of the right” and “hostile to the rule of law.” Biden passes EMK congratulatory notes throughout the questioning, but avoids berating or interrupting Bork himself. Clymer observes that the different approaches of EMK and Biden are complementary: EMK rallies the outside opposition, and Biden focuses on winning over senators on the committee. Others find Biden too restrained. (Clymer, pp. 422-424) In his account of his exchanges with Democrats and Specter, Bork claims, “Because I was, out of necessity, patient with him [Specter], a lot of people not versed in constitutional law got the impression that this was a serious constitutional discussion. Nor was there any serious discussion of the law with the Democratic senators. Kennedy kept insisting that I was against everybody’s rights. He and Metzenbaum tried to establish, but could not, that my discharge of Archibald Cox was illegal... It was left to Metzenbaum, however, to make some of the most egregious accusations about my attitudes toward women.” (Bork, p. 306; Patrick McGuigan and Dawn Weyrich, *Ninth Justice: The Fight for Bork*, USA: Free Congress Foundation, 1990, p. 108; Congressional Research Service, p. CRS-21)

On the 17th, EMK focuses on Bork’s conception of presidential power, referring to the myriad number of cases in which Bork had sided with the executive branch against Congress. Bork addresses each case individually, but not the broader issue: Bork’s conception of presidential power. This issue is of particular importance to Byrd, who is still one of four undecided committee members. (Clymer, p. 425)

On the 18th, EMK challenges the sincerity of Bork’s claims to the committee that he will not overrule precedent even if he thinks that the logic behind the precedent is incorrect. (Clymer, p. 425)

On the 21st, three prominent black leaders describe Bork as “too risky” while testifying at his confirmation hearings. William T. Coleman, Jr., Transportation Secretary under Ford, former representative Barbara Jordan (D-TX), and Atlanta Mayor Andrew Young claims that Bork has consistently opposed the expansion of minority rights. Jordan claims that she is “incredulous” at some of the more moderate claims Bork has made during his testimony, and that she would give “little weight” to them. (*The Washington Post*, 9/22/1987)

On the 23rd, Biden withdraws his candidacy for president under the weight of charges that he committed plagiarism as a law student. (Clymer, p. 427)

On the 26th, Bork visits the White House and requests that Reagan address the nation next week on prime-time television on his behalf. Bork claims, “I’ve been trying to do this on my own. You guys aren’t doing everything you can. I need the President.” Gitenstein claims that the White House’s strategy from the beginning was to keep Reagan, who is suffering from Iran-Contra fallout, in the background of the confirmation proceedings. (Gitenstein, p. 11)

At the end of the month, Dole begins to visibly distance himself from Bork, incurring the wrath of right-wing organizations. (*The Washington Post*, 10/24/1987)

The confirmation hearings end on the 30th, after EMK and Biden persuade Bork’s eager opposition that their testimony would draw attention to the groups themselves and negatively affect their campaign in the Senate against Bork. (1987 *Congressional Quarterly Almanac*, p. 273; Clymer, p. 427)

October

On the 1st, Senators David H. Pryor (D-AR), Terry Sanford (D-NC), and Bennett Johnston (D-LA) announce that they will vote against Bork. Later in the day, Specter also announces his opposition. (*The Washington Post*, 10/24/1987)

On the 5th and 6th, Citizens for America and We the People run full-page ads in *The Washington Post* and *USA Today* attacking the anti-Bork advertising campaign. The ad claims that some of the anti-Bork senators have “serious personal character flaws.” Of EMK, the ads claim, “You always wondered how he ever made it from the Chappaquiddick incident or getting expelled from Harvard for cheating.” (Gitenstein, p. 297)

On the 6th, the Judiciary Committee votes 9-5 against the Bork nomination; the Committee reports on the 13th. (Congressional Research Service, p. CRS-21)

On the 8th, Bork delivers a statement in the White House press room in which he admonishes the public relations campaign against him and states, “I harbor no illusions...If I withdraw now, that campaign would be seen as a success and I would be mounted against future nominees. For the sake of the federal judiciary and the American people that must not happen.” (Bork, p. 314)

On the 13th, Reagan publicly acknowledges that Bork will probably not be confirmed by the Senate. Later in the day, at a meeting with the New Jersey Chamber of Commerce, Reagan attacks anti-Bork senators, claiming that they have turned Bork’s confirmation battle into a “political joke.” Reagan’s words undermine White House chief of staff Howard Baker’s attempts to tone down Reagan’s remarks on the Bork nomination in order to devote time to finding a more acceptable nominee. (*The Washington Post*, 10/14/1987)

Senate debate on the Bork nomination begins on the 21st. Biden opens the debate by dismissing charges that Bork is the victim of “lynch mobs” as “nothing but a smokescreen to distract the Senate and the American people” from Bork’s Judiciary Committee testimony. EMK calls the criticism of the confirmation process by Bork’s defenders “preposterous and hypocritical.” Bork’s wife and son leave the Senate chamber when EMK speaks, and return after EMK is finished. (1987 *Congressional Quarterly Almanac*, p. 274; *The Washington Post*, 10/22/1987)

The Bork nomination is rejected 42-58 on the 23rd. EMK votes with the majority and warns Reagan not produce another nominee equivalent to Bork in judicial philosophy. (1987 *Congressional Quarterly Almanac*, p. 60-S; Clymer, p. 427; Congressional Research Service, p. CRS-21)

On the 29th, Reagan announces the nomination of Federal Circuit judge and Bork colleague Douglas H. Ginsburg to replace Powell. (1987 *Congressional Quarterly Almanac*, pp. 272, 274)

November On the 7th, Reagan accepts Ginsburg’s request to withdraw his nomination following the revelation that Ginsburg had smoked marijuana while a professor at Harvard Law School. (1987 *Congressional Quarterly Almanac*, p. 275)

On the 30th, Federal Circuit judge Anthony Kennedy is nominated to replace Powell. Kennedy is perceived as a moderate conservative, and during his twelve years as an appeals court judge, he has accumulated a comprehensive record on social and constitutional issues. Unlike those of Bork, most of Kennedy’s opinions address the issues directly involved in the case at hand, and do not extend to broader, more controversial issues. (1987 *Congressional Quarterly Almanac*, p. 275)

December On the 14th, hearings for Kennedy begin. EMK questions Kennedy on his decision to rule against the right of homeowners to act as “testers” in challenging real estate practices that allegedly steered blacks out of certain neighborhoods. The ruling was later overturned by the Supreme Court. EMK also questions Kennedy on his membership to the all-male Olympic Club in San Francisco and Kennedy’s failure to protest the club’s all-male, no-minority policy until his name appeared on a short list of potential Supreme Court nominees. In his answers, Kennedy assures EMK of his commitment to civil rights. Most of the civil rights groups that opposed the Bork nomination have remained silent on Kennedy except for the National Organization for Women. (1987 *Congressional Quarterly Almanac*, p. 276; *The New York Times*, 12/15/1987)

1988

January On the 27th, after only three days of hearings, the Judiciary Committee votes 14-0 to recommend confirmation of Kennedy. (*1987 Congressional Quarterly Almanac*, p. 276)

February On the 3rd, the Senate confirms Kennedy 97-0. EMK votes in favor. (*1987 Congressional Quarterly Almanac*, p. 276; *1988 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1988)

1990

February On the 6th, EMK spends less than ten minutes questioning Equal Opportunity Employment Commission head Clarence Thomas during his confirmation hearing as a nominee to the D.C. Court of Appeals. EMK questions Thomas on job discrimination cases and receives Thomas' responses favorably. EMK has relied on the advice of William T. Coleman and Senator John Danforth (R-MO), who had hired Thomas out of law school to be a Missouri assistant attorney general. (Clymer, pp. 481-482)

April On the 5th, the nomination of Samuel A. Alito, Jr. to the U.S. Circuit Court of Appeals is quickly and unanimously approved by the Judiciary Committee, where EMK says he is "sure" that Alito will be a successful judge. (*The Washington Post*, 11/1/2005)

July On the 25th, Judge David Souter is nominated by President George H.W. Bush to replace the liberal William J. Brennan, Jr. as Associate Justice. Souter has most recently spent four months on the U.S. First Circuit Court of Appeals in Boston, and is dubbed by the media as the "stealth justice," an unknown judge with uncertain values. Pundits speculate that the nomination of Souter is related to Souter's close friendship with Senator Warren Rudman (R-NH). The Leadership Conference on Civil Rights, which had fought Bork and remained silent on Kennedy, opposes Souter, whereas the ACLU and the People for the American Way do not express opposition. (*1990 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1990, pp. 510-511; U.S. Senate Homepage; *The Washington Post*, 10/2/1990, 10/3/1990)

During the summer, senators scour whatever material they can find on Souter, from his tenure in the New Hampshire courts to his four-month stint on the U.S. Court of Appeals, in order to flesh out his views on judicial activism, abortion, and civil rights. EMK speaks for hours with aides Carey Parker, Carolyn Osolinik, and Jeff Blattner, as well as with Harvard Law School professors Kathleen Sullivan and Tribe. (*1990 Congressional Quarterly Almanac*, p. 509; Clymer, p. 481)

August On the 6th, EMK tells an annual meeting of the ABA, "In this day and age, the Senate will not confirm a blank slate to the Supreme Court of the United States." U.S. Attorney General Dick Thornburgh, also in attendance, responds angrily that

Souter has a distinguished judicial record. (*1990 Congressional Quarterly Almanac*, p. 509; *Christian Science Monitor*, 8/8/1990)

September

On the 13th, confirmation hearings for Souter begin. EMK questions Souter on some of the positions he took as New Hampshire Attorney General, including defending the state's refusal to provide the federal government with a racial breakdown of its employees. EMK argues that there is little in Souter's record that demonstrates a dedication to civil rights.

On the same day, Souter refuses to answer Biden's questions on *Griswold v. Connecticut*, the landmark contraceptives case that provides the basis for the *Roe v. Wade* decision legalizing abortion. Souter claims that the Court will likely review *Roe v. Wade* in the future, and thus it would be inappropriate for him to give his views. However, Souter assures the committee that he will approach abortion and other sensitive issues like affirmative action with an open mind. He also claims to accept a right to privacy under the due process clause. (*The New York Times*, 9/14/1990, 9/15/1990)

On the 14th, EMK portrays Souter as taciturn and legalistic, calling Souter's denial of unemployment compensation to two elderly men while he was a New Hampshire Supreme Court justice "hostile and heartless." EMK also questions Souter about an argument he made as Attorney General claiming that state literacy tests were valid in order to prevent the dilution of votes. EMK and Souter engage in a sharp exchange after Souter claims that while committee members would believe that his personal views would play no role in his interpretation of *Roe v. Wade*, the American public would not share such beliefs. EMK responds, "What do you know and I know that's superior to the common sense of the American people?" After the hearing, leading women's and abortion groups announce their opposition to Souter. (*The New York Times*, 9/15/1990; *The Washington Post*, 9/15/1990)

On the 24th, Cranston is the first senator to announce that he will vote against Souter, claiming that he cannot support Souter's views on abortion and contraceptives. Cranston is not on the Judiciary Committee. (*The New York Times*, 9/24/1990)

On the 27th, the Judiciary Committee approves the Souter nomination by a 13-1 vote. EMK casts the only dissenting vote, fearing that as a swing voter, Souter has the capacity to erode civil rights and the right to privacy. Biden claims that he was frustrated by Souter's unwillingness to provide his views on abortion and that his vote was a "close decision," but that Souter was probably the best nominee that the Democrats could hope for under the Bush administration. (*1990 Congressional Quarterly Almanac*, pp. 510-511)

October

On the 2nd, the Senate votes to confirm Souter 90-9 after less than four hours of debate. Only Democrats, including Senator John F. Kerry (D-MA) and EMK,

stand in opposition to the nominee, and only three of them declare their opposition in floor speeches: Senator Brock Adams (D-WA), Cranston, and EMK. *The Washington Post* notes that the powerful liberal coalition that had thwarted the Bork nomination fell apart due to lack of ammunition, even though EMK personally tried to rally civil rights groups against Souter. (1990 *Congressional Quarterly Almanac*, p. 508, 515; *The Washington Post*, 10/2/1990; *The New York Times*, 10/3/1990)

1991

Spring EMK's nephew, William Kennedy Smith, is charged with sexual battery in Palm Beach. EMK had been with Smith earlier on the night in question and is later called to testify. (Clymer, pp. 488-491; Edward M. Kennedy Biography, *Almanac of American Politics* 2000)

July On the 8th, Thomas is nominated by Bush to replace Marshall as Associate Justice. Thomas is the only African American on Bush's short list of conservative nominees, and Bush calls Thomas "the best qualified," despite a minimal legal experience in entry-level jobs and an unremarkable year on the appeals court. Thomas is strongly supported by Danforth. (Clymer, p. 493; *The New York Times*, 7/7/1991; U.S. Senate Homepage)

Also on the 8th, the NAACP delays its stance on Thomas at its annual convention, opting to meet with Thomas to discuss his views before coming to a decision. (*The New York Times*, 7/9/1991)

On the 21st, the National Urban League votes to take no position on the Thomas nomination. (*The New York Times*, 8/1/1991)

On the 31st, the NAACP and the AFL-CIO declare their opposition to Thomas in coordinated statements. The NAACP, which reveals that it met with Thomas to discuss his views earlier in the month, charges him with an inconsistent view of civil rights policy, and the AFL-CIO calls the nomination a "disgraceful" attempt to pack the Court with conservatives. The White House and Danforth play down the significance of the opposition. Specter, who has not yet announced his position, says that the NAACP's opposition is "not going to help." (*The New York Times*, 8/1/1991)

September The Conservative Victory Committee and Citizens United air a commercial questioning the ethics of Biden, Cranston, and EMK, who are all expected to oppose the Thomas nomination. The ad notes EMK's suspension from Harvard for cheating, Chappaquiddick, and the recent rape charges filed against EMK's nephew, William K. Smith. Danforth calls the commercial "sleazy" and the White House deems the personal attacks "reprehensible." (*The New York Times*, 9/4/1991)

On the 5th, EMK aide and Labor Committee staff member Seidman interviews University of Oklahoma Law Professor Anita Hill as part of a systematic review of Thomas's colleagues. When asked about rumors that Thomas sexually harassed Hill while she was his colleague at the Department of Education and the Equal Opportunity Employment Commission, Hill indicates that she needs more time to decide whether she will discuss the issue. (*The New York Times*, 10/8/1991)

On the 9th, Hill tells Seidman that she is willing to discuss Thomas's allegedly inappropriate sexual advances. Osolinik and Blattner tell Seidman that this is not time for EMK to become involved in a sexual harassment case—both for his own sake and because such an accusation would not be credible coming from EMK. Seidman refers Hill to a second Labor Committee staff member, Jim Brudney. (Clymer, p. 496; *The New York Times*, 10/8/1991)

On the 10th, confirmation hearings for Thomas begin. Biden interrogates Thomas on his philosophy towards abortion and property rights. EMK then briefly questions Thomas on his views on sexual discrimination in the workplace. (*The New York Times*, 9/11/1991)

Also on the 10th, Hill tells Brudney her story. Metzenbaum is not interested, and tells his staff to pass it along to Biden. (Clymer, p. 496)

On the 11th, the Labor Committee passes Hill's allegations on to the Judiciary Committee with the recommendation that they contact Hill. The Judiciary Committee responds that Hill will have to contact them instead.

On the 12th, Thomas faces the toughest questioning yet from Democrats, who have become frustrated by Thomas's unwillingness to disclose his views on abortion and other social issues. Biden further grills Thomas on natural law and sexual relations between unmarried couples, and deems one of Thomas' hollow responses "the most unartful dodge that I have heard." (*The New York Times*, 9/13/1991)

Also on the 12th, Hill contacts the Judiciary Committee and speaks with Harriet Grant, the chief communications counsel. Hill requests that the allegations be kept secret from Thomas, but is told that the nominee must have a chance to respond. (*The New York Times*, 10/8/1991)

On the 16th, EMK chief of staff Ranny Cooper contacts Ellen Lovell, chief of staff to Leahy, reportedly concerned that nothing is happening with the Hill accusations.

On the 18th, the Judiciary Committee receives a call from a Hill associate who claims that Hill had complained to her about Thomas's behavior in the spring of 1981. (*The New York Times*, 10/8/1991)

On the 19th, Hill informs the Judiciary Committee that she wants the full committee to know of her concerns and asks to be apprised of her options. (*The New York Times*, 10/8/1991)

Also on the 19th, Leahy appeals to Biden to move on Hill's allegations, and Biden asks the FBI to investigate. Hill is unwilling to speak with the FBI. (Clymer, p. 496)

On the 23rd, Hill sends Biden a four-page account of Thomas's attempts to date her while she worked for him, his discussions of pornographic movies, and his admission that it would ruin his career if she ever told anyone. Biden informs the White House and Thurmond, the senior Republican on the Judiciary Committee, of Hill's willingness to testify, touching off a hasty FBI inquiry into Hill's allegations. (Clymer, pp. 496-497; *The New York Times*, 10/8/1991)

On the 25th, two days before the Judiciary Committee's scheduled vote on the nomination, the FBI reports its findings to the White House and Biden. (*The New York Times*, 10/8/1991)

Following Leahy's announcement of his opposition earlier in the week, Senator Herb Kohl (D-WI) and Heflin announce their opposition to Thomas on the 26th. All Democrats opposed to the nomination have not cited any single issue as a reason, but broad dissatisfaction with the quality of Thomas's responses, which they believe to be lacking in substance and rehearsed for specific audiences. Although they have not yet formally announced their intentions, Simon, Metzenbaum, and EMK are expected to oppose the nomination as well. Clymer states that EMK did not stake out an early position due to the delayed responses of rights groups and his current partnership with Danforth on a civil rights bill. (Clymer, p. 494; *The New York Times*, 9/27/1991)

On the 27th, the Judiciary Committee votes 7-7 on the Thomas nomination and sends it to the floor, even though a tie could have held the nomination in committee. (Clymer, p. 497)

October On the 5th, the Hill story is broken in the press. (Clymer, p. 497)

On the 7th, Hill holds a news conference in which she defends her accusation of sexual harassment against Thomas and assails the Judiciary Committee for giving her allegations short shrift. (*The New York Times*, 10/8/1991)

On the 8th, the full Senate vote on the Thomas nomination is postponed in favor of three additional days of Judiciary Committee hearings.

Additional Judiciary Committee hearings take place from the 10th to the early morning of the 14th. Hill discusses her allegations against Thomas in excruciating detail, yet Biden gives into the Republican offensive led by Specter, who accuses

Hill of fantasy, resentment, political conspiracy, and later perjury. Although EMK has done some private negotiating for Hill witnesses, he has little to say but for a short defense of Hill's character on the 13th. EMK tells witnesses testifying on behalf of Hill, "Some people just don't want to believe you." (Clymer, pp. 497-498; *The New York Times*, 10/14/1991)

On the 15th, the day of the full Senate vote, EMK denounces on the floor the Judiciary Committee's treatment of Hill. Specter hits back, saying, "We do not need characterizations like 'shame' in this chamber coming from the Senator from Massachusetts," and Hatch adds, "Anyone who believes that—I know a bridge up in Massachusetts that I'll be happy to sell them." Thomas is confirmed 52-48. EMK votes against the nomination. (*1991 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1991, p. 29-S; Clymer, p. 499)

EMK is criticized for not taking a more active role in attacking Thomas and defending Hill, and a post-confirmation Gallup poll finds that EMK has garnered only a twenty-two percent approval rating, whereas Specter receives a rating of forty-eight percent. A *Boston Globe* editorial speculates that EMK did not take a more definitive stand against Thomas due to his own reputation as a womanizer, and feminist columnist Anna Quindlen writes that EMK's behavior during the Thomas hearings proved that personal behavior does matter to political fitness. (Clymer, p. 499; *The New York Times*, 10/19/1991, 10/21/1991)

1993

June

On the 14th, Federal Appeals Court Judge Ruth Bader Ginsburg is nominated by President Bill Clinton to succeed Byron White as Associate Justice. Ginsburg is known as a thoughtful moderate who eschews judicial activism. (*1993 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1993, p. 319)

The Ginsburg nomination is a disappointment for EMK, who favored the nomination of Harvard Law professor and Chief Justice of the U.S. Court of Appeals for the First Circuit Stephen Breyer, formerly an EMK aide and Chief Counsel to the Judiciary Committee. Breyer appeared to be the leading choice in late May and early June, but Senator Daniel Patrick Moynihan (D-NY) quietly backed Ginsburg until it was revealed that Breyer did not pay Social Security taxes for his house cleaner and he failed to impress Clinton in a highly publicized personal interview. Still, EMK praises Ginsburg's work for women's rights, eliciting a sigh of relief from the White House, which had feared offending EMK with the Ginsburg nomination. (Clymer, pp. 526-527; U.S. Senate Homepage)

July

Confirmation hearings for Ginsburg take place from the 20th to the 23rd. During the first day of questioning, EMK prompts Ginsburg to discuss her efforts to break down legal barriers to the advancement of women. (*The New York Times*, 8/21/1993)

On the 29th, the Judiciary Committee unanimously approves the Ginsburg nomination. (*The New York Times*, 7/30/1993)

August

On the 3rd, Ginsburg's nomination is approved 96-3 by the full Senate. EMK votes in favor. Ginsburg is the first Supreme Court justice to be nominated by a Democratic president since LBJ's nomination of Marshall, and her confirmation comes at a time when a woman's right to an abortion is hanging by a thread: the Court upheld it by a scant 5-4 vote in *Planned Parenthood of Southeastern Pennsylvania v. Casey* of 1992. (*The New York Times*, 8/4/1993)

1994

April

On the 6th, Blackmun announces his retirement from the Supreme Court. Clinton has said he would like to place an individual with real-world political experience on the bench, and Senate Majority Leader George Mitchell (D-ME) becomes the leading contender to replace Blackmun. (Clymer, p. 539; *1994 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1994, p. 303)

On the 12th, Mitchell announces that he will not take the post, claiming that it would compromise his ability to get health insurance legislation passed. EMK quickly advances Breyer's name to Clinton once more, who is also considering Federal Circuit judge Richard S. Arnold and Secretary of the Interior Bruce Babbitt as potential nominees. (Clymer, p. 539)

May

On the 7th, ranking Republican on the Judiciary Committee Hatch tells Clinton and EMK that he will oppose Babbitt, urging EMK to make the case for Breyer.

On the 10th, EMK and Clinton speak about national health insurance at a meeting of the American Federation of Teachers. In a corridor of the Hyatt Regency Hotel, Clinton praises EMK's new health insurance plan in front of a reporter. EMK thanks Clinton for spending time with his son Patrick, who is running for a House seat in Rhode Island. EMK then turns Clinton so the reporter cannot hear and tells him what a great selection Breyer would make. As Breyer's other allies, such as White House counsel Lloyd Cutler, push the nomination in the coming days, EMK continues to call Clinton, convinced that his 1993 failure was due to the fact that Moynihan spoke to Clinton last. (Clymer, pp. 539-540)

On the 13th, Clinton announces his selection of Breyer as Associate Justice after Judge Richard Stearns tells him that Babbitt would write fine dissents, but that Breyer would be a leader. Arnold's recent diagnosis with cancer has eliminated him from the pool, and Breyer's clear bipartisan support is appealing to Clinton, who is pursuing a loaded legislative agenda. (Clymer, p. 540; *The New York Times*, 5/14/1994)

On the 17th, Breyer's nomination is received by the Senate. (U.S. Senate Homepage)

July Confirmation hearings for Breyer are held from the 12th to the 15th. During the hearings, Breyer tries to dispel his technocratic image, avoids saying too much on topical issues such as voting rights and abortion, and comments most extensively on the importance of the separation between church and state. Breyer is generally well-received; his most vocal critic is Metzenbaum, who questions Breyer on a potential conflict of interest between Breyer's investments with Lloyd's of London and several pollution cases over which he presided. (1994 *Congressional Quarterly Almanac*, pp. 308-309)

On the 19th, Breyer is approved 18-0 in the Judiciary Committee. Although he expresses fears that Breyer will not look out for the interest of consumers and small business in antitrust cases, Metzenbaum still votes for Breyer. (1994 *Congressional Quarterly Almanac*, p. 310)

On the 29th, Breyer is confirmed 87-9 by the full Senate. EMK votes in favor. Senator Richard Lugar (R-IN) leads the opposition based on Breyer's investments with Lloyd's. (1994 *Congressional Quarterly Almanac*, pp. 310, 42-S)

2003

January President George W. Bush nominates John Roberts, Jr. to the D.C. Circuit Court of Appeals. The Judiciary Committee approves Roberts 16-3, with Senators Richard Durbin (D-IL), Charles Schumer (D-NY), and EMK in opposition. (*The Washington Post*, 6/2/2003)

May On the 8th, the Senate unanimously votes in favor of Roberts. (*The Washington Post*, 6/2/2003)

2005

July On the 29th, Roberts is nominated as Associate Justice by Bush. (U.S. Senate Homepage)

September On the 6th, Roberts is nominated as Chief Justice by Bush. (U.S. Senate Homepage)

On the 12th, confirmation hearings for Roberts begin.

On the 13th, EMK questions Roberts on his positions on the constitutionality of extant civil rights legislation, such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act. EMK particularly focuses on voting rights, which Roberts had previously claimed was beyond the jurisdiction of the Court. Roberts points out that at the time he expressed these opinions, he was a

staff lawyer at the Department of Justice under Reagan. (Roberts Confirmation Hearings Transcripts, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/09/14/LI2005091402149.html>)

On the 14th, EMK follows up with Roberts on civil rights and affirmative action. (Roberts Confirmation Hearings Transcripts)

On the 20th, Senate Minority Leader Harry Reid (D-NV) announces his opposition to Roberts. (*The Boston Globe*, 9/23/2005)

On the 21st, EMK and Kerry declare their opposition to the Roberts nomination. On the same day, ranking Democrat on the Judiciary Committee Leahy announces his support of Roberts. (*The Boston Globe*, 9/23/2005)

On the 22nd, Roberts is approved by the Judiciary Committee 13-5. Three of the committee's eight Democrats join all ten Republicans in supporting the nomination. EMK is joined in the opposition by Senators Dianne Feinstein (D-CA), Schumer, Durbin, and Biden. (*The Boston Globe*, 9/23/2005)

On the 29th, Roberts is confirmed 78-22 by the full Senate, and is sworn in as Chief Justice just hours later. Senate Democrats split 22-22 on the vote. Democrats voting against Roberts include moderates with presidential aspirations, such as Senators Hillary Rodham Clinton (D-NY), Evan Bayh (D-IN), and Biden. (*The Washington Post*, 9/30/2005)

October On the 7th, Harriet Miers is nominated as Associate Justice. (U.S. Senate Homepage)

On the 27th, Miers requests that Bush withdraw her nomination following a Republican attack on her judicial and conservative credentials. At the withdrawal announcement, both Miers and Bush cite concern for Judiciary Committee requests for documents regarding Miers's work as White House counsel, which the administration has withheld as privileged. (*The Washington Post*, 10/28/2005)

On the 31st, Alito is nominated by Bush as Associate Justice.

December On the 1st, Schumer demands to know why Alito omitted references to a seventeen-page abortion strategy memo in a Judiciary Committee questionnaire, and EMK claims that "a credibility gap is emerging with each new piece of information released on Judge Alito's record." (*The Washington Post*, 12/2/2005)

On the 5th, EMK asks Alito to provide a fuller explanation of why he failed to recuse himself from a 2002 case involving the Vanguard investment company after telling the Senate in 1990 that he would not rule on Vanguard matters due to his investments in the firm. (*The Washington Post*, 12/6/2005)

On the 22nd, EMK sends a request to Judiciary Committee Chairman Specter requesting a subpoena for documents belonging to *National Review* editor William Rusher, sealed at the Library of Congress until Rusher's death. EMK believes that the documents may expose information about Alito's involvement in Concerned Alumni of Princeton (CAP), a conservative group founded by Rusher that opposed the admission to Princeton of women and minorities. Alito included his CAP membership on a 1985 job application for a position at the Department of Justice under Reagan.

2006

January

On the 9th, confirmation hearings for Alito begin. In opening statements, EMK focuses on the Vanguard case and Alito's belief with regards to executive authority, privacy, and job discrimination, claiming that, "...the record troubles me deeply." (Alito Confirmation Hearings Transcripts,

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900755.html>)

On the 10th, EMK questions Alito further on Vanguard, his alleged deference to "government over individuals," and Alito's concept of executive power, focusing on Alito's advocacy of "presidential signing statements" as a DOJ official under Reagan. EMK alleges that a presidential signing statement was issued in December by Bush to exempt the executive branch from a recent anti-torture law. (Alito Confirmation Hearings Transcripts; *The Washington Post*, 1/11/2006)

On the 11th, EMK grills Alito further on the Vanguard case, claiming that Alito violated his promise to the committee to recuse himself. In addition, EMK requests that Specter motion to vote on the subpoena of Rusher's documents pertaining to CAP. Rusher agrees to grant EMK's staff access to the records, although Specter cites a November 26th *New York Times* article by David Kirkpatrick claiming that Kirkpatrick had access to the documents and did not find substantial evidence of Alito's participation in CAP. Alito denies having participated actively in the group, and that he did not know until recently that CAP advocated beliefs discriminating against women and minorities. (Alito Confirmation Hearings Transcripts)

On the 12th, Specter announces to the committee that Alito's name was not mentioned in Rusher's records, and Rusher claims Alito was not heavily involved in CAP, if at all. (Alito Confirmation Hearings Transcripts)

On the 19th, EMK, Judiciary Committee Ranking Democrat Leahy, Durbin, and Senator Ken Salazar (D-CO) announce their opposition to Alito. EMK calls the confirmation vote "the vote of a generation," but does not mention CAP or Vanguard. (*The Washington Post*, 1/20/2006)

On the 24th, Alito is recommended 10-8 along party lines by the Judiciary Committee. Two days later EMK and Kerry call for a filibuster of the Alito nomination. They acknowledge the possibility that the filibuster may fail, but hope that extended debate will draw further attention to Alito's record on abortion, civil rights, and presidential power. Unlike during the Roberts confirmation process, EMK has placed little emphasis on civil rights during the Alito confirmation.

On the 31st, the Senate confirms Alito 58-42. EMK votes against confirmation.

OMNIBUS JUDGESHIP ACT OF 1978 - BACKGROUND

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Summary

Shortly after taking office in 1977, Attorney General Griffin B. Bell established a new Office for Improvements in the Administration of Justice, which generated numerous legislative proposals aimed at increasing the efficiency of the federal court system. The most far-reaching achievement was the Omnibus Judgeship Act of 1978 (hereafter OJA), creating 117 new district court positions and 35 new spots on the courts of appeal. The bill had been called for to relieve overloaded court dockets, but a Democratic Congress was waiting for a Democratic president before passing a bill that would entail such a “patronage bonanza”.

The bill included a House amendment requiring the president to issue standards and guidelines for merit selection of federal district judges. Carter’s Executive Order 11972 of February 14, 1977, which created the United States Circuit Judge Nominating Commission, had established such guidelines for the circuit courts, but did not cover district courts. The House amendment was an effort on the part of liberals and Republicans to “force Carter into a strong position on merit selection.” However, the language adopted was vague and non-binding, allowing the Carter to “waive such regulations with respect to any nomination by notifying the Senate of the reasons for such waiver.” (1978 *Congressional Quarterly Almanac*, pp. 163-164, 175)

The bill was deadlocked in conference for four months due to a Senate proposal to divide the southern Fifth Circuit into two circuits. The proposal was eventually rejected and new ambiguous language substituted, which allowed circuits with a large number of appeals judges to experiment administratively with ways of operating the courts more efficiently. The Fifth Circuit issue dominated the conference, but the most significant feature of the bill was its addition of 152 federal positions to the existing 495 judgeships. Before OJA, the federal court system was divided into eleven circuit courts with 97 judges and 94 district courts with 398 judges.

Timeline

1977

- May* On the 3rd, the “Omnibus Judgeship Bill” is reported by the Senate Judiciary Committee. It provides for 146 new judgeships.
- On the 24th, the Senate passes the bill (S 11) by voice vote after amending the bill to provide for two additional judgeships.
- November* Overriding the plans of its Chairman, the House Judiciary Committee orders reported a bill (HR 7843) on the 30th recommending the creation of 145 new judgeships. Chairman Peter W. Rodino (D-NJ) wanted to limit the number to 115. House action is held over until 1978.

1978

- February* On the 7th, the House passes HR 7843 by a vote of 319-80.
- April* On the 11th, the eight Senate and House conferees begin meeting. They agree to create 117 new district judgeships and 35 new appeals court positions. The Senators convince the House conferees to accept a watered-down version of the House merit selection provision, an amendment sponsored by Representative John F. Seiberling (D-OH). The issue of the potential division of the Fifth Circuit bogs down the conference, however, and they do not reach an agreement until September 20th. The underlying issue of the split is civil rights. The proposed division would separate Texas and Louisiana from the rest of the Fifth Circuit (Georgia, Alabama, Mississippi, and Florida) to create a new 11th circuit, which Senate Judiciary Committee James O. Eastland (D-MS) favors. However, the fear is that the new Fifth Circuit consisting of the Deep South will not be vigilant enough in favor of civil rights. (*1978 Congressional Quarterly Almanac*, p. 176)
- May* On the 11th, Carter issues a revised executive order (12059) in order to encourage the merit panels “to make special efforts to seek out and identify well qualified women and member of minority groups as potential nominees.” The original order establishing the merit panels did not emphasize affirmative action, although the panels themselves were made up of 45 percent women and 24 percent racial minorities. (Sheldon Goldman, *Picking Federal Judges*, New Haven, CT: Yale University Press, 1997, p. 239)
- September* On the 19th, Attorney General Griffin B. Bell irons out a compromise acceptable to both Chairman of the House Judiciary Committee Rodino and Chairman of the Senate Judiciary Committee Eastland. The compromise, consisting of two parts, states: 1) “Any court of appeals having more than fifteen active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of U.S. Courts” and 2) “may perform its *en banc* function by such number of members of its *en banc* courts as may be prescribed by the rule of the court of appeals.” (*1978 Congressional Quarterly Almanac*, p. 176)
- October* On the 4th, the House votes in favor of the compromise by a vote of 292-112.
- On the 7th, the Senate votes in favor of the compromise by a vote of 67-15. EMK votes in favor.
- Carter White House Counsel Robert J. Lipschutz and Bell begin drafting guidelines for the selection of judges created by the OJA. Lipschutz and Bell disagree on several issues. For instance, Bell wants Carter to sign the executive order on selection guidelines immediately, whereas Lipschutz wants key senators, particularly EMK, as the incoming Chairman of the Judiciary Committee, to review the draft. Carter agrees with Lipschutz. EMK reviews the draft and

persuades Bell to agree to delete one paragraph because it is not sufficiently sensitive to affirmative action concerns. (Goldman, p. 248)

November On the 8th, Carter signs the executive order. Bell devises a questionnaire for the senators or their selection commissions to complete when recommending one or more persons for a district court judgeship. Bell reports to Carter that he has tested the questionnaire on a few senators, including EMK, and that he is satisfied they have a workable system. However, most Democratic senators ignore the message from the White House on affirmative action. Carter writes each Democratic senator urging that they recruit women and minorities. (Goldman, pp. 248-49) After the EO is signed, several newspapers report that senators had sent in their lists of preferred candidates before the merit standards were set. Senator Lloyd Bentsen (D-TX), for instance, is quoted as saying, "I am the merit commission for Texas." EMK as well is reported as sending in his list before the standard has been set, although he did utilize a "voluntary commission" to pick the 15 finalists. (*The Washington Post*, 11/09/1978)

OJA creates a new position on the First Circuit that is speculated to go to Massachusetts, the largest state in the circuit and EMK's home state. Later in the month, *The New York Times* reports that EMK's choice for the new circuit judgeship is expected to be former Watergate prosecutor Archibald Cox. However, due to Cox's age (he is sixty-seven) he would receive a "non-qualified" rating from the American Bar Association. The Judicial Selection Commission panel for the First Circuit unanimously supports him, however, and EMK openly pushes for his nomination. Carter resists, and the seat remains unfilled for two years because of the deadlock. That EMK challenges Carter for the Democratic presidential nomination in early 1980s further complicates the matter. (Goldman, p. 261)

December On the 8th, *The New York Times* reports that Senator Harry Byrd (I-VA) and the Carter administration are fighting over the fact that Byrd's two commissions have nominated nine white males to the four judgeships positions created by OJA. Carter is reported as saying he will use all his influence to have the Senator's list expand to include women and minority nominees. (*The New York Times*, 12/08/1978)

1979

January When EMK becomes Chairman of the Senate Judiciary Committee, the Senate judicial confirmation process changes significantly. EMK makes it clear that senators who withhold the "blue slips" of persons nominated from their states can no longer rely on the Chairman to kill those nominations. Every nomination will be discussed by the full committee, and the committee will determine whether or not to proceed with the nomination by holding a hearing. This will give the administration a little more leeway on its dealings with obstinate senators and modifies the tradition of senatorial courtesy afforded the senator from the

nominee's home state. EMK also quietly informs the Carter administration that he will support an administrative effort to circumvent Senator Harry Byrd's commission, which has nominated nine white males to four Virginia judgeships. Other innovations implemented by EMK include adopting a questionnaire that all nominees have to complete, and, with the exception of a limited number of questions, are publicly available. Furthermore, the Committee begins to publish its nomination hearings, and EMK establishes the Committee's own investigatory staff to examine the nominee's backgrounds independent of the Justice Department. (Goldman, p. 263)

June On the 3rd, *The New York Times* reports on the stalemate between EMK and the Carter administration regarding the candidacy of Archibald Cox to a newly created position on the United States Court of Appeals for the First Circuit. Both EMK and Carter's merit commission support his nomination, whereas Attorney General Griffin Bell does not, arguing Cox is too old (he is 67, three years above the guidelines from the American Bar Association). According to *The New York Times*, part of the problem is the fact that EMK announced his support for Cox before the merit commission had convened. Furthermore, the Justice Department is displeased with the procedure utilized by the commission. It recommended Cox along with four other names without Cox's legal reputation, as opposed to forwarding the list of five names to the Department of Justice and the White House for a final decision as it was supposed to. (*The New York Times*, 06/03/1979)

1980 Once Carter wins re-nomination, he begins negotiations with EMK to obtain his support in the general campaign. One of EMK's conditions, which Carter agrees to, is that the First Circuit seat be filled by the Chief Counsel to the Judiciary Committee, Stephen G. Breyer. EMK wins support for Breyer's nomination from the ranking Republican on the Judiciary Committee, Strom Thurmond (R-SC) and Breyer is confirmed. However, seeing as both Cox and Breyer were EMK's choices before the merit selection commission even met, it appears as if the commission has become merely window dressing. (Goldman, p. 261)

EMK CHAIRMANSHIP OF THE JUDICIARY COMMITTEE 1979-1981

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1978

March Senator James O. Eastland (D-MS), Chairman of the Senate Judiciary Committee, announces his retirement, making Edward Moore Kennedy (EMK) the next Chairman if the Democratic Party wins a majority in the midterm elections.

November On the 8th, *The Washington Post*, in a story on the retiring members of Congress, writes that with Eastland's retirement and EMK's takeover of the Judiciary Committee the days when civil rights bills were bottled up in the committee will fade into memory. (*The Washington Post*, 11/08/1978)

1979

January *The Washington Post* reports on the 1st that as the incoming Chairman of the Senate Judiciary Committee EMK will bring a "trio of his aides" to run the Committee staff. David Boise will become Chief Counsel and Staff Director; Edward Merlis will serve as Deputy Staff Director. (*The Washington Post*, 01/01/1979)

On the 25th, *The Washington Post* reports on the new Chairman of the Judiciary Committee, commenting on his ambitious legislative agenda for the new congressional session as well as his young age (46 years old). According to the article, EMK plans to act on legislation to deregulate the trucking industry, rewrite the federal criminal code, provide a new charter for the FBI, revamp the Law Enforcement Assistance Administration, revise antitrust laws, give consumers the right to file antitrust cases, set new standards for permissible mergers and takeovers, revise immigration and refugee laws, reform the federal courts, and more. EMK also states he will hold the Carter administration to its pledge to appoint 152 new federal judges according to merit, paying special attention to women and minorities. As opposed to Eastland's committee, the Judiciary Committee under EMK is expected to be more overtly liberal. According to *The Washington Post*, EMK and "his allies" succeeded in convincing the Senate's Democratic Steering Committee in putting three Democrats sympathetic to EMK on the committee – Max Baucus (D-MT), Howell Heflin (D-AL), and Patrick J. Leahy (D-VT) – supplanting the previous southern Democrats. This means that EMK's original plan of abolishing all but four of the ten original subcommittees must be abandoned, as Baucus and Heflin both will be given their own subcommittee. Leahy reportedly does not want one. EMK is rattling both Republicans and the Carter administration, Republicans because of his proposal to institute formal rules and Carter because of his potential rivalry in the 1980

election. (*The Washington Post*, 01/25/1979; *1979 Congressional Quarterly Almanac*, p. 361)

On the 26th, *The Wall Street Journal* reports that the new chairman of the Judiciary Committee is ending the “blue slip” system where senators from the state of the nominee can effectively stop the nomination by withholding the blue evaluation slip from the Judiciary Committee. (*The Wall Street Journal*, 01/26/1979)

- Spring* President Carter and EMK clash over the vacancy on the First Circuit Court of Appeals. EMK as well as Carter’s eleven member merit commission support the nomination of former Watergate prosecutor Archibald Cox, whereas Attorney General Griffin Bell argues he is too old. EMK accuses Carter of rejecting Cox simply because Cox had supported Representative Morris K. Udall (D-AZ) in the 1976 Democratic presidential race and that the President is using the age limit as an excuse. According to Adam Clymer, the relationship between the Carter and EMK staffs is icy and worn out with suspicion. (Adam Clymer, *Edward M. Kennedy*, New York: William Morrow and Company, Inc., 1999, p. 281)
- July* On the 26th, after cooperating with the Carter administration and the House Judiciary Committee, the Senate Judiciary Committee reports S 643 – the Refugee and Immigration Amendments Act - out of committee. This act triples the number of refugees allowed into the United States and would replace the Indo-Chinese Refugee Act as well as a number of temporary refugee assistance programs. (*1979 Congressional Quarterly Almanac*, p. 392)
- September* On the 6th, the Refugee and Immigration Act Amendments passes 85-0, with EMK as the chief sponsor of the bill. EMK characterizes existing refugee laws as “inadequate, discriminatory and totally out of touch with today’s needs.” Under existing laws, refugees are “admitted in fits and starts, and after long delays and great human suffering.” With the House passing a different version of the bill, a conference is expected to take part in the next session of Congress. (*1979 Congressional Quarterly Almanac*, p. 392)
- November* On the 7th, EMK announces his bid for the Democratic presidential nomination.
- December* On the 13th, Congress clears and sends to the President compromise legislation to restructure the “embattled” Law Enforcement Assistance Administration (LEAA). President Carter signs the legislation on the 27th. Under the restructuring plan, a new office of Justice Assistance, Research and Statistics (OJARS) is established to set broad program policies jointly with LEAA officials. The Attorney General will resolve any disputes between the two agencies. (*1979 Congressional Quarterly Almanac*, p. 370)

According to the *1979 Congressional Quarterly Almanac*, only a handful of bills from the Judiciary Committee cleared Congress in 1979 and none of them

constituted major legislation. Highlights were legislation to revamp the much-criticized Law Enforcement Assistance Administration (LEAA), a bill to expand the authority of federal magistrates to hear civil and criminal cases, and legislation to postpone for one year enforcement of strict limits for conducting federal criminal trials. (*The Washington Post*, 01/25/1979; *1979 Congressional Quarterly Almanac*, p. 361)

1980

January On the 17th, the Senate Judiciary Committee's 400-page proposal to re-write and re-codify the federal criminal code is reported to the Senate floor. It is the third major attempt since 1973 to re-write the federal criminal code and represents a compromise between EMK, ranking minority member Strom Thurmond (R-SC), as well as Senator Orrin G. Hatch (R-UT). Immediately afterwards, the Committee reports a unanimous decision to re-establish the death penalty for federal crimes such as treason, espionage, and kidnapping that result in death. EMK had agreed to consider the issue immediately after the criminal code revision. In the end however, the revision of the federal crime bill is not considered on the floor. Having been shepherded through committee by EMK, the bill is left in limbo after he decides to challenge Carter for the presidential nomination. After EMK concedes the nomination to Carter at the Democratic national convention in the summer, Congress reportedly starts concentrating on re-election rather than passing legislation. (*1979 Congressional Quarterly Almanac*, pp. 363-369; *1980 Congressional Quarterly Almanac*, pp. 371, 393)

March On the 4th, after months of staff investigation and three days of hearings regarding alleged ethical misconduct, the Judiciary Committee rejects the nomination of Charles B. Winberry, Jr., a district court judge nominee from North Carolina. This marks the first time in more than 40 years that the Senate votes down a district court nominee, who traditionally have been hand-picked by Senate colleagues. According to *The Washington Post* the event marks a change in the Senate's "rubber-stamping buddy system" of approving federal judgeships. (*The Washington Post*, 03/09/1980)

On the 17th, Carter signs the Refugee Act of 1980, the compromise version of the Refugee and Immigration Act Amendments of last year. It nearly triples the number of refugees allowed to enter the United States each year, it establishes new procedures for admitting refugees and for resettling them once they arrive in the U.S. It marks the first revamping of refugee and immigration laws since 1965. (*1980 Congressional Quarterly Almanac*, p. 372)

June On the 20th, Congress clears the trucking deregulation bill supported and promoted actively by both EMK and Carter. Whereas the bill does not go as far as EMK and Carter want it to, they support the final measure and argue this will provide substantial regulatory relief. In an election year, this is one of the few measures EMK and Carter cooperate on. (*1980 Congressional Quarterly Almanac*, p. 242)

October Despite the failure of the criminal code bill, Congress clears a bill on the 1st that overturns a 1978 Supreme Court decision allowing surprise searches of newsrooms. Carter signs the 1980 Privacy Protection Act into law on the 13th. (*1980 Congressional Quarterly Almanac*, p. 372)

Also on the 1st, Congress ends a 30-year debate by creating procedures for disciplining federal judges short of removing them from the bench through impeachment. (*1980 Congressional Quarterly Almanac*, p. 372)

A third important piece of legislation passed on the 1st is the bill dividing the Fifth Circuit Court of Appeals into two smaller jurisdictions. Whereas such a proposal had met with strong opposition from civil rights groups in 1978 and had not been enacted, this time the bill passes. The legislation removes Alabama, Florida, and Georgia from of the Fifth Circuit and includes them in a new 11th Circuit. Neither the Legal Defense Fund nor the American Civil Liberties Union oppose the legislation this time around. (*1980 Congressional Quarterly Almanac*, p. 390)

December On the 9th, the major civil rights legislation of the 96th Congress dies in the Senate after an 11th hour compromise fails. The legislation, intended to strengthen federal fair housing laws, falls victim to a filibuster led by Thurmond and Hatch despite EMK's efforts on the floor, together with David L. Boren (D-OK).