

then I say we have destroyed that authority in the President. Rather than destroy it in this case, let us face it the way we should face it. If we feel that it is now our responsibility to pick a candidate because he is a liberal or because he is a moderate or because he is a conservative, then let us place before this body a constitutional amendment to place in the Senate of the United States the authority to appoint members of the Supreme Court of the United States. Consideration was given to placing this authority in the Senate but was decided against.

I might suggest that if we now say that because this country is moving in one direction or another, we must deny a man this seat because he does not ideologically fit in that pattern, then I ask the American people, "Is not every facet of the American society entitled to be represented on the Court," even though I may personally disagree with him?

Mr. KENNEDY. Mr. President, will the Senator yield?

Mr. COOK. I yield.

Mr. KENNEDY. How does the Senator conceive our responsibility? Are we supposed to be just a rubberstamp to the President?

Mr. COOK. Not at all.

Mr. KENNEDY. The Constitution clearly points out that this is a question of advise and consent. Would the Senator not agree with me that there is a different standard that should be applied in terms of the judiciary than should be applied, say, to Cabinet officials, whose term is, in effect, coterminous with that of the President of the United States? Does the Senator not agree with me, therefore, that the kind of review we would give in a judicial appointment, and the standard we would apply, would be different?

Mr. COOK. I agree.

Mr. KENNEDY. So I gather, from what the Senator has said, that the function of the Senate is not to be just a rubberstamp. Would the Senator not agree with that as well?

Mr. COOK. I agree with that.

Mr. KENNEDY. Therefore, I gather from the thrust of the Senator's argument that we have a responsibility to exercise our own, independent judgment. Is that not correct?

Mr. COOK. That is correct.

But I would say to the Senator that, if that be the case, declare it on that basis, and every man should stand up and declare it on that basis. But one should not use another motive or another reason to go around the fact that one wants it declared on an ideological basis; and if one does, he should honestly take that position.

The PRESIDING OFFICER (Mr. HOLLINGS in the chair). The time of the Senator from Kentucky has expired.

Mr. ERVIN. Mr. President, I ask unanimous consent that I may ask one question of the Senator from Kentucky and make a short statement.

Mr. DOLE. Mr. President, I yield 5 minutes of my time to the Senator from Kentucky.

Mr. ERVIN. I ask the Senator from

Kentucky if the so-called bill of particulars, known as the Bayh bill of particulars, does not consist largely of conclusions rather than facts.

Mr. COOK. It deals totally with conclusions.

Mr. ERVIN. And is it not honeycombed with conclusions that are not supported by the evidence taken before the committee?

Mr. COOK. It is.

Mr. ERVIN. I should like to make this statement: I think the Senator from Kentucky expressed my only misgiving concerning Judge Haynsworth, and that is the fact that he did not have a perfect memory and that when he purchased the Brunswick stock, he was forgetful of the fact that the Brunswick case had been argued and decided some 6 weeks before, but the opinion had not been written and had not been handed down.

I spent 15 years of my life in discharging what Walter Malone, the poet judge of Memphis, Tenn., called judging one's fellow travelers to the tomb. I spent 2 years as judge of a criminal court. I spent 7 years as a judge of the North Carolina Superior Court, which is our court of general jurisdiction and which tries most important civil and criminal cases. I spent more than 6 years as an associate justice of the Supreme Court of North Carolina. In these various capacities, I decided or participated in the decision of thousands of cases.

As a member of the supreme court, I spent many weeks studying many cases and writing opinions on them. Out of all these thousands of cases, if my life depended on it, at this moment I could not name more than a dozen or so of the litigants. I can remember the points of law involved. And this is perfectly natural, because judges—especially judges of appellate courts, who never see the parties litigant—are interested only in the points of law involved. As a consequence, they do not retain in their minds the names of the litigants.

As a result of my own experience, it is perfectly understandable to me why Judge Haynsworth had this unfortunate lapse of memory. That is the most that can be said about it. It did not affect his decision. The decision had already been made, and it was altogether concurred in by every member of the court of appeals, as well as by two U.S. district court judges—one who had heard it originally, and one who sat on the court of appeals and helped to decide it.

Mr. COOK. Certiorari was denied by the Supreme Court, also.

Mr. ERVIN. I want to commend the able and eloquent Senator from Kentucky upon a most accurate and illuminating exposition of what the testimony revealed in respect to the charges made against Judge Haynsworth on conflict of interest and ethical grounds.

Mr. BAKER. Mr. President, I ask unanimous consent that I may proceed for not to exceed 5 minutes.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. BAKER. Mr. President, may I take this brief opportunity to commend the distinguished junior Senator from

Kentucky for a most thoughtful and searching and painstaking analysis of a most difficult problem which confronts the Senate in performing its constitutional function, the problem of whether to advise and consent to the nomination of an Associate Justice of the Supreme Court by the President of the United States.

In these brief moments, I have no desire to restate the splendid points made by the junior Senator from Kentucky. I would make just these observations, because I know them firsthand.

Mr. President, I know the junior Senator from Kentucky to be a junior member of the Committee on the Judiciary and a member of the freshman class of 1969. I know him to serve with great diligence. I know him to be a most conscientious, thorough, and painstaking legislator. I know firsthand some of the dilemma he faced in trying to reach his judgment and conclusion in this case. I am bold enough to suggest it was not an easy task for a conscientious Member of this body. I know he listened carefully to the testimony before the Committee on the Judiciary. I know at times he had doubts. I know at times he was concerned about some of the charges and allegations that were made. I know that on occasion he was incensed in his private way about some of the innuendo that flowed from some of the charges leveled here and elsewhere.

But, Mr. President, I have observed today the product of the deliberations of a great man, and certainly a great colleague. Rather than taking a rigid position based on superficial reasons, or colored reasons determined by philosophical and ideological slant, our most illustrious and distinguished colleague did what I commend all of us do, and that is to examine in detail and depth these "appearances" of impropriety. In my judgment, we should get to the bottom of the barrel and find out with what Judge Haynsworth is being charged and what the facts are, rather than running with the pack or deciding the matter on some liberal or conservative bias, let alone from some geographical bias.

I believe we should all do as he has done. We should make the painful, searching analysis that leads us to an objective judgment. I think we should stop this business of hiding behind the cliché of appearances of impropriety because the appearances of impropriety dealt with in the canons of judicial ethics are created by the person himself and not by a Member of this body. I may create an appearance of impropriety by my words and phrases but I suggest there is no impropriety that has been perpetrated by the distinguished designee for this high post.

Justice Holmes once said, and I believe that all of us would agree he served with great distinction on our High Court:

Lawyers and legislators have the unhappy faculty of devoting their entire adult life to the proposition of shoveling smoke.

I do not impugn the motives of any of my colleagues in their diligent and inquiring prosecution of this question of whether or not we should advise and consent to the confirmation of the nomi-

nation of Judge Haynsworth. Nor do I say that they are shoveling smoke. I rather say we must at all costs guard against it because in the discharge of this constitutional responsibility, in the discharge of this higher duty we have created, as a result of the debate in the Fortas nomination, we cannot afford to shovel smoke. We have to look at the facts and never have the facts been more cogently, clearly, and relatively presented on this issue than has been done this morning by the Senator from Kentucky.

I commend the distinguished Senator. Mr. HRUSKA. Mr. President, I ask unanimous consent that I may proceed for 5 minutes.

The PRESIDING OFFICER. Is there objection? The Chair hears no objection, and it is so ordered.

Mr. HRUSKA. Mr. President, I endorse what has been said by several of our colleagues with reference to the distinguished part the junior Senator from Kentucky is taking in the consideration of the nomination of Judge Haynsworth. He has been perhaps the most faithful in attendance at the sessions during the 8 days of hearings before the Committee on the Judiciary. He has shown by his questions during the hearings a sincere desire to bring out all the facts in a fair way, not out of context. He did not use suspicion or innuendo, or take matters outside of the record in which they were contained. Instead he has made an effort to elicit and have recorded all the facts. The remarks made here this morning likewise show him to be a man who devoted a great deal of study to the facts of this case and to the historical background against which they must be considered.

Mr. President, the so-called bill of particulars has been answered on at least two occasions already. It is going to be answered on future occasions because when the cold analysis of reasoning and all of the facts are applied to that alleged bill of particulars, it will be found to consist of some things taken out of context, of some taken outside of the hearing record, of inaccuracies of statement, and some of bold and erroneous conclusions.

I would not want to detract one iota from the sincerity, diligence, and the integrity of the distinguished junior Senator from Indiana in his efforts to oppose this nomination. Unfortunately, however, I cannot accept the bulk of the conclusions and information of the bill of particulars as being founded in fact and fair interpretation of facts. In due time in connection with other matters, I shall explain in detail the reasons.

Reference has been made to the canons of ethics again and again as grounds for attacking this nomination, and reference will be made in the future. This issue should be answered. These canons of ethics, that are recited so often here, have been in existence between 40 and 45 years. Why is it that in 1963 that the Judicial Conference of the United States had to approve and promulgate a rule flatly saying no member of the Federal Judiciary shall sit on a board of directors or occupy any other office in an corporation engaged in business for profit? It was because the canons of ethics in that

regard were so unclear and ambiguous that it remained for the Judicial Conference in 1963 to clarify them.

Let us consider that title 28, section 455, which prohibits a Federal judge from participating in any case in which he has a substantial interest. Why was that amended in 1949 to make it applicable to appellate judges? Up until that time it applied only to trial judges. The court did not deem the canon sufficient to apply to such situations, and the Congress stepped in to deal with it definitely and without equivocation.

It remained for the Congress and the firm hand of the Judicial Conference of the United States to offer judges some degree of certainty. Until then ambiguity impaired the ability to perceive the rule. This question will be explored further, but I shall suggest now that this reflects upon the ways in which the canons of ethics have operated.

In order to create an illusion of rectitude, key phrases are being chanted again and again in discussion of the nomination. References are made to "appearances of impropriety," and "every judge must be beyond approach." Still another is, "He should avoid giving reason for suspicion of misusing the power of his office." The inference is that the nominee has failed in all these respects.

No man can be without appearance of impropriety, nor can he be beyond reproach, nor can he be above suspicion, if the deficiency is to be found solely in accusations and charges without reference to whether they are true or untrue. If they are untrue and without foundation, merit, or relevance, I submit that they cannot be used to put a man into a state of reproach or put him under suspicion, or to give him the appearance of impropriety.

When we get through with this bill of particulars, it will be seen that such is the case with most of the allegations in that bill.

It would be grossly unfair to subscribe to the idea that the mere making of a statement puts a man under suspicion or reproach. We cannot refrain from testing the veracity, fairness, and applicability of the attacks, charges, diatribes, and accusations. If, merely because they have been asserted, attacks make any nominee guilty, or disqualify him, then the canons of ethics, standards of ethics, standards of good behavior have become instruments of persecution. In fact, it would be a fair bid to reinstate the institution of witch-hunting or witchcraft which I thought we had gotten rid of 300 years ago.

I know of no better way to illustrate this than to point out that canon 25 is quoted in the bill of particulars. It says that a judge should avoid giving grounds for any reasonable suspicion that he is utilizing the power or prestige of his office unfairly and improperly.

Then the fantastic conclusion is reached that the rise in gross sales of the Vend-A-Matic Co., after Judge Haynsworth assumed the Federal bench, justified the suspicion that the prestige of his office was used to promote the well-being of that corporation.

The record contains no evidence to this

effect. There is no reference made by critics to the fact that the vending machine business in the past 15 years has been one of the fastest-growing businesses in America. There is no reference to the fact that there are other vending machine companies in that same area that prospered in as great or greater a measure as the Carolina Vend-A-Matic.

Since when are we to make a judgment on the basis of such a suspicion?

If we are governed by such attacks and upon the suspicion that they create, then indeed, we are defying the most fundamental proposition of our jurisprudence; namely, that a man is not guilty until he is proved to be guilty.

Although this presumption of innocence resides in our criminal laws, let me suggest that there are some sanctions even more cruel than 90 days, 6 months, or 1 year in jail. There is an effort to apply sanctions here in these proceedings of confirmation which are more cruel than the jail sentence or the fine; namely, casting discredit upon a judge who has served with honor and respect for 12 years on the circuit bench and before that was engaged in an honorable and highly respected career as a practitioner of the law.

Viewing innuendoes, suspicions, reproaches, which are sought to be foisted upon him without proper factual backing, I should think that many men would rise up in righteous indignation and declare that the Senate of the United States should not be a party to any such proceeding, that it is unjustified and not factual.

Mr. President, once more I commend the Senator from Kentucky (Mr. Cook) for the fine job he has done in pointing out the facts and uncovering errors. His efforts will certainly be elaborated upon in greater detail in the days ahead.

Mr. GOLDWATER. Mr. President, I was amazed, yesterday afternoon, to be told by one of the press organizations in this country to comment on a story in Newsweek magazine which infers that I would oppose the appointment of Judge Haynsworth.

I merely want to put the record straight. I have no idea where they gathered that information because I have been going across this Nation for the past week or so making speech after speech, and going on television, where I have backed Judge Haynsworth all the way.

I think this is purely a political objection which has been raised to him, which I have so stated across America.

Mr. President, I merely wanted the opportunity to reaffirm on the Senate floor the fact that I have always supported Judge Haynsworth and I intend to support him.

I ask unanimous consent to have printed in the RECORD some remarks I had prepared on the Newsweek article.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

It is nothing new in my experience—and I am sure the same goes for the majority of my colleagues—to find it necessary from time to time to put the record straight after some of our more enthusiastic and

provide for the safety of American troops and those who may wish to leave with them."

Mr. President, the welcome response to our invitation to cosponsor this resolution is another indication of the growing sentiment for peace in the Senate. To this date, a total of 18 Senators have endorsed the resolution. This represents the high water mark of Senate support for any resolution calling for an end to the war in Vietnam.

Mr. President, I ask unanimous consent that the following Senators be listed as cosponsors on the next printing of Senate Resolution 270:

The Senator from Indiana (Mr. BAYH), the Senator from North Dakota (Mr. BURDICK), the Senator from New Jersey (Mr. CASE), the Senator from California (Mr. CRANSTON), the Senator from Alaska (Mr. GRAVEL), the Senator from Oklahoma (Mr. HARRIS), the Senator from Michigan (Mr. HART), the Senator from Minnesota (Mr. McCARTHY), the Senator from South Dakota (Mr. McGOVERN), the Senator from Montana (Mr. METCALF), the Senator from Minnesota (Mr. MONDALE), the Senator from Utah (Mr. MOSS), the Senator from Wisconsin (Mr. NELSON), the Senator from Connecticut (Mr. RIBICOFF), the Senator from Maryland (Mr. TYDINGS), and the Senator from Ohio (Mr. YOUNG).

The PRESIDING OFFICER. Without objection it is so ordered.

Mr. DOLE. Mr. President, will the Senator from Idaho yield?

Mr. CHURCH. I yield.

Mr. DOLE. The Senator indicates that the cosponsors of his resolution (S. Res. 270) represent the high water mark of Senate support for any resolution calling for an end to the war in Vietnam.

May I remind the Senator that Senate Resolution 271 is sponsored by 36 Members of this body, and calls upon the North Vietnamese—the enemy in this conflict—to do certain things.

For the RECORD, I wish to emphasize that there are 36 sponsors of that resolution.

Mr. CHURCH. I am familiar with the Senator's resolution. I think that if he reads carefully the text of my remarks, he will find that they do not need revision.

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. ALLEN in the chair). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. YOUNG of Ohio. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MR. PRESIDENT—NOT ENOUGH

Mr. YOUNG of Ohio. Mr. President, President Nixon last spring announced he favored increasing social security benefits by 7 percent. With a surplus in the social security and social security disability fund of nearly \$30 billion—which is a

tremendous surplus—certainly payments to men, women, and children should be increased to 15 percent. If they were increased to 15 percent, the social security fund would still continue to be an actuarially sound insurance system.

Social security is the greatest legislative achievement of President Franklin D. Roosevelt's administration. Conservatives of that period denounced it as state socialism and sneered that Americans would be wearing "dogtags." The Republican platform of 1936 pledged repeal. Its candidate, Gov. Alf Landon of Kansas, a good man, carried but two States. It has since been unthinkable for any political party to oppose the social security program.

A young worker today is building insurance for his family that could pay thousands of dollars in benefits should he become disabled or die before his children are grown. Today, 1,300,000 disabled workers under 65, and 1 million dependent children each month receive social security checks averaging \$235. Many Americans are unaware that changes in the law now provide payments in early and middle years. For example, a young worker disabled before the age of 24 with 1½ years of covered employment during the preceding 3 years qualifies for social security payments as long as he lives. Also, children of a working mother covered by social security who dies or becomes disabled are immediately eligible for payments regardless of the father's income.

President Nixon proposed a 7-percent increase in social security benefits; recently he increased that proposal to 10 percent, effective not earlier than next April. Unfortunately, there is no delay in the ever-increasing cost of living and a long, cold winter is approaching, particularly for lower income families.

Social security is, and it will continue to be, and it must continue to be, an actuarially sound insurance system. Payments to the 25 million men, women, and children now receiving social security benefits could be and should be increased 15 percent, and without delay.

REPEAL THAT GULF OF TONKIN RESOLUTION

Mr. YOUNG of Ohio. Mr. President, in the final session of the 89th Congress on March 1, 1966, I report with pride that my vote was recorded in support of a resolution to repeal the Gulf of Tonkin resolution which was passed in the Senate following misrepresentation of facts from the White House and aided and abetted by officials of the National Security Council and Central Intelligence Agency falsely claiming small North Vietnamese gunships had fired upon our destroyers, including the destroyer *Maddox*.

Mr. President, hindsight is much better than foresight. Looking back on it, that assertion seems preposterous. The *Maddox* was accompanied by other destroyers of the U.S. Navy, but the *Maddox* alone could have destroyed every one of those small gunships that were falsely alleged to have attacked the *Maddox*.

President Johnson used this alleged incident to obtain authority to send hun-

dreds of thousands of men of our Armed Forces overseas into Vietnam to wage an undeclared, immoral major war in that faraway country.

There were only five U.S. Senators at that time who voted to repeal the Gulf of Tonkin resolution. I am glad to report I was one of those five. The others were Senators FULBRIGHT, McCARTHY, MORSE, and GRUENING.

Mr. President, I have prepared and am submitting a resolution to repeal the Gulf of Tonkin resolution.

The PRESIDING OFFICER. The concurrent resolution will be received and appropriately referred.

The concurrent resolution (S. Con. Res. 42), which reads as follows, was referred to the Committee on Foreign Relations:

S. CON. RES. 42

Resolved by the Senate (the House of Representatives concurring), That, under the authority of section 3 of the joint resolution, commonly known as the Gulf of Tonkin Resolution and entitled "Joint Resolution to promote the maintenance of international peace and security in southeast Asia", approved August 10, 1964 (78 Stat. 384), such joint resolution is terminated upon passage of this concurrent resolution.

ORDER OF BUSINESS

Mr. BAKER. Mr. President, I ask unanimous consent that I may be recognized for not to exceed 15 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, the Senator is recognized for not to exceed 15 minutes.

THE NOMINATION OF HON. CLEMENT F. HAYNSWORTH, JR., TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. BAKER. Mr. President, at a special news conference convened in his office yesterday, President Nixon reaffirmed his support for Judge Clement Haynsworth and stated he had examined in detail the record made by the Senate Judiciary Committee, and that he had absolutely no doubt that Judge Haynsworth is a man of integrity and honesty.

I have read the transcript of the news conference, Mr. President, and also examined the charges that have been raised against Judge Haynsworth and their denial by Senator Cook and others before the Senate.

I share the judgment of the President as to the honesty and integrity of this distinguished nominee.

I believe that if any Senator examines in detail and depth the so-called appearances of impropriety that have been raised, rather than taking a rigid position based on superficial reasoning determined by philosophy or ideological persuasion, he will reach a similar judgment.

If that approach is used, then I am convinced that the nominee will be confirmed by this body by an overwhelming vote.

Some are now saying the President should withdraw this nomination because there are appearances of impropriety that have been created; but I ask, in all due deference, "Who created those ap-

pearances?" Clearly, in my view, not the distinguished nominee, for, as I have said, any objective analysis of the record will clearly indicate to the contrary. The so-called appearances of impropriety so often alluded to in debate on this floor have been created, in my judgment, not by the nominee but by the debate, the newspaper accounts, the reports, the innuendo, the rumor, the incomplete analysis of the 700-page record compiled by the Senate Committee on the Judiciary.

But even if this be the fact, it is being contended that while the ethical questions that have been raised were not warranted, or were without foundation, since doubt has been raised the President should withdraw the nomination. However, as the President has said, and said only yesterday, to pursue that course of action would mean that anyone who wants to make a charge can thereby create the appearance of impropriety, raise a doubt, and then demand that the nomination be withdrawn. The President rejected that course of action, and I commend him for it.

To allow a man to be victimized in this manner would be contrary to our system, and would obviously mean that a nomination could be defeated for a good reason, for a bad reason, or, as in this case, for no reason at all.

Mr. President, I have great respect for this body, as I have deep and genuine respect for the underlying genius that created our tripartite system of central government, consisting of the executive department, the two branches of the legislative department, and the judiciary, each having a rather exquisite set of checks and balances, prerogatives, and overlapping jurisdiction with the others. This insures that there is a consensus expressed by the machinery of government that fairly and clearly represents the will of the people themselves.

The Senate is now engaged in one of its unique jurisdictional undertakings—the responsibility, under the Constitution, that it advise and consent with the President of the United States on the confirmation or the withholding of confirmation of a nominee for the highest tribunal the only constitutional tribunal, in this Republic.

I think it might be appropriate, for the moment, to examine in detail the responsibility of this body in that respect. Clearly, I believe, the President and the Senate have concurrent responsibility and concurrent jurisdiction in the matter of selecting the members of that constitutional tribunal, the Supreme Court of the United States, in this case specifically an Associate Justice of the Supreme Court.

I have no quarrel with those who say that the Senate must not act as a mere rubber stamp, giving automatic or pro forma approval to any nomination sent by any President to the Senate at any time. I do believe that our jurisdiction is as great as that of the executive department; otherwise, the phrase "advise and consent" would have no meaning. But there is one principal constitutional distinction between the responsibility of the President and the responsibility of the Senate. As it clearly appears

from the Constitution, only the President can initiate a nomination. The Senate may consider only those nominations so initiated; and, in considering nominees for the highest tribunal, it is the responsibility of the Senate to examine every fact and every facet involved in such nominations.

It is my purpose now to urge my colleagues to do precisely that; and, with all due respect, even with my great reverence for this body, to suggest that they have not yet done it. The debate thus far has been altogether too detached from the record compiled by the Committee on the Judiciary. The debate thus far has dealt too much and too often with "the appearance of impropriety," and too little with the fact and substance of the nominee's record as adduced by the committee.

I believe it would be a tragic chapter in the relationship between the Senate and the judiciary if this nomination were not determined on the basis of the merits and facts of the controversy, rather than on the basis of innuendo. I believe, as I have stated before on this floor, that it is time we examined the facts and circumstances attendant upon this nomination, and stopped "shoveling smoke"—a phrase that was impressed upon me some years ago when I was in law school. It was then pointed out that too often law students and lawyers and, I am inclined to believe, legislators, even those in this august body, tend to become caught up in the emotions of the moment and to be attracted by the glitter of vocabulary instead of careful scrutiny of the record itself and the facts and circumstances on which a judgment should be based.

In response to that implication, either Justice Holmes or Judge Learned Hand—I have forgotten now which—made the charge that lawyers are prone to spend much of their adult lives "shoveling smoke"—that is, dealing in things other than the facts of the case at issue.

I admonish my fellow Senators, and I am confident that the Senate will not do so, not to engage in a smoke shoveling contest in connection with the confirmation of Clement Haynsworth to serve as an Associate Justice of the Supreme Court of the United States. I believe my colleagues, and the Senate as a body, will not engage in the luxury of innuendo as the basis for judgment, but rather will make their judgment on the basis of the facts. The facts have been clearly delineated in the hearing record, and on occasion in debate on this floor. I commend now, as I have previously, the magnificent statement made by the junior Senator from Kentucky (Mr. Cook), wherein he took, one by one, the charges, the inferences, the allegations, and the implications—not just those involved in the debate, but in the stories circulated in the press, from every source—and made a point by point, meticulous answer to all such charges. I said then and I say once again that it is the constitutional duty of every Member of this body to do what MARLOW COOK, the distinguished junior Senator from Kentucky, did, and that is to examine these matters and look the facts in the face.

The confirmation of the nomination of a man to serve on the highest court in

this land must be so judged. It must not be judged on some inference of liberal philosophy or conservative philosophy, or some alleged bias of a prolabor or antilabor stand, because, Mr. President, if we do judge on that basis, we are setting up a constitutional principle that I believe none of us would consciously adhere to or approve of. If some say, as some have said, "I oppose Clement Haynsworth because his philosophy is too prolabor or too antilabor, or too liberal or too conservative," we are in fact saying by that allegation or that statement that we are going to choose the members of the Supreme Court of the United States based upon some artificial balance between liberal and conservative, prolabor and antilabor. Mr. President, for my part, I do not want a member of the Supreme Court of the United States, whether it be the Chief Justice or an Associate Justice, who is either pro or anti anyone in these United States. To say that Clement Haynsworth is antilabor implies that the maker of the statement would rather have someone who is prolabor; or to say that he is anti-civil rights, that he would rather have someone who is pro-civil rights.

Judge Haynsworth is neither, and no conscientious member of this Government, whether he be a Senator, a Justice of the Supreme Court, or the President of the United States himself can afford the luxury of being anything other than dispassionate, calm, and impartial in his judgment of what is best for this country and best for humanity.

So I reject out of hand the contention that we should judge on the basis of a philosophical bias of any sort, and say rather that we should examine this nominee as we should examine all nominees, on the basis of their competence, their qualification to serve and to serve well, to serve impartially and to serve judiciously the best interests of the people of this country, all of them, without breaking the population down into pro or anti anything.

Clement Haynsworth is uniquely suited for this difficult task. The President of the United States has chosen well. The Senate of the United States must examine the facts and not revel in innuendos or aspersions. We must come to terms with the judgment we must make, disregarding as we must so often disregard what its political impact will be at home with one group or another, and we must decide what is best for this country.

In my humble view, what is best for this country is a man who has the judicial impartiality to look facts in the face and call the judgments as he sees them, which is precisely what we must do also in judging this confirmation.

Mr. THURMOND. Mr. President, I commend the able and distinguished Senator from Tennessee for the fine presentation he has just made. It is my firm belief that when Senators read the record in the Haynsworth case, they will find that Judge Haynsworth is as well qualified as any man who has ever been nominated to be a Supreme Court Justice.

I am very proud that the Senator from Tennessee has seen fit to make the remarks he has made today.

role as vice president and director of Vend-A-Matic and as chief judge of the fourth circuit. This combination of business and judicial duties continued for nearly 7 years.

It is hard to believe that Judge Haynsworth could have forgotten in June the weekly board meetings, the fees he received, and the duties he performed as director of this unusually successful business which had been more lucrative for him than his judge's salary. By this discrepancy in his testimony, Judge Haynsworth set up, in my opinion, his own credibility gap. I do not claim that he deliberately lied to the committee for some ulterior motive. But I believe we have a right to expect of those we elevate to the highest tribunal in the country a forthrightness and mental acuity that would preclude such a discrepancy, even as the result of a lapse of memory.

Judge Haynsworth participated in decisions involving customers of Carolina Vend-A-Matic with no apparent recognition of the doubts his connections could raise in litigants' minds as to the fairness of the decision being handed down. In addition, he sat on several cases in which he had a small, but direct, stock interest. He acknowledges that his participation in one of these cases, involving the Brunswick Corp. was an error, due to a lapse of memory on his part in purchasing Brunswick stock while the case was before his court. He has defended his action in the other cases on the grounds that his interest was not substantial. In all these instances I believe Judge Haynsworth showed poor judgment in not taking the utmost precaution to insure that no connection between his judicial duties and his business activities could be construed.

I have given this matter more than ordinary attention. On October 10 I wrote to the Attorney General stating my belief that this nomination was not a wise one; however, the administration did not see fit to reconsider the choice. On October 20, with great reluctance I reached the conclusion that I could not in good conscience vote to confirm the nomination of Judge Haynsworth. I thought it only fair to notify the administration of my decision, and I did so in a letter of that date to the Attorney General.

I have made no public statement on this matter up to now because I do not intend to try to influence the vote of any other Senator. Each Senator should resolve this issue by his own research of the record and then follow the dictates of his own conscience.

This is not a responsibility a Senator can shrug off lightly. The Constitution divides the responsibility for selecting Justices of the Supreme Court between the executive and legislative branches, and I regard each of these responsibilities as having equal weight. Justices of the Supreme Court serve for life. Thus it is imperative that Senators exercise their constitutional responsibility to investigate and scrutinize the record of Presidential nominees in order to prevent the elevation of unworthy men to the highest judicial tribunal in the world.

Nor do I believe a Senator should be bound by party loyalty on an issue of this

magnitude. The selection of Supreme Court Justices should transcend politics. If we fail in this, we shall fail to restore the Court to the position of public esteem which it lost somewhat in recent years.

During my more than 7 years of service in the U.S. Senate few issues have generated more pressure on my office than has the confirmation of Judge Haynsworth's nomination. Support of the President is urged as if it were a personal matter rather than an issue of grave constitutional importance. The only way I can account for this unprecedented wave of interest is the fact that I decided that I could not support Haynsworth and so notified the Attorney General. This notification was sent by letter on October 20.

Since that date administration calls to my State have been legion. Some of my friends have been persuaded to call me even though they have not been provided copies of the hearing record from which they might make an independent judgment as I have done.

I have supported President Nixon on nearly every issue of note thus far in his administration, and I expect that I shall continue to do so. It is most difficult, therefore, to conclude that I would be doing my country a disservice if I concurred in this nomination, against the dictates of my conscience, simply on the grounds of party loyalty. The responsibility of all Senators on this issue is too great to simply make the easy choice of supporting whatever nominee the administration puts forward. So, with a heavy heart, but with a clear conscience, I shall oppose this nomination.

Mr. BAYH. Mr. President, will the Senator from Idaho yield briefly?

Mr. JORDAN of Idaho. I yield.

Mr. BAYH. I have read and listened to the statement of the Senator from Idaho with more than passing interest and with a real feeling of understanding of what he must have gone through over the past few weeks.

Mr. President, I found several of the thoughts expressed in the statement of the Senator are similar to the thoughts I have had over the past 5 or 6 weeks.

I joined the Senator from Idaho and most other Senators in supporting Chief Justice Warren Burger, although there may have been philosophical differences here and there between Judge Burger and me. I share the assessment of this matter made by the Senator in his statement.

I suggest also that I concur in the Senator's assessment that some of the charges made against Judge Haynsworth were questionable and had no validity. I deeply regret that during the hearings a mistake was made, to which I was a party. Two instances that were erroneous regarding the judge's connections were disclosed. I have publicly apologized for that and regret the mistake very deeply.

We are dealing with a sensitive matter, a man's qualifications to sit on the Supreme Court. One might differ as to whether the facts stated in the minority report are grievous enough to disqualify the judge. However, the statements are accurate as I know them.

I salute the distinguished Senator from Idaho. I feel a great deal of camaraderie with him. We do not agree on

all issues, but, I think I have some idea of the turmoil the Senator has gone through in reaching this decision.

In the last sentence of the Senator's statement, the Senator spoke for most, if not all of us, who join him in opposition to the nominee when he said:

The responsibility of all Senators on this issue is too great to simply make the easy choice of supporting whatever nominee the administration puts forward.

This has not been an easy choice for me. I have the feeling that perhaps it has been an even more difficult choice for my friend, the Senator from Idaho. I salute the Senator for the courage he has demonstrated.

Mr. JORDAN of Idaho. Mr. President, I thank my friend, the Senator from Indiana.

Mr. President, I yield the floor.

Mr. BAKER. Mr. President, recently a privately commissioned poll with regard to the attitude of the American people on the nomination of Judge Clement Haynsworth has been brought to my attention. This poll was conducted by the Chilton Research Center, a division of the Chilton Co. of Philadelphia, Pa., a highly reputable organization.

The results of this poll indicate that the American people favor confirmation of this nomination by a vote of approximately 2 to 1. While I do not advocate government by poll, I do believe that it is most important, in fact imperative, that the Senate be aware of the feelings of the American people on this issue.

I ask unanimous consent that the results of this poll be printed in the RECORD.

There being no objection, the poll was ordered to be printed in the RECORD, as follows:

CHILTON POLL

1. Are you aware that Judge Clement Haynsworth has been nominated by President Nixon to be a Justice of the U.S. Supreme Court?

There were a total of 1,063 interviews, 704 or 66% were aware of the Haynsworth nomination.

2. As you know, President Nixon has strongly defended this nomination. Do you believe the Senate should approve or disapprove President Nixon's nomination of Judge Clement Haynsworth to the U.S. Supreme Court?

(In percent)

	Approve	Disapprove	No opinion
Total.....	44	24	32
Male.....	46	31	23
Female.....	42	18	39
Republican.....	60	13	27
Democrat.....	33	35	32
Independent.....	35	24	41
White.....	46	22	32
Negro.....	21	44	35
Under \$5,000.....	43	18	39
\$5,000 to \$15,000.....	44	25	31
\$15,000 and above.....	49	35	16
East.....	43	28	29
Midwest.....	37	29	34
South.....	51	21	28
West.....	50	16	34

RECESS UNTIL 2:30 P.M.

Mr. BYRD of West Virginia. Mr. President, if no Senator wishes to speak at the present time, I move that the Senate stand in recess until 2:30 p.m. today.

The motion was agreed to; and (at 1

I can wonder if an American workingman can think that Judge Haynsworth would give him justice. At the circuit court level the cases were argued, decided, and appealed. But at least there was an appeal and the Supreme Court had the final decision. A Haynsworth opinion was subject to another judgment other than in the fourth circuit court. If Haynsworth is on the U.S. Supreme Court, his judgment is final and there is no further appeal.

One further comment—the question of the impeachment of Justice Douglas has been raised by the minority leader of the House. If any Member of the House of Representatives believes he has evidence justifying an impeachment resolution, he owes it to the Nation, to the Congress, and to his conscience to bring it now, this very day and not use it as trading stock to attempt to obtain votes on an irrelevant matter.

I am glad that the Senator from Kentucky (Mr. Cook) and other Senators who are vehement supporters of Judge Haynsworth's nomination were equally as vehement in protesting the equation of impeachment of Justice Douglas with a vote against Judge Haynsworth's nomination.

I assure the minority leader of the House if impeachment proceedings are brought, they will receive the same careful and reasoned response that I have given the case at hand.

In fact, there has been too much bartering for votes already in this case. The activities of employees on the President's staff are well known. Members of the Senate have been threatened, coerced, high pressured, and offered special project and appointments, all to secure votes for Judge Haynsworth's confirmation.

The vote for approval or disapproval of a contested nomination of a Supreme Court Justice may be the most important vote we cast in the Senate this session. The results of that vote have already been clouded by activity outside the Senate. I am convinced that every Senator is going to vote his own conscience in this very delicate but important issue.

For a strong Supreme Court, for a high regard of judicial ethics, for the protection of the modern concept of equal justice in civil rights and labor cases, I am going to vote against confirmation.

Mr. President, I yield the floor.

Mr. MANSFIELD. Mr. President, first, let me say I want to express agreement with my distinguished colleague in what he has said relative to impeachment proceedings against a sitting Justice and the incidental statement or assumption that action on that matter would be tied to action in the Senate on the confirmation or lack of confirmation of the nomination of Judge Haynsworth. It appears to me, as my distinguished colleague has said, that if there is any evidence—and I understand there are those who have been searching for some time—they ought to produce it now, today—

Mr. METCALF. This very afternoon.

Mr. MANSFIELD. Yes, indeed; and it should have no connection—none whatsoever—with what the Senate will do insofar as the nomination of Judge Haynsworth is concerned.

Either they have enough for impeachment or they have not; and if they have, they ought to produce it and let the process for impeachment begin. It will have to be decided here, if they have sufficient evidence. If they have not, then they ought to observe the advice of their President and lower their voices.

ORDER FOR ADJOURNMENT—PROGRAM

Mr. MANSFIELD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 12 o'clock noon tomorrow.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MANSFIELD. It is with regret that I cannot see my way clear to ask the Senate to come in earlier, but because of some important hearings, possibly decisions having to do with crime, pornography, and gun legislation in the Judiciary Committee tomorrow morning, I think it is advisable that the Senate meet at noon, to give that committee a chance to report some legislation, which it is very desirous of doing.

I would hope, also, that we would consider staying in session late this afternoon, and that it might be possible sometime to reach an agreement by which we could, at a time certain, vote on the pending nomination. As far as Senators who are opposed to the nomination of Judge Haynsworth are concerned, after inquiring around I find that they do not intend to make very many more speeches, and none, I am informed, of any length.

On last Friday we had three speeches, after coming in at 10 o'clock in the morning, and we were out of business, practically speaking, at 3 o'clock. We had to go into recess and wait around until a third speech was made available.

So I appeal both to Senators who are for and those who are against the nomination of Judge Haynsworth, as well as those who are undecided, to come to the floor, make their speeches, bring this matter to a head, and allow the Senate after a reasonable amount of time, to come to a decision one way or the other.

I make this plea because I would like to take up the amendment to the Draft Act, which is now on the calendar, and I would like to clear the path, as rapidly as possible, for bills which may be reported by the Judiciary Committee tomorrow, and also for consideration of the tax relief-tax reform bill, hopefully, next week.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. MANSFIELD. Yes indeed.

Mr. HRUSKA. It was with gratification that I heard the majority leader suggest a noon meeting hour tomorrow instead of earlier. What he has said about the matter of reporting several bills from the Judiciary Committee is true. A committee meeting had been scheduled for tomorrow, and those bills will be considered—the crime bill, the narcotics bill, if possible, the pornography bill, and also gun legislation, of which I think the majority leader is the author.

Mr. MANSFIELD. Yes.

Mr. HRUSKA. So I am happy to learn that the committee will have an opportunity to meet. We are hopeful of reporting those bills as a result of a session tomorrow.

Mr. MANSFIELD. The Senator has been most consistent, because he has been one of the strongest advocates in all these areas. I made the statement I did with the knowledge that he was on the floor and would corroborate the Senator from Montana.

I was serious, and I am serious, about staying in late tonight.

Before I suggest the absence of a quorum, I raise the possibility that it may be a live quorum, and that it may not be the only live quorum today.

I have just been handed a list of Senators who may be ready to speak on this side; and, to the best of my knowledge, we have two, at the very most.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRAVEL in the chair). Without objection, it is so ordered.

MESSAGE FROM THE HOUSE

As in legislative session, a message from the House of Representatives by Mr. Bartlett, one of its reading clerks, announced that the House had disagreed to the amendments of the Senate to the bill (H.R. 12829) to provide an extension of the interest equalization tax, and for other purposes; agreed to the conference asked by the Senate on the disagreeing votes of the two Houses thereon, and that Mr. MILLS, Mr. BOGGS, Mr. WATTS, Mr. BYRNES of Wisconsin, and Mr. UTT were appointed managers on the part of the House at the conference.

SUPREME COURT OF THE UNITED STATES

The Senate, as in executive session, resumed the consideration of the nomination of Clement F. Haynsworth, Jr., of South Carolina, to be an Associate Justice of the Supreme Court of the United States.

Mr. BAKER. Mr. President, the question is whether the Senate should advise and consent to the nomination of Judge Clement Haynsworth to the Supreme Court. I speak today in support of confirmation.

This is not a minor issue. A Supreme Court Justice serves for life, casting one vote of nine on the most powerful court in the world. The Court is a tribunal of awesome responsibility which influences the whole course of American jurisprudence. Therefore, I believe it is right and proper that the U.S. Senate carefully deliberate the nomination.

Judge Haynsworth was born 57 years ago in Greenville, S.C. He attended Furman University and Harvard Law School, joined his father's law firm and served in the Navy during World War II. In 1957 he was named by President Eisen-

hower to the Fourth Circuit Court of Appeals and he has now become the chief judge of that circuit. His nomination to the High Court has the support of 16 former presidents of the American Bar Association. They include Harold J. Gallagher, Cody Fowler, Robert G. Storey, Loyd Wright, E. Smythe Gambrell, David F. Maxwell, Charles S. Rhyne, Ross L. Malone, John D. Randall, Whitney North Seymour, John C. Satterfield, Sylvester C. Smith, Jr., Lewis F. Powell, Jr., Edward W. Kuhn, Orison S. Marden, and Earl F. Morris.

Mr. President, I ask unanimous consent to have printed in the RECORD at the conclusion of my remarks a telegram from the persons whose names I have read, addressed to the Honorable JAMES O. EASTLAND, chairman of the Senate Committee on the Judiciary, dated October 23, 1969.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. BAKER. The American Bar Association's Federal Judiciary Committee has approved the nomination of Judge Haynsworth, as have a majority of the members of the Senate Committee on the Judiciary.

It is against that background, Mr. President, that the Senate now turns to its constitutional responsibility to advise and consent on the nomination by the President of the United States of Clement Haynsworth to serve as an Associate Justice of our highest tribunal.

The opponents of this nomination apparently have centered their objections on two basic points, some contending that Judge Haynsworth has by his participation in several cases created "the appearance of impropriety," and others asserting that his decisions indicate that he is anti-civil rights and antilabor. In my judgment, the record compiled by the Senate Judiciary Committee clearly demonstrates that these characterizations of Judge Haynsworth are wholly unfounded.

Mr. President, in this respect, I allude to remarks which I made on a previous occasion about the nomination of Judge Haynsworth, and point out that my first reaction to those who allege and aver that Judge Haynsworth is anti-civil rights, or antilabor, or anti-anything else, should be careful in their scrutiny of this nominee or any other, to make sure that nominations for the highest court in the land are not made on the basis of an antiposition or a pro-position for any group within society. Rather, for my part at least, I would hope that our position on nominees for the Supreme Court would not be anti or pro anything, but would approach that responsibility and that privilege for service as nearly objectively and as free from previous judicial bias as it is possible for the frail, subjective human machine to be.

I shall not dwell in detail on the allegations of impropriety that have been raised. I have examined the record made by the Senate Judiciary Committee, have read the bill of particulars set forth by our distinguished colleague from Indiana (Mr. BAYH), and have listened carefully to the rebuttal by the Senator from Ken-

tucky (Mr. COOK) and others in this debate before the Senate. I share the judgment of the President as to the honesty and integrity of this distinguished nominee. I believe that if any Senator examines in detail and depth, the so-called appearances of impropriety that have been raised, rather than taking a rigid position based on superficial reasoning determined by philosophy or ideological persuasion, he will reach a similar judgment. If that approach is used, then I am convinced that this nominee will be confirmed by this body by an overwhelming vote.

Some are now saying the President should withdraw this nomination because these appearances of impropriety have been created; but I ask, in all due deference: "Who created those appearances?" Clearly, in my view, not the distinguished nominee, for, as I have said, any objective analysis of the record will clearly indicate to the contrary. The so-called appearances of impropriety so often alluded to in debate on this floor have been created, in my judgment, not by the nominee but by the debate, the newspaper accounts, the reports, the innuendo, the rumor, the incomplete analysis of the 700-page record compiled by the Senate Judiciary Committee.

Obviously the test of Caesar's wife, that a nominee for the highest court should be free of the appearance of impropriety is a valid test. But just as properly, an appearance of impropriety should represent the situation created by the nominee and not be contributed to by an examination of the nominee's conduct or the record of an incomplete file. Just as completely, in my view, the Senate in its deliberations on the nomination of Justice Abe Fortas to be Chief Justice of the United States created by implication, if not directly, a higher level of care and greater responsibility on the part of the Senate than had probably existed at any previous point in the history of the Republic.

In that proceeding, dealing with the confirmation or the withholding of advice and consent on the nomination of Justice Fortas to be Chief Justice of the United States, the Senate effectively broadened the scope and horizon of the inquiry and, in effect, created a reaction especially unfavorable to those who allege that it is an admonition of the administration or those of us who support Judge Haynsworth's nomination that the Senate should abdicate its constitutional responsibility to advise and consent on the desirability and the propriety of a presidential nomination to the judiciary and rather should serve merely as a rubber stamp, a suggestion recurring throughout the debate and obviously advanced by those who oppose the nomination.

I believe no such thing. I believe that the Senate has never been, nor is it ever likely to be, a rubber stamp of any administration or Chief Executive whose constitutional responsibility requires that he send to the Senate his nominations so that the Senate may make the searching analysis and critical examination that is necessary to determine whether the Senate should confirm or withhold its advice and consent.

There is no element of rubber stampism involved in these proceedings. Rather, I once again thoroughly agree with and roundly applaud the searching analysis of the examination made by the Judiciary Committee, culminating in approximately 700 pages of committee testimony and reports in the debate that has now permeated the functions of the Senate for so many weeks, notwithstanding the fact that formal debate commenced only last week.

I applaud those who have clearly and forthrightly expressed their views for and against the nomination of Judge Haynsworth.

I believe we are rendering higher service and coming closer to our constitutional mandate when we approach this problem in that manner. However, I do respectively caution against adopting the doctrine of Caesar's wife and the appearance of impropriety and then creating that appearance ourselves.

I believe, on the contrary, as I have previously said on the floor of the Senate, that our first responsibility under the heightened degree we have set for ourselves is to examine carefully all the testimony taken before the Senate Committee on the Judiciary, the committee report, and the separate and individual views, to take into account the debate on the issues as presented on both sides of the issue on the floor of the Senate, to carefully evaluate, for example, the so-called bill of particulars filed by the distinguished Senator from Indiana (Mr. BAYH) and, by the same token, to take into account the fully detailed rebuttal and reply made by the distinguished Senator from Kentucky (Mr. COOK).

In a way, in a calm and dispassionate manner, we analyze and examine the aspects of the case which are factual and which are not rumor, innuendo, or inference drawn from incomplete premises.

If the Senate does that, I affirm once again that I am convinced the nominee will be confirmed overwhelmingly.

But even if this be the fact, it is being contended that while the ethical questions that have been raised were not warranted, or were without foundation, since doubt has been raised, the President should withdraw the nomination. However, as the President has said, to pursue that course of action would mean that anyone who wants to make a charge can thereby create the appearance of impropriety, raise a doubt, invoke the doctrine of Caesar's wife, and then demand that the nomination be withdrawn. The President rejected that course of action, and I commend him for it. To allow a man to be victimized in this manner would be contrary to our system, and would obviously mean that a nomination could be defeated for a good reason, for a bad reason, or, as in this case, in my view for no reason at all.

Mr. President, the charges concerning the civil rights record of Judge Haynsworth raise a serious question requiring most careful consideration by the Senate. All agree that there is no place on the High Court for a person shown to favor the continuation of second-class citizenship, and I would vigorously oppose a nominee of that persuasion. My review of Judge Haynsworth's record convinces me

that he is not such a man. It is clear that on a few occasions Judge Haynsworth has voted against the party claiming deprivation of his constitutional rights. In addition, he has not always attributed to the Supreme Court's decisions the broadest possible scope of application. Nor has he correctly anticipated the Court's rulings in every case. On three occasions he has been reversed by the Supreme Court. The question for our resolution is whether these facts disqualify a nominee for the Supreme Court.

As final interpreter of the Constitution, the Supreme Court enunciates the "law of the land," which every Federal judge takes an oath to uphold. A nominee who disregards the Supreme Court's pronouncements violates his judicial oath and is obviously unfit for service on our highest court, Judge Haynsworth has scrupulously followed the Court's decisions. On numerous occasions he has joined in decisions against persons charged with discrimination and in so doing has adhered to principles announced earlier by the Supreme Court. No less than 19 cases are cited in the majority views in the report of the Committee on the Judiciary as instances in which Judge Haynsworth aided the vindication of rights which had been held by the Supreme Court to be secured to every citizen.

The fact that Judge Haynsworth has adhered to the Court's pronouncements should end the inquiry. I ask another question: Whether his views in each decided case are reasonable. In determining the reasonableness of Judge Haynsworth's views, I suggest to Senators the consideration of the comments made to the Judiciary Committee by Prof. G. W. Foster, Jr., of the University of Wisconsin. This esteemed gentleman calls himself a liberal Democrat and is probably more responsible than anyone else for the formulation of the HEW school desegregation guidelines. He had this to say with regard to Judge Haynsworth's civil rights record:

In the area of racially sensitive cases I have followed closely the work of the federal courts in the South over the entire span of time Judge Haynsworth has been on the Court of Appeals for the Fourth Circuit. I have thought of his work, not as that of a segregationist-inclined judge, but as that of an intelligent, open-minded man with a practical knack for seeking workable answers to hard questions. Here and there, to be sure, were cases I probably would have decided another way. I am not aware, however, of a single opinion associated with Judge Haynsworth that could not be sustained by a reasonable man.

It has come to my attention, too, that in addition to the 19 cases cited by the Committee on the Judiciary in its report summarizing the hearings on the nomination of Judge Haynsworth, there are a number of other cases, which I feel are significant in trying to gain some insight into the basic philosophy and ideology, if that in fact be valid, for judging the qualifications of the nominee to sit on the Supreme Court of the United States, and which may give us an inkling of what his real, fundamental concern and sensitivity may be in this area. I shall im-

pose on the Senate to deal briefly with a number of these cases.

I refer, first, to the case styled *McCoy v. Greensboro City Board of Education*, 283 F. 2d 677, from the Fourth Circuit Court of Appeals, in 1960.

In that case, Judge Haynsworth joined Judges Sobeloff and Soper in holding that Negro students need not exhaust their State administrative remedies where a local board had acted in obvious violation of their constitutional duty to end school desegregation.

This, too, is one of the civil rights decisions of Judge Haynsworth, and I venture the estimate that it is not the sort of case that one would use to try to establish the basis for charging that the nominee is anti-civil rights or a segregationist.

Cummings v. City of Charleston, 288 F. 2d 817, in the fourth circuit, in 1961. In that case there was a per curiam opinion in which Judges Haynsworth, Sobeloff, and Boreman found no reason for postponing the integration of a public golf course beyond the 6-month period agreed to by the plaintiffs. Once again, an example of a Federal appellate judge upholding the mandate and requirements of the highest reviewing tribunal in this country, the Supreme Court of the United States, and applying the law relating to desegregation evenhandedly and firmly to accomplish the announced purpose of this Republic, and that is to abolish the real, the legal, and the equivalent status of second-class citizenship in this country. That is not a case, not a decision, to lend credence to the characterization of a fine member of the judiciary as anti-civil-rights or a segregationist.

Wheeler v. Durham City Board of Education, 309 F. 2d 630, from the sixth circuit in 1961. This was a unanimous en banc decision enjoining the Durham School Board from continuing to administer the North Carolina Pupil Enrollment Act in a discriminatory manner.

Once again, Mr. President, the action of an even-handed judge adhering to the announced principle and objective of this Nation to create nothing but first-class citizenship and to abolish segregation, and joining with the rest of his colleagues on that court to grant the relief sought. It is not a decision, surely, upon which one could judge a nominee to be anti-civil-rights.

Brooks v. County School Board of Arlington, 324 F. 2d 303, fourth circuit, 1963. Judge Haynsworth joined Judges Sobeloff and Boreman in holding that the district judge had prematurely and erroneously dissolved an injunction against the board's discriminatory practices.

The relief sought was in keeping with the decisions of our highest court, and obviously was calculated to advance the cause of desegregation in those States embraced within the Fourth Judicial Circuit of the United States. Surely, that is not the basis on which one would judge a nominee for the Supreme Court of the United States to be anti-civil rights.

Wheeler v. Durham City Board of

Education, 346 F. 2d 768, Fourth Circuit, 1965. A unanimous court ordered that the district court reexamine the actions taken by the board to eliminate the dual system which had existed in the city of Durham. The board's suggestion that its plan should be approved by the court of appeals was rejected. The relief sought was the desegregation of schools in that area. It was a unanimous judgment by the Fourth Circuit Court of Appeals, and certainly is not a decision and a judgment on which any fair-minded person could base an inference that the participants in that opinion were anti-civil rights.

Felder v. Harnett County Board of Education, 349 F. 2d 366, Fourth Circuit, 1965. This was another en banc decision, a per curiam decision, upholding the district court's order that the school board cease its discriminatory application of North Carolina's assignment and enrollment of pupils act. Once again, the relief sought was to enhance and further the objectives of desegregation. It certainly was not a decision on which we could fairly base an assumption that this man, participating in that per curiam decision, was anti-civil rights.

Wanner v. County School Board of Arlington County, 357 F. 2d 452, from Judge Haynsworth's circuit, the Fourth Circuit, in 1966. Judge Haynsworth joined Judge Sobeloff, Judge Boreman, and Judge Bell in reversing the district court, which has enjoined the board, at the insistence of white parents, from putting certain desegregation plans into effect. The court of appeals found that the board was proceeding in an appropriate manner in its attempt to comply with earlier desegregation decrees and therefore should not have been enjoined.

Franklin v. County School Board of Giles County, 360 F. 2d 325, from Judge Haynsworth's circuit, the Fourth Circuit, in 1966. In this unanimous en banc decision, the court held that teachers who have been discriminatorily discharged are entitled to "reemployment in any vacancy which occurs for which they are qualified by certificate or experience." In my view, this is not a decision to form the basis for an inference that this nominee is anti-civil rights.

Smith v. Hampton Training Schools for Nurses, 360 F. 2d 577, from the Fourth Circuit, in 1966. Several Negro nurses at a hospital receiving Hill-Burton funds were discharged for entering an all-white cafeteria after being ordered not to do so. They brought an action under the Civil Rights Act. While the litigation was pending, the Fourth Circuit held that hospitals receiving Hill-Burton assistance are engaged in "State action" and therefore may not discriminate. A question in this case was whether the plaintiffs here could rely on that precedent. The court unanimously held that they could and that it followed that they had been unconstitutionally discharged. The nurses were ordered to be reinstated. Once again, Mr. President, the relief sought by those attempting to advance the cause of total equality of every citizen of this country, was granted, and surely this is not a decision on which one could judge this

nominee, a participant in the decision, to be anti-civil rights.

In *Wheeler v. Durham City Board of Education*, 363 F. 2d 738, Fourth Circuit 1966, the court unanimously reversed the district court's holding that racial considerations had not been a factor in the board's employment and placement of teachers. An order requiring the board to desegregate facilities was entered.

Once again relief was sought properly and in an admirable way by those trying to advance the cause of equality and citizenship for all people of this Nation; a decision once again that simply does not form the basis for an inference that the nominee is anti-civil rights. On the contrary, this case and the cases I have cited previously form a substantial and most impressive body of judicial work which creates the image of a fair, calm, even-handed jurist, dedicated to the furtherance of equality of individuals, of the preservation of their liberty, and the implementation of the law as determined and interpreted by the highest court of our land in a highly sensitive field, in a part of this Nation uniquely affected.

In *Chambers v. Hendersonville City Board of Education*, 364 F. 2d 189, fourth circuit, 1966, Judge Haynsworth was the "swing" vote. He joined Judges Sobeloff and Bell in applying the principle that where there is a long history of discrimination, the local board is under a duty to show by clear and convincing evidence that its acts were not discriminatory. Concluding that the board had not made such a showing, the three judges held that the plaintiffs were entitled to relief. Judges Bryan and Boreman in dissent were satisfied that the board's actions had not been racially motivated. This was not the view of Judge Haynsworth. In the view of this humble lawyer, Judge Haynsworth participated in the principle of law and its implementation that is truly unique to the judicial system; and that is to say the degree of concern and care to a public agency on the basis of past historical performance rather than on the facts of the instant case, notwithstanding the consequences of the law. Judge Haynsworth was once again the swing vote in establishing that principle which would bring about the relief sought by those seeking to advance the cause of equality.

Surely in this decision we do not have the example of an anti-civil-rights jurist. On the contrary, we have a brave, even-handed judge, dedicated to even-handed actions.

In *Cypress v. Newport New General & Nonsectarian Hospital Association*, 375 F. 2d 648, fourth circuit, 1967, the court sitting en banc, held that the defendant hospital had discriminatorily denied the plaintiff Negro physician's request for admission to the staff and also that it had engaged in the practice of taking race into consideration in making room assignments to patients.

Once again the nominee, Judge Haynsworth, participated in an en banc decision of his court, the court on which he sat with distinction for so many

years, to advance the cause of equality and to strike down the real, imaginary, legal, and quasi-legal barriers to give full participation in this society to men and women of all races in every walk of life.

In *Wall v. Stanly County Board of Education*, 378 F. 2d 275, Fourth Circuit, 1967, once again a unanimous en banc court reversed the district court's denial of relief to a Negro teacher who had been discharged by the defendant board. The appellate court ordered an award of money damages as well as a cessation of the Board's discriminatory practices.

The relief was sought by those trying to advance the cause of equality. The nominee, sitting en banc with his colleagues on the Fourth Circuit Court of Appeals upheld the law of the land and advanced the dignity and opportunity of every citizen, regardless of race, color, and creed. Surely, this is not a decision on which one could base a judgment of anti-civil rights.

In *Wooten v. Moore*, 400 F. 2d 239, Fourth Circuit, 1968, Judges Haynsworth, Butzner, and Merhige held a restaurant subject to the 1964 Civil Rights Act. The court rejected claims that the restaurant did not offer to serve interstate travelers and did not have a substantial effect on commerce.

This is not a case on which one could judge those participating as being anti-civil-rights.

In *Felder v. Harnett County Board of Education*, 409 F. 2d 1070, Fourth Circuit, 1969, Judge Haynsworth joined a majority of the court in holding a school desegregation plan constitutionally deficient because its effects on segregation had not been determined. The district court's order that the board furnish a plan that would promise realistically to end the dual school system was affirmed.

These are not decisions, in my view, of a man who was anti-civil-rights or a segregationist, but rather it is the record of a dedicated judge trying to uphold the law of the land as enunciated and prescribed by our highest tribunal in the field of civil rights and human dignity, at a time in our history and place in our country where that must not have been an easy task. But he did it in this case and in other cases.

It seems to me that in the business of examining all the facts and circumstances surrounding the service of this nominee, all the facts and circumstances upon which a judgment can be made, the innuendo or even the inference, most certainly the allegation, that Clement Haynsworth is anti-civil rights does not stand against the weight of the decisions I have just alluded to.

Once again, for my part, I do not want a nominee on the Supreme Court who is anti or pro anything; but I want an even-handed, objective jurist, as far as humanly possible and, as Dr. Foster said: "an intelligent, open-minded man, with a practical knack for seeking workable answers to hard questions."

I believe we have such a man in Judge Clement Haynsworth. I believe these decisions are significant and important in making the assessment that this body must ultimately make of the qualifica-

tions and competence of Clement Haynsworth as Associate Justice.

Mr. President, the allegation has been made with respect to certain other aspects of Judge Haynsworth's judicial career. If they show a state of mind or an anti-civil-rights bias, that should be taken into account. I urge colleagues to take into account any such allegations, but I believe they should be dismissed having once been considered. If there is an anti-civil-rights attitude or anti-anything on the part of this or any nominee who is faced with the prospect of a lifetime of service on the independent judiciary, it should be known now, not later, but we must take into account all of the record compiled by the Committee on the Judiciary and compiled from the debate on this floor, and from the colloquy between Senators, and whatever other solid, sound, and reliable information we can find and manage.

Criticism has been voiced from time to time that Judge Haynsworth has shown an anti-civil-rights bias because he has failed in one case to concur in an opinion that awarded attorneys' fees.

While agreeing with the thrust of the judgment, apparently Judge Haynsworth felt that the awarding of attorneys' fees in that particular case was made and left unanimously to the discretion of the trial judge, with statements upset and overturned in the appellate court.

Those of my colleagues who are lawyers, I am sure, can understand that logic. There certainly is broad discretion on the part of a trial judge. This is so deeply imbedded in the fabric of Anglo Saxon jurisprudence that it is no longer often challenged and never successfully challenged.

The reasons for the existence of that rule are real and meaningful. A trial judge is the one who sits and hears the witnesses and sees their demeanor or conduct on the stand, who can best appreciate or evaluate their sincerity or lack of sincerity of the cause being espoused or resisted. The trial judge, therefore, has tremendous latitude and discretion in many matters, including that of awarding attorneys fees. But to say that Judge Haynsworth felt that the trial court should not be reversed in such a case, because he relied on the discretion of the trial judge, sheds no light at all on his view of the civil rights situation outlined in the pleadings and the proof of the instant case.

It occurs to me that a careful examination of all of the written opinions of the Fourth Circuit Court of Appeals is essential to a careful examination of the qualifications of and confidence in the nominee. He has been part of that court since his appointment by President Eisenhower in 1957. He has participated in virtually every decision on that court since his appointment in 1957.

Some of the opinions he wrote. Some of the opinions he concurred in. Some of the opinions he dissented from. But it is important to examine them carefully and consider the totality of the conduct of this fine jurist over the 12 years which have intervened since 1957.

Mr. President, I believe that any thorough, objective analysis of the record

before this body would result in overwhelming support for the nominee. I believe we should stop hiding behind the anti-civil-rights, and antilabor, and consider the facts as they have been presented to us.

As I have said before, Justice Holmes once remarked that lawyers and legislators of the world have the unhappy faculty of devoting much of their daily lives to the art of shoveling smoke. I hope we do not devolve into a smoke-shoveling contest, but, rather, come to terms with the facts of this situation as we see them.

EXHIBIT 1

RICHMOND, VA.
October 23, 1969.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
U.S. Senate, Washington, D.C.

The Federal Judiciary Committee of the American Bar Association after careful investigation has found that Judge Clement Haynsworth is highly acceptable from the viewpoint of professional qualification to serve on the United States Supreme Court. We the undersigned past presidents of the American Bar Association, all deeply concerned with the quality of the Federal judiciary, have full confidence in the processes and judgment of the ABA Committee. Accordingly, we hereby affirm our support of Judge Haynsworth and urge his confirmation as a justice of the Supreme Court.

Harold J. Callagher; Cody Fowler; Robert G. Storey; Loyd Wright; E. Smythe Gambrell, David F. Maxwell; Charles S. Rhyne; Ross L. Malone; John D. Randall; Whitney North Seymour; John C. Satterfield; Sylvester C. Smith, Jr.; Lewis F. Powell, Jr.; Edward W. Kuhn; Orison S. Marden; Earl F. Morris.

(The following colloquy, which occurred during the delivery of Mr. BAKER's address, is printed at this point in the RECORD by unanimous consent.)

Mr. BAYH. Mr. President, I listened with a great deal of interest to the Senator from Tennessee, just as I listened with interest to the Senator from New York (Mr. JAVITS). Each looked at the same issues, and each came to an opposite conclusion.

Mr. President, it is because of the great respect I have for my friend from Tennessee that I should like to make the observation that it is possible for men of good faith to look at the facts of a case and come to different conclusions.

I have come to a different conclusion than my friend from Tennessee, but I certainly believe that he is doing what he thinks is right. I appreciate the opportunity to have been able to listen to his remarks.

Mr. BAKER. I thank my colleague from Indiana.

I am now happy to yield to the Senator from Kansas.

Mr. DOLE. Mr. President, I wish to commend the Senator from Tennessee for his precise and to the point remarks.

We have had the opinions of many experts. Those of us who have read the hearings recognize that they were protracted. We had the testimony of experts in the field of legal ethics. I have read the record and concluded more than a week ago, there is no real basis for the charges made against Judge Haynsworth unless they are made on a philosophical level.

The Senator from Tennessee has laid to rest the feeling that Judge Haynsworth might be anti-civil rights. Others have laid to rest, or will lay to rest, the charges by labor leaders that he is antilabor.

I was very much impressed, a couple of weeks ago, when I visited with former Associate Justice Charles Whittaker, who served on the Supreme Court with great distinction, from 1957 to 1962. He was appointed by President Eisenhower and was confirmed by the Senate. He now resides in the State of Missouri where he is engaged in the private practice of law.

On November 10, he released a statement which I should like to read at this point because it sets forth the views of a man who served on the Supreme Court and who served in the same position now being sought—hopefully sought—by Judge Haynsworth. He therefore knows a little about judges, their ethics and qualifications.

I shall read this brief statement which was released to the public on November 10.

I have several times been asked to publicly state my views as to whether the hearings conducted by the Judiciary Committee of the Senate on the President's nomination of Judge Haynsworth as an Associate Justice of the Supreme Court of the United States disclosed any evidence of improper or unethical judicial conduct by Judge Haynsworth.

Although I have, rather naturally, been interested in those proceedings and have kept abreast of them by carefully reading and considering the testimony before the Judiciary Committee, I have refrained, because of my rather unique position as a former Associate Justice of that Court, from any public expressions upon the matter, but now that numerous statements are being publicly made by Judge Haynsworth's opponents saying, I think quite falsely, that the hearings before the Judiciary Committee of the Senate disclosed improper and even "unethical" judicial conduct by Judge Haynsworth, my conscience compels me to speak out.

In those very lengthy and protracted hearings before the Committee, Judge Haynsworth was impugned on two cases: The first, that he sat in a case when he owned some shares of stock in one of the litigants. In truth, the record shows that he did not own any stock in either litigant in the case, but only held some shares in a vending company which, on a lease basis, maintained some of its vending machines in a plant of one of the litigants. The second, that Judge Haynsworth sat in a case, referred to as the "Brunswick" case, when he held shares of stock in the Brunswick company. In truth, the record shows that, quite aside from this being a piddling suit on a promissory note to foreclose a chattel mortgage that resulted in a judgment for \$1,425.00. Judge Haynsworth owned no stock in the Brunswick company at the time the case was heard and decided. The record shows that after the case was heard and decided, and another judge had been assigned to write the opinion, Judge Haynsworth, on the recommendation of his broker, purchased some shares in the publicly-held Brunswick company.

These are the bases upon which it is being publicly claimed by Judge Haynsworth's opponents that he has been guilty of improper and even "unethical" conduct as a judge. My sensitivities do not permit me to sit si-

lently by, and thus condone such wholly unfounded character assaults.

Inasmuch as there is no support in the record for the charges of unethical conduct that are being widely hurled and publicized against Judge Haynsworth by his opponents, it simply has to be that they are doing these for other reasons—perhaps because they do not like his nonlegislative and conservative judicial philosophies, yet, do not want frankly to oppose him on their real grounds for fear that to do so would not be publicly well received, and hence would not be politically expedient to them.

It seems evident to me that any proper sense of moral decency requires those who oppose Judge Haynsworth's confirmation to state their real reason for opposing him rather than to resort to false charges of unethical conduct.

I am not well acquainted with Judge Haynsworth, and certainly have no political or other alliances with him, but I do know him to be a fine and highly respected judge and man, and that he has gone through very protracted hearings before the Judiciary Committee of the Senate without a showing of even any appearance of impropriety, and I simply say that it seems to me to be a shame that his opponents are willing to falsely assault his character in order to obtain his defeat because they want a more "liberal" justice appointed to the Supreme Court.

CHARLES E. WHITTAKER.

NOVEMBER 10, 1969.

Again, I state that Justice Whittaker served with great distinction on the Court, and his opinion is worth having for the RECORD.

I thank the Senator from Tennessee.

Mr. BAKER. I thank the Senator from Kansas.

Mr. BAYH. Mr. President, perhaps I should ask the Senator from Kansas to permit me to comment on what I think is a unique intervention of a former member of the Court, rather than impose on the time of the Senator from Tennessee. I will submit to whatever the Senator from Tennessee thinks is in his best interest.

Mr. BAKER. I am happy to yield to the Senator from Indiana briefly, for the purpose of establishing a colloquy.

Mr. BAYH. Let me, as a member of the legislative branch, state that I take a dim view of a former member of the judicial branch impugning the motives of some Members of this body. Justice Whittaker's statement alleges that we were concerned only that Judge Haynsworth held some stock in a vending machine company. I can speak as one member of the committee who listened to every word of testimony at the hearings. It was not a matter of merely holding some stock. It was a matter of a one-seventh interest, worth a half a million dollars, a matter of serving on the board of directors, a matter of serving as vice president, and a matter of having his wife serve as secretary of the corporation for 2 years. This was the sort of involvement that concerned me, not just the holding of some stock in a vending machine company.

I noted with great interest that Justice Whittaker talked only about the Brunswick Co. Judge Haynsworth also had interests in Grace Lines, Inc., and Maryland Casualty Co. when cases in-

volving those corporation appeared before his court.

I ask the Senator to look at page 305 of the record of the hearings, in which Senator MATHIAS asked Judge Haynsworth whether the Judge had a substantial interest in Brunswick. Senator MATHIAS asked Judge Haynsworth:

Do you consider that your interest was substantial, then?

Judge Haynsworth said that it was.

I think it is fair to assume that some of us in the Senate would conclude that the interest was substantial, if Judge Haynsworth himself said it was substantial. And if the holdings in Brunswick were substantial, so were those in Grace Lines as well as Maryland Casualty. There were many facts that led us to the conclusion that we ought to have someone with a greater sense of sensitivity. Justice Whittaker seems to ignore those facts.

I thank the Senator for letting me use his time. I thought that I ought to put the record of the Senator from Indiana straight. I am getting tired of people impugning my motives. I do not impugn the motives of the Senator from Kansas. I thought the statement of the Senator from Tennessee was very interesting to follow. I know it comes from his heart. I hope the rest of the debate will continue in this tenor.

(This marks the end of the colloquy occurring during the delivery of Mr. BAKER's address.)

Mr. DOLE. Mr. President, I would hope the Senator from Indiana would give former Justice Whittaker the same right to express opinions as other people have. I happen to know that Justice Whittaker has carefully read the record. He has read the testimony. I am a lawyer, as is the Senator from Indiana. I feel that Justice Whittaker was objective when he read the record. Since he served on the Supreme Court for 5 years, he knows better than I, and perhaps as well as the Senator from Indiana, what is required of a Justice of that Court.

I trust the day never comes when a former Justice of the Supreme Court cannot express himself, as suggested by the Senator from Indiana. The former Justice said what was in his heart and he honestly believes, rightfully or wrongfully, that this is the conclusion he reaches after reading the record. He has a right to reach that conclusion.

The former Justice may have had in mind canon I, which, as the Senator from Indiana knows states that we have the responsibility sometimes to defend the Court, because the Court is in a peculiar position. Members of the Court cannot always defend themselves. Members of the bar, when they feel charges are baseless, should defend the Court. It may be that that is the canon former Justice Whittaker had in mind when writing his statement.

Let me also add that former Justice Whittaker did not volunteer anything. I know many people called on him. And in fact, when I visited him I had not made up my mind. He said, "Senator, I am glad you called, because I have been asked to contact you, but did not think it was proper to do so."

I wanted to make it clear to the Senator from Indiana that former Justice Whittaker was not trying to trespass upon the rights of this body. He replied only when he was asked to do so. He had read the record. He was not making an off-the-cuff statement or rendering an off-the-cuff opinion. I feel he has a perfect right to express himself and am happy he has expressed himself. I only wish more members of the Court would do so much.

Polls have been taken, and some of those polled had not read the record. I was informed that 80 percent of the ATLAS lawyers felt Judge Haynsworth's nomination should not be confirmed. Certainly former Justice Whittaker has as much right to express his views as anyone. He was a member of the Court. He understands the high degree of ethics required. He is not trying to compromise the canons of ethics. He has no personal interest in Judge Haynsworth and has no alliance with him politically or in any other way. He feels some of the charges against him are false and he has a right to reach that conclusion.

Mr. BAYH. Mr. President, will the Senator permit me to elaborate or repeat what I said? I am not sure who has the floor.

The PRESIDING OFFICER. The Senator from Tennessee has the floor.

Mr. BAKER. I am happy to yield to the Senator from Indiana.

Mr. BAYH. The Senator has been very tolerant.

I believe any citizen of this country, certainly any former member of the Court, has a right to give his opinions. I get a little sensitive, however, when I read a statement which says that those who have read the record and arrived at a different conclusion from those who favor Judge Haynsworth's nomination are really not sincere.

I salute my friend from Kansas for referring to the first canon of ethics. I think that is an important canon, and I hope that before this debate is over, the Senator from Kansas will also become interested in a half dozen other canons that deal with this matter of impropriety. I think they are equally important.

I rose to interrupt my distinguished friend from Tennessee only because, in pointing to the facts that he alleges were the basis for the determination of some of us who are concerned about ethics, he omitted some of the most significant facts. For example, it is not the mere owning of vending machine corporation stock that we question; as I have pointed out, it is also the involvement in the affairs of the corporation which disturbs us. Furthermore, in the Brunswick, Grace, and Maryland Casualty cases, the judge unfortunately did not meet the standard of conduct which he set for himself.

I would hope that Judge Whittaker would examine these facts and give us, the Members of this body, credit for making the determination which we think is right.

Mr. BAKER. Mr. President, I thank my colleagues for the interesting colloquy

involving Justice Whittaker's letter. That was not one of the main thrusts of the remarks I have just made. However, I accept the colloquy as a happy addition; and, having seen the matter thus expanded, I intend to expand on my own views.

I have never seen Justice Whittaker's letter heretofore; I am glad that my colleague from Kansas requested and obtained such a letter.

Mr. DOLE. Mr. President, I did not request the statement. He had been asked by several newspapers to submit his views, and he did so only after reading the entire record. I am satisfied that he took into account the W. R. Grace case and other cases alluded to.

Mr. BAKER. I understood the Senator had requested the Justice's views.

Mr. DOLE. I did not request any written response. He did tell me in a phone conversation that if we could not confirm the nomination of Judge Haynsworth, we would have to find a trapeze artist. I contacted him seeking advice, as I did the senior Federal judge of Kansas, officers of the bar association, and leading lawyers in Kansas, who make their living practicing law. Frankly I was surprised at their overwhelming support for Judge Haynsworth because of the flurry of charges made against him.

Mr. BAKER. I commend the Senator from Kansas for bringing this matter to our attention, and for talking with former Justice Whittaker in this respect. I am pleased that he has produced the Justice's letter at this point, making it a part of the RECORD. I respectfully disagree with the Senator from Kansas when he credits it with impugning any Member or former Member of this body. I also reject the idea that any former member of the highest court cannot express his viewpoints and ideas publicly. Were he at this time a sitting member of the Court, it might be a different situation, though I am not sure it would be. But I do feel that the expression of the viewpoints and ideas by former Justice Whittaker given us today by the distinguished junior Senator from Kansas is a significant contribution to that branch of this inquiry, and I commend him for adding substance to it.

Mr. BAYH. As I said, I appreciate the indulgence of my friend from Tennessee. I must say that this is the first time I have heard of the letter. Was I correct in understanding that Justice Whittaker said that because there is no ethical question, the opponents who stress this point must really be concerned about civil rights, labor, and philosophical matters? If not, I apologize to my friends, the Senator from Tennessee and the Senator from Kansas. It was a statement to that effect I thought I heard, and I am a bit sensitive to such remarks. I think in this Body, we should give everyone full faith and credit for doing what he thinks is right, for reasons which he thinks are important. That is the reason I rose, not to take issue with my friend from Tennessee and my friend from Kansas. Although I disagree with the Senator from Tennessee, I do not think he is making his presentation on any grounds other than those he considers right.

Mr. BAKER. Mr. President, on the question of sensitivity, as I understood the statement of former Justice Whittaker, in effect, he is saying that under the circumstances there must be philosophical and ideological overtones in this struggle. I very much doubt that my friend from Indiana would deny that there has been such a thread woven through the fabric of this entire debate. I think it is a proper undertaking for those for and against Judge Haynsworth to examine his philosophy; otherwise I would not have taken 45 minutes of the Senate's time going over 19 cases, in a detailed analysis, to decide whether or not there was an anti-civil rights bias in those decisions. I concluded that there is not; but in that case, I am examining a philosophical and ideological bias or bent on the part of a member of the judiciary.

I see no reason for anyone to be offended by the considered moderation of former Justice Whittaker's letter.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. BAKER. I am happy to yield to the Senator from Kansas.

Mr. DOLE. I do not believe he includes every opponent; but some opponents of Judge Haynsworth are opposing his confirmation on philosophical grounds. Some appeared before the committee, for example, George Meany; certainly he is opposed on philosophical grounds. He says in effect "He is antilabor; we are going to block him, just as we did Judge Parker in the Hoover administration."

Certainly, if he has that right, Justice Whittaker should be accorded the same right, to make a public statement about Judge Haynsworth, because public statements have been made that he is antilabor, anti-civil rights, and unethical.

The Senator from Indiana has said that, "he is honest and a man of integrity, but he is insensitive." That generally is what the Senator from Indiana said, as well as others; that he is honest and a man of integrity, but he is insensitive, and that, therefore, he is unfit to sit on the Supreme Court.

Justice Whittaker, having sat on the Court for a period of 5 years, had something to say which should be helpful to all Senators.

Mr. BAYH. Mr. President, I am glad the Senator read the letter into the Record, because I have not had a chance to see it, and I want to examine it with some degree of particularity.

As I said a moment ago, any Member of this body, any former justice of the Supreme Court, or any citizen of this country has a right to express himself. Of course he does. But I do not think we should impugn the motives of those who draw conclusions different from the conclusions reached by the proponents of Judge Haynsworth.

I concur that the matter of philosophy has been interwoven into this debate, but I think it is entirely possible for people to look at this record and say, "all right, on the matter of philosophy we are going to give the President the benefit of the doubt, but on the matter of ethical conduct, at this particular time, with these facts, we feel that the conduct falls be-

low the required standards." Disapproval of Judge Haynsworth's ethical conduct can be a valid reason for opposing him, and not some subterfuge for some other reason which George Meany or someone else might offer.

I think each of us could look at this matter entirely differently. I trust my colleagues from Kansas and Tennessee, and the other participants in this discussion who are going to face this particular issue, will look at the facts and make their own determination. I am giving them credit for doing what they think is right.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CRANSTON. Mr. President, on October 31, 1969, the Hollywood Bar Association wrote the President urging him to withdraw the nomination of Judge Clement F. Haynsworth as an Associate Justice of the Supreme Court. In their letter, the bar also requested the Senate to reject his confirmation, in event his nomination is not withdrawn. Since the recommendations of the Hollywood Bar Association have a direct bearing on the current debate on Judge Haynsworth's fitness to sit on the Court, I ask unanimous consent that the letter of the Hollywood Bar Association be printed in the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

OCTOBER 31, 1969.

The PRESIDENT,
The White House,
Washington, D.C.

Mr. PRESIDENT: The Hollywood Bar Association by vote of its Board of Governors and officers recommends the withdrawal of the nomination of Judge Clement F. Haynsworth to the Supreme Court and further recommends if such nomination is not withdrawn, that confirmation by the Senate be denied.

We have not considered nor do we feel it the province of the Bar Association to comment on Judge Haynsworth's political or social attitudes as reflected in his decisions. These attitudes and decisions are not the question before us.

Judge Haynsworth purchased stock in a company which was a party to a lawsuit before him after the court had completed its deliberation but before the decision was publicly announced. If a judge is aware that a decision is pending on a case and enters into a relationship with a party to the action, we deem such an act an impropriety. If a judge enters into a relationship with a party and is not aware of a pending decision before him, this action raises material question as to his lack of awareness and judgment. Let all Americans know that this Bar Association feels such action by a judge cannot be condoned, for a judge's first interest and obligation is to the people he serves.

The American people demand in a judge a man who is fair and impartial, a man who will analyze the questions before him with an open mind and unobstructed view. One cannot properly judge the wine from inside the barrel. Most important, the American

people want to have confidence in their courts, in their judges, and in their government. If this confidence is shaken by some act of a justice of the highest court, however innocent the intention of the act, the morale of the country suffers.

This then is the focal point of Judge Haynsworth's nomination. His acts, however intended, have shaken the trust and confidence in our judicial system.

Very truly yours,
HOLLYWOOD BAR ASSOCIATION,
By PHILIP H. GILLIN.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

HAYNSWORTH AND LABOR

Mr. HANSEN. Mr. President, opponents of Judge Haynsworth claim that he is antilabor. In no meaningful sense is this true.

Judge Haynsworth has undoubtedly either written, or joined in, opinions which were objectionable to the national leadership of the AFL-CIO. And, it is true, that if this is enough to make a judge antilabor, then Judge Haynsworth, along with countless other Federal appellate judges in our country, are antilabor. This sort of judgment is found in the statement of Mr. George Meany, president of the AFL-CIO, before the Committee on the Judiciary that "he would not approve of a decision against labor." And, predictably, therefore, Mr. Meany does not approve of Judge Haynsworth.

But if one takes the broader view, recognizing that organized labor is not entitled to receive everything it demands from the courts, any more than is management, then the criticism of the leadership of organized labor becomes much less impressive. Like most other judges of Federal courts of appeals, Judge Haynsworth has joined in many opinions that have rejected the position of the unions, and many opinions that have favored the positions of the unions. Perhaps a highly specialized labor lawyer could develop a sort of a legal Geiger counter that would tell us, at least to his satisfaction, whether the judge is a couple of degrees off center one way or the other. I do not claim to be such an expert, and I am satisfied that Judge Haynsworth is well within the mainstream on labor law.

Forty years ago, organized labor successfully opposed the confirmation of the nomination of John J. Parker as an Associate Justice of the Supreme Court of the United States. Ironically enough, Judge Parker was at that time a judge of the U.S. Court of Appeals for the Fourth Circuit, just as Judge Haynsworth is at present. Opposition to Parker was placed on the grounds that he had been antilabor, and particular emphasis was given to his opinion in the so-called Red Jacket case.

Organized labor now concedes that it misjudged its man in 1930, and that its

election. And since that was the voice of the people, I think that the President has every right to follow those general guidelines in his appointment to the Supreme Court of a new Justice.

And I say also that, in my opinion, the President is not trying to make a conservative court out of the Supreme Court.

As I see the Burger and the Haynsworth appointments, they were made in an effort to get the Court more near the middle of the road and more nearly akin to the feelings expressed across the country as to how the Court should be divided philosophically. I think that is what he is trying to do.

I do not think he is trying to revise the Court. And if he succeeds in his intention, he will be doing the country a great service.

As I mentioned earlier in my 2-year campaign for U.S. Senator from Florida—and I campaigned last year and the year before—I can say in all honesty that whenever the issue of the Supreme Court of the United States was made in any of my speeches, there was a roar such as I cannot describe on the Senate floor. It was a roar of unanimous disapproval by the people. They expressed how they felt about the Supreme Court of the United States.

I think this is a dangerous thing. I think it is very dangerous. The highest Court of the land is a Court that I as a lawyer, and I am sure every other lawyer who sits in the Senate or in law school—certainly in our earlier days of legal experience—viewed as something up high.

We viewed the men of the Supreme Court, the Brandeises and the Cardozas—and Judge Cardoza taught me at Harvard Law School—as great legal giants. We had enormous respect for them. However, during the Warren court a lot of that respect disappeared. We noticed that the people then viewed the Supreme Court as something they did not want, disrespected, and did not like. This was because the Court was tearing down many of the fundamental things people believed in.

This is very important in the appointment of Judge Haynsworth, because I firmly believe that one of the things the President is trying to do is to change the direction of the Court and, indeed, reestablish it as a bastion of strength and respect in the eyes of the people. And for the Senate of the United States to turn down the President of the United States on a matter of philosophical judgment, I think, is entirely wrong.

Mr. HATFIELD. Then, as I understand the Senator from Florida, if the President takes cognizance of this conservative trend, as the Senator would interpret the last election, in the feeling that the Court is now too liberal in its general character and that therefore he has purposely selected a conservative to balance the Court, not to make it all conservative, but to bring it into greater balance, that it is appropriate that this sentiment should stop at the Senate door as far as our judgment of the floor actions is concerned, and that we should ignore philo-

sophical reasons, that even though the people of the United States have taken cognizance of the Supreme Court and Judge Haynsworth, we should not.

Mr. GURNEY. The Senator is correct. And I think that in the former action of the Senate in confirming other Supreme Court Justices, such as Justice Fortas, when his name was presented, and Justice Goldberg and Justice Thurgood Marshall—I am not familiar with the record at that time, although I am sure that many conservative Senators would have preferred another name to come here from President Johnson, President Kennedy, or President Roosevelt—nevertheless, the Senators voted “aye” and did not take into consideration the other arguments.

Mr. HATFIELD. The Senator stated his belief that the people had lost faith in the Supreme Court and that great resentment was reflected toward the Court in the Senator's campaign in Florida. I think that much of my mail from Oregon would indicate that situation is also true in Oregon. They feel that the breakdown in law and order should be laid at the doorstep of the present Court and, that the greater permissiveness in our society should be blamed on the present Court. They blame many things on the Court that I take issue with.

Does the Senator think that the faith we should have in our Supreme Court could be reestablished by a close vote on Judge Haynsworth of, say, 52 to 48?

Mr. GURNEY. No, I do not think that would enhance the cause of the Supreme Court or reestablish faith in it. I must admit that the Senator raises a good question.

On the other hand, I must also hasten to point out—and this is the whole meat of the argument I am presenting—that it is not the fault of the President of the United States, it is not the fault of Judge Haynsworth, it is not the fault of the people of the United States that we are going to have in this Chamber next Wednesday, Thursday, or Friday a close vote on Judge Haynsworth. But, as I see it, it is Senators sitting in this body who are erroneously and wrongfully injecting their own philosophical ideas of who ought to sit on the Supreme Court. I do not think that is right. I think it is wrong.

Mr. HATFIELD. In other words, by the action of the Senate, then—the individuals the Senator refers to—we have already undermined the potential of Judge Haynsworth becoming an instrument of reestablishing the faith and confidence in the Court that we might otherwise have been able to accomplish?

Mr. GURNEY. Perhaps, to a certain extent. But if we have done that, I do not think that should inure to the detriment of Judge Haynsworth, because it is not his fault that philosophical viewpoints were erroneously injected into this matter.

The argument has been made by a number of people, as the Senator from Oregon knows, and as I know, that the President should withdraw Judge Haynsworth's name, because then we will avoid a close vote and we will not get into the business of perhaps further discrediting

the Court and further bringing it into disfavor. But I would say that I am sure that what is going on in the mind of the President of the United States is that if he caves in on this one, if he gives way to the philosophical, individual idiosyncracies of each Senator, then the same thing will happen when he sends up another name. So I think he is right in standing firm.

Mr. HATFIELD. Why does the Senator feel that this opposition to a so-called conservative appointee was not raised with the appointment of Chief Justice Burger? Chief Justice Burger fit generally into the same philosophical mold. Why was the opposition within the Senate that has accrued to Judge Haynsworth not raised against Chief Justice Burger?

Mr. GURNEY. Well, I do not know that I can answer the question of the Senator from Oregon. I would make a guess, but I cannot prove that it is so. I would say that perhaps the forces that are opposing Judge Haynsworth did not gear themselves up to oppose Judge Burger in the same fashion.

We might just as well face it: The two forces that are opposed to Judge Haynsworth are the civil rights groups of the country and the organized labor groups, the AFL-CIO. This is the steam behind keeping Judge Haynsworth off the Court, and I would say that probably they did not generate this concerted action against Judge Burger.

Then, too, I think that, in some of the ethical matters they have raised, they have found little things on which they can hang their hats. I do not think they are valid reasons, but I do think they are the kinds of things one can make a lot of noise about and spread a lot of smoke about.

Mr. HATFIELD. So there is something beyond the philosophical question, then, that the Senator feels might exist in the Haynsworth case that did not exist in the Burger case?

Mr. GURNEY. There is something to hang their hats on in the Haynsworth case that did not exist in the Burger case.

Mr. HATFIELD. I thank the Senator.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. GURNEY. I yield.

Mr. BAKER. On the point made by the distinguished senior Senator from Oregon, I should like to respond with my own views in one respect.

The question was put, in substance—at least, as I understood it—“would a close vote for confirmation, by 50, 51, or 52 votes, do anything to further the public confidence and trust in one of our equal departments of Government?”

I must say that I entirely agree with the implication that the Court is in need of greater public support and greater public trust. It should have it; it is going to have it; and I am going to do what I can to get it. But my answer is that it does not make any difference, for a very great reason, one I am proud to have had some part in, and that was the recent extended debate and conflict over the confirmation, or failure of confirmation, of Justice Fortas.

As I said in my remarks this morning,

I think that, as a result of the Fortas fight, the Senate, in effect, created a higher duty of care than it had ever exercised before in reviewing judicial appointments. I think that as a result of the Fortas case we created and implemented the "Caesar's wife" concept. We expanded the doctrine of advice and consent far beyond that which had existed probably at any other stage in the history of the Senate. As a result, we can probably foresee that every nomination to the Supreme Court of the United States, by Presidents of whichever party, will be scrutinized more carefully by this and succeeding sessions of the Senate than has been the case in the past.

I think we can expect to have closer votes than in the past. We are moving away from the position, as some have charged, of a rubberstamp Senate. I think we have broadened the scope of advice and consent.

I have frankly admitted that this nomination must be judged according to those new and improved rules. But I think that the support given and the celebration I make of the heightened degree of care that the Senate is now exercising will produce closer votes in the future, and I do not think it is going to militate against public confidence in the Court. On the contrary, I think the Court will be a better, stronger, and more accepted part of the tripartite system of government because of the searching scrutiny we give this appointment and other appointments in the future.

Mr. HRUSKA. Mr. President (Mr. SAXBE in the chair), will the Senator yield?

Mr. GURNEY. I yield.

Mr. HRUSKA. Mr. President, if we are going to think in terms of a close vote for Judge Haynsworth, if it is something undesirable and should be withdrawn, why not extend that principle to the Supreme Court. Those nine men gather and often have a difference and the vote comes out 5 to 4? If it is something we do not like and the other side has five votes, then we can say: "It is too close to really have any value. It should be a more resounding vote than that, and really does not count. So we will disregard the 5-to-3 vote."

After all, if there is anything to this one-man, one-vote rule and to the democratic processes, there is always that possibility of determining the outcome by a very narrow margin. Are we to say, if it is narrow and it is against us, "Let's call the whole thing off and go at it again"?

I do not see anything wrong with the record that Justice Brandeis made and that Chief Justice Hughes made. They had a very substantial number of votes against them. They went on to become two of the most brilliant, best, and most constructive jurists this country has ever seen.

I see nothing sinful, or improper about a close vote. I would be happy with a 50-50 vote if the man in the Presiding Officer's chair would say that he would use his best judgment as to which of the candidates would be his favorite and would cast his vote accordingly. I think that still would be a victory.

Mr. GURNEY. The Senator from Nebraska has made a good point, in his usual, well reasoned argument.

Mr. HATFIELD. Mr. President, will the Senator yield?

Mr. GURNEY. I yield.

Mr. HATFIELD. I should like to clarify one of the questions I put to the Senator from Florida, because I think the comments of the Senator from Nebraska may indicate that it was not clearly understood.

I think that what the Senator from Florida said is very true—that there is a great need today to build stronger confidence and faith in the Supreme Court as an institution in this Nation's political system. With a close vote, we are talking here not of a rule of law or an interpretation of law which has very specific wording and very specific criteria, but we are talking about very intangible things, of faith and confidence of the mass of our people. This has emotion in it. It has many other elements that are not put through the same process of rendering an opinion or a decision on a law that is being challenged before the Supreme Court in which there may be a 5-to-4 decision.

I think the Senator from Florida was quite correct when he responded that it would tend to demean the role Judge Haynsworth might play in becoming an instrumentality of reestablishing this faith if it were a close vote, because it would show that in the Senate there were a number of people who did not have faith in him to sit as a qualified member of the Supreme Court. I am not saying this is what is going to happen. I do not know what the vote is going to be in the Senate; I do not even know what my vote will be at this point.

I am deeply troubled by these discussions and arguments because as a layman I have to ferret through all the arguments in order to make a decision.

I am grateful to the Senator for discussing the matter of philosophy. I appreciate the forthrightness of his argument in saying that Senators should not use philosophy as an answer, even though the President has done so in his nominating power.

That gives me a clear-cut answer to what the Senator is talking about on the floor of the Senate. There are other Senators who have stated otherwise and who have admitted the criteria should include philosophy. I think there is a difference in rendering an opinion by a vote of 5 to 4 and confirming a nominee by a vote of 52 to 48.

Mr. GURNEY. I thank the Senator. Our colloquy on this matter of philosophy was meaningful. I shall go further and say I hope I have convinced him that philosophy should not play a part in his decision when he casts his vote a few days hence.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. GURNEY. I yield.

Mr. DOLE. Mr. President, I have listened with great interest. Some in this body came to the Senate on rather close votes. I remember President Johnson, when he came to the Senate, had a majority of 87 votes. He went on to be-

come a great political figure. When President Nixon was Vice President and first sought the Presidency he lost, but there was still confidence in him. He was elected President in 1968.

In the past many Senators have had close elections and have gone on to become great Senators. The Senator from Florida properly pointed out that some judges who have gone on the bench after close votes have become great Justices.

I share the concern of the Senator from Oregon but do not believe we can shape the image of the Court in the Senate. The President has the right to nominate and if qualified so far as integrity, honesty, and ability are concerned, the nominee should be confirmed. I think Judge Haynsworth fits these qualifications and am not concerned that a close vote, will shake confidence in the Court. It is my guess that this nominee has been scrutinized more closely than anyone in history. If he is confirmed by a one-vote margin most Americans will accept the decision of the Senate and he can become one of our great jurists.

Mr. GURNEY. I thank the Senator. I agree that if there is a close vote, it is better that he be confirmed by a close vote than for the Senate to reject the confirmation. That would not be building confidence in the Supreme Court.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. GURNEY. I yield.

Mr. BAYH. Mr. President, I appreciate the remarks of the distinguished Senator from Florida. I certainly know he has given this matter a great deal of thought.

On the point raised earlier by the Senator from Tennessee, I think we have set a higher standard. I concur with him. I think this new standard is good.

I do not believe, however, that because we have set a higher standard, we will always have a close vote. That was not the case in the Burger nomination. I do not know how many people opposed that nomination, but it was relatively few.

I am deeply concerned about the impact of a close vote on this nomination. Everybody looks at this matter differently. I appreciate the Senator yielding to me on his time although I have a different opinion. However, here we are for the first time in history being asked to fill a vacancy on the Court, which came about due to a question of ethics. Many people are looking to us to lead the way. I hope we will consider the loss of public confidence which will result from a narrow margin of votes for confirmation. I think it would be unfortunate to lose such confidence. I respectfully differ with my friend from Florida and I think it is in the finest democratic traditions.

Mr. GURNEY. I thank the Senator for his contribution. It is certain that Senators are going to differ on this matter. That is a certainty.

I might say, since this matter has been brought up as to what the country may feel about Judge Haynsworth one way or another, I have noticed in one or two polls taken recently that there is a fair amount of opposition to Judge Haynsworth. However, the interesting thing is that no one seems to know why. The pollsters, when questioning people dur-

can Bar Association, that they endorsed him since the holocaust.

Deliberate process—who has deliberated these facts? Questions of impropriety—the judge came without question. The mere fact that questions are asked must not disqualify. We must not approve the strategy of the opposition that if we charge falsely, loud enough and long enough, and keep charging, then the nominee, for the good of the Court, should withdraw from the field. That is what this is, a matter of confidence in the judge, and confidence in the court.

We must reject the idea that even though the attacks are unfounded, the very fact that they have raised such misunderstanding is in itself reason for refusing confirmation. Such a contention is contrary to the American tradition of fair play. To accede to this view would be to place the nominee's fate not in the hands of senators charged by the Constitution with advising and consenting to the nomination, but in the hands of his accusers. For those who find the judge not guilty of either a violation of ethics or law, for those who find the judge honest yet still question appearances, talk of shadows and allude to insensitivities, then I can only say that they malign their responsibilities as members of the most deliberative body and aid in impugning the integrity of the U.S. Senate. For our responsibility as Senators cannot be more clearly stated than in John 7:24:

Judge not by appearance but give just judgment.

As we reach the vote, a popularity poll on yesterday indicates that only 38 percent of the people support the judge and 53 percent oppose him.

What about that? Are we going to elect judges popularly? Are we really protecting the Union and preserving the role of advise and consent? Are we to yield to popularity polls?

The story alongside tells of the leader of the Republican Party in the U.S. Senate recommendation of another southern jurist. No one would claim Clement Haynsworth indispensable. But I shall continue to claim as indispensable the uniqueness of this body as being the most deliberative of all democratic institutions. John C. Calhoun, one of John F. Kennedy's "Profiles in Courage," once asked:

Are we bound in all cases to do what is popular? Have the people of this country snatched the power of deliberation from this body?

I believe this is an hour for sensitivity. I believe this is the hour for candor. Where is the candor and the courage that Kennedy spoke of in his profiles? Does any one really believe this is the Fortas case all over again?

We know the philosophical differences. Justice Fortas did not elect to come back before the Judiciary Committee. "Explain or resign" was the charge. Justice Fortas chose to resign.

But when Judge Haynsworth comes to explain, they fault him for it, because his very explanation gives the appearance of explaining and discussing charges of impropriety.

This is something we always say "After Fortas, you know how it is in the Senate. Fine. We welcome the improvement of the detail and concern that we have." Justice Burger was appointed after the Fortas case. Was he subjected to this scrutiny, this inquisition, this trial by headline? Justice Burger is of the same philosophy as Judge Haynsworth. Why was he not opposed with equal vigor? Judgment—poor judgment. The fact is that Judge Haynsworth's poor judgment consists purely of allowing himself to be born in the South. That is his poor judgment. Senators know that.

Could it be because Chief Justice Burger is from Minnesota, and Judge Haynsworth is from South Carolina?

The shaken confidence in the Court itself—is it really the individual conduct of the Justices that shakes the confidence, or the Court's philosophy in unleashing known convicts upon a defenseless public, tying the hands of law enforcement officers, allowing Communists to run rampant in defense plants, and denying prayer in the public schools, as the Court's bailiff chants:

God save the United States and this honorable Court.

That is the shaking of confidence—not in individuals—but in the Court itself.

No, the crying need of the hour in America today is for leadership. As in the administration before, this administration continues to deal with the politics of problems rather than with the problems themselves. This country is being polarized, and those who call for soft tones are leading in the shouting. In this atmosphere, it is next to impossible to consider anything divorced from politics and pressures. The popular is tempting. Let it be said that Judge Haynsworth did not seek this office. He was recommended by a Democratic Senator who took note of his balanced judgment and his capacity to grow in these changing times. Amidst the change, the demonstration, the charge, the headline, and the devastating pressure upon Senators, it would behoove this body soberly to reflect, deliberate, and confirm.

Mr. President, I yield the floor.

THE CIVIL RIGHTS OF JUDGE HAYNSWORTH

Mr. BAKER. Mr. President, I have previously made known my strong support for the nomination of Judge Clement Haynsworth to the Supreme Court. Yesterday I stated in some detail my belief that Judge Haynsworth has diligently followed the rulings of the Supreme Court in civil rights cases and that his decisions in this area have been objective, fair-minded, and without bias.

On Friday last the distinguished senior Senator from New York (Mr. JAVITS) addressed himself to the civil rights record of Judge Haynsworth, concluding that he has demonstrated an insensitivity to the constitutional rights of Negroes. While I was not on the Senate floor at the time these remarks were made, I have since had the opportunity to read and consider them in detail.

In discussing this important question Senator JAVITS relied only on the cases in which Judge Haynsworth filed a written opinion either for the court or concurring or in dissent. While there can

be no doubt that the written opinion is of great significance in ascertaining the philosophy of a particular judge, I believe it is a serious error not to consider the entire record, which obviously provides a more complete reflection of a judge's judicial philosophy.

There have been numerous civil rights cases in which Judge Haynsworth had joined in opinions written by his colleagues upholding the guarantees of Federal rights of minority groups and voting against the party charged with engaging in discriminatory practice. I discussed these cases yesterday, but in light of the conclusions of Senator JAVITS, I would like to restate some of them briefly today.

I refer, first, to the case styled *McCoy v. Greensboro City Board of Education*, 283 F. 2d 677, in which Judge Haynsworth joined Judges Sobeloff and Soper in holding that Negro students need not exhaust their State administrative remedies where a local board had acted in obvious violation of their constitutional duty to end school desegregation.

Cummings v. City of Charleston, 288 F. 2d 817: In that case there was per curiam opinion in which Judges Haynsworth, Sobeloff, and Boreman found no reason for postponing the integration of a public golf course beyond the 6-month period agreed to by the plaintiffs.

Wheeler v. Durham City Board of Education, 309 F. 2d 630: This was a unanimous en banc decision enjoining the Durham School Board from continuing to administer the North Carolina Pupil Enrollment Act in a discriminatory manner.

Brooks v. County School Board of Arlington, 324 F. 2d 303: Judge Haynsworth joined Judges Sobeloff and Boreman in holding that the district judge had prematurely and erroneously dissolved an injunction against the board's discriminatory practices.

Wheeler v. Durham City Board of Education, 346 F. 2d 768: A unanimous court ordered that the district court reexamine the actions taken by the board to eliminate the dual system which had existed in the city of Durham. The board's suggestion that its plan should be approved by the court of appeals was rejected.

Felder v. Harnett County Board of Education, 348 F. 2d 366: This was another en banc decision, a per curiam decision, upholding the district court's order that the school cease its discriminatory application of North Carolina's assignment and enrollment of pupils act.

Wanner v. County School Board of Arlington County, 357 F. 2d 452: Judge Haynsworth joined Judge Sobeloff, Judge Boreman, and Judge Bell in reversing the district court, which had enjoined the board, at the insistence of white parents, from putting certain desegregation plans into effect. The court of appeals found that the board was proceeding in an appropriate manner in its attempt to comply with earlier desegregation decrees and, therefore, should not have been enjoined.

Franklin v. County School Board of Giles County, 360 F. 2d 325: In this unanimous en banc decision the court held that teachers who have been discriminatorily discharged are entitled to "re-employment in any vacancy which occurs

for which they are qualified by certificate or experience."

Smith v. Hampton Training Schools for Nurses, 360 F. 2d 577: Several Negro nurses at a hospital receiving Hill-Burton funds were discharged for entering an all-white cafeteria after being ordered not to do so. They brought an action under the Civil Rights Act. While the litigation was pending, the Fourth Circuit held that hospitals receiving Hill-Burton assistance are engaged in "State action" and, therefore, may not discriminate. A question in this case was whether the plaintiffs here could rely on that precedent. The court unanimously held that they could and that it followed that they had been unconstitutionally discharged. The nurses were ordered reinstated.

Wheeler v. Durham City Board of Education, 363 F. 2d 738: The court unanimously reversed the district court's holding that racial considerations had not been a factor in the board's employment and placement of teachers. An order requiring the board to desegregate facilities was entered.

Chambers v. Hendersonville City Board of Education, 364 F. 2d 189: Judge Haynsworth was the "swing" vote in this case. He joined Judges Sobeloff and Bell in applying the principle that where there is a long history of discrimination, the local board is under a duty to show by clear and convincing evidence that its acts were not discriminatory. Concluding that the board had not made such a showing, the three judges held that the plaintiffs were entitled to relief.

Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F. 2d 648: The court, sitting en banc, held that the defendant hospital had discriminatorily denied the plaintiff Negro physician's request for admission to the staff and also that it had engaged in the practice of taking race into consideration in making room assignments to patients.

Wall v. Stanly County Board of Education, 378 F. 2d 275: A unanimous en banc court reversed the district court's denial of relief to a Negro teacher who had been discharged by the defendant board. The appellate court ordered an award of money damages as well as a cessation of the board's discriminatory practices.

Wooten v. Moore, 400 F. 2d 239: Judges Haynsworth, Butzner, and Merhige held a restaurant subject to the 1964 Civil Rights Act. The court rejected claims that the restaurant did not offer to serve interstate travelers and did not have a substantial effect on commerce.

Felder v. Harnett County Board of Education, 409 F. 2d 1070: Judge Haynsworth joined a majority of the court in holding a school desegregation plan constitutionally deficient because its effects on segregation had not been determined. The district court's order that the board furnish a plan that would promise realistically to end the dual school system was affirmed.

These are some; there are others. In each of these decisions, Mr. President, Judge Haynsworth voted in favor of the party claiming the deprivation of a fed-

erally guaranteed right. A reading of this record will clearly indicate that Judge Haynsworth has been most sensitive to the civil rights of all of our citizens.

It is undeniable, as pointed out by Senator JAVITS, that there have been three cases involving civil rights issues in which a written opinion by Judge Haynsworth has been reversed by the Supreme Court. In my judgment, a fair reading of these opinions indicates that each involved points on which reasonable men could and did differ, and while the Supreme Court disagreed with the viewpoint espoused by Judge Haynsworth, these three opinions do not evidence any bias or unreasonableness.

Senator JAVITS was particularly critical of the opinion of Judge Haynsworth in *Brewer v. School Board of the City of Norfolk*, 392 F.2d 37, a decision in which Judge Haynsworth dissented in part and in which it is alleged that by mentioning freedom of choice with favor Judge Haynsworth acted contrary to a decision of the Supreme Court rendered 4 days prior thereto.

It is, of course, correct that the Supreme Court in *Green v. County School of New Kent County*, 391 U.S. 430, held that a freedom-of-choice plan which does not work is unconstitutional. The Court expressly stated, however, that a freedom-of-choice plan which promises to result in the dismantling of a dual school system is constitutional. The Court said:

There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief.

* * * * *

We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.

It is apparent that Judge Haynsworth's statements on freedom of choice were, therefore, not at variance with the Supreme Court's pronouncement.

In his remarks Senator JAVITS did mention several decisions in which Judge Haynsworth held for plaintiffs claiming deprivation of their constitutional rights. These cases include *Hawkins v. North Carolina Dental Society*, 355 F. 2d 718, a case in which a Negro dentist brought suit against the North Carolina Dental Society contending that the society in excluding him from its membership had violated the equal protection clause of the 14th amendment. In reversing the district court in an opinion written by

Judge Haynsworth, the Fourth Circuit held that "the activities of the society being 'State action,' its practice of racial exclusivity is patently unconstitutional."

Another written opinion by Judge Haynsworth in favor of a black plaintiff in a school desegregation case is *Coppedge v. Franklin County Board of Education*, 394 F. 2d 410, in which the Fourth Circuit upheld a district court order to abandon a freedom-of-choice plan.

A case of significance that Senator JAVITS failed to include in this latter group of cases in which Judge Haynsworth wrote an opinion holding for plaintiffs claiming a deprivation of their rights involved the same parties that were in an earlier action, *Coppedge v. Franklin County Board of Education*, 404 F. 2d 1177. In that case a Federal district court had ordered compliance with a school desegregation plan. The board of education appealed claiming it would be administratively impracticable for it to comply and claiming also that it had not been given an ample opportunity to present evidence on this claim. The court in an opinion written by Judge Haynsworth rejected the board's claim and regarding the appeal as devoid of merit, ordered the board to reimburse the plaintiffs for the costs incurred by them in the litigation of it. As I have said, this case involved the same parties that had been before the Fourth Circuit in an earlier case in which the court had struck down a freedom-of-choice plan with the opinion in the earlier action also written by Judge Haynsworth.

Mr. President, I believe that the following points can be accurately made in summarizing the entire civil rights record of Judge Haynsworth:

In 12 years on the court of appeals his decisions on civil rights matters have been reversed on only three occasions.

On the three occasions when he was reversed the decisions of Judge Haynsworth do not evidence any bias or unreasonableness.

There is not one case in which Judge Haynsworth has refused to apply a mandate of the Supreme Court.

The entire civil rights record of Judge Haynsworth demonstrates that he is an intelligent, fair-minded man with a serious concern for obtaining practical answers to difficult questions.

Mr. President, while Judge Haynsworth has not in every civil rights case that has come before him always attributed to the Supreme Court's decisions the broadest possible scope of application and while he has not always correctly anticipated later rulings of the high court, I do not believe that the full record of Judge Haynsworth on civil rights cases will justify a vote against confirmation.

COMMENTS OF SENATOR JAVITS CONCERNING REMARKS OF SENATOR BAKER WITH RESPECT TO JUDGE HAYNSWORTH'S CIVIL RIGHTS DECISION

Mr. JAVITS. Mr. President, I have reviewed the remarks of Senator BAKER concerning certain civil rights decisions in which Judge Haynsworth has participated, and I find nothing in those remarks which would contradict the analysis I submitted to the Senate last Fri-

day, November 14, and which appears in the CONGRESSIONAL RECORD beginning on page 34275.

Senator BAKER cites 15 cases—the same 15 cases cited on pages 17 and 18 of the Judiciary Committee Report, Senate Executive Report No. 91-12, and the same 15 cases discussed yesterday on the Senate floor by Senator BAKER in a previous statement by him. These cases are: *McCoy v. Greensboro City Board of Education*, 283 F. 2d 677 (4th Cir. 1960); *Cummings v. City of Charleston*, 288 F. 2d 817 (4th Cir. 1961); *Wheeler v. Durham City Board of Education*, 309 F. 2d 630 (4th Cir. 1961); *Brooks v. County School Board of Arlington*, 324 F. 2d 303 (4th Cir. 1963); *Wheeler v. Durham City Board of Education*, 346 F. 2d 768 (4th Cir. 1965); *Felder v. Harnett County Board of Education*, 349 F. 2d 366 (4th Cir. 1965); *Wanner v. County School Board of Arlington County*, 357 F. 2d 452 (4th Cir. 1966); *Franklin v. County School Board of Giles County*, 360 F. 2d 325 (4th Cir. 1966); *Smith v. Hampton Training Schools for Nurses*, 360 F. 2d 577 (4th Cir. 1966); *Wheeler v. Durham City Board of Education*, 363 F. 2d 738 (4th Cir. 1966); *Chambers v. Hendersonville City Board of Education*, 364 F. 2d 189 (4th Cir. 1966); *Cypress v. Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (4th Cir. 1967); *Wall v. Stanly County Board of Education*, 378 F. 2d 275 (4th Cir. 1967); *Wooten v. Moore*, 400 F. 2d 239 (4th Cir. 1968); and *Felder v. Harnett County Board of Education*.

Of these 15 cases cited by Senator BAKER, 13 were decided unanimously by the Court of Appeals—all except the second *Felder* case and the *Chambers* case. Those 13 cases, in my judgment, show Judge Haynsworth's conclusions, not his ideas; he wrote no opinions in them; and the cases raised no difficult or novel questions about which any of the Fourth Circuit judges could find anything to disagree.

The 14th case is the second *Felder* case, 409 F.2d 1070. The only real issue in that case, however, was whether to award counsel fees because of a "frivolous appeal" and it was Judge Craven's opinion, with which Judge Haynsworth joined, which denied counsel fees. Judges Sobeloff and Winter dissented and would have found the appeal frivolous. Thus, Judge Haynsworth's stand in this case could hardly be defined as siding with the black plaintiffs, as he decided against them on such a central point.

In the 15th of the cases cited by Senator BAKER, *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966), Senator BAKER refers to Judge Haynsworth as casting the "swing" vote in that he joined Judges Sobeloff and Bell while two other judges dissented. My own reading of the case, however, convinces me that the majority opinion, in which Judge Haynsworth joined, was "amended" to absorb the views of the dissenters and make the decision substantially unanimous. The dissenters—Judges Bryan and Boreman—complained that the court was ordering the school board to rehire teachers without regard to their ability to meet minimum qualifi-

cations. In the words of the dissenters, appearing in 364 F.2d at 194—

Whatever Constitutional guidelines are recognized the bald facts here plainly reveal that at least 15 of the 16 unretained teachers were not kept because of their own preference, their physical incapacity or their failure to meet minimum criteria.

Obviously in an effort to meet this point after becoming aware of the dissenters' views, the majority opinion contains, at the end, a footnote, 364 F.2d at 193 n. 3, as follows:

While all of the improperly discharged teachers are entitled to re-employment, we do not think any practical benefit would be derived by requiring the Board to offer re-employment to a teacher who failed to meet definite, objective minimum standards.

Putting the footnoted majority opinion together with the objections of the dissenters, I fail to see how Judge Haynsworth was really a "swing" vote to all; we have here what amounts to another unanimous decision.

In sum, of the 15 cases cited by the committee report and repeated by Senator BAKER, not one reflects Judge Haynsworth's views in his own words; 14 of the 15 were clear-cut cases; and the 15th, the *Felder* case, was one in which Judge Haynsworth opposed the award of counsel fees to the black plaintiff.

In addition to citing these 15 cases, Senator BAKER has suggested that I did not mention "several decisions in which Judge Haynsworth held for plaintiffs claiming deprivation of their constitutional rights."

The first such case, Senator BAKER argues, is *Hawkins v. North Carolina Dental Society*, 355 F. 2d 718 (4th Cir. 1966). I believe the Senator is in error, as I mentioned that case in my analysis, appearing on page 34276 of the CONGRESSIONAL RECORD of November 14, 1969, and pointed out that the case was clear-cut, as the State dental society in that case had, in effect, been given the State's licensing power.

The next case which Senator BAKER says I overlooked was *Coppedge v. Franklin County Board of Education*, 394 F. 2d 410 (4th Cir. 1968). In point of fact, I did mention that case, also on page 34276, and pointed out that Judge Haynsworth did in fact find no "freedom of choice" in that case, but only after Ku Klux Klan bombings of those who chose to exercise their "freedom," and I remarked that, short of a bombing, Judge Haynsworth seems to adhere, to this day, to his preference for so-called "freedom of choice" plans, now overruled by the Supreme Court.

Senator BAKER does, however, correctly note that I overlooked one decision, the second half of the very same case, *Coppedge v. Franklin County Board of Education*, 404 F. 2d 1177 (4th Cir. 1968). My oversight was a result of the fact that the case bears the same title as the one discussed above, which I did mention. But the second *Coppedge* case does not, in any event, appear to me to support any argument that Judge Haynsworth was "pro" civil rights. In this instance, Judge Haynsworth held, writing for an unanimous court, that *Coppedge* was entitled to attorneys' fees because the school

board had taken a frivolous appeal. The school board contended that compliance with the court's order would present "insurmountable administrative problems," 404 F. 2d at 1179. The basis for award of counsel fees, as the court put it, was, "the school board carried on with its appeal notwithstanding the fact that, meanwhile, it had fully complied with the district court's order," 404 F. 2d at 1179. What could be more of an open-and-shut case of frivolous appeal than urging a court of appeals to reverse on the ground that the district court's order could not be complied with, while all the while the order had already been complied with? I see nothing in that decision to suggest that Judge Haynsworth was sensitive to civil rights, but I have never suggested that he was blind as a judge.

In sum, I stand by my original analysis. Judge Haynsworth's decisions in those instances cited which were not open and shut, and particularly in those in which he expressed his own views in his own words, are outside the context of our time in history on this most important civil rights question. I find nothing in the cases cited by Senator BAKER or the committee report to shake me in that conclusion.

I ask unanimous consent that I may speak out of order for 10 minutes.

The PRESIDING OFFICER (Mr. Boggs in the chair). Is there objection? The Chair hears none, and it is so ordered.

Mr. BAYH. Mr. President, will the Senator from New York yield to me?

Mr. JAVITS. I yield.

Mr. BAYH. Mr. President, inasmuch as my distinguished colleague from South Carolina aimed a good portion of his very eloquent remarks at me and the impropriety of my acts, I want to serve notice to the Senate, now, that I intend to supply, at some later date, whenever convenient to the Senate, what I feel to be an adequate rebuttal to the remarks of the Senator from South Carolina. However, I certainly will not interfere with the Senator from New York at this moment.

Mr. JAVITS. If the Senator from Indiana would find it more convenient, I would be pleased to yield the floor and let him get the floor and then he could yield to me for a few minutes. I just wish to introduce a bill.

Mr. BAYH. The Senator from New York already has the floor. Why does he not proceed?

Mr. JAVITS. All right. I shall be just a few minutes. I think the Senator from Indiana is quite right, that I should go right ahead.

Mr. HOLLINGS. Mr. President, will the Senator yield?

Mr. JAVITS. I yield.

Mr. HOLLINGS. I would like the RECORD to show that I took approximately 2½ hours. My distinguished colleague from Indiana has had that much time on television since this debate started, I would gladly swap those 2½ hours for half the time he asked for.

I shall be glad to support the facts as I have given them to the U.S. Senate.

I thank the Senator from New York for yielding to me.