

INTRODUCTION

“THE CIRCUIT JUSTICE IS A VERY IMPORTANT PERSON”

DID IN-CHAMBERS CONCERNS HELP DERAIL A SUPREME COURT NOMINEE’S CONFIRMATION?

Ira Brad Matetsky[†]

This *Journal of In-Chambers Practice* focuses on opinions and orders that Justices of the Supreme Court of the United States issue in their individual capacity, or “in chambers.” It has now been four years since any Justice issued an in-chambers opinion,¹ although the Court’s recent *per curiam* opinion in *Benisek v. Lamone*² cited not one but two of them.

The fact that a Justice can act on certain matters individually, rather than as one-ninth of the Court as a whole, ordinarily receives little attention outside the Court, some of its Bar, and readers of its *Journal*. In at least one instance, however, the significance of the Justices’ in-chambers authority was used strategically, as part of an ultimately successful effort to defeat a nomination to the Supreme Court.

In 1969, Justice Abe Fortas resigned. To succeed him, President Richard Nixon nominated Clement Haynsworth, a Judge of the U.S. Court of

[†] Partner, Ganfer Shore Leeds & Zauderer, LLP, New York, N.Y.

¹ The Justices’ four most recent in-chambers opinions, issued between 2011 and 2014, are reprinted in the *Rapp’s Reports* section of this issue.

² 138 S.Ct. 1942 (2018) (citing *Lucas v. Townsend*, 486 U.S. 1301, 3 Rapp 1284 (1988) (Kennedy, J., in chambers); *Fishman v. Schaffer*, 429 U.S. 1325, 2 Rapp 721 (1976) (Marshall, J. in chambers)). See Tony Mauro, *In-Chambers Supreme Court Opinions Get Rare Nod in Gerrymandering Ruling*, <https://www.law.com/nationallawjournal/2018/06/20/in-chambers-supreme-court-opinions-get-rare-nod-in-gerrymandering-ruling> (June 20, 2018).

Appeals for the Fourth Circuit, but the Senate rejected the nomination by a 55-45 vote.³ Nixon then nominated Judge G. Harrold Carswell, of the Fifth Circuit, but the Senate rejected Carswell as well.⁴ Nixon's third nominee, Judge Harry Blackmun of the Eighth Circuit, was confirmed and went on to serve for a quarter-century from 1970 to 1994.

The consensus today appears to be that Haynsworth was at least a respectable, if flawed, nominee for the Supreme Court but that Carswell was wholly unqualified. To the extent Carswell's nomination is remembered, it is largely for Senator Roman Hruska's inept attempt to defend Carswell against accusations that he was a "mediocre" judge. Hruska told a radio interviewer, "even if [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."⁵ At least one commentator has opined that "[m]ore than any other single thing, this statement killed Carswell's nomination."⁶

But while Carswell's nomination was pending in 1970, it was by no means clear that it would be rejected. Many of the Republican senators who had voted against Haynsworth were reluctant to go against the President's choice a second time, while some Southern Democrats who had opposed Haynsworth did not want to oppose a second straight Southern nominee. Ultimately, a confluence of revelations about Carswell's background and judicial performance, adroit parliamentary maneuvering by Carswell's senatorial opponents led by Birch Bayh of Indiana, and a series of missteps by Carswell's senatorial supporters led to the nomination's defeat by a 51-45 vote.

The Carswell nomination's fate was unclear just a few days before the final floor vote was to take place on April 8, 1970. A key senator who had not announced a position on the nomination was Margaret Chase Smith, Republican of Maine. Smith often kept her positions on upcoming votes to herself until the roll-call, and was known to resent overt efforts to influ-

³ See generally JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991).

⁴ See RICHARD HARRIS, DECISION (1971). Harris's reporting first appeared in *The New Yorker* for December 5 and 12, 1970.

⁵ FRANK, *supra* note 3, at 112; HARRIS, *supra* note 4, at 110.

⁶ FRANK at 112; see also HARRIS at 110.

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ence her decisions.⁷ Those who wished to influence her vote needed to do so more subtly.

Surprisingly, one attempt to persuade Smith to oppose Carswell cited Carswell’s potential in-chambers duties if he were confirmed:

Toward the end of the contest, [young lawyer Gary Burns] Sellers . . . happened to mention to Bayh’s staff that if Carswell was confirmed he would be the justice who oversaw the First Circuit, which took in Maine, and would have jurisdiction over stays of execution, contested federal actions in the region, and other local affairs that would be of concern to a politician with both local and national responsibilities. Sellers was asked for a memorandum on this, and when it arrived Bayh’s press officer, [Bill] Wise, telephoned the Boston office of the A.P., where the news was rejected by the acting night editor, who told him that it was “a Washington story,” and then the *Boston Globe*, where the assistant managing editor was very interested – and rather put out that his staff hadn’t thought of it. Wise dictated the information in Sellers’ memorandum, and a story on it appeared on the first page of the next day’s edition. That was said to have impressed Mrs. Smith, who had been unaware that Carswell would have such an effect on her domain if he reached the Court.⁸

In an oral history interview, the *Boston Globe* reporter, Thomas Oliphant, recalled this story’s being pitched to him:

[The fate of the Carswell nomination] was in doubt into the final weekend. One of the last votes to go against Carswell was Margaret Chase Smith, who was still in the Senate. . . . [T]hey were working right through the weekend, and they came to me on the Friday, OK? The story they were offering was that because of the vacancy, because of the way the Court was, the District [*sic*] Justice for the [United States Court of Appeals for the] First Circuit would be whoever filled that opening, which meant New England. So that meant that Carswell would be the Circuit Justice for the First Circuit, meaning New England [*laughs*]. And they wanted her to read that in her Sunday paper.⁹

⁷ HARRIS at 118-19, 181-82.

⁸ *Id.* at 182.

⁹ Thomas Oliphant oral history, Miller Center, U. of Virginia, Mar. 14, 2007, available at <https://millercenter.org/the-presidency/presidential-oral-histories/thomas-oliphant-oral-history-3142007-washington>. In the oral history, Oliphant thought it might have been one of two aides to

Oliphant's article, titled "Carswell Could Be Judge for New England Circuit," appeared on the *Boston Globe's* front page on Sunday, April 5, 1970.¹⁰ Its opening paragraph declared that if confirmed, Carswell "could end up being a vital link in the appeals process for the citizens of Maine, Rhode Island, Massachusetts, New Hampshire, and Puerto Rico."¹¹ The article provided a primer on the Circuit Justice's role:

This is so because of a little-understood function of Supreme Court justices, which places them in the role of circuit justices, each getting first crack at cases coming up from lower jurisdictions in 10 sections of the country.

In effect, in his role of circuit justice, a Supreme Court justice has the power to grant or deny temporary relief to petitioners pending final resolution of a case by the whole court.¹²

For example, Oliphant speculated that Carswell "could be the justice making the first decision on the Vietnam War Act adopted in Massachusetts last week,"¹³ and that if a stay were denied in such a case, the soldier-appellant "could be in Vietnam and get killed before the final phase of the appeals process was completed."¹⁴ In addition, Oliphant reported that "[t]wo important civil rights cases decided in the 1960s show the important position the circuit justice occupies in the appeal process"¹⁵ – a 1964 case in which Justice Hugo Black refused to stay an order enforcing the recently enacted Civil Rights Act,¹⁶ and a 1970 case in which Justice Thurgood Marshall stayed an order requiring legislative redistricting in Indiana.¹⁷

Senator Edward Kennedy who contacted him with this story lead, but Oliphant's and Harris's contemporaneous reporting does not support this.

¹⁰ Thomas Oliphant, "Carswell Could Be Judge for New England Circuit," *BOSTON GLOBE*, Apr. 5, 1970, at 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* On April 1, 1970, Massachusetts had adopted legislation challenging the Nixon Administration's authority to conduct the Vietnam War without congressional approval and providing that servicemen from Massachusetts could not be involuntarily deployed in an undeclared war. See *Massachusetts v. Laird*, 400 U.S. 886 (1970) (refusing by a 6-3 vote to allow Massachusetts to file an original bill of complaint in the Supreme Court to test the validity of this law).

¹⁴ Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).

¹⁵ *Id.*

¹⁶ *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 1 Rapp 351 (1964) (Black, J., in chambers); see also *Katzenbach v. McClung*, 85 S. Ct. 6, 1 Rapp 354 (1964) (Black, J., in chambers).

¹⁷ See *Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (granting stay application presented to Marshall, J., and referred to the full Court); Robert P. Mooney, *Court Delays Use of Remap*, *INDIANAPOLIS STAR*,

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While Oliphant’s article initially reported only that Carswell “could” be allotted to the First Circuit if confirmed, it cited aides to Bayh as asserting that “Judge Carswell would almost certainly be assigned to the First Circuit . . . because no Supreme Court Justice is assigned to it now.”¹⁸ This was not actually true: Justice William Brennan had been assigned to the First Circuit, in addition to his home Third Circuit, following Fortas’s resignation in 1969. However, Fortas had previously served the First Circuit and Brennan’s may have been perceived as a temporary, fill-in assignment until the Court was back at full strength.¹⁹

While the Oliphant article reportedly “impressed” Senator Smith,²⁰ no one knows how much it may have contributed to her vote on Carswell’s nomination three days later. There were plenty of other concerns about Carswell; for example, around the same time, Smith also expressed concerns about a report that Carswell had given misleading testimony about his role in incorporating a segregated golf club.²¹ When the time came, Smith voted against Carswell’s confirmation. During the roll-call, her vote “brought a roar of approval from the galleries and more applause, for her vote made twelve Republicans opposed – the number necessary to defeat the nomination.”²² Smith never gave specific reasons for her vote against Carswell, either before or after she cast it.

Whether Carswell would in fact have been assigned as Circuit Justice for the First Circuit if he had been confirmed to the Court is another unknowable. When Blackmun was confirmed two months later to what would have been Carswell’s seat, he was allotted not to the First Circuit but to the Eighth Circuit, where he had sat on the Court of Appeals before his elevation. Brennan, who had been allotted to the First Circuit upon Fortas’s resignation, retained that assignment after Blackmun joined the Court. Indeed, Brennan remained the Circuit Justice for both the First and Third Circuits until he retired from the Court in 1990. Blackmun took his assignment to the Eighth Circuit over from Justice Byron White, who had

Feb. 7, 1970 (reporting that Marshall had granted a stay in this case).

¹⁸ Oliphant, *supra* note 10, at 1, 21.

¹⁹ For listings of Circuit Justice assignments, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, table 5-4 (6th ed. 2015), or the Federal Judicial Center website at <https://www.fjc.gov/history/courts/supreme-court-united-states-circuit-allotments>

²⁰ HARRIS, *supra* note 4, at 182.

²¹ *Id.* at 183.

²² *Id.* at 201.

been Circuit Justice for that circuit since his appointment in 1962.

What is clear is that Carswell would not have been assigned in 1970 to the Fifth Circuit, which since 1937 had been the domain of Justice Hugo Black. Quite possibly Carswell would have been assigned to the Eighth Circuit, even though he was geographically unconnected with that circuit. This would have relieved White from his doubled-up responsibility for both the Eighth Circuit and his home Tenth Circuit. White's double load in serving both the Eighth and Tenth Circuits was more burdensome than Brennan's in serving both the First and Third Circuits, because the First Circuit was the smallest in the country. Despite all this, it is possible that Carswell would have been slotted in to fill the First Circuit seat in 1970 – but even then, it would probably have been a short-lived assignment, as Carswell could have been reallocated to his home Fifth Circuit when Black left the Court the following year.

But in any event, at one critical moment in 1970s, the breadth of the Circuit Justice's responsibilities made front-page news in a major city. As Oliphant's article concluded: "In short, the circuit justice is a very important person."²³

²³ Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).