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## SUPREME COURT OF THE UNITED STATES

The Senate continued with the consideration of the nomination of George Harrold Carswell to be an Associate Justice of the Supreme Court of the United States.

Mr. KENNEDY. Mr. President, I yield 5 minutes to the Senator from Maine.

The ACTING PRESIDENT pro tempore. The Senator from Maine is recognized for 5 minutes.

Mr. MUSKIE. Mr. President, it is almost 2 months since I first announced my intention to vote against the confirmation of the nomination of Judge G. Harrold Carswell as an Associate Justice of the Supreme Court. Since that time, tens of thousands of words have been written and spoken on the nomination. They have not changed my position, because the facts have not changed, but they have deepened my conviction that Judge Carswell should not be a member of the Supreme Court.

I do not intend to prolong the debate today, Mr. President; but I do have a few observations which were triggered by the President's assertion that he has the prerogative to appoint, and that the Senate's role is limited to offering advice and consenting to his decision.

As a constitutional theory, Mr. President, that assertion is novel, but it is not sustainable. As a statement of the President's view of the federal system, it has an ominous ring.

Presidents may fret at the resistance of the Senate to certain of their proposals and nominations, but the authors of the Constitution knew what they were doing when they established our system of checks and balances. We tamper with that system at our peril.

The immediate question, however, is not the President's constitutional theories. The question each of us must answer is whether Judge Carswell meets the standards we believe should be met by a member of the highest court of the land. What we decide on this nomination, Mr. President, will hold not merely for the remainder of President Nixon's term, it will hold for many years, and it cannot be recalled by a change of political sentiment or a shift of political power.

Whenever an appointment to the Court becomes controversial, there is discussion of the respective roles of the President and the Senate. What does advise and consent mean? Does it impose a positive or a negative responsibility on the Senate? Does it limit the Senate's role to consideration of technical competence? Does the Senate have any responsibility or, indeed, any right to consider the quality of an appointee's background, experience, performance, understanding, judgment, insight?

Such discussion and debate, Mr. President, is useful in the long run, to shape and sharpen our understanding of the responsibilities of the President and the Senate in connection with these appointments.

However, Mr. President, I have no doubt as to the intent of the Founding Fathers in framing the applicable provisions of the Constitution. The result hoped for by them, I am sure, was a court whose competence, judgment, and wisdom would inspire confidence among all Americans that the quality of justice to be dispensed by the Court would be the highest attainable quality. I am also sure that it is the responsibility of the President and the Senate to so interpret their respective roles under the Constitution as to contribute to that result.

Such a result, at any given point in our history, may well raise different questions as to specific nominees, as well as some obviously recurring questions relating to character, competence, and capability.

What questions are raised by this appointment? Was it the President's intent, in making this appointment, to bring the Nation together, having in mind the ugly divisiveness in the land? If so, he has failed to meet that objective.

Was it the President's intent, in making the appointment, to apply the test of highest judicial competence to nominees for the Supreme Court, in the tradition of Holmes, Cardozo, Brandeis, and Frankfurter, who have held this seat? If so, he has clearly failed to meet that objective.

Was it the President's intent to continue the Supreme Court as the honored place of last resort, in the protection of liberty, privacy, and freedom of all Americans? If so, then he has failed to reassure millions of Americans that the record of this nominee shows a genuine concern or commitment to the cause of equal rights and equal justice for all Americans.

Was it the President's intent to provide the South with a representative on the Supreme Court of the United States worthy of the highest traditions of that region? If so, then again he has failed.

Was it the President's intent to strengthen the federal system of checks and balances? If so, then he has failed both in the candidate he has submitted to the Senate and in the approach he has taken to the Senate on the issue of confirmation.

Mr. President, I support the motion to recommit the nomination of G. Harrold Carswell to the Judiciary Committee, and I will vote against confirmation of Judge Carswell. I do so because I do not believe this nomination to be consistent with the needs of our country and our people in this divisive time.