



## NOMINATION OF SIMON E. SOBELOFF

FRIDAY, JULY 6, 1956.—Ordered to be printed

Mr. BUTLER, from the Committee on the Judiciary, submitted the following

### REPORT

together with

### MINORITY VIEWS

[To accompany the nomination of Simon E. Sobeloff]

The Committee on the Judiciary, to which was referred the nomination of Simon E. Sobeloff, of Maryland, to be United States circuit judge, fourth circuit, vice Morris A. Soper, retired, having considered the same, reports favorably thereon with the recommendation that the nomination be confirmed.

The Committee on the Judiciary, considering the nomination of Simon E. Sobeloff to be United States circuit judge for the Fourth Circuit Court of Appeals, reports said nomination favorably and recommends the nominee's confirmation by the United States Senate.

The record of the nominee and all the testimony in this case have been fully discussed and considered both in the subcommittee and in the full committee. It is doubtful if any judicial nomination has received more minute examination. The committee after full consideration has recommended Judge Sobeloff for confirmation by a vote of 9 to 2 with 1 abstention.

The nominee is presently the Solicitor General of the United States, for which office he was unanimously approved by the United States Senate less than 2½ years ago.

Previously he served as chief judge of the Court of Appeals of Maryland, the highest court of that State and one of America's oldest and most respected tribunals.

Before that he had served with marked distinction as United States attorney for the district of Maryland, and as city solicitor of Baltimore City. His honorable and successful career at the bar has been shown by leading lawyers and jurists who appeared before the committee and who otherwise expressed their approval of the nomination.

In addition to these impressive professional attainments he has been for many years a leader in the civic life of Baltimore City and the State of Maryland. He headed the Maryland Commission for the Reorganization of the State Government, known as the Sobeloff Commission, which is responsible for major improvements in the budget procedure of the State, the revision of the State's parole system, and many other notable advances.

His support is bipartisan. Among his ardent endorsers, who appeared before the subcommittee, was former Democratic Senator George L. Radcliffe, of Maryland. Likewise in hearty support of the nomination is former Democratic Senator Herbert R. O'Connor, also of Maryland. Both of these Senators are personal friends and endorsers of the nominee. The nominee has the unusual distinction of having served in the key position of city solicitor in both Republican and Democratic city administrations of Baltimore. He has been active in charitable and other public causes in his community and nationally.

His integrity as a man, his ability as a lawyer, his impartial demeanor as a judge, and his fitness for the post to which he has been named are vouched for not only by the respective committees on judicial appointments of the Baltimore City and Maryland State Bar Associations, as well as the corresponding committee of the American Bar Association, but also by Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, and by his associate judge, the Honorable Morris A. Soper, who testified for the nominee on the basis of an intimate acquaintance for more than 40 years; and by Associate Judge Armistead M. Dobie, also of that court.

The opposition to the nomination falls into five separate categories:

1. The alleged role of the nominee in the receivership of the Baltimore Trust Co. nearly 20 years ago.
2. The nominee's participation in the argument before the Supreme Court in the segregation cases.
3. The alleged views of the nominee as to the doctrine of the separation of powers.
4. Failure to sign the brief in the Peters case.
5. The claim that South Carolina is entitled to the appointment.

#### I. THE BASELESS CHARGES AS TO THE ROLE OF THE NOMINEE IN THE RECEIVERSHIP OF THE BALTIMORE TRUST CO.

It was alleged at the hearings that the nominee represented conflicting interests. We think that, in simple justice and to determine the weight to which the charge is entitled, the question must first be raised, Who brings the charge?

It is brought, and not from personal knowledge, by one Charles Shankroff, who is convincingly shown by the record to be habitually engaged in champertous practices. The evidence at the hearing discloses that Mr. Shankroff has no legitimate occupation, but spends his time haunting the clerks' offices of the Baltimore City courts, examining old records in the endeavor to stir up litigation and to insinuate himself into situations with which he has no legitimate concern. He is not a lawyer and claims that his business is Baltimore real estate, but it has been established that in the 14 years he has



lived in Baltimore he has never had a real-estate license, and search of the land records discloses not a single purchase or sale by him.

The record contains the statement of the Baltimore City Bar Association (printed hearings, p. 162) with numerous documenting exhibits (hearings, p. 163), which demonstrate the total irresponsibility of Mr. Shankroff.

A specific instance of Mr. Shankroff's inexcusable conduct is shown in the affidavit of Mr. Julian Victor of the leading Baltimore law firm of Harley, Whettle & Victor (hearings, p. 156). He attaches a transcript of certain proceedings in the Orphans' Court of Baltimore City (hearing, p. 157), in which Mr. Shankroff tried to inject himself without justification (hearings, pp. 157-160).

The police commissioner of Baltimore City, Mr. James M. Hepbron, former director of the Community Fund of Baltimore, has written on the basis of this personal and official knowledge that Charles Shankroff, and his strange and persistent activities, that Mr. Shankroff is generally regarded as "a mental case" and a "public nuisance." Mr. Hepbron expresses the opinion, clearly supported by the data he cites, that Shankroff is "irresponsible as well as unreliable" (hearings, p. 247).

Further, the present city solicitor of Baltimore, Hon. Thomas N. Biddison, has submitted a letter (hearings, p. 248), citing Mr. Shankroff's appearances in 15 different instances before the Board of Estimates of Baltimore City, in which he attempted without any basis whatsoever to meddle into matters with which he had no concern and in respect to which he could play no possible useful role. His sole purpose obviously was to make mischief.

At the hearings, the chairman of the subcommittee, Senator O'Mahoney, by certain preliminary questions, developed that Mr. Shankroff had no personal knowledge of the facts and no qualifications entitling him to offer views based upon his summary of court records. The chairman was clearly correct in declining to permit Mr. Shankroff to elaborate his testimony upon such a basis.

The foregoing abundantly demonstrates the complete unreliability of the witness and would be enough to discredit his charges. There is, however, overwhelming independent proof of unquestioned reliability which utterly refutes Mr. Shankroff's claims.

As we shall presently show, the allegations made by Mr. Shankroff, and which he claimed would be supported by Mr. John D. Hospelhorn, deputy banking commissioner of Maryland, who acted as receiver of the Baltimore Trust Co., were completely demolished by Mr. Hospelhorn. Mr. Hospelhorn, a man of unquestioned veracity and disinterestedness, not only proved the groundlessness of claims brought by Mr. Shankroff but he gave high praise to Mr. Sobeloff's conduct in his connection with the Baltimore Trust Co., and he joined the other witnesses in acclaiming his high standing at the bar and in the community.

We are fully convinced that Mr. Sobeloff's conduct in the Baltimore Trust case was unexceptionable. There is no responsible testimony to the contrary.

For a complete understanding of the accusations and a demonstration of their groundlessness, it is necessary to review briefly the history of the Baltimore Trust Co.'s failure. Important, too, it is to note the special and limited function which Mr. Sobeloff performed in respect to the receivership.

Although Mr. Shankroff assumes throughout, in bald disregard of the indisputable truth, that Mr. Sobeloff was general counsel for the receiver in the liquidation of the bank's affairs, the fact is that the nominee had nothing whatever to do with the administration of the receivership. He was neither consulted by the receiver nor did he seek to influence him in respect to the sale of any of the bank's assets or the settlement of any of its claims. All such decisions were made without the participation of the nominee.

Mr. Sobeloff was appointed by the equity court to make an inquiry into the causes of the failure of the bank and to ascertain particularly whether there had been misconduct of a criminal or civil nature on the part of the officers and directors.

The Honorable Eugene O'Dunne, presiding judge in the circuit court No. 2 of Baltimore City, in which the receivership was pending, appointed him for that limited purpose only, in order to satisfy the natural curiosity of the public as to what had happened to their money and to set at rest after an impartial inquiry certain rumors which were rife in the community as to alleged malfeasance by officers and directors of the bank.

The Baltimore Trust Co. was the largest banking institution in Baltimore. Indeed, it was the largest bank south of Philadelphia. Its depositors were numbered in the tens of thousands. It first ran into difficulty in September 1931, some 18 months before the widespread collapse of banks throughout the country. Public-spirited citizens raised a guaranty fund of some seven or eight million dollars to replenish the bank's capital and to enable it to continue in business. But it continued to lose deposits and there was a steadily diminishing confidence in the community in respect to the bank. In the latter part of February, or early March 1933, when President Roosevelt declared the "bank holiday," the Baltimore Trust Co. closed its doors. Although, as is well known, most banking institutions throughout the country were permitted ultimately, after investigation, and where necessary, adjustment of their affairs, to reopen, the Baltimore Trust Co. was found to be in such condition that it could not resume business. The disagreeable rumors concerning the bank persisted.

This condition continued until September 1935, when Mr. Sobeloff was appointed to make his inquiry. This appointment took place at a hearing in open court, occasioned by the receiver's move to collect the statutory double liability from the bank's stockholders. Mr. Sobeloff was present, along with numerous other lawyers representing stockholders. These lawyers suggested to the court that the stockholders' liability could not be enforced until there had been some legal showing as to the nature and approximate amount of the losses, and a judicial finding that the assessment was necessary to pay the bank's debts.

At the hearing which the court ordered for this purpose, a former vice president of the bank, Mr. Henry Thomas, was called as a witness by the receiver. He reviewed a number of the larger loans of the bank and showed that these alone, without broadening the inquiry into other matters, indicated losses of more than \$26 million.

At this point Judge O'Dunne declared that he was shocked by these revelations. The record shows the statement made by the judge from the bench from which we quote as follows:

\* \* \* In view of the disclosure and testimony of yesterday as to absolutely worthless loans, 18 in number, aggregating \$4 million, it becomes the duty of



this court, when confronted with testimony of such order, to make or cause to be made some official inquiry as to whether there was mere banking improvidence of the officials of the Baltimore Trust Co. in so doing, or whether the facts are pregnant with suggestion of more sinister character.

\* \* \* There would be a more wholesome feeling in the community if some intelligent, impartial, efficient, disinterested, outside inquiry were made by some lawyer skilled in that line of inquiry whose judgment has been accepted in the community as fair and impartial, with the understanding that that be done unostentatiously and conservatively and that the reports and the conclusions that he reaches be made to the counsel for the receiver, and to no one else, to be by the counsel for the receiver analyzed, interpreted, qualified and acted on, in their judgment, and as they see fit.

\* \* \* To that end, because of the particular qualifications Mr. Simon Sobeloff has, experienced as an eminent United States district attorney (and Judge Chesnut has said he was the best that Baltimore has ever had), I select him. At a testimonial banquet on his retirement from office I heard all present refer to his impartiality and his devotion to public duty. The court wants Mr. Simon Sobeloff to make this inquiry, with the understanding that his compensation may be considerably circumscribed. The court reserves the right to relieve him from further activities, as and when the court thinks a proper time to do so, has come.

If the question of his impartial activities and inquiry results in disclosures that the receiver upon advice of counsel, thinks litigation ought to be instituted, why, then, there may be further opportunity and justification for his continued services.

This was in September of 1935, nearly 21 years ago. The date should be noted. Mr. Sobeloff was ordered to lay aside all other work and to proceed at once to make the investigation. He made two reports—a preliminary report on December 31, 1935, and a final one on May 25, 1936.

Mr. Sobeloff found no basis for criminal prosecution as there had been no fraud or bad faith, but he did find gross negligence on the part of certain officers and directors and recommended suits against them. The insistence of Mr. Shankroff that Mr. Sobeloff found fraud and criminality is unsupportable. (See hearings, pp. 182, et seq., and newspaper headlines of the time, hearings, pp. 182, 193.)

The receiver then had 3 counsel, and Mr. Sobeloff was not 1 of them. The counsel were Joseph C. France, Alexander Armstrong, and J. Purdon Wright. Mr. France announced that because of personal relations with certain of the defendants he would decline to participate in any suits against them. It was then that Judge O'Dunne designated Mr. Sobeloff to cooperate with the two remaining counsel in prosecuting several suits against officers and directors. He did no other work for the receiver, then or later.

There was no inconsistency in the nominee's participating in these suits. Mr. Shankroff complains that there was some impropriety in this because Mr. Sobeloff had theretofore appeared in open court on behalf of certain stockholders resisting the assessment. As we see it, there was involved no impropriety on Mr. Sobeloff's part. Mr. Sobeloff's representation of the stockholders was open and as public as anything could be. It was actually in the interest of stockholders as well as depositors for directors and officers who were guilty of negligence to be brought to account. If they responded in damages it would enure to the benefit of both stockholders and depositors, by increasing the funds available for distribution.

No one at the time suggested there was any inconsistency in this representation. It can be assumed with confidence that if there had been a basis for any charges of irregularity in Mr. Sobeloff's conduct,

the influential directors and bank officials he sued, and their competent lawyers, would not have overlooked the opportunity to point this out. No such assertion was made then or in the 20 intervening years. During this long period Mr. Sobeloff was constantly in the public eye, held a number of offices in his city and State, including the highest post in the State's judiciary, and at no time did anyone suggest that he had acted unethically in accepting or executing the court's public appointment. We think that the attempt after 2 decades to concoct such a charge is unwarranted and scandalous.

Mr. Shankroff criticizes the nominee for permitting the court to settle the suits against directors and officers for too small an amount. The circumstances under which these suits were settled are fully and satisfactorily discussed in Mr. Sobeloff's letter to the chairman of the subcommittee, Senator O'Mahoney, under date of May 20, 1956, and also in Mr. Hospelhorn's affidavit of that date, as well as in their oral testimony. We need not go into details here. It is sufficient to say that there were practical reasons which to the judge indicated the wisdom of a settlement. The important and decisive fact to be noted is that neither Mr. Sobeloff nor the other counsel who participated in the suits were consulted by the court as to the terms of the settlement. This fact was specially noted at the time by the judge. The receiver points this out in his affidavit (hearings, p. 176). To blame Mr. Sobeloff, 1 of 3 attorneys in the case, none of whom in fact joined in the settlement, for not attacking a settlement which no one wished to attack, seems to us not only unjust but preposterous.

Mr. Shankroff says that the nominee should have appealed the court's action.—The simple answer is that he represented no interests that desired or were entitled to appeal or that would benefit from an appeal. There was no demand on anybody's part—public, private, official, or nonofficial—for an appeal. As a matter of fact, the action of the court was generally regarded as wise and fair and it would be a fantastic thing for the United States Senate—20 years after the event—to undertake to sit as a reviewing court of Judge O'Dunne's action.

The same observation may well be made with respect to the settlement of the stockholders' liability. Although the statutory liability was the additional par value of the share, par being \$10, Judge O'Dunne, after protracted hearings and negotiations which he personally conducted and in which Mr. Sobeloff, according to the affidavit of Mr. Hospelhorn, had no part, decided to accept a general offer made by the stockholders as a class to settle for \$5 per share. This, too, was something which the nominee would have had no standing to appeal and which no one in the last 20 years has suggested should have been appealed. No stockholder enjoyed any preference. All paid on the basis ordered by the court, namely, \$5 per share. The record makes it clear beyond dispute that Mr. Sobeloff did not participate in the settlement negotiations because he was then actively engaged in the investigation to which the court had appointed him.

Mr. Shankroff levels another attack against the nominee. Repeating the false allegation that Mr. Sobeloff was counsel for the receiver, Mr. Shankroff says Mr. Sobeloff also represented the purchaser of one of the receiver's assets, namely, the Baltimore Trust Building. This assertion involves a series of untruths. In the first place, as Mr. Hospelhorn, the receiver has shown, Mr. Sobeloff did not represent



him in the sale of the building. Second, the sale was not made by the receiver to Mr. Funkhouser. Mr. Funkhouser was the third in a line of purchasers, and he did not acquire the building until some years after the original purchaser's sale. Third, Mr. Sobeloff did not represent Mr. Funkhouser in the purchase. Mr. Hospelhorn's affidavit and oral testimony both establish conclusively that Mr. Sobeloff did not participate in the transaction on behalf of either the seller or the buyer of the building, and probably was unaware of the transaction at the time.

Mr. Sobeloff did not enter this picture until 1943, 7 years after Mr. Sobeloff had concluded his special work for the Baltimore Trust Co., and long after the receiver had made final distribution to the creditors. Mr. Funkhouser had by then become the owner of the building. It was at this late date that Mr. Funkhouser, through his general attorney, requested the present nominee to intercede with the receiver to have him move certain old filing cabinets out of the building; or in the alternative, if that could not be accomplished, to arrange for the receiver to consolidate his old records to take up less of the valuable office space. The receiver claimed that he was holding the space rent-free under some arrangement made at the time of the original sale of the building to the initial purchaser. Mr. Funkhouser did not think he should be bound by this order to which he was not a party.

When Mr. Sobeloff approached the receiver and his counsel, they suggested that he file a petition which they would promptly answer, and that the judge be requested to decide whether the receiver should continue to hold the space. Such a petition and answer were accordingly filed, but thereafter the receiver agreed that he could get along with less space than he had theretofore used. The petition was therefore dismissed by agreement without the necessity for a hearing.

This trivial incident has been called a "suit" against the receiver and this is said by Mr. Shankroff to be an impropriety on the part of the nominee. We disagree. The nominee was under no obligation in 1943 not to approach the receiver in respect to this matter (of the removal of filing cabinets) on behalf of a man whom he did not even know in 1935 or 1936 when he performed his special assignment for the court. To magnify this petty incident into a purported professional impropriety seems to us, not only utterly without merit, but quite indefensible.

Nothing that has been shown in the Baltimore Trust matter reflects in any degree whatsoever against the fitness of the nominee.

## II. THE NOMINEE'S PARTICIPATION IN THE ARGUMENT IN THE SUPREME COURT ON THE SEGREGATION CASES

There has been much discussion of the nominee's argument in the Supreme Court on segregation. It should be pointed out that he was not yet Solicitor General when the original question was argued as to the legality of segregation. He had no part in bringing the case or in representing the Government until after the Court's decision was made. His first appearance took place 11 months later when he made the argument for the Government at the second hearing. The "separate but equal" doctrine had been overruled and the sole remain-

ing issue was the type of decree that should be passed to implement the decision previously made.

The argument of the nominee was generally regarded as restrained and reasonable and southern newspapers characterized his presentation as the "voice of moderation." He disagreed with the contentions of those who insisted on a decree calling for the "forthwith" integration of public schools. He maintained that the cases should be remanded for further proceedings to the lower courts, which were better acquainted with local conditions. He pointed out that "there is such a great variety of conditions that no single formula could be devised that would fit aptly all cases;" and that the Supreme Court cannot act as a "super school board." He urged that the district courts be given discretion to determine how soon the required changes could be feasibly made. He particularly declared to the Court that "people should not be run over roughshod" and urged the Court not to fix a deadline. He told the Supreme Court that "institutions that had existed for generations cannot be wiped out by a stroke of the pen."

It has been said that the nominee argued for a deadline of 90 days to effect desegregation; this is not correct. He suggested that the district courts require the defendants merely to submit a plan within 90 days and that this period could be extended where the Court found that more time was required. He asked the Court to allow ample time, but to require a show of good faith. Throughout his presentation the nominee showed an awareness of the human factors on both sides of the question. We are convinced from his calm and dispassionate treatment of this delicate question that there is nothing in his having participated in the Supreme Court as the chief trial lawyer for the Government that disqualifies him for the office to which he has been nominated.

### III. ALLEGED VIEWS AS TO DOCTRINE OF SEPARATION OF POWERS

The subcommittee and the full committee heard criticism of a speech delivered by the nominee before the Judicial Conference of the Fourth Circuit. That speech, addressed to an assembly of judges and lawyers, dealt with the considerations that may move the Supreme Court to grant or deny certiorari. It was pointed out that the jurisdiction of the Court has been made by Congress largely discretionary; that the Court will consider only such questions as it deems of sufficient importance to engage the attention of the highest tribunal; and that timing is a factor in determining whether a question is suitable for review on certiorari. The nominee said:

The Court is not merely the adjudicator of controversies, but in the process of adjudication it is, in many instances, the final formulator of national policy.

We find nothing in this statement deserving condemnation.

The speech was delivered in the presence of the Chief Justice and all of the judges of the fourth circuit, as well as several hundred lawyers, mostly from the South. Neither then nor later were the nominee's statements criticized. The speech was published in the American Bar Association Journal many months ago. No exception was taken then. Since the nomination it has been asserted that the speech proved that the nominee adheres to a philosophy of law that disregards the separation of powers. We find no support for this contention.



Judge John J. Parker has written the committee:

I understand that criticism has been made of Judge Sobeloff on the ground that, in a speech which he made before the Judicial Conference of the Fourth Circuit in June 1954, he stated that "the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy." I heard that speech and saw nothing in it to criticize. That it is the proper function of the Supreme Court to interpret the Constitution of the United States and acts of Congress and that such interpretation is often the final formulation of national policy has been recognized so long that it has never occurred to me there could be any doubt about the matter. *Chisholm v. Georgia*, *Marbury v. Madison*, *Gibbons v. Ogden*, the Standard Oil case, the Appalachian Coals case, the Washington Minimum Wage case, the Mortgage Moratorium case, the Steel Seizure case, and many others, which will doubtless occur to you without my mentioning them, illustrate what I mean and what I am sure Judge Sobeloff had in mind in the passage of his speech which is criticized.

One does not have to believe that the Supreme Court is invariably right in all its decisions to recognize the truth that where the Supreme Court interprets an act of Congress in a way that Congress thinks incorrect, Congress may amend the law to make its will effective; for where Congress makes the purpose clear in an area within its constitutional power, its will is binding on the Court regardless of its preference or notions as to the desirability of legislation. On the other hand, where the Court interprets a constitutional provision, its ruling is final and binding and cannot be changed except by the slow and difficult process of constitutional amendment.

However this may be, the very speech under consideration makes it clear that the nominee has a high regard for the obligation to respect the separation of powers, for (as he said) "the disregard of this principle would itself lead to tyranny." The concluding sentence of the speech, referring to the Office of the Solicitor General, spoke of the duty and constant endeavor to be "obedient to the legislative policy laid down by others."

The record also contains an address made by the nominee before the Alumni Association of the New York University School of Law, in which he declared as follows:

We know that courts cannot be looked to exclusively for protection against tyranny. The first place to take precautions is at the administrative level. In no system of law can there be effective judicial review of all official conduct. Perhaps there will never be a complete answer. However this may be, when judges declare what is correct and traditional, namely, that they are concerned only with the limits of legal power, not with whether power within those limits has been exercised with wisdom and fairness, the core of the difficulty persists.

Yet, despite these limitations and difficulties we must bear in mind that the goal is justice. Edmund Burke eloquently called justice "the great standing policy of civil society." That is the real business of the courts, and the reason for their existence.

Laymen sometimes naively ask, "Why cannot the courts simply do justice?" But lawyers understand why doing justice is not always a simple thing.

Many perplexities present themselves. It is one thing to declare, quite sincerely, devotion to the goddess of justice; but it is another and more difficult thing to know in the particular instance precisely what is justice. Even when we are quite sure what it is and what it requires, other men of undoubted wisdom and character will think it is something very different. Often the demands of justice seem to contradict one another. But we have the obligation to try; we must seek justice and pursue it within the established rules.

On another occasion the nominee, addressing the Ninth National Conference on Citizenship at the Statler Hotel in Washington, in September 1954, which was before his nomination, on the theme

Who Guards Our Freedoms, showed his appreciation of the limitations on the power of the courts in the following language:

Who guards our freedoms? Not the courts alone; in this area their function, which I hold in reverence, is the limited one of deciding what is constitutionally permissible. Strive as they may to square law with justice, by and large theirs is not the duty or the right to censor the wisdom of the policies made by Congress or legislatures, or even in many instances the acts of administrators. Although the courts have on numerous important occasions made historic contributions to freedom's cause, informed laymen as well as lawyers know that courts are not empowered to set aside every law of which they disapprove, even when they feel that it may lead to injustice. Not everything that is unwise or unfair is necessarily unconstitutional. We may, and often do, chafe when courts decline to exceed the limits assigned them, but experience with so-called "people's courts" in certain other lands, where judges are released from the restraints of law and are free to follow arbitrary notions of justice, should provide ample warning of the dangers of confusing the legislative function with that of adjudication.

We are fully satisfied that these attitudes and expressions are not those of a man who would seek to override the separation of powers or would sanction usurpations by one department in the area reserved for other departments of the Government.

#### IV. FAILURE TO SIGN BRIEF IN PETERS CASE

A witness before the committee complained of the nominee's failure to sign the Government's brief or to argue in the case of Dr. John P. Peters. Dr. Peters was a professor of medicine at the Yale Medical School, and a part-time consultant of the United States Department of Health, Education, and Welfare.

This is not the first instance of a Solicitor General's declining to sign a brief of the Government when he did not believe in the soundness and justice of the case. Predecessors have on occasion done likewise, withdrawing from the case to permit others to handle it who found themselves more in accord with the asserted position of the Government. In some instances Solicitors General have gone further and confessed error on behalf of the United States.

The Attorney General, Herbert Brownell, Jr., has asserted that such honest differences are not to be deplored. The Attorney General declared:

The Department of Justice might just as well close up shop if its lawyers felt that they had to "pull their punches" in their discussion with me on any issue. Simon Sobeloff and I have always dealt with each other on this frank and sensible basis.

Unless we want responsible officials in Government to abdicate their functions, we must expect that they will have reasonable disagreements and exercise independent judgment. \* \* \* (p. 113, report hearings, Senate Judiciary Committee, May 5, 1956).

The independence of the Solicitor General in respect to Supreme Court legislation is traditional.

Mr. Brownell has declared in a letter to the chairman of the committee that—

the conduct of the Solicitor General in all matters before that high office has been in the best traditions of the law.

He supported the testimony of his executive assistant, Mr. John V. Lindsay, that the Solicitor General's action in the Peters case was taken with the Attorney General's full knowledge and consent.



With the Attorney General consenting, and the President apparently not being aggrieved, we believe that honest differences of opinion should not be a disqualifying consideration of an able lawyer.

#### V. THE CLAIM OF SOUTH CAROLINA

Finally, it has been objected that the nomination should have been made from South Carolina, in obedience to an alleged tradition to rotate appointments among the States comprising the circuit. One weakness of this argument is that the experience of the past does not show the existence of such a tradition. A practice can hardly be called traditional which has not been observed through the years. Whatever reasons may be adduced for such rotation, and granting its general desirability when other factors are in balance, certainly rotation, which has not been customary in the fourth circuit, or elsewhere, cannot be exalted to the place of an inexorable requirement in disregard of other considerations. There is no constitutional requirement of rotation and, if Congress intended such a rule it could have enacted it. The geographical consideration, while pertinent, is not controlling, and has never been considered controlling. In the absence of constitutional or statutory restriction, the President was within his rights in nominating a qualified person from any part of the circuit. Certainly the Senate would not be justified in rejecting a well-qualified nominee in these circumstances, and he should not suffer the slur to his reputation which would attach to our failure to confirm.

#### CONCLUSION

We find the nominee well fitted for the office to which he has been named. We find no merit in the objections that have been raised against the appointment.

Accordingly, it is recommended that the Senate confirm the nomination of Simon E. Sobeloff to be a circuit judge for the fourth judicial circuit of the United States.

## MINORITY VIEWS

This nomination should be rejected.

It is repugnant to the majority of persons living within the geographical area which the court serves. It violates the rotation principle by which the States embraced in the circuit receive representation periodically on the Federal courts of appeals. In addition, and of prime importance, there are serious questions concerning the fitness of this nominee for the office to which he has been nominated. These serious questions arise as a result of (a) his public utterances regarding functions of the court, (b) his publicly manifested predisposition on certain issues, and (c) his inability to discern ethical considerations applicable to lawyers and judges alike.

We shall treat each of these objections to this nomination at length. We deem it important initially, however, to restate the fundamental principle that the Senate, if it is to fulfill its constitutional function of advising and consenting to nominations such as this, must, independently and without fear of political stigma or unfavorable publicity, examine thoroughly the manner of the nomination and the fitness of the nominee. The Constitution did not confer upon the Chief Executive the sole authority to appoint officers of the United States, including the members of our Federal judicial system. It vested a coordinate responsibility in the Senate of the United States which cannot be fulfilled by supine acquiescence in the designation of the Chief Executive.

If the Chief Executive, or more appropriately his administration, has failed to observe custom without reason, if his administration has failed to give representation to a State on the circuit bench when representation is due, if the administration has failed to consider whether the nominee is acceptable to the majority of those whose interests he will judge, if the administration has not fully examined the nominee's fitness for the high office he is to fill, if the administration has sought to gain political advantage in other areas by the appointment to the disregard of those immediately affected; if the administration has done these things, the Senate has an obligation to assert to the full measure its constitutional prerogative. If any one of these contingencies is present, the Senate should exercise its veto and compel another, and better, choice.

### I. THE RIGHT OF SOUTH CAROLINA TO THIS APPOINTMENT

The nomination of Simon E. Sobeloff to fill the vacancy created by the retirement of Judge Morris A. Soper of Maryland violates the traditional rotation custom of appointments for vacancies on the Fourth Circuit Court of Appeals.

The courts of appeal were established by the Congress by the act of March 3, 1891. There is a court of appeal for each of the 10 circuits and another for the District of Columbia. We are here concerned



with the Court of Appeals for the Fourth Circuit, comprising the States of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Prior to 1891, however, for administrative purposes, the Nation had been divided into circuits which, in turn, were subdivided into districts. There were district courts and circuit courts, though the jurisdiction of the old circuit courts was very dissimilar to that of the later courts of appeal. There was assigned to each circuit one of the Justices of the Supreme Court of the United States (traditionally, the Chief Justice of the United States is the circuit justice for the fourth circuit) and there was a circuit judge. The burden of review of a district court and of the old circuit court decisions, however, was upon the Supreme Court of the United States.

By the 1880's the volume of cases in the Federal courts had grown to such proportions that there was an evident necessity for the establishment of courts, under the Supreme Court of the United States, but having general appellate jurisdiction over appeals from the district courts. That necessity was recognized by the Congress in 1891 when it created a court of appeals for each Federal circuit and provided for each of the courts of appeal appellate jurisdiction over District courts within each circuit.

With the creation of the courts of appeal in 1891, Judge Hugh L. Bond of Baltimore, Md., who, for many years, had been a circuit judge of the fourth circuit, became the first member of the court of appeals for the fourth circuit. The next year (1892) a second judge, Nathan Goff of Clarksburg, W. Va., was appointed.

There were never more than two active circuit judges of the Court of Appeals for the Fourth Circuit until 1914. Usually, cases were heard by the 2 circuit judges together with the circuit justice (Chief Justice of the United States) or 1 of the district judges.

When the old Commerce Court was abolished and its jurisdiction terminated, however, the judges who were sitting upon that court were assigned to several of the courts of appeals. One of those judges, Martin A. Knapp, originally of Syracuse, N. Y., but then a resident of the District of Columbia, was assigned to the Court of Appeals for the Fourth Circuit. Since then the fourth circuit has been a court of three judges.

The judges who have served as circuit judges upon the Court of Appeals for the Fourth Circuit, in the order of their appointment, are:

Judges	State of residence	Period of service
Hugh L. Bond <sup>1</sup>	Maryland	Mar. 3, 1891 to Oct. 24, 1893.
Nathan Goff	West Virginia	Mar. 17, 1892 to Mar. 31, 1913.
Charles H. Simonson	South Carolina	Dec. 19, 1893 to Apr. 25, 1904.
Jeter C. Pritchard	North Carolina	Apr. 27, 1904 to Apr. 10, 1921.
Charles A. Woods	South Carolina	1914 to June 21, 1925.
Martin A. Knapp <sup>2</sup>	District of Columbia	1914 to Feb. 10, 1923.
Edmund Waddill, Jr.	Virginia	1914 to Apr. 9, 1931.
John C. Rose	Maryland	June 20, 1922 to Mar. 26, 1927.
John J. Parker	North Carolina	Oct. 3, 1925 to ———.
Elliott Northcott	West Virginia	Apr. 26, 1927 to Oct. 15, 1930.
Morris A. Seper	Maryland	May 6, 1931 to ———.
Armistead M. Doble	Virginia	Dec. 19, 1930 to Feb. 1, 1932.

<sup>1</sup> Judge Bond had been circuit judge of the 4th circuit for many years prior to 1891, but the court of appeals was not constituted until passage of the act of Mar. 3, 1891.

<sup>2</sup> Transferred from old Commerce Court, enlarging the court from 2 to 3 circuit judges.

In no instance has a circuit judge of the Court of Appeals for the Fourth Circuit been succeeded by a resident of the same State.

The succession has been as follows:

<i>Successor</i>	<i>Predecessor</i>
Judge Bond of Maryland	Original appointment.
Judge Goff of West Virginia	Do.
Judge Simonton of South Carolina	Succeeded Judge Bond of Maryland.
Judge Pritchard of North Carolina	Succeeded Judge Simonton of South Carolina.
Judge Woods of South Carolina	Succeeded Judge Goff of West Virginia.
Judge Knapp of District of Columbia	Original appointment.
Judge Waddill of Virginia	Succeeded Judge Pritchard of North Carolina.
Judge Rose of Maryland	Succeeded Judge Knapp of District of Columbia.
Judge Parker of North Carolina	Succeeded Judge Woods of South Carolina.
Judge Northcott of West Virginia	Succeeded Judge Rose of Maryland.
Judge Soper of Maryland	Succeeded Judge Waddill of Virginia.
Judge Dobie of Virginia	Succeeded Judge Northcott of West Virginia.

At no time in the history of the Court of Appeals for the Fourth Circuit have there been two circuit judges from the same State, either active or in retirement, serving together.

Judge Bond of Maryland served with Judge Goff of West Virginia.

Judge Goff of West Virginia served with Judges Bond of Maryland, Simonton of South Carolina, and Pritchard of North Carolina.

Judge Simonton of South Carolina served with Judge Goff of West Virginia.

Judge Pritchard of North Carolina served with Judges Goff of West Virginia, Woods of South Carolina, and Knapp of the District of Columbia.

Judge Woods of South Carolina served with Judges Pritchard of North Carolina, Knapp of the District of Columbia, Waddill of Virginia, and Rose of Maryland.

Judge Waddill of Virginia served with Judges Woods of South Carolina, Knapp of the District of Columbia, Rose of Maryland, Parker of North Carolina, and Northcott of West Virginia.

Judge Rose of Maryland served with Judges Woods of South Carolina, Waddill of Virginia, and Parker of North Carolina.

Judge Parker of North Carolina has served until the present with Judges Waddill of Virginia, Rose of Maryland, Northcott of West Virginia, Soper of Maryland, and Dobie of Virginia.

Judge Northcott of West Virginia served with Judges Waddill of Virginia, Parker of North Carolina, and Soper of Maryland.

Judge Soper of Maryland has served until the present time with Judges Parker of North Carolina, Northcott of West Virginia, and Dobie of Virginia.

Judge Dobie of Virginia has served until the present time with Judges Parker of North Carolina and Soper of Maryland.

Each of the 5 States in the fourth circuit has had 2 judges on the court of appeals with the exception of Maryland which, not including this nomination, has had 3.

Each of the five States is naturally interested in the aggregate total of its representation on the court of appeals in comparison with



that of other States. The aggregate time in service, computed to the nearest whole year, by States, is as follows:

State	Judges	Aggregate total years of service
North Carolina.....	Pritchard, Parker <sup>1</sup> .....	47
West Virginia.....	Goff, Northcott.....	38
Maryland.....	Bond, Rose, Soper <sup>2</sup> .....	31
Virginia.....	Waddill, Doble <sup>1</sup> .....	25
South Carolina.....	Simonton, Woods.....	22

<sup>1</sup> Still in active service but retirement requested as of Feb. 1, 1956.

<sup>2</sup> Still available for service in a retired capacity.

The tradition of rotating appointments among the five States and the simple fairness of equalizing the representation of the States on the court, therefore, require that the present appointment go to a South Carolinian. The present nominee is a resident of Maryland.

Since South Carolina last had an appointment (1913), Maryland and Virginia have each had 2, while West Virginia and North Carolina have each had 1. Since South Carolina last had a circuit judge in service (1925) each of the other 4 States in the circuit has had a new appointment to the court and at least 1 of its citizens in active service as a circuit judge.

In filling the present vacancy, therefore, the appointment of anyone other than a South Carolinian would do violence to what has become an established tradition.

There is no reason to discriminate against South Carolina on the basis of the origin of the cases. The volume of business in the Circuit Court of Appeals for the Fourth Circuit shows that, in 1954, 27 cases arose from the State of Maryland and 32 from the State of South Carolina. In the fiscal year of 1955 there were 34 cases from Maryland and 36 from South Carolina. With the large Federal project (H-bomb plant) now nearing completion in South Carolina, and with the recent decision of the Supreme Court in the school cases, it would be reasonable to expect that the volume of business arising from South Carolina would exceed that arising from the State of Maryland in the years ahead.

There is no basis for discrimination against South Carolina on the basis of population. According to the 1950 official census, Maryland had a population of 2,243,001 and South Carolina had a population of 2,117,027. Populationwise there is little difference among the number of citizens to be served by the present appointment.

The vacancy on the Court of Appeals for the Fourth Circuit, created by the retirement of Judge Morris A. Soper of Baltimore, Md., should be filled by an appointment from South Carolina. Only such an appointment would be in keeping, in the fourth circuit, with (1) a tradition of rotation of such appointments among the 5 States in the circuit; (2) a tradition that no 2 judges serving upon the court in an active or retired capacity at the same time should come from the same State; (3) a tradition that no circuit judge should be succeeded by an appointee from the same State; (4) fairness in generally equalizing the representation of the 5 States concerned on the court of appeals. Moreover, the volume of business arising from South

Carolina justifies the present recognition of South Carolina. The relative number of residents to be served in the respective States adds weight to the claims of South Carolina.

If the present nominee is confirmed, an inequitable situation will result in that Maryland will have had 4 judges on the fourth circuit (with South Carolina now being bypassed) while the other States have had but 2 each.

The Judiciary Committee of the Senate had a similar situation before it in 1943 when a nomination was sent in for the Fifth Circuit Court of Appeals from Texas, which was claimed for a citizen of Louisiana. The committee declined to report out the nomination of former Gov. James V. Allred for service on the Fifth Circuit Court of Appeals because at that time, according to the custom prevailing, the appointment was due the State of Louisiana. His professional and personal qualifications were beyond question. The nominee had been Governor of the State of Texas and he also had been a United States district judge for one of the districts in the State of Texas. Nonetheless, the nomination was not reported.

## II. FAILURE OF THE NOMINEE TO QUALIFY

### A. PREDISPOSITION OF ISSUES

A notable characteristic commonly associated with judicial fitness is often referred to as the "open mind." By this is meant a receptivity to argument and evidence on issues which may be presented. It may be stated conversely by saying that it is a lack of predisposition on matters which may be presented to the court. However the characteristic is stated, it is a prime prerequisite to service on any bench, but particularly on a Federal circuit court of appeals bench for, as the nominee himself has noted:

One can hardly fail to be impressed with the growing finality of the courts of appeals of the several circuits in the disposition of ordinary legislation.

In our judgment this nominee lacks this essential attribute.

This nominee, if confirmed, may reasonably be expected to pass upon loyalty review cases, immigration cases, and cases involving segregation in the schools. Yet he has been so outspoken on these subjects as to call into question his ability to detach himself from his personal views when such issues are presented. How can this nominee, for instance, impartially determine the issue of the right of a Government employee to confrontation of his accusers when he felt so deeply on the subject that he refused to sign, as Solicitor General, the brief of the United States Government urging that an employee had no such right? It is possible to believe that a man who would take such an unusual step could now abandon what evidently is a deep conviction on his part and adjudicate the issue impartially? If he could not argue a cause for the Government contrary to his personal convictions, how could he sit in judgment when such an issue was presented to the court?

The unusual aspect of the personal action of Mr. Sobeloff in the loyalty case (*Peters v. Hobby*, 349 U. S. 331 (1955)) certainly did not escape the press. His failure to join in the Government's brief and his failure to argue the case before the Supreme Court was noted widely. (For instance, see New York Times, March 5, 1955, p. 1.)

In regard to the Peters case, Peters was discharged as a Federal health consultant by the Loyalty Board of the Federal Security Agency (now HEW) under the loyalty program. Peters brought an action in the courts, seeking to be restored to his position on the ground that it was unconstitutional for the Government to dismiss him without permitting him to confront all of his accusers. This issue had been decided in favor of the Government by the court of appeals in an earlier case, and the Government, therefore, prevailed over Peters in the district court and the court of appeals. Peters appealed to the Supreme Court of the United States. It became the duty of Solicitor General Sobeloff to prepare the Government's brief in the Supreme Court, in support of the dismissal of Peters. Instead, Mr. Sobeloff proposed that the Government consent to restore Peters to his job. Mr. Sobeloff argued that accusers should be concealed only when the necessity of concealment has been proved before some impartial board. Mr. Sobeloff was overruled, and the Government contested Peters' contentions vigorously in the Supreme Court. It was widely noted, however, that the brief filed by the Government was signed by Attorney General Brownell and not by Mr. Sobeloff. This was an unusual and emphatic step on the part of Mr. Sobeloff, and was later described in an admiring article about him in the Reporter magazine as "the first public break by a Solicitor General on a major policy question in at least 20 years" (May 5, 1955). The Supreme Court subsequently reversed the ruling of the lower courts against Dr. Peters, on the ground that the Loyalty Review Board did not possess jurisdiction to review the Peters case.

At the hearing on this nomination, this matter was discussed only briefly. A representative of the Attorney General's office sought to excuse the nominee for his disregard of an attorney's ordinary function to advocate his client's cause despite personal misgivings. Later, the nominee mentioned the matter briefly by commenting in substance that he saw no reason for anyone to take offense at his action since the Attorney General and the President had not. We believe this demonstrates the inability of the nominee to discern the real issue. The issue is not whether he had a right to do what he did, but whether his action showed such deep-seated emotions on this subject as to render the nominee incapable of judging such issues fairly when and if they are presented to him as a judge. In short, the issue is whether the nominee is prejudiced against the views of the Government on the confrontation issue. We would also point out that the resolution of this issue is of primary importance if the Government is to protect itself from infiltration by persons disloyal to our philosophy of Government.

We do not believe that such basic issues are resolved by receiving self-serving statements by the nominee to the contrary. Each Senator who passes on this nomination must weigh the action of Mr. Sobeloff in the Peters case and determine, in the light of that action, whether he has demonstrated the ability to distinguish his personal beliefs from his professional obligations and whether he will be able to make such distinctions if he is elevated to a lifetime position on the Federal bench. Also, we believe that Senators should consider whether, if the nominee is confirmed, his judgment on this matter will receive public acceptance as being impartial in view of his known propensities as a crusader.



On the subject of segregation in the public schools, the nominee has expressed himself in and out of the courts. His argument before the Supreme Court, which he characterizes as "moderate," in the hearing on implementation of the decision in *Brown v. Board of Education* (349 U. S. 294 (1955)) suggested that local authorities be given 90 days to frame appropriate plans for ending segregation. This was 90 days more than the NAACP would have afforded, and to the nominees' way of thinking this entitles him to the "moderate" label.

The nominee publicly praised the Court's decision although without citing a case in point, the Court had reversed a number of well-reasoned decisions to the contrary. This predilection for social change not based on law, but on sociology and psychology, is another attribute which many citizens in this circuit find objectionable in this nominee.

On immigration, the nominee has chosen to express opposition to the law of the land as expressed in a statute approved by more than two-thirds of the Members of both Houses. In speaking before the Ninth Annual Citizenship Conference on Citizenship on September 16, 1954, Mr. Sobeloff stated the provisions of the immigration law go far beyond the needs of security or economic protection. Yet, he is now to be placed in the position of deciding such important questions

#### B. PHILOSOPHY ON THE FUNCTION OF THE COURTS

In addition to the public utterances of the nominee on the foregoing subjects, one particular speech deserves searching examination. Mr. Sobeloff, in addressing the Judicial Conference of the Fourth Circuit at Hot Springs, Va., on June 29, 1954, indicated his personal philosophy in the following manner:

The Court may reject a case, not because the question is unimportant, but because it thinks the time not ripe for decision. In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policymaking body might. For example, for several years before taking the School Segregation cases the Court repeatedly turned away opportunities to decide questions in that area, perhaps because they deemed them premature. Lately it declined to review a ruling on segregation in public housing, perhaps because the Court thought it best, after deciding the School cases, not to say more on other aspects of segregation at this time. Or the Court may think the record in the case at hand not adequate or otherwise unsuitable to raise and decide the point. We can only speculate. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance.

When questioned concerning this amazing utterance, the nominee appeared astonished that anyone could read into those remarks the inference that he was advocating that the Supreme Court was a policymaking body. Yet that is precisely the inference conveyed by the text itself. On several occasions during the hearings the nominee was given the opportunity to state categorically that the Supreme Court was not a policymaking body, but he never saw fit to make such a statement. Throughout his entire testimony Mr. Sobeloff appeared unable to distinguish between the functions of the Court as an interpreter of the laws and the functions which he assigned to it of "a policymaking body." The Court may, and should guard against excesses

of the Congress or the Executive, but this does not make the Court a policymaking body.

The reference which we find most at variance with our views is the statement that—

It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policymaking body might.

If this is not an equation of the Supreme Court with the Congress as a policymaking body, it is difficult to envisage the terms which might make the observation more explicit.

In his testimony he sought to escape the consequences of that portion of the paragraph quoted above that the Court waits until the time is ripe before deciding constitutional questions. However, it is obvious from an impartial reading of his entire speech that he is quoting, with approval, the idea that the Court may treat constitutional issues whenever the time is opportune. This is a philosophy which we reject. We consider it opportunistic and at variance with proper judicial philosophy.

Further evidence of this attitude may be seen in the latter sentence in this paragraph that—

In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance.

We categorically reject the thesis that great constitutional questions can be treated on the basis of "time" which, if we interpret the statement of the nominee correctly, can only mean when the surrounding circumstances present a most favorable climate for the decision.

The nominee in his testimony before the subcommittee on this particular subject of "timing" pointed out that the Supreme Court had on a number of occasions refused to grant writs of certiorari in cases involving the separate but equal doctrine developed by the Supreme Court in the case of *Plessy v. Ferguson* (163 U. S. 537 (1896)). He points out that apparently the Court had determined when the Brown case was brought up that the time was ripe for a new decision on the question. This is precisely the attitude which has caused so much consternation in legal ranks in recent years. The idea that the doctrine of stare decisis is to be cast aside in favor of such a doctrine, which requires reexamination of fundamental questions at intervals to be determined by the Supreme Court, is foreign to our thinking. How are litigants and lawyers to determine, if such a proposition is sustained, what the law is, as it applies to them?

We have here a clear case of a nominee whose public utterances are such as to cause grave doubts as to whether his legal philosophy entitles him to serve on the Federal bench. Federal judges with lifetime tenure present themselves but once before the Senate for confirmation. The Senate, therefore, should not act on any nomination, particularly on this one, until it is entirely satisfied that the nominee's legal philosophy is in accordance with the idea that the Constitution, and questions determined under that basic document, are not to be resolved by the dictates of the convenience of the moment.

#### C. CONFLICTING INTERESTS AND ETHICAL CONSIDERATIONS

In 1935, the Baltimore Trust Co., one of the largest banking institutions in the South, failed and went into receivership. Mr. John

D. Hospelhorn, a deputy banking commissioner, was appointed the receiver. The case is known as *State of Maryland v. The Baltimore Trust Company*. It appears in Docket 44A and is numbered 20433A. The case is still open and pending in circuit court No. 2 of Baltimore, Md., though it was commenced over 20 years ago. The receiver still has assets for final distribution and has, therefore, not been discharged.

In this case Mr. Sobeloff represented conflicting interests. He appears first in this case representing a plaintiff suing the receiver; then, by appointment of the court, he made 3 reports of discovery and liability; he then appears as an attorney for the receiver in 15 cases; and finally, thereafter, he again enters the case for a plaintiff suing the same receiver.

As attorney of record for the plaintiff in the case of *Robinson v. John D. Hospelhorn, Receiver for The Baltimore Trust Company* (No. 46 in the April term of the Maryland Court of Appeals, 1935) Mr. Sobeloff resisted the efforts of the receiver to apply the additional statutory stockholders' liability on behalf of the receivership (169 Md. 117). Mr. Sobeloff, and a witness appearing on his behalf at the subcommittee hearings (Mr. Enos Stockbridge), stated that he (Sobeloff) possibly represented more stockholders than any other attorney in Baltimore. In this litigation the additional statutory stockholders' liability of \$10 per share was held proper by the Court of Appeals of Maryland.

Thereafter in the same case (20433A), by appointment of the presiding judge, Mr. Sobeloff was directed to report upon the liability of the officers and directors by reason of their alleged negligence in the transaction of the business of the trust company. He made 3 official reports, in 2 of which he charged the officers and directors with both criminal and civil liability for their negligence. For this service Mr. Sobeloff received compensation from the receiver under a court order amounting to \$30,000.

Pursuant to his 3 reports, Mr. Sobeloff brought 15 actions to enforce liability against the officers and directors for their alleged negligence. These cases on behalf of the receiver were brought in circuit No. 2 and in the city court of Baltimore, Md., in 1936. The numbers of these cases appear on page 4 of Mr. Shankroff's letter of May 15, 1956, to Senator O'Mahoney (hearings, p. 147).

In 1943 the nominee again appears in case No. 20433A in opposition to the interests of the receiver. He was attorney for the corporation which had bought the Baltimore Trust Building. He sought in this action to have an unexpired rent-free-occupancy agreement of the receiver canceled, thereby increasing the liabilities of the receiver to the detriment of the depositors and general creditors. The latest proceeding is known as file No. 1117 in Case No. 20433A and the answer of the receiver is known as file No. 1118. The title of the case is *O'Sullivan Building, Inc. v. Hospelhorn, Receiver*.

In the case of *Robinson v. Hospelhorn*, cited supra, it was determined, and the mandate of the court in that case was to the effect, that the \$10 additional stock liability would apply to all stockholders of record. Here we find the nominee appearing for a plaintiff against the receiver, as defendant.

At a later date the court appointed Mr. Sobeloff to discover and report on the possible liability of the officers and directors for their alleged negligence. Having represented resisting stockholders and



being placed in a position opposed to the interests of the receiver, his appointment, in our judgment, as an officer of the court was improvident. Mr. Sobeloff should have declined the appointment for that reason. This later appointment placed him in a legal position contrary to the first position he had assumed in the trust company case. Accepting the appointment, however, it became his professional responsibility to represent the receiver without regard to his former clients, namely, the stockholders. He made three official reports. He brought 15 suits on the basis of those reports, wherein civil and criminal liability was fixed under oath in an aggregate amount in excess of \$56 million. He permitted those suits to be settled (with the approval of the court) for the sum of \$205,500. On this point, and elaborating upon these suits, the letter to the chairman of the subcommittee from Mr. Charles Shankroff, dated May 15, 1956 (cited *supra*), is revealing.

At a subsequent date, namely October 21, 1943, Mr. Sobeloff, representing the O'Sullivan Building, Inc. (owned by one Raymond J. Funkhouser), filed a petition in case No. 20433A against the receiver for the cancellation of the rent-free agreement. This was the Baltimore Trust Co. Building, the largest physical asset of the trust company and still the largest office building in the city of Baltimore. The several sales of this building through straw deals and the ultimate fact that it wound up in the hands of a client of the nominee are matters requiring investigation.

The record of the testimony before the subcommittee does not disclose, because Mr. Sobeloff was never interrogated on the point, as to what compensation he received for resisting the efforts of the receiver to collect the additional statutory stock liability of \$10 per share. It is interesting to note here that when settlements of this fixed statutory liability were taking place, Mr. Sobeloff was then attorney for the receiver and much of that \$10 stock liability of the stockholders was settled for \$5 per share. Whose interest then was Mr. Sobeloff representing? Was it his prior clients—the stockholders—or the receiver? In the 15 suits which he brought as 1 of the attorneys for the receiver against the officers and directors he received compensation in the sum of \$7,500.

What he received from Mr. Raymond J. Funkhouser, purchaser of the Mathieson Building, formerly belonging to the receiver, in his suit to cancel the rent-free agreement, is not shown because the subcommittee did not compel Mr. Funkhouser to attend the hearings. Mr. Sobeloff's client knew from the minutes of the corporation (petitioner) of the existence of the rent-free agreement. Mr. Sobeloff's representation of the receiver in the prior matters had brought this knowledge within his range. The correspondence attached to the receiver's answer clearly demonstrates this fact. The correspondence also reveals that the real ownership of the largest physical asset of the receiver had remained in Funkhouser, notwithstanding the several nominal transfers of title involved.

Patently, it is unethical for an attorney to appear in a case in opposition to the interests of a party-litigant, and subsequently in the same case represent such a party, and still thereafter in the same case file suit again against his one-time client. Rules of ethics are meaningless if they do not condemn such diverse and obnoxious professional actions as these.

These charges cannot be overlooked by reason of the fact that the case is of long standing. The case is still pending. Laches is a poor defense to urge in behalf of one who assumes such obvious contradictory positions in the same case and who now seeks confirmation as a Federal judge. To us, the conclusion is inescapable that the nominee has represented interests that conflict and in so doing has violated the applicable canons of ethics of the profession. Consequently, this conduct on the part of the nominee disqualifies him in our judgment for a lifetime place of honor in our Judicial system.

### III. NOMINATION REPUGNANT TO THE PEOPLE IN THE AREA SERVED

The hearings conducted on this nominee amply support our contention that the overwhelming portion of the people of the area to be served, particularly those citizens of Virginia, North and South Carolina, object to this nominee being placed in this high judicial position where, during the course of the next few years, he will pass on issues vitally affecting these citizens.

We call attention to the appearance of the Honorable A. Willis Robertson, United States Senator from the State of Virginia, testifying to the nomination of Mr. Sobeloff. Senator Robertson testified with regard to the sentiment of the people of the State of Virginia. It was his expression that it would be impossible for the nominee to perform duties of this office in a manner satisfactory to the people of the area, and that Mr. Sobeloff's serving on this circuit would impose hardship on the people of the State of Virginia.

Senator Robertson, in his testimony, took great pains to observe that the feelings of the people of Virginia against Mr. Sobeloff do not rest on blind prejudice but that the objections of the people of the State of Virginia are based on fundamental principles. They are based, firstly, on the circumstances of his selection, which they feel was politically motivated. The people of Virginia recognize the nominee as the selection, primarily of an official who not only is the legal adviser to the President but also is the chief architect of his party's plans to win this year's election, and that he (the nominee) is backed by political-pressure groups which claim control of enough votes to swing the balance of power in key States far removed from those in the fourth judicial circuit.

A similar argument was made against the nomination of Judge John J. Parker, of North Carolina, to be Associate Justice of the Supreme Court. In that instance, the Senate of the United States, on May 7, 1930, by a vote of 41 to 39, rejected the nomination, although Judge Parker was widely endorsed throughout his State and was a member of the Fourth Circuit Court of Appeals at the time of his nomination.

It is unquestioned that probably a majority of the cases which will come for review before the fourth judicial circuit in the next few years ~~will involve cases affecting racial segregation. The Junior Senator~~ from Virginia asked whether the people of the State of Virginia should be compelled to try those cases before a judge who has proclaimed his personal views on the subject from lecture platforms,

throughout the Nation, as well as before the Supreme Court itself? He asks—and we agree—Are not the people of Virginia entitled to hearings before judges whose views are less firmly fixed?

It should not be forgotten here that during all the years when the Supreme Court was saying separate but equal schools fully met the requirements of the 14th amendment, the National Association for the Advancement of Colored People continued to bring successive cases and to seek to have those rulings—which were the supremelaw of the land at the time—reversed. Why, then, should we, who hold a different view, fail to pursue any avenue available to us to reverse these decisions by the exercise of every lawful judicial process?

The confidence of the junior Senator from Virginia and that of the people of the State of Virginia in the nominee's ability to handle segregation cases in an understanding manner is diminished by the proposal the nominee made to the Supreme Court as to its decree in the school cases and, even more, by his characterization of that proposal, during these hearings as proving his "understanding and moderation."

Mr. Sobeloff had suggested that the Southern States, which had segregated schools ever since the founding of our Nation, and which have the separation of races in such activities imbedded in their statutes and constitutions, be given 90 days to formulate a plan for compliance with the decision of the Supreme Court abolishing a whole way of life. In this connection, Mr. Sobeloff stated that it was his intention that more time might be given if necessary, but he felt 90 days was enough for them to come to the Court with a definite plan which the Court could accept or reject with further instructions.

Senator Robertson also stated that the people of Virginia object to the nomination of Mr. Sobeloff because his stated views on the functions of the judiciary in our system of government are contrary to the principles which our own forefathers took such pains to imbed firmly in our Federal Constitution.

This nomination is repugnant to the people of the State of North Carolina, a State served by the fourth judicial circuit, according to the testimony of the Honorable Sam J. Ervin, Jr., United States Senator from the State of North Carolina, who appeared before the Committee on the Judiciary to oppose the confirmation of Mr. Sobeloff. The senior Senator from North Carolina opposed confirmation of the nominee on the ground that his appointment and confirmation would breach a custom which has prevailed in the circuit for many years. The senior Senator from North Carolina also opposed confirmation of the nominee on the ground that his constitutional and judicial philosophy is such that he condones, if he does not in fact approve, a course of action which, if continued in the United States, will reduce the sovereign States to meaningless roles or mere geographical divisions.

We firmly believe that the feelings and the views of the people of the States of Virginia, North and South Carolina, as so ably reflected during the course of the hearings through their Senators, disclose that the appointment of this nominee to the circuit embracing these States makes this nomination totally unacceptable to them. We can only conclude that the submission of this man's name to the Senate for confirmation is in utter disregard for the feelings of the majority of



the people in the area served by the fourth judicial circuit, and that such action has the inevitable consequence of lowering the dignity of that court in the minds of the people who will be so adversely affected by the views and philosophy of this nominee serving on the bench.

We believe that the record supports our contention that this nomination is repugnant to the great majority of not only the bench and the bar, but the people of the States of Virginia, North and South Carolina.

In the interest of these people, and the preservation of the administration of justice, this nominee should not be confirmed.

JAMES O. EASTLAND.  
OLIN D. JOHNSTON.

