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Foreword

Tribute to a Federal Trial Judge

This memoir recounts the life of an extraordinary federal trial judge and a most remarkable human being. Judge Warren Urbom weaves a rich tapestry on life, lawyering, and judging, covering subjects common and not so common. We learn about Warren Urbom’s humble, rural upbringing in western Kansas and southwest Nebraska, the loss of one of his eyes at the hands of his older brother, and young Warren’s path to a Methodist ministry detoured to a professional life in the ministry of justice. We then witness Warren Urbom emerge as an exemplary trial lawyer and jurist. Judge Urbom also shares his personal recollections on the emotional trauma of his involvement in a fatal car accident and the later loss of his beloved wife, Joyce, to cancer.

As a trial lawyer and judge, Warren Urbom encountered the challenges and surprises arising from the drama of human affairs presented in an American federal courtroom. As a judge, he applied the law when required and common sense when discretion was appropriate. His judicial career addressed issues both great and small. Judge Urbom applied his wisdom and creativity in important cases involving civil rights, women’s equality, freedom of religion versus government regulation, criminal sentencing, RICO, and life-and-death issues, including the death penalty and abortion. And he applied the law with the same dedication, fairness, and respect in cases involving long hair and potato chips as he did in the nationally famous Wounded Knee trials.

It is during the historic Wounded Knee litigation when one of Urbom’s hallmarks was on display: his judicial temperament. Judge Urbom will tell...
you that, in presiding over his first trial, three years before the Wounded Knee trials, he used a sharp tone with a lawyer who interrupted him. At that time Judge Urbom resolved to forever maintain his patience and respectfulness, which he recognizes as one of the basic virtues of a judge. This commitment served him well throughout his career, but perhaps had the greatest challenge during the Wounded Knee cases. In managing cases against more than 130 defendants arising from the 1973 standoff between the American Indian Movement and the U.S. government, Judge Urbom eventually earned and received the Indians’ respect and trust through his fair and impartial rulings.

Judge Urbom asked the “whys” of judicial practices and traditions and thereby tested and adapted innovative concepts in witness oaths, juror note taking, jurors questioning witnesses, lawyers questioning jurors, opening the court session, ponderous trials, and jurors resting or sleeping at trial. This memoir presents a rare insight into the busy life of a federal trial judge; for example, in 1984 Judge Urbom was trying two, and at one time three, jury trials simultaneously, including a seven-month civil jury trial.

Judge Urbom inquires, “What makes a first-rate trial judge?” and then succinctly captures the essence of an ideal trial judge and, at the same time, in my view, describes the author. Warren Urbom weighed competing interests fairly and wisely, just as a judge must.

I know Judge Urbom from his stellar reputation, from experiencing his judicial skills in 1976, when I was a young trial lawyer and appeared before him for a week-long trial (Securities and Exchange Commission v. American Beef Packers, No. CV-76-O-68), and now having the privilege to review his work as I sit on the Eighth Circuit Court of Appeals. Judge Urbom’s January 9, 1984, trial notes declared in frustration, “The 8th Circuit has so little confidence in district judges.” The Eighth Circuit has outstanding district judges in whom the Eighth Circuit has great confidence. Among these distinguished judges, none is more outstanding than Warren Urbom. He is held in the highest regard throughout our circuit and in the federal judiciary nationwide.

Urbom’s memoir is written for the benefit of the public and lawyers alike. He informs and teaches with clarity and the practiced skill of a wordsmith. Quotable views on judging, the rule of law, lawyers, and life in general
abound in this text. In April 2002 Judge Urbom mentored the law students and lawyers in the Robert Van Pelt American Inn of Court, and me too, saying:

Respect the law.
Honor the law.
But never worship the law.
The law does not represent our highest standards.
The law is the lowest common denominator, that is, a set of rules of minimum acceptable behavior, and you can do better than that.

Judge Urbom has done better than that.

In this memoir you will encounter the work of an accomplished author; every story is compellingly told and every paragraph beautifully written. Each story paints a vivid portrait of the human affairs, good and not so good, happy and sad, confronting a life so well lived. You will also witness what drives one of the legendary trial judges of his generation. His remarkable story is told here.

I thoroughly enjoyed reading Warren Urbom's memoir, and so will you. Judge Urbom, thank you for your life's commitment and service to the ministry of justice.

William Jay Riley, Chief Judge, Eighth Circuit Court of Appeals
It is January 2, 1975. Two years ago two hundred American Indians invaded the village of Wounded Knee on the Pine Ridge Reservation in western South Dakota. Armed, they held off federal law enforcement officers for seventy-one days, until a peace of sorts was agreed upon. Most of the invaders were arrested and charged in federal court with an assortment of crimes. I am one of the federal judges assigned to try those cases.

For the past eleven days I’ve listened to the testimony of traditional Indians, historians, and archaeologists in support of and opposition to the Indians’ prime defense. The defense asserts that this court has no jurisdiction; that is, a treaty forged in 1868 between the Sioux Indians and the United States means that this court has no power to decide whether any Indian is guilty of any crime committed on the reservation. If I say the treaty means that, the Sioux will have shown that they compose a sovereign nation independent of the United States, all the charges will be dropped, and the Indian defendants will go free.

John Thorne, an impassioned cause lawyer from San Jose, California, is making his closing argument on the motion to dismiss the charges. He
tells me, “[I am out to] get into your guts.” He drills me with reminders of two hundred years of broken promises, lies, and deceptions by the United States to the Indians. I am bound, he insists, by moral law; it is immoral to allow the law to be built on the false and arrogant assertion that the Indians are ignorant savages. He knows, he says, that I’m a religious man. “And I am certain in my mind you are suffering with this decision, that it’s hurting, because I think it’s getting right down into your guts and you are feeling it. That’s what you get for taking the job. But you are big enough for it.”

When I say to him that the law as interpreted by the Supreme Court of the United States is against him and ultimately it is *that* court who has to say it has been wrong, he shoots back:

No, . . . I disagree completely. . . . All you have to do is grant the defendants’ motion and dismiss the cases. It will never get to the Supreme Court, unless the government makes an appeal, because I guarantee we [defendants] won’t. There’s no need to. Justice [will have] been done [if you dismiss these cases], and a great, great moral suasion will spread across this land. I don’t care about the Supreme Court. . . . You have seen the people . . . and know what they are like. . . . To say no, let the Supreme Court do it, . . . that’s the real buck passing that I don’t think we need.

I ask, “What shall I do with my oath to uphold the law when the United States Supreme Court has declared what the law is? Do I just say . . . I don’t like that law so I’m going to change it? Is that what I do?”

Thorne says, “What would you do, Judge, if the Congress passed a law and said every third child born to a family shall be put to death, if the issue came before you?”

“I might resign, Mr. Thorne. That’s different from saying I will not obey what the United States Supreme Court has said is the law.”

Thorne: “*As you put the question, Judge, in this case, your duty is to resign if you honestly do not think the defendants’ position is legally sound, when you know what the facts are.*”

The hearing is over. Each side has said its piece.

I rise slowly from my swivel chair, find my way through the huge door-
way behind the bench, walk through the library of my chambers and into the reception room, where I meet the lawyers, learn their addresses for mailing their copies of the opinion I must prepare, thank them for their work, and make my way to the main office of the chambers. I slump into the large brown leather chair that sits in its familiar spot behind my desk. He’s right, of course, I think to myself. The law of this case is built on an arrogant assumption of the ignorance and savagery of Indians. The long hearing was convincing that the Indians were not and are not of that ilk. If I can do nothing about that, the invitation to resign has a point, but the thought is chilling.

Now I’m exhausted. My mind sighs, “It’s okay. Maybe he’s right. Maybe it’s time to step down. Maybe you’ve had enough of judging.”

And every single day of the past four and a half years I have thought this was the dream job of all jobs.
The Rocky Road to a Judgeship

Every federal judge has a story. Not just a story, but a story. It’s an account of his or her becoming a federal judge. It’s about as true as modesty requires and as restrained as the ego allows. The outcome is always sweet, but the process is nerve-wracking.

In a way my story begins in the summer of 1939, in Minden, Nebraska, with my uncle and aunt, Elmer and Dora Leaf. Their daughter Marjorie, my age, had died of pneumonia, and I had the impression I was to be a temporary distraction from their grief. I remember four things about that visit. First, I was embarrassed that my sole pair of socks had holes in the heels. Second, the Leafs had ginger ale in their icebox every day, and I thought if I ever grew up and could afford it, I would have ginger ale in my icebox all the time. Third, I saw the scariest move ever, Night Must Fall, starring Robert Montgomery and Rosalind Russell. Fourth, Uncle Elmer took me to visit a newly elected member of Congress, a young lawyer with a practice in Minden, Carl T. Curtis. Mr. Curtis’s office was cluttered with cardboard boxes being packed with books to be sent to Washington DC. I had never met such an important person, so I was quiet except for exchanging hellos with him. He and Uncle Elmer visited about the impending move, and that was that. I didn’t realize, of course, that Carl Curtis would become an important factor in my future life, but I doubt I’d have done or said anything different if I had. I did not see Curtis again or have any communication with him that I can recall for the next thirty years—that is, until 1969. I knew of him in 1969, of course, because of his political celebrity and the fact that in the 1960s we both served on the
governing board of Nebraska Wesleyan University, although we had no interaction that I know of.

On September 17, 1969, at 11:20 in the morning, a secretary left a note on my desk at the Baylor law firm in Lincoln, Nebraska, where I’d practiced law for sixteen years. The note asked that I return a telephone call from Judge Robert Van Pelt.¹ When I called, I was asked a single question: Are you a Republican? I said I was a registered Republican, and the conversation ended.

I had no suspicion of what that was about.

A dozen days later, on September 29, I learned what it was about. That day Richard “Dick” Smith, an attorney whom I knew principally through our mutual attachment as alumni and members of the governing board of Nebraska Wesleyan University, called and asked me to meet him in the
Tepee Room of the Cornhusker Hotel that evening after the Lincoln Bar Association meeting. I wondered whether it was about some emergency at Nebraska Wesleyan I hadn’t heard about, or perhaps some case he’d like me to take a look at, or some nonlegal undertaking he wanted to invite me to help on. It was none of those.

At the Cornhusker Hotel that evening Dick Smith explained that the judgeship to be vacated by U.S. District Judge Van Pelt was his if he chose to take it and that he had not yet made up his mind.² Again, there was a question: If he chose not to take the position, would I be available to take it?

The idea was a teeth-rattling clap of thunder. Racing through my mind were thoughts like Is he really saying what I think he’s saying? Does he mean me? I’ve been a trial lawyer seventeen years. I love oral combat in the courtroom. I’d have to give that up. And Could I be objective? I mean, really objective? What would it do to my family, the change of lifestyle? I haven’t thought this through.

It is true that I had given a wisp of thought to standing for appointment to the state trial bench or perhaps even to the state supreme court, but I had taken no step toward either, nor had I ever mentioned it aloud, not even to Joyce, my wife. More than that—much more than that—I stood in awe of the federal trial court and the judges I knew who occupied it during my professional life. These men (no woman had yet reached the position in the District of Nebraska) were giants, and their place was exalted. I was no giant. I was also thinking, I know that the president of the United States appoints federal district judges, and President Nixon doesn’t know me or anything about me. And I know the Constitution requires that he make the appointment with “the advice and consent of the Senate,” and I have no contact with our Senators. So who’s kidding me?

In the twenty seconds (or was it five or thirty?) I looked at Dick Smith and let my mind twirl. I settled into a mode of rationalizing: perhaps it would be permissible to say yes because I have no expectation of ascending to the exalted place.

I said yes.

That same evening I wrote to my brother Ward:

Without relating the details—of which there aren’t many—I want you to know that there is some possibility of my being named U.S.

The Rocky Road to a Judgeship
District Judge to fill the spot being left by Judge Van Pelt’s retirement. I consider it still quite remote and am doing nothing to bring it about. But should the unlikely occur I want you not to be utterly unprepared. Dick Smith has the nomination if he wants it but is not yet able to decide. Even if he decides he cannot take it, there are other formidable candidates—like Bob Denney and Hale McCown. My lack of active participation in Republican party affairs must stand as a distinct weakness to my possibilities. Anyway, it’s an enormous honor to be even in the wings, even if the stage itself never opens. I’m not rearranging my life on the strength of what’s happened to now, I assure you. This is all in confidence, of course.

But I did begin to discuss the situation with Joyce and our four children. Allison, who was eight, reacted this way: “Why would anybody want to be a federal judge? All you do is sit there and say, ‘Motion sustained, Mr. Mason!’”

How could I explain to an eight-year-old that I was as uncomprehending as she was, but for a different reason? She couldn’t understand why anyone would want to be a federal judge. I couldn’t understand why anyone would think I should be a federal judge.

A few days later, on October 5, the Lincoln Journal newspaper carried under the title “One Paragrapher” merely, “Speculation over possible successors for retiring U.S. District Judge Robert Van Pelt should not exclude Warren Urbom, highly respected Lincoln attorney.”

That morning, a Sunday, U.S. Senator Carl Curtis telephoned me at home, saying that if I was interested in the federal judgeship, he would like me to fly to Washington to talk with him. I did that on Wednesday, October 8.

Carl Curtis was perhaps five feet eight inches tall (my height), portly, quick of speech, bespectacled, and virtually bald. He gave me a noodle-like handshake and an amiable smile. We visited about the practice of law. About one of his trials when he practiced in Minden, Nebraska, that he was particularly proud of. About my meeting him when I was thirteen (he didn’t recall that, but recalled Uncle Elmer and Aunt Dora) and of our devotion to Nebraska Wesleyan University. We talked for perhaps half an hour in his office and then walked to the office building of Nebraska’s other U.S. senator, Roman Hruska. On that walk Senator Curtis asked me the only question he ever asked me, then or since, about how I felt about the law.

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"It's the job of a judge to follow the law, isn't it?" he asked. I said, "Yes, it is." I suppose if I had been more experienced I might have given a more sophisticated answer, but I was satisfied with it then and still am. It was an honest answer, suitable for a short walk.

I met Senator Hruska for the first time at his office. He was a well-built man, nearly six feet tall, with graying black hair, dark eyebrows, and a forceful, slightly accented voice, suggesting his Czech heritage. He was known as an avid citizen of Omaha and was the ranking Republican on the Senate Judiciary Committee. My conversation with him was abbreviated because he was readying himself for hearings by that committee on the fitness of Judge Clement Haynsworth of South Carolina to be the successor to Supreme Court Justice Abe Fortas, who had resigned.

On my return to Lincoln I wrote to my mother-in-law and father-in-law, Mr. and Mrs. Charles Crawford, of my feelings, of the visit to Washington, and of my gratitude for being in their family. Joyce, I assured them, was an ideal partner for me, and I continued to be thankful for her support, her character, and her love. About the possible appointment I told them that Senator Curtis was solidly behind me and that Senator Hruska, although "terribly preoccupied with the Haynsworth hearings," was gracious and had given me an "optimistic impression" as to an appointment. I said, "I still find the whole thing incredible."

But within days matters took a turn. Entirely unexpectedly, Senator Hruska walked into my office in Lincoln, saying that Chief Judge Richard Robinson (he and Judge Van Pelt were the only two federal district judges in Nebraska) would be required by law to step down as chief judge in four years upon his reaching the age of seventy, even if he opted to continue as an active judge, and that whoever was selected to fill Judge Van Pelt’s vacancy would then become chief judge. He said the chief judge should reside and be stationed in Omaha, where the bulk of the federal chief judge’s work needed to be conducted. Then came the question: Would I be willing to move to Omaha if I were appointed?

The question was another surprise. I hadn’t thought about the chief judgeship. But I had thought about the pleasant fact that I had no strings attached to me, no pledges I’d made, no wrinkled baggage to drag beside me. I wanted to keep it that way.

After a moment, I responded that I felt I had to become a federal judge,
if at all, without any commitment of any kind, except to honor my oath of office. I said if I found that justice could best be dispensed from Omaha or any other place, I would move to that place at once, but I had no basis for making that decision in advance of assuming the bench. Hruska left.

I felt good. I had turned the corner. I wanted the appointment, but maybe even more I wanted to feel free, and I did feel free.

There was a further complication. Earlier that year the Senate had before it a bill to create several dozen judicial positions, including another district judgeship for Nebraska. The Lincoln Journal on October 19 reported, “Political sources say Hruska very much wants to have Republican National Committeeman Donald R. Ross of Omaha filling that new bench slot.”

I could see dark clouds gathering.

Senator Curtis called me on Friday, October 17, asking that I meet with him at his room at the Cornhusker Hotel at nine that evening. At the hotel he invited me to a seat, then seated himself and told me there had been a report from someone in my church that I had been involved on behalf of John F. Kennedy, a Democrat, in his campaign against Richard Nixon for the presidency in 1960—indeed that I had been Nebraska’s principal financial supporter of Kennedy in that campaign. I assured the senator that there was no grain of truth in such a report.

He also said that from an article in the Omaha World-Herald he deduced that Senator Hruska was being pressured by his political organization to delay my appointment until a third judgeship was authorized by Congress, then to have Donald Ross appointed to fill it so that Ross would have seniority over me and would become chief judge (the judge with the most seniority in the district would automatically become the chief judge of the district), and I could be appointed after Ross to fill the Van Pelt vacancy.

Senator Curtis said he thought Senator Hruska had no part in such a plan. I said that a World-Herald reporter had told me the day before that the third-judgeship bill had passed the House committee and that passage by the whole Senate was expected within two weeks. Curtis acknowledged that Hruska was dragging his feet, but not because of opposition to me. That was reassuring, but Curtis’s view that passage of the bill authorizing a third judgeship for Nebraska would not come about for “several months” and that my appointment could not be delayed that long seemed a bit too optimistic.

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My assessment was that the reporter was right, the article was right, and if passage of the bill was imminent, my appointment would be delayed until after a third judgeship could be authorized. My gloomier side was showing.

Two obstacles now appeared: Who would be chief judge? Must the nominee live in Omaha? Donald R. Ross was a principal in both questions. Some headlines began to appear:

**Patronage Squabble Looming? Hruska, Curtis May Not Agree on Van Pelt Job**

*Lincoln Journal, October 19, 1969*

**U.S. Judge Vacancy Is Touchy**

*Omaha World-Herald, October 28, 1969*

The gathering of dark clouds continued when Senator Curtis gave me a copy of three letters dated October 29 and addressed to President Richard M. Nixon. One was signed by Senators Hruska and Curtis: “We respectfully submit the name of Mr. Warren K. Urbom of Lincoln, Nebraska, for United States District Judge for the vacancy brought about by the retirement of Judge Robert Van Pelt.” Another was signed by Hruska alone. It made clear his position that the chief judge should reside in the Omaha area and that three options existed: (1) the nominee could establish residence in that area; (2) he could declare that he would forgo service as chief judge if and when the contingency occurred; or (3) the nomination and confirmation of a nominee to fill the vacancy could be delayed until a nominee could be selected and qualified who would reside in the Omaha area.

The Hruska letter further pointed out that the Senate had already passed a bill that would give the District of Nebraska a third judgeship and that the House of Representatives was then holding hearings on a similar bill. He proposed a “reasonable delay” to await approval of the legislation before making a judicial appointment to succeed Van Pelt and suggested the wisdom of having “a conference with the Attorney General or other appropriate persons.”

Hruska was urging that Donald R. Ross of Omaha be appointed to the
new position, and then perhaps I could be appointed to the Van Pelt spot. Such a delay was of no great importance, except that by then I had learned that delay in federal appointments can be disastrous to an expectant appointee. Coupling that with the rumor of my support of John F. Kennedy, weird as it was, the dark clouds grew darker.

**Sen. Hruska Backs Urbom, Hedges Time**

*OMAHA WORLD-HERALD, OCTOBER 29, 1969*

**On with the Appointment**

*LINCOLN JOURNAL, OCTOBER 29, 1969*

The third letter was signed by Senator Curtis only. It said he would give a complete answer to the Hruska letter later but added, “I . . . wish to notify you [at this time] that I totally disagree with [Senator Hruska] both as to facts and conclusion.”

Soon thereafter Senator Curtis made it known publicly that he thought residence in Omaha or Lincoln made no difference in the responsibilities of the chief judge.

Weeks went by without resolution of the impasse.

**Curtis Disagrees on Judge Premise**

*LINCOLN JOURNAL, OCTOBER 30, 1969*

**Hruska Takes Judge Issue to Nixon**

*OMAHA WORLD-HERALD, NOVEMBER 1, 1969*

**Curtis: Confirm Nominee**

*LINCOLN JOURNAL, NOVEMBER 10, 1969*

**Why the Delay?**

*LINCOLN STAR, NOVEMBER 22, 1969*

**Frivolous Delay on Judge**

*LINCOLN JOURNAL, NOVEMBER 22, 1969*

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Senator Curtis was a stalwart in support of me, and I was grateful. He brought me whatever could be considered good news, and the bad as well. Most of the bad came to him from some person never identified for me, nor did I ever ask. Besides the claim that I had been a huge contributor to Kennedy was another, that I had been seen marching with rebellious university students down 15th Street from the State Historical Society to the State Capitol Building in Lincoln in opposition to the ongoing Vietnam War. That too was wholly untrue but nevertheless disheartening and draining.

One story that was true, however, related to my noninvolvement in politics. In a column by Darwin Olofson of the Washington Bureau of the Omaha World-Herald on November 25, 1969, under the headline, “Judgeship Creating Curtis, Hruska Split,” Olofson observed that when Senator Curtis turned to me after Dick Smith withdrew as a candidate, “it raised some Republican eyebrows in the state.” Nonetheless, the article continued, “there has been no suggestion from either senator that party activity, or the lack of it enters into their disagreement on the timing of the Urbom appointment.”

In December Donald Ross took a job with Nebraska Consolidated Mills and withdrew from judicial consideration. That, as matters developed, changed virtually nothing.

On December 9, 1969, a note from my secretary, Marlene McGuire, said that Judge Van Pelt had telephoned, saying he had a call from Mr. Kyle of the American Bar Association to report the Association’s preliminary assessment of my qualifications to be appointed to the federal trial bench. The report was a thumbs-up. The note also said that Van Pelt had some things to talk about, including a committee to which he had been appointed, regarding extracurricular activities of judges.

In a journal I had been keeping I wrote on January 22, 1970:

Van Pelt just returned from Wash. Sen. Curtis says that Hruska is irritable about the matter, so Curtis will go to the Justice Dept. Says FBI noted rumor of [my supposedly participating in a moratorium march.
in opposition to the Vietnam War] but Van Pelt thinks that’s of no great importance, except to give Hruska something to fuss about.

As a result, I’ve come to suppose it may be July 1 before the log jam is broken.

I had no basis for any prediction; I was just trying to keep my hopes alive.

On January 26, 1970, I hired Rodney Johnson to be a law clerk if I should be appointed; in the meantime he was to work part time with Judge Van Pelt and part time with the Nebraska Crime Commission. I had been in the line of officers of the Grand Lodge of Ancient Free and Accepted Masons of Nebraska since 1966, a process that would ordinarily lead to the office of grand master in 1971–1972. I put before an ethics committee of the judiciary the question of whether I should continue in the line and take the grand master’s role if elected or abandon my Masonic membership altogether. I noted that the lodge’s failure to elect blacks to membership was a concern,
as was the fact that litigation regarding state-church relationships, an area of interest to Masonry, might come before me as a federal judge.

Adding to that the considerable time the position of grand master would take, I had asked for the committee’s recommendation for accepting such a position or not. I had heard nothing from the committee, but now understood the reference to a “committee regarding extrajudicial activities of judges” mentioned by Marlene McGuire in her note of December 9. My journal entry of January 27, 1970, said, “Van Pelt called to say that [the] ethics committee met in Wash. & decided it would not write opinions on inquiries by non-judges [meaning me] but its thinking is that I should not accept grand mastership of [the Masonic Lodge of Nebraska] because of time, school-church litigation, lack of Negroes. But wants not to have to decide whether [I] should remain a Mason.” (My interpretation: Don’t renew the request when I become a judge, because the question is applicable to many judges.)
On March 11, 1970, President Nixon nominated me for appointment to the federal district court, sending my name to the Senate for such advice and consent as it wished to offer, as required by the Constitution. That was in no way a defiance of Senator Hruska’s reluctance. It was a foregone understanding that my nomination would never go forward through the Senate without approval of both Nebraska senators. Senator Hruska continued to delay, the press indicated, in order to “check out” some things, hoping the third judgeship for Nebraska (and coincidentally, I suspected, a chief judgeship for Donald Ross) might still be worked out.

I was still predicting July 1.

The press had been carrying news of the nomination of Judge G. Harold Carswell of Florida as successor to Supreme Court Justice Abe Fortas since the nomination of Judge Haynsworth was rejected. The word was that Senator Hruska was serving as floor manager in the Senate to press forward the approval of Judge Carswell, but some complaints about Carswell had been raised, including concern about racism on his part and assertions that in his judicial role he was “mediocre.” My journal entry for March 17 says, “Today Hruska told a news commentator on a national TV hookup that even if Judge Carswell were mediocre, as is being charged by some, ‘the mediocre judges, people and lawyers’ are entitled to representation on the Supreme Court.”

Whew! I thought, nobody ever said being a U.S. senator was easy!

On the morning of March 18 Cella Heitman, a Lincoln Journal reporter, called me, saying that she had looked over clips of the newspaper and found that Senator Hruska had early suggested that a solution to my problem could be had by my moving to Omaha. She asked if I had considered doing that. I said I had, and if I became a federal judge and if the business of the court could best be handled from Omaha, I would have no reluctance to move. I said I wouldn’t know what would be best for the court until I became more familiar with it, and I would make no pre-appointment commitment about it.

My journal entry of Wednesday, March 18, reported, “By mid-afternoon Sen. Curtis called, saying that Sen. Hruska had rousted him out of the gymnasium (I think he said the steam bath) with the report that I had
agreed to move to Omaha. I gave him the account as it occurred & agreed to learn from the newspaper the exact story as it appeared.

Actually, the story hadn’t yet appeared, but Cella Heitman read the proposed story to me. Senator Curtis was concerned that the story—especially the lead sentence—gave the impression that I had “caved in” to Senator Hruska by making a concession in order to move the confirmation along. He asked that I discuss it with Judge Van Pelt, which I did. When he said the story sounded all right, the senator still wasn’t satisfied, so I talked personally with Judge Van Pelt and then Cella Heitman. I explained the problem to her and suggested that any implication of a concession be removed. She agreed, saying she would rewrite the last sentence and emphasize that I said I had made and would make no commitment. Senator Curtis had said he was also concerned that the story looked like he had joined in the concession, so Cella agreed to separate any reference to him from the lead sentence. Senator Curtis and I agreed that he might appropriately call Jack Hart, the managing editor of the Lincoln Journal.

Both Senator Curtis and Cella Heitman suggested that Senator Hruska apparently was looking for a way to retreat gracefully and might use this incident to do so.

Early the next morning, March 19, Senator Curtis called, saying that he was reporting back to Senator Hruska that I had said to the reporter that no commitment would be made and that if and when I became a judge and the business of the courts was of first importance, I would consider where the court administration could best be handled. Curtis said that he had talked with Jack Hart, the managing editor of the Lincoln Journal, as we had agreed would be appropriate. I was grateful for Senator Curtis’s sensitivity to appearances, and told him so.

That morning’s Lincoln Star reported that the House of Representatives had passed the omnibus judgeship bill with Nebraska’s hoped-for third judgeship deleted. That meant the matter would go to conferees of the two houses for some kind of compromise.

By 8:45 a.m. Cella Heitman had called again. Senator Hruska had issued a statement that morning that the getting of a third judgeship by means of the conferees, if at all, would take several weeks or even months, and he was not willing to postpone my confirmation that long. Cella said she was
killing the story about my moving to Omaha. (In fact it wasn’t killed, but was at the bottom of an eighteen-inch-long article.)

Great news arrived just after noon from Senator Curtis: not only had Senator Hruska returned his “blue card,” signifying his assent to my confirmation, but he had arranged a hearing before the subcommittee of the Judiciary Committee for March 26 at 10:30 a.m. The purpose was to question me regarding my fitness for the judicial position. The panel would be Senators James O. Eastland, chairman of the Judiciary Committee; Roman Hruska of Nebraska; and Quentin Burdick of North Dakota. Senator Curtis said he would send some statements made to the subcommittee by previous nominees for use as a guide if I wanted to use them. All of that was quieting news.

John Duffner of the attorney general’s office called in midafternoon and briefed me on procedure before the subcommittee:

No witnesses, please, except your senators and members of Congress, i.e., members of the House of Representatives. It’s traditional that the senators come, optional as to representatives. Questions will be few and will not require preparation. . . . Give a short statement of appreciation, and write a note sometime to the president. Lyndon Johnson was miffed by a couple of judges who didn’t. . . . Timing of confirmation and issuance of the commission are uncertain because of the interstice between the subcommittee’s hearing and full Committee’s approval. . . . The Committee is so occupied with the Carswell nomination . . . that the Committee has no regular schedule for this or similar matters. . . . Within a month you should be on the bench.

Whoa! Only two days earlier, on March 21, I was predicting an answer by July 1. On March 23 Senator Hruska called to invite Joyce and me to breakfast on the morning of the Senate subcommittee hearing. He was friendly and gently apologetic for “having been abrasive at times.” He hadn’t been, and I told him so. (I thought it impolitic to remind him that the day following his defense of mediocrity in judges he decided to endorse me!)

Senator Curtis called a few minutes later, saying that having breakfast with Hruska was a good idea. Earlier he had asked me to meet him at his office before the hearing and had said we would have lunch following
the hearing, but acknowledged that breakfast as guests of Senator Hruska would be even better. He was sure that Hruska’s friendliness was sincere.

In the mail came an invitation to become a member of the American College of Trial Lawyers.3

It had been a good week.

Breakfast on March 26 was in the main Senate dining room, with Senator Hruska, Senator Curtis and his wife, Mr. Duffner of the Justice Department, and Senator Carl T. Curtis, immediately after the hearing before the Senate Judiciary Committee, April 26, 1970. Photograph in author’s possession.


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Judge Van Pelt phoned on April 7, saying that he had just had an extended telephone conversation with Senator Curtis, who reported on the Carswell situation. He said that on April 6 the Senate rejected a motion 52–44 to recommit the Carswell nomination to the Judiciary Committee and would vote on confirmation of that nomination on April 8. That action had divided the Judiciary Committee into three factions—Republican, Democrat, and civil rights—resulting in taut feelings and declination to approve district or any other judges or other matters by the “round robin” method, by which approval could be given by telephone without a meeting. Instead a committee meeting would be necessary for approval of my nomination. A lag of two or three days before confirmation by the full Senate must be expected; in the normal course of things the president would sign the commission in one day, and it would go to the Justice Department for engraving; a day or two later it would be mailed to me. I could plan an induction ceremony for perhaps April 27 and almost certainly for May 1. At 10:15 a.m. on April 21 Senator Curtis phoned to say that the full Judiciary Committee had just approved my nomination. That was three days earlier than I had expected. He said that Senator Hruska was then still in the committee meeting, but had sent word out to get to me. He understood that the nomination would get to the full Senate Thursday, the 23rd, lay over twenty-four hours, and be voted on the 24th. But that was a Friday and such matters are usually not taken up on Fridays, so Monday would probably be the day.

Confirmation by the full Senate came on April 23. Senator Curtis notified me at 12:20 p.m. During the afternoon I talked with Senator Curtis, Senator Hruska, and Congressman Denney; none would be able to come to my oaths-taking ceremony on May 5 because that was a Tuesday, and they had to be in Washington for congressional duties. I could have scheduled the ceremony for Monday, when I later learned they could have come, but other scheduling events made that a poor choice. Monday, April 4, was our oldest daughter’s sixteenth birthday, and she wanted to be at the county courthouse for her first driver’s license test that morning. A former chief justice of the Supreme Court of Nebraska, Robert G. Simmons, would be memorialized that morning too. I was sorry about having no congressional members at my oath-taking, but I decided I’d live with it rather than rob Kim of her long-awaited driver’s license at the earliest possible time.

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Lloyd McDowell’s story in the Journal that evening said I was a leader in Senator Curtis’s previous campaign for reelection. I called Lloyd to tell him I wasn’t. He said that was a part of the wire story from Washington, but he would put a note on the city editor’s desk about it. I said that all I wanted was for him to know so it wouldn’t be reported by default, because a gratifying feature of my nomination was the complete lack of political motivation, except the bare fact of my registration as a Republican. This story is the only taint on that.

I did write the president, thanking him for the appointment, as I’d been advised to do.

Duffner called on April 25 to say the president had signed the commission on the 24th. On Monday, the 27th, Joyce found a yellow slip in the mailbox at home notifying us that an attempt had been made to deliver a package, which could be picked up at the post office before 5:00. She didn’t make it by then, but found a friendly employee who got the package for us.
I went home and found family, friends, and neighbors waiting. The grand opening of the commission was duly held.

The oaths-taking day was May 5. The Journal said two hundred people were there, and I think that’s about right. They were standing in the hallway and along the sides of the courtroom inside. The ceremony was perfect. Judge Van Pelt administered the oaths, my dad helped me don my new robe, nice speeches were made, I responded, and then I greeted people in the reception room of the judge’s chambers. We retired to the University Club for lunch with the participants, relatives, Dr. Darrel and Ruth Berg, and Dr. Vance and Barbara Rogers.

The move of my office into the third story of the four-story limestone building was during the weekend, before the taking of the oath of office. The judge’s chambers were immediately to the south of the courtroom and consisted of a reception room, two adjoining rooms accommodating two law clerks, the judge’s office, and a library running parallel to the judge’s office and between the office and the courtroom. All rooms of the chambers were ample in size, all lined with plaster and bordered by oak frames and doors.

But for me the attraction of the chambers was the antique furniture. The massive oak desk of the judge was constructed the same on both the front and the back, apparently to accommodate two persons—practicing lawyers or other coworkers—sitting across from and facing each other. The secretary’s desk matched the judge’s, but was somewhat smaller. Oak chairs with leather seats were plentiful in all the rooms. A stately six-by-six breakfront with two vertical glass doors outlined with oak strips stood against one wall of the judge’s office. Oak chairs with leather seat coverings were at an oak conference table in the middle of the judge’s office and conveniently placed elsewhere about the rooms. A leather-covered lounge invited visitors to remain in the reception room, and three- and four-shelved oak bookcases with horizontal drop-down glass doors and a circular bookcase supplied places for all the books a federal judge should need close at hand. The chambers were nice, commodious, comfortable, and well-kept, but they showed their age, probably having been in place since 1906, when the first phase of the building was completed.
The courtroom—Courtroom No. 1—was “the sublime” of the building. It extended from the third to the fourth floors, was “adorned in heavy, dark oak,” and according to the Lincoln historian Jim McKee, as quoted in the *Lincoln Journal-Star*, was “the building’s most interesting feature.”7 The courtroom had a special dignity and a proud elegance, highlighted by walls covered with carved plaster figures and leather-covered doors. The bench, elevated three steps above the floor, its writing surface slanted slightly downward toward the judge, was next to the witness seat, which was next to the jury box. Acoustics were excellent, even without sound-enhancing devices. I used that courtroom almost every day for the first five years of my tenure, and I loved it.

At about 3:00 p.m. on May 5 Attorney Herb Friedman called for an appointment about getting a temporary restraining order. I saw him at 3:30 and told him to file his motion, but that I would not rule on it until notice

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was given to the opposing counsel, and I would then set a time for a hearing. Friedman got an oral agreement from opposing counsel, and I set the hearing for the next day at 10:00. It was a Civil Rights Act case arising from a boy’s alleged suspension from sixth grade because he wore blue jeans, cut off and frayed above the knees, contrary to school policy. So that night Rodney Johnson and I researched the law until 11:00.

The next day, Wednesday, I sat alone—one is alone up there—at the bench and entered an order against the Lincoln Public Schools. The schools didn’t resist, saying the boy, Eric Barnaul, never was suspended as far as they could tell. The school welcomed him back but put on no evidence because the principal was out of town. I relied on the affidavits presented by the boy’s counsel. Signing of the order was at 10:40, exactly twenty-four hours after my taking the oath of office.

On Thursday I had only two criminal arraignments and one appointment of counsel to represent an indigent criminal defendant. On Friday I had an oral argument on a motion to dismiss a class action. That was the day, in late afternoon, I began to feel confident that I could do this job.

So I was ready to move on. I remembered that the word around town was that the appointment was for life. My commission says I stay only “during good behavior.”

POSTSCRIPT TO MY STORY

Carl Curtis was in the Congress, the House and the Senate, for forty years. The title of his book is Forty Years against the Tide. He retired from the Senate in 1979 and died on January 24, 2000. He lived in Lincoln after he retired, and I saw him and his second wife, Mildred, quite often. His first wife, Ruth, died before he retired.

Roman Hruska lived with his “mediocre” statement until he died in 1999. He served in the House and Senate for twenty-three years, retiring in 1976. The new federal courthouse in Omaha bears his name.

Within a year after I took the oath of office, Congress awarded Nebraska a third district judgeship, and Robert Denney was appointed to fill it in early 1971. His name graces the federal courthouse, completed in 1975, in Lincoln.

Seven months after I was sworn in, Don Ross ascended to the Eighth Circuit Court of Appeals, succeeding Harry Blackmun, who became a justice
of the Supreme Court of the United States in June 1970, succeeding Justice Abe Fortas. Ross soon came to me, saying, “I want to be your friend.” He has been my friend, as well as an outstanding circuit court judge.

My dad, age seventy-six, robed me at my swearing-in ceremony. He died in 1987.

Judge Richard Robinson chose to take senior status and to step aside from the chief judgeship in 1971. I then moved into the chief judgeship, where I remained for fourteen years (at that time there was no law requiring relinquishment of the title, except upon reaching the age of seventy, which for me would have been in 1995), then withdrew from that position in 1985 to make sure Judge Lyle Strom could serve as chief judge before his age would prevent it. He did so serve and did it well. I found that the duties of the chief judge could be appropriately fulfilled from Lincoln, so didn’t move away. Judge Richard Kopf, my successor as federal district judge, served as chief judge while living in Lincoln. Other than Senator
Hruska in 1969–70, to my knowledge nobody has said that the chief judge should reside in Omaha.

Richard Dier of Holdrege, Nebraska, was appointed to fill the vacancy left by Judge Robinson’s taking senior status in 1971. Dier served one year, dying in Little Rock, Arkansas, while in an evening recess from a trial. He was succeeded by Albert Schatz of Omaha in 1973.

Dick Smith practiced law with Woods Aitken in Lincoln until a few years before his death in 2004.

Warren Burger succeeded Earl Warren as chief justice of the Supreme Court from 1969 until his retirement in 1986.

One mystery remains. If I wasn’t close to any senator, if I wasn’t active in politics, if I never mentioned to anyone any interest in judicial office, who would pass a word compelling enough to result in the unremitt ing efforts of Senator Curtis to make a judgeship real?

C. M. “Barney” Pierson might have had something to do with it. He was a real estate lawyer in Lincoln and very knowledgeable about Republican politics. He didn’t do trial work and sometimes asked me to try a case of his, and a time or two he sat through such a trial with me. I would refer to him the reading of abstracts of title that needed to be examined. That’s a slim reed for gauging the strength of a political connection. And I’m not sure he had the ear of Senator Curtis.

Dick Smith was another possibility. He was close to and had influence with Senator Curtis. He knew me only from afar, except that we both sat on the Nebraska Wesleyan University governing board. I doubt that he was sure that I had the temperament and legal ability to be a good prospect for the federal trial bench. Even so, he was the one sent to feel me out about interest in the position.

I count out Jim Ackerman, an attorney about whom it was said that nothing happened in Nebraska Republican politics without his approval. If he had had a part in my selection, he would have discussed my prospects with Vance Rogers, then president of Nebraska Wesleyan University. But Rogers was not even aware that I was in the picture for a judgeship until after I had traveled to Washington to meet with Senators Curtis and Hruska, so Ackerman probably had little or nothing to do with my journey to the bench, as was true of Rogers.10

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Robert Van Pelt can’t be counted out. He knew me as a lawyer and, more particularly, how I conducted myself in a federal courtroom. He was the first to inquire about my political affiliation—“Are you a Republican?”—before speculation about his replacement became serious. After I had been publicly revealed as a bona fide candidate for the position, Judge Van Pelt called me often, carrying messages from Senator Curtis about how the appointment process was going, bringing me word from the Administrative Office of the Courts, or slipping me advice about what I would need—one or more law clerks, a bailiff, a robe, choices of books for a chambers’ library, an installation ceremony, ideas of who might appropriately fit the protocol for a particular act of ceremonial preparation, a reminder to thank the president for the appointment, if it were to come to that.

I never asked any of them—not Pierson, not Smith, not Ackerman, Van Pelt, or anybody else—who it was who called the play in the huddle or centered the ball to me or ran as the pulling guard with Carl Curtis. No one mentioned the subject, and by now all the suspects have died. I don’t know, and I’m not likely to find out. That’s all right. I don’t need to know. But if I were a gambling man, my money would be on Van Pelt.

If it was Judge Van Pelt alone or in collaboration with another, he seemingly was doing acts quite similar to those Justice Abe Fortas suffered from immediately before I went through the selection process. While Fortas was on the Supreme Court, he continuously gave consultative assistance to President Lyndon Johnson, including suggestions of who should be appointed federal district judges. A claim made against Justice Fortas was that these acts were in violation of the constitutional doctrine of separation of powers, inasmuch as the president was in the executive branch of government and Fortas was in the judicial branch. If that claim were valid, a similar claim could be made that a district judge in the judicial branch in interacting with a senator of the legislative branch regarding a power assigned to senators violates the doctrine of separation of powers. I offer no answer. I only make the observation and say I am constantly thankful for Judge Van Pelt’s kindly and constant service on my behalf. It has altered my life, all for the better.

The truth is I had a life before the judgeship. A good life, I could always have gone back to it.

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